Reflections on the UK High Court Decision on arms sales to Saudi Arabia

Introduction

The 10 July High Court Decision to reject the legal challenge by Campaign Against Arms Trade (CAAT) regarding arms sales to Saudi Arabia for use in the Yemen conflict was a huge disappointment, and devastating for the people of Yemen.

The Court did not however address the core concern that brought about this legal challenge: the clear risk that UK arms exports to Saudi Arabia might be used in Yemen in the commission of serious violation of international humanitarian law (IHL). As was feared, the Decision turned instead on *procedural* matters, on whether government processes were rigorous enough and whether the Secretary of State was "rationally entitled" to reach the conclusions that he did (para. 210). Beyond that, the Court was not willing to second-guess the Government.

The Court Decision does not change the fact that the situation for Yemenis is dire, and that the UK government needs to immediately suspend the transfer of any arms that might be used by any participant in this conflict and push instead for a political solution.

But in explaining its Judgement, the Court raised, or ignored, some issues in ways that were at the very least surprising, and which it is hoped might be subject to further consideration should the Decision be appealed. These include:

- 'double-tapping' as a tactic of the air campaign
- the concept of 'clear risk'
- the relative merits of investigations by external experts, UN Panels and the Joint Incident Assessment Team (JIAT)
- the lack of co-operation of the Coalition and the JIAT with other, independent investigators and interested parties
- the value to be placed on Saudi declarations of good intention and good conduct
- the use of cluster munitions
- 'dynamic targeting'
- the concept of 'finely balanced' decisions.

Conflict in Yemen

The escalation of the Yemen conflict in March 2015 has devastated what was already an extremely poor country facing myriad developmental and political challenges.

All sides to this extremely complex conflict stand accused of committing terrible violations of international law. The UK Government has been providing political and military support to just one side—the Saudi Arabia-led coalition (the Coalition)[1]—and so it was with respect to the UK-Saudi relationship that CAAT launched its legal challenge.

[1] The Coalition has for most of the campaign comprised Bahrain, Egypt, Jordan, Kuwait, Morocco, Qatar, Saudi Arabia, Sudan and UAE. Qatar's membership was terminated on 5 June 2017.

UK support for Saudi Arabia and the Coalition is premised on the request by the internationally-recognised President of Yemen, Abdrabbuh Mansur Hadi, for military support from the Gulf Cooperation Council and the League of Arab States, and on UN Security Council Resolution 2216. In addition, Government Ministers have on numerous occasions referred to Houthi incursions across the border with Saudi Arabia and Saudi casualties as rationale for their support. The central issue here, however, is not whether Saudi involvement in Yemen is legitimate, it is that Saudi *conduct* is unacceptable and has been in repeated breach of international law.

The air attacks by the Saudi-led Coalition have been responsible for the majority of direct civilian casualties. But much more than that, air attacks have played a huge part in destroying Yemen's civilian infrastructure. Schools, hospitals, water treatment, energy generation, markets, factories, port facilities—all have been subject to repeated attack and devastation, with the Coalition playing its full part. All sides have also been active in preventing desperately needed supplies from reaching Yemeni civilians, for example by hindering access through the port of Hodeida. 17 million Yemenis (out of a total population of 27 million) are now food-insecure. The consequences of all this continue to escalate: Yemen has been bombed, beaten and blockaded to the brink of famine and economic collapse, and into a fully-fledged cholera epidemic. Even when the war ends, restoring life in Yemen to some semblance of normality will be a mammoth undertaking.

The UK and the conflict

The part the UK has played in the Yemen conflict has been an awkward combination of the incoherent and the shameful.

Since the conflict began on the one hand the UK has been among the most generous in providing aid to the victims of this violence. Last year, the UK provided more than 1 million Yemenis with emergency humanitarian assistance. UK funding for Yemen for 2017-18 currently stands at £139m, and the UK is helping fund 1 million cholera vaccines for use in Yemen. The UK Government has repeatedly stressed that the only way out of the current situation is through political means; that there is no military solution to the conflict. And yet, at the same time, it has provided political cover to the Saudi Government's opposition to international efforts to establish a properly independent investigation into allegations of international law violations; it has ridiculed the findings of the UN Panel of Experts on Yemen where these were critical of the Saudi-led air campaign. But most importantly the UK Government has encouraged and supported the Saudi war effort by authorising the sale to the Royal Saudi Air Force (RSAF) of billions of pounds worth of fighter aircraft and their components and over a billion pounds worth of bombs for those aircraft. The UK has moreover confirmed the use by the RSAF of UK-sourced aircraft and bombs in the conflict. The UK is giving aid worth millions of pounds to ameliorate a conflict that it is at the same time supporting and enabling through *inter alia* the supply of billions of pounds worth of arms.

The Judgement

The argumentation in the Judgement raised a number of concerns, in terms of both what was discussed and what was not.

Central to the case was an examination of whether the Government was in breach of its obligation as set out in Criterion 2c of the UK's Consolidated EU and National Arms Export Licensing Criteria to "not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of IHL." But conspicuous by its absence was a meaningful reflection on what is meant by 'clear risk', a concept which must virtually by definition be at the heart of the risk assessment the Government is required to undertake before permitting any arms transfer. At certain points, however, the Court appears to imply this equates to a very high level of certainty in a way that runs counter to any common understanding of the term 'risk'.

For example, the Court notes that "a significant proportion of incidents" listed on the UK Ministry of Defence 'Tracker'—a database which monitors IHL violation allegations made by international organisations, other governments, the media and NGOs etc.—"did not refer to a 'legitimate military target'. This does not mean, however, that there was *in fact* no 'legitimate military target'" (para. 110, emphasis added). This lack of 'fact' appears to carry great weight with the judges, but this is very different to saying there was no 'clear risk'. As at 13 January 2017 the Tracker had on record 251 potential incidents of concern, which cumulatively could be seen as containing the grounds for a significant level of risk, and which would therefore seem to merit in-depth analysis of these incidents, an analysis which the Government acknowledges it has not undertaken.

Also absent was any reference to Coalition 'double tapping', i.e. the practice of launching delayed follow-up attacks so as to hit rescuers, a tactic which immediately raises serious questions regarding international humanitarian law and which the UK has described as a possible war crime in the context of Russian and Syrian-regime attacks in Syria. While the frequency of the use of this tactic by the Coalition is not clear, there is little dispute that it has been used on a number of occasions, for example in the Great Hall funeral bombing in October 2016, which according to the UN Panel of Experts on Yemen killed 132 people and injured a further 695.

The Court's position on the Coalition's decision to designate the whole of Sa'dah city and the Maran region as military targets was also perplexing. The Judges appeared satisfied that the Coalition, by putting the population "on notice through social media and leaflet drops to evacuate prior to military action", had acted "in accordance with … IHL [which] requires adequate advanced warning to be given to civilians who may be affected by military attacks" (para 141). This runs counter to widely-held views, expressed for example by the UN Panel of Experts, that the notice given was *in*adequate, due to a number of impediments such as the short period of the warning before attacks (as little as only one or two hours), high level of illiteracy among the population, and impediments to evacuation such as fuel shortages.

In general, the High Court Judgement appears to place a great deal of faith in the Saudis' own statements about their good faith, good intentions, good policy, good practice and commitment to compliance with international humanitarian law—indeed the judgement quotes from and discusses, approvingly, Saudi declarations on these subjects at length.

The Decision appears to assign significantly more weight to Saudi claims of Houthi incursions and attacks than it does to claims by others of Saudi violations. The Saudi claims, which seem to be accepted by the Court at face value, are set out in a section of the Decision entitled

"BACKGROUND—The conflict in Yemen" (paras 39-45), whereas the widely-recognised consequences of Coalition action do not appear in this section. This chimes with the narrative that Saudi behaviour is basically defensive and thus justified, and that instances of civilian harm in Yemen by Saudi Arabia should be assessed in this context. Any claims of Coalition violations or misconduct appear within the context of the Claimant's arguments, rather than as generally acknowledged as true. While it is entirely proper that these should not simply be accepted at face value by the Court, the comparison with the more 'relaxed' unquestioning attitude of the Court to Saudi Arabia's own claims is disconcerting.

Joint Incidents Assessment Team

One area in particular where the Judgement displays an inexplicable level of confidence is in the work of the Joint Incidents Assessment Team (JIAT), a body established by the Coalition to act as its own investigator and judge with regard to allegations of misconduct. No significance is placed by the court on this clear and fundamental conflict of interest, nor on the fact that JIAT was not set up until January 2016, almost a year after the aerial campaign and the violations began and a considerable time after the most significant UK export licences were approved (i.e. seven months after a licence was granted for military aircraft and related items worth £1.7 billion and five months after a licence was granted for £990 million of bombs, for both of which the end-user was the RSAF). This questionable timing is not considered at all, while obvious doubts around the quantity and quality of JIAT's work are largely ignored. This is despite the fact that, by the end of 2016, more than one full year after having been established, JIAT had investigated only 14 cases, or just 5 per cent of the 251 potential incidents recorded by the Tracker as at 13 January 2017. At the time of writing, it appears the total number of JIAT investigations may still only be around 20.[2]

The nature as well as the extent of JIAT's work has been subject to significant criticism.

In letters written on 13 January 2017 and 16 January 2017, Human Rights Watch (HRW) and Amnesty International respectively and independently took issue with JIAT's findings. Both letters challenged JIAT in general terms with regard to issues such as such as mandate, transparency, impartiality, and independence. Both letters also took issue with JIAT's ways of working and conclusions as they related to specific incidents. Both letters asked follow-up questions on these subjects. As at 17 July 2017 JIAT had not responded to either letter.

The most recent (January 2017) report of the UN Panel of Experts on Yemen, which was not referred to in the Court decision, carried out detailed investigations into 10 air strikes that it identified as leading to "at least 292 civilian casualties, including at least 100 women and children" and the destruction of "three residential buildings, three civilian industrial factory complexes, a hospital and a marketplace" (para. 120).

The Panel, "[i]n eight of the 10 investigations … found no evidence that the air strikes had targeted legitimate military objectives. For all 10 investigations, the Panel considers it almost certain that the

[2] Compiling comprehensive data on the workings of JIAT in 2017 is difficult, as the work of JIAT is largely opaque, which of itself should itself raise doubts about JIAT's *modus operandi* . The Saudi Press Agency releases occasional press releases on the work of JIAT, however it is extremely hard to construct anything approaching a coherent overall picture of JIAT's work from these releases.

coalition did not meet international humanitarian law requirements of proportionality and precautions in attack [and] that some of the attacks may amount to war crimes." (para. 127)

The Panel also noted that "[n]one of the member States comprising the coalition that operated air assets provided the Panel with access to information on the [identified air strikes], its requests notwithstanding [, which] is in non-compliance with paragraph 8 of [UN Security Council] resolution 2266" (para. 126).

The level of expertise and potential/likely conflict-of-interest of JIAT members is not touched on by the Judgement, but in this context the fact that the MoD "has supported the development of JIAT and delivered training sessions in Saudi Arabia on the process of investigating alleged violations of IHL in May and September 2016" (para. 125), while welcome, may reflect a lack of expertise at the outset. The contrast between the Court's apparent lack of interest in JIAT competence on the one hand and its skepticism regarding the work of Amnesty International, HRW and UN Panel experts is striking.

Cluster munitions

In May 2016 Amnesty International released a report detailing the use of cluster munitions by the Coalition. Over the next seven months, Saudi Arabia repeatedly denied using such munitions; the UK Government declared itself largely satisfied with Saudi reassurances, though after Amnesty provided more detailed information in June the UK announced it was asking Saudi Arabia to investigate further. Finally, in December 2016, the UK Defence Secretary Michael Fallon admitted in parliament that Saudi Arabia had indeed used cluster munitions, including British-made BL755 bombs. This whole sequence strains all credibility, but if indeed it does take Saudi Arabia seven months (or even seven days) to establish whether it loaded and then dropped cluster bombs, then this completely undermines all claims that the RSAF is running a reliable targeting operation. According to military experts, on the basis of the procedures that Saudi Arabia follows as standard, it is almost certain that Saudi Arabia would have known at the time how many cluster bombs were being dropped from which aircraft and where, which points strongly to the Kingdom withholding information about the strikes from the UK, which has implications for other Saudi assurances regarding their conduct.

It is with this context in mind that the Court's faith in the Saudi Government is so perplexing, especially when set against its attitude with respect to disinterested independent analysis and investigation by highly credible organisations and institutions including the UN. The judgement at one point criticises the independent investigations as being overly reliant on second-hand information (when the UK Government is, in fact, *completely* reliant on second-hand information), but then in the next sentence questions the value of gathering information from "ground witnesses" (para. 201.ii).

Dynamic targeting

This sense of disproportionate trust is exacerbated by the references in the judgement (and in evidence submitted to the Court) to the use of dynamic (i.e. not pre-planned) targeting by the Coalition.

The judgement refers to the November 2015 IHL Update by the Middle East and North African Directorate (MENAD) of the Foreign & Commonwealth Office (FCO) where it notes that "most coalition missions were employing dynamic targeting which was more difficult to assess" (para. 155), and to the January 2016 Update which states "Saudi processes governing dynamic targeting are *less robust* than those governing their pre-planned targeting and we have little insight into these. […It is assessed that an increased proportion of airstrikes now involves dynamic targeting…]" (para. 159).

The Court then refers to a submission by the Head of Policy at the Export Control Organisation at the Department for Business, Innovation and Skills to his Secretary of State which expresses a "concern that 'FCO/MOD appear only to have insight into Saudi processes in respect of pre-planned strikes and *have very little insight into so-called dynamic strikes* – where the pilot in the cockpit decides when to despatch munitions – which account for a [significant proportion of all strikes]'" (para. 202).

'Finely-balanced' decisions

Another point of interest was the way in which the judgement responded to the concept of licensing decisions being finely-balanced, concluding that on this basis it would be inappropriate to attempt to second-guess Ministers. The language of 'finely-balanced decisions' was used repeatedly and over an extended period of time in the intra-governmental communications that were included in the witness statements from officials. However, officials also claimed over an extended period that Saudi targeting and reviewing processes were going through apparently continual improvement.

If, therefore, decisions *were* finely balanced in February 2016, as described by the Secretary of State for Business Innovation and Skills (para. 204), does it make sense that, for example, the decision to approve the sale of a billion pounds of bombs was also finely balanced when it was taken seven months earlier (in July 2015)?

It also appears odd that in a situation where arguments are finely balanced, the decision is almost always the same. From the beginning of the air campaign until 31 March 2017 (the latest date for which licensing decisions are so far available), there have been 709 licences issued for exports to Saudi Arabia and just five refusals. The reason for these refusals is not reported, however of the five licences in question only one appears relevant to the Saudi air campaign.[3] It is hard to reconcile these statistics with the claimed 'fine balance'.

Other aspects of Saudi Arabian conduct

In addition to the issues that relate specifically to arms sales, there are a number of other developments that raise additional concerns about tying UK colours so firmly to the Coalition's mast, and that raise doubts about the credibility of the commitment of Coalition members to compliance with international law.

[3] Saudi Arabia was refused as a destination for an Open Individual Export Licence covering components for launching/handling/control equipment for missiles, components for military aircraft ground equipment, components for military containers, components for military training equipment, equipment for the use of launching/handling/control equipment for missiles, launching/handling/control equipment for missiles, military aircraft ground equipment, military containers, military training equipment, software for air-to-air missiles, software for combat aircraft, software for launching/handling/control equipment for missiles, technology for air-to-air missiles, technology for combat aircraft, technology for launching/handling/control equipment for missiles, technology for military aircraft ground equipment, technology for military training equipment, technology for training air-to-air missiles.

There have recently been credible reports of secret prisons in Yemen run by the UAE and allied security forces where "abuse is routine and torture extreme". Included among Coalition ground-forces are Sudan's Rapid Support Forces (RSF), linked to the notorious Janjaweed militia, much feared in Sudan and infamous for their brutality in Darfur (which was part of the basis for the ICC indictment of Sudanese President Omar al-Bashir for crimes against humanity).

In April 2016, the UN Secretary General, in his annual report on children and armed conflict, included the Coalition among the "parties that recruit or use children, kill or maim children, commit rape and other forms of sexual violence against children, or engage in attacks on schools and/or hospitals, or abduct children in situations of armed conflict, on the agenda of the Security Council". This reference was subsequently removed (in June 2016), reportedly due to pressure from Saudi allies and a threat from the Kingdom to withhold funding for the UN. Pressure is mounting on the UN Secretary General to include Saudi Arabia in the same list in his report this year, with a recent Save the Children briefing identifying 23 cases where the Coalition committed "grave violations against children".

Saudi Arabia has long supported the spread of extremist Wahhabi ideology through the funding of mosques and religious schools around the world, while the UK Government's decision to publish only a summary of the Home Office internal review into the nature, scale and origin of the funding of Islamist extremist activity in the UK is widely rumoured to be because of what it reveals about Saudi Arabia.

Saudi Arabia's general commitment to human rights is also formally questioned by the UK (and the US). It is included as one of 30 countries on the FCO's list of human rights and democracy priority countries, while the US State Department's Saudi Arabia 2016 Human Rights Report is scathing of Saudi Arabia's observance of a whole raft of basic human rights. The Obama Administration suspended sales of precision-guided munition kits to Saudi Arabia last year in light of concerns over their conduct in Yemen; the Trump Administration has since decided to proceed with the transfer however in June 2017 this reversal was almost blocked by the legislature. The final Senate vote, 53-46 in favour of the sale, would have been unthinkable even a year ago. Meanwhile, in July 2017, the US House of Representatives passed a number of amendments to the latest National Defense Authorization Act seeking to place limits on US involvement in the Yemen conflict.

Implications for arms transfer control in the UK

The recent Court judgement may not signal the end of the legal process; the case may go to appeal. If it does, it would be useful if at the next stage some of the issues raised above could be considered in detail.

But regardless of what happens next, this case raises some disturbing issues about the UK's current system of arms transfer control. While theoretically the UK Government could follow even more egregious policies, for example by arming the Houthi forces in Yemen, or the Assad regime in Syria, it is difficult to conceive of any realistic scenario where UK practice would defy rational consideration and be so blatantly contrary to the rules it is obliged to follow as in this case. Which suggests that

the current system is, in effect, an exercise in the purely procedural: as long as the correct processes are followed, the Consolidated Criteria do not constrain the UK Government at all, unless the Government chooses to be constrained.

Interestingly, the Government does on occasion *choose* to be constrained. On 15 occasions in 2016 it refused to issue Standard Individual Export Licences on the basis of criterion 2 (the criterion that was at the centre of the Court deliberations). For more information on these refusals see Table 1.

Table 1: Standard Individual Export Licences refused in 2016 by UK Government under criterion 2

Country	Number	Equipment
Brazil	1	Including machine guns
China	2	Unclear
Djibouti	1	Probably anti-riot/ballistic shields
Egypt	2	Unclear
Pakistan	1	Unclear
Philippines	2	Probably including sniper rifles
Republic of Congo	1	Military helmets
Sri Lanka	1	Components for combat naval vessels
Thailand	2	Components for small arms ammunition; corrosion resistant chemical manufacturing equipment
US	1	Components for military aero-engines
Vietnam	1	Military helmets or imaging equipment and weapons sights

Source: UK Strategic Export Controls: Country Pivot Report 1 January 2016-31 December 2016, Department for International Trade, July 2017.

It would be interesting to compare the circumstances and the rationale used by the Government in determining that in each of these 15 cases the risk that the items in question might be used in the commission of serious violations of IHL or international human rights law was greater than the risks attending the export of aircraft and bombs to RSAF since the air campaign began in 2015. It is hard to escape the conclusion that the export criteria are not the decisive factor in decisions to grant or refuse licences when other significant factors are in play, regardless of what the law might say, and that in such cases the process provides cover for decision-making, rather than the basis for it.

If the case does go to appeal, whatever the outcome, the process so far suggests something is seriously wrong with the system. The rewriting of the UK's export control law in 2002, the agreement of the EU Code of Conduct on Arms Exports in 1998 and its transformation into a legally-binding Common Position in 2008, the adoption of the global Arms Trade Treaty in 2013 and its entry into force in 2014—all of these instruments and agreements were designed and intended to tackle the excesses of earlier times: to place limits on States' arms export decision-making, based on fundamental principles of international law and enlightened self-interest. The UK played a pivotal role in promoting these objectives in European and international arenas, and repeatedly stresses the importance and value of an international rules-based system more broadly.

And yet, in the case of arms sales to Saudi Arabia, the UK appears unwilling to apply its own rules to a credible standard. The recent Decision in the High Court suggests the current law is drafted in such a way as to give far too much discretion to the Executive. Which would argue for either the law or at the very least the existing guidance to be amended so as to place meaningful limits on the decision-making freedoms of the Government of the day.

There is a significant and perhaps growing body of opinion that the *status quo* may need revision. Ahead of the 2017 General Election, the manifestoes of Labour, the Liberal Democrats and the Scottish National Party all spoke to a change of policy on selling arms to Saudi Arabia. In September 2016 the Business, Innovation & Skills and the International Development Committees in their report entitled The use of UK-manufactured arms in Yemen concluded that "[i]n the case of Yemen, it is clear to us that the arms export licensing regime has not worked" and recommended that "the UK suspend licences for arms exports to Saudi Arabia, capable of being used in Yemen, pending the results of an independent, UN-led inquiry into reports of violations of IHL, and issue no further licences." Public opinion is firmly opposed to arming Saudi Arabia where those arms are at risk of use in the Yemen conflict; only 18 per cent of respondents to a July 2017 poll commissioned by the Independent supported such sales "while the Middle Eastern state is engaged in Yemen's civil war".

The legal process may still have some distance to run, and might still deliver a result more in keeping with common sense and common decency. However this is far from guaranteed. Should CAAT not be given leave to appeal, or should the appeal be allowed to proceed but then deliver the same result as the High Court, then the logical conclusion is that the current regime is flawed. Regardless of the behaviour of others, it cannot be right that UK arms transfer control law, guidance, policy and practice can take us to the point where the UK is actively supporting and providing the means for the bombing and blockading of millions of people to the point of death by starvation and disease.

If the Courts ultimately decide that the Government is operating within legal bounds it will be incumbent on the government, parliament, civil society and industry to change the existing framework, and to ensure that the next time the Government is faced with similar circumstances, its legal obligations are fully consistent with the moral imperative.