

## DJEP-DCU CAAT JR (MULTIUSER)

---

**From:** Chew Christopher (ITEC) <Chris.CheW@bis.gsi.gov.uk>  
**Sent:** 04 February 2016 13:32  
**To:** Javid MPST  
**Cc:** Soubry MPST; Anelay MPST; SpAd Javid MPST; SpAd Soubry MPST; Perm Sec (BIS); Beckett Samantha (MPST DG); Barton Chris (ITEC); Bell Edward (ITEC); Hickman Richard (ITEC); Cheeseman Clare (LEGAL B); Behzadi-Jenkinson (Jobshare); Welch Kirsty (Communications)  
**Subject:** [OFFICIAL-SENSITIVE] Urgent: Export Licensing for Saudi Arabia  
**Attachments:** Submission - Possible Judicial Review of export licensing for Saudi Arabia - 4 Feb 2016.doc; REST 20160126 Saudi Leigh Day Final Submission.docx

**CLASSIFICATION: OFFICIAL-SENSITIVE**

Sarah

Please see attached (first document) a submission to the Business Secretary on arms export licensing for Saudi Arabia and the potential judicial review proceedings from Campaign Against Arms Trade.

### Recommendation:

That the Business Secretary agrees *in principle* with the Foreign Secretary's recommendations *but* defers a final decision until we have received advice from Counsel and senior Government lawyers due in the next few days, concerning the Government's response to Leigh Day solicitors.

### Timing:

Urgent.

I know it is unusual to make a conditional recommendation in this way but we are not yet in position to make a full recommendation because we are awaiting further advice from Counsel and senior Government lawyers. Because this advice will not be available until Tuesday, with a final decision having to be made by close Wednesday, and because this is such a complex issue, we felt it was important the Business Secretary had a chance to consider the issue and to review relevant documents in advance.

The second attachment is FCO's advice to the Foreign Secretary which underpins our own advice; there is a confidential annex in hard copy which I will bring up shortly. The SoS needs to read both these documents.

Any questions please contact Edward Bell or myself.

Regards

Chris.

Chris Chew | Head of Policy | Export Control Organisation | Department for Business, Innovation and Skills | 1 Victoria Street | London | SW1H 0ET | +44 (0)207 215 8088 |  
<https://www.gov.uk/government/organisations/export-control-organisation>

**CLASSIFICATION: OFFICIAL-SENSITIVE**

OFFICIAL-SENSITIVE

**To:** Secretary of State for Business Innovation and Skills  
**From:** Chris Chew, Head of Policy, Export Control Organisation  
**Date:** 4 February 2016

**Subject:** Foreign Secretary's advice on military exports to Saudi Arabia

**Purpose:**

To advise you on the Foreign Secretary's recommendations not to suspend licensing and not to suspend extant licences for military exports to Saudi Arabia and update you on the potential legal challenge to these exports from Campaign Against Arms Trade (CAAT).

**Recommendation:**

That you agree *in principle* with the Foreign Secretary's recommendations *but* defer a final decision until we have received advice from Counsel and senior Government lawyers due in the next few days, concerning the Government's response to Leigh Day solicitors.

**Timing:**

Urgent.

**Summary:**

**The Claim**

1. On 8 January Leigh Day, solicitors acting for CAAT, sent you a "letter before claim" (i.e. the first step towards bringing judicial review proceedings) alleging that the Government was acting unlawfully in continuing to grant export licences, and in not suspending extant licences, for supply of military goods to Saudi Arabia that could be used in Yemen.
2. There have been widespread allegations that the Saudi-led Coalition has committed breaches of international humanitarian law (IHL) while carrying out airstrikes in Yemen. IHL is the law of armed conflict and requires that, among other things, attacks are only carried out against legitimate military targets and that civilians and civilian property should be protected. Where attacks on civilians do occur these should be properly investigated and steps taken to avoid any repetition. Various UN agencies, the International Committee of the Red Cross, and NGOs such as Human Rights Watch and Amnesty International have documented a large number of attacks on civilians and civilian property which they allege were carried out by the Coalition and which represent breaches of IHL.

OFFICIAL-SENSITIVE

3. All export licence applications are assessed against the Consolidated EU and National Arms Export Licensing Criteria (the "Consolidated Criteria"): Criterion 2c states that the Government "will 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". In addition, in 2012 the Government announced a "suspension mechanism" which would "allow the Government to quickly suspend the processing of pending licence applications to countries experiencing a sharp deterioration in security or stability. Suspension will not be invoked automatically or lightly, but triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult." In practice this mechanism has been extended to cover extant licences (i.e. licences already in circulation).
4. Leigh Day claim that the Government has acted unlawfully in continuing to grant new licences and in not suspending extant licences because:
  - We have offered no reasonable explanation for rejecting the conclusions of UN agencies and other international organisations regarding breaches of IHL in Yemen. It is therefore irrational for us to conclude that there is no "clear risk" that UK-supplied equipment "might be used" in violation of IHL.
  - We have relied too heavily on assurances given by Saudi Arabia that they are seeking to comply with IHL. There is no evidence that Saudi Arabia has conducted any investigation into any allegation of a breach of IHL, and the UK has not sought to conduct its own investigations. By relying on Saudi assurances we have failed in our public law duty to "make such enquiries as are necessary" to reach a proper decision.
  - Given the many allegations of breaches of IHL and the lack of any "independent and effective investigations" into those allegations there is no proper basis for the Government to conclude that the Consolidated Criteria are presently satisfied. We should therefore suspend licensing for equipment that might be used in Yemen until such an investigation is concluded.
5. The pre-action letter asks for confirmation that the Secretary of State will:
  - Agree to suspend extant licences for the export of military equipment and technology to Saudi Arabia for possible use in Yemen pending the outcome of a full review as to whether the export of military equipment pursuant to such licence is compatible with the requirements of the Consolidated Arms Export Licensing Criteria;
  - Agree not to grant further licences for the export of military equipment to Saudi Arabia pending the completion of such a review; and
  - In addition, agree not to grant further licences (and to suspend existing licences) until the Secretary of State is in possession of sufficiently clear information to enable a proper assessment as to whether such licences can be granted lawfully.

OFFICIAL-SENSITIVE

**FCO Advice**

6. FCO provide advice to us on Criterion 2 although the final decision to grant or refuse an export licence rests with you. FCO officials submitted to the Foreign Secretary on 26 January with a recommendation to advise BIS not to suspend extant licences and not to suspend the processing of new licence applications for the export of arms to Saudi Arabia, and to continue to assess licence applications for arms exports to Saudi Arabia on a case-by-case basis against the Consolidated Criteria. The Foreign Secretary accepted this recommendation.
7. In considering the Foreign Secretary's recommendation you should read the submission and its annexes made by FCO officials; in particular you should read the FCO Confidential note "Yemen – Saudi led Coalition compliance with IHL" carefully in full (this is referred to in FCO's submission as "Annex B"). In summary their arguments are as follows:

- MOD have been tracking 114 incidents of potential IHL concern; only a very, very small percentage of the overall coalition airstrikes carried out, have been tracked. Preliminary analysis of the UN Panel of Experts' Report has identified a further 19 incidents, and MOD have separately become aware of a number of other allegations, bringing the total to "approximately 145".
- Based on "all the information available", however, FCO maintain that "we have not established any violations of IHL by the Coalition in this conflict".
- FCO do acknowledge that there are gaps in their knowledge but they say there are "always some gaps in our knowledge when we are conducting Consolidated Criteria assessments in relation to exports to any country". In this case they consider they are "in possession of sufficient information, despite not being in possession of complete information, to conduct a Consolidated Criteria assessment". They consider that the flow of information they receive from the [REDACTED] from Post, and from open sources including NGOs, "continues to provide adequate detail and context to make an informed assessment against the Consolidated Criteria".
- Saudi Arabia is "seeking to comply with IHL and broadly has IHL-compliant processes in place". In addition, "Given the very small percentage of incidents which are considered as being of potential concern, it is not clear that a pattern of violations can be discerned". They conclude that while "there is a risk here, that risk is not 'clear'".
- [REDACTED]

8. In addition, subsequent to the FCO submission Saudi Arabia publicly announced the result of an investigation into a strike on a Medecins Sans Frontieres' clinic on 26 October 2015, including the processes they found they could improve.

OFFICIAL-SENSITIVE

**Our Concerns**

9. While FCO appear confident about their ability to make proper assessments against the Consolidated Criteria we do have concerns regarding the acknowledged gaps in knowledge about Saudi targeting processes and about the military objectives of some of the strikes; in particular, the fact that while MOD consider only a third of the incidents they have been tracking to have been the result of Coalition airstrikes, the MOD are only able to identify a "valid military target" for the majority of them. Additionally they cannot be certain that the vast majority of the total airstrikes that are not being tracked have all been IHL-compliant. We are also concerned that FCO/MOD appear only to have insight into Saudi processes in respect of pre-planned strikes and have very little insight into so-called "dynamic" strikes – where the pilot in the cockpit decides when to despatch munitions - which account for a significant proportion of all strikes.
10. On the other hand, we accept that the arguments are finely balanced and that the FCO is the competent authority to assess compliance with Criterion 2 of the Consolidated Criteria. They make clear robust statements that there is enough evidence and note that there are always gaps in information when making an assessment. On that basis, we recommend accepting *in principle* the Foreign Secretary's advice.
11. But this should be conditional on advice from Counsel and senior Government lawyers due in the next few days, concerning the Government's response to Leigh Day solicitors.

**Risks**

12. It is a near certainty that Leigh Day will file a claim in the High Court for judicial review proceedings should we refuse to suspend licensing for Saudi Arabia. In doing so they are likely to request an expedited ("rolled-up") hearing. Whether the court grants a rolled-up hearing will depend not only on whether it considers there to be a significant public interest at stake (which is likely) but also on the court's workload. If granted, a rolled-up hearing could, at the earliest, take place in a matter of weeks. The Government's decision making would come under very close scrutiny and there would be very high media interest in the proceedings.
13. We are consulting external Counsel on the reply to the Leigh Day letter.
14. Any decision to suspend would clearly have a significant impact on political and commercial relationships with Saudi Arabia and with other Coalition states, although these broader political considerations do not override our duty to ensure export licensing criteria are applied properly.

OFFICIAL-SENSITIVE

**Next Steps**

15. We had previously agreed with Leigh Day that we would respond to their letter by Friday 5 February. The availability of suitable Counsel means that a draft will not be ready until Monday 8 February. The draft needs to be cleared with FCO and MOD as well as [redacted] senior Government lawyers. We expect to receive [redacted] senior Government lawyers [redacted] advice on Tuesday before the NSC meets to discuss Gulf Strategy. We will submit the draft reply for your approval as soon as possible on Tuesday.
16. We have now advised Leigh Day that they will receive a reply by close of play on Wednesday 10 February. Therefore the submission on Tuesday will require urgent attention so that we can meet the deadline.

**Copied to:**

**Anna Soubry; Lord Maude; SPADS; Perm Sec; Sam Beckett (DG E&M); Chris Barton (Dir, ITEC); Edward Bell (Hd, ECO); Richard Hickman (ECO); Kirsty Welch (Comms); Clare Cheeseman (Legal)**

**Advice received from:**

<b>Finance</b>	<b>SpAds</b>	<b>Press</b>	<b>Legal</b>	<b>Analysts</b>
N/A	No - submitted in parallel	N/A	Yes [Clare Cheeseman]	N/A

