

Advocating for better protection for conflict-affected populations

Legal action against UK arms sales to Saudi Arabia for use in the Yemen conflict

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Lessons learned

Partnerships and collaboration within and outside the humanitarian sector are critical in strengthening advocacy for better protection of civilians affected by conflict, through leveraging respective expertise and sharing risk.

Where litigation is part of a broader advocacy campaign there should be coherence in legal and advocacy strategies, with trade-offs identified at the outset. A theory of change with scenario mapping would support this.

Strategic litigation can be an effective advocacy tool for humanitarian actors. Renowned legal expertise, a well-evidenced and well-resourced strategy and a persuasive case are central to maximising the chances of success.

Risks can be mitigated and shared through collective advocacy once the potential risks have been jointly assessed.

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Objective

In 2017, a collective lawsuit by humanitarian, human rights and peacebuilding actors¹ was taken against the UK government. The primary objective was to stop UK arms sales to Saudi Arabia where they could be used in the conflict in Yemen. Legal action was central to a broader collective advocacy campaign to put pressure on the UK government to influence the conduct of the Saudi Arabia-led coalition² (the Coalition) in the Yemen conflict.³ Additionally, the partners sought to raise the profile of the conflict and the conduct of conflict parties through challenging the legal basis for continued arms sales, regardless of the outcome of litigation.

Background

The Coalition military campaign, launched in March 2015 (Amnesty International, 2016a), has had devastating consequences including ‘confirmed rampant levels of serious violations of international human rights law [IHRL] and international humanitarian law [IHL], many of which may amount to war crimes’ (UNHRC, 2020). Military equipment used by the Coalition in Yemen has been supplied by third states, of which the US and the UK are the largest (UNOHCHR, 2020). Despite mounting documentation,⁴ throughout 2015 and 2016 the UK government denied there was ‘credible evidence’ that Coalition airstrikes in Yemen had violated IHL (UK Parliament, 2015), while increasing arms sales to Saudi Arabia.⁵

The Yemen case illustrates how pursuing legal avenues to influence governmental policy and practice is complex and risky, and requires partnership and a solid legal case. In this case, laws regulating arms sales in the UK and Europe require that licences for arms transfers should not be granted if there is a clear risk they might be used in a serious violation of IHL (UK Parliament, 2014). But regardless of the legal outcome, such strategies can provide opportunities to apply pressure through increased media attention, galvanise public opinion and enhance political

¹ The case was initially taken by the Campaign Against Arms Trade (CAAT) with expert advice from Saferworld. Amnesty International UK, Human Rights Watch and Rights Watch UK were the second intervenors, and Oxfam later intervened in the case as a third intervenor.

² Members of the Saudi-led coalition in 2015 were United Arab Emirates (UAE), Sudan, Bahrain, Kuwait, Qatar, Egypt, Jordan and Morocco. Qatar withdrew from the coalition in 2017; Sudan and Morocco withdrew in 2019.

³ Some organisations attempted to open a dialogue with Saudi Arabia and other Coalition members; however, direct access to relevant parts of the government proved near impossible. Therefore, a strategy of applying pressure to Saudi Arabia through its more accessible allies was pursued.

⁴ See for example Sands et al. (2015).

⁵ Between 2015 and 2016, the UK granted £3.3 billion of export licences without providing assurances these arms would not be used in the conflict in Yemen (Oxfam, 2016).

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scrutiny. In this case, litigation was seen as a viable avenue: the partners made informed calculations that the likelihood of bringing about policy change without litigation was low, while it was clear the UK was in breach of regulatory laws.⁶ The assessment of the organisations involved was that the court's findings, even when a case is not successful, can lead to policy change. Due to these factors, creating a strong case can have impact and motivate involvement in litigation, regardless of success.

Influencing policy central to the relationship between the UK and Saudi Arabia will always be difficult. Saudi Arabia is one of the UK's largest arms markets and for years this relationship has been a key element of the UK's economic, security and political interests. Previous attempts to influence government policy on Saudi Arabia, including through litigation, had failed.⁷

While the initial case was unsuccessful, in June 2019 the Court of Appeal found that it was 'irrational and therefore unlawful' for the UK to have granted licences for arms exports to Saudi Arabia for use in Yemen without making an assessment as to whether violations of IHL had taken place (UK Court of Appeal, 2019a). Although the UK resumed arms sales a year after the review,⁸ important partnerships were formed and lessons learned, which can and have influenced other advocacy approaches.

Activities and strategy

1. The **relevance of partnerships and collaboration** between humanitarian, human rights and peacebuilding actors was clearly demonstrated.⁹ Each organisation leveraged their expertise, networks and evidence to build a well-informed, strategic campaign. As the case progressed, a broader range of actors joined, who sought to complement and add value by drawing on their expertise and mandates. Yemen civil society organisations also became involved, providing

6 The Arms Trade Treaty (ATT), which regulates the international arms trade, came into force on 24 December 2014 after being adopted by the UN General Assembly on 2 April 2013. The European Union (EU) Common Position on arms exports and the implementation of the ATT was updated on 20 July 2015 in order to incorporate relevant provisions of the ATT, while the UK Consolidated EU and National Arms Export Licensing Criteria (EU Consolidated Criteria) incorporates the EU Common Position and therefore the ATT.

7 HPG interview, 5 February 2021.

8 On 7 July 2020, the UK announced it would resume arms sales, having concluded that IHL violations were 'isolated incidents' (UK Parliament, 2020).

9 CAAT, Saferworld, Amnesty International UK, and Oxfam are all part of the UK Working Group on Arms.

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important evidence and advice. While this collective approach achieved results, in some respects it was ad-hoc.¹⁰ Activities were often reactive and the respective advantages of the organisations involved were not fully maximised. The links to litigation and campaigns elsewhere took place almost accidentally.¹¹

2. **Litigation as a strategic component of an advocacy campaign** required trade-offs and consideration of risks (see point 4 below). The broader advocacy effort on this issue included mobilisation of membership to campaign and draw attention to the issue, as well as a range of private and public advocacy and campaign activities,¹² ranging from private bilateral, collective and public advocacy. This used documented evidence generated from organisations with presence and/or partnerships in Yemen and was central to building a legitimate case.
 - The legal focus was central to gaining public, media and political traction; however, it dominated the campaign, which, while compelling, narrowed the framing of the problem. Legal arguments should be situated within a broader advocacy strategy, with complementary relevant (e.g. political, economic, moral) arguments deployed.
 - Long-term campaigns are necessary to achieve impact. This was particularly important given the decades-long relationship between the UK and Saudi Arabian governments, which necessitated a multi-dimensional approach to maximise impact. With this in mind, activities should be phased to maintain momentum.
3. **Strategic litigation** can be an effective advocacy tool in its own right, particularly when carried out collectively.¹³ Campaign Against Arms Trade (CAAT) led the legal action due to its higher risk appetite, history of pursuing strategic litigation, its mandate specific to the arms trade and

¹⁰ CAAT first filed the Judicial Review with limited engagement with other organisations. Amnesty International and Oxfam became involved later, and advocacy activities and campaign activities were added on around the case.

¹¹ All organisations interviewed spoke to the fact that litigation was pursued due to the individuals personally committed, including with broader membership overseas, rather than this being a strategic, evidenced and resourced case.

¹² Organisations used evidence they had documented by presence or through monitoring roles to generate reports, briefings and press statements. They carried out bilateral and collective closed-door advocacy with the UK government, mobilised public campaigns and carried out public activities, all with the objective to raise awareness of the devastating consequences of the conflict in Yemen.

¹³ While it is more commonplace for human rights and campaigning organisations to use strategic litigation, it can be an effective advocacy tool for humanitarian actors, particularly as part of a collective to mitigate risk (see point 4 on risks).

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limited operational footprint.¹⁴ While the human rights organisations involved documented the conduct of hostilities in Yemen, including the use of internationally supplied weapons in harming civilians,¹⁵ humanitarian organisations operating in Yemen witnessed and responded to the devastating humanitarian crisis. The international legitimacy of the organisations involved added weight and evidence, and broadened the legal basis for the case.¹⁶

- However, not all humanitarian organisations had the systems and structures in place to systematically document and record IHL and IHRL abuses. When these were in place, they tended to be narrow in scope and were not maintained in the long term. The establishment of monitoring and documenting mechanisms should be established as early as is feasible.
- Litigation takes time and resources, and requires sustained campaigns. For CAAT, the financial burden was minimised with the agreement of a win-only fee basis, a cost-capping order from the courts in the event of losing the case, and crowdfunding to fund the legal action. Without the first two agreements in place, it is unlikely they would have proceeded.¹⁷ Oxfam paid the initial legal fees and later secured pro-bono representation.¹⁸

¹⁴ CAAT is registered in the UK and had previous history of challenging UK policy including through litigation. All other organisations either had operational presence in Yemen, or staff or partners documenting violations against civilians in Yemen.

¹⁵ For example, see Amnesty International (2016b).

¹⁶ CAAT's legal case was built on the requirement that licences for arms transfers should not be granted if there is a clear risk that the equipment to be exported might be used in a serious violation of IHL. The intervention of humanitarian and human rights organisations broadened the legal basis for the case, including through applicable international human rights law in conflict complementary to IHL, and provided further evidence of IHL violations in Yemen.

¹⁷ HPG email exchange with CAAT, 26 February 2021.

¹⁸ HPG interview, 4 February 2021.

- A previous legal opinion sought by the humanitarian and human rights organisations involved was instrumental in giving legal weight to the case, due to its content and the prominence of the lawyers who prepared the opinion. As well as using known and respected lawyers,¹⁹ lessons in pursuing effective legal action include clearly identified grounds to take the case²⁰ and clearly defined requests of the court;²¹ along with ensuring a breadth of detailed evidence to make a persuasive case. Even where litigation is not used, soliciting a legal opinion is also of demonstrated value.²²

4. Perceived and actual **risks** were a key consideration in taking action, leading to an initial reluctance from most organisations to become involved in the case at the outset. Risks considered included:

- **Legal risks**, including setting a negative legal precedent; undermining fragile legal frameworks; and, if arguments and evidence were not persuasive at the outset, closing further avenues for strategic litigation.
- **Operational risks**, including limits being placed on humanitarian organisations' ability to operate and deliver programmes in Yemen;²³ retaliation against beneficiaries, staff and operations; and retaliation against civil society actors in Yemen related to the case.²⁴

¹⁹ The choice of lawyers and law firm representing the organisations was key in giving weight and authority to the case. The 2015 legal opinion considering the lawfulness of UK weapons transfers to Saudi Arabia in the context of the conflict in Yemen was prepared by Professor Philippe Sands QC, Professor Andrew Clapham and Blinne Ni Ghralaigh. The Legal Professors who prepared the case are internationally renowned lawyers specialising in IHRL, IHL and international justice. Due to their international standing, this opinion carried significant legal weight, including to the legal action itself. Other legal opinions with lesser-known lawyers did not gain as much traction.

The lead law firm for the case was Leigh Day, a firm specialising in representing people who have suffered human rights abuses. They have been involved in a number of cases against the UK government, including on its responsibility for torture and a range of IHL and human rights violations against civilians in Iraq, its role in renditions and torture in Libya, and the torture and ill-treatment of Mau rebels in Kenya during colonial rule. They had sent letters before action to the UK regarding its arms sales to Iraq used in Iraq's attack on Gaza. For more information see: www.leighday.co.uk/our-services/international/cases-against-the-british-government/.

²⁰ The initial Judicial Review was filed on the basis of Criterion 2(c) of the EU Consolidated Criteria. Oxfam's intervention broadened the argument to consider IHRL and the application of Article 1 (b). This wasn't considered in the final appeal judgement. A broader case may have been more persuasive.

²¹ In appealing the case, applicants didn't explicitly ask for all arms exports (existing and new licenses) to be stopped. When the government made a policy commitment to cease granting all new licenses for a year, they were able to resume granting licenses without being in contempt of court.

²² See 'Impact' section below.

²³ While Saudi Arabia had no governance structures in Yemen, it was responsible for authorising all no-strike lists and deconfliction requests for organisations working within Yemen.

²⁴ As the case progressed, there was increased involvement of Yemeni civil society actors, including human rights organisations, conflict monitoring actors and think tanks.

- **Reputational risks** to the perception of organisations working in Yemen, including repercussions because of perceived compromises of humanitarian principles,²⁵ with the potential for reputational risks to translate into operational risks.
- **Political risks**, including potentially closing other avenues to influence the behaviour of third-party states and conflict parties, such as direct dialogue;²⁶ organisations' continued registration in the UK; and organisations' continued access to UK²⁷ and other institutional²⁸ funding.
- Some of these risks were mitigated because of the broad coalition of actors involved in the campaign, where risk was shared. However, this was not collectively discussed ahead of the case. The strategy itself also contributed to mitigating risks due to the timing of the case, the strength of evidence presented and high levels of public interest. While it saw an end to direct dialogue with the UK about its policy of arms sales in Yemen, privately some UK officials encouraged the organisations involved to continue applying pressure through litigation.²⁹ In part, operational risks were less likely given that the Coalition were predominantly engaged in a military air campaign.³⁰ However, there were threats to Yemeni civil society actors. This was partly mitigated by their presence and visibility as part of this international coalition, coupled with their standing and connections in Yemen.³¹

Impact

The Court of Appeal's finding that it was 'irrational and therefore unlawful' (UK Court of Appeal, 2019a) for the UK to have continued to grant licences for arms exports to Saudi Arabia for potential use in Yemen was considered a landmark ruling (Saferworld, 2019). The UK was ordered

²⁵ For example, organisations faced repercussions from the Yemen diaspora in the UK, who felt that the international organisations involved were taking sides with the Houthis.

²⁶ For example, direct dialogue with the UK was halted while the case was considered and is yet to resume.

²⁷ All organisations were registered in the UK. Multiple organisations actively involved in the case or joining the broader campaign are recipients of UK funding.

²⁸ For example, Saudi Arabia became one of the largest donors to Yemen; other Coalition members were also funding humanitarian activities in Yemen, and allies of Coalition members were large potential donors (e.g. Turkey).

²⁹ HPG interview, 29 January 2021.

³⁰ In 2015, the Coalition were only militarily involved in the conflict through the air campaign. Their limited presence on the ground meant that direct retaliation was less likely.

³¹ For example, Mwatana for Human Rights continues to document human rights and IHL abuses in Yemen from all parties to the conflict. Part of their protection is the level of visibility they have: this is partly due to their partnerships with a range of international organisations, and also because they have made direct interventions to the UN Security Council. One of the founders and director of the organisation is from a dominant and well-connected clan in Yemen.

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to review all licences to Saudi Arabia (UK Court of Appeal, 2019a) and committed to cease issuing new arms licences while it carried out the review. The court did not order the suspension of all sales (this was not requested by CAAT).³²

As a result, new licences were not issued for a year (UK Parliament, 2020). These gains were set back with the UK government's resumption of arms sales to Saudi Arabia in 2020,³³ providing a lesson to ensure clear requests are made to the court as part of the legal strategy.

The use of legal opinions without legal proceedings seems to have had some impact. In 2017, Oxfam got an opinion on the lawfulness of UK's licencing of military equipment in the context of the Saudi-led coalition's blockade of air, sea and land ports in Yemen (Kaufmann et al., 2017). The case and legal opinion influenced parliamentary and public opinion. This in turn is reported to have contributed to the UK and other third-party states pressuring Saudi Arabia and the Coalition to strengthen compliance with IHL.

Yemen civil society organisations have been empowered by a heightened profile and strengthened partnerships, and continue to monitor the conduct of hostilities and IHL/IHRL violations. Many have spoken of strong partnerships with relevant international actors, including through facilitation for their direct intervention in international platforms such as the UN Security Council.³⁴

Given the nature of the relationship between Saudi Arabia and the UK, this case was complex and chances of success were slim. However, in other countries where the commercial value and/or strategic relationship between states were of less value, there was a higher potential for success.

Collective campaigns and/or legal action have taken place in other countries, some of which involved organisations linked to networks with the organisations involved in this case.³⁵ For instance, collective campaigns and/or legal action reportedly contributed to blocking ships carrying arms to Saudi Arabia.³⁶ In Germany, Netherlands, Norway, Denmark, Finland and

32 CAAT did not request the suspension of arms sales, in part due to the perception that chances of winning the case were low and this may have negatively impacted the potential to win the case (UK Court of Appeal, 2019b).

33 In the first three months following the resumption of arms sales, £1.3 billion of arms were approved for export to Saudi Arabia. For more information, see Oxfam (2021).

34 There are a number of civil society organisations in Yemen which continue to document, monitor and report on IHL/IHRL violations in Yemen and which work with international partners to ensure this evidence and data is used in international monitoring and compliance mechanisms and potential legal actions (HPG interview, 9 February 2021).

35 Members of the UK Working Group on Arms (Amnesty International UK, Saferworld, Oxfam) had an operational footprint and/or were linked to similar groups in other countries, for example the European Network Against Arms Trade.

36 HPG interview, 4 February 2021; 5 February 2021; 8 February 2021.

Switzerland, arms licences and transfers were halted to Saudi Arabia, United Arab Emirates (UAE) and other Coalition members in cases where these arms could be used in IHL violations in Yemen between 2018 and 2019.³⁷

In January 2021, Italy revoked all licences to Saudi Arabia and UAE with immediate effect;³⁸ and in February 2021 the US Administration announced it would end all support, including sales of arms used for ‘offensive operations’³⁹ in Yemen. While it is unclear whether these shifts will impact the UK position, the UK is increasingly isolated in its current policy. The US change in policy could potentially further strengthen the legal case against UK arms sales in the future.⁴⁰

Alternative avenues for legal action are also being pursued by organisations involved in the UK case, including to the International Criminal Court (ICC).⁴¹ The Communication requests the ICC to investigate whether government ministers and officials, and/or senior leadership in arms companies, bear individual criminal responsibility in aiding and abetting war crimes in Yemen by authorising and exporting arms to Saudi Arabia and Coalition members. The referral of European political and economic actors to the ICC for their potential involvement in the commission of war crimes has not previously been tested (ECCHR, 2020).

37 For more information, see Amnesty International (n.d.b).

38 Collective action by international non-governmental organisations was taken against Italy, which led to a parliamentary process. This decision was significant as Italy was one of the largest suppliers of ‘dumb’ bombs to Saudi Arabia and UAE (HPG interview, 4 February 2021). For more information on Italy’s decision, see Reuters (2021). For more information on dumb bombs relevant to Yemen, see Americans for Democracy & Human Rights in Bahrain (2017). For more information on dumb bombs, see Hallion (1995).

39 This includes precision-guided missiles, which are alleged to have struck hospitals, schools and civilian homes, killing healthcare providers, teachers and entire families – including children as young as two years old (Amnesty International, 2021). The US also stated that they would continue to sell ‘defensive support’ to Saudi Arabia (Borger and Wintour, 2021).

40 For example, it could be difficult for the UK to claim it has additional information to the US to make such a different calculation in assessing the level of risk of arms sales being used to carry out IHL violations. Early indications suggest a strong rejection that the change in US policy will impact the UK policy (UK Parliamentary Questions, 2021). However, there may be technical implications for the UK’s ongoing arms sales: depending on the parameters of the ban, it may handicap the UK and other states’ ability to continue to supply arms regardless, due to the way that military equipment is assembled and maintained.

41 The Communication was submitted by the European Centre for Constitutional and Human Rights (ECCHR), along with Mwatana for Human Rights from Yemen and other organisations, as well as Amnesty International Secretariat, CAAT (UK), Centre d’Estudis per la Pau J.M. Delàs (Centre Delàs) (Spain and Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L) (Italy). For more information, see ECCHR (2020).

Conclusion

The strategy of collective litigation⁴² to seek to influence policy change raises interesting questions about the interplay between law, policy and advocacy, while a long-term collective approach can have incremental and potentially significant impact. Legal action is a high-cost, high-risk and lengthy process; while timing balanced with evidence, media attention, public opinion and parliamentary scrutiny are all important. If arguments and evidence are not persuasive at the outset, there are limited options to try again using the same legal avenue. However, changes to law and judgements (even when they do not change the law) give a legal foundation to potentially change policy at a later date.

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⁴² While this was the first attempt at collective litigation, organisations involved in the case had been testing responsibility of third-party states in arms sales used in the conflict in Syria, as well as illegal conduct of Saudi Arabia, which paved the way for litigation.

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Appendices

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