[2018] AACR 19

(Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office [2017] UKUT 495 (AAC))

Charles J **GI/428/2017**
Lane J **GI/429/2017**
Ms Chafer **GI/430/2017**
14 December 2017

Freedom of Information – scope of exemption in section 23 Freedom of Information Act 2000 – public interest test in relation to section 35(1)(c) (Law Officers' advice) and section 42 (Legal Professional Privilege)

These appeals were transferred from the First-tier Tribunal. The appellants, in separate requests, requested information relating to a precision airstrike carried out by an RAF remotely piloted aircraft in Syria (the Raqqa Strike). The first appellant sought correspondence and communications between the second and third respondents. The second appellant sought the legal advice referred to by the Prime Minister when announcing the Raqqa Strike to Parliament. The second and third respondents refused the requests, relying on the absolute exemption in section 23(1) (security bodies) and the qualified exemptions in section 35(1)(c) (Law Officers' advice) and section 42 (legal professional privilege) of the Freedom of Information Act 2000 (FOIA). The appellants complained to the Information Commissioner, who concluded that the exemptions applied and second and third respondents did not have to provide any information under FOIA. The appeals against the Information Commissioner's decision were transferred to the Upper Tribunal. The issues before the Upper Tribunal were: on the application of exemptions (1) what is the scope of section 23(1) FOIA, (2) does section 23(1) apply to the entire contents of the advice or can the contents be disaggregated so that some information is treated as outside the scope of section 23(1) FOIA, (3) is the information in the advice otherwise wholly or partially exempt from disclosure under section 35(1)(c) and 42 FOIA on an application of the public interest test in section 2(2) FOIA, (4) is other information within scope of the first appellant's request exempt under section 23(1), section 35(1)(c) and/or section 42 FOIA, and on a procedural challenge (5) was the Information Commissioner entitled to rely on an assurance from the second and third respondents that the advice was exempt under section 23(1) FOIA or should she have required the advice to be disclosed for her consideration?

Held, dismissing the appeal:

1. taking issues 1 and 2 together, the legality of a policy decision can be debated and explained by reference to the legal principles engaged and how they are to be applied without linking them to evidence relied on in a particular case (paragraph 34). The legal analysis in the requested information was of interest to security bodies so section 23 FOIA was engaged (paragraph 41) therefore there was an absolute exemption unless the legal analysis founding the view that the policy decision was lawful could be disaggregated and the disaggregated information falls outside the scope of section 23 FOIA (paragraph 43);

2. the disaggregated information was of interest to security bodies but Parliament did not intend such information to be covered by section 23 FOIA because (i) this interest was shared by Parliament and the public because it related and was confined to the legality of Government policy and so (ii) it fell within the qualified exemptions in section 35 and 42 as being legal advice on the formulation of government policy (paragraph 62);

3. the public interest balance in section 35 and 42 was firmly in favour of non-disclosure of the disaggregated information in the advice (paragraph 80). The Upper Tribunal adopted the approach in *Savic v (1) ICO, (2) AGO and (3) CO; AG appeal* [2016] UKUT 0534 at [34]: the powerful public interest against disclosure does not convert a qualified exemption into an absolute exemption (paragraphs 67 to 68). In this case a properly informed public debate of the legal issues could be had without disclosure of the information (paragraphs 78 to 80);

4. while the additional information sought by the first appellant was not confined to the legal advice given by the second respondent, it was part of a continuum of advice that attracted legal professional privilege and, in the absence of a further public interest argument in favour of disclosure, the balance was in favour of non-disclosure (paragraphs 87 to 88);

5. on the procedural issue, the Information Commissioner should have used her statutory powers to require the advice to be disclosed to her for consideration. To accept an assurance which effectively allowed the second and

third respondents to be the decision maker on the challenge to their stance on the section 23 FOIA exemption was unfair (paragraph 95).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The first appellant appeared in person

The second appellant was represented by Anya Proops QC and Julianne Kerr Morrison instructed by Deighton Pierce Glynn Solicitors

The first respondent was represented by Christopher Knight instructed by the Information Commissioner

The second and third respondents were represented by Karen Steyn QC and Julian Blake instructed by the GLD

Decisions: Both appeals are dismissed

REASONS

Introduction

1. The three appeals relate to the decisions made by the Information Commissioner on three requests for information made under the Freedom of Information Act 2000 (FOIA) relating to a precision airstrike which was carried out on 21 August 2015 by an RAF remotely piloted aircraft in Syria (the Raqqa Strike). All of the decisions are dated 30 August 2016.

2. On 9 September 2015, the first appellant (Ms Corderoy), who is a journalist, made a request to the Attorney General's Office for correspondence and communications between the Attorney General's Office and both the Cabinet Office and the Ministry of Defence relating to the approval of "*the RAF drone attack which killed two Britons, Reyaad Khan and Ruhul Amin*". The result of the internal review refusing to supply the information was sent on 24 November 2015.

3. On 8 September 2015, the second appellant (Ms Ahmed) made two requests on behalf of Rights Watch (UK) one to the Attorney General's Office and one to the Cabinet Office for the "*legal advice to which the Prime Minister referred*" when making his announcement to Parliament that action had been taken against Reyaad Khan and Ruhul Amin. The results of the internal reviews refusing to supply the information requested were sent on 6 January 2016 and 24 February 2016 by respectively the Attorney General's Office and the Cabinet Office.

4. As is immediately apparent from the fact that the requests relate to legal advice given by the Attorney General about a targeted drone attack in Syria that killed two British citizens, the requests have resulted in claims for exemption under section 23 (security matters), section 35(1)(c) (Law Officers' advice) and section 42 (legal professional privilege) of FOIA. The Information Commissioner concluded that those exemptions applied and the second and third respondents did not have to provide any of the requested information under FOIA. The

appeals were transferred to the Upper Tribunal. Other FOIA exemptions have been advanced but they are not the subject of this decision. Their consideration has been stayed.

5. Section 23 (1) of FOIA provides:

> **23 Information supplied by, or relating to, bodies dealing with security matters**
>
> (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

It is an absolute exemption. The exemptions for Law Officers' advice and legal professional privilege are qualified exemptions and so only apply to negate the right to information under FOIA when in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

6. The only closed material is the requested information and a statement by a Mr Gus Jaspert, who was the Director, Security and Intelligence in the Cabinet Office (and is now in the Foreign and Commonwealth Office). We heard no oral evidence and the open evidence was contained in the statements put in on behalf of the parties and the lengthy exhibits to them.

7. The parties agreed that the issues before us were:

> Application of exemptions
>
> 1. What is the scope of section 23(1) FOIA and, in particular, how should the concept of "in relation to" be construed and applied?
>
> 2. Does section 23(1) apply to the entirety of the contents of the Advice or can those contents be disaggregated, such that some of the information within it is not to be treated as covered by section 23(1)?
>
> 3. Is the information contained in the Advice otherwise wholly or partially exempt from disclosure under sections 35(1)(c) and 42 FOIA on an application of the public interest test under section 2(2) FOIA?
>
> 4. Is the other information within the scope of the first appellant's request exempt from disclosure under sections 23(1) and 35(1)(c) / 42 FOIA?
>
> Procedural challenge
>
> 5. Was the Commissioner entitled to rely on an assurance on behalf of the AGO/CO that the Advice was exempt under section 23(1) FOIA or ought she to have exercised her statutory powers so as to require the Advice to be disclosed to her for her consideration?

8. This identification of the issues reflects the fact that Miss Corderoy's request is in wider terms than that of Rights Watch (UK) and shows that the appeals raise two main issues, namely:

(a) one of statutory interpretation and application of the absolute exemption in section 23(1) of FOIA and, in particular, on whether it permits disaggregation in these appeals, and
(b) the application of the public interest test to those parts of the requested information not covered by section 23.

The exchanges in Parliament on 7 September 2015 and the letter referred to by the Prime Minister

9. We cite from these exchanges (with our emphases) because they set the scene for the arguments before us.

10. On 7 September 2015, which was the first sitting day after the summer recess the Prime Minister stated in the House of Commons:

> Turning to our national security, I would like to update the House on action **taken this summer to protect our country from a terrorist attack.** ----- This year, there have already been 150 such attacks, including the appalling tragedies in Tunisia in which 31 Britons lost their lives. I can tell the House that our police and security services stopped at least six different attempts to attack the UK in the past 12 months alone.
>
> The threat picture facing Britain in terms of Islamic extremist violence is more acute today than ever before. -----
>
> We have pursued Islamic terrorists through the courts and the criminal justice system. Since 2010, more than 800 people have been arrested and 140 successfully prosecuted. Our approach includes acting overseas to tackle the threat at source, with British aircraft delivering nearly 300 airstrikes over Iraq. Our airborne intelligence and surveillance assets have assisted our coalition partners with their operations over Syria. As part of this counterterrorism strategy, as I said before, **if there is a direct threat to the British people and we are able to stop it by taking immediate action, then, as Prime Minister, I will always be prepared to take that action. That is the case whether the threat is emanating from Libya, from Syria or from anywhere else.**
>
> In recent weeks, it has been reported that **two ISIL fighters of British nationality, who had been plotting attacks against the UK and other countries,** have been killed in airstrikes. Both Junaid Hussain and Reyaad Khan were British nationals based in Syria and were involved in actively recruiting ISIL sympathisers and **seeking to orchestrate specific and barbaric attacks against the West, including directing a number of planned terrorist attacks right here in Britain,** such as plots to attack high profile public commemorations, including those taking place this summer.
> We should be under no illusion; **their intention was the murder of British citizens,** so on this occasion we ourselves took action. Today, I can inform the House that **in an act of self-defence and after meticulous planning,** Reyaad Khan was killed in a precision airstrike carried out on 21 August **by an RAF remotely piloted aircraft** while he was travelling in a vehicle **in the area of Raqqa in Syria**. In addition to

Reyaad Khan, who was the target of the strike, two ISIL associates were also killed, one of whom, Ruhul Amin, has been identified as a UK national. They were ISIL fighters, and I can confirm that there were no civilian casualties.

We took this action because **there was no alternative.** In this area, there is no Government we can work with; we have no military on the ground **to detain those preparing plots**; and there was nothing to suggest that Reyaad Khan would ever leave Syria or **desist from his desire to murder us at home, so we had no way of preventing his planned attacks on our country without taking direct action.** The US Administration have also confirmed that Junaid Hussain was killed in an American airstrike on 24 August in Raqqa.

With these **issues of national security** and with current prosecutions ongoing, the House will appreciate that there are limits on the details I can provide. However, let me set out for the House **the legal basis for the action we took, the processes we followed and the implications of this action for our wider strategy** in countering the threat from ISIL. First, I am clear that the action we took was entirely lawful. **The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law**. We were exercising **the UK's inherent right to self-defence.** There was clear evidence of these individuals **planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK** and our allies, and given the prevailing circumstances in Syria, **the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom. The United Nations Charter requires members to inform the President of the Security Council of activity conducted in self-defence, and today the UK permanent representative will write to the President to do just that**.

Turning to the process, as I said to the House in September last year:
"I think it is important to reserve the right that if there were a critical British national interest at stake or there were the need to act to prevent a humanitarian catastrophe, you could act immediately and explain to the House of Commons afterwards." --

Our intelligence agencies identified the direct threat to the UK from this individual and informed me and other senior Ministers of that threat. At **a meeting of the most senior members of the National Security Council, we agreed that should the right opportunity arise, military action should be taken. The Attorney General attended the meeting and confirmed that there was a legal basis for action. On that basis, the Defence Secretary authorised the operation. The strike was conducted according to specific military rules of engagement, which always comply with international law and the principles of proportionality and military necessity. The military assessed the target location and chose the optimum time** to minimise the risk of civilian casualties. This was a very sensitive **operation to prevent a very real threat to our country**, and I have come to the House today to explain in detail what has happened and to answer questions about it.

I want to be clear that the strike was not part of coalition military action against ISIL in Syria; **it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home.** The position with regard to the wider

conflict with ISIL in Syria has not changed. As the House knows, I believe there is a strong case for the UK taking part in airstrikes as part of the international coalition to target ISIL in Syria, as well as Iraq, and I believe that that case only grows stronger with the growing number of terrorist plots being directed or inspired by ISIL's core leadership in Raqqa. **However, I have been absolutely clear that the Government will return to the House for a separate vote if we propose to join coalition strikes in Syria.**

My first duty as Prime Minister is to keep the British people safe. That is what I will always do. **There was a terrorist directing murder on our streets and no other means to stop him**. The Government do not for one minute take these decisions lightly, but I am not prepared to stand here in the aftermath of a terrorist attack on our streets and have to explain to the House **why I did not take the chance to prevent it when I could have done.** This is why I believe our approach is right. I commend this statement to the House.

11. In response Harriet Harman stated:

I thank the Prime Minister for briefing the shadow Foreign Secretary and me this morning, when for the first time we learned of the specific operation on 21 August of which he has just informed the House. The Prime Minister has told the House today that **in order to protect the safety of our citizens here at home, the Government have authorised the targeting and killing of a man - a British citizen - in Syria, a country where our military force is not authorised.** Will he confirm **that this is the first occasion in modern times on which this has been done?**

The Prime Minister said in his statement that **a meeting of senior members of the National Security Council had agreed that should the right opportunity arise, the military should take action**, and that the Attorney General, who was at the meeting, had confirmed that there was a "legal basis for action'. The Prime Minister has said that the action was **legally justifiable under the doctrine of national self-defence, because the man was planning and directing armed attacks in the United Kingdom, there was no other way of stopping him, and the action was necessary and proportionate.** Bearing in mind that the **sufficiency of evidence in relation to each of those points is crucial to the justification of that action, why did the Attorney General not authorise the specific action, rather than merely confirming that "there was a legal basis" for it?** Was the Attorney General's advice given or confirmed in writing and will it be published? The Prime Minister said in his statement that the Defence Secretary had authorised the operation. Why was it not the Prime Minister himself who authorised it?

12. In answer the Prime Minister stated:

Let me turn to the right hon. and learned Lady's questions on counter terrorism. She asked: is this the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war? The answer to that is yes. **Of course, Britain has used remotely piloted aircraft in Iraq and Afghanistan, but this is a new departure, and that is why I thought it was important to come to the House and explain why I think it is necessary and justified**.

> The right hon. and learned Lady asked about the legal justification. She is right to say that **we believe it was necessary and proportionate, and there was no other way we could have met our objectives, and all this was based on the Attorney General's advice. We do not publish the Attorney General's advice, but I am very happy to discuss the content of that advice and describe what it was about, which was largely self-defence.** She asked whether the Attorney General should take the responsibility for carrying out these strikes. **I do not think that is the right person to carry it out. I think the way we did this is right: with a meeting of senior national security Ministers, it being authorised by that group, and the operational details being left with the Defence Secretary**, in line with what the Attorney General said. **A proper process was followed.**
>
> ---------- The choice we were left with was to either think, "This is too difficult," throw up our arms and walk away **and wait for the chaos and terrorism to hit Britain, or take the action in the national interest and neutralise this threat**, and I am sure that was the right thing to do. **She asked if we would repeat this. If it is necessary to safeguard the United Kingdom and to act in self-defence, and there are no other ways of doing that, then yes, I would.**

13. Also on 7 September 2015 the UK's Permanent Representative to the UN wrote to the President of the Security Council in accordance with Article 51 of the UN Charter to inform him that the UK had undertaken military action in Syria against Daesh in "*exercise of the inherent right of individual and collective self-defence".* That letter, was published on the UN's website the next day and continued:

> On 21 August 2015, **armed forces of the United Kingdom of Great Britain and Northern Ireland carried out a precision air strike against an ISIL vehicle in which a target known to be actively engaged in planning and directing imminent armed attacks against the United Kingdom was travelling. This air strike was a necessary and proportionate exercise of the individual right of self-defence of the United Kingdom.**
>
> As reported in our letter of 25 November 2014, ISIL is engaged in an ongoing armed attack against Iraq, **and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq.**

Comment on those exchanges and that letter

14. Daesh is also known or referred to as the Islamic State of Iraq and the Levant or ISIL. Daesh is a proscribed terrorist organisation, having been proscribed pursuant to the Terrorism Act 2000 on 20 June 2014. Prior to June 2014, Daesh had been proscribed as part of Al Qa'ida, but on 2 February 2014 the senior leadership of Al Qa'ida issued a statement officially severing ties with Daesh, prompting consideration of the case to proscribe Daesh in its own right.

15. It is apparent that the Prime Minister's statement was addressing both:

(a) the legality in international law of the Raqqa Strike, and

(b) the constitutional convention concerning the consultation of Parliament, and having regard to both

(c) the process by which the decision to launch the Raqqa Strike was made (see the references to "*the legal basis for the action we took, the processes we followed and the implications of this action for our wider strategy*", "*turning to the process*" and "*if there is a direct threat to the British people and we are able to stop it by taking immediate action, then, as Prime Minister, I will always be prepared to take that action. That is the case whether the threat is emanating from Libya, from Syria or from anywhere else*.").

16. It is also apparent that the Prime Minister makes the obvious distinctions between:

(a) the in principle or policy decision (the policy decision) that, if certain circumstances existed, a targeted drone strike against individuals in Syria would be lawful in international law, and so could be authorised

(b) the decision authorising the strike that took place (the Raqqa Strike) in accordance with that policy decision, which was made by the Defence Secretary, and

(c) the operational decisions on the implementation of the Raqqa Strike.

17. In our view, the statement makes it clear that the policy decision was made by senior ministers and so the executive left the authorisation and actual implementation of the strike (or strikes) made pursuant to that policy to others.

18. This decision-making process applies to a number of high level decisions of the Government. In its application here, the statement makes it clear that the intelligence agencies and the armed forces were involved in the provision of information that informed decision making at all three levels, but also makes it clear, as one would expect, that whatever parts the intelligence agencies and the armed forces played in the decision-making process, they did not make the policy decision.

19. That policy decision of the Government was that, in certain circumstances, a targeted drone strike such as the one that took place:

(a) was lawful in international law, and as a matter of constitutional law and convention, and

(b) so could lawfully found the authorisation and operational decisions for the Raqqa Strike and other strikes in the future (see "*She asked if we would repeat this. If it is necessary to safeguard the United Kingdom and to act in self-defence, and there are no other ways of doing that, then yes, I would.*").

20. As one would expect, the intelligence agencies and the armed forces provided information on which:

(a) the policy decision was based (see "*our intelligence agencies identified the direct threat to the UK from this individual - there was clear evidence of these individuals planning and directing armed attacks against the UK"*) and then

(b) the authorisation and operational decisions were based (see "*the military assessed the target location and chose the optimum time"*).

Clearly there is room for overlap and co-operation between the relevant roles of the intelligence agencies and the armed forces.

21. A policy decision can be made by reference to hypothetical situations or a mixture of hypothesis and evidence that has been gathered and triggers the consideration of what can be done lawfully. In that way, the policy decision can identify the circumstances and factors that have to be in place to render both the policy and then decisions made pursuant to it lawful. The underlying analysis for the policy decision can therefore resemble a text book or lecture or could be re-written or expressed in that way or in a way that did not reveal any of the evidence base that was supplied and considered.

22. The authorisation and operational decisions have regard to the sufficiency of the evidence to establish the existence of the factors and circumstances relied on to satisfy the relevant legal tests and so to make the action lawful (see Harriet Harman's response).

23. That is not to say that the intelligence agencies and the armed forces would not be interested in the legality of a strike before and after it was implemented under the relevant chain of command. Indeed, as one would expect and as the statement makes clear, the intelligence agencies and armed forces were providing the evidential base for the policy, authorisation and operational decisions and so they would be interested in knowing what evidence was needed to enable the strike to be carried out pursuant to the policy and so, in the view of the Government, lawfully. Inevitably, as the statement makes clear, a collaborative process between the executive (acting through senior Ministers), the intelligence agencies and the armed forces was involved and all those taking a part in the process were interested in the lawfulness of what was done in the performance of their respective roles and statutory functions.

24. Harriet Harman's response shows that she understood that:

(a) the Prime Minister had addressed why Parliament had not been consulted pursuant to the constitutional convention relating to committing troops to combat in a country (here Syria),

(b) the Prime Minister had addressed the lawfulness of the strike under international law,

(c) there are distinctions between the relevant tests to be applied in respect of the constitutional convention and the international law issues, and that the reasons given in the statement for the authorisation for the first time of a targeted strike in Syria against individuals applied to both, namely that: "*the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom"* (see the Prime Minister's statement) and "*The Prime Minister has said that the action was legally justifiable under the doctrine of national self-defence, because the man was planning and directing armed attacks in the United Kingdom, there was no other way of stopping him, and the action was necessary and proportionate. Bearing in mind that the sufficiency of evidence in relation to each of those points is crucial to the justification of that action"* (see the response of Harriet Harman), and

(d) the authorisation and implementation decisions must closely examine the sufficiency of the evidence to support the existence of the factors and circumstances relied on to establish the legality of the implementation of the policy decision and compliance with the constitutional convention concerning the consultation of Parliament.

25. In our view, it is clear that the Prime Minister's statement and the exchanges in Parliament on 7 September 2015 did not preclude additional or alternative arguments being put to the UN (or anyone else) on the legality of the drone strike in international law (or indeed on the need to consult Parliament).

26. Rights Watch (UK) and Miss Corderoy asserted before us, and they and others have asserted elsewhere, that the reference in the letter dated 7 September 2015 (see paragraph 13 above) to the exercise of collective self-defence in Iraq is inconsistent with the statement made by the Prime Minister in the House of Commons. We do not agree.

27. We acknowledge that we may have reached that conclusion with the benefit of the argument before us and the analysis in the Report of the Joint Committee on Human Rights of the House of Lords and House of Commons ordered to be printed on 27 April 2016 (the Joint Committee Report). That committee was constituted in late October 2015 and so it was conducting its inquiry at the time that the Attorney General's Office and the Cabinet Office were considering the request, and had reported when the ICO made the decisions under appeal.

28. However, in our view, when it is recognised and remembered that the position announced in the House of Commons on 7 September 2015 was addressing the constitutional convention and international law issues, a fair reading of what the Prime Minister said on that day makes it plain he was not in any way suggesting that the drone strike:

(a) was not part of, and so lawful as being part of, coalition action to protect Iraq, or

(b) was not a lawful exercise of collective self-defence, or

(c) was not lawful within the context of armed conflict.

In short, the Prime Minister's statement and the letter to the UN were consistent and complementary.

29. We therefore agree with the Joint Committee that there is "*nothing inherently contradictory"* in reliance on both individual and collective self-defence as justification for the Raqqa Strike and that a "*single use of force can simultaneously serve both purposes"* (see paragraph 2.12 of the Joint Committee Report).

30. Having said that, we recognise that, with the benefit of hindsight, the Prime Minister could have gone on to further clarify the point that additional or alternative arguments would be advanced, when he referred to the letter to be sent to the UN. The Joint Committee Report shows that members of that committee and others were at least initially of the view that the letter to the UN and a letter from the Government Legal Department (the GLD) to Leigh Day dated 23 October 2015 contained a contradiction and caused confusion about the bases for the policy decision and so what the Government's policy on targeted drone strikes was and is. Properly analysed, however, there was no such contradiction.

The Report of the Joint Committee on Human Rights of the House of Lords and House of Commons ordered to be printed on 27 April 2016 and published on 10 May 2016 – the Joint Committee Report

31. We set out in the schedule to this decision, the summary, an extract from chapter 1 (on the Government's engagement with the inquiry) and chapters 2 and 3 of the Joint Committee Report. We do so because, in our view, it is a convenient way to address:

> (a) the arguments advanced by the appellants, that the Government has made contradictory statements, and that its position is unclear, and
>
> (b) the background to the arguments before us on s. 23(1) and the public interest.

The use of bold type is as found in the original report. The use of italics and underlining is our means of emphasising particular passages.

32. The Joint Committee Report cites from the letter to the UN sent on 7 September 2015 and the letter from the GLD to Leigh Day dated 23 October 2015 and sets out disagreement between witnesses (see paragraphs 2.11 to 2.15). It reaches a clear conclusion at paragraphs 2.38 and 2.39 on what the Government's policy is. That conclusion is a well-reasoned and authoritative assertion on what that policy is and, in our view, it accords with a fair and natural reading of what the Prime Minster stated to the House of Commons on 7 September 2015.

33. In particular, the parts of the Joint Committee Report that we have highlighted identify the following:

> (a) The Joint Committee's conclusion that the Government's policy is that, in exceptional circumstances, targeted drone strikes can be used lawfully abroad in and outside armed conflict and so against identified individuals and outside armed conflict against individuals who are planning a terrorist attack or attacks in the UK.
>
> (b) A number of issues arise concerning the legal bases for that policy based on the right of self-defence in international law, the Law of War and international human rights law. These include (i) what amounts to an "armed attack", (ii) the extent and nature of the requirements of "imminence" and "necessity and proportionality" and so how flexible those concepts are in the application of the international law of self-defence, (iii) the application of the Law of War to the use of lethal force outside of armed conflict, (iv) what engages Article 2 of the ECHR, and (v) a comparison of the policy positions of the UK and the USA on targeted strikes and their underlying justifications at law.
>
> (c) The Joint Committee recognised the existence of inhibitions on the provision of information to it based on security considerations and legal professional privilege.
>
> (d) However, the Joint Committee was disappointed with the extent and detail of the information provided by the Government and recommended that it provide further clarification of its position on legal questions and so on the legality of its policy and strikes carried out pursuant to it.

34. Further, and importantly in respect of the public interest test set by FOIA, the Joint Committee Report demonstrates that the legality of the policy decision, that is the subject of

the requests in these appeals, can be debated and explained by reference to the legal principles engaged and how they are to be applied, without linking them to evidence relied on in a particular case to establish that the interpretation of the relevant legal principles that is relied on applies to the situation in which the policy is implemented.

35. Also, the Joint Committee Report removes the force of the appellants' arguments on contradiction and confusion because it identifies as the Government's policy:

> (a) the policy announced by the Prime Minister on 7 September 2015, and so
>
> (b) a policy that the appellants assert goes beyond the boundaries of legality under international law or, at least, may do so and so requires further explanation and debate in the public interest.

Preliminary reasoning

36. As is usually the case, the information requested is contained in documents and the argument has focused on those documents which make up the closed material. However, in our view it is important to remember that:

> (a) the request is for *information* and not for documents and that the requested information does not have to be given by providing whole or redacted documents that record it, and so
>
> (b) the information can be given by extracting it from documents and other records held by the public authority (see paragraphs 32 and 33 of *APPGER v IC and FCO* [2015] UKUT 0377 (AAC); [2016] AACR 5).

37. The appellants have made it clear throughout that the focus of their request is for the legal analysis underlying, and so the legal basis for, the Government's conclusion and assertion that its policy on targeted drone strikes, and so the policy decision made by senior ministers that was referred to by the Prime Minister in his statement to the House of Commons on 7 September 2015, is lawful.

38. On examining the documents that contain the requested information it seemed (and still seems) to us that a question that is not directly addressed in the earlier cases is raised by these appeals on the ambit of section 23 of FOIA. This can be addressed by argument on the following basis, namely:

> In response to Questions 1 and 2 can the appellants set out their position on the following hypothetical scenarios:
>
> 1 A request for advice made by a non-section 23 body in circumstances where the advice is sent to a section 23 body.
>
> 2. A request for advice made by a section 23 body alone.
>
> 3. A request for advice made by a number of section 23 and non-section 23 bodies.
>
> 4. In relation to each of these three scenarios what is the appellants' submission if the advice was requested:
>
> a. for the purposes of a section 23 body,

b. for non-section 23 body purposes, and
c. for a combination of the above?

39. Accordingly, the appellants were invited to address those scenarios.

40. Their consideration raises, amongst other things, the issue, whether the acknowledgement in paragraph 26 of *APPGER v IC* and *FCO* (cited above) that:

> --------- information, in a record supplied to one or more of the section 23 bodies for the purpose of the discharge of their statutory functions, is highly likely to be information which relates to an intelligence or security body and so exempt under section 23

requires qualification when it can be said that information is sought by, or provided to, or is of interest to:

(a) such a body for their purposes or to fulfil their roles and statutory functions, and

(b) to another public authority for its purposes or to fulfil its roles and responsibilities, in this case the making of Government policy by the Executive.

As appears below, we have concluded that it does.

41. As we have acknowledged (and the Joint Committee Report confirms by, for example, its reference to possible criminal liability), the legal analysis sought by the requests would have been and is of interest to the section 23 bodies (the intelligence agencies referred to by the Prime Minister).

42. We accept that the existence of this interest can found a conclusion that, as a matter of language, that legal analysis "relates to" section 23 bodies whether they sought the advice alone or together with others or were provided with the advice.

43. The appellants inevitably accept that the absolute nature of the exemption in section 23 will preclude disclosure under FOIA unless:

(a) the legal analysis to found the view that the policy decision was lawful can be disaggregated and provided in an intelligible form, and

(b) any such disaggregated information falls outside the scope of section 23.

Only if (a) and (b) above are satisfied will the issue turn to whether the 'qualified' exemptions in sections 35(1)(c) and 42 apply to the disaggregated information and, if so, whether the public interest in withholding that information outweighs the public interest in disclosing it. However, as we shall see, in determining the scope that Parliament intended section 23 to have, it will be necessary to consider whether a qualified exemption would nevertheless apply to the information concerned.

44. It follows that the public interest arguments are founded on and address the policy decision and not (i) the authorisation decision for the Raqqa Strike made by the Defence Secretary or (ii) the operational decisions made in respect of it, save to the extent that, through

the relevant chain of command, their legality is founded on the same legal analysis and so is of interest to those involved.

45. As demonstrated by the Joint Committee Report, and mentioned above, we consider that generally such an analysis can be extracted from the documents that contain it and provided as, in effect, a text book or lecture analysis based on hypothetical or possible circumstances and so divorced or disaggregated from the facts of a strike made pursuant to it.

46. Going back to the policy decision, we consider that the "circumstances" referred to in it can be identified from the information contained in the closed material, in a way that is divorced or disaggregated from:

> (a) the circumstances of the Raqqa Strike, save that the view was taken that sufficient of them existed to render the strike lawful, and
>
> (b) the part played by the security bodies in any particular operation that is authorised by the Defence Secretary (or other Secretary of State) and implemented by the armed forces and the security bodies.

Indeed, this reflects the nature and purpose of the formulation of, and the reasoning for, a policy decision that founds operational decisions as and when certain circumstances exist.

47. We shall refer to this possible presentation and provision of the requested information as the "Disaggregated Information".

The first two issues – the application of section 23(1) of FOIA

48. We repeat that section 23 (1) provides:

> **23 Information supplied by, or relating to, bodies dealing with security matters**
>
> (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

49. We record that, in our view correctly, it was not asserted that the requested information could not be provided without disclosing the record and so the documents in which it is held (see paragraph 34 of *APPGER* v *IC* and *FCO*).

50. The respondents argued that on all of the scenarios we identified by the questions set out in paragraph 38 above the Disaggregated Information relates to section 23 bodies and sought to make good that argument by reference to the earlier cases, including *APPGER v IC* and *FCO* which refers to many of the earlier cases at paragraphs 14 to 19.

Reasoning

51. In our view, their reliance on those earlier cases failed to give proper weight to the points made in paragraphs 23, 24 and 25 of that decision where the Upper Tribunal said:

> 23. We agree with Ms Steyn that it is important not to allow a judge-made formulation based on statutory functions to supplant or override the statutory 'relates

> to' test in section 23(1). However, we also agree with Mr Hopkins that a steer as to the contours of the statutory language may be helpful (not least for the Commissioner, for future FTTs and for future requesters).
>
> 24. There are many cases in which Ms Steyn's submission is reinforced by guidance to the effect that the approach taken to the meaning and application of an ordinary English word that can have a range of meaning is best shown by the reasons given in a particular case for the application of the test that contains it. But that solution is not, or is not as readily, available when a FOIA exemption is found to apply to information. This is because an open explanation cannot be given by reference to the actual content of the information.
>
> 25. However apart from the steer given in earlier cases and by the FTT in this case to the effect that in section 23(1) "relates to" is used in a wide sense we agree with Ms Steyn that a steer or guidance in general terms is impermissible and unhelpful.

52. As mentioned during argument, the identification of the steer given by the earlier cases and the FTT in that case in paragraph 25 of that decision was deliberately so limited.

53. The earlier cases do not expressly address the disaggregation proposed in these appeals and which we have concluded would be possible, in the circumstances of the present case. So, for the reasons set out in paragraphs 23 to 25 of the decision in *APPGER v IC and FCO*, the judicial language in earlier cases should not be substituted for the statutory language and the correct approach is to give effect to that language in its context and so having regard to the relevant statutory purpose and other principles of statutory construction.

54. Nevertheless, this does not mean that assistance on the approach to and analysis of the legislation is not found in the reasoning in the earlier cases. On the contrary, we are assisted by the reasoning in paragraphs 14 to 16, and 26 to 33 of *APPGER v* IC *and FCO*, in which it was said:

> 14. Mr Pitt-Payne sought to persuade us that this was the wrong approach. His submission was that information "relates to" a security body only if the information has that body as "its focus, or main focus" or has an equivalent connection to that body, relying on the Court of Appeal's judgment in *Durant v Financial Services Authority* [2003] EWCA Civ 1746 (at [24]). This argument had also been unsuccessfully advanced before the FTT. It fares no better before us. As Ms Steyn contended, it is contrary to the language of section 23(1), its statutory purpose and authority. More particularly, there are four reasons why we reject Mr Pitt-Payne's submission on this point.
>
> 15. First, it is simply inconsistent with the ordinary meaning of the language. For example, in plain English a planning proposal to redevelop Site A may well *relate to* the adjoining property Site B even though its main *focus* is obviously Site A.
>
> 16. Second, it is inconsistent with Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all. There is no point sending a letter making a FOIA request to Thames House. As Ms Steyn put it, Parliament had shut the front door by deliberately omitting the section 23 bodies from the list of public

authorities in the Schedule to the Act. Section 23 was a means of shutting the back door to ensure that this exclusion was not circumvented.

26. Having said that, we acknowledge that information, in a record supplied to one or more of the section 23 bodies for the purpose of the discharge of their statutory functions, is highly likely to be information which relates to an intelligence or security body and so exempt under section 23.

27. Further, in our view this approach is likely to provide an answer in the great majority of cases to the question whether the relevant record (and so here and in many cases the document(s) in question) and so all of the information within it is covered by the section 23 exemption. Also, this approach would avoid problems that have bedevilled this case relating to disclosure of parts of documents and the identification of other passages in them in respect of which an exemption is claimed. This has inevitably involved much time and effort and has led to APPGER asserting that they cannot see why parts are covered by an exemption and cannot help the tribunal on that because they have not seen the document.

28. The approach suggested by Mitting J would accord with Mr Pitt-Payne's correct acceptance that the fact that information had been sent to a section 23 body is exempt information and would avoid the problem that redaction from a document in reliance on section 23 would in many cases reveal that this was the case.

29. However, we agree with Mr Pitt-Payne that because such an approach is to the whole of a record (or a document and its enclosure or a chain of documents) it leaves alive the problems relating to that the points that:

> (i) simply sending information to a section 23 body does not turn information held by a public authority into section 23 exempt information held by it; and
>
> (ii) a FOIA request is for information not for a record or a document

30. One example he gave to illustrate these problems was of a thesis that the FCO had obtained for its own purposes unconnected with national security and later thought might be of interest to a section 23 body and so sent to that body.

31. That example indicates a practical solution to these problems in that it shows that generally the public authority will have the information in a record that is separate from that which it sends to the section 23 body and so, if it falls within the request, that record of it (or its content) can be provided and the section 23 exemption can be claimed on the basis advanced by Mitting J for the whole of the record of the communication with the section 23 body.

32. The problems remain if there is no other record of the information. In our view, this is likely to be rare and if it arises it is likely that the better way of dealing with it would be to provide the information rather than a redacted copy of the record sending it to a section 23 body. This would preserve the ability not to confirm or deny pursuant to s. 23(5).

> 33. So, in our view, the approach suggested by Mitting J has considerable utility in the application of section 23. Firstly, it provides a clear explanation that can be given to the requester and can be checked by the Commissioner and the tribunal. Secondly, information held by the public authority that is included in that record of communication with a section 23 body that falls within the request and for which the section 23 exemption cannot otherwise properly be claimed can and would still be provided. The fact of the supply of that information can be checked by the Commissioner and the tribunal. Thirdly, it would avoid significant detailed work in marking up documents and partial disclosure and the risk that partial disclosure of a document would reveal section 23 exempt information (i.e. that information was provided to a section 23 body for the discharge of its statutory functions or other involvement of a section 23 body for such purposes).

55. The contrast in the analysis and conclusions in respect of the examples given in paragraph 15 (planning permission) and paragraph 30 (a thesis) demonstrate problems in the ascertainment and explanation of Parliament's intention on what we consider is the central question namely: "Which exemption or exemptions to the right to be provided with information conferred by FOIA did Parliament intend to apply to the disclosure of particular information by a public authority?".

56. Here, this question can be put by asking: "Did Parliament intend that an absolute or qualified exemption would apply to the Disaggregated Information?"

57. In our view, the correct approach to answering that central question is to address by reference to the content of the information in question (and so a document, a redacted document or information extracted from record and documents) which of the exemptions Parliament intended to apply. In other words, is the Disaggregated Information still 'caught' by section 23, or is it subject to the qualified exemptions in sections 35(1)(c) and/or 42?

58. Going back to the planning permission and thesis examples, the answer it seems to us could go both ways depending on the content of the information under consideration.

59. An approach based on primary and secondary or other purposes was rejected in *APPGER v IC and FCO.* We reiterate that Parliament clearly did not intend information to be obtained from or about security bodies through the back door and we acknowledge that there can be difficulty:

> (a) in an outsider identifying what the revelatory nature of information, if any, which is said to be subject to the absolute section 23 exemption might be, and so
>
> (b) in the application of an approach that asks whether the information is or might be revelatory of the Security Services' activities, their intelligence or intelligence sources, and that

these points support a wide approach to the reach of section 23.

60. But here, the revelatory problem does not exist. Firstly, no doubt because of the expected and confirmed involvement of the security bodies a "neither confirm nor deny approach" was correctly not advanced by the respondents under section 23. Secondly, and on all of the scenarios set by the question set out in paragraph 38 above the Disaggregated Information:

(a) is obviously of interest to all involved in formulating or acting in accordance with the Government policy on targeted drone strikes because it is an analysis of the lawfulness of that policy, but

(b) that interest is limited to analysis of the relevant legal principles and does not reveal anything about the activities of security bodies as such which were involved, save that it sets the parameters of what is lawful and so the circumstances that must be established to exist to found that legal analysis.

61. In our view, and notwithstanding that members of security bodies might be liable to criminal or civil action when acting in accordance with authorities and orders given under the policy, that interest in the Disaggregated Information like that of both Parliament and the public (on whom FOIA confers a right to information subject to exemptions), and so the public interest, is in the legality of Government policy.

Conclusion

62. Returning to what we regard as the central question we have concluded that although we accept that the Disaggregated Information was and is of interest to security bodies for their statutory purposes and, as a matter of ordinary language, can be said to relate to them, Parliament did not intend such information to be covered by the absolute section 23 exemption. The reasons for this are that (i) the interest of the security bodies in such information is shared by Parliament and the public because it relates and is confined to the legality of Government policy, and so (ii) such information falls obviously within the qualified exemptions in sections 35 and 42 as being legal advice on the formulation of Government policy.

Article 10

63. Late in the day this was relied on by the appellants to support their arguments that section 23, and so an absolute exemption, did not apply to the Disaggregated Information. It was addressed by written and oral submissions at the adjourned hearing on 5 October 2017. In view of our conclusion on disaggregation without reference to Article 10 it is not necessary for us to address the arguments based on it.

Issue 3 - the application of the public interest test under sections 35(1)(c) and 42 of FOIA

64. It is accepted that these exemptions apply to the Disaggregated Information and that the application of the public interest balance test set by section 2(2)(b) of FOIA determines whether it must be communicated to the appellants or whether it is exempt information.

65. The date at which the public interest balance has to be considered is the date when the request is refused by the public authority. No point was raised that the differences in those dates gave rise to any distinctions. The requests were made very shortly after the announcement in Parliament on 7 September 2015 and were refused during the inquiry that led to the Joint Committee report that was ordered to be printed in April 2016 and was published in May 2016.

66. Argument was not advanced to us on the basis that disclosure during the inquiry of the Joint Committee would have been premature and, in our view sensibly, the Joint Committee Report has essentially been used as an analysis of the situation at the times that the requests were refused and so as at the relevant dates for our purposes.

67. This tribunal has recently addressed the public interest balance test in the context of sections 35(1)(c) and 42 in *Savic v (1) ICO, (2) AGO and (3) CO; AG Appeal* [2016] UKUT 0534 (AAC); [2017] AACR 26. We adopt the approach set out in paragraph 34 of that decision. (Indeed, the arguments before us related to the application of that approach.) We said:

> 34. We take the view, in line with earlier authority, that:
>
> i) the factors identified by the courts in favour of the non-disclosure of LPP information provide powerful reasons for a refusal of a FOIA request, but
>
> ii) it must be remembered in the FOIA context they do not found a right, and so
>
> iii) in the FOIA context a fact sensitive weighing of the competing public interests must be carried out (see for example *BERR v O'Brien* at paras 41 and 58 relating to the approach to the public interest test and para 64 of the judgment in *HM Treasury v ICO* cited below).

68. The powerful public interest against disclosure described in *Savic* is one side of the equation and it has to be established by the public authority claiming the exemption that it outweighs the competing public interest in favour of disclosure if the exemption is to apply. However strong the public interest against disclosure it does not convert a qualified exemption into one that is effectively absolute.

69. The appellants argued that the public interest in favour of disclosure was overwhelming. We do not agree.

Reasoning

70. We acknowledge and accept that:

(a) There is a strong public interest in full and informed discussion of the legality of the Raqqa Strike and thus of the lawfulness of the Government policy decision on which it is founded.

(b) That policy decision was the foundation of the first targeted drone strike of this type made by the UK, namely in self-defence against individuals in a foreign country where UK military action was not authorised. It was therefore a "new departure" in Government policy, to use drones for targeted killing that raised significant human rights issues that demanded detailed scrutiny by Parliament.

(c) That policy and the Raqqa Strike raise a number of legal issues on which different views are held.

(d) The Joint Committee Report contains criticisms of the approach of the Government to the provision of information to it and recommended that it provide clarification on a number of those legal issues (see for example paragraph 3.92).

(e) Points (b) to (d) mean that there is a closer analogy than in *Savic* to the circumstances in which Blake J indicated at paragraph 64 of his judgment in *HM Treasury v ICO* (cited in paragraph 43(i) of *Savic*) that legal advice would be disclosed under FOIA.

(f) The Prime Minister made express reference to and relied on the point that the Attorney General had advised that the policy was lawful.

71. We also acknowledge and accept that the disclosure of the Disaggregated Information (and so the advice of the Attorney General in this form) whenever it took place would act as a catalyst to further examination and debate in the public interest of the lawfulness of the Government's policy that founded the Raqqa Strike and could found other strikes in similar circumstances. But we reject the arguments of the appellants that:

(a) Parliament and the public cannot appreciate, evaluate or scrutinise the legal basis of the policy without such disclosure, and

(b) disclosure is needed to or would assist in making it clear what the Government's policy was and is or for removing inconsistencies in the Government's position.

72. As to (a): the Joint Committee Report shows that robust and detailed debate on the disputed legal issues can take place without disclosure of the Disaggregated Information. Its recommendation that further information should be provided confirms the importance of the issue and thus the strength of the public interest in full discussion and transparency. But is not an indication that the Government should waive its privilege in the public interest and it does not impose any obligation on the Government to provide more detailed argument.

73. As to (b): we have explained above (see paragraphs 14 to 35) that we do not accept that the lack of clarity and inconsistencies relating to what the Government's policy was and its justification in law that have been asserted by the appellants existed when the requests were made and refused and, in any event, they have been put to rest by the Joint Committee Report.

74. In our view, the appellants' assertions of inconsistency and lack of clarity are a manifestation of the view, in particular of Rights Watch (UK), that the Government's policy is unlawful, for example and in particular on the application of the concept of "imminence".

75. We agree with Miss Steyn's submissions that there has been no partial disclosure or waiver of the privilege. Rather, there has been an assertion of the Government's position on the basis of legal advice it has received from the Attorney General. This accords with the stance adopted by many when asserting their position and that it is right in law or lawful in the absence of any risk of litigation or when it is contemplated. We agree with Miss Steyn that the appellants' assertion that "Parliament and the public face a complete information blackout" is wrong.

76. The importance of the issue and the public interest in the issue works both ways because it supports the need for frankness and confidentiality between client and lawyer on

the one hand and the arguments in favour of transparency and fully informed debate on the other.

77. The Government's policy has not been changed and so any debate about it would not be historical; indeed, much of it would be directed to a future implementation of the policy.

Conclusion

78. Accordingly, in our view:

(a) Rights Watch (UK) and anyone else who wants to, can advance arguments on the lawfulness of the Government's policy (and so the Raqqa Strike or any other strike that is authorised and carried out pursuant to it) from the base of its announcement in Parliament and the conclusions in the Joint Committee Report,

(b) disclosure of the Disaggregated Information might act as a catalyst for further debate on or consideration of the lawfulness of the policy but it is not necessary for that purpose, and so

(c) disclosure of the Disaggregated Information would undermine the core of the public interest against the disclosure of legal advice given by the Law Officers (often, as here on matters of considerable public importance) and legal professional privilege generally.

79. So, we have concluded that when the requests were refused (and we add now) the primary effect of disclosure of the Disaggregated Information would be to allow those who disagree with the policy or its lawfulness to attack it using the reasoning in that advice without necessarily disclosing the reasoning, and so the strengths and weaknesses, set out in their own legal advice.

80. In short, we have concluded that as a properly informed public debate of the legal issues can be had without that disclosure the public interest balance comes down firmly in favour of non-disclosure.

81. We have reached that conclusion in the context of general public debate leaving on one side the prospect of litigation.

82. The prospect of litigation at the times the requests were made and refused (and we add in the future assessed then and now) is another factor that supports the conclusion that the public interest is against disclosure. There have been threats of litigation. For example:

(a) on 9 September 2015, the Ministry of Defence received a pre-action protocol letter in relation to an individual who was reported to be on a drone "kill list" and specific reference was made to the Raqqa strike,

(b) on 23 September 2015, Caroline Lucas MP and Baroness Jones alleged by a pre-action protocol letter that the government had failed to formulate a targeted killing policy or failed to publish one in breach of domestic and international law, and

(c) in the context of disclosure of the Attorney General's advice, in a letter dated 8 September 2015 Rights Watch (UK) referred to potential judicial review proceedings

> and stated that it "reserves the right to bring legal proceedings for judicial review without further notice to you".

83. The accuracy of part of an exhibited newspaper report dated 8 September 2015 referring to actions for compensation by member of the families of the victims of the Raqqa Strike was challenged on instructions but we consider that a risk of such actions in respect to that strike or future ones existed at the relevant dates.

The additional information sought by Miss Corderoy

84. This has a wider compass than the advice of the Attorney General and so the Disaggregated Information.

85. We examined these documents in a separate closed session and agreed the following gist of that session:

> During the CLOSED session on 5 October 2017, the tribunal were taken to three specific documents which were referred to in paragraph 18 of the ICO's skeleton argument. Both of the respondents made submissions in respect of the information contained within those documents and the tribunal considered and tested the application of the claimed exemptions to them.
> Counsel for the ICO then took the tribunal to three further documents to put points which he considered would be likely to have been put by the appellants if the session had not been CLOSED. Counsel for the AGO and Cabinet Office responded.

The tribunal concluded that there was no need for the appellants to be asked to address any further identified questions or issues as a result of this process.

86. In our view, the information in the additional three documents covered by Miss Corderoy's request could be added to the Disaggregated Information and in that form, would engage the exemptions in sections 35(1)(c) and 42 as being a part of the legal advice given by the Attorney General or members of his office.

87. The public interest argument in respect of this additional information is not on all fours with the argument discussed above because, as the request indicates, it is not confined to the advice given by the Attorney General on the lawfulness of the policy decision.

88. However, where this is the case it is part of a continuum of advice that attracts legal professional privilege and, in our view, it engages the core arguments for that privilege and apart from the arguments for the disclosure of the legal analysis underlying the policy decision no further public interest argument for its disclosure was advanced or identified by us.

89. Accordingly, in our view the public interest balance falls firmly in favour of non-disclosure.

The procedural point - Was the Commissioner entitled to rely on an assurance on behalf of the AGO/CO that the Advice was exempt under section 23(1) FOIA or ought she to have exercised her statutory powers so as to require the Advice to be disclosed to her for her consideration?

90. During the hearing, we expressed surprise at the approach taken by the Information Commissioner and through counsel she modified her defence of the approach by accepting that she should have asked for more detail and not accepted the assurance in the terms it was given but she did not accept that it was necessary for her to look at the documents in this case.

91. We expressed surprise at the approach taken by the Information Commissioner and the other two respondents of respectively seeking and relying on and giving and supporting reliance on such an assurance in this case because in our view that approach fell well short of what was required under FOIA.

92. It follows that we welcome the Information Commissioner's modification of her position but we disagree that it would not have been necessary for her to look at the documents in this case whatever further (and undefined) detail she accepts she should have sought.

93. A feature of this case is that the Cabinet Office and the Attorney General's Office had come to different conclusions on the application of the absolute exemption in section 23. Without explanation, other than an assertion that it had been wrong, the Attorney General's Office has adopted the view advanced in the assurance given by Mr Jaspert on their joint behalf. Of itself, that disagreement and absence of explanation should have indicated that the seeking, giving and reliance on an unexplained assurance were inappropriate.

94. However, on the assumption that there had been no difference in the conclusions reached by the two public authorities, we do not understand how it was thought appropriate to seek and offer an assurance that did not address the test being applied by the person giving it, and so his reasons for giving it, in particular regarding the way in which the requests were framed and so the disaggregation of the legal advice proposed.

95. We acknowledge the resource difficulties of the Information Commissioner but we consider that the course adopted here of effectively permitting the other two respondents to be the decision-maker on the challenge to their stance on the application of the absolute exemption in section 23 is unfair.

96. Finally, we record that the reliance placed by the respondents on the memorandum of Understanding on National Security Cases was misplaced. That reliance failed to have proper regard to the principles of fair decision making or the terms of paragraphs 4 and 5 of the memorandum.

97. If the relevant public authority wishes to avoid a consideration of the relevant documents and so information and disaggregation issues, we have not thought of any circumstances in which it could rely on an assurance rather than a certificate given pursuant to s. 23(2) that can be appealed under section 60. We did not hear any submissions on what open and further or alternatively closed reasoning should be included in or accompany such a certificate. That is for another day.

Closed decision and procedure

98. In our view, no such decision is necessary. The application of the relevant exemptions and our view on disaggregation flow from a reading of the relevant documents and require no further explanation.

99. We confirm that the agreed direction that there should be no open or closed oral evidence did not need to be reviewed. There was no challenge to any of the primary evidence and the conclusions on the application of the exemptions and the public interest could best be and were dealt with by argument.

SCHEDULE TO DECISION

Summary

Introduction

On 21 August 2015 Reyaad Khan, a 21year old British citizen from Cardiff, was killed by a RAF drone strike in Raqqa, Syria. He had appeared in a recruitment video for ISIL/Da'esh and was suspected of being involved in plotting and directing terrorist attacks in the UK and elsewhere.

Deploying the UK's Armed Forces is a prerogative executive power, but the Government has chosen to observe a recently established constitutional convention that, before troops are committed abroad, the House of Commons should have an opportunity to debate the matter, except when there is an emergency and such a debate would not be appropriate. Pursuant to this convention, the House of Commons in August 2013 debated the possibility of airstrikes against President Assad's forces in Syria after their use of chemical weapons but both the Government's motion and the Opposition's amendment (which did not rule out airstrikes) were defeated. When voting in favour of military action against ISIL/Da'esh in Iraq in September 2014, the House expressly did not endorse UK airstrikes in Syria and resolved that any proposal to do so would be subject to a separate vote in Parliament. ***At the time of the drone strike that killed Reyaad Khan, the Government therefore had the express authorisation of the House of Commons to use military force against ISIL/Da'esh in Iraq, but airstrikes in Syria were expressly not endorsed without a separate Commons vote***.

The Prime Minister told the House of Commons on 7 September 2015 that the lethal drone strike in Syria ***was "a new departure": the first time, in modern times, he said, that a British military asset had been used in a country in which the UK was not involved in a war. He said explicitly that the strike was not part of coalition military action against ISIL in Syria, before which, he acknowledged, the House of Commons would have to be consulted.*** Rather, the strike was part of the Government's comprehensive counter- terrorism strategy that seeks to prevent and disrupt plots against the UK at every stage, as part of the stepped-up response to the acute threat from Islamist extremist violence.

The Prime Minister's statement to the House of Commons, that the drone strike against Reyaad Khan was not part of military action against ISIL/Da'esh to protect Iraq, was ***contradicted by the statement of the UK Permanent Representative to the UN, also on 7 September 2015, that the action had been taken in the collective self-defence of Iraq. That statement suggested that there had been no "new departure" in UK policy, merely a conventional use of force abroad by the UK in an armed conflict in which the UK was already involved.***

Our inquiry

We decided to hold an inquiry into the matter ***in view of the extraordinary seriousness of the taking of life in order to protect the lives of others, which raises important human rights issues***; ***the fact that the Government announced it as a "new departure" in its policy;*** and because of the importance we attach, as Parliament's human rights committee, to the rule of law. ***It is obviously right in principle that the Government is subject to the rule of law and must comply not only with domestic law but with the international obligations it has***

voluntarily assumed. But the UK's compliance with the rule of law is also vitally important to its ability to influence other countries in its foreign policy and to be a force for good in the world. When meeting the challenges of countering terrorism in the new situation, it is therefore imperative that the UK complies with international law, because it sends an important signal to the rest of the world about the importance of the international rule of law. ***The Government therefore urgently needs to demonstrate that it at all times complies with the international legal frameworks that regulate the use of lethal force abroad outside of armed conflict.***

We were also concerned that the ongoing uncertainty about the Government's policy might leave front-line intelligence and service personnel in considerable doubt about whether what they are being asked to do is lawful, and may therefore expose them, and Ministers, to the risk of criminal prosecution for murder or complicity in murder.

The main purpose of our inquiry was to achieve clarification in relation to a number of important questions, in particular: (1) what precisely is the Government's policy? (2) what is its legal basis? (3) what is, and what should be, the decision-making process that precedes such a use of lethal force? and (4) what are, and what should be, the mechanisms for accountability?

Context

The context in which our inquiry has taken place is important. ***Two developments have combined to blur the line between war in the traditional sense on the one hand and countering the crime of terrorism on the other***. First, rapid technological advance has transformed both the nature of the threat the UK faces from terrorism and its capacity to counter it: both terrorist attacks and prevention of such attacks can be carried out remotely and instantaneously. Second, the nature of armed conflict has changed, with the steady rise of non-state armed groups such as ISIL/Da'esh with both the intent and capability to carry out terrorist attacks globally, and aspirations which are without territorial limit. ***This has created a new situation for which the legal frameworks which currently obtain were not designed. While the answer to some legal questions (such as the applicability of the European Convention on Human Rights) is clear, there is an urgent need for greater international consensus about precisely how the relevant international legal frameworks are to be interpreted and applied in this new situation.***

The Government's policy

Our inquiry has analysed the Government's policy. ***The Prime Minister's statement to the House of Commons on 7 September 2015 should be read in the context of the recently established constitutional convention whereby, before the Government uses military force abroad, the House of Commons has an opportunity to debate the proposed use of force, except when there is an emergency which means it would not be appropriate to consult the House of Commons in advance***. Examples of such exceptions include if there were a critical British national interest at stake, or considerations of secrecy make it impossible. In such exceptional cases the constitutional convention is that the Government can act immediately and explain to the House of Commons afterwards, at the earliest opportunity.

1. Introduction

……..

The Government's engagement with our inquiry

1.52 On 4 November we wrote to the Defence Secretary, the Foreign Secretary and the Attorney General to make clear the intended scope of our inquiry and to indicate some ways in which we hoped the Government would be able to help us with our inquiry. We ***made clear that the focus of our inquiry was the Government's policy and not the use of drones for targeted killing in any particular case.*** We also made clear that, while the events leading up to the lethal drone strike in Raqqa on 21 August 2015 might be relevant to our inquiry ***insofar as they suggest what the Government's policy is and reveal the decision-making process prior to such a use of force, we were not in a position to inquire into the intelligence on which the decision was made to launch that particular strike as our members are not security-cleared.*** We regarded that as a matter for the Intelligence and Security Committee ("the ISC"), which had announced on 29 October that one of its immediate work priorities would be looking into "the intelligence basis surrounding the recent drone strikes in which British nationals were killed." ……

1.53 We asked the Government to provide us with a detailed memorandum, covering a number of matters:

i) ***A clear statement of the Government's policy*** on the use of drones for targeted killing.

ii) ***A comprehensive description of the legal framework which the Government considers to be relevant to its policy, including international law, and an explanation of the circumstances in which it is lawful to use drones for targeted killing.***

iii) A description of all existing guidance which the Government considers to be relevant to any use of drones for targeted killing.

iv) A description of the decision-making process that precedes any ministerial authorisation in a particular case.

v) A summary of all the existing accountability mechanisms which apply to any use of drones for targeted killing.

1.54 We also asked for the memorandum to address a number of specific questions set out in the Annex to our letter, which were intended to establish some basic factual and legal matters at the outset of our inquiry. ***These included important questions about the international law frameworks that govern the use of drones for targeted killing abroad, such as what tests must be satisfied for a targeted killing abroad to be lawful, and, importantly, whether the Government considers human rights law to apply to such uses of lethal force abroad.***

1.55 We regret that the Government failed to provide us with many of the answers to our questions. We initially received a request for an extension of time by two weeks for the submission of the Government's memorandum. Our Chair declined that request on the basis that our inquiry was urgent in light of the Government's stated intention to conduct similar lethal drone strikes in future in similar circumstances, and the Government should already

have been clear about the legal basis for its policy before it implemented it by the lethal drone strike in Syria on 21 August.

1.56 We received a brief, four page memorandum from the Government on 3 December 2015. We consider the substance of the memorandum in the chapters which follow, but we record here our disappointment that the memorandum leaves unanswered a number of important questions that we had asked in our letter, including whether, in the Government's view, international human rights law applies to UK drones strikes in Syria.

1.57 We therefore wrote again on 7 December to the Ministry of Defence ***making clear our disappointment*** and asking for a further Memorandum, answering each of the questions we had asked in our letter or, if any could not be answered, an explanation of why not, in time for the Secretary of State's appearance before us.

1.58 We also asked that the Secretary of State ***be accompanied by the MoD Legal Adviser when he came to give evidence, to give us the opportunity to ask some detailed questions about the availability of legal advice in the decision-making process that precedes a lethal drone strike. The Secretary of State declined to provide a further memorandum on the basis that the earlier memorandum contained the Government's response to all the questions we had raised in our letter. He also said that ministers had decided that Government lawyers would not appear, "in order to protect the principle of Legal Professional Privilege".***

1.59 **We thank the Ministry of Defence for facilitating our visit to RAF Waddington, and the serving officers there who made the visit so informative. We also thank the Secretary of State for Defence for giving oral evidence to us. We were disappointed, however, by the Government's failure to answer a number of important questions that we asked of them, particularly about the Government's understanding of the applicable legal frameworks that govern the use of lethal force abroad outside of armed conflict.** ***We fully acknowledge the inevitable limits to transparency in relation to intelligence- based military and counter-terrorism operations, but the need to protect sensitive information cannot explain the Government's reluctance to clarify its understanding of the relevant legal frameworks.***

1.60 Because the issue of taking a life in order to protect lives is so important, we hope the Government will respond positively and transparently to this Report. ……

2 The Government's policy

Introduction

2.1 One of the main objectives of our inquiry was to clarify whether the drone strike in Syria on 21 August heralded the adoption of a new policy by the Government on the use of lethal force abroad and, if so, exactly what that new policy is. In particular, as the title of our inquiry indicates, we were concerned to establish whether the Government had now followed the US and Israel by adopting a policy of "targeted killing" of suspected terrorists abroad. In this chapter, we examine the various ministerial and other statements of the Government's position, from what the Prime Minister called a "new departure" in UK policy in the House of Commons on 7 September, through a number of other formulations by various ministers, to the most recently stated position in the oral evidence of the Defence Secretary to us on 16

December and the Prime Minister's evidence to the Liaison Committee on 12 January, with a view to establishing exactly what the Government's policy now is.

2.2 ***We have considered carefully the nuances and, in some cases, contradictions and inconsistencies in the Government's account of its policy, which have given rise to confusion, in particular, in relation to whether or not the strike in Syria on 21 August was part of an armed conflict in which the UK was already involved at the time of the strike. This matters because the UK has never previously had an explicit policy of using lethal force abroad outside an area of armed conflict.*** The Government says that it has not adopted a policy of targeted killing. However, as we make clear in this Chapter, our inquiry has established that ***it is the Government's policy to use lethal force abroad, even outside of armed conflict, against individuals suspected of planning an imminent terrorist attack against the UK, when there is no other way of preventing the attack.***

A "new departure"

2.3 When the Prime Minister reported to the House of Commons on 7 September, he made very clear that the strike in Syria had not been part of the wider conflict with ISIL/Da'esh in Syria, which the House had, at that point, not yet authorised:

> "I want to be clear that the strike was not part of coalition military action against ISIL in Syria; it was a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home. The position with regard to the wider conflict with ISIL in Syria has not changed."

2.4 In response to a question from our Chair, as to whether this was the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war, the Prime Minister said:

> "The answer to that is yes. Of course, Britain has used remotely piloted aircraft in Iraq and Afghanistan, but this is a new departure, and that is why I thought it was important to come to the House and explain why I think it is necessary and justified."

2.5 The Prime Minister was therefore unequivocal that the lethal drone strike on Reyaad Khan in Syria on 21 August was a "new departure", and it seemed that his reason for characterising it as a new departure was because it was the first time that a military asset had been used to deliver lethal force outside an area of armed conflict.

2.6 Earlier in his statement the Prime Minister had also made clear that this action was part of a wider counter-terrorism strategy, according to which such action would be taken wherever the threat comes from:

> "As part of this counter-terrorism strategy, […] if there is a direct threat to the British people and we are able to stop it by taking immediate action, then, as Prime Minister, I will always be prepared to take that action. That is the case whether the threat is emanating from Libya, from Syria or from anywhere else."

2.7 Following the Prime Minister's statement, other ministers made clear that the exceptional action taken on 21 August in Syria was not a one-off, but the Government would do the same again if similar circumstances arose. The Secretary of State for Defence, for example, said:

> "There are other terrorists involved in other plots that may come to fruition over the next few weeks and months and we wouldn't hesitate to take similar action again. […] There is a group of people who have lists of targets in our country, who are planning armed attacks on our streets, who are planning to disrupt major public events in this country and our job to keep us safe, with the security agencies, is to find out who they are, to track them down and, if there is no other way of preventing these attacks, then yes we will authorise strikes like we did."

Conflicting messages about "armed conflict"

2.8 ***At the time of the Prime Minister's statement to the House of Commons on 7 September, it was widely thought that the "new departure" of which he spoke was that it was now part of the Government's counter-terrorism strategy to use lethal force against suspected terrorists abroad who pose an imminent threat to the UK, even in countries where the UK is not involved in an armed conflict, and that the drone strike against Reyaad Khan was the first application of this new policy***. Indeed, this was the assumption on which two parliamentarians, Caroline Lucas MP and Baroness Jones of Moulsecoomb, threatened to bring judicial review proceedings against the Government, challenging "the Government's failure to formulate and publish a Targeted Killing Policy, or publish any such existing policies or procedures, governing the circumstances in which it will pre-authorise the deliberate killing of individuals overseas outside an armed conflict or war in which the UK is participating."

2.9 However, whether the UK now ***had a policy of using lethal force abroad outside of armed conflict was immediately thrown into question by the Government's apparently contradictory statement that the drone strike in Syria on 21 August was carried out in the context of an existing armed conflict: the armed conflict with ISIL/Da'esh in Iraq*** that is spilling over the border into Syria.

2.10 In a letter dated 7 September to the UN Security Council the UK Permanent Representative to the UN said that the strike in Syria was not only in self-defence of the UK but was *also* in exercise of the right of collective self-defence of Iraq (which suggests that it was carried out as part of the armed conflict with ISIL/Da'esh in which the UK was already involved):

> "I am writing to report to the Security Council that the UK has undertaken military action in Syria against the so-called Islamic State in Iraq and the Levant (ISIL) in exercise of the inherent right of individual and collective self-defence. […] ISIL is engaged in an ongoing armed attack against Iraq, and therefore action against ISIL in Syria is lawful in the collective self-defence of Iraq."

2.11 In a letter dated 23 October from the Government Legal Department to Leigh Day & Co., solicitors, in response to the letter before claim threatening judicial review proceedings referred to above, the Government's lawyers similarly asserted that the strike in Syria *was* part of an armed conflict:

> "[…] your letter proceeds from the premise that the action taken in Raqqa occurred outside the context of an armed conflict. That premise is fundamentally mistaken. An armed conflict is taking place in Iraq, and crossing over into Syria, at present. The United Kingdom is not currently participating in coalition air strikes within Syria (but is

> doing so in Iraq). The military action taken in Syria by the RAF on 21 August 2015 was aimed at a specific ISIL target that presented a clear, credible and specific threat of armed attack on the United Kingdom in the context of an active armed conflict in which the three ISIL fighters killed in the attack were participants. The fact that the United Kingdom had not up to that point conducted any air strikes on Syrian territory provides no basis for the assertion that this action took place outside the context of an armed conflict. The Raqqa strike was a military operation which was consistent with international humanitarian law [ie. the Law of War]."

2.12 T***here is nothing inherently contradictory in the Government relying on both individual and collective self-defence*** as justification for its action in Syria on 21 August. A single use of force can simultaneously serve both purposes. There is, however, a direct contradiction between what the Prime Minister told the House of Commons on 7 September (that the drone strike was not part of coalition action to protect Iraq) and what the UK Permanent Representative told the UN (that it was).

2.13 On the basis of the statement of the UK Permanent Representative to the Security Council, Sir David Omand told us that in his view the Government had maintained what he and the Birmingham Policy Commission had concluded was the important distinction between the law that applies in times of peace and that which applies in times of war. He did not consider that the Government had a new policy of strikes by remotely piloted aircraft outside areas of armed conflict. He made clear that, if there were such a policy, he would "deplore" it.

2.14 Jennifer Gibson, on the other hand, another member of the same Policy Commission, disagreed. She read the statements of the Prime Minister and other ministers to indicate that the Government now had a broader targeted killing policy that is not just about using drone strikes in traditional zones of armed conflict.

2.15 ***The disagreement between these two members of the same, unanimous Birmingham Policy Commission, about what the Government's policy now is, demonstrates the Government's lack of clarity about its position as a result of the inconsistent statements made in the wake of the drone strike in Syria.***

Clarification

2.16 In view of the confusion and uncertainty created by the Government about its policy, when the Secretary of State for Defence appeared before us we asked him directly what the UK's policy is on targeted killing *outside recognised areas of conflict*. The Secretary of State's answers provided two important clarifications of the Government's position.

The significance of the constitutional convention to consult Parliament

2.17 The first clarification provided by the Secretary of State for Defence concerns the significance of the constitutional convention to consult Parliament before exercising the prerogative power to deploy the Armed Forces.

2.18 The Secretary of State for Defence confirmed what the Prime Minister had told the House of Commons on 7 September: "This was the first time that we had acted in an area in which we were not previously involved in an armed conflict." The Prime Minister had

reported it to Parliament as soon as he could because what was novel about the situation was that the use of lethal force had been in a country which:

> "was not only a country in which we were not involved militarily but a country in which we said we would not be involved militarily when we first came to Parliament in August 2013 [sic] to get approval to act in Iraq."

2.19 The Secretary of State's answers ***have clarified the context in which the Prime Minister spoke of the drone strike on Reyaad Khan in Syria being a "new departure".***

2.20 In March 2011 the Government acknowledged that in recent years a convention had developed that the House of Commons should have the opportunity to debate a proposed use of military force. The then Leader of the House of Commons, Rt Hon Sir George Young MP, said:

> "A convention has developed in the House that before troops are committed, the House should have an opportunity to debate the matter. We propose to observe that convention except when there is an emergency and such action would not be appropriate. As with the Iraq war and other events, we propose to give the House the opportunity to debate the matter before troops are committed."

2.21 The Cabinet Manual confirms that this is the case. It states:

> "In 2011, the Government acknowledged that a convention had developed in Parliament that before troops were committed the House of Commons should have an opportunity to debate the matter and said that it proposed to observe that convention except when there was an emergency and such action would not be appropriate."

2.22 Examples of when it might not be appropriate to have a prior debate in the House of Commons include if there were "a critical British national interest at stake"; "the need to act to prevent a humanitarian catastrophe"; or "considerations of secrecy make it impossible". In such exceptional cases the convention is that the Government can act immediately but will explain to the House of Commons afterwards, at the earliest opportunity. As the Prime Minister put it in September 2014:

> "If there was the need to take urgent action to prevent, for instance, the massacre of a minority community or a Christian community, and Britain could act to prevent that humanitarian catastrophe […] I would order that and come straight to the House and explain afterwards."

2.23 The Prime Minister's statements on 7 September 2015 ***about a new departure in UK policy, and the strike on Reyaad Khan not being part of an armed conflict in which the UK was involved, were made in the context of this constitutional convention and should be read in that light. The Government used military force to target and kill Reyaad Khan in Syria on 21 August. The nature of the operation was such that it was not appropriate for the House of Commons to debate the use of force in advance. The Prime Minister came to the House of Commons on 7 September, Parliament's first day back after the summer recess, to explain the use of military force in Syria.*** While this was not the first time since the emergence of the recent constitutional convention that the Government had used military force abroad without a prior debate in the House of Commons, it was the first time that

military force had been used in a country where the House of Commons had not only voted against the use of military force in 2013, but had specifically excluded the use of airstrikes in its resolution in September 2014 supporting air strikes against ISIL/Da'esh in Iraq:

> "[…] this House […] notes that this motion does not endorse UK air strikes in Syria as part of this campaign and any proposal to do so would be subject to a separate vote in Parliament."

2.24 ***It was therefore a "new departure" in terms of the domestic constitutional convention governing the use of military force abroad: the first time since the establishment of that convention that the Government had invoked the exception recognised by the convention, by using military force against ISIL/Da'esh not only outside the geographical area (Iraq) already authorised by the House of Commons, but in the very area (Syria) where the use of such force had been expressly excluded by the terms of the authorising resolution, and against the background of the House of Commons having voted not to support airstrikes in Syria in 2013***.

2.25 In our view, these very particular circumstances also explain why the Prime Minister was so insistent in his statement on 7 September that the 21 August drone strike in Syria was *not* part of an armed conflict in which the UK was already involved. Indeed, it is testament to the remarkable normative strength already acquired by the recently established constitutional convention. Because of the importance attached to that convention, he was keen to establish that the Government had not ignored the will of the Commons, but rather had acted in accordance with the convention, by taking urgent military action and then coming to the Commons at the earliest opportunity to explain the justification for that action. His remarks about the strike not being part of armed conflict were part of his explanation as to why the Government had in fact acted in accordance with the domestic constitutional convention rather than ignored it.

2.26 Whether the drone strike in Syria on 21 August was part of a wider armed conflict with ISIL/Da'esh, for the purposes of whether the Law of War applies, is a wholly separate question of international law. For reasons we explain in more detail in Chapter 3 below, we accept the Government's argument that the drone strike in Syria on 21 August was part of the same armed conflict with ISIL/Da'esh in which the UK was already involved in neighbouring Iraq, at the request of the Iraqi Government. It was therefore a use of force to which the Law of War applies.

2.27 As Sir David Omand said in evidence:

> "I have read the authoritative statement as that of Matthew Rycroft, the Permanent Representative to the United Nations, to the Security Council on 7 September, where the strike in Syria was seen as action against ISIL in Syria in the collective self defence of Iraq. That is a formal letter that is on the record. That, I think is the formal position. I had to read the Prime Minister's statement several times to try to square it with that. It was, I think, a political statement to explain to the House that, although this strike was in Syria, it was not going against the will of the House, which had failed to authorise strikes against President Assad's forces."

2.28 We welcome the Government's commitment to the recently established constitutional convention that, other than in exceptional emergencies, the Government will not use military force abroad without first giving the House of Commons an opportunity to debate it. We welcome too the fact that the Prime Minister came to the House of Commons at the earliest opportunity on 7 September to explain the exceptional use of force in Syria. ***In our view, his statements that the drone strike in Syria on 21 August was a "new departure" and was not part of an armed conflict must be read in the context of that domestic constitutional convention.***

2.29 We accept that the action taken against ISIL/Da'esh in Syria was part of the same armed conflict in which the UK was already involved in Iraq. ***Whether the Law of War applies depends on the proper characterisation of the situation from the point of view of international law, not domestic rules of constitutional law governing when the Government will use military force.*** **We are satisfied that the strike on Reyaad Khan was a new departure in terms of the domestic constitutional convention governing the use of military force abroad. It was not, however, a new departure in the sense of being a use of lethal force outside of armed conflict, because we accept, as a matter of international law, that it was part of the wider armed conflict with ISIL/Da'esh already taking place in Iraq and spilling over into Syria.**

Lethal force abroad outside of armed conflict

2.30 The second clarification provided by the Secretary of State for Defence concerns whether it is the Government's policy that it would be prepared in future to use lethal force against terrorist suspects abroad even outside of armed conflict.

2.31 In the Government's response to the letter before claim from Caroline Lucas MP and Baroness Jones, it argued that the Government does not have a "policy" as such at all: rather, in deciding whether to initiate a strike when faced with a threat such as that posed by ISIL/Da'esh in Iraq and Syria, it will consider the applicable law (including international law) and then consider whether, on the facts, a strike is justified in law. That involves a factual assessment as to whether or not military action should be taken and is justified, applying the relevant legal framework.

2.32 In the Government's memorandum which it provided to us for the purposes of our inquiry, however, it set out its position under the heading "The policy", and made clear its preparedness to use force in accordance with international law where it is necessary to do so and there is no alternative:

> "It is the first duty of any Government to ensure the safety and security of the people they serve. This is a responsibility which this Government takes very seriously and which it will discharge by all lawful means it considers necessary. The Government has made very clear that when there is an identified direct and imminent threat to the UK and British interests abroad it will take action to counter that threat. […] Lethal action will always be a last resort, when there is no other option to defend ourselves against an attack and no other means to detain, disrupt or otherwise prevent those plotting acts of terror. The principles of necessity and proportionality underpin all our decision-making."

2.33 When we asked the Secretary of State directly what the UK's policy is on targeted killing outside recognised areas of conflict, his response was unequivocal:

> "There is no policy of targeted killing."

2.34 ***We understand the Government's reluctance to describe its policy as one of "targeted killing". "Targeted killing", outside of armed conflict, sounds uncomfortably close to assassination, which is illegal under international law, and has always, rightly, been rejected by the UK, which has criticised other countries such as the US and Israel when it has judged their policies to go too far.***

2.35 However, when we asked the Secretary of State whether the Government's approach "would apply anywhere where there is no recognised Government, where there is a vacuum", the Secretary of State confirmed that this was indeed the Government's position:

> "If there is a direct and imminent threat to the United Kingdom and there is no other way of dealing with it–it is not possible to interdict that threat or to arrest or detain the people involved in that threat–then of course as a last resort we have to use force."

2.36 Later in his evidence, the Secretary of State gave a hypothetical example of such a use of lethal force outside an area of armed conflict in which the Government had been authorised to use military force:

> "If we had known that our 30 citizens were going to be murdered on the beach in Sousse [Tunisia], and we knew that that attack was being directly planned from, say, a training camp in Libya, would we have needed to seek authority if we were trying to forestall that attack by striking in Libya? I suspect that the answer would be fairly similar, that there was no political authority in Libya, there might have been no other way of preventing it and therefore we would have been justified in doing it–but, again, we would have had to explain it afterwards."

2.37 Libya is outside the geographical area (Iraq and Syria) in which the UK is involved in an armed conflict with ISIL/Da'esh. There are no extant UN Security Council Chapter VII Resolutions authorising the use of force against ISIL/Da'esh in Libya. The Secretary of State for Defence was therefore quite unequivocal in his oral evidence to us that the Government does claim the right to use lethal force against suspected terrorists *outside of armed conflict,* if there is a direct and immediate threat to the UK which cannot be averted in any other way. ***Even if, as we accept above, the particular strike in Syria on 21 August is correctly characterised as being part of an armed conflict, the Secretary of State's Libyan example leaves no room for doubt that it is the Government's policy to use lethal force abroad outside of armed conflict if the same circumstances arose. It confirms the Prime Minister's statement to the House that he will always be prepared to take immediate action to stop a direct threat to the British people, "whether the threat is emanating from Libya, from Syria or from anywhere else." That this is the Government's policy has now been further confirmed by the permission given to the US Government by the Defence Secretary to use UK air-bases for the US air strikes against an ISIL/Da'esh training camp in Libya on 19 February.***

2.**38 Our inquiry has therefore secured a second important clarification of the Government's position: it has established that it is the Government's policy to use lethal**

force abroad against suspected terrorists, even outside of armed conflicts, as a last resort, if certain conditions are satisfied.

Conclusion

2.39 **Despite the sometimes confusing explanations offered by the Government, we are now clear about what the Government's policy is. Although the Government says that it does not have a "targeted killing policy", it is clear that the Government does have a policy to use lethal force abroad outside armed conflict for counter-terrorism purposes. We understand why the Government does not want to call its policy a "targeted killing policy". In our view, however, it is important to recognise that the Government's policy on the use of lethal force outside of areas of armed conflict does contemplate the possibility of pre-identified individuals being killed by the State to prevent a terrorist attack.**

2.40 **We welcome the Government's recognition that such use of lethal force abroad outside of armed conflict should only ever be "exceptional". As we make clear later in this Report, we accept that in extreme circumstances such uses of lethal force abroad may be lawful, even outside of armed conflict. Indeed, in certain extreme circumstances, human rights law may even impose a duty to use such lethal force in order to protect life. How wide the Government's policy is, however, depends on the Government's understanding of its legal basis. Too wide a view of the circumstances in which it is lawful to use lethal force outside areas of armed conflict risks excessively blurring the lines between counter-terrorism law enforcement and the waging of war by military means, and may lead to the use of lethal force in circumstances which are not within the confines of the narrow exception permitted by law.** As David Davis MP, Chair of the All Party Parliamentary Group on Drones, said in the Westminster Hall debate on Armed Drones on 1 December 2015:

> "[t]he most important aspect of this debate is the blurring of the area between war and peace. Drone operations in war zones worry me much less than drone operations outside war zones. That is where Governments will be tempted to do things that are beyond what we normally expect of a civilized Western Government."

2.41 We therefore turn to consider the legal basis for the Government's policy of the use of lethal force abroad outside of armed conflict for counter-terrorism purposes.

3 Legal Basis

Introduction

3.1 ***The second main objective of our inquiry has been to clarify the legal basis of the Government's policy on the use of lethal force abroad outside of armed conflict for counter-terrorism purposes***. The legal basis of the Government's policy matters for a variety of reasons. The rule of law requires the Government to act lawfully when countering terrorism, including in accordance with the UK's international legal obligations. Moreover, the legal basis of the policy determines the legal standards that apply. ***The circumstances in which the Government will be prepared to use lethal force abroad outside armed conflict, pursuant to its policy, will therefore depend on the Government's view of its legal basis.*** If the Government proceeds on a misunderstanding about any aspect of the legal basis of its

policy, it runs the risk of using lethal force in circumstances which cannot be legally justified, ***thereby exposing ministers and other personnel involved in such action to the risk of criminal prosecution.***

3.2 In this chapter we examine the Government's apparent understanding of the legal position in light of the most relevant aspects of the various international legal frameworks that apply and the relationship between them. ***We consider first the international law on the use of force, which governs whether a State is entitled to resort to force at all on the territory of another State, and in particular the right of self-defence against threatened armed attacks by terrorist organisations. We then go on to consider the other relevant international legal frameworks which govern not whether but how force may be used: the Law of War and human rights law. We consider, first, when the Law of War applies and what it requires when it does apply; and, second, when human rights law applies and what it requires if it is applicable. Finally we consider the legal position where the UK provides support for the use of lethal force outside armed conflict by a third country such as the US.***

3.3 The apparent legal complexity of this area is a real obstacle to parliamentary debate and therefore effective democratic scrutiny of the Government's position on this important question. We hope that our Report will help to demystify some of the legal questions by identifying the most important legal issues on which the Government's position requires clarification. Annex 1 to this Report contains a more detailed account of the relevant international legal frameworks. Annex 2 contains three flowcharts which are intended to make the complex legal framework more accessible by parliamentarians and the public. The flowcharts do not purport to provide an exhaustive legal analysis of the issues, but are designed to help explain the relationship between the relevant international legal frameworks and identify the main questions that need to be asked under each of those frameworks when assessing the lawfulness of the use of lethal force abroad. ***Readers looking for more detailed analysis are referred to Annex 1, and also to the written evidence we received, much of which concerned what legal frameworks are applicable and what they require.***

The Government's understanding of the legal position

3.4 In our letter of 4 November to the Government at the start of our inquiry, we asked for a comprehensive description of the legal framework which the Government considers to be relevant to its policy, including international law, and an explanation of the circumstances in which it is lawful to use drones for targeted killing. We also asked for the Government's memorandum to address a number of much more detailed questions about their view of the relevant international law frameworks that govern the use of lethal force abroad, including the following four important questions:

- ***the Government's understanding of the meaning of the requirement in the international law on self-defence that an attack on the UK must be "imminent"***
- ***whether the Government considers the UK to be involved in a non-international armed conflict with ISIL/Da'esh***
- ***whether the Law of War applies to UK drone strikes in Syria***
- ***whether international human rights law applies to UK drone strikes in Syria and, if so, what it requires.***

3.5 The answers to these legal questions are absolutely central to our inquiry because, having established that it is the Government's policy to use lethal force abroad outside armed conflict

for counter-terrorism purposes, how far that policy goes depends entirely on the legal basis on which it rests.

3.6 While the Government's memorandum contains some helpful analysis of some of the legal issues, ***we regret to say that, despite repeated requests, we never received a detailed memorandum from the Government setting out its understanding of the relevant international legal frameworks (such as whether human rights law applies) or its answers to some of our more specific questions about important aspects of those frameworks***. We note that in the Government's response to the letter before claim from Caroline Lucas MP and Baroness Jones, it argued:

> *"**There is no requirement to publish the Government's conception of the applicable legal framework in any particular context, still less in a context such as the present. Indeed, such information is privileged and the courts have consistently recognised the importance to be attached to the concept of legal professional privilege.**"*

3.7 ***We are disappointed by the Government's unhelpfulness in this respect. Invoking the Government's acknowledged right to legal professional privilege seems quite inappropriate in this context. We have made very clear that we do not wish to see the Government's confidential legal advice or any documents which attract such privilege. However, considerations of transparency and democratic accountability require the Government to explain publicly its understanding of the legal basis on which it takes action which so seriously affects fundamental rights***. We routinely receive from Government departments, for example, detailed and very helpful human rights memoranda accompanying Bills which explain the Government's reasons for its view that the provisions in a Bill are compatible with the European Convention on Human Rights and other relevant human rights instruments. Such human rights memoranda often contain detailed legal analysis, including the Government's understanding of the requirements of human rights law in the context of specific provisions in Bills. Although strictly speaking some of this analysis no doubt attracts legal professional privilege, the Government chooses to make it available in the interests of transparency and democratic accountability, in order to facilitate effective parliamentary scrutiny of the human rights compatibility of its legislation. It has been invaluable to us and our predecessors in enabling this Committee to perform that function.

3.8 **We understand the sensitivity around the matters which we are investigating in this inquiry and respect the legitimate requirements of national security which make this different from our regular scrutiny work on legislation brought forward by the Government. However one of our roles as a select committee is to give careful and detailed scrutiny to Government policy which has significant implications for human rights, including those of our armed forces who are involved in such actions. <u>In order to fulfil this important function, it is vital that the Government engage with the detailed questions which we ask about its understanding of the legal frameworks in which the policy is situated.</u>**

3.9 ***In the absence of a detailed Government memorandum on the relevant legal frameworks, we have pieced together what we believe to be the Government's understanding of those frameworks from a variety of sources. The Government's understanding of the legal position is to be found primarily in the Prime Minister's statement to the House of Commons on 7 September; the evidence of the Attorney General to the Justice Committee on 15 September; the Government's brief memorandum***

responding to our letter at the beginning of our inquiry; and the oral evidence of the Defence Secretary on 16 December.

3.10 The Prime Minister first set out the legal basis for the drone strike on Reyaad Khan in Syria in his statement to the House of Commons on 7 September. He said:

> "I am clear that the action we took was entirely lawful. The Attorney General was consulted and was clear that there would be a clear legal basis for action in international law. We were exercising the UK's inherent right to self-defence. There was clear evidence of these individuals planning and directing armed attacks against the UK. These were part of a series of actual and foiled attempts to attack the UK and our allies, and given the prevailing circumstances in Syria, the airstrike was the only feasible means of effectively disrupting the attacks that had been planned and directed. It was therefore necessary and proportionate for the individual self-defence of the United Kingdom. The United Nations charter requires members to inform the President of the Security Council of activity conducted in self-defence, and today the UK permanent representative will write to the President to do just that."

3.11 As we pointed out above, when the UK Permanent Representative wrote to the President of the Security Council later the same day, as well as the individual self-defence of the UK referred to by the Prime Minister, he invoked the right of collective self-defence of Iraq, notwithstanding that the Prime Minister had expressly disavowed that as the legal basis in his statement to the Commons. ***We asked the Defence Secretary, the Foreign Secretary and the Attorney General in our letter of 4 November why the right of collective self-defence of Iraq was relied on by the UK Permanent Representative but not mentioned by the Prime Minister in his statement to the House on 7 September, but we did not receive a reply to this question.***

3.12 The Prime Minister's summary of the Government's legal position has been supplemented somewhat by subsequent statements by ministers. The Attorney General himself went a little bit further than the Prime Minister when giving evidence to the Justice Committee on 15 September. He declined an invitation to disclose the legal test he had applied when advising that there was a clear legal basis for the drone strike, on the grounds that this would disclose the detailed content of his advice in breach of the "Law Officers' Convention" whereby the content of the Attorney's advice is not disclosed. However, he went on to say:

> "[…] ***in order for any state to act in lawful self-defence, it is necessary to demonstrate that there is an imminent threat that needs to be countered and that, in countering that threat, the action taken is both necessary and proportionate, and it is necessary to demonstrate that what you do complies with international and humanitarian law. In all of those respects I was satisfied that this was a lawful action****."*

3.13 This went further than the Prime Minister's statement by indicating that, in addition to satisfying the tests for lawful self-defence, the action also had to be compatible with the Law of War.

3.14 The Government's memorandum to our inquiry gives a little bit more detail in its explanation of the legal basis for the Government's military action against ISIL/Da'esh in

Syria. Invoking the inherent right of individual and collective self-defence, as recognised by Article 51 of the UN Charter, the memorandum explains why, in the Government's view, the requirement of an "armed attack" is satisfied:

> "Individual terrorist attacks, or an ongoing series of terrorist attacks, may rise to the level of an "armed attack" for these purposes if they are of sufficient gravity. This is demonstrated by UN Security Council resolutions 1368 (2001) and 1373(2001) following the attacks on New York and Washington of 11 September 2001. Whether the gravity of an attack is sufficient to give rise to the exercise of the inherent right of self-defence must be determined by reference to all of the facts in any given case. The scale and effects of ISIL's campaign are judged to reach the level of an armed attack against the UK that justifies the use of force to counter it in accordance with Article 51."

3.15 The memorandum also explains that, in keeping with the long-held position of successive UK Governments, ***force may be used in self-defence not only where an armed attack is underway, but also where such an attack is imminent, and where the UK determines that it faces an imminent armed attack from ISIL, it is therefore entitled to use necessary and proportionate force to repel or prevent the attack. It explains why the legal test of an imminent armed attack was satisfied in the particular case of Reyaad Khan****:*

> *"**There was clear evidence of Khan's involvement in planning and directing a series of attacks against the UK and our allies, including a number which were foiled. That evidence showed that the threat was genuine, demonstrating both his intent and his capability of delivering the attacks. The threat of attack was current; and an attack could have become a reality at any moment and without warning. In the prevailing circumstances in Syria, this airstrike was the only feasible means of effectively disrupting the attacks planned and directed by this individual. There was no realistic prospect that Khan would travel outside Syria so that other means of disruption could be attempted. The legal test of an imminent armed attack was therefore satisfied.**"*

3.16 Finally, the Memorandum, like the Attorney General, goes beyond invoking the right of self-defence, and states that in addition "[t]he UK always adheres to International Humanitarian Law [i.e., the Law of War] when applying military force, including upholding the principles of military necessity, distinction, humanity and proportionality."

3.17 The Secretary of State for Defence, in his oral evidence to us, also elaborated a little on the law which the Government considers to apply to the action it takes in self-defence. He said "the military force we use is governed by humanitarian law [i.e., the Law of War]." He made no distinction in this respect between military force used in an area of armed conflict, and force used outside of armed conflict. In the Secretary of State's view, all uses of military force are governed by the Law of War, and the applicable legal standards are therefore those of the Law of War. When we asked him directly about whether the human rights law standard applies, he said that if any human rights law obligations are thought to apply, they are discharged by the UK's compliance with the Law of War:

> **The Chair:** "The human rights law standard says that lethal force outside an armed conflict situation is justified only if it is absolutely necessary to protect life. Is that the standard?"

> *Michael Fallon MP*: "I think that compliance with international humanitarian law discharges any obligation that we have under international human rights law, if I can put it that way. If any of those obligations might be thought to apply, they are discharged by our general conformity with international humanitarian law."

3.18 When dealing with an issue of such grave importance, taking a life in order to protect lives, the Government should have been crystal clear about the legal basis for this action from the outset. They were not. Between the statements of the Prime Minister, the Permanent Representative to the UN and the Defence Secretary, they were confused and confusing.

3.19 **The legal basis of the Government's policy appears to be that the use of lethal force abroad outside of armed conflict for counter-terrorism purposes is lawful if it complies with (1) the international law governing the use of force by States on the territory of another State, and (2) the Law of War. In the Government's view, it is not necessary to consider whether human rights law applies, or what it requires, because compliance with the Law of War, it argues, is sufficient to discharge any obligations that apply under international human rights law.**

3.20 ***We now turn to consider whether this is a sound legal basis on which to rest the Government's policy of using lethal force abroad outside of armed conflict for counter-terrorism purposes, or whether there are aspects of the Government's legal understanding which require clarification.***

The right of self-defence in international law

3.21 As the Government rightly observes, any use of lethal force abroad outside of armed conflict must, first, be lawful under the international law on the use of force which governs whether a State is entitled to resort to force at all. The Government invokes the inherent right to self-defence against a threat of imminent armed attack.

3.22 ***Whether the right of self-defence can be exercised where the threat of armed attack emanates from non-state actors such as ISIL/Da'esh who are not acting under the control or direction of another state is an issue which is not clearly settled in international law.*** Some international lawyers appear to take the view that the right of self-defence can only be invoked against another State. Others, including the Government, take the view that a State's inherent right of self-defence extends to attacks originating from non-state actors such as ISIL/Da'esh. State practice since 9/11 certainly supports the view that a State's right of self-defence includes the right to respond with force to an actual or imminent armed attack by a non-State actor, and the most recent UN Security Council Resolution 2249 (2015) lends support to this view. To be entitled to rely on self-defence against non-state actors, the State from whose territory the armed attack is being launched or prepared for must be unable or unwilling to prevent the attack.

3.23 The Government's position is that the right of self-defence can be invoked against non-state actors such as ISIL/Da'esh operating in another state which is unwilling or unable to prevent the attack by the non-state actors. The Prime Minister told the Commons in the run up to the debate on extending authorisation for use of military force to Syria that "there is a solid basis of evidence on which to conclude, first, that there is a direct link between the presence and activities of ISIL in Syria and its ongoing attack on Iraq, and secondly, that the Assad

regime is unwilling and/or unable to take action necessary to prevent ISIL's continuing attack on Iraq, or indeed attacks on us."

3.24 ***We accept the Government's argument that there is a right of self-defence against armed attack by non-State actors such as ISIL/Da'esh, and that anticipatory self-defence is also permitted***. We have examined carefully two particular aspects of the Government's individual self-defence argument: first, the assertion that the scale and effects of ISIL's campaign reach the level of an "armed attack" and, second, the assertion that the armed attack the UK faces is "imminent" in the sense required by the right of self-defence.

The meaning of "armed attack"

3.25 For a State to invoke the right of self-defence there must be an "armed attack" or the threat of an imminent armed attack. To constitute an "armed attack" for the purposes of the right of self-defence the attack must cross a certain threshold of seriousness or intensity. A series of minor attacks is not necessarily enough to constitute an armed attack. The scale and effect of the attack must reach a certain threshold of gravity.

3.26 The Prime Minister told the House of Commons that "It is […] clear that ISIL's campaign against the UK and our allies has reached the level of an 'armed attack', such that force may lawfully be used in self-defence to prevent further atrocities being committed by ISIL." The Government's memorandum similarly states that the scale and effects of ISIL's campaign reach the level of an armed attack against the UK which justifies the use of force to counter it.

3.27 It is clear that terrorist attacks by non-State actors such as ISIL/Da'esh can amount to an armed attack on a State. It is not clear, however, what level the Government considers they have to reach in order to constitute an armed attack. The Prime Minister, in his statement on 7 September, referred to six terrorist plots having been foiled in the UK in the preceding 12 months. A number of written submissions that we received pointed out that this raises a question as to the level and scale of violence that the UK considers to be sufficient to cross the threshold between criminal offences and armed attack such that the State is entitled to go beyond counterterrorism law enforcement and use military force on the territory of another state to defend itself.

3.28 We note that the UN Security Council, in its Resolution 2249 (2015), refers to "the horrifying terrorist attacks perpetrated by ISIL also known as Da'esh which took place on 26 June 2015 in Sousse, on 10 October 2015 in Ankara, on 31 October 2015 over Sinaï, on 12 November 2015 in Beirut and on 13 November 2015 in Paris, and all other attacks perpetrated by ISIL also known as Da'esh, including hostage-taking and killing", and determines that the threat from ISIL/Da'esh "affects all regions and Member States, even those far from conflict zones."

3.29 **We accept, as does the UN Security Council, that the attacks on the UK already mounted by ISIL/Da'esh satisfy the requirement that there must be an armed attack on the UK which entitles it to invoke the right to self-defence. However, to provides certainty for the future, we recommend that in its response to our Report the Government provide clarification of its view about the threshold that needs to be met in order for a terrorist attack or threatened attack to constitute an "armed attack" which entitles the Government to invoke its right of self-defence in international law.**

The meaning of "imminence"

3.30 Although it is not expressly provided for in the UN charter, it is well-established that a State's right of self-defence can be invoked preventively, in anticipation of an armed attack. The UK Government's view has always been that such preventive action in self-defence may only be taken to avert an *imminent* armed attack.

3.31 ***However the precise meaning of imminence is disputed in international law.*** Under the long established "Caroline test" for imminence (so called after a 19th century case on the use of force), the need to use force in self-defence must be "instant, overwhelming, leaving not choice of means and no moment for deliberation." However, others argue that the Caroline test is too narrow in the light of modern conditions. In 2004, the then Attorney-General Lord Goldsmith said in the House of Lords:

> "The concept of what constitutes an 'imminent' armed attack will develop to meet new circumstances and new threats […] It must be right that States are able to act in self-defence in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack."

3.32 However, the then Attorney-General distinguished the UK Government's position from the much more expansive US doctrine of pre-emptive self-defence set out in the US's 2002 National Security Strategy:

> "It is […] the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive attack against a threat that is more remote."

3.33 The Government has made clear, in the course of our inquiry, that it favours a more flexible approach to the meaning of "imminence", to include an ongoing threat of a terrorist attack from an identified individual who has both the intent and the capability to carry out such an attack without notice.

3.34 The Attorney General, for example, indicated that he considers that the traditional "Caroline" test for imminence (that the threat must be "instant, overwhelming, leaving no choice of means and no moment for deliberation") needs to be reassessed in the light of modern conditions:

> "The Caroline case, as you will appreciate, goes back to the 19th century, and we are talking about very different circumstances now. […] One of the things we probably need to think about as a society in any event is what imminence means in the context of a terrorist threat, compared with back in the 1890s when you were probably able to judge imminence by a measure of how many troops you could see on the horizon. That is something that everyone—including the academic world, no doubt—will want to consider, but the basic tenets of acting in self-defence have not changed."

3.35 The Secretary of State for Defence also preferred a much more flexible approach to the meaning of imminence:

> **"Jeremy Lefroy:** Secretary of State, to return to the understanding of the word "imminence", because it is clearly very important, in the past an armed attack was considered imminent only if it was so proximate in time that it left no moment for deliberation. Clearly, we live in an era of instant communication and the fact that we are dealing with people who have made it quite clear that they want to kill us at any time and in any way possible means that that definition of "imminent" may have changed a bit. Is your understanding that "imminence" means what it used to mean—that is, so proximate that it leaves no time for deliberation—or have circumstances changed so that an ongoing threat from a specific terrorist is considered imminent all the time?
>
> *Michael Fallon MP*: Circumstances have certainly changed from the definition that you have quoted. I would not want to rest on that. You look at these things on a case-by-case basis in the light of the assessment that you make in each particular case. I do not think it is possible to have a hard and fast rule about how you would define "imminent".
>
> […]
>
> **The Chair:** Basically, to summarise your response to Jeremy's question, an imminent threat can be ongoing: somebody by their very nature, by their ongoing commitment to a particular course of action, can be an ongoing imminent threat by virtue of what they have done in the past and their general way of going about things?
>
> *Michael Fallon MP*: I am not, as you have probably realised, a lawyer. But yes, an imminent threat can presumably grow in immediacy. It may grow in seriousness. It may grow in likelihood. It may exist for some period of time, absolutely."

3.36 We accept that the meaning of "imminence" in the international law of self-defence must be interpreted with a degree of flexibility, in light of modern conditions and in particular the fact that we live in an era of instantaneous communication. A terrorist on the other side of the world may well have the capability to launch a terrorist attack in the UK literally at the touch of a button. While opinion is divided amongst international law experts as to the legally correct interpretation of "imminence" in the international law of self-defence, we note that the broader interpretation of "imminence" preferred by the Government appears to have the implicit support of the UN Security Council in its most recent resolution concerning ISIL/Da'esh in Syria and Iraq (UNSCR 2249 (2015)).

3.37 We welcome the implicit indication in the Government's memorandum that ***for the test of imminence to be satisfied the threat must be "genuine" in the sense that there was both an intention to attack and the capability to do so; and that the attack could happen at any moment and without warning***. We also note the Government's recent answer to a written question asking the Secretary of State for Defence "what working definition of imminence his Department uses in the application of Article 51 of the UN Charter?"

> "It has long been the position of successive UK Governments that "the inherent right of self-defence", as recognised in Article 51 of the UN Charter, does not require a State to wait until an armed attack is actually under way before it can lawfully use force to alleviate the threat. A State may use force in anticipation of an armed attack where such an attack is imminent, provided that such force is both necessary and proportionate to averting the threat. The assessments would depend on the facts of each case, with consideration likely to include issues such as the nature and immediacy of the threat, the

probability of an attack, its scale and effects and whether it can be prevented without force."

3.38 ***We welcome the Government's indication in this written answer that, while the assessment of imminence will be fact-dependent, it will include consideration of relevant issues which clearly go to the question of imminence, such as the nature and immediacy of the threat and the probability of an attack.***

3.39 We nevertheless have some concerns about the implications of too expansive a definition of "imminence" for the width of the right of self-defence in international law. ***Introducing flexibility into the meaning of imminence raises important questions about the degree of proximity that is required between preparatory acts and threatened attacks. Is it enough to trigger the right of self-defence, for example, if there is evidence that an individual is planning terrorist attacks in the UK, or does the preparation need to have gone beyond mere planning? Once a specific individual has been identified as being involved in planning or directing attacks in the UK, does the wider meaning of imminence mean that an ongoing threat from that individual is, in effect, permanently imminent? These questions arise directly in relation to the UK drone strike in Syria on 21 August, as it appears that the authorisation of the use of force may have been given by the National Security Council in May 2015, up to three months before the actual use of lethal force. Whether the test of imminence was in fact satisfied on that occasion will, of course, turn on the intelligence and should therefore be a question for the ISC to consider, not us.***

3.40 We do not feel that all of these questions about the Government's understanding of the meaning of "imminence" in the international law of self-defence have been fully answered by the end of our inquiry**. The Government's interpretation of the concept of "imminence" is crucial because it determines the scope of its policy of using lethal force outside areas of armed conflict. Too flexible an interpretation of imminence risks leading to an overbroad policy, which could be used to justify any member of ISIL/Da'esh anywhere being considered a legitimate target, which in our view would begin to resemble a targeted killing policy.**

3.41 **We therefore recommend that the Government provides, in its response to our Report, clarification of its understanding of the meaning of "imminence" in the international law of self-defence. In particular, we ask the Government to clarify whether it agrees with our understanding of the legal position, that while international law permits the use of force in self-defence against an imminent attack, it does not authorise the use of force pre-emptively against a threat which is too remote, such as attacks which have been discussed or planned but which remain at a very preparatory stage.**

3.42 **Subject to the two questions we have raised above about the Government's understanding of the meaning of "armed attack" and "imminence", we accept the Government's understanding of the international law of self-defence which forms the first part of the legal basis for its policy of using lethal force abroad outside of armed conflict.**

Other relevant international law frameworks

3.43 However, compliance with international law on the use of force does not exhaust all the questions which must be asked about the legal basis of a use of lethal force abroad. The fact that a use of lethal force is lawful under the international law on the use of force, for example because it was taken in self-defence, does not mean that the use of force is necessarily lawful under the other relevant international legal frameworks: the Law of War (otherwise known as the law of armed conflict or international humanitarian law) and international human rights law, which govern not whether but how force may be used. Any use of force in lawful exercise of the right of self-defence must also comply with those other legal frameworks where they apply. Human rights law requires standards to be met which are more protective of the right to life than those required by the Law of War. Which legal framework applies to a particular use of lethal force, and precisely what they require, are therefore of crucial importance. The applicability and requirements of those legal frameworks must also therefore be addressed, separately and in turn.

The Law of War

3.44 In the case of force used in armed conflict, the most relevant legal framework is the Law of War. The Law of War is the set of international law rules that governs the way in which armed conflict is conducted, premised on the idea that even in war some things are not permitted because military necessity must be tempered by basic principles of humanity.

When does the Law of War apply?

3.45 The Law of War applies where there is an armed conflict. ***Whether an armed conflict exists, for the purposes of deciding whether the Law of War applies, is not a matter for a State to decide for itself, by mere assertion; it is a legal question, governed by the international Law of War. Armed conflicts are of two types. An international armed conflict is the traditional type of armed conflict, between two or more States. A non-international armed conflict is an armed conflict between a State and an "organised non-State armed group" or several such groups.*** A non-international armed conflict can take place across State boundaries: the conflict is "non-international" because one of the parties is a non-State actor, even though the territorial scope of the conflict may cross State boundaries.

3.46 A non-international armed conflict exists if armed violence reaches a certain level of intensity and is with an armed group that is sufficiently organised to meet the international law criteria. ***Although ISIL/Da'esh claims to be a State, it is not recognised as such in international law. It is an organised non-State armed group, involved in protracted armed violence with governmental authorities in Iraq and Syria. It seems clear to us that, as a matter of international law, the UK is therefore involved in a non-international armed conflict with ISIL/Da'esh in Iraq and Syria, and that the Law of War applies to that armed conflict.***

What does the Law of War require?

3.47 ***Where the Law of War applies, it permits targeted killing in an armed conflict, provided certain principles are complied with.*** The principle of distinction requires targeting to distinguish between lawful military targets and civilians. A person is a lawful target in a non-international armed conflict if he or she is a member of an armed group or a civilian

directly participating in hostilities. The principle of proportionality requires civilian casualties to be proportionate to the military advantage to be gained from the use of force. The principle of precaution requires care to be taken to minimise the danger to civilians in any use of force.

3.48 ***International human rights law also applies in armed conflict***. However, the substantive protections of human rights law, including for the right to life, are to be read in light of the more specific requirements of the Law of War. ***Compliance with the lower standards of the Law of War will therefore usually be sufficient to satisfy the requirements of human rights law in armed conflict***.

3.49 As will be seen when we consider the requirements of human rights law below, the relevant legal standards on the use of lethal force are therefore more permissive where the Law of War applies than where only international human rights law applies: the Law of War does not prohibit deliberate "targeted killing" in armed conflict provided certain principles are observed.

The US and UK positions on the applicability of the Law of War

3.50 The United States has caused controversy in the years since 9/11 by arguing that it is involved in a single, global non-international armed conflict with Al Qaida, so that the permissive rules of the Law of War, rather than the stricter rules of human rights law, apply to the use of lethal force against members of Al Qaida wherever in the world they may be found. The International Committee of the Red Cross has criticised this view that the international fight against terrorism is a single, global non-international armed conflict, but the US has continued to take this position and to use it to justify lethal drone strikes against suspected terrorists in a variety of countries which are not in an area of armed conflict, such as Yemen, Somalia and Pakistan.

3.51 The US position has been widely criticised on the ground that it risks turning the world into a global battlefield in which the lower protection of the Law of War is the norm rather than the exception. Some of the broader statements by ministers since the drone strike in Syria on 21 August suggested that the UK Government may have adopted the same position, and considers itself to be involved in a global armed conflict with ISIL/Da'esh wherever it may be found.

3.52 Our inquiry has importantly established, ***however, that the UK Government does not take the US position*** that it is in a global war against ISIL/Da'esh such that it can use lethal force against them anywhere in the world. We asked the Secretary of State for Defence about this directly and he made absolutely clear in his evidence to us that the Government does not consider the UK to be in a non-international armed conflict with ISIL/Da'esh wherever it may be found: rather than such a generalised state of conflict, with no geographical limits, the Government considers itself to be involved in a geographically defined non-international armed conflict with ISIL/Da'esh in Iraq and Syria:

> **"The Chair:** Can you clarify whether the Government consider the UK to be in a non-international armed conflict with ISIL wherever it may be found?
>
> *Michael Fallon MP*: We consider that to be true in Iraq and Syria.
>
> **The Chair:** Wherever it is?

Michael Fallon MP: No, in Iraq and Syria.

The Chair: So we are not in a generalised state of conflict with ISIL, except in Iraq and Syria? What about in Yemen, Somalia or Libya, as Mr Lefroy asked?

Michael Fallon MP: No, we consider we are involved in a non-international armed conflict in Iraq and Syria, primarily because we have been invited to assist by the legitimate Government of Iraq.

The Chair: That is different from the Americans' policy, is it not?

Michael Fallon MP: There may well be differences, yes, as I said."

3.53 **We welcome the unequivocal statement by the Secretary of State for Defence in his evidence to us that the Government does not consider the UK to be in a non-international armed conflict with ISIL/Da'esh wherever it may be found. This disavowal of the controversial US position according to which it considers itself to be in a single, global non-international armed conflict with Al Qaida and its associates goes some way towards meeting concerns that the Government's policy is now so wide as to seek to justify using lethal force against any person it considers to be a member of ISIL/Da'esh wherever they are.**

3.54 ***However, the Secretary of State went on to assert that where the UK uses lethal force abroad outside of armed conflict, pursuant to the policy we described in Chapter 2 above, it will comply with the Law of War and that compliance will be sufficient to meet any obligations that the UK may have under human rights law. The effect of that assertion is that the UK Government's policy ends up in the same place as the US policy, despite disavowing the wide American view of the existence of a non-international armed conflict.***

3.55 In our view, the Secretary of State's position that the Law of War applies to the use of lethal force abroad outside of armed conflict, and that compliance with the Law of War satisfies any obligations which apply under human rights law, is based on a misunderstanding of the legal frameworks that apply outside of armed conflict. In an armed conflict, it is correct to say that compliance with the Law of War is likely to meet the State's human rights law obligations, because in situations of armed conflict those obligations are interpreted in the light of humanitarian law. Outside of armed conflict, however, the conventional view, up to now, has been that the Law of War, by definition, does not apply. We recommend that the Government, in its response to our Report, clarifies its position as to the law which applies when it uses lethal force outside of armed conflict.

The European Convention on Human Rights ("ECHR")

3.56 International human rights law recognises and protects the right to life. This includes customary international law's rule against the arbitrary deprivation of life; the right to life under Article 6 of the International Covenant on Civil and Political Rights; and the right to life under Article 2 ECHR. The right to life is often referred to as the most fundamental human right, or the supreme right. The common law has also long recognised and protected the right to life, as demonstrated, for example, in the common law criminal offences of murder and manslaughter. Of the international human rights standards, we focus in this

Report on the right to life in Article 2 ECHR, which is part of UK law by virtue of the Human Rights Act, and from this point on we therefore refer to "the ECHR" rather than "human rights law" more generally.

3.57 Article 2 ECHR provides, so far as relevant:

> "2(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than is absolutely necessary:
>
> (a) in defence of any person from unlawful violence".

When does the ECHR apply?

3.58 The applicability of the right to life in Article 2 ECHR depends on the victim being "within the jurisdiction" of the UK. Jurisdiction under the ECHR is primarily territorial, but the ECHR also has extraterritorial application in certain circumstances, including the exercise of power and control over the person in question. On the current state of the case-law, the use of lethal force abroad by a drone strike is sufficient to bring the victim within the jurisdiction of the UK: in the recent case of *Al Saadoon v Secretary of State for Defence*, the High Court held that "whenever and wherever a state which is a contracting party to the [ECHR] purports to exercise legal authority or uses physical force, it must do so in a way that does not violate Convention rights." The judge found it difficult to imagine a clearer example of physical control over an individual than when the State uses lethal force against them:

> "I find it impossible to say that shooting someone dead does not involve the exercise of physical power and control over that person. Using force to kill is indeed the ultimate exercise of physical control over another human being. […] jurisdiction arose through the exercise of physical power and control over the individual who was shot and killed."

3.59 The right to life in the ECHR therefore clearly applies to the use of lethal force abroad outside of armed conflict. The same applies to the right to life in the ICCPR.

3.60 The ECHR permits States to take measures "derogating" from their obligations under the Convention "in time of war or public emergency threatening the life of the nation." The effect of such a derogation is to make the relevant right not apply. One of the concerns often articulated about the Human Rights Act and the ECHR is that the European Court of Human Rights has, by interpretation, extended the scope of the Convention to the battlefield, which hinders the armed forces in the performance of their task. The Conservative Party manifesto at the 2015 General Election included a commitment to look at the application of the ECHR to the operation of the armed forces.

3.61 We therefore asked the Defence Secretary if the Government has any plans to derogate from the right to life in Article 2 ECHR. Although the Defence Secretary told us that the Government had no present plans that he was aware of, he was subsequently reported in the press as considering a derogation from the ECHR in relation to the actions of the UK's armed

forces on the battlefield. According to the press report, the Secretary of State considers that the ECHR is not needed in the field of military conflict overseas, because it merely duplicates the Law of War which already protects the human rights of combatants. Any future derogation is likely to be brought forward as part of the package of proposals in relation the Human Rights Act and a British Bill of Rights, which is now not likely to be before the EU referendum in June.

3.62 We note that any future derogation from the ECHR will not affect the Government's policy in relation to the use of lethal force abroad outside of armed conflict. Derogation from the right to life in Article 2 ECHR is only possible in relation to "deaths resulting from lawful acts of war". States can therefore choose to be bound by the more permissive rules of the Law of War, rather than the more restrictive rules of human rights law, in times of war or public emergency. However, the Government will not be able to derogate from the right to life in Article 2 where it uses lethal force abroad outside of armed conflict: such deaths will not be the result of "acts of war" because by definition they will have taken place outside armed conflict. The right to life in Article 2 ECHR therefore inescapably applies to uses of lethal force abroad outside of armed conflict.

What does the ECHR require?

3.63 What are the implications of the right to life in the ECHR applying to uses of lethal force abroad outside of armed conflict? Article 2 of the ECHR prohibits the taking of life by the use of force where this is not justified by any of the exceptions expressly permitted by its text. One of the exceptions is where the deprivation of life results from the use of force which is "no more than is absolutely necessary in defence of any person from unlawful violence".

3.64 According to the case-law of the European Court, where the right to life in the ECHR applies, it requires (1) the use of lethal force must be "no more than absolutely necessary" to avert an immediate threat of unlawful violence to other people and be strictly proportionate to that aim; (2) the use of lethal force by the state must be effectively regulated by a clear legal framework and the planning and control of any particular operation must be such as to minimise the risk of loss of life; and (3) there must be an effective independent investigation capable of leading to accountability for any unlawful deprivation of life. The effect of the right to life in Article 2 ECHR applying, therefore, is that the applicable standards which govern the use of lethal force are in certain respects higher than those imposed by the Law of War.

3.65 The main difference as far as the relevant standards for the use of lethal force are concerned is that under the Law of War there is no "imminence" requirement, provided the use of force is necessary to advance the military objective. As Professors Simpson and Ekins explained in their evidence:

> "In war […] it is not the case that [soldiers] are permitted to use force only when they are imminently threatened. […] The imminence condition is redundant because, in war, the enemy's future intentions are plain. Someone is killed justifiably if there is sufficient evidence that they are a combatant, and without proof of personal, imminent intention to attack."

3.66 In Syria, for example, where we accept that the UK is involved in an armed conflict with ISIL/Da'esh, the question of the imminence of an armed attack by ISIL/Da'esh fighters does not arise so long as that armed conflict subsists, so they can be targeted without having to demonstrate that they pose a direct and imminent threat to the UK.

3.67 In Libya, however, which is outside armed conflict, the higher standards of the ECHR alone would apply and require there to be an immediate threat of unlawful violence to other people which makes it "absolutely necessary" to act to prevent it. In other words, outside of war the right of self-defence can only be exercised if there is an imminent threat of unlawful violence. Even if an individual has been previously identified as somebody suspected of planning terrorist attacks, the critical time for consideration of the imminence question is before the decision is taken to use lethal force against that individual. That assessment will depend very much on the facts, but it is important that the mind of the relevant decision-maker is directed to the question of imminence at the relevant point in time.

3.68 The Government must acknowledge that where the Government takes a life where we are not in armed conflict, the higher standards laid down in the Human Rights Act and the ECHR have to be met. It is only where the taking of life is in an armed conflict, that the lower standards of the Law of War apply.

3.69 The fact that the ECHR, and not the Law of War, applies to the use of lethal force outside of armed conflict does not, however, make it impossible to use force in such circumstances, and therefore shackle the Government's ability to protect the UK from terrorism, as is commonly supposed, for two main reasons.

ECHR may require the use of lethal force to protect life

3.70 First, in the Government's hypothetical example of the circumstances in which it might use lethal force abroad outside armed conflict (that is, as a last resort, where the Government has intelligence that there is a direct and imminent threat to the UK and there is no other way of preventing that threat), the ECHR would not only permit but positively require the use of lethal force by the Government if it were in a position to do so. This is because Article 2 of the ECHR imposes a positive obligation on the State to protect life, including by taking effective preventive measures against a real and immediate risk to life from a terrorist attack.

3.71 The European Court of Human Rights made this clear in the case of *Osman v UK*, in which it held that the obligation in Article 2(1) ECHR to protect life requires the State to take preventive action where "the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and […] failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk." In subsequent cases, this positive obligation to take preventive action to protect life has been extended beyond the protection of particular individuals to the protection of the public at large.

3.72 It follows that if the UK had clear and reliable intelligence that a terrorist attack was about to be launched on the UK or UK citizens from an ISIL/Da'esh training camp in Libya, so that there was a real and immediate risk to life, and the only way of preventing that attack and therefore saving those lives was to use lethal force against the would-be attackers in

Libya, the Government would be under a positive obligation to use lethal force to protect life if it was in a position to do so.

Flexibility inherent in concepts of necessity and proportionality

3.73 The second reason why the applicability of the ECHR does not mean that the Government's ability to protect the UK from terrorism is undermined is that, even in less extreme circumstances than the hypothetical case just described, it is clear from the European Court's case-law that it will take a realistic approach to applying the concepts of necessity and proportionality in difficult counter-terrorism situations in which States have to make heat of the moment decisions about how to prevent a terrorist threat to life. The Strasbourg Court has, in its application of the high standards in Article 2, demonstrated that it is "acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence and recognises the complexity of this problem." As the President of the Court recently said, at the opening of the judicial year in Strasbourg:

> "[…] my overview of 2015 would not be complete without mentioning the crises that we have witnessed: […] above all the terrorist attacks which have struck us in Europe–again recently–and which have left our democracies in a state of shock. […] I felt that it was important to emphasise, on this occasion, that the Court is [, to use the words of its case-law,] "acutely conscious of the difficulties faced by States in protecting their populations against terrorist violence, which constitutes, in itself, a grave threat to human rights". The Court thus finds it legitimate for "the Contracting States to take a firm stand against those who contribute to terrorist acts", but without destroying our fundamental freedoms, for not everything can be justified by an emergency."

3.74 In the case-law referred to by the President of the Court, the Court has recognised that the rigorous standard of "absolute necessity" in Article 2 ECHR may sometimes be departed from in circumstances in which its application may simply be impossible, where certain aspects of the situation lie far beyond the Court's expertise and where the authorities had to act under enormous time pressure and where their control of the situation was minimal. The Russian authorities were therefore allowed a certain amount of discretion in deciding how best to try to save the lives of 950 hostages taken by Chechen terrorists in a theatre in Russia, where the hostages' lives were at real and immediate risk.

3.75 In other cases the Court has accepted that States are entitled under Article 2 to use force to protect lives in counter-terrorism operations which go beyond the use of lethal force by the police on a city street. In a Turkish case, for example, intense firing by security forces at a village, using missiles and grenades in reaction to shots fired from the village in an area of known PKK terrorist activity, was found to be justified under Article 2 ECHR as a use of force that was no more than was absolutely necessary to protect life. The massive use of indiscriminate force, however, would be unlikely to be proportionate to the threat to life that has to be averted.

3.76 Most recently, the Grand Chamber of the Court has held, in the case arising out of the mistaken shooting of Jean Charles de Menezes by counter-terrorism police in Stockwell tube station, that the test for self-defence in England and Wales is compatible with the right to life in Article 2 ECHR. The Court held that the existence of "good reasons" for an honest belief in the necessity to use lethal force should be determined subjectively:

> "In a number of cases the Court has expressly stated that as it is detached from the events at issue, it cannot substitute its own assessment of the situation for that of an officer who was required to react in the heat of the moment to avert an honestly perceived danger to his life or the lives of others; rather, it must consider the events from the viewpoint of the person(s) acting in self-defence at the time of those events […] Consequently, in those Article 2 cases in which the Court specifically addressed the question of whether a belief was perceived, for good reasons, to be valid at the time, it did not adopt the standpoint of a detached observer; instead, it attempted to put itself into the position of the person who used lethal force, both in determining whether that person had the requisite belief and in assessing the necessity of the degree of force used. […] It can therefore be elicited from the Court's case-law that in applying the McCann and Others test the principal question to be addressed is whether the person had an honest and genuine belief that the use of force was necessary. In addressing this question, the Court will have to consider whether the belief was subjectively reasonable, having full regard to the circumstances that pertained at the relevant time."

3.77 In the light of this case-law, we do not consider that the applicability of the ECHR, rather than the Law of War, to any use of lethal force against ISIL/Da'esh outside armed conflict would necessarily hamper the Government's ability to protect lives from the threat of terrorism, provided there was a real and immediate threat to life by ISIL/Da'esh fighters and the use of force was proportionate to the threat to life posed by those fighters. Any assessment of the necessity and proportionality of the use of force will have to take account of the unprecedented nature and seriousness of the threat posed by ISIL/Da'esh.

3.78 While it is clear that the ECHR applies to any use of lethal force abroad for counter-terrorism purposes outside of armed conflict, and that the Article 2 thresholds of necessity and proportionality would have to be met, exactly how the right to life in Article 2 ECHR will be interpreted, and precisely what it will be held to require in light of the unprecedented nature of the threat from ISIL/Da'esh is therefore open to interpretation.

3.79 In our view, there is scope to spell out the Government's interpretation of what the right to life in Article 2 ECHR requires in this particular context and we ask the Government to set out its understanding in its response to our Report. The issue which would particularly benefit from clarification by the Government is how it understands the requirement that the use of force to protect life must be no more than is absolutely necessary, having regard to the nature of the threat posed by ISIL/Da'esh. It would be useful if the Government's response could spell out the sorts of considerations which will be relevant to assessing whether resort to lethal force really is the only option to prevent the threatened violence, and no other means such as capture or some other means of incapacitation is practical.

3.80 We also consider there to be scope for internationally agreed guidance as to how the right to life in Article 2 ECHR should be interpreted and applied in this context, and in Chapter 6 we consider what role the Government could play in seeking to achieve such international consensus.

The legal basis for UK support of US lethal force outside armed conflict

3.81 On 19 February the US carried out airstrikes on an ISIL/Da'esh training camp near Sabratha in western Libya. The target of the attack was said by the Pentagon to be Noureddine

Chouchane, a Tunisian national suspected of being involved in two recent terrorist attacks in Tunisia, including the attack on the beaches in Sousse in which 30 British nationals were killed. According to press reports, 41 people were killed in the airstrikes.

3.82 The Secretary of State for Defence confirmed that the US operation had made use of UK bases and was quoted as saying:

> "I welcome this strike that has taken out a Da'esh training camp being used to train terrorists to carry out attacks. I was satisfied that its destruction makes us all safer, and I personally authorised the US use of our bases."

3.83 Asked at Defence Questions in the Commons to explain his assessment of whether the action in Libya was lawful according to the law relating to the use of force, international humanitarian law and human rights law, the Defence Secretary said:

> "The United States followed standard procedures, and made a formal request to use our bases. Once we had verified the legality of the operation, I granted permission for the United States to use our bases to support it, because they are trying to prevent Da'esh from using Libya as a base from which to plan and carry out attacks that threaten the stability of Libya and the region, and indeed, potentially, the United Kingdom and our people as well. I was fully satisfied that the operation, which was a United States operation, would be conducted in accordance with international law."

3.84 The US spokesman explained the US view of the legal basis for the air strikes in Libya. The strikes were said to demonstrate that the US will go after ISIL/Da'esh whenever it is necessary, confirming President Obama's statement that the US "will go after ISIS wherever it appears, the same way that we went after al-Qaida wherever they appeared." Surveillance of the training camp had led the US to believe that an ISIS attack emanating from the camp on US interests in the region was at some stage of preparation, and the camp had been struck before they could pose a more specific threat: "they had ill intent in their mind" said the Pentagon spokesman.

3.85 The UK's support for this use of lethal force abroad by the US demonstrates the urgent need for the Government to clarify its understanding of the legal basis for the UK's policy. The US policy, in short, is that it is in a global armed conflict with ISIL/Da'esh, as it has been since 9/11 with al-Qaida, which entitles it to use lethal force against it "wherever they appear." On this view, the Law of War applies to any such use of force against ISIL/Da'esh, wherever they may be. This is not, however, the position of the UK Government. As the Defence Secretary made clear in his evidence to us, the Government considers itself to be in armed conflict with ISIL/Da'esh only in Iraq and Syria. This means that the Law of War may not apply to strikes such as the US airstrikes in Libya. Rather, as our Report demonstrates, the ECHR applies to such airstrikes outside of armed conflict.

3.86 As explained above, the ECHR may well provide a legal basis for such use of lethal force, where there is a real and immediate risk to life which cannot be prevented in any other way, or when the force used is no more than absolutely necessary to defend any person against unlawful violence. Whether the ECHR requirement that the use of force must be no more than absolutely necessary is satisfied where air strikes on training camps against ISIL/Da'esh fighters with "ill intent in their minds" kill 41 people, however, requires careful scrutiny.

3.87 Parliament and the public are entitled to expect absolute clarity about the legal basis on which the Government provides support to other countries which facilitates such uses of lethal force outside of armed conflict. Complicity by a State in the internationally unlawful act of another State is itself unlawful under general international law principles of State responsibility for internationally wrongful acts. The general principles of state responsibility in international law, now conveniently set out in the International Law Commission's *Articles on the Responsibility of States for Internationally Wrongful Acts*, expressly deal with the situation where one State provides aid or assistance to another with a view to facilitating the commission of an internationally wrongful act by the latter:

> ARTICLE 16
>
> "Aid or assistance in the commission of an internationally wrongful act
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State."

3.88 UK personnel who facilitate such uses of lethal force outside of armed conflict by providing logistical support to the US, or who provide intelligence gathered through UK surveillance and reconnaissance, also deserve absolute clarity from the Government about the legal basis on which such support is being provided to the US, to provide the necessary reassurance that they are not at any risk of criminal prosecution for complicity in killings which may lack international legal justification.

3.89 We therefore also ask the Government to clarify, in its response to this Report, its understanding of the legal basis on which it provides any support which facilitates the use of lethal force outside of armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force.

Conclusion

3.90 **In our view, the Government's assertion that the Law of War applies to a use of lethal force outside of armed conflict demonstrates the necessity of the Government clarifying, in its response to our Report, its understanding of the legal position. The tests which are to be satisfied before such force is used, the safeguards required in the decision-making process and the necessary independent and effective mechanisms for accountability all flow from the legal framework which governs such uses of lethal force. We call on ministers to avoid conflating the Law of War and the ECHR and to remove the scope for such legal confusion by setting out the Government's understanding of how the legal frameworks are to be interpreted and applied in the new situation in which we find ourselves.**

3.91 The clarification of the Government's understanding of the legal frameworks, and any subsequent consideration of it in Parliament, is in our view an opportunity for a very practical application of the important principle of "subsidiarity": the principle that the national

authorities (including the Government and Parliament) have primary responsibility for securing the rights and freedoms in the Convention to everyone within their jurisdiction. Just as in the Immigration Act 2014 the Government asked Parliament to approve its detailed interpretation of the requirements of the right to respect for private and family life in Article 8 ECHR in the context of deportations, as an exercise in subsidiarity, so the Government would be doing the same by setting out its detailed interpretation of the requirements of the right to life in Article 2 ECHR in the particular context of using lethal force outside of armed conflict

3.92 **We therefore recommend that the Government provides clarification of its position on the following legal questions:**

- **its understanding of the meaning of the requirements of "armed attack" and "imminence" in the international law of self-defence;**
- **the grounds on which the Government considers the Law of War to apply to a use of lethal force outside armed conflict;**
- **its view as to whether Article 2 ECHR applies to a use of lethal force outside armed conflict, and if not why not;**
- **its understanding of the meaning of the requirements in Article 2 ECHR that the use of force be no more than absolutely necessary, and that there is a real and immediate threat of unlawful violence, in the context of the threat posed by ISIL/Da'esh; and**
- **its understanding of the legal basis on which the UK takes part in or contributes to the use of lethal force outside armed conflict by the US or any other country adopting the same or a similar view with regard to the use of lethal force.**