

Scrutinizing the International Weapons Trade

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On June 20, 2019, in Campaign Against Arms Trade, R (On the Application Of) v The Secretary of State for International Trade (CAAT) the Court of Appeal for England and Wales held that the UK government unlawfully granted export licenses for military equipment sold to Saudi Arabia for possible use in the armed conflict in Yemen. According to the Court, the British government failed to make the necessary detailed inquiries into potential breaches of international humanitarian law (IHL) and international human rights law (IHR) and so acted irrationally. This Journal reported on similar applications made in Federal Court in *Turp v. Canada* Turp I and Turp II at Canadas-trade-off-between-arms-and-human-rights. Turp I was an unsuccessful attempt to limit the export of LAVs (light armoured vehicles) to Saudi Arabia and the appeal to the Federal Court of Appeal was dismissed (here) with leave to appeal to the SCC refused (here). The Federal Court of Appeal was satisfied that all necessary factors were considered by the Minister before the export permits were issued. The two appellate cases show a difference in the degree of investigation into potential humanitarian effects of

the use of the weapons by the purchaser, partly due to the stringency of the legal requirements to approve the export permits in the two jurisdictions. Canada has recently added mandatory considerations to ensure that the government has considered whether the permit and export of weapons could be used to commit or facilitate breaches of, among other things, serious violations of international humanitarian law, international human rights law and serious acts of gender-based violence or serious acts of violence against women and children (amendments) by adding a new s. 7.3 to the *Export and Import Permits Act* (EIPA) (here) to enable Canada to accede to the Arms Trade Treaty (ATT)(here).

CAAT

CAAT went to court to stop the export of military equipment to Saudi Arabia alleging that there was evidence that it had committed many serious breaches of international humanitarian law in Yemen fighting Houthi rebels while leading a coalition of states. CAAT alleged the Saudis had committed indiscriminate or deliberate airstrikes against civilians, used cluster bombs and targeted schools and medical facilities. The evidence before the courts included reports from the UN, the European Parliament, the Council of the European Union (EU), the International Committee of the Red Cross, Médicins Sans Frontières, Amnesty International, Human Rights Watch, Parliamentary Committees and the press. Under s. 9 of the *Export Control Act 2002*, the Secretary of State must give guidance on the principles to be applied when granting licenses. Accordingly, the Secretary of State set out Guidance for military technology that consolidated the *EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment* (here) and national criteria which provided in Criterion 2 of the Consolidated Criteria:

Having assessed the recipient country's attitudes towards relevant principles established by international humanitarian rights instruments, the Government will:

1. b) exercise special caution and vigilance in granting licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the European Union;
2. c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law.(here)

The Guidance mirrored the EU Common Position by providing that the government could consider domestic economic concerns that did not affect these criteria. It also provided that application of the Criteria would take into account relevant evidence. The key issue before the English courts was the rationality of the licensing decision which turned on the question of whether the decision-maker could reasonably have made the decision based on the information before it (paras. 57-9). In this context, the Court of Appeal viewed the central question as whether the Minister had adequately considered the historic pattern of breaches of IHL by Saudi Arabia that would support the required prediction of future violations. The Court noted that this decision was capable of being answered as it had been in the reports of the organizations mentioned above (para. 62).

The Court of Appeal concluded that the Secretary made no assessment of whether the suspicious incidents tracked were violations of IHL (para. 74). The Court examined the government record that established: the lack of evaluation about the many reported incidents of possible violations of IHL, the fact that the Ministry of Defence's "Tracker" of incidents had an empty column for IHL assessment of such incidents that the column was subsequently removed and the Secretary's admissions that it could not assess each and every incident. The Court concluded that the government had not assessed the likelihood of a breach of IHL in any specific case (para. 83).

The Court of Appeal reviewed the sources of information, some of which were disclosed in closed session and others in open session. It first noted the importance of the information provided by the NGOs and the UN Panel of Experts about potential breaches of IHL and acknowledged that the secret information that the Secretary of State had disclosed in closed session could have assisted with the question of why the incidents happened. All of this information was highly relevant to determining whether breaches of IHL occurred and whether they would occur in the future which was highly relevant to the question of future risk. The Court accepted that the UK government and military carried out detailed and extensive listing of incidents on which the Secretary of State was forced to rely on to determine future risk (para. 136). In February 2016, an internal government report revealed that the Ministry of Defence (MOD) was tracking 114 incidents of potential IHL concern, noting that only a very small percentage of airstrikes were tracked, that the UN Panel added 19 more to the list and that MOD became aware of 19 more through other sources making a total of 145 incidents, and, while admitting gaps in their knowledge, the report maintained that there were no established violations of IHL (para. 78).

CAAT drew the Court's attention to three specific incidents. First, the declaration by a Saudi general that Sa'dah a city of 100,000 was a military target and information revealed that it had been indiscriminately and seriously damaged by targeted airstrikes; second, an attack on Abs Hospital, Hajjah, killing many civilians including medical staff with UK-built bombs; third, an air strike on a funeral with 1000 in attendance in Sana'a. All these incidents were apparently unaffected by the training, support and other inputs given to the Saudis by the UK (paras. 106-16). The UK government relied heavily on the fact that it had demonstrated its concern with the IHL issue and took great efforts to offer training and support to the Saudis to emphasize its importance (para. 137). In the end though, the Secretary had to face the issue of an historic pattern of breaches of IHL as set out in Criterion 2 which calls for assessing a 'real risk' of future violation ('clear risk' in Criterion 2). The historic pattern and future violation were reasonably linked (para. 139), but the Tracker system never addressed the issue, suggesting a decision by the government not to assess past violations of IHL (para. 141). Further and perhaps more importantly, how was the Secretary to reach a rational decision about the effect of the training, support and other inputs given to the Saudis and the value of their high-level assurances without this historical data? The continuing of breaches should have been a major consideration in deciding real risk for the future and whether the Saudis had the intent or capacity to live up to their IHL commitments in the future. The Court of Appeal concluded the Secretary's decision was irrational despite the deference owed the Executive in this kind of matter and referred the matter back to the Secretary to reconsider the decision.

Turp I appeal

This case was the rejection of an appeal from a judicial review by Tremblay-Lamer J of the Federal Court in which Daniel Turp had sought to challenge the decision of the Minister of Foreign Affairs to issue permits for the export of LAVs to Saudi Arabia. He argued that the Export Controls Handbook and Canada's international obligations required the Minister to decline issuance because of a reasonable risk that the Saudis would use the LAVs against civilian populations in Yemen.

At the time, the EIPA empowered the Governor in Council to establish an Export Control List, which included the LAVs. The Minister could issue permits for export on the list. Section 7(1.01) allowed the Minister to consider, among other things, the prejudicial effect of the export on the peace, security or stability in any country. The Export Controls Handbook was the framework of the application of a system of control in situations where the military exports would pose a threat to Canada, would be exported to be used in hostilities or to countries under UN sanction or to countries whose governments commit human rights violations. The Handbook described factors to consider before issuing a permit including exports to 'countries whose governments have a persistent record of serious violations of the human rights of their citizens, unless it can be demonstrated that there is no reasonable risk that the goods might be used against the civilian population' reproducing government policy from 1986 called *Guidelines for Exports of Military and Strategic Goods* (paras. 14-16). These Guidelines also emphasized the importance of the defence industry to Canada's economy (para. 17).

The Federal Court of Appeal commenced its analysis of Tremblay-Lamer J's decision by looking at the memorandum from the Deputy Minister of Foreign Affairs on the LAV exports that had been sent to the Minister for his decision. The Court noted the memorandum emphasized the importance of the production of LAVs to the economy and Canada's involvement with the various regional threats the Saudi military has coped with since the invasion of Kuwait, resulting in the export of almost 3000 LAVs, including those to be used in Yemen (para. 41). The Court also noted that the memorandum mentioned wide intra-government consultations on the export issue which was favoured by all government actors. The memorandum also addressed the human rights abuses reported in Saudi Arabia and noted that Canada was in dialogue with the Saudis about the issue and that the government expressed concern 'when necessary'. It included an evaluation of whether there was a reasonable risk of the use of the LAVs against civilians and concluded 'according to the information provided' that 'we do not think that the proposed exports would be used to violate human rights in Saudi Arabia'. It emphasized that the UN Panel of Experts on Yemen while reporting that all the participants in the Yemen conflict committed breaches of IHL, did not suggest Canadian equipment was involved. It noted the Saudi official statement that it complied with IHL and that they had created an 'independent team of specialists' to evaluate incidents of civilian deaths (para. 43). The Deputy Minister recommended approval of the permits.

Though the use of LAVs is different from the UK concerns about the use of British ordinance in airstrikes, the Canadian memorandum appears considerably less probing than the UK's efforts to follow and deal with IHL breaches. However, as noted by both Courts of Appeal, the scope of the

inquiry is up to the decision-maker as part of the Executive.

Turp pressed Canada's international commitments such as the Wassenaar Arrangements and Guidelines (here, s. 1(e)) implemented under s. 3(1)(d) of the EIPA to control conventional weapons by asking, among other things, whether there is 'a clearly identifiable risk' that the weapons under consideration might be used in the violation of IHL or IHR. He also noted that the Minister did not provide an analysis of the Geneva Conventions. Turp objected that the reviewing judge had required him to prove the LAVs would be used in breaches of IHL, when the Yemeni context created a reasonable inference that it was 'extremely likely' the LAVs would be used in such IHL breaches. He decried the lack of investigation that the context and the UN Panel should have provoked, and Canada's preference to accept Saudi promises to comply with IHL, even when evidence was led about the use of LAVs sent to Najran in Yemen in the thick of the fighting (para. 49). He also argued that the Minister's decision was not transparent given the fact that he relied only on the memorandum alone and that accordingly there was no indication of how thorough the review by officials was supporting its conclusions (para. 51).

The Court of Appeal dismissed the appeal on the grounds that the Minister had considered what he was supposed to do, including the economic concerns and 'human rights issues' including the 'reasonable risk' factor (paras. 53-55). The Court rejected the argument that decisive weight should be given to humanitarian considerations by noting that the law allowed the Minister to determine the weight that should be given to various factors according to the legislative grant of power (paras. 57, 60). According to the court, no weighting of the factors can be found in the EIPA and the Guidelines were not binding. Deference was owed to the Minister in international relations and economic matters. The statutory regime here does not impose a methodology for gathering the information necessary to make the decision or the scope of the inquiry necessary as long as the proper factors are considered (paras. 63-5). The Court also said that the Minister could have approved the permits even if there was a reasonable risk that the LAVs would be used against civilians as long as all of the other relevant factors were considered (para. 66). The Court also held that the references in the memorandum to the conflict in Yemen and IHL and IHR concerns impliedly took into account the values protected by the Geneva Conventions (para. 68).

The present situation

Canada continues to export LAVs to Saudi Arabia, many equipped with armament from Belgium, though it has been reported that Belgium has recently cancelled the export permits (here). However, no new permits have been issued (here).

Canada will become a State Party to the Arms Trade Treaty effective September 17, 2019. To be able to accede, Parliament passed amendments to the EIPA. These included mandatory considerations for the issuance of export permits and related transactions, paralleling article 7 of the ATT:

7.?3 (1) In deciding whether to issue a[n export or brokerage] permit…in respect of arms, ammunition, implements or munitions of war, the Minister shall take into consideration whether the goods or

technology specified in the application for the permit

(a) would contribute to peace and security or undermine it; and

(b) could be used to commit or facilitate

(i) a serious violation of international humanitarian law,

(ii) a serious violation of international human rights law,

(iii) an act constituting an offence under international conventions or protocols relating to terrorism to which Canada is a party,

(iv) an act constituting an offence under international conventions or protocols relating to transnational organized crime to which Canada is a party, or

(v) serious acts of gender-based violence or serious acts of violence against women and children.

Additional mandatory considerations

(2) In deciding whether to issue a[n export or brokerage] permit…, the Minister shall also take into consideration the considerations specified in regulations…

Substantial risk

7.?4 The Minister shall not issue a[n export or brokerage] permit…in respect of arms, ammunition, implements or munitions of war if, after considering available mitigating measures, he or she determines that there is a substantial risk that the export or the brokering of the goods or technology specified in the application for the permit would result in any of the negative consequences referred to in subsection 7.?3(1).

The Canadian government has announced the process and the evidence to be used to make the permit assessment:

For there to be a substantial risk [rather than the ‘overriding risk’ term in the ATT that was thought to be alien to Canadian legal terminology], there should be a connection, based on compelling evidence, between the negative consequences and the specific goods or technology proposed for export or brokering. The minister will judge whether to issue export or brokering permits based on an assessment of all relevant information available at the time of a permit application, including the nature of the goods and their end-use, the country of destination, the record and behaviour of the stated consignee, and the possibility of unauthorized diversion, as well as various other criteria established in law and policy. Should Global Affairs Canada become aware of reliable evidence concerning violations perpetrated using Canadian-made equipment, the Minister of Foreign Affairs may suspend or cancel the associated export or brokering permits.(here)

Conclusion

The two Court of Appeal decisions reviewed in this article play out in the context of the balance between economics and humanitarian law in the regulation of the arms trade. Both Courts recognize the importance of the ability of the executive to go about its business in deciding the scope of the inquiry that it will make to decide whether the risk of harm to people in countries to which arms are exported is too great. The English Court of Appeal was faced with an extensive government system of identifying suspicious incidents, but found that the failure of the government to assess whether these incidents were breaches of IHL and the reliance on 'good faith' of the recipient of the arms was irrational in making the 'clear risk' assessment before issuing export permits. In Canada, the Federal Court of Appeal had the thin record that was before the Minister who decided on the risk of breaches of IHL which did not go into the detail of the British incident list but rested on the lack of evidence of breaches of IHL. It dismissed an appeal of a decision of the Federal Court on the basis that the Minister had considered all he had to before approving the permits, and hypothesized that the Minister could have approved the permits even if the risk of breach of IHL exceeded the level of risk in the Guidelines as long as all factors in the Guidelines were considered. There was no hierarchy of considerations between life and dollars. Canada's legal preparations for accession to the ATT are promising in that they create a priority for humanitarian concerns.

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