

**IN THE FIRST TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
INFORMATION RIGHTS
BETWEEN:**

APPEAL REFERENCE: EA/2021/0035

CHRIS COLE

Appellant

- and -

INFORMATION COMMISSIONER

Respondent

- and -

THE MINISTRY OF DEFENCE

Second Respondent

WITNESS STATEMENT OF CHRIS COLE

I, Chris Cole of 7, Victoria Street, Shaftesbury, SP7 8AG say as follows:

A. Introduction

1. I am making this witness statement in Tribunal case EA/2021/0035 in support of my appeal against the Information Commissioner and Ministry of Defence (as Second Respondent).
2. The Information Commissioner upheld the refusal of the Ministry of Defence (MoD) to disclose the information sought in this case, arguing that to do so 'would be likely to prejudice the capability, effectiveness or security of any relevant forces' (Exemption 26(1)(b) of FOIA). The MoD also claimed exemption under Section 27 (International Relations) but the Information Commissioner did not consider this aspect.
3. The Commissioner concurred with the MoD's decision that the information was exempt from disclosure after undisclosed submissions and further information was provided by the MoD to the Commissioner. While I am not in a position to judge those submissions, I continue to believe there are legitimate reasons to doubt the conclusion drawn by the MoD and the Information Commissioner, and that the public interest in disclosure outweighs the potential risk said to arise from disclosure.
4. I appreciate the Tribunal is not necessarily expert in the use of armed Unmanned Aerial Vehicles (UAVs), or 'drones' as they are commonly called. The first part of my

statement therefore sets out some of the background as well as some of the legal and ethical issues surrounding their use (paragraph 10-36). Please note that throughout this statement I will use the term 'drone' or 'UAV' interchangeably. I am aware that the MoD prefers to use the term 'Remotely Piloted Air System' (RPAS). Nothing is intended by the use of the more commonly accepted terms.

5. Before I discuss these issues, I wish to inform the Tribunal on what basis I make these statements.
6. I have been researching the use of armed UAVs, and in particular those used by UK forces, since 2009. In June 2010 I founded Drone Wars UK, a small British NGO which undertakes research, education, and campaigning on the use of Unmanned Aerial Vehicles and the wider issue of remote warfare from a critical perspective. Drone Wars UK has become recognised internationally as a credible and reliable source of information on the use of drones and unmanned technology. The research and information produced by Drone Wars UK has been used by MPs, journalists, NGOs, lawyers, human rights organisations, campaigners, and the general public.
7. I have submitted evidence or made presentations on the British use of armed drones to several parliamentary committees including the Defence Select Committee, the Joint Human Rights Committee, the Committees on Arms Export Controls, the All-Party Parliamentary Group on Drones and the All-Party Parliamentary Group on Afghanistan. Drone Wars UK is a key civil-society partner of the All-Party Parliamentary Group on Drones.
8. In addition, I have written numerous articles and briefings on the issue and my research and commentary is frequently used in articles in national and specialist press. Recent examples include:
 - [UK would be prepared to launch Afghanistan drone strikes, says Wallace](#)
The Guardian, Sept 2021
 - [NATO spy drones used to monitor borders pose crash risk, warn experts](#)
The Telegraph, Feb 2021
 - ['Ninja bomb' could increase use of drone strikes, warn military experts](#)
The Telegraph, June 2020
 - [Record number of UAV shoot downs prompt new USAF tactics](#)
Flight Global, June 2020
9. I have also appeared as an expert on broadcast media to discuss the use of armed drones including on Newsnight, The Moral Maze, The Today Programme, British Forces Radio and Sky News.

A. Background: UK use of armed Reaper drones

10. The UK procured three US Reaper UAVs from the US company General Atomics in 2007 under 'urgent operational requirement' rules for use strictly within Afghanistan, with the first UK drone strike taking place there at the end of May 2008.¹ After a UK

¹ Craig Hoyle, 'UK cheers the Reaper UAV', *Flight International*, 16.06.08
<http://www.flightglobal.com/articles/2008/06/16/224622/uk-cheers-the-reaper-uav.html>

Reaper crashed in April 2008, additional Reapers were purchased bringing the number of Reapers owned by the UK up to five and then, in July 2014, to ten.²

11. In January 2014, as UK forces prepared to leave Afghanistan, the government confirmed that it intended to retain Reaper for operations beyond the Afghanistan conflict.³ In September 2014, following a request for help from the Iraqi government, British MPs debated a government motion to authorise the use of armed force against ISIS.⁴ As the government had, 12 months previously, lost a vote on undertaking air strikes in Syria, the motion made clear that such action would be confined within the borders of Iraq and that any use of force in Syria would be subject to a separate parliamentary approval.⁵
12. MPs approved the motion and UK air strikes against ISIS in Iraq began almost immediately with RAF Tornado's and Reapers deployed to the region. However, within six weeks of the vote, armed British drones were crossing the border into Syria, with intelligence gathered by the British drones used by the US-led Coalition forces to undertake strikes in Syria.⁶ [Appendix - Document 1: FoI response from MoD, 21 October 2015.] When questioned by the media about legal authorisation for such missions, the Prime Minister's official spokesman claimed it was because the flights did not amount to military action:

*"The prime minister and government have made clear that we would return to parliament for a separate decision if we were proposing to take military action. This is about intelligence-gathering."*⁷
13. It is difficult to accept the government's suggestion that flying armed Reaper drones over a sovereign country does not amount to 'military action'. Flights by Russian military aircraft, for example, that come near, but not within, UK air space incur not a political or diplomatic reaction, but a strong and rapid military response from UK military forces.⁸
14. The number of armed UK Reaper flights crossing into Syria gradually grew over the following months, from one per month in November 2014 to around one per day by June 2015. On 21 August 2015, a British Reaper drone targeted and killed UK citizen Reyaad Khan near Raqqa in Syria. Alongside Khan, his cousin from Aberdeen, Ruhul Amin, and a Belgian man known only as Abu Ayman al-Belgiki, were also killed. In

² 'MoD: More RAF Reapers Take To The Skies': Ministry of Defence Press Release 03.07.2014 <http://www.raf.mod.uk/news/archive/more-raf-reapers-take-to-the-skies-03072014>

³ Craig Hoyle, RAF ready for Reaper fleet boost, confirms expeditionary plan, Flight, 16 January 2014, <https://www.flightglobal.com/news/articles/raf-ready-for-reaper-fleet-boost-confirms-expeditionary-394929/>

⁴ Hansard 26 Sep 2014: Column 1255: <https://publications.parliament.uk/pa/cm201415/cmhansrd/cm140926/debtext/140926-0001.htm> The motion named 'ISIL' but the group has subsequently become widely known as 'ISIS' or 'Daesh'.

⁵ Syria crisis: Cameron loses Commons vote on Syria action, BBC News, 30 August, 2013, <https://www.bbc.co.uk/news/uk-politics-23892783>

⁶ Rowena Mason, "UK to fly military drones over Syria", *The Guardian*, 21 October 2014, <http://www.theguardian.com/uk-news/2014/oct/21/uk-to-fly-military-drones-over-syria>. See also FCO response to PQ from Andrew Rosindell MP, 23 Feb 2015 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-02-11/224326/>.

⁷ Ibid.

⁸ 'RAF Typhoons scrambled to monitor Russian aircraft approaching UK airspace', *RAF News*, 6 August 2021, <https://www.raf.mod.uk/news/articles/aircraft-in-uk-controlled-airspace/>

Parliament, David Cameron admitted that the strike was “the first time in modern times that a British asset has been used to conduct a strike in a country where we are not involved in a war.”⁹ Senior military officers acknowledged that the strike represented the ‘crossing of a Rubicon’.¹⁰

15. In his letter to the United Nations reporting the strike, the UK Ambassador argued the strike against Reyaad Khan was undertaken as part of the collective self-defence of Iraq as well as self-defence of the UK. The MoD insists, however, that the strike was not part of Operation Shader, the MoD’s operational name for the UK’s military support of Iraq against ISIS [Appendix - Document 2: Fol response from MoD, 23 March 2018].¹¹
16. In December 2015, a government motion proposed “taking military action, specifically airstrikes, exclusively against ISIL in Syria.”¹² [Note that ‘military action’ includes, but is not synonymous with, air strikes.] Parliament approved the motion and air strikes were officially extended into Syria. Over the next three and half years, UK Tornados, Reaper, and Typhoon aircraft participated in military operations against ISIS in Iraq and Syria, launching 1,925 air strikes by the end of 2018, in support of Iraqi and Syrian forces seeking to overcome ISIS.¹³
17. In March 2019, both Iraq and Syria officially declared victory over ISIS when the last of the territory held by the militants was overrun.¹⁴ While a number of countries participating in the US-led coalition to defeat ISIS have since ended armed air operations, the UK continues to undertake surveillance and strike missions, launching more than 130 munitions in more than 30 air strikes between April 2019 and September 2021.
18. Meanwhile, the UK has committed to doubling the number of armed drones in its inventory, contracting to buy the latest version of the Reaper drone, which the manufacturer, General Atomics, calls ‘SkyGuardian’ but which the UK has decided to call ‘Protector’.¹⁵ The commitment of the government towards remote and autonomous technology was highlighted in the recent Integrated Review of Security, Defence, Development and Foreign Policy. Prime Minister Boris Johnson told the House of Commons:

“There is big, big chunk of this package specifically dedicated to research and development in cyber, AI and drone warfare – all the warfare of the future. The

⁹ Hansard, 7 Sep 2015 : Column 28

<https://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm>

¹⁰ Peter Foster, RAF remote drone pilots facing real-world combat stress, The Telegraph, 9 November 2015 <http://www.telegraph.co.uk/news/uknews/defence/11984557/RAF-remote-drone-pilots-facing-real-world-combat-stress.html>

¹¹ See also Fol response to Chris Cole, 12 Nov 2015

https://dronewarsuk.files.wordpress.com/2015/11/20151112-foi2015-08518_mr_cole.pdf

¹² ISIL in Syria, Hansard Volume 603, 2 December 2015,

<https://hansard.parliament.uk/commons/2015-12-02/debates/15120254000002/ISILInSyria>

¹³ Figures compiled from quarterly Fol submissions. Reaper launched 464 strikes, Tornado, 842, Typhoon 619. More details at <https://dronewars.net/uk-drone-strike-list-2/>

¹⁴ Islamic State group defeated as final territory lost, US-backed forces say, BBC News, 23 March 2019, <https://www.bbc.co.uk/news/world-middle-east-47678157>

¹⁵ UK drone fleet to double in fight against IS, says PM, BBC News, 4 October 2015, <https://www.bbc.co.uk/news/uk-politics-34436917>

victors of the future will be those who are able to master data and new technology in the way that this package supports.”¹⁶

19. In ‘*Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy*’, published in March 2021, the government argues that the UK is in “a continuum of conflict” which requires “persistent global engagement and constant campaigning.” UK troops, drones and aircraft it says, “will no longer be held as a force of last resort, but become more present and active around the world, operating below the threshold of open conflict to uphold our values and secure our interests.”¹⁷

B: Concerns about the use of armed drones

20. Advocates of the use of armed drones often dismiss legal and ethical concerns about their use by insisting that there is no difference between unmanned drones and other armed aircraft. However, there are real and significant differences.
21. Firstly, and most obviously, they can be operated remotely, over very great distances, via satellite links. While the aircraft themselves are located near the point of use, once they are launched, control can be handed over to pilots thousands of miles away. Currently, RAF pilots based at Creech Air Force Base in Nevada and RAF Waddington in Lincolnshire operate the UK’s Reaper drone fleet, which is reportedly based at Ali Al Salem Air Base in Kuwait.¹⁸ This extreme remoteness, engendering what some call ‘risk-free war’, means that attacks can be undertaken with virtual impunity.
22. The second major difference between drones and traditional aircraft is persistence. Due to the lack of any crew on board, drones can remain airborne far longer than a piloted aircraft. A fast jet can remain in the air for only a certain amount of time before the crew become too fatigued to operate such aircraft. Current Reaper missions typically last between 12 and 20+ hours. Crews simply change shifts on the ground while the drone remains in the air. It is this greater persistence together with remote operating that is a real difference and is seen as an important advantage by the military.
23. ‘Remote persistence’ is a significant capability that appears to be having an impact on the resort to force (*jus ad bellum*) and the use of armed force (*jus in bello*). Advocates of this technology argue that ‘remote persistence’ enables drones to better comply with the Law of Armed Conflict (LOAC) during armed conflict. Nevertheless, time and time again we have seen drones mistakenly target civilians undermining such claims.¹⁹

¹⁶ The Integrated Review, Statement of the Prime Minister, 19 November 2020,

<https://hansard.parliament.uk/commons/2020-11-19/debates/CA347B2B-EE02-40DF-B5CE-1E8FAA07139E/IntegratedReview#contribution-E8C6762F-1935-4B89-B5AB-D3986AD79481>

¹⁷ Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy, March 2021, <https://www.gov.uk/government/publications/global-britain-in-a-competitive-age-the-integrated-review-of-security-defence-development-and-foreign-policy>

¹⁸ Sky News, The Financial Times, The Guardian, The Daily Mail and various defence press have all named Ali Al Salem as the RAF’s Reaper base in the Middle East although the MoD has not officially confirmed the location.

¹⁹ US admits Kabul drone strike killed civilians, BBC News, 18 Sept 2021, <https://www.bbc.co.uk/news/world-us-canada-58604655>

24. There are a number of concerns about the impact of armed drones, including how they transfer the cost of armed conflict from combatants on to civilians; are enabling and encouraging ‘forever war’ and seducing the public with the myth of ‘risk-free’ warfare. However, here I am here limiting myself here to two specific issues related to the information I am seeking. These are how drones can be said to be a) lowering the threshold for the use of armed force; and b) how the advent of drones has led to an increase in what has become known as extra-judicial or ‘targeted’ killing.

B.1 Lowering the threshold for use of armed force

25. In modern democracies, political leaders understand that there is a political cost to launching military intervention overseas. Whatever the legal arguments about whether a particular intervention is justified under international law or not, time and again polling has shown that the public do not like to see young service men and women sent overseas only to return in wheelchairs or coffins. The potential political impact of grieving families awaiting the returning funeral procession of those sent to fight overseas is a definite restraint on political leaders weighing up the option of whether or not to launch a possible military intervention. Take away that potential cost, by using unmanned systems and it makes it much easier to opt to use lethal military force. In 2013, British military planners circulated an internal discussion document on how to avoid ‘casualty aversion’ amongst the public by lowering the profile of military repatriation ceremonies, and an increased use of armed drones, mercenaries and Special Forces.²⁰
26. Senior military and political voices are recognise this danger. General Stanley McChrystal, former commander of US and NATO forces in Afghanistan, told a conference in London in 2015 that he believed the capabilities of drones make them more palatable to military decision-makers and “lower the threshold” for lethal force.²¹ Towards the end of his presidency, Barack Obama too seemed to accept this when he told CNN "It became so easy to use them without thinking through all the ramifications."²² The Ministry of Defence too, has recognised the issue, stating in a 2015 policy document, ‘*Future Operating Environment 2035*’:

“Increased use [of remote and automated systems] in combat and support functions will reduce the risk to military personnel and thereby potentially change the threshold for the use of force. Fewer casualties may lower political risk and any public reticence for a military response...”²³

27. The use of armed drones by US intelligence agencies to attack Al Qaeda and other groups in Yemen, Somalia and, in particular, Pakistan is cited as an example of how drones are lowering the threshold for resort to the use of armed force. As the US Task

²⁰ Ben Quinn, “MoD study sets out how to sell wars to the public”, *The Guardian*, 26 September 2013, <https://www.theguardian.com/uk-news/2013/sep/26/mod-study-sell-wars-public>. Note original discussion paper has been removed from MoD website.

²¹ Richard Norton-Taylor and Alice Ross, "RAF base may be legitimate target for Isis, says ex-Nato commander", *The Guardian*, 25 November, 2015, <https://www.theguardian.com/uk-news/2015/nov/25/raf-base-may-be-legitimate-target-isis-ex-nato-commander>

²² Nicole Gaouette, Obama on the future of terrorism after bin Laden raid, *CNN*, 3 May 2016, <http://edition.cnn.com/2016/05/02/politics/obama-terror-doctrine-bin-laden-raid/>

²³ Ministry of Defence, *Future Operating Environment 2035*, August 2015, p31-32, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607612/20150731-FOE_35_Final_v29-VH.pdf

Force on Drone Policy put it “the availability of lethal UAV technologies has enabled US policies that likely would not have been adopted in the absence of UAVs.”²⁴

28. The use of armed drones by British forces in Syria in 2014 and 2015 is also an illustration of how drones lower the threshold for the use of force. As discussed above, in September 2014, MPs authorised the use of British forces in operations against ISIS within the borders of Iraq. However, British Reaper drones very quickly crossed the border into Syria in order to assist and enable the US to undertake air strikes, which the government argued at the time, did not amount to a use of military force.
29. From mid-2015, the MoD began to argue that it was “illogical”²⁵ and “morally indefensible”²⁶ that UK forces could not undertake airstrikes against ISIS in Syria as well as Iraq. In August 2015, British drones operating in Syria undertook the targeted killing of Cardiff-born Reyaad Khan and also directly assisted in the US drone targeted killing in Syria of Junaid Hussain (August 2015) and Mohammed Emwazi (November 2015).²⁷ The fact that British drones were already flying missions in Syria, and had already launched one strike and assisted with others, was then used in part to persuade MPs and the public to support wider military action in Syria. A government motion to extend UK military action from Iraq into Syria was subsequently tabled and passed in December 2015.
30. A crucial question is whether the resort to armed force by the US against Al Qaeda in Pakistan, and UK operations and strikes against ISIS in Syria prior to the December 2015 parliamentary vote, would have occurred without the availability of armed unmanned drones. It is, in my opinion, probable that in both cases the technology itself had an impact on resort to force calculations. Given how these systems are changing use of force calculations, it is vital that there is transparency over the deployment of these systems.

B.2 Expanding ‘targeted killing’

31. Perhaps the most controversial use of armed drones has been their use for ‘targeted killing’ of suspects beyond the battlefield. Legal scholars define targeted killing as the deliberate, premeditated killing by a State of selected individuals who are not in their

²⁴ Recommendations and Report of The Task Force on US Drone Policy, The Stimson Center, April 2015, https://www.stimson.org/sites/default/files/file-attachments/recommendations_and_report_of_the_task_force_on_us_drone_policy_second_edition.pdf

²⁵ Martha Kearney interview with Michael Fallon MP, BBC Radio Four, 1 July 2015, <http://www.bbc.co.uk/programmes/p02w1vh3>

²⁶ Michael Fallon: ‘Morally indefensible’ not to bomb IS in Syria, BBC News, 6 November 2015, <http://www.bbc.co.uk/news/uk-34742361>

²⁷ “Cardiff jihadist Reyaad Khan, 21, killed by RAF drone”, *BBC News*, 7 September, 2015, <http://www.bbc.co.uk/news/uk-wales-34176790>. Kimiko De Freytas-Tamura, Junaid Hussain, ISIS Recruiter, Reported Killed in Airstrike, *New York Times*, 27 August 2015, https://www.nytimes.com/2015/08/28/world/middleeast/junaid-hussain-islamic-state-recruiter-killed.html?_r=1. Missy Ryan, U.S. strike believed to have killed ‘Jihadi John,’ Islamic State executioner, *Washington Post*, 13 November 2015, https://www.washingtonpost.com/world/national-security/us-drone-strike-targeted-jihadi-john-the-briton-linked-to-hostage-beheadings/2015/11/13/8d58595c-89df-11e5-be39-0034bb576eee_story.html

custody.²⁸ Where International Humanitarian Law (IHL) applies, the targeted killing of combatants may well be legal. Outside of IHL situations, International Human Rights Law (IHRL) takes priority, and lethal force may only be used when absolutely necessary to save human life that is in imminent danger.

32. There were two separate parliamentary inquiries following the UK's drone targeted killing of Reyaad Khan in August 2015. The Joint Human Rights Committee (JHRC) argued, following its inquiry, that the legal basis offered by the government for the strike was "confused and confusing."²⁹ The committee urged the government to clarify:
- the grounds on which it says that the Law of War applies to the use of lethal force outside an armed conflict;
 - its understanding of 'imminence' in relation use of force under the right of self-defence, and
 - the legal basis on which the UK takes part in or contributes to the use of lethal force outside armed conflict by the US or any other country.

In October 2016, following the government's response to the JHRC's report, the Committee stated that the Government had "ducked" these central questions.³⁰

33. At the end of April 2017, a heavily redacted copy of the Intelligence and Security Committee's (ISC) report into the intelligence basis of the strike against Khan was published.³¹
34. Even before the redactions, however, the Committee were refused access to what they describe as "central", "key" and "clearly relevant" documents on the strike against Reyaad Khan.³² In addition they were refused all access to information on the drone strikes conducted by the US in conjunction with the UK on Junaid Hussain and Mohammed Emwazi around the same time.³³
35. While the Committee appears to have done its best to scrutinise the intelligence basis of the UK's first drone targeted killing outside the battlefield, they faced clear resistance from the National Security Secretariat (NSS) and the Government. While it may be understandable that some information is deemed too sensitive to be publicly released, the very point of the ISC is that it is allowed to see such information in order for there to be proper and appropriate parliament scrutiny of government activities. As the Committee itself says in its report:

²⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Human Rights Council, May 2010, https://reliefweb.int/sites/reliefweb.int/files/resources/A38037358F1EF91B492577370006546B-Full_Report.pdf

²⁹ Joint Committee on Human Rights, The Government's policy on the use of drones for targeted killing, April 2016, <https://www.publications.parliament.uk/pa/jt201516/jtselect/jtrights/574/574.pdf>

³⁰ Government has ducked central question about lethal drone strike, Joint Human Rights Committee, 19 October 2016, <https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/drone-report-published-16-17/>

³¹ Intelligence and Security Committee, *UK Lethal Drone Strikes in Syria*, April 2017, https://b1cba9b3-a-5e6631fd-s-sites.googlegroups.com/a/independent.gov.uk/isc/files/20170426_UK_Lethal_Drone_Strikes_in_Syria_Report.pdf

³² *Ibid.* p3, p23

³³ *Ibid.* p2

“Without sight of the actual documents provided to Ministers we cannot ourselves be sure – nor offer an assurance to Parliament or the public – that we have indeed been given the full facts surrounding the authorisation process for the lethal strike against Reyaad Khan.”³⁴

36. In summary, two core concerns about the increasing use of armed drones are that they lower the threshold for the use of armed force (eroding the principle that armed force should only be used as a last resort) and are expanding the use of targeted killing beyond the battlefield. Given that parliament has been frustrated in its attempts to ensure proper scrutiny over the legal and intelligence basis for some strikes undertaken by the UK’s armed drones, the need for transparency and accountability over basic details of the deployment of the UK’s Reaper drones is vital.

C: The general public interest in transparency on deployment of armed drones

37. Some will no doubt argue that the UK should be able to deploy and utilise its military capabilities without making details of such operations public. However, most will recognise that it is in the public interest for there to be public and parliamentary oversight and accountability over UK military operations. This is an important characteristic of a democracy.
38. Before turning to the specifics of this appeal, I would like to draw the Tribunal’s attention to the report of the 2019 inquiry by the Public Administration and Constitutional Affairs Committee (PACAC) held into the role of parliament in authorising and scrutinising the government’s use of military force as it made a number of important conclusions and recommendations that I believe are relevant to this appeal [Appendix - Document 3: PACAC report: ‘The Role of Parliament in the UK Constitution: Authorising the Use of Military Force’, 6 August 2019].³⁵

C.1 The PACAC Inquiry

39. The Committee acknowledged that, by long-standing convention, the Prime Minister, together with the Cabinet, exercises the power to deploy military force on behalf of the Sovereign. However, the legitimacy of the Government’s exercise of this power is dependent on maintaining the confidence of House of Commons.

“The Prime Minister, together with the Cabinet, exercises the power to deploy military force on behalf of the Sovereign... It is the role of the House of Commons to scrutinise, analyse and ultimately approve or reject the Government’s policy and decisions. Nothing should compromise the ability of governments to use military force when our national or global security is threatened, but a clearer role for the House of Commons is necessary in order to underline the legitimacy of the use of military force, and to give the public confidence that the Government is being held to account.”³⁶

40. However, as the Rt Hon Lord Hague put it in his evidence to the Inquiry:

³⁴ Ibid. p24

³⁵ ‘The Role of Parliament in the UK Constitution: Authorising the Use of Military Force’, Public Administration and Constitutional Affairs Committee, HC 1891, 6 August 2019. Available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmpublicadm/1891/1891.pdf>

³⁶ Ibid. para 130

“The question is: what is the degree of scrutiny and accountability and control that Parliament is able to exercise over that [the power to deploy force]?”³⁷

41. The amount of scrutiny and accountability possible over the executive in this area is even more difficult where the government claims exception from the convention that prior authorisation should be sought before the deployment of military force. These claimed exceptions are where it could compromise the effectiveness of operations and the safety of British service men and women; to protect sources of secret intelligence; so as not to undermine the effectiveness or security of operational partners; and where the legal basis for action has previously been agreed by Parliament.³⁸

42. As the Committee stated:

“These questions are particularly relevant in relation to activities falling within the exceptions to the new convention that Parliament shall be consulted in advance of armed conflict, and in relation to the emerging challenges arising out of the changing nature of conflict.”³⁹

The Committee reported the oral evidence of Professor Gavin Phillipson:

‘Professor Phillipson told us that a “strong and clear role for Parliament acting as a check upon governmental decisions to use military force may be seen as particularly important in the United Kingdom” because the uncodified constitution means there are no formal checks and balances present as there would be in other countries. He pointed out that the royal prerogative is a “non-statutory executive authority that is defined in no authoritative constitutional text and which remains unclear in scope today”. Given that the courts have repeatedly declared decisions of the executive to deploy military force non-justiciable, Professor Phillipson thought that the check on the Government’s power “must be a parliamentary check”.⁴⁰

43. While the Committee strongly recognised the principle that there were exceptions to consensus that the Government is expected to seek prior authorisation from the House of Commons before taking military action, it also recognised what it called ‘a legitimate concern’

‘that the Government will remain the sole arbiter of what constitutes military action such as would require parliamentary approval under the post-2003 convention; what the exceptions to the convention are; and whether the planned military action falls under one of these exceptions.’⁴¹

As the committee made clear:

‘This is of particular importance in respect of clandestine operations and other areas of sub-conflict confrontation which are becoming much more frequent, and

³⁷ Ibid. para. 27

³⁸ The Government set out its view to the Committee on four areas for taking military action without prior consultation in Parliament, although other witnesses raised concerns that they were so wide in scope that it could render the convention to consult parliament meaningless. See Para.58.

³⁹ Ibid. para 84

⁴⁰ Ibid. para 31

⁴¹ Ibid. para 93

*this includes instances when Parliament may not even be notified of actions that could quickly escalate into full conflict.*⁴²

And:

*'The increasing frequency and importance of sub-conflict confrontations highlighted throughout the evidence poses new challenges both for the Government and Parliament. While we accept that much of this would not, and should not, be covered by the existing convention on prior parliamentary approval, we do not accept the view of the Minister for the Armed Forces that these are not issues for Parliament. On the contrary, it is imperative that the House of Commons considers how it can effectively fulfil its duty to hold the Government to account in relation to foreign policy and defence issues.'*⁴³

44. In relation to the use of drones and other emerging military technology in this context, the Committee agreed:

*'Developments in the nature of conflict highlight the need for both the Government and Parliament to adapt rapidly to new challenges. We support the Government's view on the importance of retaining flexibility in the decision-making process so that governments can react and adapt to as yet unknown challenges. However, in a democracy such executive flexibility must be subject to democratic scrutiny. The challenges posed by the changing nature of conflict must be taken seriously.'*⁴⁴

*'We are persuaded, for example, that the principle of how special forces and drones are utilised should be considered by the House, even if specific instances of deployment cannot be debated openly. This would both hold the Government to account for its general policy and give the Government guidance in relation to the types of policy which the House of Commons would, in principle, tolerate and support.'*⁴⁵

45. In its conclusion, the Committee stated:

*"It is clear to us that strong scrutiny of Government leads to better decisions. This applies as much to the decisions and policies on military action, as it does to any other area of Government policy and decision-making."*⁴⁶

D. The public interest in disclosing information about the deployment of UK armed drones beyond Operation Shader

46. Due to the way that remote armed technology is changing the use of armed force, and the consequent implications for peace and security I believe it is very important that there is proper public and parliamentary scrutiny over the use of these systems. In order to better understand how they are being used, I regularly submit Freedom of Information (FoI) requests to the MoD about the UK's use of armed drone on behalf of Drone Wars UK with the aim of publishing the findings to the public and media.

⁴² Ibid. para 65

⁴³ Ibid. para 96

⁴⁴ Ibid. para 117

⁴⁵ Ibid. para 119

⁴⁶ Ibid. Conclusions and Recommendations No. 17, p46

D.1 Attempts to seek disclosure in this matter

47. On 2 January 2020, I submitted an FoI request to the MoD, as I do each quarter, seeking statistical details about the use of Reaper and other armed RAF aircraft. As part of this I asked:

'Please can you detail how many sorties have RAF Reaper aircraft flown outside of Operation Shader during 2019 and, if any, where these sorties occurred?'

The MoD have refused to provide the information, citing Section 26 (1)(b) and Section 27 (1)(a) and (c) of the FoI Act.

48. Previously, the MoD has regularly provided details about where UK Reapers were operating in response to parliamentary questions or FoI requests. A selection of such responses is attached. [Appendix - Document 4: Selection of previous MoD responses to parliamentary questions and FoI requests detailing where UK Reapers were being operated]. Of particular note is the response to my FoI request of 21 February 2018 asking about the number of Reaper missions outside of Operation Shader, to which the MoD responded simply and straightforwardly with the answer 'one'.
49. Following media coverage of the MoD's refusal,⁴⁷ Baroness Stern, Baroness Bennett and Ed Davey MP, submitted questions in the House of Lords and the House of Commons seeking some details about the operations of Reaper aircraft outside of Operation Shader:

Baroness Stern (9 June 2020) : To ask Her Majesty's Government whether RAF Reaper drones have been used for operations outside of Operation Shader over the past 12 months; and if so, for what purpose they were used and where? ⁴⁸

Baroness Bennett of Manor Castle (9 June 2020): To ask Her Majesty's Government whether RAF Reaper drones have been operated outside Operation Shader; if so, why; and whether such operations took place under independent UK control? ⁴⁹

Ed Davey MP (11 June 2020): To ask the Secretary of State for Defence, if he will list the countries that RAF Reaper drones are being deployed in outside of those of Operation Shader; and if he will make a statement? ⁵⁰

50. The MoD refused to give details, with all questions getting the same reply:

"REAPER is an intelligence, surveillance and reconnaissance platform. We do not comment on intelligence matters and I am therefore withholding the

⁴⁷ Jamie Doward, Ministers refuse to reveal target of new RAF killer drone missions, *The Observer*, 6 Jun 2020, <https://www.theguardian.com/world/2020/jun/06/ministers-refuse-to-reveal-target-of-new-raf-killer-drone-missions>

⁴⁸ HL5486, tabled on 9 June 2020, <https://questions-statements.parliament.uk/written-questions/detail/2020-06-09/hl5486>

⁴⁹ HL5457, tabled on 9 June 2020, <https://questions-statements.parliament.uk/written-questions/detail/2020-06-09/hl5457>

⁵⁰ HC58612, tabled on 11 June 2020, <https://questions-statements.parliament.uk/written-questions/detail/2020-06-11/58612>

information as its disclosure would or would be likely to prejudice the capability, effectiveness or security of the Armed Forces.

51. Baroness Stern submitted two further questions on this matter:

Baroness Stern (22 Jul 2020): To ask Her Majesty's Government, further to the Written Answer by Baroness Goldie on 18 June (HL5486), whether it is their policy not to answer questions about the deployment of RAF Reaper drones; and if so, when this policy was agreed? ⁵¹

Response: MoD Minister Baroness Goldie (30 July 2020): There is no policy to not answer questions about the deployment of RAF REAPER drones. However, there is a long-standing policy not to comment on operational matters where the disclosure of information would increase the risk to intelligence and operational security.

Baroness Stern (9 Nov 2020): To ask Her Majesty's Government, further to the Written Answer by Baroness Goldie on 30 July (HL7182), whether RAF drones used on operations outside of Operation Shader are being used in support of NATO operations or missions.⁵²

Response: MoD Minister Baroness Goldie (18 November 2020): REAPER is an intelligence, surveillance and reconnaissance platform. We do not comment on intelligence matters and I am therefore withholding the information as its disclosure would or would be likely to prejudice the capability, effectiveness or security of the Armed Forces.

52. Baroness Stern has submitted a statement outlining her reasons for seeking transparency in this matter in support of my appeal. Her statement is attached [Appendix - Document 5: Letter and Statement from Baroness Stern, 12 October 2021].
53. On 24 July 2020, Clive Lewis MP wrote directly to the Defence Secretary, Ben Wallace seeking further information about the use of UK Reaper drones outside of Operation Shader. A statement from Clive Lewis outlining his reasons for seeking transparency in this matter along with copies of correspondence with the Defence Secretary is submitted separately.

D.2 Examining the public interest in favour of non-disclosure

54. Both Section 26 and Section 27 of the FoI Act require a public interest test to be undertaken, and I understand that the public interest in favour of disclosure must be balanced by the suggested public interest in non-disclosure. This balance is rightly the focus of the Tribunal. I have not been made fully aware of the reasons for non-disclosure and therefore am unable to challenge these reason in detail, relying on the Tribunal to examine the validity of the MoD's arguments. However I would make the

⁵¹ HL7182, tabled on 22 July 2020, <https://questions-statements.parliament.uk/written-questions/detail/2020-07-22/hl7182>

⁵² HL10122, tabled on 9 November 2020, <https://questions-statements.parliament.uk/written-questions/detail/2020-11-09/hl10122>

following comments about the MoD's public interest arguments before turning to the public interest in disclosure.

55. In her Decision Notice, the Commissioner argues that the information provided by the MoD leads her to conclude that the information sought "risks undermining the capability and effectiveness, and ultimately the safety of, British armed forces." However, it is hard to understand this.
56. Releasing a) the number of UK Reaper sorties that took place in 2019 outside of Operations Shader and b) where they occurred, cannot on the face of it raise such a real risk. If, for example, the answer to the first part of my information request is that there were 36 such sorties, it is very hard to understand how that information in and of itself could be a "risk to the lives of sensitive and protected individuals" even if it is put alongside data about the number of Reaper sorties undertaken as part of Operation Shader. It is hard also to see how such broad locational detail as the name of a country or global region (such as 'The USA' or 'North Africa' or 'The Middle East') would raise the severe risk claimed.
57. In late 2014 and 2015, when the MoD deployed Reaper drones for surveillance missions within Syria before parliamentary approval, the MoD released sortie numbers and locational detail (i.e. country of operation) without any argument that such details were exempt under Section 26 or Section 27. Again, without seeing all submissions it is hard to understand why such details are refused now in, what is on the face of it, similar circumstances.
58. In its open response to my Grounds of Appeal, the MoD highlights at paragraph 30ff several points which it argues shows the public interest in favour of non-disclosure in relation to Section 26.
59. At paragraph 30b it is argued that operation of Reaper in the future "*may* [emphasis added] depend on a greater degree of public ambiguity." It is then argued that because of this possible future need, it is important to "retain a degree of ambiguity regarding the full extent of RPAS operations now."
60. In other words, it is being argued that because of a possible need for 'ambiguity' in the future, parliament and the public must accept that information about current operations should not be released. I would argue that that simply does not follow and is contrary to the principles underlying the FoI Act. Firstly, decisions about whether to release or not release information about operations in the future is not constrained by decision about levels of secrecy around current and separate Reaper operations. Decisions should be made on a case-by-case basis. Further, the information requested, does allow for ambiguity about the employment of Reaper. Statistical data about annual number of sorties and/or broad locational detail, limited to country or region of the globe, allows plenty of ambiguity about purpose to which Reaper is being put to while allowing appropriate oversight.
61. At paragraphs 30c - 30e, the suggested dangers of the 'mosaic effect' are raised. This, in many ways, is a rather broad and vague argument against the public right to know. Any and all information released by the MoD, '*may*' or "*might*" (paragraph 30e) "assist adversaries with their understanding of military activities. Again, I would urge the Tribunal to question whether the information under question is actually capable of

allowing “a sophisticated adversary to improve its understanding of the capabilities of the platform and the UK’s Tactics, Techniques and Procedures (“TTPs”).”

62. At paragraph 30f, a rather disturbing argument is raised. The MoD suggests that refusing to disclose the information sought “enables adversaries tacitly to ignore the activities of the UK, if any, without being forced to respond (potentially in an escalatory way).” This suggests that the MoD is comfortable with adversaries being aware of current UK Reaper deployments and operations, while arguing the British Members of Parliament and the public should be kept in the dark. This, it suggests, allows the avoidance of “unnecessary confrontation”. What it is actually avoiding is parliamentary and public scrutiny of these operations.

63. At paragraph 30g, the MoD argues that if it were to release information about “aspects of Reaper activity”

“this in future may highlight or be suggestive of the employment of broader military capabilities. This, in turn, may provide an adversary with indications and warning of wider UK military activity and/or UK military presence.”

Again, the suggestion that release of information about current operations ‘may’ impact on operations at some time in the future is tenuous. Such questionable claims about possible harm are hard to reconcile with the argument by MoD that the release of the requested information ‘would’ prejudice rather than ‘would be likely to’.

64. In my opinion, the MoD’s claims as to the potential risk to UK and allied forces by the release of this information needs to be rigorously and critically tested by the Tribunal. There is a real danger that once the idea of a risk to British and/or allied force’s lives is raised - no matter that it is caveated with words such as ‘possible’ or ‘may’ or ‘could’ - it is exceedingly difficult to challenge. This is not by any means an argument that the MoD is acting in bad faith here. Rather, I am arguing that it is surely right that such claims are thoroughly examined in order to ensure the effectiveness of the FoI process.

65. Certainly, information of the type which the MoD previously argued should be exempt under Section 26 due to the risk of prejudice to UK and allied forces is now routinely released without any such harm. For example, information I requested about ‘the circumstances of weapon launches from UK Reaper drones’ was refused in 2009 under Section 26.⁵³ This refusal was then upheld by the ICO on the basis of the MoD’s Section 26 submissions. However, the MoD now routinely releases exactly the type of information I requested (details of the circumstances around launches of weapons from Reaper) without any resulting prejudice.⁵⁴

66. With regard to the claimed exemption under Section 27, almost no information has been advanced in open as to how the information sought causes prejudice relevant to international relations. At paragraph 43 of its response to my Grounds of Appeal, the MOD argues, in a general sense, that the UK’s partners value ‘discretion’ and that disclosure of the information sought “would reduce partners’ willingness to cooperate with the UK.” It goes on to argue, again in a general way, that “maintaining trust in

⁵³ Refusal of Chris Cole FoI Request dated 12 December 2009: <https://dronewars.net/wp-content/uploads/2020/06/20091221-Response-FOI-Cole-26112009-155918-002.pdf>. Circumstances of launches of weapons from UK Reapers now routinely released. See <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list>

⁵⁴ See for example <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/raf-air-strikes-in-iraq-and-syria-april-2019-to-december-2019>

relationships with other states is exceptionally important” and that disclosure of information sought would “undermine mutual trust”. Release of the information I requested, it argues would harm relations and adversely affect the interests of the UK abroad. No detail or explanation about how or why this would occur in relation to the specific information sought is given or suggested.

D.3 The public interest in favour of disclosure

67. I believe that there are two separate, but related, issues of public interest in favour of the disclosure of the information sought:

- a) Firstly, it is greatly in the public interest that there is public understanding and parliamentary participation in decisions to deploy Reaper drones;
- b) Secondly, it is in the public interest for some transparency about the specific deployment of Reaper covered by my information request, to enable public and parliamentary accountability.

D.3.1 Public Interest in disclosure of information about deployment armed drones

68. With regard to the public interest in transparency about the deployment of armed drones in general, I would argue that it is strongly in the public interest to have proper parliamentary and public oversight over military operations. If military deployments are undertaken in secret - without at least some information and underlying rationale for such operations being made available - it is hard to argue that there is proper civilian oversight and accountability. While it is undoubtedly easier for governments to accept public oversight and parliamentary accountability over operations that are uncontroversial, it is where deployments are controversial and oversight is contested that transparency particularly matters.

69. Transparency around the deployment and use of armed drones is particularly important as I have tried to outline above. Due to the way drones are lowering the threshold for the use of force, increasing the use of targeted killing and transferring the cost of armed conflict from combatants to civilians, it is vital that at least some information is released when these systems are deployed.

70. In modern times, conflict has moved beyond the realms of the traditional battlefield and deployment of large numbers of armed forces personnel. Today's warfare primarily consist of counterterrorism and counter-insurgency operations often involving the deployment of drones and utilising their capacity for surveillance and armed strike. Counterterrorism and counter-insurgency operations, often conducted among the general populace and against those not in military uniforms, are manifestly more dangerous to civilians. They also erode the traditional distinction between wartime and peacetime, blurring the legal framework under which military operations are carried out, that is International Humanitarian Law (IHL) vs International Human Rights Law (IHRL). Scrutiny of the deployment of armed drones is therefore vital to in order to support a rules-based international order and to defend democratic values.

71. While it may be argued that drone surveillance operations are less worthy of transparency than those used to carry out armed strikes, it needs to be remembered that surveillance sorties can be turned into strike missions at the press of a button.

The deployment of UK Reapers into Syria in 2014/15 were for surveillance only, until they were used to undertake the targeted killing of Reyaad Khan.

72. The lack of transparency and oversight over the deployment of armed drones was a key issue in the most recent report (2020) on the use of armed drones by the (now former) UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard. Condemning violations of international humanitarian and human rights law in some drone operations, she asserted that "the lack of transparency, and accountability, about the extent of armed drones' operations and consequent civilian casualties is the result of State policies and legal loopholes."⁵⁵ She went on:

"Drones sit at the intersection of several oversight regimes, but, being an intelligence asset, they somehow fall between them. With few to no risks involved for those directing or operating drones, including little risk of legal accountability, "the typical decision-making barriers to the use of force become eroded ... because they do not attract 'the public scrutiny that a troop deployment invites'", as then US President Barrack Obama conceded in May 2013 . In general, at the domestic level, there seems to be many loopholes by which to avoid scrutiny, not the least because the matter can fall within the remit of many agencies but under the responsibility of none."⁵⁶

73. While I of course accept there are times when operational sensitivities prevent a full disclosure of information, that in and of itself should not provide carte blanche for non-disclosure of any information about the deployments of these systems as the MoD seems to seek.
74. It should also be understood that by providing timely and accurate information on the deployment and use of armed drones, states can counter the dissemination of deliberate misinformation, inaccurate information and garner public trust in value of particular military deployments.

D.3.2 Public interest in disclosure about this specific deployment

75. Separate from arguments about the public interest in transparency about the deployment of armed drones in general, I would argue that there is, in addition, public interest in disclosure of information about the deployment covered by this specific information request. The fact that the MoD has deployed Reaper drones on an operation outside of Operation Shader without the knowledge, let alone approval of parliament or the public is very significant. There is weighty public interest in some information being disclosed in order to promote transparency and accountability over decisions and spending related to this deployment.
76. Until now, as far as parliament and the public is aware, Britain's Reaper drones have always been deployed on operations that are in the public domain, that is Operation

⁵⁵ Agnes Callamard, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the UN Human Rights Council (A/HRC/44/38), 15 June 2020. Available at https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_38_AUV.docx

⁵⁶ Ibid. para 24

Herrick (Afghanistan) and Operation Shader (Iraq and Syria). The exception to this – the targeted killing of Reyaad Khan which the MoD says was outside of Operation Shader – was reported directly to parliament by then Prime Minister, David Cameron.

77. The decision to deploy UK Reapers on a new mission then, particularly one about which the government refuse to disclose any information, is highly significant and raises a great many questions, not least about the very purpose of the deployment. Is it being conducted in co-operation with the state in which it is being conducted? Is it being conducted in co-operations with other states? Which states or parties are being given access to intelligence obtained from this deployment? What safeguards are in place in to endure that deployment complies with all relevant international treaty and legal obligations? What are the legal risks to UK personnel conducting these operations outside of parliamentary approval?
78. While any response to my information request will not answer these wider questions, it will confirm the deployment. There is a great deal of public interest in understanding, at least broadly, the scope of UK Reaper operations outside of Operation Shader. Basic statistical information will enable parliament and the public to broadly gauge the level of use of Reaper outside of Shader. A broad-brush figure for the number of sorties undertaken during 2019, and/or their location by country or global region, as my request seeks, will enable some scrutiny and oversight, without revealing detailed information.
79. Without proper oversight and accountability, secret deployments such as this potentially draw us down the rabbit hole of unaccountable military operations which can quickly spiral out of control and lead to violent confrontation. The public interest in preventing such incidents is significant.

E. Concluding remarks

80. In a submission to Public Administration Committee's inquiry 'Learning Lessons from the Iraq Inquiry', the then National Security Adviser, Sir Mark Lyall Grant, highlighted that the Chilcot Inquiry found that preparation for military endeavours

"needs to involve real challenge from inside and outside government, testing of assumptions, and a broad range of evidence-based options which highlight the risks, and ways to mitigate them."⁵⁷

81. Keeping details of military deployments such as that covered by my information request, frustrates at a fundamental level this important lesson learned from the invasion of Iraq highlighted by the Chilcot Inquiry. It is simply not possible for there to be a challenge to the assumptions behind the deployment either from inside or outside the government if the very fact of the deployment is kept secret even from parliamentarians.

⁵⁷ Annex One: Learning Lessons from the Iraq Inquiry: The National Security Adviser's Report, 1 January 2017, 'Lessons still to be learned from the Chilcot inquiry: Government Response to the Committee's Tenth Report', <https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/708/70803.htm>

82. I believe that the Tribunal needs to reassess the judgement of the prejudice that would likely arise from disclosure as well as giving proper weight to the public interest in favour of disclosure. Although I not been allowed to see all the submissions, I believe that the potential for harm by the release of this information has been given too much weight. In other words, the suggestion that the release of the information “risks undermining the capability and effectiveness, and ultimately the safety of, British armed forces” needs to be critically assessed.
83. At the same time, I believe that the public interest in the disclosure of the information sought, in that it would enable a measure of proper parliamentary and public oversight over the deployment of UK Reaper drones, has not been given significant weight.

List of documents in Appendix

- Document 1: Letter from MoD, 21 October 2015 (UK Reapers armed when entering Syria).
- Document 2: Letter from MoD, 23 March 2018 (Khan strike not part of Op. Shader).
- Document 3: Public Administration and Constitutional Affairs Committee: *‘The Role of Parliament in the UK Constitution: Authorising the Use of Military Force’*, 6 August 2019.
- Document 4: Selection of previous MoD responses to parliamentary questions and Fol requests detailing where UK Reapers were being operated.
- Document 5: Letter and submission from Baroness Stern.

I believe the facts in this statement are true:

Chris Cole

A handwritten signature in black ink that reads "Chris Cole". The signature is written in a cursive style and is underlined.

Dated:

29th October 2021