

Canada, Arms Transfer to Saudi Arabia

INTRODUCTORY TEXT: *After Canada has become a party to the Arms Trade Treaty in September 2019, Mr. Daniel Turp, a Canadian professor for constitutional and international law, brought a legal action against the Canadian Minister of Foreign Affairs' approval to issue permits for the export of light armoured vehicles to Saudi Arabia. In addition to his argument on Canadian law, he referred to Common Art. 1 of the Geneva Conventions. According to Mr. Turp, this obligation had required the Minister of Foreign Affairs to ensure respect with IHL. Considering that Saudi Arabia is involved in the conflict in Yemen where all parties are committing violations of IHL, he claimed that the approval was in contrast with Canada's international obligation under Common Art. 1. Both the Federal Court and the Federal Court of Appeal did not follow his arguments.*

Case prepared by Ms. Pia Marie Siebert, student at the Universities of Geneva and Münster, under the supervision of Professor Marco Sassòli and Mr. George Dvaladze, teaching and research assistant, both at the University of Geneva and the Geneva Academy of International Humanitarian Law and Human Rights.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

See also the case **United Kingdom, Arms Trade with Saudi Arabia**

A. Daniel Turp v. The Minister of Foreign Affairs

[Source: Federal Court of Canada, 2017 FC 84, 24 January 2017, available at <https://www.fct-cf.gc.ca/en/home>]

[...]

REASONS AND JUDGMENT

I. Nature of the matter

[1] This is an application for judicial review [...] of a decision by the Minister of Foreign Affairs [the Minister] approving the issuance of permits for the export of light armoured vehicles [LAVs] to the Kingdom of Saudi Arabia [Saudi Arabia].

[...]

III. Decision

[...]

[11]The memorandum [which was the basis for the Minister's approval] also indicated that a UN expert report on the situation in Yemen had concluded that all parties to the conflict in Yemen had violated international humanitarian law, in particular by targeted airstrikes against the civilian population. However, there was no evidence that Canadian equipment, including LAVs, had been used for that purpose.

[...]

VI. Positions of the parties

A. The applicant

[14] The applicant submits that the issuance of the permits to export LAVs to Saudi Arabia runs counter to the objectives of [...] the Geneva Conventions Act, RSC 1985, c G-3 [the GCA], since both Parliament and the Government wanted to ensure that Canadian arms would not be exported to countries that could use them against their own population or against civilians in an armed conflict. [...]

[15] The Minister was also required to ensure compliance with the GCA, whereby Parliament incorporated into Canadian law the four Geneva Conventions of 1949 [the Conventions]. Common Article 1 of the Conventions requires Canada to ensure respect for the Conventions and their additional protocols in all circumstances. The evidence establishes that there exists a reasonable risk that LAVs exported to Saudi Arabia would be used in a manner that would threaten the safety of Shiite minorities and jeopardize the peace, safety or stability of the Arabian Peninsula. In addition, Saudi Arabia is directly involved in the hostilities in Yemen through a coalition that it leads. The Minister has therefore [...] acted in violation of the GCA.

[...]

B. The respondent

[...]

[21] The respondent notes that common Article 1 has not been incorporated into Canadian law and that, even if it had been, the applicant lacks the necessary standing to raise the issue of its violation, as this article is binding only on States and does not confer any rights on individuals. [...] The respondent nevertheless notes that the Minister's decision is consistent with the values expressed in the Conventions.

[22] Should the Court decide nonetheless to rule on this issue, the respondent submits that the Minister's decision does not violate Article 1. There is no evidence that the State Parties to the Conventions subscribe to the interpretation of this provision put forward by the applicant's expert, and State practice does not support it. Moreover, the evidence regarding the potential violation of international humanitarian law by Saudi Arabia in Yemen is inconclusive and the Court cannot accept that premise as a fact. Furthermore, Article 1 applies solely in the context of international armed conflicts; the conflict in Yemen does not fit that description, and Canada has no involvement in it whatsoever. Finally, even if Article 1 were applicable, Canada may choose the measures that are appropriate to ensure compliance with the Conventions, as the provision does not require that specific measures be taken in response to violations of international humanitarian law.

VII. Analysis

[...]

3. Did the Minister commit a reviewable error in issuing permits to export LAVs to Saudi Arabia?

[...]

iii. Canada's international obligations

[56] As a further argument, the applicant submits that the Minister's decision violates Article 1 of the Conventions, which he argues was incorporated into Canadian law through the GCA. [...]

[57] The respondent submits in the first place that the applicant does not have the standing to raise the violation of Article 1 of the Conventions, even if it has been incorporated into domestic law. If a treaty does not confer any rights on individuals, its incorporation into domestic law does not create any [...]. I agree with the respondent on this point.

[58] I note that Article 1 of the Conventions confers rights and imposes obligations on the State Parties to the Conventions, but not on individuals. The protection of individuals under the Conventions is instead conferred

directly to the State Party, and it is solely the responsibility of the State Party to discharge these obligations [...].

[59] However, considering the lengthy discussion of the applicability of the GCA and the Conventions in the facts of both parties and at the hearing, the Court is prepared to consider the issue briefly and to make the following comments.

[60] The respondent submits that Article 1 was not incorporated into Canadian law through the GCA. Reception of international law into Canadian law occurs by incorporation or by adoption, depending on the nature of the rules of law in question. [...]

[61] Section 2 of the GCA reads as follows:

2 (1) The Geneva Conventions for the Protection of War Victims, signed at Geneva on August 12, 1949 and set out in Schedules I to IV, are approved.

[...]

[62] [...] Section 2 of the GCA does not have the effect of giving force of law to Article 1 of the Conventions.

[...]

[67] In any event, the only armed conflict the applicant has referred to is that in Yemen. The conflict in Yemen is not an international armed conflict. It opposes the Houthi rebel forces against those of Yemeni President Hadi, who are supported by a coalition made up of a number of countries in the Arabian Peninsula, including Saudi Arabia. The presence of foreign forces in this context does not transform the conflict into an international armed conflict since it is not a conflict between different states. This distinction is significant because the rules that apply are not the same for an internal conflict.

[68] The applicant's expert witness, Professor David, provides the following explanation:

[...]

The distinction [between an international armed conflict and a non-international armed conflict] is essential because the law of armed conflict only applies in its entirety to an international armed conflict. Only certain rules apply to an internal armed conflict.

[...]

[69] He later states [...] that the rules that apply to non-international armed conflicts are limited to Common

Article 3 of the Conventions.

[70] Moreover, Canada is an important partner of Saudi Arabia, but is not directly involved in the Yemeni conflict or in any other defence initiatives involving Saudi Arabia. Author Maya Brehm affirms that, since it cannot be presumed that weapons sold legally will be used to obstruct international humanitarian law, the limits on arms trade that are based on respecting international humanitarian law only apply to states that are already involved in an armed conflict [...].

[71] Additionally, although the ICRC considers that Article 1 applies equally to international armed conflicts and to non-international armed conflicts, Canadian case law has determined that Article 1 does not impose any obligation in the context of non-international armed conflicts. In *Sinnappu v Canada* [...] this Court held as follows:

[...] Since Canada has no involvement whatsoever in that dispute [the civil war in Sri Lanka], common Article 1 of the Geneva Conventions of 1949 does not impose upon our country an obligation to ensure that the parties to that conflict respect common Article 3. [...]

[72] Lastly, I also note that no sanction has been imposed on Saudi Arabia in connection with its intervention in Yemen and that the United Nations Panel of Experts recommended that Saudi Arabia continue to play a military role by authorizing the coalition it leads to inspect vessels suspected to be carrying weapons intended for Yemen [...].

[73] As Canada is not involved in the conflict in Yemen and it is a non-international armed conflict, in my opinion Article 1 does not apply. Extending the scope of Article 1 to states that are not parties to an armed conflict would prevent the export of military equipment without there being any evidence of a substantial risk that such equipment will be used to commit a violation of international humanitarian law. In the present case, the history of exports of LAVs to Saudi Arabia does not support such a conclusion.

[74] Moreover, a declaration by the Court that issuing export permits is contrary to the GCA would not have any practical effect because the Court cannot dictate to the executive the measures to be taken in the event of violations of Article 1 of the Conventions. The experts of both parties recognize that Article 1 of the Conventions does not impose on the State Parties in the taking of any specific measure in response to a violation of international humanitarian law by another state [...]. This is also the ICRC's interpretation in its Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2016) [...]. The ICRC clearly states that:

States remain in principle free to choose between different possible measures, as long as those adopted are considered adequate to ensure respect.

ICRC, Commentary on the First Geneva Convention (2016) at para 165.

[75] The doctrine recognizes that states are often powerless when faced with violations of international humanitarian law [...]. The rules of international humanitarian law, interpreted and applied consistently with the general rules of international law, including the principle of state sovereignty, do not always allow for such situations to be addressed. In this specific context, Canadian case law has recognized that the executive, rather than the courts, has the expertise necessary to make decisions regarding international relations, [...]. [...] Canada's obligations under this article fall strictly within the framework of its foreign policy. Even if Article 1 did apply in this case, the Court would not be able to intervene.

[...]

B. Daniel Turp v. The Minister of Foreign Affairs (Appeals Judgment)

[Source: Federal Court of Appeal, 2018 FCA 133, 6 July 2018, Reasons for Judgment, available at http://www.fca-caf.gc.ca/fca-caf_eng.html]

[...]

REASONS FOR JUDGMENT

NADON J.A.

[...]

IV. Analysis

[...]

2. Is the Federal Court's decision reasonable?

[...]

iii) Did the judge err when she rejected the appellant's arguments based on Common Article 1 of the Conventions?

[...]

[75] The appellant submits that the judge committed three errors, including having ruled that he did not have

the appropriate standing to complain of a violation of the Geneva Conventions, even if they were incorporated into Canadian law.

[...]

[77] Since it is my view that the judge correctly ruled that the appellant did not have the standing necessary to raise a violation of the Geneva Conventions, we will not have to linger over the appellant's other arguments concerning this issue.

[78] In my view, only the states that have signed the Geneva Conventions can raise a violation of those instruments and, more specifically, a violation of Common Article 1. The language of Common Article 1 leaves no doubt about this subject. The Geneva Conventions provide the contracting parties with the right, and may I say, the duty to "ensure respect for the present Convention in all circumstances" (Common Article 1 of the Conventions). Consequently, individuals like the appellant are not at liberty to raise violations of the Geneva Conventions and demand their enforcement before the courts. Clearly, any individual can raise these questions as part of political and democratic debates and ask their government to take action. However, an individual cannot do so, as the appellant is trying to do, through an application for judicial review of the Minister's decision to issue permits [...].

[79] In this respect, I fully concur with the comments of the respondent's expert, Professor Schmitt [...], where he opines that a violation of the Geneva Conventions by a signatory state constitutes an "internationally wrongful act" with respect to states not responsible for the violation. Moreover, according to Professor Schmitt, a violation in no way gives rise to a remedy to individuals affected by the violation.

[80] In other words, the individuals or persons affected by the violation cannot seek any remedy against the state responsible for violating the Geneva Conventions. That is the sole right of a signatory state that is not responsible for the violation. Consequently, according to Professor Schmitt, an individual such as the appellant in this case cannot raise a conventions violation before the courts. Author Kate Parlett shares this conclusion [...]. [...]

The substantive provisions of the four Geneva Conventions generally express the protection of individuals as protective obligations on state parties to a conflict, rather than as specific rights conferred directly on individuals. Common Article 1 of each of the Geneva Conventions states that the High Contracting Parties "undertake to respect and to ensure respect for the present Convention in all circumstances". Additionally, the first and second Geneva Conventions provide that "[e]ach Party to the conflict . . . shall ensure the detailed execution" of the provisions of those conventions. The provisions relating to execution in all four conventions refer exclusively to obligations incumbent upon states.

The vast majority of the provisions of the conventions which provide for the protection of various categories of individuals are expressed in terms which indicate that obligations are imposed on states parties to a

conflict, rather than rights directly conferred on the relevant individuals.

[81] Consequently, as the judge ruled, the appellant does not have the appropriate standing to raise a violation of Common Article 1 of the Geneva Conventions, even if it has been incorporated into domestic law.

[...]

DISCUSSION

I. Classification of the Situation and Applicable Law

1. (*Document A, paras 15, 67, 70-73*) How would you classify the situation in Yemen? Does the military intervention of the coalition led by Saudi Arabia influence the nature of the conflict? Is it an armed conflict involving foreign intervention? How would you define an armed conflict involving foreign intervention? What is IHL applicable to such a conflict?
2. Is Saudi Arabia a Party to the conflict in Yemen? What is the applicable law? (GC I-IV, Art. 3; P II, Art. 1)
3. Is Canada a Party to the armed conflict in Yemen? (GC I-IV, Art. 2)

II. Common Article 1 to the Geneva Conventions

4. (*Document A, paras 60-62*) What are the obligations of the High Contracting Parties under Common Art. 1? How should States implement them? What do “respect” and “ensure respect” mean? Is it a positive or a negative obligation? Both?
 - a. Are states that are not Parties to the conflict also bound by the provision?
 - b. How can State Parties “ensure respect” for the Conventions? To act in conformity with Common Art. 1, what means must they use?
 - c. (*Document A, paras 22, 74*) Can Canada choose the measures it undertakes to “respect and ensure respect” or do the Geneva Conventions require that certain measures that must be taken? What does the ICRC commentary say about this?
 - d. What is the impact of Art. 89 of Additional Protocol I on this obligation?
5. Does Common Art. 1 states a mere possibility/recommendation to State Parties or does it impose an obligation on them to “respect and ensure respect”? Of means or result? Considering that not every State Party to the Conventions has taken measures when IHL was violated in the past, have all of them violated

international humanitarian law?

6. (*Document A, paras 67, 71-73*) Does Common Article 1 apply only to IACs or also to NIACs? According to the Canadian Courts? According to the ICRC? In your opinion, are the findings of the Canadian Courts convincing? What are the arguments in favour and against such a view? (GC I-IV, Art. 1; GC I-IV, Art. 3)

7. (*Document A, paras 21, 57-58; Document B, paras 75-81*) Can the Geneva Conventions be invoked by individuals (in Canada if they were incorporated into Canadian law) or are the addressees only the State Parties to the Conventions? Is Common Article 1 a special case? What is the opinion of the Federal Court? Of the Federal Court of Appeal?

8. (*Document B, paras 79-80*)

a. What are the conditions for aiding or assisting in the commission of an internationally wrongful act under the general regime of the ILC Articles on State Responsibility? Is Common Art. 1 limited to or to be interpreted in line with the general rules on State Responsibility for internationally wrongful acts? (ILC Articles on State Responsibility, Arts 16, 40)

b. In situations of armed conflict, could Common Art. 1 be considered *lex specialis* to general rules on State Responsibility? If yes, would every State Party to the Geneva Conventions become an “injured state” according to the ILC Articles? Only the Parties to the conflict? Which consequences would this have on the measures that could be taken to “ensure respect”?

9. (*Document A, para. 70*)

a. Does Common Art. 1 impose limits on arms trade? If yes, should these limits only apply to Parties to the conflict? According to the Federal Court? In your opinion?

b. Is knowledge that arms supplied in the past were used to violate IHL sufficient to find a violation of Common Art. 1? Or does Common Art. 1 require intent to assist in violations of IHL as in Art. 16 of the ILC Articles on State Responsibility?

c. Canada is now a party to the Arms Trade Treaty. If this case was decided today, do you think the result would be different? How?

10. (*Document A, para. 75*) Are States “powerless” when confronted with IHL violations? What does the Federal Court mean when stating that IHL has to be interpreted and applied in conformity with the principle of state sovereignty? Can States ensure respect when providing weapons to a party to a conflict or are they “powerless” in this respect? Should there be a new kind of supervision mechanism for the compliance with IHL including with Common Art. 1? Why or why not? Should there be a mechanism accessible for

individuals? International? National? With what characteristics?

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