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Trampert, J.

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State responsibility

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Joëlle Trampert

The UK's Unlawful Grant of Export Licences for the Sale of Arms to Saudi Arabia

Since March 2015, a Saudi Arabia-led coalition of Arab States is conducting air strikes against the Houthi rebels in Yemen. Without going into the details and legality of the war, it is uncontested that Yemeni civilians are currently experiencing one of the world's worst man-made humanitarian crises. In April 2019, the London Court of Appeal ('Court') heard the Campaign Against Arms Trade ('CAAT')'s appeal against the High Court of Justice Divisional Court ('Divisional Court') judgment of 10 July 2017 on the lawfulness of the continued granting of arms export licences. On 20 June 2019, the Court delivered its appeal judgment, ruling that it was *irrational* and therefore *unlawful* for the Secretary of State for International Trade ('Secretary of State') to proceed as he did, namely to not take Saudi Arabia's past and present record of respect for international humanitarian law ('IHL') into consideration. In this regard, the Court overturned the Divisional Court's earlier decision.

It is worth stressing – as the Court also emphasised – that the case concerned a claim for judicial review: a process where a court assesses whether a public authority has taken a decision in the correct way (appeal judgment para. 54). This means the Court is *not* in the position to examine the executive's decision as such; at issue is the procedure of how the public organ reached that decision. In the present case, the Court is not concerned with the merits of the government's decision to grant export licences for the sale or transfer of arms or military equipment to Saudi Arabia for possible use in the conflict in Yemen. The main point of contention was whether the Secretary of State could lawfully (continue to) grant arms export licences, based on the test of rationality.

This blog post outlines the legal context applied by the Court under (I). Although the Court did not rely on the Arms Trade Treaty ('ATT') directly, this treaty encompasses the most relevant international norms with regard to arms control to date, and will be touched upon under (II). Lastly, the outstanding question of the UK's responsibility for complicity in violations of IHL in Yemen will be briefly discussed under (III).

I. The legal context as applied by the Court

The export of military goods from the UK to Saudi Arabia is regulated by the Export Control Act 2002, which requires the Secretary of State to 'give guidance about the general principles to be followed when exercising licensing powers' in accordance with the Consolidated EU and National Arms Export Licensing Criteria ('Consolidated Criteria'), which in turn incorporate the criteria in the EU Council Common Position 2008/944/CFSP ('EU Common Position'). Criterion 2 (c) of the EU Common Position prohibits the granting of an export licence if there is a 'clear risk' that the military goods 'might be used in the commission of serious violations of international humanitarian law.' In the 2017 claim for judicial review, CAAT challenged the conclusion that criterion 2 (c) was not met; all the open source evidence raised a presumption of a 'clear risk' that could not rationally be rebutted (Divisional Court judgment paras 51-54; 205-206). The Divisional Court dismissed CAAT's claim in its entirety and found that the Secretary of State's decision not to analyse the possible past violations of IHL fell within his discretion.

Article 13 of the EU Common Position refers to the 'User's Guide' which serves as guidance for the implementation for the EU Common Position. On the meaning of 'clear risk' in criterion 2 (c), the User's Guide provides in para. 2.13 that 'an inquiry into the recipient's past and present record of respect for [IHL]' should be included. Furthermore, the User's Guide adds that Common Article 1 of the Geneva Conventions is to be interpreted as obliging third States not involved in an armed conflict to refrain from encouraging or assisting violations of IHL by parties to the conflict, and to prevent and bring such violations to an end. Unlike the Divisional Court, the Court took issue with the fact the Secretary of State had made no assessments of whether the Saudi-led coalition had committed violations of IHL in the past during the Yemen conflict, and had made no attempt to do so. On this point the Court concludes that the question whether there was a historic pattern of breaches of IHL 'was a question which required to be faced.' (appeal judgment para. 138). Criterion 2 (c) and the User's Guide specifically call attention to past violations for the assessment of the real risk of future violations. The fact the Secretary of State had not done this while he had been in the position to, meant that he had acted irrationally in the decision of applying the criterion (appeal judgment paras 139-145).

II. The obligation to assess the risk of serious violations in the context of the Arms Trade Treaty

The obligations set out in the EU Common Position are reflected in Article 7 of the ATT. This provision imposes on exporting States a duty to assess the potential that the exported arms could be used to commit or facilitate a serious violation of IHL or human rights law (para. (1) (b) (i) and (ii)) and to refrain from authorising export if the assessment is negative (para. (3)). Criterion 1 (b) of the aforementioned Consolidated Criteria sets out that the government may not grant a licence if

this would be inconsistent with the UK's obligations under the ATT. Curiously, neither the parties nor the judges referred to Article 7 ATT.¹ The Court highlighted the importance of making such assessments:

without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high level assurances by the Saudi authorities? If the result of historic assessments was that violations were continuing despite all such efforts, then that would unavoidably become a major consideration in looking at the "real risk" in the future. It would be likely to help determine whether Saudi Arabia had a genuine intent and, importantly, the capacity to live up to the commitments made. (appeal judgment para. 144)

In handing down the summary of the judgment, Master of the Rolls Sir Terence Etherton said the government 'made no concluded assessments of whether the Saudi-led coalition had committed violations of international humanitarian law in the past, during the Yemen conflict, and made no attempt to do so'. If a failure of the State to conduct such a risk assessment results in a serious violation as specified in Article 7 ATT, then the State is potentially in breach of the preventive obligation expressed in this provision.² Although explicitly finding the UK in breach of its obligations as stipulated in the ATT goes beyond the scope of judicial review, the Court could have taken the provision into consideration, especially as the UK's own Consolidated Criteria directly refer to it.

III. The obligations of non-assistance in the Draft Articles on State Responsibility

A breach of Article 7 ATT does not mean that the State in question is necessarily complicit in the serious violations of IHL or international human rights law.³ Article 7 supplements Article 6 ATT, which proscribes in paragraph 3 the transfer of arms if a State Party had 'knowledge at the time of authorization that the arms or items would be used in the commission of' certain core crimes. This rule of *lex specialis* is conceptually similar to the obligation of non-assistance in the general rules of State responsibility in the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ('DARS'). Respect for IHL by parties to the conflict raises broader questions in this situation: if such violations are found to be happening, or even if there is a clear or overriding risk of these occurring, could the UK be held responsible under international law for facilitating violations of IHL based on its failure to properly conduct the risk assessment? The question – which falls outside the scope of the process of judicial review – has also been raised by CAAT and certain Interveners.

Article 16 DARS

In the 2017 case before the Divisional Court, Amnesty International, Human Rights Watch, and Rights Watch ('Interveners') submitted a witness statement in which they put forth the applicable law of State responsibility. According to the Interveners, criterion 1 of the Consolidated Criteria also requires that the UK does not breach the customary rule embedded in Article 16 DARS (submission para. 4.4). The Divisional Court did not pronounce itself substantively on this point, but the relevance of the customary rule on aid or assistance as a basis for responsibility of the UK under international law has been discussed by scholars elsewhere.

Article 41 (2) DARS

Besides Article 16, Article 41 (2) DARS could be relevant. Although Article 41 (2) does not yet have the same customary status as the general rule in Article 16, the obligation of non-assistance in the ILC's aggravated regime of State responsibility is still worth considering (not lastly because the UK has accepted its relevance elsewhere). Article 41 (2) DARS states that '[n]o State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.' In other words, States are under the obligation to refrain from furnishing assistance for maintaining a situation created by a serious breach of *ius cogens*, which includes IHL.⁴ Arguably, the continued export of arms to Saudi Arabia extends the consequences of past violations and maintains the climate for further violations of IHL in Yemen, such as the repeated targeting of civilians and civilian objects. A subsequent requirement is that the breach of the *ius cogens* norm must be *serious* in nature. Article 40 (2) DARS defines this as a 'gross or systematic failure by the responsible State to fulfil the obligation'. Based on the evidence submitted by NGOs – including the Interveners – and the UN Panel of Experts, CAAT submitted that the IHL violations were repeated and not incidental (appeal judgment para. 11). In light of the open evidence, we may assume that there is indeed such a pattern of grave breaches.⁵

Furthermore, Article 41 (2) DARS applies to conduct 'after the fact', so after the initial commission of the wrongful act. This includes continuing violations. No specific causal link is mentioned, but the Commentary explains that Article 41 (2) is to be interpreted in light of Article 16 DARS. Does this mean the standard is the same, i.e. that the contribution of the assisting State must be *significant* for the manifestation of the wrongful act? Or that there can in fact be causeless complicity? Finally, and most notably, there is no explicit knowledge requirement in Article 41 (2). There is no need, as it is highly unlikely that a State would be ignorant of the commission of a serious breach by another State (ILC Commentary to Article 40, para. 11). Relatedly, the nature of the norm at stake and the values it seeks to protect merit a presumption of knowledge. If applied to the case of the UK and Saudi Arabia, this would mean knowledge of the violations on the part of the UK would not need to be proven. The presumption of knowledge in this provision means this rule is more far-reaching than Article 6 (3) ATT, which requires 'knowledge at the time of the authorization'.

Outlook

Following the appeal judgment, the Secretary of State stated that the government 'will not grant any new licences for exports to Saudi Arabia and its coalition partners that might be used in the conflict in Yemen.' However, existing licences have not been suspended and it seems the UK continues to engage with Saudi Arabia in the context of international arms trade. In July 2019, one month after the Court's judgment finding the granting of arms export licences unlawful, the UK's Department for International Trade Defence & Security Organisation ('DIT DSO') invited Saudi Arabia to London for the DSEI 2019 arms fair - one of the biggest in the world. Besides the UK government backing the event, British arms supplier BAE Systems – whose customers include Saudi Arabia – is one of its 'platinum partners'.

The Secretary of State will appeal the Court's decision, so the last word has not been said about this matter. It will be interesting to follow the different approaches taken by domestic courts in cases where certain States grant arms export licences to other States, which in turn launch attacks

in violation of IHL, and to explore if and how the concept of complicity may inform the final outcome of cases in the context of international arms trade.

1. Save 'Claimant's Updated Skeleton Argument for Appeal Hearing on 9-11 April' para. 8, and 'Written Submissions on behalf of Amnesty International, Human Rights Watch, and Rights Watch UK', para. 28 (footnote 46).
2. Nina HB Jørgensen, 'State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty' (2014) 108 *The American Journal of International Law* 722, 729.
3. *Ibid.*
4. International Law Commission, Report on the Work of its Fifty-third session, General Assembly, Official Records, Fifty-sixth session, Suppl. No. 10 (A/56/10) at 113; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226, 257, para. 79.
5. See also ILC Commentary to Article 40, para. 8: 'Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims.' This last factor is especially apparent in the present case of Yemen.

State responsibility

Due diligence

Domestic law

International Humanitarian Law

Arms export

DARS

