The Saudi-Led Coalition in Yemen, Arms Exports and Human Rights: Prevention Is Better Than Cure

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Abstract: The transfer of arms has long been on the agenda of States. While they continue to be the object of defence, security and economic affection, the consequences spiralling from poorly regulated arms transfers can be devastating. In fact, the lack of a stringently applied legal framework can not only lead to the illicit trafficking of arms, but can have more serious humanitarian and developmental consequences. Nothing can signify what is meant by ‘devastating’ quite like the conflict situation in Yemen. At the heart of Yemeni reports has been the involvement of countries like the UK and the USA in inadvertently causing a percentage of the bloodshed through its supply of weapons to Saudi Arabia. This article assesses the issue of arms trade regulation and international law. It pays specific attention to the importance of integrating human rights and humanitarian laws within arms exporting processes and analyses the development of international law on arms transfers within the context of the Yemen conflict.

1. Introduction

The transfer of arms has long been on the agenda of States. While they continue to be the object of defence, security and economic affection, the consequences spiralling from poorly regulated arms transfers can be devastating. In fact, the lack of a stringently applied legal framework can not only lead to the illicit trafficking of arms, but can have more serious humanitarian and developmental consequences. Nothing can signify
what is meant by ‘devastating’ quite like the conflict situation in Yemen, which has plagued the headlines in recent months. At the heart of Yemeni reports has been the involvement of countries like the UK and the USA in inadvertently causing a percentage of the bloodshed through its supply of weapons to Saudi Arabia. As a result, even the British national courts have been brought into the equation to assess UK practices on arms transfers as per a judicial review case submitted by the organization Campaign Against the Arms Trade (CAAT) against the UK Government. The Saudi–Yemen case strikes at the core of effects that poorly regulated and law-abiding state practice on arms transfers can have on innocent populations.

Similarly, it shows the clear risk of widespread and systematic violations of human rights and humanitarian law violations, which can inevitably take place.

Despite the impact of arms transfers, as shown by the Saudi-led Coalition’s actions in Yemen, there is a drought in the number of international lawyers contending with issues on the regulation of the arms trade and thus, on the prevention of violations. It has become apparent that international lawyers have a general preoccupation to deal with the international applicability of laws after the fact, usually after a violation has occurred and how it can be remedied. The judicial review case brought by CAAT concerning UK arms transfers to Saudi Arabia, which the High Court subsequently rejected, is a prime example of legal work (including critical scholarship) taking effect after mass atrocity. Much more international legal work to properly assist governments in the application of international laws on the arms trade is needed. If the arms trade is regulated properly, it could potentially prevent, or at least reduce the exponential rises in human rights and humanitarian law violations and the commission of crimes such as genocide, war crimes and crimes against humanity. This is because the global arms trade is the substrate for these violations and crimes. There is a causal link between strict international law considerations pre-export and levels of deaths and casualties post-export. There is also an indirect socio-economic impact from armed conflicts and international crimes, as fuelled by poorly regulated arms, including famine, family segregation, disease, lack of education, refugee levels and even a decline in foreign investment—the list is not exhaustive. It is also believed that conventional weapons, such as small arms, cause far more deaths than any other weapon.

These links affirm the greater obligations that must be placed upon States and suppliers to effectively control arms transfers and provide a basis to reinforce the evolving norm against these specific actors, rather than merely those pulling the trigger. While the Yemen case has perhaps placed a more magnified spotlight on the responsibility of States with regard to authorized transfers, there have been endless examples of authorized transfers that were utilized for the purposes of infringing human rights and humanitarian law. Belgium, has in the past, approved the transfer of arms to Nepal, even though its government had been involved in violations such as summary executions, as well as the torture and abduction of civilians. Past transfers to Rwanda, the DRC and Sri Lanka have also caused the shift towards a stronger link between arms transfers and the responsibility of States, not just the end-user. While international law has come a long way in terms of content, legal developments on the arms trade has been somewhat lacking.

Perhaps the most significant of developments is the entering into force of the Arms Trade Treaty (ATT). While the Arms Trade Secretariat in Geneva is the main organ responsible for the Treaty's implementation, there is still a long road ahead before standardized human rights-adhering arms export processes can be integrated within national frameworks, as per the Treaty text. This was apparent from discussions between states during the preparatory process for the Third Conference of States Parties (CSP3), which took place in September 2017. A number of issues on effective treaty implementation, transparency and reporting and treaty universalization came to the fore and were the basis of working groups for the ATT’s application in national states.
This article pays specific attention to the importance of integrating human rights and humanitarian laws within arms exporting processes. It will analyse the development of international law on arms transfers, but do so within the context of the Yemen conflict, and thus the involvement of the British and the USA in their supply of weapons to the Saudi-led Coalition. This article, however, will not deal with the political context of the conflict itself, only as it relates to UK and US sales to Saudi Arabia. Ultimately, it is national governments that authorize licences for the sale of arms to importers. Therefore, States must apply arms control laws strictly to prevent human rights abuses. The difficulty surrounding that implementation is no better exemplified than the Yemen case. In addition, there is the need for exporting states to recognize that their duty to abide by international law is not relinquished upon the completion of an arms transaction and additional measures must be undertaken to also ensure the prevention of human rights and humanitarian law violations, as will be dealt with later on in the article. Given the involvement of the UK and USA, the article will focus on these national frameworks and then broadly assess how all states can in general strengthen their arms trade national processes to conform to international law—particularly the ATT—and prevent the diversion of arms to countries in precarious or fragile situations, which results in the commission of extensive human rights and humanitarian law violations.

2. The Use of British and American Arms by the Saudi-led Coalition in Yemen

The Saudi-led Coalition became involved in the Yemen conflict on 26 March 2016 to reinstate President Abd Rabbuh Mansour Hadi following his expulsion by northern Houthi rebels and groups faithful to Ali Abdullah Saleh. Saleh had been the previous President of Yemen who was also ousted in 2012 and who later publicly sided with the Houthis.\(^8\) Arms transferred by the UK and the USA to Saudi Arabia were subsequently used by the Saudi-led Coalition in Yemen. The Coalition consists of nine Middle Eastern and African countries and is a prime example of the devastation that poorly regulated and illegal arms transfers can have on the lives of innocent civilians. In this case, ‘munitions [were] supplied to the Saudi Air Force under pre-existing contractual arrangements’.\(^9\) Statistics show that UK approved licences between 2010 and 2015 were worth £6.7 billion, and those from the beginning of the airstrikes in Yemen to the latter part of 2015 were worth £2.8 billion.\(^10\) With substantial figures like these, it is hard not to see why Saudi Arabia is deemed a ‘priority market’ for the UK and despite all law pointing in the direction of non-transfer, as will be discussed, the UK has continued to do so.

NGO's and international organizations such as Amnesty International and Saferworld condemned the airstrikes before the end of the first day of intervention.\(^11\) Previous evidence from Amnesty International had already highlighted the use of UK Tornado fighter jets by Saudi in Yemen in 2009, which would normally have been considered when assessing end-user past practices. Figures from 25 October 2016 show that 19 months into the conflict, there have been approximately 44 000 casualties, which included 7100 deaths.\(^12\) In the period between March 2015 and October 2016 alone, the majority of deaths and injuries were caused by coalition airstrikes, including 4125 deaths and 7207 injuries.\(^13\) High numbers of children have been injured or killed as a result of the war. Following detailed investigations, a UN Panel of Experts confirmed that ‘the coalition led by Saudi Arabia did not comply with international humanitarian law in at least 10 air strikes that targeted houses, markets, factories and a hospital’.\(^14\)
Humanitarian aid warehouses were also bombed, as was an Oxfam warehouse in April 2015. Despite this 2015 incident, the UK authorized a licence on 14 May 2015 approving a £1.7 billion arms export licence for military aircraft and equipment. In the same way, despite apparent violations of humanitarian laws and human rights in Yemen, through airstrikes on schools, residential homes and other non-hostile public places, the UK Government approved further arms export licences worth £1 billion in July 2015. The UN also categorized Yemen as a country with the most severe humanitarian crisis and one significantly aggravated by the conflict. Additional violations included an attack on a Medecins Sans Frontieres (MSF) hospital in August 2015. In these instances, Saudi Arabia could not plausibly justify the damage as incidental, particularly since hospital coordinates had already been provided. Identification of the hospital was also not problematic since the MSF symbol was visible on the hospital roof.

The use of UK weapons in the Yemen war is also not hearsay. A UK Cruise missile was found beneath the wreckage and debris of a civilian factory targeted by the airstrikes. There have also been investigations into the alleged use of UK-manufactured cluster munitions, namely BL755 and supplementary Tornado jets produced by BAE Systems, which the UK has stated were recalled in 2008. This has been refuted by claims showing otherwise. A UN report also stated that:

- the coalition had conducted airstrikes targeting civilians and civilian objects, in violation of international humanitarian law, including camps for internally displaced persons and refugees;
- civilian gatherings, including weddings; civilian vehicles, including buses; civilian residential areas; medical facilities; schools; mosques; markets, factories and food storage warehouses;
- and other essential civilian infrastructure, such as the airport in Sana’a, the port in Hudaydah and domestic transit routes.

The panel documented 119 coalition sorties relating to violations of international humanitarian law.

While the UK was not directly participating in the hostilities, they were providing technical assistance in addition to authorizing arms transfers to Saudi Arabia. The UK’s role here is worth assessing in light of the Nicaragua case, where the ICJ found the USA held responsibility through its ‘training, arming, equipping, financing, supplying or otherwise encouraging, supporting and aiding’ the contras. This responsibility was not so much attribution of contra action to the USA, but more so the behaviour of the USA in the ‘training, arming […]’ etc. This could be aligned to the UK’s technical assistance to Saudi Arabia, albeit considering the ambiguity around what this technical assistance involved. In relation to the contras’ violation of international humanitarian law, responsibility was not attributed to the USA due to a lack of effective control. The USA had not, according to the Court, ‘directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State’.

The facts of the case are in many ways quite different to the position of the UK and its assistance and arms transfers to Saudi Arabia. However, issues from the Nicaragua case bring up points of debate in the UK–Saudi context. As a point of concern here, arms have been utilized to breach international humanitarian law by the Saudi-led Coalition, yet effective control cannot be established as regards the UK on these IHL breaches—a high threshold was put forward by the ICJ in Nicaragua. However, state responsibility does not allow for States like the UK to escape its responsibility towards other States when they use other groups to cause damage instead of taking action themselves. These States must be held responsible even if authorization has been exceeded or instructions not followed.

If responsibility fell short at the point of authorization, then there would be no way of establishing the evidence that an agent had acted upon the receipt of instructions or not. This rationale clearly embodies a
more general rule that could apply to other instances such as the authorization of arms transfers and technical assistance provided by the UK. While this article in no way infers that the UK gave specific direction to the Saudi-led Coalition to commit human rights abuses or breach international humanitarian law in Yemen, technical support and arms transfers should carry the same underlying responsibility for the incidents, despite the Nicaragua judgment, particularly for the prevention of human rights and humanitarian law violations. Article 16 of the ILC Draft Articles on State Responsibility discusses the issue of aid and assistance in the commission of an internationally wrongful act. This Article is interpreted to mean that the UK would have needed to have the ‘knowledge of the circumstances of the internationally wrongful act’, which could constitute a number of violations that will be discussed later on in the article.

The UK’s support for Saudi Arabia had also been legitimized by UN Resolution 2216. This Resolution was viewed as formally approving the

intervention. It referred to a letter dated 24 March 2015 from the Permanent Representative of Yemen to the UN relaying additional correspondence from the President of Yemen requesting ‘from the Cooperation Council for the Arab States of the Gulf and the League of Arab States to immediately provide support, by all necessary means and measures, including military intervention, to protect Yemen and its people from the continuing aggression by the Houthis’. The Resolution continued to reiterate its support for the Gulf Cooperation Council in aiding the political transition in Yemen, as well as the legitimacy of Abso Rabbo Mansour Hadi as President of Yemen. It did, however, also recognize the already grave humanitarian and security situation in Yemen.

The Resolution condemned Houthi unilateral action, affirmed its recognition that continuing deterioration of violence posed a threat to neighbouring States and ultimately constituted a threat to international peace and security. A previous Security Council Resolution had already been issued condemning Houthi action and demanding the ceasing of hostilities, among other peace-facilitating action. Interestingly, despite the UK’s reliance on Resolution 2216 for their support of the Saudi-led Coalition, the Resolution explicitly demanded that ‘all Yemeni parties adhere to resolving their differences through dialogue and consultation, reject acts of violence to achieve political goals, and refrain from provocation and all unilateral actions to undermine the political transition’. In addition, they should take ‘concrete steps to agree and implement a consensus-based political solution to Yemen’s crisis in accordance with the Gulf Cooperation Council Initiative and its Implementation Mechanism and the outcomes of the comprehensive National Dialogue conference’. The Resolution was not a licence to escalate violence or to aid other countries to do so. It also prioritised the safety of civilians and the compliance with humanitarian and human rights law. It had to be a Yemeni-led political transition process for ‘peaceful change and meaningful political, economic and social reform’. In this sense, reference to the Resolution as legitimating the intervention was inaccurate and skewed its real purpose.

It should also be noted that the UK was not the only country that had been found to supply weapons to the Saudi-led coalition. Investigators from organizations like Human Rights Watch also found a US bomb delivered to Saudi Arabia during the war, as well as remnants of US-supplied weapons at 23 unlawful coalition airstrikes. Human Rights Watch proved that around 12 attacks

involved US cluster munitions. Looking at the specifics, fragments of two US made GBU-12 Paveway II laser guided 500 lbs bomb had been found. One of the laser guidance systems had been produced by the US manufacturer Raytheon Inc. seven months into the war. This was after the UN, among other agencies had declared the coalition airstrikes and bombings as violating endless international laws. Another incident on 29 October 2016 was an attack on a security administration building in Hodeida, where a JDAM satellite guided bomb was discovered. US manufactured weapons were also used in an attack on Mastaba market, killing 97 civilians and a funeral hall in Sanaa, killing 100 and wounding more than 500 people. Other attacks involved US manufactured weapons at the Arhab Water Drilling Site in September 2016, Al-Zaydiya Security Administration in October 2016 and a residential neighbourhood in Souq al-Hinood in September 2016.
All these findings contribute to the growing evidence that the UK and US infringed a number of laws that attempted to limit the transfer of arms to situations where there was the risk of human rights and humanitarian law abuses. The following section shall outline and assess some of these international laws with respect to UK and US practices, placing emphasis on those with a specific human rights orientation.

3. The Arms Trade, Human Rights and Humanitarian Law

There are a number of international laws or arrangements that pertain to the arms trade. There is the Convention on Cluster Munitions (CCM),\(^40\) the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Ottawa Treaty),\(^41\) the Missile Technology Control Regime (MTCR),\(^42\) the Wassenaar Arrangement\(^43\) and the Arms Trade Treaty (ATT).\(^44\) Not all, however, aim to integrate human rights and humanitarian law within the arms transfer processes of exporting states.

The CCM prohibits the direct or indirect use, development, stockpiling and transfer of cluster munitions.\(^45\) Under the CCM, State parties must also not assist, encourage or induce anyone to engage in any activity prohibited by the Convention.\(^46\) Amnesty International found a 'partially-exploded' UK manufactured BL755 cluster bomb in governorates close to the Yemen-Saudi border in early 2016.\(^47\) This particular bomb had originally been manufactured in the 1970s by a Bedfordshire company, Hunting Engineering Ltd, but is now banned by the CCM.

The UK Government has stated that, following the signature of the CCM, all support for this type of weapon was halted\(^48\) and as of yet, there is no evidence that cluster munitions were actually transferred after the entering into force of the Convention in 2010, or even after signature in December 2008. However, as suggested in the previous section, the UK's provision of technical assistance to Saudi Arabia could be construed as in violation of Article 1(c) of the CCM, particularly as it related to Tornado aircrafts which would have been required for the use of cluster munitions, such as the BL755 discovered by Amnesty. Although Saudi Arabia is not a party to the CCM, the CCM extends its prohibitions to non-State parties, as well as non-State actors. The UK's assistance could be in breach of this Convention article since 'assistance' has been interpreted as including 'technological or scientific know-how or provision of specialised personnel' in other similar legal instruments\(^49\) and could also cover any past authorised licences that have included the obligation of suppliers—in this case it was BAE—to provide lifetime support. The fact that terminology such as 'assistance' was not clarified or elaborated during the CCM's drafting process, as well as the fact that further information from the UK Government and the supplier would be required before definitive legal conclusions could be made, means there is a level of ambiguity surrounding this issue.

Other weaknesses of the Convention are the fact that parties to the CCM provided their signatures in agreement for agreed compromises, such as the ability to contribute in joint military operations with non-state parties. Furthermore, since the Convention focuses on a prohibition, rather than the assessment of arms transfers, it cannot inform States on human rights and humanitarian law prescriptions and does so only for victim assistance and international cooperation issues.\(^50\) Nonetheless, the discovery of UK-manufactured cluster munitions on Yemeni ground highlights the pertinence of States and suppliers to perform continuous review and comprehensive due diligence even much after licence authorization. The strong correlation this has to the prevention of human rights and humanitarian law violations will be discussed in the final section.
The Wassenaar Arrangement deals with the multilateral cooperation of the exporting of conventional arms and dual-use goods and technologies after the adoption of the 1996 'Initial Elements'. The Arrangement's purpose was to facilitate regional and international peace and security by destabilizing accumulation through the promotion of enhanced transparency and greater responsibility. Countries involved in the Arrangement would ensure that their national regulation did not permit anything that would contradict or weaken the Arrangement's purpose. This included potential for diversion.

While the Wassenaar Arrangement was and is significant and does explicitly refer to human rights, it does so only in the context of 'best practice guidelines', where there must be 'respect for human rights and fundamental freedoms in the recipient country'. Since it is not a treaty, it is not legally binding. Participating States must also not issue licences for small arms and light weapons (SALW) where it deems that there is a clear risk that the arms will be used for the violation or suppression of human rights and fundamental freedoms. States should consider this during proposed export assessments. The phrasing infers a great deal of control on the State that could choose to ignore human rights should it wish. It also does not provide States with any additional supplementary guidance to ascertain what consideration for human rights actually means. This is extremely significant, as the term has become quite loaded. Governments have often been inadequate in their understanding of human rights law or consciously skewed its core meaning and legal regime. It is also much less stringent than its predecessor, the Coordinating Committee for Multilateral Export Controls (COCOM).

The most recent and greatest development on the regulation of the arms trade, however, is the Arms Trade Treaty (ATT). The ATT has placed human rights and humanitarian law at the core of decision-making on the arms trade, which this article argues should be at the forefront of arms trade regulation to prioritize the protection of innocent human lives. If applied strictly and effectively, it could limit the illegal use of arms and hinder the exacerbation of conflict around the world by States and non-State actors such as terrorists and warlords. In turn, this would minimize civilian injury and deaths. The adoption

of the ATT recognizes the human cost of insufficient and poor regulation of conventional arms. It is different to previous attempts to tackle the illicit arms trade by extending its focus to beyond simply the trading issue of arms. It, for the first time, places an obligation on States to analyse the consequences and effects of arm exports. It acknowledges the strong causal links between the export of arms and the acts of violence taking place on innocent civilian populations, particularly on women and children.

The ATT integrated concepts of transparency and accountability into the regulatory processes at hand. For example, the First Conference of States Parties in 2015 made the decision to allow civil society to attend meetings relating to the ATT. The ATT also requires States to retain all records of authorized and actual transfers of conventional arms. Details of these transfers should be submitted via a report to the Treaty's Secretariat. Additional State Party reporting should consist of information on national laws, policies and administrative measures adopted by States. By embedding a degree of transparency into decision-making processes, there was an aim that there would be less room for States to enter into trading deals with actors who are or could even potentially be responsible for violations of international humanitarian law and human rights abuses. The fact that these reports would not automatically be available to the public undermines this transparency. States would need to give their permission for the availability of these reports and under Article 13, States may refrain from including 'commercially sensitive or national security information', which could provide a broad scope for States to decide on what information to provide. The UK's sale of arms to Saudi Arabia has already called this aim into question, since information on these transfers, for example, assessment methodology for authorization decisions were not made publicly available.

One must bear in mind, however, that there are still many significant arms exporters and importers from around the world that have not yet ratified the Treaty nor have any intention of joining. While the current participation of States is promising, there are countries, such as China and Russia that have not yet embraced the ATT. The USA, as an exporter to Saudi Arabia and a top exporter in general has also yet to ratify the Treaty. In order for the ATT to be effective, it is imperative that it has global involvement for global impact. Failing to achieve widespread effect would increase the risk of international crimes taking place, such as genocide and crimes against humanity, as Yemen has shown.
Given that the Treaty came into force in December 2014, it may still be too early to predict its true impact on the nature of international arms sales,

especially since the Third Conference of States Parties only recently took place in September 2017 and many issues—substantive and administrative alike—need to be ironed out for the effective implementation of the Treaty. The ATT, however, does have the potential to have a significant impact beyond merely a symbolic nature.

The object and purpose of the Treaty is laid out in Article 1 of the ATT and is 'guided' by the UN Charter. The Charter 'seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources (…)' There is a direct link between the regulation of the arms trade and the maintenance of peace and security, which the UN confirms in a number of ways. A study by the International Committee of the Red Cross also showed that the widespread availability of arms increased violations of international humanitarian law, causing severe injury to the civilian population.

Article 1 of the ATT describes its purpose as to contribute towards international and regional peace, security and stability; reduce human suffering and promote cooperation, transparency and responsible action by States in the international trade in conventional arms, building confidence among them. The purpose would be achieved by establishing the highest possible common international standards for regulating or improving regulation of the international conventional arms trade, but as applied nationally. The Treaty also seeks to prevent and eradicate the illicit trade in conventional arms. The fact that the ATT refers only to 'illicit' trade in its object means that the interpretation of the wording does not include restrictions on lawful arms transfers, contrary to the opinions of many States who did in fact want to regulate transfers to States where arms would be used lawfully.

Article 6 of the ATT sets out the prohibitions imposed upon a State. Attention should be drawn to Article 6(3) where a 'State Party shall not authorize any transfer of conventional arms […] or of items covered [by the Treaty], if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party'.

Article 7 under the Treaty is one of the most important, yet simultaneously, most contentious treaty articles. In certain respects, it is a 'get-out' clause, as a transfer may be unlawful under the ATT, but an authorization of that transfer by a State may be legal through establishing that a transfer's impact on peace and security would be contributory and not undermining. To provide clarity and prevent States from benefiting from this apparent loophole, there must be detailed guidance on how States should undertake their risk assessments and tests in determining the effects of the transfer. They must look at the number of exported weapons and their normal usage, an in-depth study on the beneficiary state must be conducted, as well as in the importing State's region. As this article will show, there are various other supplementary means and methods in which States can fulfil their obligations under the ATT that could circumvent this possible loophole and assist States in placing human rights and humanitarian law at the forefront of arms assessment processes.

Article 7(2) of the ATT on the Export and Export Assessment refers to 'measures that could be undertaken to mitigate risks'. These could include 'confidence-building measures or jointly developed and agreed programmes by the exporting and importing States'. To enhance effectiveness, more guidance should be provided on how States could mitigate risks with the importing State. The current ambiguity surrounding possibilities for mitigating measures does not provide States the incentive to implement such measures. However, with detailed specifications and increased practice, measures could be integrated into the export assessment more comprehensively, as will be explained in the following section.
The international laws addressed in this section, particularly the ATT, show that there is ongoing development in regulating the arms trade more effectively. To causally link it with human rights and humanitarian law is a realistic and necessary approach, given the devastating consequences of poorly regulated arms transfers. While the existence of international laws may prescribe this, it is States that must implement these laws. Since this article has focused on UK and US sales to Saudi Arabia for its use in Yemen, it is apt to discuss how both countries' national laws already conform to these international laws and how they have—and have not—taken into account human rights and humanitarian law.

A. UK Law and Practice

The context in Yemen quite apparently points to the existence of a non-international armed conflict (NIAC) due to the organizational capacity held by the Houthi forces and consequently, the ability to observe international law, as well as the nature of the conflict between the Houthis, Houthi allies and Hadi's forces. Based on the evidence available, overall control by Iran over the Houthis could not be established. While the level of power the Houthis can exercise for the formation of a functioning government and territorial control could evolve over time—particularly since membership of this group has constantly been in flux—in addition to President Hadi's position, as of yet, it cannot definitively be stated that an international armed conflict (IAC) between Yemen and Saudi Arabia (and its allies) is taking place. This classification is important to discuss the applicable law.

UK practices on defence exports have undoubtedly contravened various international obligations, rendering them in violation of international laws. The UK violated Article 6(3) of the ATT through the transfer of weapons to Saudi Arabia. Saudi Arabia was already established as a country of concern by the UK Government, as stated in the FCO's Human Right and Democracy Report. The Saudi-led Coalition's intervention in Yemen constituted grave breaches of the Geneva Conventions 1949. Under Geneva Convention I, Article 19 medical units and establishments may in no circumstances be attacked and in Article 50 the specific 'grave breaches' are outlined. The Saudiled intervention was also involved in attacks directed against civilians, which violated the principle of distinction and the principle of proportionality under customary international humanitarian law since the loss of civilian life was excessive against the military advantage gained for the killing of an incomparably lesser amount of combatants. Indiscriminate attacks took place, which are prohibited under Additional Protocol I.

While the UK Government had taken into account assurances made by Saudi Arabia on prohibited action under Article 6(3) of the ATT, it was essential that these were not the sole basis for transfers, particularly since Saudi Arabia was, and is, a country of concern. The apprehension and care needed when assessing an arms transfer was also confirmed by cases such as R v Secretary of State for Trade and Industry. Here, the Secretary of State affirmed that 'due to the misuse of a particular export, the Secretary of State would not rely on assurances about the extent of the intended use given by the Israeli authorities'. If the UK had knowledge that Saudi Arabia would commit prohibited practices as stated in Article 6(3), then the UK would be in contravention of the ATT. The end use of arms following a transfer is very much the concern of the UK under its international obligations under the ATT.

In fulfilling its obligations, the UK should also have performed a full risk assessment, in an 'objective and non-discriminatory manner' under Article 7 of the ATT where an export was not completely prohibited. The UK had to ensure that the export would not undermine peace and security. Even if the assessment showed that it would not, the UK would still have to assess whether the export could be used to 'commit and facilitate' a serious violation of international humanitarian law, international human rights law or an act constituting an offence under international conventions or protocols relating to terrorism or transnational organized crime.
that the UK was party to. As far as Saudi Arabia was concerned, it should be questioned whether any assessments complied with the requirements outlined in the Treaty, or were even taken heed of, as various reports and on-the-ground commentators had already confirmed the serious humanitarian and human rights abuses taking place in Yemen.  

While this article has discussed UK arms transfers to Saudi Arabia (as one of its main clients), it should be noted that the UK could also be found in breach of the ATT for the transfer of arms to other countries. In previous years, the UK

\[ \text{J Conflict Security Law (2017) 22 (3): 433 at 449} \]

has made transfers to countries such as Sri Lanka, Russia and China, to name a few, which have all been named by the FCO as countries of concern. The extensive studies and reports, including that of the FCO, detailing violations of humanitarian law and human rights taking place in countries such as these makes it highly questionable that the UK did not have knowledge of such international infringements. The FCO's Human Rights and Democracy Reports reflects the UK's human rights policies and 'concerns on key issues' and therefore could be taken as reflective of prior knowledge of ongoing violations in any given country. However, in practice, the FCO's recommendations are not necessarily indicative of how other Departments behave and, in the case of arms export controls, the Department of International Trade need not automatically accept and adhere to a FCO recommendation in their decision to approve (or not) a licence.

Now that the ATT is in force, past importing States should be investigated before any future authorizations are granted, otherwise the UK will be in further contravention of Article 6(3) of the ATT. In evaluating the provisions that the ATT bestows upon states, it is clear that regulation and implementation must come from these national control systems. Every exporter does not have the same law on arms exports and even with the recent ATT, it is unlikely that national control systems will ever be standardized completely. This section will first look at the UK's national legal regime for its human rights considerations.

In the UK, a new national export licensing criteria was introduced after the 1997 governmental election, which supplemented an EU Code of Conduct on Arms Exports that came into effect in 1998. This was formally introduced as the 'Consolidated EU and National Arms Export Licensing Criteria' in 2000 and integrated the obligations that, in general, human rights, must be respected and arms transfers would only be authorized to countries that did so. While the

\[ \text{J Conflict Security Law (2017) 22 (3): 433 at 450} \]

Consolidated Criteria are legally binding in the UK, this status stems from the European Council Common Position (ECCP) 2008. The issue of Brexit has called the Criteria's status into question, particularly since there is ambiguity surrounding law originating from the EU Common positions that the UK, as a member, is bound by. This is because the ECP 2008 is not directly applicable in UK law and is referred to as guidance in the Export Control Act 2002. So, the EU obligation comes not from the content of the law itself, but the obligation to provide guidance. It is this that holds the status of being legally binding. As a result, all exporting applications for arms listed on the ‘Consolidated List’ had to be assessed on a case by case basis against the consolidated criteria. The Export Control Organisation (ECO), as part of the Department for International Trade, then issued the final application decision.

To begin with, it is worth questioning to what extent the UK system considers human rights, at least in principle, as part of the case by case assessment. The UK's consolidated criteria does integrate human rights into its assessment procedure. Criterion two is based on the 'respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law'. The Government, according to this criterion, will examine a potential recipient's attitude towards international human rights law and

\[ \text{a) not grant a licence if there is a clear risk that the items might be used for internal repression;} \]
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;

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.⁹⁰

Criterion three states that the Government will not grant a licence for items which would 'provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination'.⁹¹

 Criterion four is closely related and states that the Government 'will not grant a licence if there is a clear risk that the intended recipient would use the items aggressively against another country, or to assert by force a territorial claim'.⁹²

When assessing these risks, the UK are to consider:

   a) the existence or likelihood of armed conflict between the recipient and another country;

   b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;

   c) the likelihood of the items being used other than for the legitimate national security and defence of the recipient;

   d) the need not to affect adversely regional stability in any significant way, taking into account the balance of forces between the states of the region concerned, their relative expenditure on defence, the potential for the equipment significantly to enhance the effectiveness of existing capabilities or to improve force projection, and the need not to introduce into the region new capabilities which would be likely to lead to increased tension.⁹³

The words 'clear risk' are indicative of how in reality, the UK Government should be applying the law, but does not in fact reflect the current state practice. It is questionable how strict this assessment actually is, given the depredations in Yemen due to UK weapons sold to Saudi Arabia. The judicial review case brought by CAAT and rejected by the High Court recently also brought up an important issue relating to what a 'serious violation', as per criterion 2(c) and Article 7 of the ATT, was. The Government argued that 'serious violation' was tantamount to 'war crimes' and 'grave breaches' as defined in the Rome Statute; four Geneva Conventions and Additional Protocol 1.⁹⁴ Unfortunately, this demonstrates a flawed inter-mixing of concepts, since not every international humanitarian law would invoke criminal liability (and the same level of mens rea, if at all). This interpretation limits the range of instances in which a violation could occur and seems inappropriate to the context of arms transfers and how licences should be approved.

Additional contribution to the statutory framework on arms trade regulation in the UK comes in the form of the Export Control Act 2002. Specific controls under the 2002 provisions are contained in the Export Control Order 2008.⁹⁵ The 2002 Act enhanced the Government's capabilities on issues pertaining to the transfer of sensitive technology and WMD-related technology, to name a couple. The introductory paragraph in the Act states that it is 'An Act to make provision enabling controls to be imposed on the exportation of goods, the transfer of technology, the provision of technical assistance overseas and activities connected with trade in controlled goods; and for connected purposes'.
The phrase ‘connected purposes’ could be interpreted to cover human rights. This is because, in the Schedule of the Act, ‘[e]xport controls may be imposed in relation to any goods […] capable of having a relevant consequence’. Relevant consequences are then also explicitly stated as including ‘breaches of international law and human rights’. These could consist of acts threatening international peace and security; acts contravening the international law of armed conflict or even internal repression in any country. Other consequences that could relate to human rights and international law breaches are internal conflict, weapons of mass destruction, an adverse effect on national security, terrorism and crime. Other sections of the Act do not specifically refer to human rights, but the broad scope allowed for controls to be ‘imposed’ upon trade, export or transfer means that human rights contexts could be a viable reason for such controls to be placed.

B. US Law and Practice

The USA could also incur responsibility in providing weapons to Saudi Arabia. Following the sale of precision guided munitions (PGM) worth $1.3 billion in 2015 and the subsequent concern from certain Congressmen, the USA began reducing sales. This was recognition of violations of human rights and humanitarian law taking place in Yemen. The halting of arms sales included stopping the transfer of cluster munitions—due to its contribution to the loss of civilian lives—as well as nearly $400 million transfer of PGMs. While the USA has been quite reluctant in terms of becoming a state party to international treaties and conventions, as is the case of the CCM and the refusal to ratify the ATT, their national laws have also pointed to the fact that the sale of arms to Saudi Arabia have violated human rights and humanitarian law.

On the face of it, the US national control system appears rigorous; however, arms sales to Saudi Arabia have highlighted that the existence of law does not necessarily mean practice. The USA does appear to have one of the most detailed and comprehensive national frameworks on arms control. While, for some, this is a justification for why the USA has not in fact ratified the Arms Trade Treaty, the way in which the national framework has been put into practice does call into question its consideration of human rights and again, shows that having a stringent legal framework on the one hand, does not necessarily mean as stringent an application on the other. These must be married cohesively for the prevention of widespread human rights and humanitarian abuses in countries like Yemen.

The US principal law on the regulation of arms transfers is the Arms Export Control Act (AECA) 1976. Section 2751 states that all sales [will] be approved only when they are consistent with the foreign policy interests of the United States, the purposes of the foreign assistance program of the United States as embodied in the Foreign Assistance Act of 1961, […] the extent and character of the military requirement, and the economic and financial capability of the recipient country, with particular regard being given, where appropriate, to proper balance among such sales, grant military assistance, and economic assistance as well as to the impact of the sales on programs of social and economic development and on existing or incipient arms races.

The President also has powers to regulate export and imports of defence articles under Section 2778, which has been assigned to the State Department and realized through another law, the International Traffic in Arms Regulations (ITAR). It must be noted that the ITAR does not mention human rights. The AECA only permits the sale of ‘defen[ce] articles and defen[ce] services for purposes consistent with the UN Charter, peace and security, self-defence and security’.
Evidence has shown that Saudi Arabia has used US defence articles contrary to the statutory restrictions prescribed by the AECA. US PGMs have been used to strike at medical facilities and residential areas contravening AECA provisions. Although, it could be argued that Saudi Arabia was invoking collective self-defence through Hadi’s request, however, the AECA terms are aligned with the DOD Security Assistance Management Manual that US weapons are only to be used against “legitimate military targets”. The systematic and intended targeting of civilians could not be established as proportionate or necessary, and thus lawful in this case. Saudi actions are therefore in contravention of the AECA.

Another US law, the Leahy Law regulates arms transfers based upon human rights criteria fulfilled by recipient countries. This law lies within the Foreign Operations Appropriations and Defence Appropriations Acts 2001 and 2002.

The law refers specifically to human rights stating that military assistance could not be provided to ‘any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights’. Since its implementation, it has been integrated within both the Foreign Operations Appropriations Act and Defence Department Appropriations Act. Unfortunately, the provision has allowed leeway that questions the Leahy Law’s impact. It allows the Secretary of State to proceed with assistance if the potential human rights violator ‘is taking effective measures to bring the responsible members of the security forces unit to justice’ or if ‘corrective steps have been taken’ as per the Defence Appropriations Act. This was extended to assistance—including military—or funding continuing only when the individual responsible for human rights infringements was ejected. While approval must be given by the Secretary of State on human rights standards, some commentators have suggested that assistance was being approved even when human rights violations continued. This amendment to the Leahy Law must also be reintroduced every year through the Foreign Operations Appropriations and Defence Appropriations Acts.

The Foreign Assistance Act (FAA) 1961 regulates US foreign assistance to other countries and affirms the US’s core foreign policy aims to ‘promote the increased observance of internationally recognised human rights by all countries’. This is supplemented by the additional affirmation that

security assistance may not be provided to the police, domestic intelligence, or similar enforcement forces of a country, and licenses may not be issued under the Export Administration Act of 1979 for the export of crime control and detection instruments and equipment to a country, the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker […] that extraordinary circumstances exist warranting provision of such assistance and issuance of such licenses.

The FAA puts forward the definition of an ‘internationally recognized’ human rights as

torture or cruel, inhuman, or degrading treatment or punishment, pro-longed detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.

In the case of the latter, the President does have the power to make exceptions when needed. Additionally, the Export Administration Act 1979 governs the transfer of dual-use goods, but does not include any provision on human rights. The sale of arms to Saudi Arabia does not reflect the exercise of the President’s power to make exceptions under the FAA and in light of the fact that there has been systematic pattern of human rights violations by Saudi Arabia, such as torture.
As in the case of the UK, it may seem on the surface that the USA have a strict national system, their arms transfers to Saudi Arabia has brought to light either a misapplication of the law or even a rejection of the law, as the national regime clearly shows the need to consider human rights before a transfer is authorized. The disengagement between law and practice means that national states need to effectively apply the law. The following section outlines some of the ways in which countries like the UK and USA could prevent future violations of human rights and humanitarian law.

4. Applying Human Rights and Humanitarian Law Standards to Arms Exports

Various arms sales to Saudi Arabia have shown that the UK and USA had not properly adhered to their human rights and humanitarian law obligations. In particular, the UK who is party to additional treaties has failed to follow laws that they themselves have championed. There are a number of international laws that seek to ensure that human rights standards are adhered to by states. These international obligations, however, must be implemented through the national framework and sources of law that States must integrate within their arms assessment process. These must be considered as part of the assessment by all states objectively, in line with international law, such as the ATT. This article has shown that a strict national legal framework that textually abides by international law does not necessarily mean practical adherence. This section seeks to provide supplementary guidance on how States could further strengthen the interpretation and application of national arms trade law to prevent the violation of human rights and humanitarian law.

To integrate human rights into the arms transfer process, the exporting agency must apply an ‘objective and non-discriminatory’ approach with the sole purpose of preventing human rights violations. For this reason, anticipatory or even reparative processes could be a basis for mutually beneficial and productive communications between exporters and importers. If done in a constructive manner, it need not jeopardize future transfers, particularly since national systems would be strengthened once recipient states were able to improve their human rights adherence as well as helping with the prevention of future violations.

The UN Charter, for one, clearly asserts the general obligation of states to respect and observe human rights. Other general international obligations come in the form of the plethora of treaties in existence. A few examples include the ICCPR, ICESCR, various regional Charters such as the American Declaration of the Rights and Duties of Man and Revised Arab Charter on Human Rights. Other human rights-based treaties include the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, the International Convention for the Protection of all Persons from Enforced Disappearances and Convention on the Rights of the Child and Convention on the Elimination of all forms of discrimination against Women. While these treaties might not necessarily specify obligations relating to arms exports, they serve as extremely useful and pertinent tools to assist states throughout the process of arms transfers. All human rights treaties, the Universal Declaration of Human Rights and Vienna Declaration on Human Rights, as well as the commitment from UN Member States, means that human rights must be fulfilled as part of their duties within the international legal community. The content of these treaties should therefore be used as established and guiding standards for a country in their arms export assessment, as well as an indication of whether a State is human rights-abiding. They must be adhered to by arms export agencies within the national framework.
Whilst it is beyond the means of this article to address all international human rights standards, some that can be linked to arms control issues are listed below.

- Equality and Non-Discrimination: The accessibility and use of conventional weapons have severe consequences on the exercise of the rights to equality and non-discrimination. Numerous studies have shown that poorly regulated arms can lead to the commission of sexual and gender-based violence. Small arms are used as an ‘expression of male power within already unequal societies on the basis of sex and gender’ and often leads to violence (and threats) against women and children, as was demonstrated by the systematic and widespread rape of women during the Rwandan Genocide and Bosnian War. Ethnic cleansing was also evident in both these conflicts demonstrating racial discrimination. Gender-based, racial, religious, as well as discrimination against children, among others, would not have occurred but for the use and availability of arms.

The Universal Declaration of Human Rights, ICESCR, ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of Persons with Disabilities and Convention on the Elimination of All Forms of Discrimination against Women all state that no one can be exposed to de jure or de factor discrimination in the exercise of their human rights based on issues such as race, gender, religion and ethnicity, as well as emphasis on equality before and equal protection to the law. Since discrimination under international human rights law constitutes ‘distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights’, certain arms transfers could be discriminatory, as per this definition.

- Right to Food/Right to Housing/Right to Health: The supply of arms can hinder the enjoyment of these rights, as the conflict in Yemen has shown. The earlier sections of this article highlighted the attacks on medical facilities and residential areas in certain districts in Yemen. The use of arms here violated these human rights. As a consequence of the transfer of arms, the Saudi-led Coalition were able to apply a naval blockade of Yemeni ports, which resulted in the deprivation of food, water and other crucial supplies to civilians. This has contributed to the ‘largest food security emergency in the world’ and an infringement of the right to food and health to many.

Under a number of legal instruments, everyone has the right to an adequate standard of living for themselves and their family and there is an obligation for States to ensure that the enjoyment of this right, through international cooperation. Small arms have also been established as a key underlying factor causing forced migration, as well as preventing sustainable repatriation and/or resettlement. This inhibits the standard that individuals must not be subjected to arbitrary interference of their privacy, home or family and not arbitrarily displaced either.

- Right to Life/Right not to be Tortured: The two non-derogable human rights standards most apparently relevant to arms transfers are the right to life and the right not to be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Many conflicts, including in Yemen, exemplify how arms transfers may cause and aggravate the violation of these two norms. The military intervention in Yemen caused large numbers of civilians to be deprived of their right to life. In this case, the UK’s arms transfers to Saudi Arabia can be directly correlated with the hindrance of Yemeni civilians to enjoy the right to life. States should avoid interpreting standards such as the right to life narrowly and adopt positive measures within their arms
control processes to apply this right and ensure that no weapons they transfer will be used to deprive individuals of this right.\textsuperscript{144}

In assessing a potential recipient country’s human rights adherence, exporters should also look at the frequency, magnitude and nature of human rights violations. These should be made with reference to infringements of any civil, political, socio-economic rights and their gravity and prevalence. The history must be assessed in light of the risk of continuing human rights respect, as certain countries may have implemented remedial mechanisms in the meantime and therefore their history is no longer indicative of current day practice. In the same vein, exceptional cases of one-off incidents need not be the basis of denying an arms transfer.

National rules, regulations and mechanisms of recipient States are useful sources to assist export assessment. The analysis of national policies and practices would not only have an impact on the legality and legitimacy of the transfer at hand, but it would ensure a domino effect, where an exporter could influence a country to continue properly regulating arms, potentially reform or even create their arms control law to conform to significant international law, such as the ATT.\textsuperscript{145} Consequently, this would facilitate a more responsible arms trade and nurture a self-fulfilling human rights and humanitarian law prophecy, minimizing the impact associated with potential human rights violations.

When determining the end user of the arms, the risk of diversion is clearly a point to be included in the arms assessment. Minimizing the risk of diversion should be an integral part of how a State assesses a potential arms transfers and the ultimate decision on authorization. An exporting State must conduct a full assessment on the ability of recipient States to make sure diversion does not occur, as well as checking its past history on the same. During its end use assessment, the agency assessor should carefully check the type and character of the equipment along with the way it is to be transported and stored.

The nature of the weapon must be assessed in light of its previous use by the recipient country and respective end-user, such as for security purposes or for the use in an armed conflict. It would be useful to balance the category and number of equipment against the lawful and valid security conditions of the end user. Similarly, the end user’s relationship to the recipient country is vital in the assessment, regardless of whether the end user is a public or private entity. Both types must have a delineated chain of authority with sufficient degrees of transparency and accountability. There must be a guarantee by the recipient country on the identity of the actual end user and exporters should include contractual obligations that the recipient country will not transfer to a third party.\textsuperscript{146} If a further transfer occurs then it must be done so with the full authorization of the originating state to conduct the same stringent analysis on the third state.

The end user’s legitimate need must be clarified, in addition to its capacity to ensure that the arms would be utilized in conformity to international law. If international bodies perceive the end user’s attitude and behaviour towards human rights as negatively then this should be taken into account. Processes to deal with stockpiles effectively must be firmly in place, to avoid surplus equipment leading to violations of human rights, particularly if there is a history of illicit trafficking of arms in the recipient country.

Any decisions by exporting States on whether an arms transfer is authorized or not should be disclosed publicly. One of the key flaws in both the UK and US national control systems was that while the national legal frameworks on arm transfer assessments was widely known, how the legal framework was applied was completely opaque. Civil society and other stakeholders were unable to identify for what reasons an arms transfer was authorized and how it fulfilled the national and international law on issues such as human rights. The connection between the law and practice was evidently distorted. However, even if a department responsible for arms transfers have the genuine belief that an export is legal and applied accurately via the
law, they should provide detailed reasoning explaining their decision. In the UK case, ministers from the Department remained silent on this issue and did not justify their decisions. It is hoped that the ATT and supplementary adoption of reporting templates for States—both on the implementation of the Treaty, but also for the authorization of arms transfers—would deal with this issue. It should hopefully enhance the effectiveness of the Treaty and guide States on the level of transparency required under this duty to report. The public disclosure of reports should therefore be made mandatory.

In the situation of UK sales to Saudi Arabia, the UK government affirmed that they were providing ‘technical support, precision-guided weapons and exchanging information with the Saudi Arabian armed forces through pre-existing arrangements [as well as continuing to] provide support for equipment supplied’. This could be enhanced more comprehensively to include assistance for the recipient state and end user on human rights and humanitarian law principles to ensure that they are not violated. It could also include training programmes on such issues. Contractual agreements and licences should be supplementary to any dialogue and training, to insert clauses that make it clear that the exporting State will not transfer arms to countries where they could be diverted. There must be enhanced information exchange between exporting and importing States.

5. Concluding Remarks

The link between violations of human rights and humanitarian law and security has been established by many, with its recognition rising rapidly. It is apparent that such violations can often lead to the prolongation of civil war and high numbers of lost civilian lives. One of the ways in which national and international security can be strengthened is through the proper regulation of the arms trade. With this, human rights should be more comprehensively integrated into the way in which States assess transfers. While the ATT prescribes this, the importance of human rights is also evident in national legal frameworks.

This article has focused on the national arms regulation of the UK and the USA, given their sale of arms to Saudi Arabia. While international treaties and both national legal systems explicitly require a consideration of human rights before an arms transfer is authorized, it is difficult to establish how stringent these national frameworks are in practice. Both the UK and the USA have secretive licensing procedures, making their practices quite opaque. A mere analysis of the law is not indicative of how the UK and the USA have in fact applied it. The lack of cohesion between the law and the practice is evident from arms transfers to Saudi Arabia, where violations of human rights and humanitarian law have meant the loss of countless innocent lives. It is crucial that for countries like the UK and the USA to avoid these types of violations for the protection of civilians, that they more stringently apply the law, fully integrating particular measures in the process, as outlined in the previous section. In not doing so, would leave the law as a hollow feckless gesture, with rights, but no realization.


14 Final UN Report on Yemen (n 8) 3.

15 The Department for Business, Innovation and Skills UK Export Licence Database showed this transfer for combat aircraft, components for combat aircraft and military airborne equipment (ML10).

16 ibid; Wearing (n 10) 11.


23 ibid.

24 ibid. See the opinion of Judge Shahabuddeen in Tadic, 15 July 1999, no IT-94-1-A, paras 228, 292.

25 ibid para 115.


29 art 16 (n 26).

30 art 16(a), ibid.


32 ibid.


34 UNSC Resolution 2216 (n 31); ibid.

35 ibid.


39 Human Rights Watch (n 37).


43 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, established on 12 July 1996.

44 ATT (n 6).

45 arts 1(a)(b) of the CCM (n 40).

46 art 1(c), ibid.


49 The CCM does not specifically define the word ‘assistance’, but see Walter Krutzsch, Eric Myjer and Ralf Trapp (eds), The Chemical Weapons Convention: A Commentary (OUP 2014) pt III, 1(d).

50 See arts 5, 6 and 21 of the CCM (n 40).


52 Trade Policy Department and Trade Relations and Export Department, COCOM, FCO 69, The National Archives.

53 The ATT (n 6).


55 See Preamble, art 1, art 6 and art 7 of The ATT (n 6).

56 art 1, ibid.

art 12 and art 13, ibid.

ibid.

ibid.

art 1, ATT (n 6).


art 1, ATT (n 6).

ibid.

art 6, ATT (n 6).

art 7, ATT (n 6).

ibid.

Louise Arimatsu and Mohbuba Choudhury, ‘The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya’, Chatham House Report, International Law PP 2014/01. In fact, in reality, it could be argued that there are several NIACs taking place in Yemen.


art 50 Geneva Convention, ibid.


Further explanations can be found at ICRC, Rule 1: The Principle of Distinction between Civilians and Combatants, Chapter 1: See Practice relating to Rule 14, Principle of Proportionality.

See arts 51, 52, 57 of Additional Protocol I, Geneva Conventions.

R (on the application of Hasan) v Secretary of State for Trade and Industry [2007] EQHC 2630 (admin).

Please see arts 7 and 8 of the ATT (n 6).


European Council Common Position 2008/944/CFSP.

Export Control Act 2002, c 28, 9(8).


Criterion 3, ibid.

Criterion 4, ibid.
The Queen on the Application of Campaign Against Arms Trade and The Secretary of State for Business, Innovation and
Skills and Human Rights Watch, Amnesty International, Rights Watch (UK), Oxfam, Open Skeleton Argument of the Secretary
of State, CO/1306/2016.

Export Control Order 2008.

Export Control Act 2002, ch 28, Schedule—Categories of goods, technology and technical assistance, 2(1).

ibid, Relevant Consequences (A), (B), (C), (D), (E).

ibid.


The Section refers to the Congressional Findings and Declaration of Policy in 22 US Code 2151.

Chapter 39, Arms Export Controls, 22USC 2751: Need for International Defense Cooperation and Military Export Controls; Presidential Waiver; Report to Congress; Arms Sales Policy.

US Code, Title 22, Chapter 39, 22 US Code 2778—Control of Arms Exports and Imports.

The International Traffic in Arms Regulation, 22 CFR 120-130.


Security Assistance Management Manual, Chapter 8, Def Sec Cooperation; Newton (n 99) 18.


ibid 2304(d)(1).
States could also use the guidance and recommendations put forward by organizations such as Saferworld, Amnesty International etc, as well as begin coordinating closely with the Arms Trade Secretariat in Geneva.

This is not an exhaustive list, but merely a few examples of current international treaties that could provide guidance. Due to logistical restrictions, this article is unable to assess each of these legal instruments in detail and apply them to arms transfers.


IntAmCHR, American Declaration of the Rights and Duties of Man, adopted 2 May 1948.


UNGA, Universal Declaration of Human Rights, 10 December 1948, 217A(III).


arts 2 and 7.

art 2 ICESCR.

arts 2(1), 3 and 26 ICCPR.
art 1(1).

art 5.

art 14(2)(g) and 15, Convention on the Elimination of All Forms of Discrimination against Women.


The Human Rights Committee has also stated that the right to life cannot be viewed restrictively. See General Comment No 6 (1994), para 5.

Please see the various committee meetings held by the Committee on Arms Export Controls.
