

IN THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS  
CHAMBER)

Appeal Numbers: EA/2016/0232,  
EA/2016/0233, GI/429/2017,  
GI/430/2017

BETWEEN:

YASMINE AHMED  
on behalf of  
RIGHTS WATCH (UK)

Appellant

- and -

(1) THE INFORMATION COMMISSIONER  
(2) THE ATTORNEY GENERAL'S OFFICE  
(3) THE CABINET OFFICE

Respondents

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WITNESS STATEMENT OF YASMINE AHMED

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I, Yasmine Ahmed, of Rights Watch (UK) of 54 Poland Street, London, W1F 7NJ.  
will say as follows:

**Introduction**

1. I am the Appellant in the above appeal. However, I act on behalf of Rights Watch (UK) ("RWUK") of which I am the Director. The facts within this witness statement are from matters within my own knowledge except where otherwise stated.
2. I have been Director of RWUK since April 2014. I have an LLM in Public International Law from the School of Oriental and African Studies (SOAS). Amongst other roles, I have taught public international law at SOAS and the University of Adelaide, South Australia. I have also worked as a public international lawyer for the UK and Australian Governments, as well as the UN. With respect to the UK Government, I worked as an Assistant Legal Adviser at the Foreign and Commonwealth Office for three years.
3. Through this appeal, RWUK is seeking access to the legal advice given by the Attorney General to the Prime Minister in respect of a lethal drone strike which was

carried out on 21 August 2015 in Syria (“**the Advice**”). The strike, which I refer to below as “**the Raqqa strike**”, resulted in the death of three people, including two British citizens. For the reasons set out below, RWUK takes the view that there are very powerful and indeed overwhelming reasons why the Advice should be disclosed in the public interest. In summary:

- a) the Raqqa strike, which amounted to a form of extra-judicial killing of British citizens and another by the Government of the United Kingdom, constituted a new departure in terms of the UK’s use of lethal force in (and outside of) military conflicts; it has been enormously controversial;
- b) there are serious questions as to whether the Raqqa strike, which was executed in the absence of any Parliamentary debate, was lawful, particularly having regard to international legal principles;
- c) more generally, there are serious questions as to whether the Government’s position on when it is permissible to use lethal force to carry out targeted killings is consistent with established norms of international law;
- d) very troublingly, there have been conflicting accounts of the justification for the strike provided by the Government;
- e) the need for transparency and accountability in relation to the Raqqa strike could not be more acute in all the circumstances as the Advice embodies an analysis of the supposed legal basis upon which the Government executed the strike;
- f) whilst publicly asserting that it relied on the Advice, which may have been drafted months before the Raqqa Strike, to conclude that the Strike was lawful, the Government has repeatedly refused to disclose the legal analysis which underpinned that advice. This is despite the fact that the Attorney General has himself chosen to drip-feed aspects of the advice to the public which inevitably gives rise to considerations of cherry-picking and waiver of privilege.

4. In this statement I address the following matters:

Section A: RWUK

Section B: Overview of RWUK’s concerns

Section C: Factual Background

Section D: The Domestic and International Legal Context

Section E: Contradictory statements as regards the Legal Basis for the Strike

Section F: Concerns as to Legality

Section G: Public Interest Justifications for Disclosure

Section H: Response to the Arguments put forward by the Attorney General's Office and the Cabinet Office

Section I: Other Litigation

Section J: Conclusions

Documents references in the evidence are displayed in Exhibit YA1 to this witness statement. I have endeavoured to exhibit all the principal material referred to in the statement. In the interest of brevity I have not included all legal authorities, but I can do so should the Tribunal so request.

**A. RWUK**

5. RWUK is a non-governmental organisation working to promote just and accountable security. We do this by ensuring that the measures taken by the UK Government in pursuit of national security are compliant with human rights and international law. We have over twenty-five years of experience of working in the field of national security: initially in Northern Ireland, and, since 9/11, in Great Britain and abroad.
6. RWUK has received the Parliamentary Assembly of the Council of Europe (PACE) Human Rights Prize for 'outstanding civil society action in the defence of human rights in Europe', the Irish World Damien Gaffney Award, and the Beacon Award for Northern Ireland.
7. Since 1990, RWUK has been at the forefront of holding the Government to account for practices such as torture, as well as indefinite detention and arbitrary deprivation of life. RWUK was instrumental in ending the systemic ill-treatment of terrorist suspects in custody in Northern Ireland and the routine intimidation of defence lawyers.<sup>1</sup> We played a leading role in seeking accountability for the state sponsored murder of leading human rights lawyers in Northern Ireland<sup>2</sup> and exposed the systemic collusion between the UK Government and non-state actors in the commission of various human rights abuses in the pursuit of countering terrorism.<sup>3</sup>

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<sup>1</sup> RWUK documented and challenged the routine harassment that legal representatives faced in Northern Ireland including in the cases of Patrick Finucane and Rosemary Nelson who were both lawyers in Northern Ireland subject to significant intimidation and ultimately murdered by loyalist paramilitaries. As a result of this work the level of intimidation significantly reduced.

<sup>2</sup> The work of RWUK was instrumental in bringing about the Rosemary Nelson Inquiry and the apology of the then Prime Minister, David Cameron, in 2012 for the British Government's role in the 1989 murder of a Patrick Finucane, a defence lawyer in Northern Ireland, see <https://www.gov.uk/government/speeches/prime-minister-david-cameron-statement-on-patrick-finucane>

<sup>3</sup> RWUK carried out extensive investigations and authored a number of reports over a period of two decades into the collusion between the UK Government and paramilitaries in Northern Ireland including in relation to the murder of Patrick Finucane (the confidential Report, Deadly Intelligence, was shared with the British and

The work of RWUK was instrumental in bringing about the establishment of four public inquiries in Northern Ireland concerning the UK Government's counter-terrorism tactics, including the second Bloody Sunday Inquiry that revealed that the Government had killed unarmed civilians and resulted in a public apology from the Prime Minister. Drawing on the work in Northern Ireland, RWUK has been working to expose and hold the UK Government to account for the use of counter-terrorism techniques since 9/11 that violate human rights including: the use of indefinite detention,<sup>4</sup> the redeployment of torture techniques abroad<sup>5</sup> and the criminalization and marginalisation of suspect communities.<sup>6</sup>

8. RWUK has intervened in a number of cases before UK Courts and the European Court of Human Rights concerning the UK Government's counter-terrorism measures (including the use of lethal force) and the temporal and geographical scope of the application of human rights obligations including, *inter alia*: *McCann and Others v United Kingdom* (21 ECHR 97 GC), *A v Secretary of State for the Home Department* [2006] 2 AC 221 and *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, *Geraldine Finucane v United Kingdom* ECHR (Application no. 29178/95), *Al-Saadoon and Mufdhi v. United Kingdom* ECHR (no. 61498/08), *Keyu and Others v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 and *Campaign Against the Arms Trade v Secretary of State for Business, Innovation and Skills* Claim No. CO/1306/2016.

## **B. Overview of RWUK's Concerns**

9. One of RWUK's areas of focus is monitoring States' use of lethal force. Inevitably, the Raqqa Strike has been a key area of concern for RWUK, not least because: (a) it constitutes a major departure in terms of the use of drones to effect lethal strikes and (b) there are serious questions as to whether the Strike was compatible with international law.
10. Importantly, in the wake of recent atrocities in London as well as those that have occurred in Brussels, Paris, Stockholm and elsewhere, it is reasonable to suppose

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Irish Governments and the Finucane family), and the Omagh Bombing in 1998 (the latter is being relied on in evidence in a judicial review currently being brought by families of some of the victims of the bombing).

<sup>4</sup> RWUK intervened in *A v Secretary of State for the Home Department* [2006] 2 AC 221.

<sup>5</sup> RWUK made submissions to the public inquiry into the death of Baha Mousa and drafted a report that identified that the unlawful interrogation techniques that the inquiry found had been used by British soldiers in Iraq in the early 2000s had their origin in Northern Ireland and had been banned by the British Government in the late 1970s (the latter was a result of the case of 14 men, known as the Hooded Men, who were interned and subject to enhanced interrogations techniques in Northern Ireland in 1971).

<sup>6</sup> In July 2016 RWUK published a landmark report on the impact of the UK Government's counter extremism strategy, Prevent, on children in schools.

that the use of such tactics is at the forefront of the Government's current strategy for dealing with the threat from the so-called 'Islamic State'/'ISIL', whether in Iraq, Syria or elsewhere.<sup>7</sup> In light of this, and coupled with the continued use of lethal drones strikes in Syria,<sup>8</sup> RWUK believes that a timely and informed public debate about the legality of past, current and future military solutions, including the use of lethal force in Syria or elsewhere is of utmost public importance. It is all but impossible to have these debates without knowing the purported legal basis for the Raqqa Strike. A failure to address such issues now, through a properly informed democratic process, is likely to have very serious consequences for the United Kingdom and the international community more widely.

11. The need for transparency and accountability in relation to such an exceptional power – the rights to engage in the premeditated killings of individuals, including British nationals overseas – could not be more acute. The Advice embodies an analysis of the supposed legal basis upon which the Government has claimed such a right and without disclosure of the advice,<sup>9</sup> or at the very least a summary of the legal principles relied on, the ability of the public and Parliament to have a fully and informed debate and discussion about an issue of such importance, and for there to be effective accountability, is perpetually frustrated.
12. While it is acknowledged that there may be aspects of the advice that need to be redacted because they relate to or otherwise disclose the activities of security bodies, there will inevitably be parts of the Advice to which the relevant exemption (section 23 FOIA) does not apply. As for the remainder of the Advice, even if such information is subject to relevant qualified exemptions, the public interest balance inevitably and overwhelmingly tips in favour of disclosure in view of the circumstances of this case. For the avoidance of doubt, RWUK contends that, to the extent that, in respect of any particular aspect of the Advice, there are concerns that disclosure of the information may reveal exempt information relating to security bodies, consideration must

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<sup>7</sup> Notably in a speech made at the Lord Mayor's banquet on 16 November, only days after the Paris attack, the Prime Minister made clear that there was to be renewed focus on using drones in the fight against 'Islamic State', with an intended doubling of the UK drones fleet: <https://www.politicshome.com/foreign-and-defence/articles/news/david-cameras-speech-lord-mayors-banquet>. Furthermore, the Government have been clear that they will not hesitate to use extraterritorial lethal force to respond to direct threats to the United Kingdom, wherever the threat emanates from. See for example, the then Prime Minister's statement to Parliament where he made clear that he was prepared to order future targeted drone killings to address a threat "emanating from Libya, Syria or anywhere else" HC Deb, Hansard, 7 September 2015, (Prime Minister's Announcement) <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm#1509074000002>

<sup>8</sup> See 'UK Drone Strike Statistics' obtained by Drone Wars through Freedom of Information requests, available at <https://dronewars.net/uk-drone-strike-list-2/>

<sup>9</sup> RWUK is aware that the alleged threat posed by the Raqqa strike was identified by the intelligence services. However, the advice must set out the legal frameworks and principles which are said to govern the use of force overseas and, more specifically, killings executed through drone strikes.

inevitably be given to the question of whether a summary of the information could be provided so as to effectively: (a) conceal the exempt information whilst at the same time (b) maximising transparency and accountability in accordance with FOIA's underlying objectives.

13. Without this disclosure the public and Parliament, will not be in a position to determine and/debate whether the Executive is exercising its prerogative power to execute British and other citizens, lawfully. A power that it has said it will not hesitate to use.

### C. **Factual Background**

#### The 21 August 2015 Drone Strike

14. On 21 August 2015, the Royal Air Force conducted the Raqqa strike, i.e. the lethal drone strike, which resulted in the death of two UK nationals named Reyaad Khan and Ruhul Amin, together with a Belgian national<sup>10</sup>. The UK was not participating in any armed conflict in Syria at that time.

#### The 7 September 2015 Announcement

15. On 7 September 2015, the Prime Minister announced the Raqqa strike, stating that the individuals in question had been killed by way of “a precision airstrike carried out on 21 August by an RAF remotely piloted aircraft”.<sup>11</sup> The Prime Minister stated that the specific target of the strike had been Reyaad Khan. The decision to carry out the strike was not subject to any prior Parliamentary scrutiny.
16. The Prime Minister said explicitly and unequivocally that the strike was not part of coalition military action against ISIL in Syria that was being carried out in collective self-defence of Iraq. Thus, the Prime Minister stated (emphasis added):

*“I want to be clear that this 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...ISIL’s core leadership in Raqqa. But I have been absolutely clear that the government will return to this House for a separate vote if we propose to join coalition strikes in Syria...”<sup>12</sup>*

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<sup>10</sup> Prime Minister’s Announcement (n 7)

<sup>11</sup> *Ibid*

17. The Prime Minister justified the strike on the basis of (emphasis added) “...the UK’s inherent right to self-defence [since t]here was clear evidence of these individuals planning and directing armed attacks against the UK...It was therefore necessary and proportionate for the individual self-defence of the United Kingdom.”<sup>13</sup>
18. With respect to the alleged threat posed by Mr Khan, the Prime Minister described Reyaad Khan as having been engaged in (emphasis added) “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 [past] summer”.<sup>14</sup> He continued to claim that the individuals targeted were “planning and directing armed attacks against the UK” which were “part of a series of actual and foiled attempts to attack the UK and our allies”.<sup>15</sup> He then stated, “We are dealing with people who are producing [...] a tempo of potential terrorist attacks”.<sup>16</sup>
19. Regarding the timing of the assessment of the threat posed by Reyaad Khan, the Prime Minister said (emphasis added):
- "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."<sup>17</sup>*
20. While it is unclear when this National Security Council meeting was held, press reports suggest that the meeting occurred “shortly after the election” in May 2015.<sup>18</sup> The Defence Secretary, presumably with the approval of the Prime Minister, then made a separate decision to order the execution of the Raqqa strike.
21. The Prime Minister also indicated that similar actions could occur in the future, stating:

*"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."<sup>19</sup>*

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<sup>13</sup> *Ibid*

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid*

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> <http://www.theguardian.com/uk-news/2015/sep/08/drones-uk-isis-members-jihadists-syria-kill-list-ministers>

<sup>19</sup> *Ibid.*

22. When making this announcement, the Prime Minister relied expressly on advice provided by the Attorney General to justify the strike to Parliament, which was stated to be to the effect that the strike was (emphasis added) “*entirely lawful*”.<sup>20</sup>

### Subsequent Explanations, Investigations and Reports

23. In the eighteen months that have passed since the attacks, the Government has made several statements regarding the Raqqa strike and its legal justification. The Attorney General and/or the Executive has also drip fed some of the contents of the Advice, but the information disclosed remains incomplete, vague and raises further intensifies concerns about the legality of the Raqqa strike (and any future strike).

#### (a) UN Notification

24. On the same day as the Prime Minister told Parliament that this action was “*not part of coalition military action against ISIL in Syria*” but rather “*a targeted strike to deal with a clear, credible and specific terrorist threat to our country at home*”, the UK Executive offered a contrary justification to the UN Security Council.<sup>21</sup> The letter justifying their use of force under Article 51 of the UN Charter stated that the UK had “*...undertaken military action in Syria against the so-called Islamic State in Iraq and Levant (ISIL) in exercise of the inherent right of individual and collective self-defence*”.<sup>22</sup>
25. The contradiction between the two accounts, which is discussed in detail in Section E (Concerns as to Legality), provoked significant interest amongst Parliamentarians. Jeremy Corbyn MP, now leader of the opposition, stated it raised questions about whether parliament had been properly informed: “*The government appears to have used an additional and entirely separate justification for this covert strike in their letter to the UN, which was not mentioned in the prime minister’s statement to parliament. Why did the government cite the defence of Iraq when justifying this strike to the UN, but not when doing so to parliament?*”<sup>23</sup> David Davis MP, formerly the Shadow Home Secretary and currently the Secretary of State for Exiting the European Union, said

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<sup>20</sup> *Ibid.*

<sup>21</sup> On this see Gray, C, (2016) ‘Targeted killing outside armed conflict: a new departure for the UK?’ *Journal on the Use of Force and International Law*, 3 (2), 198

<sup>22</sup> UK Letter to the Security Council, 8 September 2015  
[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2015/688](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/688)

<sup>23</sup> <https://www.theguardian.com/politics/2015/sep/10/syria-drone-killings-legal-justification-uk-envoy-un>

the government should consult MPs on the grounds that the UK's justification to the Security Council appeared to show a "*material change of strategy*".<sup>24</sup>

*(b) Defence Secretary's Public Statements*

26. On 8 September 2015 the Secretary of State for Defence gave interviews in which he stated the targets of the Raqqa strike were 'terrorists' "*who had been planning*" attacks, some involving public events. The Defence Secretary refused to confirm that the order to strike was given in response to the threat of future attacks. Instead, the Defence Secretary referred to "*potential threats*"<sup>25</sup> and "*potential plots*"<sup>26</sup> Anonymous government sources have been reported in the media as suggesting that Mr Khan (and the other individuals killed in the strike) were involved in threats to the UK that did not materialise, i.e. the 'threats' were in the past.<sup>27</sup> The Defence Secretary said that he would not hesitate to take such action, i.e. pre-authorized targeted killings, when an armed attack is "*likely*".<sup>28</sup> However, he then stated that the Government would undertake a preventative strike if an attack is being "*planned*" and it considered there was no other way to prevent it.
27. To be clear, RWUK does not in this appeal invite the Upper Tribunal to assess the actual threat risk which existed at the time of the Strike. However, inevitably the question of what threshold test was adopted in the Advice is centrally important to assessing the legality of the Strike and indeed the Government's current policy on use of lethal drone strikes.

*(c) Foreign Affairs Select Committee*

28. On 9 September 2015, the then Foreign Secretary appeared before the Foreign Affairs Select Committee. He acknowledged that coalition forces operating in Syria "*are doing so on the basis of the collective defence of Iraq*" and that "*the logic of extending our mandate to cover ISIL targets in Syria would be very clearly a logic in support of the mandate we have in Iraq for the collective defence of that country*"<sup>29</sup>. The implication of this statement is that, at the point when the Strike was effected, the

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<sup>24</sup> <https://www.theguardian.com/politics/2015/sep/10/syria-drone-killings-legal-justification-uk-envoy-un>

<sup>25</sup> Emphasis added.

<sup>26</sup> Emphasis added.

<sup>27</sup> <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11849857/Syria-drone-strike-how-execution-of-British-nationals-in-Raqqa-was-carried-out-from-Lincolnshire-hangar.html>

<sup>28</sup> Emphasis added.

Foreign Secretary did not consider the Government's mandate in respect of the collective defence of Iraq extended to effecting lethal strikes in Syria.

*(d) Justice Select Committee*

29. On 15 September 2015, the Attorney General gave evidence to the House of Commons Justice Select Committee. In doing so, he discussed the advice he had provided in relation to the Raqqa strike. The Attorney General stated:

*“the Government has set out what it believes the basis of the legality of this action was. You can take it that I agree wholeheartedly with the Government’s legal position.”*<sup>30</sup>

30. Although the Attorney General claimed that he had not disclosed the contents of his advice, he was also willing to state that he considered it necessary to *“think about as a society in any event is what imminence means in the context of a terrorist threat”*<sup>31</sup>

*(e) Joint Committee on Human Rights*

31. The Parliamentary Joint Committee on Human Rights (“**JCHR**”) held an Inquiry into the Government's policy on the use of drones for targeted killing *“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”*.<sup>32</sup> The JCHR is the sole committee of Parliament that has thus far produced a publically available report on this matter.
32. As will be elaborated on in detail in Section E (“Concerns as to Legality”) the JCHR were seriously concerned by the lack of clarity as to the Government's legal position which they characterised, on one front, as *“confused and confusing”*<sup>33</sup> and requiring *“urgent clarification”*.<sup>34</sup> Ultimately, they concluded that the Government *“ducked the*

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<sup>30</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-attorney-general/oral/21698.html>

<sup>31</sup> *Ibid*

<sup>32</sup> JCHR Report, ‘The Government’s policy on the use of drones for targeted killing’ Second Report of Session 2015–16 <https://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf> at p.5

<sup>33</sup> *Ibid*, at p. 42

<sup>34</sup> *Ibid*, at p. 7

*central question*” about lethal drone strikes by failing to identify what legal principles had been relied on by the Government as justifying the Strike.<sup>35</sup>

33. The Inquiry was also significantly curtailed in the exercise of its functions by a lack of cooperation from the Government. In the absence of even a written response from the Ministry of Defence, the JCHR was forced to cancel its first evidence session. This led JCHR Chair, Harriet Harman MP, to write to the Secretary of State for Defence stating that she was *“disappointed”* that she had to write in *“such strong terms”* but that the *“failure of the Government to deliver the memorandum is causing serious delay to the Committee’s Inquiry”*.<sup>36</sup> Harriet Harman MP emphasised Committee had sent repeated requests to Ministry of Defence lawyers to appear and to provide a memorandum.<sup>37</sup> The Government failed to respond or to provide the requested Memorandum. Harriet Harman MP emphasised that *“given that this inquiry is about targeted killing, a matter of the utmost seriousness, to fail to be accountable to Parliament is inexcusable”* and specified that she had *“written to the chair of the Liaison Committee to draw to his attention the Government’s failure to make itself accountable”*.<sup>38</sup>
34. The Attorney General and the Foreign Secretary refused to give oral evidence to the JCHR, and the Ministry of Defence declined to allow their lawyers to appear. The Secretary of State for Defence appeared before the Inquiry, but circumscribed his own evidence on the grounds that he is *“not a lawyer”*.<sup>39</sup> After some chasing correspondence, the Government eventually provided a four-page Memorandum. The JCHR Chair, Harriet Harman MP, immediately responded that it *“does not even begin to answer any of the detailed questions we asked in the Annex to our letter”*.<sup>40</sup> Ms Harman requested the Government to equip the Committee with a further, detailed memorandum, which they failed to do. In their final report, the JCHR *“regret[ted] 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*

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<sup>35</sup>JCHR Comment <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/drone-report-published-16-17/>

<sup>36</sup> <http://www.parliament.uk/documents/joint-committees/human-rights/2015-11-30-Michael-Fallon.pdf>

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Secretary of State for Defence, Oral Evidence to JCHR [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/oral/27633.html#\\_ftnref1](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/oral/27633.html#_ftnref1)

<sup>40</sup> [http://www.parliament.uk/documents/joint-committees/human-rights/Letter\\_to\\_Defence\\_Secretary\\_on\\_Drones\\_Inquiry\\_071215.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Letter_to_Defence_Secretary_on_Drones_Inquiry_071215.pdf)

more specific questions about important aspects of those frameworks” and, as a consequence, concluded that they were “disappointed by the Government’s unhelpfulness” given that “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.”<sup>41</sup> In line with this, the JCHR noted that they did not believe that all of the “questions about the Government’s understanding of the meaning of “imminence” in international law of self-defence have been fully answered by the end of inquiry”.<sup>42</sup>

35. It is clear that the JCHR was acutely dissatisfied with the Government’s lack of engagement, noting that the Government’s uncooperative and opaque approach risked frustrating their role as an oversight body given that: “In order to fulfil this important function [of scrutinising Government policy which has significant implications for human rights], 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” and, in the absence of this government engagement, they were constrained to “piece together what we believe to be the Government’s understanding of those frameworks from a variety of sources.”<sup>43</sup>
36. Following publication of the JCHR Report, the Government issued a response addressing the specific conclusions reached by the Committee.<sup>44</sup> On 19 October 2016, the JCHR issued a reply to the Government’s response which stated that the Government had “ducked the central question”<sup>45</sup> about lethal drone strikes, i.e. the law which applies to drone strikes. The JCHR raised particular concerns about the lack of clarity about the legal framework that would apply to the use of lethal force for counter-terrorism purposes outside armed conflict and the relevance of temporal factors to determining whether an armed attack is “imminent”.<sup>46</sup>
37. Pausing there, it is readily accepted by RWUK that, when engaging with Parliamentary Committees such as the JCHR, the Government has to take into account the need to avoid taking action which could compromise the activities of relevant security bodies. However, what is in issue here is not the disclosure of

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<sup>41</sup> *Ibid*

<sup>42</sup> JCHR Report, (n 32).

<sup>43</sup> *Ibid* at p. 40

<sup>44</sup> Government Response to the Committee's Second Report of Session 2015-16, [https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74705.htm#\\_idTextAnchor032](https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74705.htm#_idTextAnchor032)

<sup>45</sup> JCHR Comment (n 35)

<sup>46</sup> JCHR Report on the Government Response to the Committee's Second Report of Session 2015-16, [https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74703.htm#\\_idTextAnchor005](https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74703.htm#_idTextAnchor005)

information which may pose a risk to security bodies but the Government's wholesale failure to ensure that there can be an informed Parliamentary, and indeed public, debate as to whether the legal principles relied on to justify the Strike were consistent with the rule of law. In effect, the Government's withholding approach creates a situation in which there can be no democratic engagement or accountability at all in respect of the crucial issue of whether the Strike was lawful. This is a constitutionally unsound outcome.

38. RWUK raised its concerns about the lack of transparency or disclosure of relevant information concerning the reason for the Raqqa strike, the legality of it, and the implications of the Strike with the JCHR Inquiry.<sup>47</sup> These submissions were cited with approval by Kirsten Oswald MP in a debate in the House of Commons on 01 December 2015 who agreed that there needed to be clarity about the framework on which the UK Government rely in their use of targeted drone strikes so as to allow proper and informed debate.<sup>48</sup>

*(e) Intelligence and Security Committee*

39. The UK Government's Intelligence and Security Committee (ISC), whose chair is the former Attorney General Dominic Grieve, has also investigated the intelligence behind the Raqqa strike. The aim of the inquiry has been to bring a *"unique contribution to Parliament's collective oversight of lethal strikes is in its statutory power to access highly classified material and its ability to examine the intelligence which led to the decision to conduct the operation"*.<sup>49</sup> Notwithstanding the fact that all ISC members are security cleared, the Government sought to narrow the scope of the Inquiry<sup>50</sup> and, as a consequence, it took *"rather longer than...hoped to finalise of the scope of the agreement on the disclosure of material to the Committee"*.<sup>51</sup> As Conservative MP Andrew Tyrie commented, the consequence of the Prime Minister's Cameron's intention to limit the scope of the ISC's Inquiry is that *"the ISC will be incapable of providing reassurance to parliament and the public that the strikes were both*

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<sup>47</sup>RWUK Submissions to the JCHR <http://www.rwuk.org/advocacy/uk-govs-policy-on-use-of-drones-for-targeted-killing/>. Similar concerns have also been raised by Human Rights Watch (See <https://www.hrw.org/news/2015/09/09/dispatches-if-drone-attack-was-legal-uk-should-have-nothing-hide>) and Amnesty International (See <https://www.theguardian.com/uk-news/2015/sep/07/uk-forces-airstrike-killed-isis-briton-reyaad-khan-syria>).

<sup>48</sup>Westminster Hall Debate on Armed Drones

<https://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151201/halltext/151201h0001.htm>

<sup>49</sup>Letter from Dominic Grieve to Harriet Harman, 14<sup>th</sup> January 2016, <http://bit.ly/2nZoPFR>

<sup>50</sup> <https://www.theguardian.com/politics/2016/jan/12/david-cameron-criticised-harriet-harman-intelligence-security-committee-access-syria>

<sup>51</sup> Letter from Dominic Grieve to Harriet Harman (n 49)

*necessary and proportionate.*<sup>52</sup> Leaks to the media suggest that the ISC was “dissatisfied” with the information provided to them, and the report submitted to Downing Street expressed this frustration.<sup>53</sup> This final report was sent to the Prime Minister in December 2016 and has, since then, been undergoing the redactions process.<sup>54</sup>

(f) *The Attorney General’s Speech of 11 January 2017*

40. On 11 January 2017, a significant time after the requests in these proceedings were made and appealed, the Attorney General gave a speech in which he provided some further insight into the Government’s position on when it is lawful to use force in self-defence.<sup>55</sup> In the speech - titled the ‘Modern Law of Self-defence’ - the Attorney General’s set out “*how the UK applies the long-standing rules of international law on self-defence to the need to defend itself against new and evolving threats*”. The central issue discussed in his speech was how the Government assesses the requirement of imminence. The Attorney General, as the State Department Legal Adviser Brian Egan had done in early 2016,<sup>56</sup> endorsed a principle espoused by former Foreign Office Legal Advisor Sir Daniel Bethlehem (hereinafter Bethlehem’s Imminence Principle) that sets out the factors to be considered when determining whether an armed attack is imminent. Bethlehem’s Imminence Principle, according to the Attorney General, identifies a non-exhaustive “*series of factors that ... should be taken into account when assessing imminence*”.<sup>57</sup> The Attorney General also discussed the controversial issue of when it is permissible to use force on the territory of another state and appeared to endorse the principle that it is permissible to use force on the territory of a host state against an actual or imminent attack by a non-state actor if the host state is unwilling or unable to prevent the attack or is not in effective control of the relevant parts of its territory. As I explain in detail below, the Attorney General’s speech significantly broadens the circumstances in which the UK Government will lay claim

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<sup>52</sup> <https://www.theguardian.com/politics/2016/jan/12/david-cameron-criticised-harriet-harman-intelligence-security-committee-access-syria>

<sup>53</sup> <http://www.thetimes.co.uk/article/spies-told-to-come-clean-on-camerons-order-to-kill-ppfnlwddd>

<sup>54</sup> The government have declined to state when the report is likely to be published: see <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-02-22/65235/>

<sup>55</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/583171/170111\\_Imminence\\_Speech\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf) and <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/747/74705.htm>

<sup>56</sup> Brian Egan Speech, Legal Adviser, U.S. Dep’t of State, ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign’, 1<sup>st</sup> April 2016,

<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1668&context=ils>

<sup>57</sup> Jeremy Wright Speech, UK Attorney General, ‘Modern Law of Self Defence’ 11 January 2017, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/583171/170111\\_Imminence\\_Speech\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf), at p 15

to use unilateral force in self-defence. This exacerbates concerns that the Government's position is inconsistent with international law.

*(g) Subsequent Media Reports*

41. Following the announcement of 7 September 2015, some facts were added and clarified in media reports:
- a) It was reported<sup>58</sup> that the decision to launch a military strike to kill Mr Khan was made in the spring by the National Security Council a number of months prior to the Strike.
  - b) It was reported<sup>59</sup> that Downing Street pointed to attacks on VE Day in May 2015 and the Armed Forces Day in June 2015 as examples of attacks that Mr Khan had been plotting.
  - c) It was reported, by the Sunday Times<sup>60</sup> and the Times<sup>61</sup>, that the ISC: were "*dissatisfied*" with the information the Government had disclosed to them during the course of their Inquiry; questioned whether the imminence requirement had been satisfied, and were "*suspicious that the legal advice wasn't as rigorous as it should have been*".

*The Information Requests*

42. Given the seriousness of the issues raised by the Raqqa strike, and moreover the fact that it appears from Government statements that similar tactics will be deployed in future, I, on behalf of RWUK, submitted requests for access to the Advice on 8 September 2015 to respectively the Attorney General's Office and the Cabinet Office.
43. The Attorney General's Office and Cabinet Office responded separately to the requests on 6 October 2015. However, the responses were in materially the same terms. Both confirmed that whilst they held the information requested, the information was exempt on the basis of the following exemptions: section 23(1) (security bodies), section 26(1) (defence), section 27(1) (international relations), section 35(1)(c) (Law Officer's advice), section 40(2) (personal data), and section 42 (legal professional

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<sup>58</sup> <https://www.theguardian.com/world/2015/sep/08/how-did-britain-decide-to-assassinate-uk-isis-fighter-reyaad-khan-drone-strike>

<sup>60</sup> <https://www.thetimes.co.uk/edition/news/spies-told-to-come-clean-on-camerons-order-to-kill-ppfnlwddd>

<sup>61</sup> <https://www.thetimes.co.uk/past-six-days/2017-02-20/scotland/killing-of-scottish-jihadist-may-not-have-been-lawful-n8czzm0bt>

privilege). Materially, only the exemptions provided for under s. 23(1) and 40(2) constitute absolute exemptions. The remainder, where they are engaged, call for an application of the public interest test.

44. I requested an internal review of the refusal decisions. By letter dated 24 February 2016, the Cabinet Office upheld its previous decision, including applying section 23(1) to the entirety of the Advice. By contrast, the internal review undertaken by the Attorney General's Office confirmed that only part of the Advice was being withheld on the basis of section 23(1). This obviously raises the question of whether the Cabinet Office impermissibly applied the exemption on a blanket basis.
45. In response, I complained to the Commissioner in respect of the refusal notices issued by the Cabinet Office and Attorney General's Office. Apparently during the course of the Commissioner's investigation the Attorney General's Office changed its position on the application of section 23(1) FOIA; it claimed that the entirety of the Advice was covered by section 23(1) FOIA. I do not understand the reason for this conclusion. As a matter of common sense, it seems almost inevitable that parts of the Advice, including not least those which identify the legal principles relies upon, will not fall within the scope of s. 23(1).
46. The Information Commissioner issued two Decision Notices dated 30 August 2016 upholding the decisions of the Cabinet Office and the Attorney General's Office to withhold the Advice on the basis of section 23(1) of FOIA. The Commissioner did not deal with the other exemptions relied on. I commenced this appeal on 27 September 2016.

**D. The Domestic and International Legal Context**

*International Law Governing the Resort to Force (jus ad bellum)*

47. A State's use of force is governed by the *jus ad bellum*, which is to say the corpus of international law regulating when States can and cannot take military action. Under the UN Charter, States must refrain from the threat or use of force against the territorial integrity or political independence of another State (Art. 2, para. 4). Two narrow exceptions to this principle are provided in case of self-defence or following a decision adopted by the UN Security Council under chapter VII of the UN Charter.

48. In the case of self-defence, it is generally accepted, though by no means uncontroversial, that a State may use force in self-defence in *anticipation* of an armed attack on itself provided that the alleged armed attack is imminent. However, given the significant controversy with respect to the recognition of anticipatory self-defence, which has been highlighted by the practice of States,<sup>62</sup> it is generally accepted that the doctrine can lawfully be relied upon as a matter of international law only in limited and tightly defined circumstances. As has been acknowledged by the UK Government,<sup>63</sup> for the use of force in anticipatory self-defence to be lawful it must be necessary and proportionate and in response to an imminent armed attack. Accordingly, these three factors - necessity, proportionality and imminence - serve as important limitations on the use of force in anticipatory self-defence.

#### *International Law Regulating the Use of Lethal Force vis-à-vis the Target*

49. Beyond the body of law that governs the resort to force, any use of force must also comply with international human rights law (IHRL) and in the context of an armed conflict, international humanitarian law (IHL) also applies. Both legal regimes are concerned with the legality of any particular strike *vis-a-vis* the rights of the individual targeted. IHRL applies both within and outside an armed conflict.

50. The right to life, and the associated prohibition on the arbitrary deprivation of life, is a fundamental right enshrined in numerous human rights treaties and is a norm of customary international law. Under international human rights law, the use of lethal force is legal only if: it is strictly necessary and proportionate, it is required to protect life, and there are no other means, such as capture or other forms of non-lethal incapacitation, of preventing that threat to life. It follows that targeted killings “*will rarely be lawful outside a situation of armed conflict, because only in the most exceptional of circumstances would it be permissible under international human rights law for killing to be the sole or primary objective of an operation.*”<sup>64</sup> Association with or membership of a terrorist organization by itself does not per se justify targeted

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<sup>62</sup> Even the UK, US and Israel, States that have long stated their recognition of a right to anticipatory self-defence, have, in practice, tended to justify military action on the basis of responsive, rather than anticipatory self-defence, even where an anticipatory theory could have been argued. Further, States have not argued consistently for any recognition of an anticipatory doctrine in the key General Assembly resolutions in the field, including the ‘Definition of Aggression’ and ‘Declaration on the Non-Use of Force,’ and a range of States did not automatically endorse the Secretary-General’s ‘In Larger Freedom’ report in 2005, which had referred to the doctrine without noting the controversy surrounding it.

<sup>63</sup> Attorney General Speech, (n 57) p 7 and Government Response to the Committee’s Second Report of Session 2015-16 (n 44).

<sup>64</sup> Report of the U.N. Special Rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, U.N. doc A/HRC/25/59, Feb. 28, 2014, para. 60. <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-59.doc>

killing under international human rights law. It may be noted that international legal norms concerning the right to life also find expression domestically in the UK's Human Rights Act.

51. IHL only applies within the context of an armed conflict. If there is no armed conflict, which the State using force is party to, then the only relevant international rules against by which to judge the legality of any strike are those in IHRL. Whether an armed conflict does exist, and thus whether, IHL applies, is an objective question of fact.<sup>65</sup> IHL is a more permissive regime than IHRL – it grants positive authority to use lethal force where the principles of distinction (whereby civilians may not be targeted unless, and for such time as, they directly participate in hostilities) and proportionality (whereby it is prohibited to carry out an attack which may be expected to cause civilian casualties which would be excessive in relation to the concrete and direct military advantage anticipated) are satisfied.

### Constitutional Convention

52. As a matter of domestic constitutional law, the deployment of the UK's Armed Forces is a long-standing prerogative executive power. However a constitutional convention has recently emerged, that, save in exceptional circumstances, the House of Commons is given the opportunity to debate and vote on the deployment of armed force overseas ("the Debate Convention"). The recognised exceptional circumstances are that a critical British citizen interest is at stake or there is a need to act to prevent a humanitarian catastrophe. Pursuant to the Debate Convention, on 30 August 2013 the House of Commons debated and voted against military intervention against Assad's forces in Syria<sup>66</sup>. In September 2014, the House of Commons voted in favour of military action against ISIL in Iraq, but explicitly did not approve intervention in Syria. Accordingly, at the time of the Raqqa strike, the UK had been authorised by Parliament to use military force in Iraq, but not in Syria.
53. The Syria vote delivered a clear parliamentary vote against the use of military action in Syria. Following the vote, the Prime Minister stated to Parliament:

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<sup>65</sup> International humanitarian law (IHL) requires that two criteria are met for a non-international armed conflict to exist: (1) the non-state actor must have a certain level of organisation with a command structure, and (2) the violence must reach a certain degree of intensity. This second criterion was defined in *Tadic* by the ICTY Appeals Chamber as 'protracted armed violence'. (*Prosecutor v. Du'ko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, Case No. IT-94-1-AR72, para. 70).

<sup>66</sup> <http://www.bbc.co.uk/news/uk-politics-23892783>

*“Edward Miliband: On a point of order, Mr Speaker. There having been no motion passed by this House tonight, will the Prime Minister confirm to the House that, given the will of the House that has been expressed tonight, he will not use the royal prerogative to order the UK to be part of military action before there has been another vote in the House of Commons?”*

...

*The Prime Minister: Further to that point of order, Mr Speaker. I can give that assurance. Let me say that the House has not voted for either motion tonight. I strongly believe in the need for a tough response to the use of chemical weapons, but I also believe in respecting the will of this House of Commons. It is very clear tonight that, while the House has not passed a motion, the British Parliament, reflecting the views of the British people, does not want to see British military action. I get that, and the Government will act accordingly.”<sup>67</sup>*

54. With respect to the Raqqa strike, the Government purported to invoke the exception of protecting a critical British citizen interest – namely the security of the United Kingdom, referred to at paragraph 52 above. Accordingly, the issue of the Strike only came before Parliament after it had been effected.<sup>68</sup>

#### **E. Contradictory statements as regards the Legal Basis**

55. As outlined in Section B (Factual Background) the Government has provided manifestly contradictory public explanations as to whether the Raqqa strike was justified, under the law of *jus ad bellum*. Was it exclusively on the basis of individual self-defence, as stated in Parliament by the Prime Minister? Or was collective self-defence also being relied upon, as clearly suggested in the UK’s letter to the Security Council.
56. As indicated above, when announcing the strike to Parliament on 7 September 2015, the Prime Minister justified it exclusively on the basis of the inherent right of individual self-defence of the United Kingdom.<sup>69</sup> It was stated to be part of the Government’s counter-terrorism strategy to prevent and disrupt plots against the UK from Islamist extremist violence. He explicitly said that the strike was not part of coalition military action against ISIL in Syria which was being carried out in collective self-defence of Iraq, see paragraph 16 above.<sup>70</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> Prime Minister’s Announcement (n 7)

<sup>69</sup> Ibid

<sup>70</sup> This position is supported by data held by the MOD on strikes in Syria that show no record of a drone strike being carried out by the MOD as part of Operation Shader, the operational code name given to the British participation in the ongoing collective military intervention against the Islamic State of Iraq and the Levant (ISIL), in August 2015. See <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-05/45010/>

57. As noted above, on the very same day as the Prime Minister told Parliament that this action was not part of coalition military action against ISIL in Syria (which was being carried out in collective self-defence of Iraq), the UK notified the UN Security Council that the strike was justified on the basis of collective self-defence of Iraq as well as the individual self-defence of the UK.<sup>71</sup> In more recent statements, the Government has reasserted that collective self-defence formed part of the justification for the Strike. Thus, the Government's Memorandum to the Joint Committee on Human Rights, stated that, in addition to the Raqqa strike being a justified exercise of individual self-defence:

*“... The US and other members of the Coalition (including the UK) have therefore asserted the right to take action against ISIL in Syria on the basis of the collective self-defence of Iraq. The UK asserted this right in its letter to the UN Security Council of 25 November 2014...the UK has supported and contributed to the US-led efforts to target ISIL in Syria as a necessary aspect of effectively bringing an end to ISIL's armed attack on Iraq, at the request of the Government of Iraq. ...”<sup>72</sup>*

58. In their Response to this Appeal, the Attorney General's Office and the Cabinet Office note that the JCHR acknowledged *“there is nothing inherently contradictory in the Government relying both on individual and collective self-defence as justification of its action in Syria on 21 August. A single use of force can simultaneously service both purposes.”* While this position is not disputed, the Government omit to mention that the JCHR then continued to state: *“there is, however, a direct contradiction between what the Prime Minister told the House of Commons on 7 September (that the Raqqa strike was not part of coalition action to protect Iraq) and what the UK Permanent Representative told the UN (that it was)”* (emphasis added).<sup>73</sup> The Government goes on in its Response to suggest that the Prime Minister *“focused on”* the fact that a vital British citizen interest had been at stake because Parliament had expressly voted against authorising the UK to take part in coalition military action in Syria.<sup>74</sup> Regardless of the policy justification, this mischaracterises the Prime Minister's *exclusive* focus on individual self-defence, and the unequivocal and specific assurance provided to Parliament that the Raqqa strike was not part of coalition air

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<sup>71</sup> UK Letter to the Security Council, (n 22)

<sup>72</sup> Government Memorandum to the Joint Committee on Human Rights, [http://www.parliament.uk/documents/joint-committees/human-rights/Government\\_Memorandum\\_on\\_Drones.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf)

<sup>73</sup> JCHR Report (n 32). Whilst the JCHR were ultimately satisfied that the Prime Minister, subjectively, did not consider the strike to be taken outside of armed conflict, they made no attempt to resolve these manifestly contradictory statements as regards the *jus ad bellum* justification.

<sup>74</sup> See the discussion of the parliamentary convention at paragraphs 52-53 above.

strikes carried out against ISIL in Syria on the basis of the collective self-defence of Iraq.

59. I share the view of the JCHR that the two positions adopted by the Government are irreconcilable. This lack of consistency in terms of the underlying justifications for the Strike inevitably very substantially fuel the public interest in disclosure of the Advice. It is only through disclosure of the Advice that the public, and Parliament, can test for themselves whether the public statements made by the Government about the Advice constitute a fair, non-misleading account of its contents.

## F. **Concerns as to Legality**

### *International Law Governing the Resort to Force (jus ad bellum)*

60. In addition to concerns about conflicting justifications for the use of force, there has been a distinct lack of clarity about the Government's interpretation of when it is permissible to use force in self-defence under *jus ad bellum*. The government's interpretation on when it is permissible to lawfully resort to force, and their application to the facts of the Raqqa strike, have been drip fed to the public through various ambiguous and often incoherent statements, which cast into yet further doubt the legality of the strike and the UK's position under international law. As I explain below, disclosure of the Advice, and in particular those parts of the Advice which deal with the relevant legal framework/principles, is crucially important in terms of understanding the supposed legal basis for the Strike.
61. In this section, I outline the generally accepted requirements for the lawful use of force in self-defence, the varying statements about how these were or were not applied in authorising the Raqqa strike, the implications for the authorisation of future strikes, and thus the importance in obtaining disclosure of the Advice.

#### *(a) Imminence*

62. For a use of force to be a lawful exercise of self-defence under international law, it must respond to an actual or an imminent armed attack. The elements of the requirement are widely accepted as being rooted in the *Caroline* Incident of 1837 and the subsequent diplomatic correspondence between the US and Britain.<sup>75</sup> In

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<sup>75</sup> This has consistently been the UK approach. For example, former Attorney General, Lord Goldsmith rooted the customary international law definition of self-defence in the *Caroline* incident, noting that the right 'included the right to use force in anticipation of an imminent armed attack'. See Statement of Lord Goldsmith, House of

particular, the imminence requirement is considered to be found in the words of Mr Webster to Lord Ashburton – that exceptional action in self-defence should be confined to cases in which the “*necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation.*”<sup>76</sup>

63. While the precise scope of imminence beyond the *Caroline* test remains debated, it is generally agreed that for the requirement to be met, there must be a specific and identifiable actual attack that exists as a matter of fact, and is operational.<sup>77</sup> The development of plans on its own would not form sufficient basis to conclude that an attack was imminent, absent active steps to execute that plan.<sup>78</sup> There must be concrete danger of a future imminent attack that is objectively verifiable<sup>79</sup> such that the use of force to attack a person who may in the future contemplate such activity is not legitimate.<sup>80</sup> And as explained in the commentary to the well-recognised Chatham House Principles of International Law on the Use of Force in Self-defence, “[t]here must exist a circumstance of irreversible emergency.”
64. The JCHR report into the Raqqa Strike concluded that the Government should provide clarification of its position of key legal issues, including what it understands the requirement of “imminence” in international law of self-defence.<sup>81</sup> While the Government responded to this request in their response to the report,<sup>82</sup> the JCHR noted that there was still ambiguity and that further clarity was required.<sup>83</sup> The JCHR noted “*that 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*

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Lords, Hansard, 21 April 2004, col 370.

<https://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm>

<sup>76</sup> Letter from Mr. Webster to Lord Ashburton, Department of State, Washington, 6 August 1942, available at [http://avalon.law.yale.edu/19th\\_century/br-1842d.asp#web2](http://avalon.law.yale.edu/19th_century/br-1842d.asp#web2) emphasis ours.

<sup>77</sup> Lubell, N ‘*The Problem of Imminence in an Uncertain World*’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 695, 702. The threat against which action is taken in self-defence must exist as a matter of fact, and be operational. As Professor Noam Lubell notes: *This must go beyond vague suspicions, and requires a threat of an identifiable actual attack which is being prepared, rather than the unformed potential of attack, or a threat which has not yet materialized. There must be a ‘concrete danger of an imminent attack’ which is ‘objectively verifiable’, and there is wide agreement by states and writers that force in self-defence cannot be taken to counter ‘potential or abstract’ threats. Ibid 704*, citing in part the Independent International Fact-Finding Mission on the Conflict in Georgia, Sept 2009, vol II available at < [http://www.mpil.de/files/pdf4/IIFFMCG\\_Volume\\_II1.pdf](http://www.mpil.de/files/pdf4/IIFFMCG_Volume_II1.pdf).

<sup>78</sup> On this view, see Akande, D ‘UK Parliamentary Inquiry into UK Policy on the Use of Drones for Targeted Killing’, EJIL: Talk!, 23 December 2015 available at <https://www.ejiltalk.org/uk-parliamentary-inquiry-into-uk-policy-on-the-use-of-drones-for-targeted-killing/>

<sup>79</sup> Lubell, N ‘*The Problem of Imminence in an Uncertain World*’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 695, 702.

<sup>80</sup> Chatham House Principles <https://www.chathamhouse.org/publications/papers/view/108106>

<sup>81</sup> See the Chapter entitled “Conclusions and Recommendations” in the JCHR Report (n 32) p 81 <https://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>

<sup>82</sup> Government Response (n 44)

<sup>83</sup> JCHR Report (n 32)

*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 be to resemble a targeted killing policy".*<sup>84</sup>

65. From the explanations provided by the Government since the Raqqa strike it appears that the Government may have adopted an interpretation of imminence that does not require there to be a specific, identifiable future attack that has materialised and is operational. Rather, the available information suggests that the Government now considers involvement in previous attacks, absent any evidence of their involvement in a specific future attack, to be sufficient. Hence, the Government's position appears to be that a right to use defensive force is permanently engaged by a continuous potential threat.
66. As set out above, when explaining the threat posed by Mr Khan, the Prime Minister noted that he was actively recruiting persons to carry out specific and barbaric attacks against the west, including directing a number of planned terrorist attacks in the UK. However, at no point did he make any reference to there being an objectively verifiable attack that Mr Khan and his associates had operationalized at the time of the strike. Instead, he made reference to attacks against the UK and its allies that had been planned and directed in months preceding the attack,<sup>85</sup> which formed part of a series of actual and foiled attempts.<sup>86</sup> The Secretary of State for Defence referred to "potential threats"<sup>87</sup> and "potential plots"<sup>88</sup>; see further paragraph 26 above. He stated that the Government would undertake a preventative strike if an attack is being "planned" and it considered there was no other way to prevent it. He made no reference to any assessment of a concrete and identifiable attack that was operational.
67. In its response to the JCHR, the Government stated: "*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*

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<sup>84</sup>Ibid, at p. 47

<sup>85</sup> Prime Minister's Announcement (n 7)

<sup>86</sup> *Ibid*

<sup>87</sup> Emphasis added.

<sup>88</sup> Emphasis added.

*moment and without warning.*"<sup>89</sup> It is not clear how this assertion fits with the comments of the Prime Minister and the Secretary of State for Defence in announcing the Raqqa strike, which focused on past alleged attempts to commit attacks or potential attacks at some point in the future.

68. Furthermore, there is no suggestion that the Government was responding to a current and immediate attack in fact it is reported 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.<sup>90</sup>
69. RWUK, amongst others, has serious doubts about whether the UK Government's position and interpretation of the concept of imminence is in accordance with international law governing when it is permissible to use unilateral lethal force in anticipatory self-defence against an imminent armed attack. In fact, the Government's justification potentially mirrors the US White Paper on Lethal Operations against Al-Q'aida leaders, which articulates that an operational leader herself can present an imminent threat even in the absence of evidence of a threatened specific attack on the US in the future.<sup>91</sup>
70. The JCHR shares these concerns, noting as follows:

*"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."*

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<sup>89</sup> Government Memorandum to the JCHR (n 72) (emphasis added)

<sup>90</sup> <https://www.theguardian.com/world/2015/sep/08/how-did-britain-decide-to-assassinate-uk-isis-fighter-reyaad-khan-drone-strike>

<sup>91</sup> *Lawfulness of a Lethal Operation Directed against a US Citizen Who is a Senior Operational Leader of Al-Q'aida or an Associated Force*, Department of Justice White Paper, 8<sup>th</sup> November 2011 <https://assets.documentcloud.org/documents/602342/draft-white-paper.pdf>

71. Moreover, the ISC were reportedly unconvinced that Mr Khan was an “imminent” threat to the UK, such that the use of force may not have been justified – which suggests an incorrect legal test may have been applied. One intelligence official opposed to the Strike stated that, while Mr Khan had gone on to become a poster boy for Isis and a prolific Twitter user who acted as a propagandist, there was no evidence that he posed an imminent threat: “*the imminence related to inspiring attacks around the world but there was not a specific attack to pin them down*”.<sup>92</sup> The official was further quoted as asserting, “*Many intelligence officials were opposed to the extrajudicial killing, not because we’re opposed to defeating Isis but because we weren’t convinced that drone strike reached the legal threshold*”.<sup>93</sup> Another intelligence official familiar with the “*discussion and debates*” in the lead-up to the attack commented that several officials from MI5 and GCHQ had questioned the imminence of the threat posed by Mr Khan.<sup>94</sup>
72. As indicated above, I accept that any intelligence specifically relating to any threat posed by Mr Khan may be exempt from disclosure under section 23(1) FOIA. However, the more fundamental question for organisations like RWUK and the public is the Government’s position on when an armed attack can be classified as imminent as a matter of law. What threshold tests are they applying and do those tests accord with the UK’s international legal obligations? Inevitably, disclosure of the legal analysis section(s) of the Advice would directly address this hugely important question.
73. Subsequent statements made by the Government to the JCHR and in the Attorney General’s speech on self-defence have served only to reinforce concerns about the Government’s interpretation of imminence. While it is impossible to piece together a comprehensive account of the Government’s position on imminence, these statements certainly suggest that the Government is now adopting a position on imminence that is far more flexible than the position accepted by JCHR, jurists and other democratic States. In their response to the JCHR the Government explained that:

*“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*

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<sup>92</sup><https://www.thetimes.co.uk/edition/news/spies-told-to-come-clean-on-camerons-order-to-kill-ppfnlwsdd>

<sup>93</sup>*Ibid*

<sup>94</sup>*Ibid*

*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.”*<sup>95</sup>

74. The Government also asserted that an effective concept of imminence cannot “be limited to be assessed solely on temporal factors”.<sup>96</sup> In their report on the Government’s response, the JCHR suggests that this sentence requires careful scrutiny given that it raises the question of the extent to which the Government still considers evidence of when an attack is likely to take place as relevant to determining whether an armed attack is imminent.
75. The Attorney General’s speech of 11 January 2017 did not assuage these concerns. As noted above, he endorsed Bethlehem’s Imminence Principle which, according to the Attorney General, identifies a non-exhaustive “*series of factors that ... should be taken into account when assessing imminence*” including:

*“the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defence that may be expected to cause less serious collateral injury, loss or damage.”*<sup>97</sup>

76. The Attorney General then went on to endorse the final observation which forms part of by Bethlehem’s Imminence Principle, which mirrors its response to the JCHR, namely: “*The absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of a right of self-defence, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.*”<sup>98</sup>
77. Of particular concern here is that the Attorney General then went one step further and asserted that an armed attack could also be considered imminent in the absence of knowledge of when an attack will take place. While at times the UK Government seems to take a more nuanced approach to temporality for example by stating that it will not always be necessary to know the *specific* timing,<sup>99</sup> and that imminence cannot be assessed *solely* on temporal factors,<sup>100</sup> the Attorney General claims that “*we will not always know...when an attack will take place*”<sup>101</sup> dispensing altogether with any

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<sup>95</sup> Government Response (n 44)

<sup>96</sup> *Ibid*

<sup>97</sup> Attorney General Speech (n 57)

<sup>98</sup> *Ibid*, p 17

<sup>99</sup> *Ibid*

<sup>100</sup> Government Response to the JCHR Report (n 44)

<sup>101</sup> Attorney General Speech (n 57) at p 17

requirement of *knowledge* of when an attack will take place, let alone that it be temporally proximate.

78. There are significant and urgent questions with respect to the Government's understanding of imminence that require further clarification through the disclosure of the Advice to resolve.
- a) First, in his speech, the Attorney General made no attempt to explain how, substantively, the position articulated by Sir Daniel Bethlehem in his academic article from 2012 is consistent with international law as it stands. The Attorney claims that Bethlehem's "*Principle 8 on imminence...is a helpful encapsulation of the modern law in this area*".<sup>102</sup> Yet, as former Foreign Officer Legal Advisors Elizabeth Wilmshurst and Sir Michael Wood noted in their critique of the Bethlehem principles,<sup>103</sup> not even Sir Daniel Bethlehem himself considers that the principles are reflective of international law. Sir Daniel Bethlehem acknowledged that his Principles would "*undoubtedly prove controversial*"<sup>104</sup> and "*do not purport to reflect a settled view of the law or the practice of any state*"<sup>105</sup>, offering them in normative terms as a statement of what "*the appropriate principles are, and ought to be*" rather than a description of the law as it is.<sup>106</sup> The Advice from the Attorney General to the Government presumably must have grappled with this issue: it must have set out a developed articulation of the threshold test being applied on the issue of imminence and how, in the Attorney General's view, this test could be regarded as compatible with international law.
  - b) Secondly, and more specifically, the Attorney General provides no detail on how the factors he identifies as relevant relate to one another, how much weight any one carries or what the evidentiary thresholds are. He simply states that these are the right factors 'to consider'. Of particular concern is the suggestion that the requirements of temporal proximity and specificity of the attack (referred to as 'the nature and immediacy of the threat' in Bethlehem's Imminence Principle) may be dispensed with altogether. The Attorney General suggests that in

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<sup>102</sup> *Ibid*, p 15

<sup>103</sup> Wilmshurst, E and Wood, M 'Self-Defense Against Nonstate Actors: Reflections on the "Bethlehem Principles"' (2013) 107(2) *American Journal of International Law* 390, 392.

<sup>104</sup> Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-State Actors,' (2012) 106 *American Journal of International Law* 769.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid*. Former Government Legal Advisors Wilmshurst and Wood make this point persuasively in their critique of Bethlehem's article, (n 103).

determining whether an attack is imminent, the absence of knowledge of the precise nature of the attack or when it is going to happen does not preclude it from being characterised as an imminent armed attack. Such an approach significantly broadens the circumstances of when a State can use lethal force in self-defence, and is inconsistent with the accepted interpretation of imminence under international law. If no temporal proximity is required, this negates the requirement of imminence of any real substance – with the effect that only a requirement of necessity applies (and it is not clear how this requirement would be applied on the Attorney General’s apparent approach). If the ‘precise’ nature of the attack is unknown, it would appear the Attorney General’s position may still be that the State is entitled to act in anticipatory self-defence. The continued absence of any understanding of how the various factors identified by the Attorney General are applied as a matter of law raises serious concerns that imminence is being interpreted in a way that no longer requires the State to have identified a specific attack that is operational. In the absence of knowledge of the specific nature of the attack, it is difficult to see how a State can assess and determine that an attack that has moved from being a theoretical possibility to an operational reality, and that active steps have been taken execute the attack.<sup>107</sup>

79. Practically speaking, if the criterion of imminence is stripped of its temporal character and divorced from the requirement of specificity, it inevitably leaves the door open to action against non-imminent or remote threats/theoretical threats against, for example, individuals that have posed a threat in the past and may do so again at some point. In other words the concept of “imminence” becomes a dead letter. The use of lethal force in the absence of imminence (as defined in international law) is generally termed ‘pre-emptive self-defence’<sup>108</sup>. While referred to as a type of self-defence in discourse, its use is in fact inconsistent with the accepted position under international law.<sup>109</sup>

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<sup>107</sup> On this view, see Akande, ‘UK Parliamentary Inquiry into UK Policy on the Use of Drones for Targeted Killing’, EJIL: Talk!, 23 December 2015 available at <<http://www.ejiltalk.org/uk-parliamentary-inquiry-into-uk-policy-on-the-use-of-drones-for-targeted-killing/>>

<sup>108</sup> Though sometimes termed ‘preventive’ self-defence.

<sup>109</sup> Following the 9/11 attacks against the United States in 2001, and citing in particular the threats posed by and other non-state actor elements, and by weapons of mass destruction, the US articulated a more expanded reading of the imminence requirement. The clear intent was to take lawful use of force outside of a context which was purely defensive, to one that was pre-emptive – eliminating threats *before* they had opportunity to emerge, that is, before a specific and concrete threat could be identified. This expanded interpretation of the imminence requirement has been continuously rejected, including by the UK. For example, in specific reference to the legitimacy of the US position of pre-emptive armed attack as a part of the inherent right of self-defence under Article 51 of the UN Charter, then Attorney-General of the UK, Lord Goldsmith, noted that while it has been the consistent position of successive UK Governments that self-defence includes the right to use force before an armed attack occurs, where that attack is imminent,

80. This may be why the Attorney General in his speech was at pains to distinguish his approach from the highly controversial and widely discredited Bush era doctrine of 'pre-emptive' strikes against "*threats that are more remote*", contending, "*it is absolutely not the position that armed force may be used to prevent a threat from materialising in the first place*".<sup>110</sup> Yet given the ambiguity of the interpretation of imminence actually articulated by the Attorney General, many months after I submitted the requests, the line between the concept of imminence contemplated by the Attorney General and pre-emptive self-defence appears thin and porous. The continued lack of clarity is inevitably of very serious concern.
81. These issues, and the flexibility of the UK's approach, come into sharp focus in the Reyaad Khan case. As noted above, it is almost certain that the Advice would provide a comprehensive analysis of the Government's position of when an armed attack is classified as imminent as a matter of law. Without seeing the Advice, subject to appropriate redactions to protect intelligence/security bodies, neither RWUK nor the public have a clear understanding of when the Government considers it lawful to use lethal force in self-defence, and accordingly, whether the Government is adopting an overly permissive and broad interpretation of imminence, which risks placing the UK in breach of its international obligations.

(b) Gravity

82. A further condition on the legitimate use of force in self-defence is for the attack to constitute an "armed attack" of such scale and effect as to reach the requisite degree

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international law 'does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote.' Statement of Lord Goldsmith, (n 75). This position was reiterated by the then Foreign Secretary in statements to the UK House of Commons Foreign Affairs Committee

<<http://webarchive.nationalarchives.gov.uk/20121212135632/http://www.fco.gov.uk/Files/kfile/CM6340.pdf>>. Similarly, the weight of academic authority rejects the lawfulness of pre-emptive self-defence for example see e.g. Chatham House Principles (*To the extent that a doctrine of 'pre-emption' encompasses a right to respond to threats which have not yet crystallized but which might materialise at some time in the future, such a doctrine (sometimes called 'preventive defence') has no basis in international law*); Leiden Recommendations (*Action to avert a threatened attack is best termed anticipatory self-defence and must be distinguished from the use of so-called 'pre-emptive' or 'preventive' force before a threat has crystallized, which could only be lawful if authorised by the Security Council*).

<sup>110</sup> In a speech delivered at the US Military academy at West Point, President Bush articulated the doctrine as follows: "...new threats also require new thinking. ...If we wait for threats to fully materialize we will have waited too long. ...Yet the war on terror *will not be won on the defensive*. We must take the battle to the enemy, disrupt his plans and confront the worst threats *before* they emerge. See <http://www.nytimes.com/2002/06/01/international/text-of-bushs-speech-at-west-point.html>

of gravity.<sup>111</sup> Thus, not every use of force against a State will necessarily justify a response in self-defence.

83. The Government's statements in the wake of the Raqqa Strike as to the gravity of the alleged armed attack have been vague, potentially expansive and particularly sparse. When announcing the strike, David Cameron stated 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.*"<sup>112</sup> Any gravity assessment, or indeed reference to such assessment, was conspicuously absent from later statements, until the brief Memorandum the Government provided to the JCHR. Here they asserted that "*Individual terrorist attacks, or an on-going series of terrorist attacks, may rise to the level of an "armed attack" for these purposes if they are of sufficient gravity... 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.*"<sup>113</sup>
84. These statements intimate that the United Kingdom is perhaps, endorsing the controversial 'pin prick' or accumulation of events theory – i.e. that small scale uses of force, individually not sufficient to meet the gravity threshold, can be aggregated together with the result that, in their totality, they satisfy the criterion. This theory remains highly controversial: there is little discernible acceptance of this theory by States<sup>114</sup> nor has it gained traction amongst authoritative scholars.<sup>115</sup> There is a further question over whether the UK approach further expands this theory, by dispensing with any need for the smaller attacks to be directed at the United Kingdom – implying that general attacks [ISIS' campaign], rather than specific, targeted attacks against the state resorting to force, may be sufficient.<sup>116</sup>

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<sup>111</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, 1986 ICJ Rep 14; and confirmed in *Oil Platforms (Iran v United States)*, 2003 ICJ Rep 161. See also *Eritrea / Ethiopia Claims Commission Award 45 ILM* (2006) 430.

<sup>112</sup> Prime Minister's Announcement (n 7)

<sup>113</sup> Government Memorandum (n 72)

<sup>114</sup> See Henderson, C 'Non State Actors and the Use of Force' in Math Noortmann, August Reinisch, Cedric Ryngaert (eds) *Non-State Actors in International Law* (2015 Hart Publishing)

<sup>115</sup> See Wood, M 'Terrorism and the International Law on the Use of Force' in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2014, Edward Elgar Publishing)

<sup>116</sup> The JCHR requested further clarification of the Government's approach to the gravity criterion, they were satisfied with the Government's response that ""where terrorist violence reaches a level of gravity such that were it to be perpetrated by a State it would amount to an armed attack". However, the Government's Response does not address the fact that, if the UK are endorsing an 'accumulation of events' theory in itself

85. Yet in other statements, the Secretary of State for Defence implied that the alleged imminent armed attack itself, rather than previous uses of force, satisfied the gravity threshold, claiming that Mr Khan was involved in “*planning to disrupt major public events in this country*”...“*which would be extremely dangerous and obviously involved the loss of life*”.<sup>117</sup> Part of the confusion lies in the fact that the UK has never, in practice, relied on anticipatory self-defence (i.e. the right to use extraterritorial force *in anticipation* of an imminent armed attack), which leads to questions of what threshold test is being applied in respect of the gravity criterion. Is it the *likely* scale of the future attack or something else? Moreover, the question of what threshold test the Government is applying to gravity criterion also goes directly to whether the action taken satisfies the proportionality limb of the *jus ad bellum* test.<sup>118</sup> As Roberto Ago, writing as the Special Rapporteur on State Responsibility in 1980 noted, “*If, for example, a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks*”.<sup>119</sup>
86. The statements provided by the Government have only served to raise questions about what the Government’s position is with respect to the gravity threshold, how it was met in the Raqqa strike and how the position aligns with the demands of international law. Once again, this powerfully reinforces the need for disclosure of the Advice.

(c) *Self-defence, Absent State Attribution.*

87. The Raqqa Strike is the first time that the United Kingdom has used force against a non-state actor when the host state has not consented to force being used on its territory or the attack is not in some way imputable to the host state (attribution). It remains unclear how the Government justifies this shift as a matter of international

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marks a conceptual break with the traditional understanding of self defence, and the need for a large scale attack.

<sup>117</sup> <http://www.parliament.uk/documents/joint-committees/human-rights/2015-11-30-Michael-Fallon.pdf>

<sup>118</sup> For a state’s use of force to be lawful under international law it must satisfy the twin requirements of necessity and proportionality. *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States) (Merits)* ICJ Rep (1986), 176.

<sup>119</sup>Special Rapporteur of the International Law Commission on State Responsibility, Eighth Report on State Responsibility, Addendum, UN Doc. A/CN.4/318/Add.5-7 available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_318\\_add5\\_7.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_318_add5_7.pdf)

law, and recent government statements alluding to reliance on the controversial<sup>120</sup> ‘unwilling or unable’ test, serve to compound confusion. Though the contours and content of this test remain unclear, and the UK Government has not sought to define them, its premise is that States may lawfully use of force in self-defence against a non-state actor on the territory of a third State, without the consent of or attribution to that third State, if the third State is deemed either ‘unwilling or unable’ to address the threat posed by the non-state actor.

88. In public statements in the immediate aftermath of the Raqqa strike, and in their letter to the Security Council, the UK proffered no explanation as to how it considered it lawful to use force on Syrian territory absent consent or attribution, though the Prime Minister noted that “*in this area, there is no Government we can work with*”<sup>121</sup> and the Secretary of State for Defence later stated, in evidence to the JCHR, that there was “*no source of authority in that area of Syria*”.<sup>122</sup> In the Attorney General’s speech, in January 2017, he referred to the “unwilling or unable test”, stating:

*“...the situation we face today does not always allow for the possibility of using criminal law enforcement measures to stop attacks – when attacks are planned from outside our territory and where the host state is unable or unwilling to act.”*<sup>123</sup>

And, later that: “*A number of states have also confirmed their view that self-defence is available as a legal basis where the state from whose territory the actual or imminent armed attack emanates is unable or unwilling to prevent the attack or is not in effective control of the relevant part of its territory*.”<sup>124</sup>

89. Numerous questions flow from these statements which remain unanswered.
- a) First, the failure to publicly address this issue directly until 18 months after the event provokes real concern that it was not considered properly at the time or at all. Access to the full contents of the Advice (subject to appropriate redaction) will reveal whether this issue was considered.

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<sup>120</sup> For a range of views as regards the ‘unwilling or unable’ test, *cf.*: Corten, O ‘The ‘Unwilling or Unable’ Test: Has it Been, and Could it be, Accepted?’ *Leiden Journal of International Law* (2016), 29, 777; Hakimi, M ‘Defensive Force against Non-State Actors: The State of Play’ (2015) *International Law Studies* 91, 1; Deeks, A ‘Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense’ (2012). *Virginia Journal of International Law* 52, 483

<sup>121</sup> Prime Minister’s Announcement (n 7)

<sup>122</sup> <http://www.parliament.uk/documents/joint-committees/human-rights/2015-11-30-Michael-Fallon.pdf>

<sup>123</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/583171/170111\\_Imminence\\_Speech\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf)

<sup>124</sup> *Ibid*,

- b) Second, in his speech the Attorney General offers no evidence to support the claim that the contentious ‘unwilling or unable’ test is consistent with international law as it stands. Thus, he provided no evidence that there was a consistent and uniform practice establishing a new norm of customary international law. He merely references ‘a number of states’ endorsing the test, footnoting a blog.<sup>125</sup> No assessment is provided as to how can the test can be reconciled with the collective system of security established by the UN Charter and the foundational principles of international law, including in particular territorial integrity and sovereign equality. These principles are cornerstones of the international legal order.<sup>126</sup> The Advice must have addressed these issues. If it did not then that would be even more concerning. The disclosure of the Advice, even with intelligence/security body material redacted, is inevitably critical in terms of testing the robustness of the legal analysis on why the Strike was justified.
- c) Third, the Government has failed to explain how it applies the principle of ‘unwilling or unable’, if in fact this principle has been applied. For example, is a State obligated to seek consent of the host State and/or request action prior to the commencement of acts taken in self-defence? Is the test strictly disjunctive – the two criteria identified and analysed independently? For how long must a government lose effective control such that it can be deemed to be ‘unable’ with the result that its territory can be subject to intervention on self-defence grounds and, importantly, who decides these issues? Clear and precise parameters are pivotally important, given that the doctrine is ripe for abuse.

90. Clarity on these issue is inevitably of overwhelming public importance, as the unwilling and unable test, if accepted, allows for unilateral military interventions. If the Government is claiming to use force in these exceptionally expanded circumstances it is certainly in the public interest that there is a clear explanation about what precisely those circumstances are, the contours of any test they will be applying and how the action is consistent with international law. It is assumed that the Advice will shed light

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<sup>125</sup> The blog he references has been criticized as being over inclusive in its analysis: “A few of the “express” endorsements seem to us to be less definitive than [the blog authors] claim. Moreover, we don’t think the “implicit” or “ambiguous” endorsements are endorsements at all.” See Hakimi, M and Katz Cogan, J, A Role for the Security Council on Defensive Force? EJIL Talk! (21 October 2016) <https://www.ejiltalk.org/a-role-for-the-security-council-on-defensive-force/>

<sup>126</sup>For development of this point see Report of the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions on the use of lethal force through armed drones from the perspective of protection of the right to life, UN Doc A/68/382 (13 September 2013) <https://www.justsecurity.org/wp-content/uploads/2013/10/UN-Special-Rapporteur-Extrajudicial-Christof-Heyns-Report-Drones.pdf>

on this crucially important issue. It will be equally telling if the Advice sheds no such light.

*Applicable Legal Framework Regulating the Use of Lethal Force vis-à-vis the Target*

91. The Government has been unclear about its position as to which legal framework or frameworks protecting the rights of individuals applies to the use of lethal drone strikes, including the Raqqa strike. As outlined above, (see paras 49-51) for a particular drone strike to be lawful under international law it must satisfy the legal requirements under all applicable international legal regimes.<sup>127</sup> Even if the use of force in the territory of another state is lawful as a matter of the *jus ad bellum*, the attacking state must still comply with international human rights law and/or international humanitarian law when targeting specific individuals.
92. In announcing the Raqqa strike, the then Prime Minister was clear that the UK “wouldn’t hesitate to take similar action again”<sup>128</sup> 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.”<sup>129</sup> The Government’s readiness to effect strikes outside of armed conflict was confirmed by the Secretary of State for Defence in his evidence to the Joint Committee on Human Rights.<sup>130</sup>
93. This in itself reflects a sea change in UK policy. As David Davis MP, then 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.”<sup>131</sup>
94. The Government have not answered the key question of when they consider that the use of force by lethal drone strikes outside war zones needs to comply with

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<sup>127</sup> As was emphasised by the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions in his Report *Ibid.*

<sup>128</sup> Prime Minister’s Announcement (n 7)

<sup>129</sup> *Ibid*

<sup>130</sup> Secretary of State for Defence, Oral Evidence to JCHR (n 39)

<sup>131</sup> Westminster Hall Debate on Armed Drones (n 48)

international human rights law.<sup>132</sup> As regards the Raqqa strike, initial government statements made reference to international human rights law and international humanitarian law interchangeably and indistinctly when discussing the legal frameworks that it applied when carrying out the strike. The JCHR pressed the Government to articulate its view on the applicable legal regime outside of armed conflict, and to clarify the grounds on which the Secretary of State for Defence claimed, in oral evidence, that IHL applied to a use of lethal force outside armed conflict. However, the Government responded that, although they considered the question of what law would apply outside of armed conflict to be ‘hypothetical’, in regards to military operations, *“the law of war would be likely to be regarded as an important source in considering the applicable principles”*.<sup>133</sup>

95. As the JCHR note, this is not a *“satisfactory answer, given the importance of the question of what law applies to the use of lethal force for counter terrorism purposes outside armed conflict”*.<sup>134</sup> Of significant concern is the fact that it appears that, as a matter of law, the Government are not applying the correct test for when IHL applies – which turns on an assessment of whether there is an armed conflict. Instead, as the JCHR observed, the Government:

*“come (...) close to asserting that the applicable law follows the choice of means by the State to deal with a particular threat: that if the State chooses to deal with it by military means, the relevant principles and standards are the Law of War, even if the military operation is carried out in an area which is outside of armed conflict.”*<sup>135</sup>

96. In this regard, the Committee made clear that the Government *“failed to answer one of the most important questions identified in [the Joint Committee on Human Rights] Report”*<sup>136</sup> and *“ducked the central question”* of the Inquiry.<sup>137</sup> This has an immense bearing on the legality of future action and suggests that the Government are attempting to forge a new approach to lethal strikes, an approach which is inconsistent with international law. The UN Special Rapporteur on Extrajudicial, summary or arbitrary executions previously expressed concern at the *“highly problematic blurring and expansion of the boundaries of the applicable legal frameworks”*<sup>138</sup> whereby

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<sup>132</sup> As a matter of law, Government bound by IHRL and customary international law both within and outside of armed conflict.

<sup>133</sup> Secretary of State for Defence, Oral Evidence to JCHR (n 39) (emphasis added)

<sup>134</sup> JCHR Report the Government’s Response (n 46) at para 18

<sup>135</sup> *Ibid*

<sup>136</sup> *Ibid*

<sup>137</sup> JCHR Comment (n 35)

<sup>138</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24/Add.6, 28<sup>th</sup> May 2010

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> at p. 3

states' refer to the law of wars as the predominant or sole legal paradigm governing their actions, to exploit its more permissive targeting standards, when international law clearly mandates that international human rights law exclusively applies (in respect of the lawfulness vis the individual) where no armed conflict exists.

97. Furthermore, and as the JCHR noted<sup>139</sup>, this may mark an unexplained departure from UK statements at the UN Human Rights Council just two years previously, where the Government stated: "*The UK expects other States to act lawfully in accordance with the applicable legal framework including when using RPAS [Remotely Piloted Aircraft Systems] against terrorist targets. If armed RPAS were to be used outside the scope of an armed conflict, their use must be in accordance with international human rights law.*"<sup>140</sup>
98. The issue of appropriate legal frameworks is of direct relevance to the Raqqa Strike. If, as the Prime Minister stated, the legal basis for the strike was exclusively individual self-defence, then there is a very important question over whether the threshold for the existence of an armed conflict was met. It is highly unlikely that a single drone-strike would reach the requisite intensity threshold for international humanitarian law to apply.<sup>141</sup> If this were the case, the strike would be governed by the stricter requirements of international human rights law unless the Raqqa Strike formed part of a pre-existing conflict. As noted above, the latter appeared to be discounted by the Prime Minister when he provided a clear and unequivocal statement that the Raqqa strike was taken in a country that we are not involved in a war in response to a direct threat against the United Kingdom.<sup>142</sup>
99. The disclosure of the Advice is critical in this context. It is important to understand whether this issue was analysed and advised upon in relation to the Raqqa Strike and any conclusions drawn. Only then can this issue be properly scrutinised and debated by the public.

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<sup>139</sup> JCHR Report on the Government's Response (n 46) at paras 28-29.

<sup>140</sup> UK Statement at the Panel on Remotely Piloted Aircraft Systems (RPAS), Human Rights Council, 22<sup>nd</sup> September 2014 <https://www.gov.uk/government/world-location-news/uk-statement-at-the-panel-on-remotely-piloted-aircraft-systems-rpas-human-rights-council-geneva>

<sup>141</sup> International humanitarian law (IHL) requires that two criteria are met for a non-international armed conflict to exist: (1) the non-state actor must have a certain level of organisation with a command structure, and (2) the violence must reach a certain degree of intensity. This second criterion was defined in *Tadic* by the ICTY Appeals Chamber as 'protracted armed violence'. (*Prosecutor v. Du'ko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, Case No. IT-94-1-AR72, para. 70). A single strike is highly unlikely to this criterion, and thus would not reach the threshold for the application for IHL.

<sup>142</sup> Prime Minister's Speech (n 7)

**G. Public Interest Justifications for Disclosure**

100. In the preceding sections of my statement, I have tried to outline why there is considerable constitutional and legal controversy about the Raqqa strike and the government policy and practice in respect of the use of targeted lethal killings which was disclosed as a result in the Prime Minister's speech and subsequent additional statements.
101. It is critical to underscore that the alleged conclusion of the Attorney General's Advice - that the strike was lawful – has not only been disclosed to the public but in fact has been actively relied upon by the Government in justifying its past actions and future actions. The Attorney General has also given accounts of the approach being taken to key concepts such as imminence. Yet, the Government refuses to disclose the Advice for full and informed public scrutiny and debate. It has otherwise refused to identify the specific legal principles which, on its case, justified the Raqqa Strike. In effect, the public and Parliament faces a complete information black-out on this hugely important issue.
102. The critical importance of the issues raised by the controversial Raqqa strike and the use of targeted killings in the future justifies the exceptional disclosure of the Advice from the Attorney General. That interest is only heightened by: (a) the partial disclosure of the Advice and the reliance on its contents in publicly defending the Government's actions in conducting the Raqqa strike and the clear statement that such strikes will happen again on the same basis; and (b) the serious concerns about the legality of the Government's actions which are in turn heightened by the continuing lack of clarity over the Government's position; and (c) the inability of the Parliamentary processes to secure any meaningful accountability.
103. As noted above, the events of September 2015 are of acute importance. The decision to effect the targeted killing of British nationals and another, with no prior warning, pursuant to a significantly changed policy with no prior publication, based apparently on a novel interpretation of relevant legal principles was unquestionably of enormous constitutional importance. As the JCHR noted,

*“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.*"<sup>143</sup>

This point was emphasised by David Davis MP in a Westminster Hall Debate on drone strikes, where he stated that the conflicting explanations "*highlight...why we need absolute clarity on such matters*" since "*this is not an area in which we can risk having doubt*".<sup>144</sup>

104. To be clear, the gravity of the situation concerns not merely the loss of life as a result of extra-judicial killing by the State, but also the significance of the shift in legal and policy positions that the Raqqa strike appears to have signalled. The Raqqa strike undoubtedly marks a fundamental shift in UK practice. There is every reason to suppose that it is merely the first incidence of a new and on-going Governmental policy on the circumstances under which the right to life can be extinguished by the State. See the comments of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions published a seminal report on targeted killing referred to above at paragraph 96.
105. It follows that access to the Advice is critical both in assessing the Government's past actions in respect of the Raqqa strike and also in the context of future policy.
106. Further, as I have explained above, there are considerable doubts as to the legality of the Raqqa strike and the Government's interpretation of, and potential attempt to stretch, long standing legal limits. Given the serious questions that remain, there is a significant public interest in now receiving a clear picture of the advice that was given on key legal points, such as the application of *jus ad bellum*; the threshold tests for imminence, gravity, attribution and the governing legal framework. It is in any event in the public interest to have a clear understanding of the Government's position on when it is lawful to use force in anticipatory self-defence, not least so the public can: (a) be assured that the Government is not placing the UK in breach of its international obligations or alternatively (b) hold the Government to account insofar as it is acting in breach of its legal obligations.
107. There is a considerable public interest in resolving the inconsistencies in what the public have been told to date regarding the basis and application of the legal advice. The already strong public interest in the public having a clear understanding of the purported legal basis is significantly heightened by the fact that the Government has

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<sup>143</sup> JCHR Report (n 32) at p. 42

<sup>144</sup> Westminster Hall Debate on Armed Drones (n 48)

provided materially inconsistent justifications. As discussed above, the explanations given by the Government as to the legal basis for the strike are irreconcilable. Plainly, there is a powerful public interest in disclosure of the Advice so that the public can assess for itself whether the public statements made by the Government about the legal basis for the strike constitute a fair and non-misleading, rather than a cherry-picked account of that Advice. This is particularly given the reliance placed on the Advice to legitimise the strike and assure Parliament of its legality.

108. Finally, it is clear that parliamentary committees charged with overseeing the actions of the Government have failed, by their own admission, to resolve these critical issues. In their Response to our Appeal, the Cabinet Office and the Attorney General place reliance on post-strike parliamentary scrutiny, which they label as 'considerable'. However, as a result of the lack of information disclosed to the various Parliamentary Committees and a more general lack of cooperation on the issue of the legal principles relied on to justify the Strike, the ability of the public and Parliament to scrutinise the Government's decisions and policy approach has necessarily been limited. As noted above [see paras 31-39] the Government has not proven willing to fully engage in post-scrutiny of the Raqqa strike or the legal issues it gives rise to more generally. It certainly cannot be said that the requirement of independent, robust oversight has been adequately discharged. The Government's refusal to facilitate transparency and attempts to evade accountability are particularly concerning given the gravity of the matter.
109. It follows that the public interest in the disclosure of the full contents of the Advice, even with appropriate redactions, is in no way allayed by scrutiny that took place after the Cabinet Office and the Attorney General refused my requests. I also note that much of this scrutiny took place a long time after I submitted, and the Government refused, my requests. At the time I made the requests there was considerable public debate about the legality of the Raqqa strike which took place with only a partial disclosure of the outcome of the Advice, but with no access to or informed scrutiny of its contents.
110. In short, I and RWUK see the public interest in the disclosure of the Advice (subject to appropriate redaction) to have been overwhelming and that that interest has not been diminished by the passage of time.

**H. Response to the Arguments put forward by the Attorney General's Office and the Cabinet Office**

111. *Application of section 23(1) FOIA* - As I have noted above, RWUK does not contest the fact that, if on a proper construction section 23(1) is engaged in respect of information in the Advice, it may be withheld. What it does not accept, in line with the position adopted by the Attorney General in its internal review response, that all of the information would be covered by this exemption. In particular, it is not accepted that the exemption could properly be applied in respect of the identification or discussion in the Advice of the relevant legal principles.
112. *Section 35(1)(c)/Section 42* - I am aware that the Attorney General's Office assert that the Advice is covered by sections 35(1)(c) and 42 FOIA. However, these are qualified exemptions. The burden lies on the Respondents to establish not only that the relevant exemptions are engaged but also that the public interest balance tips in favour of their being maintained. For all the reasons identified above, I take the view that the Respondents cannot discharge this burden.
113. I accept that generally in the context of applying ss. 35(1)(c) and 42, consideration may need to be given to whether a claim may yet be brought against the Government. However, this consideration carries little weight in the present case. Alternatively, it is not sufficient to justify a conclusion that the Advice should be held. This is so for the following reasons:
- a) As matters currently stand there has been no transparency or accountability around the specific legal principles and threshold tests which the Government applied in the context of the hugely controversial decision to carry out the Raqqa Strike.
  - b) It cannot be right that the Government can continue to withhold such information because of concerns of a risk of legal challenge. Indeed, if the decision to carry out the strike is potentially at risk of challenge because of a lack of sound legal foundation, then that makes it all the more important for the Advice to be disclosed. Any other conclusion creates a wholly untenable situation whereby the Government's concerns about being sued in respect of their unlawful actions trump the public interest in revealing those actions, and holding the Government to account.

- c) The notion that, in the context of such a challenge, the Government could in any event avoid effectively disclosing the legal principles relied upon as justifying the Strike is in any event highly fanciful.
- d) As for the concern about a risk of a general chilling effect on the provision of law officer advice if the Advice is disclosed, it is not accepted that realistically there is any such risk.
  - i) The Government was inevitably bound to take advice on the Strike given its novelty and implications in terms of loss of life.
  - ii) The Attorney General in turn would have been bound to provide such advice and, moreover, to have ensured that the Advice was properly reasoned.
  - iii) It cannot reasonably be inferred that the fact that exceptionally this Advice has been disclosed will result in any chilling effect on the giving of advice of law officers generally.
  - iv) It is far more likely that disclosure will instead spur law officers on to ensure that they approach the advice they give with utmost rigour.
- e) Further and in any event, to treat this Advice as immune to disclosure itself has inevitably negative effects in terms of creating an environment where law officers are not subject to the disciplining effects created by the fact that their advices may be subject to scrutiny and testing following disclosure under FOIA. These disciplining effects are all the more important where the Government is seeking advice on matters of enormous public importance.
- f) Put simply, if the Government cannot be pressed to reveal the legal principles which it relied upon in order to effect the hugely controversial Raqqa Strike, then that raises important constitutional questions as to whether we have arrived at a point where the Government is effectively at liberty to act outside the four corners of the law with effective impunity. As I see it, it is no answer to this point to say that the Government can always be sued. This is because: (a) if the Government is sued it will inevitably have in any event to reveal the legal principles embodied in the Advice which it relied on to effect the Strike and (b) that takes us full circle back to the question of why the Advice should not be

disclosed so that the public can assess whether a legal challenge is in fact warranted in the first place.

114. *Other exemptions* - I note that the Attorney General's Office and the Cabinet Office have also asserted that sections 26(1), 27(1) and 40(2) FOIA would be engaged. However, to date they have not explained why this is the case or why the public interest in disclosure would not outweigh the interest in withholding the information. The Response of the Government simply asserts that the exemptions apply – and would seek to rely on them if the ICO's decision notices are not upheld. This means that I cannot respond to these alternative cases at this point in time.
115. I note the reference at paragraph 38 of the response to the: (a) particular sensitivities involved in the instant case, which concerns the use of force abroad in a security, defence and intelligence context; and (b) the fact that the requests seek information that is particularly recent, far more so than advice concerning the Kosovo intervention (military action which dates back some seventeen years). However, as I have noted elsewhere, intelligence material may be redacted from the Advice. The importance of the issues addressed in the Advice, and the fact that Advice relates to key matters of current and future concern heighten the public interest in disclosure in this case as the public needs to understand and scrutinise now whether the Government's interpretation of the law is legally tenable. Disclosure in say seventeen years' time would not serve the public interest as there is the risk that, in the interim, countless individuals would have lost their lives as a result of unlawful actions being taken by the UK Government.
116. In their Response to our Appeal, the Cabinet Office and the Attorney General place reliance on post-strike parliamentary scrutiny, which they label as 'considerable'. I have already explained above why this line of argument does not carry weight.
117. In short, I remain of the view that there is an overwhelming public interest in disclosing the remainder of the Advice, including above all those sections which set out and discuss the legal principles relied on as the basis for the strike. Without access to this information, the public and Parliament, will not be in a position to determine and/debate whether: (a) the Executive exercised its prerogative power to execute British citizens and another lawfully in the context of the Raqqa strike; and/or (b) any subsequent targeted killing overseas executed in reliance on the legal views expressed in that Advice would be lawful. Disclosure of the Advice is critical for the purposes of understanding the Government's policy on the use of such strikes as a tactical weapon in the future. Inevitably, there is an overwhelming public interest in

ensuring that that policy is shaped in a way that shows due deference to the law.

118. Finally, it may assist the Upper Tribunal to consider the disclosures which the United States Government – the UK’s closest ally, which faces similar threats and has an expansive targeted killing programme – has had to make of its analysis of the legality of using lethal drone strikes.
- a) The American Civil Liberties Union (ACLU), a nonpartisan, non-profit organisation whose stated mission is to defend and preserve the individual rights and liberties guaranteed by the U.S. Constitution and laws of the United States, have pursued three separate law suits under the United States’ Freedom of Information Act. One law suit sought information about the strikes that killed three Americans in Yemen, a second sought the legal and factual bases for the government’s use of drones to kill people overseas and the third requested information about the government’s targeted killing program, including the Obama administration’s Presidential Policy Guidance (PPG) under which the program operates.
  - b) As a result of the US courts’ decisions in the ACLU litigation, the U.S. government has been forced to disclose to the public significant information about the legal basis for its lethal strikes, and how it interprets and applies statutory, constitutional and international law to them. The legal memoranda disclosed contain the government’s analysis of legal frameworks, including, the use of force in self-defence under international law; the definition of the term imminence as a justification for the use of defensive force and international legal principles governing respect for other countries’ sovereignty.
  - c) Most notably, in the third law suit referenced above the District Court rejected the government’s blanket exclusion of privilege over the Presidential Policy Guidance – a document that sets out the legal and policy guidelines for lethal drone strikes away from battlefields. As a result, the government abandoned its sweeping claims of secrecy over the PPG and committed to releasing a redacted version of the document to the public. The government also promised to release less redacted versions of two Department of Defence reports discussing the government’s application of the PPG and its assessment of groups against which the United States is at war. Whilst the disclosures have not been wholly adequate, it is significant that the court rejected blanket bans on disclosing information articulated on national security grounds.

119. There is obviously a serious question as to why a more limitative approach should be adopted in our own jurisdiction.

#### **I. Other Litigation**

120. Mr Justice Charles, in his Case Management Directions of 1 March 2017 requested that I clarify my knowledge of “any contemplated or existing proceedings relating to the drones strike...of which she is aware and in which the information she has requested is or may be relevant and a claim for legal professional privilege could be made by the Respondents (the Crown)”.

121. I am not aware of any such litigation. RWUK originally contemplated bringing a judicial review to obtain the reasoning behind the Raqqa strike, but decided that these proceedings were the most appropriate forum for such a request. I am also aware that Caroline Lucas MP and Baroness Jones sent a letter before claim<sup>145</sup> to the Respondents in relation to the policy that had permitted the Raqqa strike to take place, but I believe that this was not pursued and it would seem likely that any such claim, if not issued by now, would be out of time. I am not aware of any other claims, contemplated or existing.

122. I in any event repeat the points made above about the risk of litigation in any event not being determinative in this case.

#### **J. Conclusions**

123. The Government’s statements and actions risk eroding long standing constraints on the use of lethal force, crystallised in the shadow of World War II. It is imperative that any such erosion is subject to detailed and informed public scrutiny. As a recent ‘Plea Against the Abusive Invocation of Self-defence as a Response to Terrorism’ signed by over 200 distinguished academics, states *‘The purpose of the [UN] Charter was to substitute a multilateral system grounded in cooperation and the enhanced role of law and institutions for unilateral military action. It would be tragic if, acting on emotion in the face of terrorism (understandable as this emotion may be), that purpose were lost’*.<sup>146</sup>

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<sup>145</sup> Letter from Caroline Lucas MP and Baroness Jones to the Rt Hon Michael Fallon [http://www.parliament.uk/documents/joint-committees/human-rights/Leigh\\_Day\\_letter\\_to\\_Defence\\_Secretary\\_230915.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Leigh_Day_letter_to_Defence_Secretary_230915.pdf)

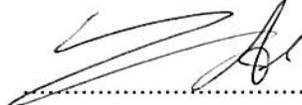
<sup>146</sup> ‘A plea against the abusive invocation of self-defence as a response to terrorism’ <http://cdi.ulb.ac.be/wp-content/uploads/2016/06/A-plea-against-the-abusive-invocation-of-self-defence.pdf> Signatories available here: <http://cdi.ulb.ac.be/wp-content/uploads/2016/06/Liste-prof-et-assistants-oct.pdf>

124. For all of the reasons I have sought to outline in this Statement, I invite the Tribunal to order the disclosure of all of the contents of the Advice which is not covered by an absolute exemption.

**Statement of truth:**

I believe that the facts stated in this witness statement are true.

Signed:



Yasmine Ahmed

Dated:

12 April 2017