The UK Government Needs to Learn that Secrecy is Not the Answer to Increased Litigation

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Following the wars in Iraq and Afghanistan, large scale deployments of British troops on combat missions seem unlikely until national memories are healed and budgets are rebalanced. In today's military operations, troops from the United Kingdom are limited in number and play a primarily supporting role, providing training, equipment, air support or intelligence to local and regional forces who do the bulk of frontline fighting.

This shift towards what we call "remote warfare" is paired with a decline in the transparency of operations, as these military engagements tend to fall outside of what is traditionally understood as "combat missions" and the mechanisms designed to oversee them. These operations also tend to lack the rich and comprehensive body of law (international humanitarian law (IHL)) that has emerged to cover traditional state-on-state conflict. IHL is clear on the laws that govern state actors when engaged in fighting; however, it is far less developed when states are not only not fighting each other but are instead supporting non-state actors, whose rights, status and obligations are much more heavily contested.

In the meantime, increasing litigation against the U.K Ministry of Defence (MOD) appears to have reduced the British government's willingness to publicly justify or explain operations abroad – potentially to the detriment of public trust and the government's own goals of reducing litigation against it.

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Before he became a British politician and eventually chair of the Foreign Affairs Committee, Tom Tugendhat co-authored a report with fellow soldier, Laura Croft, decrying the impact of litigation on U.K. armed forces:

> **“ Britain’s armed forces are now under threat from an unexpected quarter: the law. ”**

They were referring to the series of rulings that cemented the extra-territorial application of the European Convention on Human Rights, which, according to the Economist, had by April 2014 brought “two public inquiries, more than 200 judicial reviews and more than 1,000 damages claims.”

Four years on, it is clear that many within the current government remain concerned about these developments. In a pre-election panel discussion at the Royal United Services Institute (RUSI) in 2017, the major political parties discussed defense and security policy; when asked what they would like to see less of in defense the Conservative Party spokesperson, Harriett Baldwin MP, responded with a one-word answer: “litigation.”

In this difficult climate, it is possible that remote warfare may seem like an appealing way of engaging abroad with its greater opacity and less established legal principles providing additional flexibility and freedom of maneuver. This concern was certainly raised by some participants in a series of roundtables my own organization – the Oxford Research Group’s Remote Warfare Programme –

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ran with legal experts from academia, government, the military and civil society over the last 18 months.

In a number of conversations for the resulting report, we noticed an increasingly antagonistic relationship between government and civil society, with the government unwilling to discuss the legal guidance for current military operations, revealing its own interpretations of contested legal principles remain vague and ill-defined.

However, such an approach leaves the government, and the armed forces alike, in a position of latent legal liability as we wait for future court rulings in areas that are currently contested in international or domestic law, or that are poorly covered by existing legal guidance. This is, arguably, exacerbated by greater secrecy. Burgeoning access to the internet and increasing interconnectivity mean there is likely to be ever more information about UK operations in the media. Thus, a failure to have healthy debate about these engagements could increase feelings of mistrust and may even increase the amount of litigation against the UK government.

Saudi case

This is captured most clearly by the recent case against the U.K. over its arms sales to Saudi Arabia. As questions about the legality of the Saudi-led coalition's air campaign in Yemen have increased, so to have concerns about the U.K.'s arms sales to the country – which have amounted to £6 billion worth of arms since the bombing of Yemen beganin 2015. Despite increased calls from the British Parliament – such as through parliamentary questions and inquiries – for more information on how the U.K. ensures the legality of its arms sales to the Kingdom, the government has often been

unwilling to discuss what safeguards it has in place beyond saying they are "robust."

In response, Campaign Against the Arms Trade (CAAT) launched a judicial review of the government's decision to continue granting weapons export licenses to Saudi Arabia. While the High Court ruled in favor of the government, the judges noted that the evidence presented by CAAT "represent[s] a substantial body of evidence suggesting that the Coalition has committed serious breaches of International Law in the course of its engagement in the Yemen conflict."

A large part of the ruling was based on secret evidence, which the Court argued had provided "valuable additional support" and revealed that the government has sufficient checks and balances in place. These included: "fast-jet operational reporting data"; "high-resolution MoD-sourced imagery"; "UK defence intelligence reports and battle damage assessments"; an MOD "Tracker" database of strikes; British-run IHL compliance workshops with Saudi personnel; and the establishment of a Joint Incidents Assessment Team to build Saudi capacity to monitor strikes. While some continue to criticize these measures as insufficient, they do show the government had been more considered about the decision to supply arms to Saudi Arabia that it had initially seemed.

This, then, begs the question as to why the UK government needed to be taken to Court to reveal these safeguards and mitigating measures? If this information satisfied the judges, then the government would have benefitted from making more of it public so that, at least, those people – within civil society as well as British parliament and public – who are persuadable may be satisfied too and see less need to support litigation.

Instead, the fact that this information was revealed in a secret court and only after NGOs mounted a judicial review has, perhaps unsurprisingly, done little to quell criticism. In fact, CAAT is now attempting to repeal the judgement, and opinion pollsand parliamentary questions reveal that the British public and Parliament remain critical of arms sales to the Kingdom – especially with the recent devastating Saud-led coalition strike that killed 40 children in a bus.

Conclusion

The CAAT case involved a state party, well-established U.K. safeguards and relatively clear rules. However, even in case, the U.K. government did little to mitigate concern and won the Court case without winning the narrative or convincing many of the legitimacy of its actions. It seems unlikely, then, that the government's current strategy of poor public engagement would work any better in more complex cases. Instead, adopting a more proactive policy of transparency and engagement would surely do much to improve relations between the government and civil society communities and allow for a more informed debate about British operations overseas without the need for recourse to litigation.

Image credit: Defence Images/Flickr.

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