

# **INTERNATIONAL TRADE IN ARMS: NATIONAL REGULATORY SYSTEMS**

**Legal Memorandum**

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**INTERNATIONAL TRADE IN ARMS: NATIONAL REGULATORY SYSTEMS****Executive Summary**

This memorandum identifies and analyzes the legal instruments relevant for regulating the export of arms in Belgium, France, the United Kingdom (UK), and the United States (US). The memorandum focuses on any safeguards against arms exports that could lead to or contribute to human rights abuses or international crimes. In addition to their national provisions, France, Belgium and the UK are also European Union (EU) member states, and as such must comply with relevant EU provisions on arms trade. Equally, all of them but the USA have ratified the Arms Trade Treaty and are therefore also subject to its provisions.

While these states all require certain criteria to be taken into account when considering an arms export, the decision-making processes differ as well as the enforcement and oversight mechanisms. The decision whether or not to grant the export license is taken by the executive power. Problematic in this regard is the fact that often, the decision-making process lacks transparency. It is also problematic that the assessment weighs various interests including human rights, and in some states, like France and the USA, other considerations can prevail. Belgium is somewhat unique in that it has decentralized the licensing process by delegating it to the provinces, and has introduced human right protections in excess of the minimums set by the EU.

In theory, the human rights situation in the state of destination is always one of the points to be taken into account when determining an arms export license. However, differences of interpretation exist and in practice it seems hard to enforce conformity with this criterion through legal action. In the UK, for example, the Government is not obliged to provide reasons for its decisions on the arms export license. Moreover, some states – namely the US - do not easily allow citizens or civil society actors to contest an arms export license before a competent judicial body. However, success has been had by NGO litigants before Belgian courts in challenging arms export licenses on the basis of human rights concerns.

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**INTERNATIONAL TRADE IN ARMS: NATIONAL REGULATORY SYSTEMS****Statement of purpose**

This memorandum identifies and analyzes the legal instruments and regulations in various national systems that control and monitor the export and trade of arms. The national systems addressed are Belgium, France, the United Kingdom (UK) and the United States (US). The memorandum focuses on the safeguards present in these systems to prevent states from exporting arms to other states that will or could use these arms for internal repression, international crimes, or human rights abuses. The purpose of the memorandum is to elaborate the various frameworks for arms trade regulation and to identify grounds for contesting exports to certain states.

**Introduction**

The global trade in conventional arms is as old as the history of war, and plays a major role in global politics.<sup>1</sup> Arms trade can be both legal and illegal, with various restrictions on the types of arms to be traded and the conditions. A persistent issue regarding legal arms trade, especially the trade of small arms and light weapons, is that it can nevertheless contribute to human rights abuses and international crimes. As such, the international community has collaborated to create limitations on arms trade, including the recently negotiated Arms Trade Treaty.<sup>2</sup> In addition, states have implemented laws in their national systems to regulate arms trade, including specifically to limit trade when arms may be used to commit crimes or abuse human rights.

This memorandum identifies and analyzes the legal instruments and regulations in various national system that control and monitor the export and trade of arms. The national systems addressed are Belgium, France, the United Kingdom (UK), and the United States (US). These states were selected as they are some of the biggest arms exporters, and they represent both common law and civil law systems. In addition, France, Belgium and the UK are also European Union (EU) member states, and as such must comply

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<sup>1</sup> Sophie Brinkel, *Arms Trade Treaty: A Historical Breakthrough?*, PEACE PALACE LIBRARY, (2014), available at

<http://www.peacepalacelibrary.nl/2014/12/arms-trade-treaty-a-historic-breakthrough/?lang=fr>.

<sup>2</sup> This treaty is analyzed in detail in a separate memorandum on the topic provided to the Public Interest Litigation Project (PILP) dated July 2015 and entitled “The Arms Trade Treaty: Key Principles Limiting Trade to Human Rights Violating States”.

with relevant EU provisions on arms trade.<sup>3</sup> Finally, all of them but the USA have ratified the Arms Trade Treaty and are therefore also subject to its provisions.

This memorandum commences by setting out the relevant legal framework in the Belgium, France, the UK and the US, and the available control mechanisms on arms exports. The memorandum also addresses where available any relevant case law. The focus is on the safeguards present to prevent states from exporting arms to other states that will or could use these arms for internal repression, international crimes, or human rights abuses. While these states all require certain criteria to be taken into account when considering an arms export, the enforcement and oversight mechanisms differ.

### **I. III. Arms Trade Regulations in Belgium**

Belgium has passed national and regional legislation regulating arms export. As an EU member state and a party to the Arms Trade Treaty (ATT), Belgium also has relevant obligations under these instruments. According to Belgium's regulatory framework, respect for human rights and international humanitarian law are among the criteria that the Government has to consider when deciding upon an arms export license. This section of the memorandum first describes the Belgian regulatory framework dealing with foreign arms exports. It then provides an overview of the criteria that the Belgian Government has to take into account when deciding on an arms export license. The final section discusses the way in which Belgium's highest court has dealt with litigation on the topic of foreign arms trade.

#### *Belgian Regulatory Framework*

In 2003, Belgium transferred the competence for arms export control from the Federal to the regional level.<sup>4</sup> Since then, the three regions have been responsible for control of the foreign arms trade within their territories. The Flemish region introduced a completely new legal framework by ratifying

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<sup>3</sup> The main EU instrument is the European Council Common Position on arms trade, which is also detailed in the above mentioned memorandum provided to PILP dated July 2015.

<sup>4</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

the Flemish Arms Trade Act 2013.<sup>5</sup> The authorities of the Brussels Capital Region largely followed the Flemish proposal.<sup>6</sup> The Walloon region, however, emphasized continuity and to a great extent adopted the existing Federal legislation.<sup>7</sup> As such, the separate regions are responsible for deciding whether or not to grant a license for the export of arms. This decision is partly based on Federal and EU legislation. The Federal and EU regulatory frameworks are briefly discussed below, as well as the Walloon, Flemish and Brussels Capital regional legislation.

Currently, the Flemish, Walloon and Brussels Capital Region are each responsible for “determining, implementing and monitoring the handling of arms export licenses.”<sup>8</sup> Until 2012, the three regions had all used the Federal legal framework to develop their own arms export policies: the Law of 1991 and the Royal Decree of 1993.<sup>9</sup> These texts contained several criteria to be taken into consideration by the licensing authority when deciding whether or

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<sup>5</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf). See also Tomas Baum and Nils Duquet, *Flemish Foreign Arms Trade 2013*, FLEMISH PEACE INSTITUTE, 10 (Feb., 2015), available at [http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish\\_foreign\\_arms\\_trade\\_2013\\_0.pdf](http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish_foreign_arms_trade_2013_0.pdf).

<sup>6</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf). See also Tomas Baum and Nils Duquet, *Flemish Foreign Arms Trade 2013*, FLEMISH PEACE INSTITUTE, 10 (Feb., 2015), available at [http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish\\_foreign\\_arms\\_trade\\_2013\\_0.pdf](http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish_foreign_arms_trade_2013_0.pdf).

<sup>7</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf). See also Tomas Baum and Nils Duquet, *Flemish Foreign Arms Trade 2013*, FLEMISH PEACE INSTITUTE, 10 (Feb., 2015), available at [http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish\\_foreign\\_arms\\_trade\\_2013\\_0.pdf](http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish_foreign_arms_trade_2013_0.pdf).

<sup>8</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>9</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf). See also Tomas Baum and Nils Duquet, *Flemish Foreign Arms Trade 2013*, FLEMISH PEACE INSTITUTE, 10 (Feb., 2015), available at [http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish\\_foreign\\_arms\\_trade\\_2013\\_0.pdf](http://www.flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/flemish_foreign_arms_trade_2013_0.pdf).

not to issue an export license.<sup>10</sup> Despite the fact that the regions used this Federal framework, since 2003, companies that wanted to export military equipment have had to apply for regional export licenses.<sup>11</sup> After the regionalization in 2003, the regions were given one year to prepare their own legislation.<sup>12</sup> Almost ten years later – in 2012 - the regions have finally adopted and implemented their own legal frameworks.<sup>13</sup>

The European Union has strongly influenced the regional legislation in Belgium. The three regions have incorporated the assessment criteria from the EU Common Position 2008/944/CFSP into their legislation for exports to non-EU member states.<sup>14</sup> The Flemish and Brussels Capital Region have included six additional criteria to the EU. These additional criteria concern the use of child soldiers in the armed forces of the recipient state, the recipient state's attitude towards the death penalty, and the external interests of the region and of Belgium.<sup>15</sup> In their legislation, the Flemish and Brussels Capital Region stress the principle of precaution, which means that the possibility that certain exports could lead to, for example, internal repression is a sufficient reason to refuse export licenses.<sup>16</sup> These criteria are discussed further below in relation to each piece of legislation in Belgium.

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<sup>10</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>11</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>12</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>13</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>14</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>15</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>16</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 40 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

### Belgian Federal Law of 1991

As mentioned, since 2003, the three Belgian regions have been in charge of arms export licensing. This licensing is in line with rules that are at least as restrictive as those set by Federal law and policy. Notwithstanding this regional competence, the Federal Government is still competent with regard to issuing certain arms export licenses in Belgium. All import and export licenses for the Belgian armed forces and Federal police are handled by the Federal Government.<sup>17</sup> The Federal Government still uses the Law of 5 August 1991 on Import, Export, Transfer and the Fight against Trafficking of Weapons, Ammunition and Material Intended Specifically for Military Use or Law Enforcement and Corresponding Technology of 1991 to determine these license applications.<sup>18</sup>

According to Article 4 of the 1991 Law, an application for an export or transfer license has to be rejected if there is enough evidence against the recipient state that the export or transfer will contribute to a gross violation of human rights; that there is a clear risk that the export might be used for internal repression; or when it is established that child soldiers are used in the regular army. Taking into account the nature of the equipment to be exported, this requires particular caution in each case with regard to licenses for states where serious violations of human rights have been observed by the UN, the Council of Europe, or the EU.<sup>19</sup>

### Common Position 2008/944/CFSP

In June 1998, the EU adopted the EU Code of Conduct on Arms Exports. Belgium was the first state to acknowledge the binding nature of the European Code of Conduct on Arms Exports by incorporating it in its legislation in 2003.<sup>20</sup> In 2008, this European instrument was translated into the Council Common Position 2008/944/CFSP defining common rules

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<sup>17</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 42 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>18</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 42 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>19</sup> *The law of 5 August 1991 concerning the import, export, and transit and the counteracting of illegal trade in arms, munitions and materials specifically intended for military use or law enforcement and associated technology* art. 4 (Belgium, 1991), available at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1991080568&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1991080568&table_name=wet)

<sup>20</sup> Group for Research and Information on Peace and Security, *Belgium and the Arms Trade*, available at [http://archive.grip.org/en/siteweb/dev\\_8ada74ac.asp.html](http://archive.grip.org/en/siteweb/dev_8ada74ac.asp.html).

governing the control of exports of military technology and equipment (Common Position).<sup>21</sup> The Common Position replaced and expanded the 1998 EU Code of Conduct on Arms Exports.

The Common Position contains eight criteria that all member states have to consider when granting or refusing an arms export license.<sup>22</sup> These criteria include the recipient state's respect for human rights. These criteria in the Common Position are binding minimum standards, which means that EU member states are free to impose more stringent standards of their own.<sup>23</sup> The Belgian regions have to comply with the Common Position's criteria. For example, all of the EU criteria can be found in Article 14 of the 2012 Arms Trade Act of the Walloon region,<sup>24</sup> and in Article 26 of the Flemish Arms Trade Act.<sup>25</sup> The eight criteria in the EU Common Position can be found in Article 36 of the Brussels Capital Region Law on arms trade.<sup>26</sup>

#### Legislation in the Flemish region and the Brussels Capital Region

In Article 28 of its Arms Trade Act of 15 June 2012, the Flemish region added six more specific "Flemish" criteria to those that must be considered in determining an arms export under the EU Common Position. The six new Flemish criteria are: (1) the external interests of the Flemish region and Belgium; (2) the use of child soldiers in the armed forces; (3) the end-user

<sup>21</sup> Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, *Arms Trade*, available at [http://diplomatie.belgium.be/en/policy/policy\\_areas/peace\\_and\\_security/disarmament\\_non\\_proliferation/conventional\\_arms/arms\\_trade/](http://diplomatie.belgium.be/en/policy/policy_areas/peace_and_security/disarmament_non_proliferation/conventional_arms/arms_trade/).

<sup>22</sup> Detailed information on the EU Common Position has been provided separately to PILP. As the EU Common Position is legally binding on all EU member states, it is also binding on France and the UK. *Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment* art. 2 (2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

<sup>23</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 15 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>24</sup> *Décret du 21 juin 2012 relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense (Arms Trade Act)* art. 14 (Belgium, 2012), available in French at <https://wallex.wallonie.be/index.php?doc=22677&amp%3bamp%3bamp%3bamp%3bamp%3brev=23794-15545>

<sup>25</sup> *Decreet betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten, ander voor militair gebruik dienstig materiaal, ordehandhavingsmateriaal, civiele vuurwapens, onderdelen en munitie (The Flemish Arms Trade Act)*, art. 26 (Belgium, 2012), available in Dutch at <http://www.codex.vlaanderen.be/Portals/Codex/documenten/1021895.html>.

<sup>26</sup> *Ordonnantie betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten, ander voor militair gebruik dienstig materiaal, ordehandhavingsmateriaal, civiele vuurwapens, onderdelen, toebehoren en munitie ervan* art. 36 (Belgium, 2013), available in Dutch at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=2013062003&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013062003&table_name=wet)

state's attitude to the death penalty; (4) the prevalence of firearm violence; (5) the presence of gender-related violence; and (6) the presence of peace building and reconciliation processes.<sup>27</sup> The Brussels Capital Region added the same six criteria to its legislation in Article 38 of its 2013 "Law on the import, export, transit and transfer of defense-related products, other material for military use, law enforcement equipment, civilian firearms, parts, accessories and ammunition."<sup>28</sup> By adding these criteria relevant to human rights, these laws can be seen to be more protective than the EU Common Position.

### *Belgian Case Law on Arms Trade*

There have been several cases before Belgian courts regarding arms exports. The most important and controversial case concerned the export of firearms and ammunition to Libya in 2009. The UN and the EU lifted the arms embargoes on Libya in 2003 and 2004.<sup>29</sup> In 2008, the Libyan armed forces awarded a contract to FN Herstal (a Belgian based arms manufacturer) for the supply of, among others, guns and ammunition for the Khamis Brigade<sup>30</sup> - a security brigade of the Libyan Armed Forces loyal to Muammar Gaddafi and led by one of his sons.<sup>31</sup> According to the license application, the intended use for the weapons was the securing of a UN humanitarian corridor between Benghazi and Darfur.<sup>32</sup>

<sup>27</sup> *Decreet betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten, ander voor militair gebruik dienstig materiaal, ordehandhavingsmateriaal, civiele vuurwapens, onderdelen en munitie (The Flemish Arms Trade Act)*, art. 28 (Belgium, 2012), available in Dutch at <http://www.codex.vlaanderen.be/Portals/Codex/documenten/1021895.html>.

<sup>28</sup> *Ordonnantie betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten, ander voor militair gebruik dienstig materiaal, ordehandhavingsmateriaal, civiele vuurwapens, onderdelen, toebehoren en munitie ervan* art. 38 (Belgium, 2013), available in Dutch at [http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=2013062003&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2013062003&table_name=wet)

<sup>29</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 49 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>30</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 49 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>31</sup> Mark Bromley, *The Review of the EU Common Position on Arms Exports: Prospects for Strengthened Controls*, EU NON-PROLIFERATION CONSORTIUM, 11 (Jan., 2012), available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>. Damien Spleeters, *Profit and Proliferation: A Special Report on Belgian Arms in the Arab Uprising, Part I*, THE NEW YORK TIMES, Apr. 5, 2012, available at [http://atwar.blogs.nytimes.com/2012/04/05/profit-and-proliferation-a-special-report-on-belgian-arms-in-the-arab-uprising-part-i/?\\_r=1](http://atwar.blogs.nytimes.com/2012/04/05/profit-and-proliferation-a-special-report-on-belgian-arms-in-the-arab-uprising-part-i/?_r=1).

<sup>32</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 49 (March, 2014), available at

When FN Herstal applied for export licenses for this contract in 2008, authorities of the Walloon region considered the applications to be sensitive and requested additional advice.<sup>33</sup> A confidential report by the Department of International Relations of the Walloon region signaled the risk of violation of the EU criteria and the very poor human rights situation in Libya.<sup>34</sup> Based on this report, an advisory committee decided to formulate negative advice for the military part of the contract. It gave a positive advice for the weapons intended for the Libyan police forces, however.<sup>35</sup>

FN Herstal campaigned heavily in favor of granting the export licenses. FN Herstal even put some pressure on the Walloon authorities by producing the weapons in advance and holding them ready to be shipped. This strategy was successful, and three main political parties spoke in favor of the export, using economic arguments and the argument that if the Walloon region does not deliver the weapons, others will. In 2009, the advisory committee changed its position and decided in favor of the arms export to Libya.<sup>36</sup> On 8 June 2009, merely a day after the regional elections, the Walloon authorities decided to grant all the export licenses to FN Herstal.<sup>37</sup>

In August 2009, two Walloon non-governmental organizations (NGOs) brought a case before the Council of State – the highest court in Belgium – to cancel the export licenses. They argued that Belgian legislation and the

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[http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>33</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 49 (March, 2014), available at

[http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>34</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at

[http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>35</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at

[http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>36</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at

[http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>37</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at

[http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

European Code of Conduct had been violated and that the weapons might be used for human rights abuses.<sup>38</sup> In October of that year, the Council of State ruled in favor of the NGOs, and held that a “caretaker government” was not competent to take such an important decision as no parliamentary control was possible.<sup>39</sup> The Council of State rescinded the export licenses to Libya. The Walloon authorities acknowledged this ruling and stated that they would review the situation. However, as not all the weapons had been delivered to Libya, the Walloon authorities granted new export licenses for the remaining exports. The authorities did this under the pretext that FN Herstal needed to fulfil its contractual obligations and that the state was no longer a “caretaker government.”<sup>40</sup> Eventually, all the weapons were delivered to Libya. Consequently, one of the NGOs brought the case once more before the Council of State, which in April 2011 confirmed its October 2009 ruling.<sup>41</sup>

Another case brought before the Council of State in 2002 was unsuccessful, as this time this judiciary did not cancel the export licenses in question. The Nepalese People’s Progressive Forum brought a case against Belgium requesting the Council of State to rescind the arms export license granted to Fabrique Nationale. This license concerned the export of 5,500 Minimi machine guns to the Kingdom of Nepal. The Council of State refused to revoke the export license on the ground that the license did not cause serious irreparable harm to the organization of the Nepalese People’s Progressive Forum or to any of its members.<sup>42</sup>

Another case before the Council of State, from 2011, concerned the export of parts for a hot isostatic press to an Iranian company, Iran Aircraft Industries. The Flemish Minister of Foreign Trade denied Engineered Pressure System International an arms export license for this material.

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<sup>38</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>39</sup> Ligue des Droits de l’Homme and others v. The Walloon region (2009) 6 available at <http://www.raadvst-consetat.be/arr.php?nr=197522&l=nl>.

<sup>40</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>41</sup> Nils Duquet, *Business as usual? Assessing the impact of the Arab Spring on European arms export control policies*, FLEMISH PEACE INSTITUTE, 50 (March, 2014), available at [http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report\\_business\\_as\\_usual\\_web.pdf](http://www.vlaamsvredesinstituut.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/report_business_as_usual_web.pdf).

<sup>42</sup> VZW “Nepalese People’s Progressive Forum, Belgium” v. The Belgian state (2002) 7-8 available at <http://www.raadvst-consetat.be/arr.php?nr=110185&l=nl>.

Consequently, Engineered Pressure System International brought a case before the Council of State in order to overturn the decision to deny the license. The Council of State overruled the decision because the Flemish authorities did not sufficiently demonstrate that there was a clear risk that the parts in question could be used for the production of missiles or for other military projects.<sup>43</sup>

### *Conclusion: Belgian Arms Trade Regulations*

This first section of the memorandum described the Belgian regulatory framework dealing with foreign arms exports and provided an overview of the criteria that has to be considered when determining an arms export license. According to Belgium's regulatory framework, respect for human rights and international humanitarian law are among the criteria that must be considered when determining an arms export license. Belgium has passed national and regional legislation regulating arms export that is in line with the EU Common Position. Importantly, the Belgian regions have extended the protection set out in the EU Common Position, adding six criteria to be considered in granting export licenses.

This section of the memorandum also set out the way in which Belgium's highest court has dealt with litigation on the topic of foreign arms trade. There have been several cases before Belgian courts regarding arms exports and the highest court, the Council of State, has made numerous important decisions. Relevantly for the purposes of this memorandum, the Council of State has recognized NGO applicants as claimants before it, and has also taken decisions rescinding government decisions to grant licenses on the basis of human rights considerations.

## **II. Arms Trade Regulations in France**

French policies regarding arms export aim to be responsible and transparent, and in compliance with its international and European obligations.<sup>44</sup> Within the Wassenaar Arrangement, the EU and now as a party to the Arms Trade Treaty (ATT), France reinforces the control of arms

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<sup>43</sup> NV Engineered Pressure System International (EPSI) v. The Flemish region (2011) 33 *available at* <http://www.raadvst-consetat.be/arr.php?nr=213920&l=nl>.

<sup>44</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 17 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

transfers.<sup>45</sup> France controls strictly the manufacture as well as the trade in military equipment. France subjects the manufacture and trade of arms to authorization that runs for a maximum renewable period of five years.<sup>46</sup> The policy of the French Government is to deny arms export licenses if the arms are to be used for the repression of the civil population, in open conflicts, or if there are considerable risks of human rights violations.<sup>47</sup> Although supervised by mechanisms of control, the decision to export arms is political and is part of the French foreign and national security policies.<sup>48</sup>

This second section of the memorandum details these control mechanisms regulating arms exports in France. It first covers the legal and regulatory framework surrounding arms trade in France, and then focuses on the safeguards and protections relating to human rights. As an EU member state and a party to the Arms Trade Treaty (ATT), France also has relevant obligations under these instruments.

### *French Legal and Regulatory Framework*

The French Defense code establishes under its Chapter V title III book III the system applicable to arms exportation.<sup>49</sup> The law n°2011-702 of 22 June 2011<sup>50</sup> and the decree n°2012-901 of July 2012<sup>51</sup> modify Chapter V. The French laws and regulations – including these just mentioned - are largely

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<sup>45</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 36 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>46</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 17 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>47</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 23 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>.

<sup>48</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 26 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>49</sup> *Code de la défense* (May 2015), *available at* <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307>

<sup>50</sup> *Loi n°2011-702 du 22 juin 2011 relative au contrôle des importations et des exportations de matériels de guerre et de matériels assimilés, à la simplification des transferts des produits liés à la défense dans l'Union européenne et aux marchés de défense et de sécurité*, (22 June 2011), *available in French at* <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024228630&categorieLien=id>

<sup>51</sup> *Décret n°2012-901 du 20 juillet 2012 relatif aux importations et aux exportations hors du territoire de l'Union européenne de matériels de guerre, armes et munitions et de matériels assimilés et aux transferts intracommunautaires de produits liés à la défense*, (22 July 2012), *available in French at* <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026209273&categorieLien=id>

implementations of European rules and directives.<sup>52</sup> Under French law, there are two systems for arms exportation: one that concerns exports outside the EU, and the other concerning exports within the EU.<sup>53</sup> For the purposes of the present memorandum the focus of this research is on the former system for export outside of the EU.

The 2014 Report of the Ministry of Defense specifies that ‘exportation’ include re-exportations, temporary exportations, handovers, donations, technology transfers and technical assistance.<sup>54</sup> Moreover, the system applies to military equipment and arms listed under the orders of June 27, 2012<sup>55</sup> and May 9, 2014,<sup>56</sup> which implement and complete the EU List of military equipment. Overall, French customs regulate the flux of arms transfers.<sup>57</sup>

### *French Control on Arms Export*

The control of arms exports in France relies on three principles.<sup>58</sup> First, it relies on the principle of prohibition or of preliminary authorization that engages the Government’s responsibility on each application for export. Second, an application for export license requires the opinion of an inter-ministerial commission. This principle implies that the commission assesses the export from all its dimensions, such as operational, geostrategic, economic, technical, diplomatic and political. Third, within the French administration’s structures, functions that provide support regarding arms

<sup>52</sup> Rapport au Parlement sur les exportations d’armement de la France, (France, 2014), 26 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>53</sup> Rapport au Parlement sur les exportations d’armement de la France, (France, 2014), 43 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>54</sup> Rapport au Parlement sur les exportations d’armement de la France, (France, 2014), 17 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>55</sup> Arrêté du 27 juin 2012 relatif à la liste des matériels de guerre et matériels assimilés soumis à une autorisation préalable d’exportation et des produits liés la défense soumis à une autorisation préalable de transfert, (27 juin 2012), available in French at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026088164>

<sup>56</sup> Arrêté du 9 mai 2014 modifiant l’arrêté du 27 juin 2012 relatif à la list des matériels de guerre et matériels assimilés soumis à une autorisation préalable d’exportation et des produits liés à la défense soumis à une autorisation préalable de transfert, (29 juin 2014), available in French at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028940260&categorieLien=id>

<sup>57</sup> Nathalie Chabanne and Yves Foulon, *Rapport d’information déposé en conclusion des travaux d’une mission d’information sur le dispositif de soutien aux exportations d’armement*, Assemblée Nationale (17 December 2014), 123, available in French at <http://www.assemblee-nationale.fr/14/rap-info/i2469.asp>

<sup>58</sup> Nathalie Chabanne and Yves Foulon, *Rapport d’information déposé en conclusion des travaux d’une mission d’information sur le dispositif de soutien aux exportations d’armement*, Assemblée Nationale (17 December 2014), 111, available in French at <http://www.assemblee-nationale.fr/14/rap-info/i2469.asp>

exports are separate from those exercising control over exports. This applicable system involves control both *a priori* and *a posteriori* of export authorizations. These are discussed below.

#### Decision to Grant Authorization: the A Priori Control

The inter-ministerial Commission on the study of exportation of military equipment (CIEEMG – Commission interministérielle pour l'étude des exportations de matériels de guerre) examines applications for licenses authorizing arms exports and transfers (AFCI – Autorisation de fabrication, de commerce ou d'intermédiation).<sup>59</sup> This Commission works under the Prime Minister's authority.<sup>60</sup> The different ministries composing the commission give their opinion as to whether to grant the licenses.<sup>61</sup>

Each ministry assesses the export application in relation to its area of expertise. For instance, while the Defense Ministry considers mostly geostrategic issues and operational impacts of the proposed export, the Ministry of Foreign Affairs assesses the geopolitical impact and French international obligations.<sup>62</sup> In order for the assessment to be complete, the Commission involves the intelligence and the diplomatic services.

These ministries usually base their opinion on the criteria defined in the European Council Common Position 2008/944/CFSP, and other international agreements. They also take into account national criteria aimed at the protection of French military forces and allies, and economical interests.<sup>63</sup> Moreover, annually the ministries elaborate general export directives applicable to states and types of arms. After the inter-ministerial procedure, the Prime Minister decides whether to grant licenses authorizing exports and

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<sup>59</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 19 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>60</sup> Nathalie Chabanne and Yves Foulon, *Rapport d'information déposé en conclusion des travaux d'une mission d'information sur le dispositif de soutien aux exportations d'armement*, Assemblée Nationale (17 December 2014), 112, available in French at <http://www.assemblee-nationale.fr/14/rap-info/i2469.asp>

<sup>61</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 26 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>62</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 26 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>63</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 26 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

transfers or arms.<sup>64</sup> The licenses may require that the exporting company demand certain commitments from its clients, states or companies.

#### Control “sur Pièce et sur Place”: the A Posteriori Control

In June 2012, the Defense Ministry put into place a control subsequent to the authorization of an arms export. Agents from the general department of armament (DGA – Direction générale de l’armement), under the Defense Ministry, conduct the control. They control systematically the items for licenses (“control sur pièce”), and on the premises of exporting companies they control that all operations conducted prior to the authorization complied with the license granted (“control sur place”).<sup>65</sup> The control aims at verifying the coherence between, on the one hand, the authorization, the licenses, the reports of the administration, and records; and on the other hand, the contracts, and the equipment stocked and manufactured.

The Ministry officials undertake these controls and prepare an official report that is provided to the ministerial Committee for *a posteriori* control, which is presided over by a member of the French army general control (Contrôle général des armées – CGA).<sup>66</sup> Moreover, according to Article L2335-4 of the Defense Code, the French Government can at any time suspend, modify, repeal or withdraw a granted license for reasons of international obligations, national security, public order or non-respect for the requirements of the license.<sup>67</sup>

#### *Reporting Obligations*

Due to its international and regional obligations, France reports information on its arms exports. For instance, it participates in the 1992 UN Register of Conventional Arms,<sup>68</sup> and as part of the Wassenaar Arrangement<sup>69</sup> it provides export information. Within the EU, France participates in the

<sup>64</sup> Rapport au Parlement sur les exportations d’armement de la France, (France, 2014), 19 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>65</sup> Rapport au Parlement sur les exportations d’armement de la France, (France, 2014), 19 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>66</sup> Rapport au Parlement sur les exportations d’armement de la France, (France, 2014), 19 available in French at <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>67</sup> *Code de la défense*, Article L2335-4 (May 2015), available at <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071307>

<sup>68</sup> See for further information: <http://www.un.org/disarmament/convarms/Register/>

<sup>69</sup> See for further information: <http://www.wassenaar.org>

exchange of information mechanisms elaborated by the Council Working Party on Conventional Arms Exports (COARM).<sup>70</sup> Nationally, the French Ministry of Defense publishes an annual report to Parliament.<sup>71</sup>

### *Arms Exports and Human Rights Protection in France*

As a member state of the EU and a party to the ATT, France is obliged to follow a number of criteria in assessing the proposed export of conventional arms. For instance, under the European Council Common Position 2008/944/CFSP<sup>72</sup> and Article 7(1)(b)(i) of the ATT, France must assess whether the export would contribute to human rights violations in the receiving state.<sup>73</sup> The 2014 French Ministry of Defense report on arms exports includes information on the reasons why licenses were denied in 2013 according to the EU criteria on which the CIEEMG bases its decisions of whether to grant exports.<sup>74</sup>

According to this chart, four per cent of applications were denied due to preservation of regional peace and security; 15 per cent were denied due to respect for international obligations; 29 per cent were denied due to a risk that the arms would be diverted to a third state or organization; and 26 per cent of applications were denied due to the internal situation of the recipient state. Of note, in 2013 no licenses were denied on the basis of respect for human rights, or due to the behavior of the buyer state with regard to the international community.

According to other annual reports on arms export, it can be seen that licenses have been denied based on respect for human rights. For example, in 2008, three out of the 93 licenses rejected by the French Government were rejected based on respect for human rights; and in 2009, six of the 91 rejected licenses were denied based on respect for human rights. In 2010, the licenses

<sup>70</sup> See for further information: <http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-conventional-arms-exports/>

<sup>71</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 28 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

<sup>72</sup> Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment Art. 2(2), (European Union 2008), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008E0944>.

<sup>73</sup> On the framework of the ATT and the EU see the relevant research of the PILP project.

<sup>74</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 37 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

rejected dropped to 44, of which 12 were based on respect for human rights. In 2011 and 2012, the rejected licenses increased to 73 and 63 respectively, from which only 12 and 13 were rejected based on respect for human rights.<sup>75</sup> Finally, in 2014 the French Government announced that it was not going to send military equipment to the Russian Federation, as part of the package of sanctions the EU had imposed due to the conflict in Ukraine.

### *Conclusion: French Arms Trade Regulations*

This section of the memorandum detailed the various control mechanisms regulating arms exports in France, with a focus on the protections relating to human rights. France has national regulations regarding arms trade that aims to be transparent and comprehensive. Its laws specifically preclude arms export licenses if the arms are to be used for internal repression, in open conflicts, or if there are considerable risks of human rights violations.<sup>76</sup> As an EU member state and a party to the Arms Trade Treaty (ATT), France also has relevant obligations under these instruments relating to human rights violations and international crimes.

Although there are supervisory mechanisms both before an export license is granted and afterwards, ultimately, the decision to export arms is political and part of the French foreign and national security policies.<sup>77</sup> Furthermore, no case law or litigation was identified challenging any relevant French exporting decisions. As such it appears that the courts to date have played a very limited role in overseeing these licensing processes and decisions.

### **III. Arms Trade Regulations in the UK**

This third section of the memorandum starts by briefly outlining the current arms export regulations in the UK. The section then analyzes court cases, applications, and parliamentary procedures in the UK initiated to challenge the granting of arms export licenses. A focus is on the export of

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<sup>75</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2013), Annex 9, *available in French at* <http://goo.gl/K0JCUV>.

<sup>76</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 23 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>.

<sup>77</sup> Rapport au Parlement sur les exportations d'armement de la France, (France, 2014), 26 *available in French at* <http://www.defense.gouv.fr/salle-de-presse/dossiers-de-presse/rapport-au-parlement-2014-sur-les-exportations-d-armement-de-la-france/>

arms by the UK to Indonesia in 2002. This includes the case of *R. (on the application of Aguswandi) v Secretary of State for Trade and Industry*, and subsequent findings by the House of Commons Select Defence Committee on this arms export, and assurances given by the Indonesian authorities. Another focus is on two examples regarding arms export licenses to Israel: *R. (on the application of Hasan) v Secretary of State for Trade and Industry*; and a complaint by the Campaign Against Arms Trade against the Secretary of State for Business, Innovation and Skills. Finally, this section discusses the scrutiny report of the session 2014-2015 by the House of Commons Committee on Arms Export.

### *UK Regulatory Framework*

The system of arms export in the UK consists of several laws. As an EU member state and a party to the Arms Trade Treaty (ATT), the UK has relevant obligations under these instruments. Domestic affect to the EU Common Position 2008/944/CFSP, which sets out common rules governing control of military and technology equipment, is given via the Consolidated EU and National Arms Export Licensing Criteria (Consolidated Criteria).<sup>78</sup> These Criteria set out the basis on which the UK Government assesses applications for licenses regarding military and dual-use goods. An amendment to the Consolidated Criteria requires that the criteria are not applied mechanistically, but on a case-by-case basis. This allows all relevant and available information to be taken into account at the time of assessment of the license application.<sup>79</sup> The Common Position 2009/428 on Dual-Use Regulations and the EU Regulation on Torture also apply directly in the UK.<sup>80</sup>

The Export Control Act 2002<sup>81</sup> is the main UK legislation on export controls on military and dual-use goods. The term ‘dual-use goods’ refers to goods, software, technology, documents, and diagrams allowing usage both in

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<sup>78</sup> Department of Business, Innovation & Skill, *Assessment of export licence application: criteria and policy*, (Sep.10, 2012), available at: <https://www.gov.uk/assessment-of-export-licence-applications-criteria-and-policy>.

<sup>79</sup> Leigh Day, *In The Matter of Judicial review: Campaign Against Arms Trade v. Department of Business, Innovation and Skills*, 10 (Oct.1,2014), available at:

<https://www.caat.org.uk/resources/countries/israel/legal/2014-10-01.leigh-day.letter-before-claim-to-bis.pdf>.

<sup>80</sup> Department of Business, Innovation & Skills and Export Control Organization, *Overview of export control legislation*, (Sep.3, 2012), available at: <https://www.gov.uk/overview-of-export-control-legislation>.

<sup>81</sup> *Export Control Act 2002* (United Kingdom, 2002), available at: <https://www.gov.uk/export-control-act-2002>.

a civil and military application.<sup>82</sup> Decisions under the Export Control Act 2002 follow the Consolidated Criteria.<sup>83</sup> The Export Control Order 2008<sup>84</sup> is the main statutory instrument, and secondary legislation under the Export Control Act. The Export Order Control covers the export of strategic goods, transfer of technology, the provision of technical assistance, and trade of military equipment between foreign states where any part of the activity takes place in the UK. The Export Control Order also regulates trade controls with the destinations subject to arms embargos by the UK, EU, and the Organization for Security and Cooperation in Europe (OSCE).<sup>85</sup> The UK Strategic Export Control Lists provides an overview of controlled goods requiring an export license.<sup>86</sup>

The Export Control Organization (ECO), part of the Department for Business, Innovation and Skills, is responsible for examining license applications for arms exports.<sup>87</sup> The ECO assesses all applications for an export license on a case-by-case basis against the Consolidated Criteria.<sup>88</sup>

### *Committees on Arms Export Controls*

The Business, Innovation & Skills Committee, the Defense Committee, the Foreign Affairs Committee and the International Development Committee together form the Committee on Arms Export Controls (the Committee). The task of the Committee is to scrutinize the arms control procedure and legislation of the UK Government, individual arms export licenses decisions, arms export policies and the role of the UK in international arms control

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<sup>82</sup> Department of Business, Innovation & Skills, *Controls On Dual-Use Goods*, (Sep.12, 2012), available at: <https://www.gov.uk/controls-on-dual-use-goods>, see also: *Council Regulation (EC) No 1334/2000*, art. 2(a) (2000), available at: <http://www.sussex.ac.uk/Units/spru/hsp/documents/2000-0622%201334-2000.pdf>.

<sup>83</sup> *Export Control Act 2002* art.9(8) (2002), available at: [http://www.legislation.gov.uk/ukpga/2002/28/pdfs/ukpga\\_20020028\\_en.pdf](http://www.legislation.gov.uk/ukpga/2002/28/pdfs/ukpga_20020028_en.pdf).

<sup>84</sup> *Export Control Order 2008* (United Kingdom, 2002), available at: <https://www.gov.uk/export-control-order-2008>.

<sup>85</sup> *Export Control Order 2008* (United Kingdom, 2002), available at: <http://www.legislation.gov.uk/uksi/2008/3231/contents/made>.

<sup>86</sup> Department of Business, Innovation & Skills and Export Control Organization, *UK Strategic Export Control Lists*, (Aug.3,2012), available at: <https://www.gov.uk/uk-strategic-export-control-lists-the-consolidated-list-of-strategic-military-and-dual-use-items>, and *Council Regulation (EC) No 1334/2000* art. 2(a) (2000), available at: <http://www.sussex.ac.uk/Units/spru/hsp/documents/2000-0622%201334-2000.pdf>.

<sup>87</sup> Export Control Organization, *About us: what we do*, available at: <https://www.gov.uk/government/organisations/export-control-organisation/about..>

<sup>88</sup> Department of Business, Innovation & Skills and Export Control Organization, *Overview of export control legislation*, (Sep.3, 2012), available at: <https://www.gov.uk/overview-of-export-control-legislation>.

agreements.<sup>89</sup> The Committee can make recommendations for the Government to consider, which are not legally binding but carry political power.<sup>90</sup>

In their report on the scrutiny of Arms Exports and Arms Controls in 2015, the Committee made a number of observations and recommendations. The Committee held that the promotion of arms export and the upholding of human rights are legitimate governmental policies.<sup>91</sup> The Committee has, however, recommended that the UK Government report to it all breaches of the Government's human rights policies and its international human rights commitments.<sup>92</sup> The reporting obligation would look at the use of UK Government approved export of controlled goods, software, technology and components, and where and when any such breaches occur. The UK Government did not accept this recommendation.<sup>93</sup>

The Committee recommended a more cautious approach towards the export of cryptographic equipment, software, technology and components since they may raise human rights issues if exported to states of human rights concern.<sup>94</sup> Additionally, the Committee encouraged the development of guidelines together with the industry and human rights organizations to address export of information and communication technology not subject to export controls but which can impact human rights.<sup>95</sup> The UK Government declined to follow the Committee's recommendation on cryptographic

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<sup>89</sup> Committee on Arms Export Control, *Role of the Committee*, available at:

<http://www.parliament.uk/business/committees/committees-a-z/other-committees/committee-on-arms-export-controls/role/>.

<sup>90</sup> House of Commons, *Guide For Select Committee Members*, 22 (April 2015), available at:

<http://www.parliament.uk/documents/commons-committees/guide-select-ctte-members.pdf>.

<sup>91</sup> Committee on Arms Export Controls, *Scrutiny of Arms Export and Arms Controls (2015)*, 88 (Mar. 9, 2015), available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608.pdf>.

<sup>92</sup> Committee on Arms Export Controls, *Scrutiny of Arms Export and Arms Controls (2015)*, 89 (Mar. 9, 2015), available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608.pdf>.

<sup>93</sup> Reports from the Business, Innovation and Skills, Defence, Foreign Affairs and International Development Committees, *Session 2014-15, Strategic Export Controls: Her Majesty's Government's Annual Report for 2012, Quarterly Reports for 2012 and 2013, and the Government's policies on, arms exports and international arms control issues: Response of the Secretaries of State for Business, Innovation and Skills, Defence, Foreign and Commonwealth Affairs and International Development*, p.107, (Oct. 2014), available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608.pdf>

<sup>94</sup> Committee on Arms Export Controls, *Scrutiny of Arms Export and Arms Controls (2015)*, 93 (Mar. 9, 2015), available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608.pdf>.

<sup>95</sup> Committee on Arms Export Controls, *Scrutiny of Arms Export and Arms Controls (2015)*, 94 (Mar. 9, 2015), available at: <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/608/608.pdf>.

equipment, software, technology and components, holding that they have no strategic importance, and that their use does not raise human rights issues.<sup>96</sup>

### *Claims Against Indonesian Arms Export Licenses*

Several cases have been brought before UK courts attempting to challenge arms export licenses. For example, the case of *R. (on the application of Aguswandi) v Secretary of State for Trade and Industry*, was brought against the UK Government for authorizing arms export licenses to Indonesia during the then worsening conflict in Aceh in 2003. This was the first case in the UK challenging arms export on the ground of possible human rights violations. This case is discussed below, along with the subsequent findings by the House of Commons Select Defence Committee on this arms export, and assurances given by the Indonesian authorities.

In December 2003, the Indonesian human rights activist Mr. Aguswandi commenced proceedings before a UK court against the UK Government. The case revolved around military export licenses allegedly given in violation of UK and EU arms export control laws to Indonesia by the UK.<sup>97</sup> In May 2003, Indonesia conducted military operations and declared martial law in the province of Aceh. These actions exacerbated the conflict between the Indonesian military and the Free Aceh Movement (GAM), leaving casualties, both military and civilian.<sup>98</sup> Despite the assertions of ongoing human rights violations, the UK was a leading supplier of military equipment to Indonesia, seeing an increase of export from £2 million in 2000 to £41 million in 2002.<sup>99</sup>

The legal basis of Mr. Aguswandi's claim was that the continuing sale of military equipment to Indonesia violated the criterion prohibiting arms export if there is a clear risk of the exported arms being used for internal

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<sup>96</sup> Reports from the Business, Innovation and Skills, Defence, Foreign Affairs and International Development Committees, *Session 2014-15, Strategic Export Controls: Her Majesty's Government's Annual Report for 2012, Quarterly Reports for 2012 and 2013, and the Government's policies on, arms exports and international arms control issues: Response of the Secretaries of State for Business, Innovation and Skills, Defence, Foreign and Commonwealth Affairs and International Development*, p.111 (Oct. 2014), available at: <http://www.parliament.uk/documents/commons-committees/Arms-export-controls/2014-15-Cm8935.pdf>.

<sup>97</sup> Campaign Against Arms Trade, *Legal Action against UK Government's arms to Indonesia policy*, (Dec.10,2003), available at: <https://www.caat.org.uk/media/press-releases/2003-12-10>.

<sup>98</sup> Human Rights Watch, *End the Cycle of Abuse in Aceh*, (Dec.19,2003), available at: <http://www.hrw.org/news/2003/12/18/end-cycle-abuse-aceh>.

<sup>99</sup> Campaign Against Arms Trade, *Arms to Indonesia: CAAT-TAPOL Factsheet*,(Dec.,2005), available at: <https://www.caat.org.uk/resources/countries/indonesia/factsheet>.

repression.<sup>100</sup> Mr. Aguswandi also raised the obligation on the UK to exercise caution after a situation of serious human rights violations in Indonesia was acknowledged by the UN, CoE, or the EU.<sup>101</sup> The UK Government was continuing to monitor the situation in Aceh, and the Indonesian authorities gave reassurance that no British equipment was to be used in Aceh.<sup>102</sup> The UK High Court dismissed the application, stating that there was insufficient evidence to demonstrate that the UK Government applied the incorrect assessment when determining the applications for the export licenses.<sup>103</sup> This lack of information did not allow the High Court to judge whether the Government reached the wrong conclusion in the assessment.<sup>104</sup>

#### House of Commons Select Defence Committee On End-Use Assurances

The House of Commons appoints the Select Defence Committee, and gives the Select Committee the mandate to scrutinize the expenditure, administration, and policy of the Ministry of Defence and associate entities.<sup>105</sup> In its first joint report of the 2003-2004 session, the House of Commons Select Defence Committee (the Committee) reviewed the assurances given by Indonesian to the UK in 2002.<sup>106</sup> The Committee was critical of the UK Government's response to the assurances in this case, which are detailed below.

Until 2002, the Indonesian Government was obliged not to deploy British military equipment in Aceh, and required to provide an advance warning of any possible deployment. In August 2002, the Indonesians provided the UK with advanced notification of its intention to use British armored personnel carriers in Aceh for casualty evacuation and logistical support. The notification came with the assurance that no violation of human

<sup>100</sup> Leigh Day, *Arms sales to Indonesia- are they illegal?*, (Dec.10, 2003), available at:

<http://www.leighday.co.uk/News/Archive/2003/December-2003/Arms-sales-to-Indonesia---are-they-illegal->

<sup>101</sup> Leigh Day, *Arms sales to Indonesia- are they illegal?*, (Dec.10, 2003), available at:

<http://www.leighday.co.uk/News/Archive/2003/December-2003/Arms-sales-to-Indonesia---are-they-illegal->

<sup>102</sup> Laurence Lustgarten, *The European Union, the Member States, and the arms trade: a study in law and policy*, 38 *European Law Review*, 521,528 (2013).

<sup>103</sup> Leigh Day, *Indonesian Rights Activist Vows to Continue Campaign Against Arms Export*, (Apr. 25, 2004) available at: <http://www.leighday.co.uk/News/Archive/2004/April-2004/Indonesian-rights-activist-vows-to-continue-campai>.

<sup>104</sup> Leigh Day, *Indonesian Rights Activist Vows to Continue Campaign Against Arms Export*, (Apr. 25, 2004), available at: <http://www.leighday.co.uk/News/Archive/2004/April-2004/Indonesian-rights-activist-vows-to-continue-campai>.

<sup>105</sup> Commons Select Committee, *Defence Committee: Role*, available at:

<http://www.parliament.uk/business/committees/committees-a-z/commons-select/defence-committee/role/>

<sup>106</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002 , Licensing Policy and Parliamentary Scrutiny*, p. 82 (May 18, 2004), available at:

<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

rights will take place in Aceh or elsewhere during the use of these materials.<sup>107</sup> In September 2002, the Indonesian Government renewed its assurances to refrain from using British materials either offensively, or in violation of human rights.<sup>108</sup> However, the UK Government informed the Indonesian Government that they were no longer required to provide advance warning of any deployment of British military equipment to Aceh resulting from a change of policy that was not notified to Parliament until 12 June 2003.<sup>109</sup>

The UK Government asserted that due to the lack of evidence, it was uncertain whether British materials were used in violation of the assurances.<sup>110</sup> The Select Committee inquired into the steps taken to find out about the use of the exported materials. The Committee was notified of one single visit to Aceh by British officials, however, this was to meet local NGOs, and it was unclear whether this meeting contributed to the UK Government's knowledge of the use of British arms.<sup>111</sup> Two NGOs (one UK based<sup>112</sup> and the other Indonesian<sup>113</sup>) referred the Select Committee to a report by the *Guardian* newspaper showing British-exported Scorpion tanks firing at positions in Aceh held by separatists.<sup>114</sup> The Committee concluded that the UK Government did not take any action to investigate claims of possible involvement of the British military equipment in human rights violations or their possible offensive use in Aceh.<sup>115</sup>

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<sup>107</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, p. 82 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>108</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, p. 83 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>109</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, p. 83 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>110</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, p. 93 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>111</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 200, Licensing Policy and Parliamentary Scrutiny*, p. 94 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>112</sup> Campaign Against Arms Trade, *About CAAT*, available at: <https://www.caat.org.uk/about>.

<sup>113</sup> TAPOL, *About Us*, available at: <http://www.tapol.org/about-us>.

<sup>114</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, p. 95 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>115</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002, Licensing Policy and Parliamentary Scrutiny*, p. 97 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

In case of substantive misuse or diversion of arms exported from the UK, the Government may revoke existing export licenses to the country or end-user.<sup>116</sup> The information on misuse or diversion is also considered when determining future export license applications.<sup>117</sup> Diplomatic tools are also available to deal with misuse or diversion.<sup>118</sup> The Committee reasserted the need for more active and effective monitoring of the end-use of UK equipment,<sup>119</sup> and noted that end-use assurances have little value when no thorough investigation is conducted into allegations of violations. This is especially the case if there is no willingness by the UK to take putative action after a breach of assurances.<sup>120</sup>

### *Claims Against Arms Export from UK to Israel*

There are two instances of judicial procedures against arms export licenses to Israel. The first is a 2008 Court of Appeal case, *R. (on the application of Hasan) v Secretary of State for Trade and Industry*. The other is a complaint commenced by the Campaign Against Arms Trade (CAAT) in 2014 against arms export licenses to Israel in the wake of the Gaza-conflict. These two examples are discussed below in more detail.

#### *R. (on the application of Hasan) v Secretary of State for Trade and Industry*

*R. (on the application of Hasan) v. Secretary of State for Trade and Industry* was originally lodged in 2006 and went to the Court of Appeal in 2008. The Appellant Hasan was a landowning Palestinian national who lived in a village near Bethlehem. In 2005, Israeli troops destroyed all his trees and fenced off land, asserting it was property of the Israeli Land Department.<sup>121</sup>

<sup>116</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002 , Licensing Policy and Parliamentary Scrutiny*, p. 98 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>117</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002 , Licensing Policy and Parliamentary Scrutiny*, p. 98 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>118</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002 , Licensing Policy and Parliamentary Scrutiny*, p. 98 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>119</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002 , Licensing Policy and Parliamentary Scrutiny*, p. 102 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>120</sup> House of Commons Defence Select Committee, *First Joint Report: Strategic Export Controls- Annual Report for 2002 , Licensing Policy and Parliamentary Scrutiny*, p. 102 (May 18, 2004), available at: <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmdfence/390/39007.htm#a17>.

<sup>121</sup> *R. (on the application of Hasan) v Secretary of State for Trade and Industry* (2008) EWCA Civ. 1312 para.1.

Hasan sought to challenge the decision to grant 27 Standard Individual Export Licenses (SIEL's - the most common type of export licenses for controlled goods<sup>122</sup>), for Military List items exported to Israel from April to June 2006.<sup>123</sup>

The original claim followed a protocol letter demanding a review of the legality and rationality of the UK Government's arms export to Israel. The claim called for an immediate suspension of export licenses for military equipment, and alleging the usage of such licensed articles against Palestinians for internal repression.<sup>124</sup> The original claim aimed to challenge, and persuade the court to prevent the export of the military items.<sup>125</sup> The Secretary of State for Trade & Industry gave information to demonstrate that the 27 SIEL's complied with the UK regulations and the Consolidated Criteria.<sup>126</sup> Following this disclosure, Hasan conceded that licenses in the quarters April-June and June-September 2006 were rightfully issued.<sup>127</sup>

On appeal, Hasan noted that public authorities are obliged to publish reasons for administrative decisions whenever a court was of the opinion that the public interest so required, having regard to the standards of good administration set by law such as the principles of proportionality, transparency, public confidence, and accountability.<sup>128</sup> However, the Court of Appeal held that the Freedom of Information Act 2000 indicated no common law duty to give reasons for decisions.<sup>129</sup> According to the Court of Appeal, there was no support for the suggestion that the common law has set a general requirement for transparency in decision-making by government or other public bodies.<sup>130</sup> The Court of Appeal's conclusion was that there was no law recognizing a general duty to give reasons for an administrative decision,

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<sup>122</sup> Department of Business, Innovation & Skills and Export Control Organization, *Standard Individual Export Licenses*, (Dec.12, 2012), available at: <https://www.gov.uk/standard-individual-export-licences#what-are-siels>

<sup>123</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.1.

<sup>124</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.2.

<sup>125</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.3.

<sup>126</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.3.

<sup>127</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.3.

<sup>128</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.4.

<sup>129</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.19.

<sup>130</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312 para.19.

resulting in the dismissal of the appeal.<sup>131</sup> The Court of Appeal reasoned there were exceptions for individuals and classes of individuals, and there might be a trend for the exceptions to become the norm.<sup>132</sup>

### Campaign Against Arms Trade v Department of Business, Innovation & Skills

The second example of challenging arms exports to Israel was brought by the Campaign Against Arms Trade (CAAT). This was not a case brought to court but was an initial enquiry launched by CAAT into the Government's decision-making in relation to 12 export licenses granted to Israel during the 2014 Israeli military action in Gaza. CAAT sought to bring a claim against the UK Government for failing to revoke the 12 arms exports licenses issued to Israel. CAAT eventually dropped this challenge before it made it to court.

On August 4, 2014 the UK Prime Minister David Cameron announced the plan to review arms exports licenses to Israel.<sup>133</sup> The then Business Secretary, Vince Cable, declared that the UK Government could not clarify if the export license criteria were being met.<sup>134</sup> Due to this uncertainty, Cable noted the decision to suspend the licenses in the case of resumption of significant hostilities.<sup>135</sup> Upon review the 12 licenses were not suspended, while - as a precautionary measure - it was decided that there would be no new licenses issued.<sup>136</sup>

<sup>131</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312, *Case Analysis*, available at:

<http://login.westlaw.co.uk.proxy.library.uu.nl/maf/wluk/app/document?&suppsrguid=ia744c0970000014d6b0523f6fa372537&docguid=I484A8680BD0611DDB366A7A3A710BD7B&hitguid=IBE0B5920BB7711DD8D5BD73A0F56A493&rank=1&spos=1&epos=1&td=68&crumb-action=append&context=26&resolvein=true>

<sup>132</sup> R. (*on the application of Hasan*) v Secretary of State for Trade and Industry (2008) EWCA Civ. 1312, *Case Analysis*, available at:

<http://login.westlaw.co.uk.proxy.library.uu.nl/maf/wluk/app/document?&suppsrguid=ia744c0970000014d6b0523f6fa372537&docguid=I484A8680BD0611DDB366A7A3A710BD7B&hitguid=IBE0B5920BB7711DD8D5BD73A0F56A493&rank=1&spos=1&epos=1&td=68&crumb-action=append&context=26&resolvein=true>

<sup>133</sup> Times of Israel Staff, *UK Reviewing Arms Export Licenses to Israel*, Times of Israel, Aug. 4, 2014, available at: <http://www.timesofisrael.com/uk-reviewing-arms-export-licenses-to-israel/>.

<sup>134</sup> Department of Business, Innovation & Skills and Export Control Organization, *Government Announces findings of Review of Licensed Export to Israel*, (Aug.12, 2014), available at: <https://www.gov.uk/government/news/government-announces-findings-of-review-of-licensed-exports-to-israel>.

<sup>135</sup> Department of Business, Innovation & Skills and Export Control Organization, *Government Announces findings of Review of Licensed Export to Israel*, (Aug.12, 2014), available at: <https://www.gov.uk/government/news/government-announces-findings-of-review-of-licensed-exports-to-israel>.

<sup>136</sup> Department of Business, Innovation & Skills and Export Control Organization, *Government Announces findings of Review of Licensed Export to Israel*, (Aug.12, 2014), available at: <https://www.gov.uk/government/news/government-announces-findings-of-review-of-licensed-exports-to-israel>.

CAAT claimed that the decision not to suspend or revoke the 12 licenses, subject to a resumption of significant hostilities, was contrary to the EU Common Position 2008/944/CFSP, and the Consolidated EU and National Arms Export Licensing Criteria. As such, it was unlawful.<sup>137</sup> CAAT argued that the decision-maker asked the wrong question as a matter of law.<sup>138</sup> According to CAAT, the question within Article 2(2) of EU Common Position 2008/944/CFSP should be whether there is “*a clear risk*” that the equipment “*might*” be used in violations of humanitarian law or internal repressions. This requires an assessment at the time of export.<sup>139</sup> The same argument applies to Article 5 of the Common Position, requiring “*reliable prior knowledge*” of the end-usage of the equipment. CAAT argued that through its statements the UK Government had indirectly acknowledged that at the time there was a clear risk of the exported items being used in future violations of human rights or humanitarian law.<sup>140</sup>

The Treasury Solicitor for the UK Government agreed that Criterion 2 of the Common Position was the most relevant: not granting a license if there is a clear risk of the items being used for internal repression, violation of human rights or humanitarian law.<sup>141</sup> It conceded that the criteria require an assessment of future risk, and that past events are relevant, but not the focus of such an assessment for suspending or revoking an existing license or granting a new license.<sup>142</sup> The Treasury Solicitor noted that certain factors are taken into account in the Consolidated Criteria, such as the UK’s national interest,

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<sup>137</sup> Leigh Day, *In The Matter of Judicial review: Campaign Against Arms Trade v. Department of Business, Innovation and Skills*, 9 (Oct.1,2014), available at:

<https://www.caat.org.uk/resources/countries/israel/legal/2014-10-01.leigh-day.letter-before-claim-to-bis.pdf>.

<sup>138</sup> Leigh Day, *In The Matter of Judicial review: Campaign Against Arms Trade v. Department of Business, Innovation and Skills*, 9 (Oct.1,2014), available at:

<https://www.caat.org.uk/resources/countries/israel/legal/2014-10-01.leigh-day.letter-before-claim-to-bis.pdf>.

<sup>139</sup> Leigh Day, *In The Matter of Judicial review: Campaign Against Arms Trade v. Department of Business, Innovation and Skills*,9 (Oct.1,2014), available at:

<https://www.caat.org.uk/resources/countries/israel/legal/2014-10-01.leigh-day.letter-before-claim-to-bis.pdf>.

<sup>140</sup> Leigh Day, *In The Matter of Judicial review: Campaign Against Arms Trade v. Department of Business, Innovation and Skills*, p.10, (Oct.1,2014), available at:

<https://www.caat.org.uk/resources/countries/israel/legal/2014-10-01.leigh-day.letter-before-claim-to-bis.pdf>.

<sup>141</sup> Department of Business, Innovation & Skills, *In the Matter of a Proposed Claim for Judicial Review: R (Campaign Against Arms Trade) v Secretary of State for Business, Innovation and Skills*, 2 (Oct.24,2014), available at: <https://www.caat.org.uk/resources/countries/israel/legal/2014-10-24.tsol-to-ld.pdf>.

<sup>142</sup> Department of Business, Innovation & Skills, *In the Matter of a Proposed Claim for Judicial Review: R (Campaign Against Arms Trade) v Secretary of State for Business, Innovation and Skills*, 5 (Oct.24,2014), available at: <https://www.caat.org.uk/resources/countries/israel/legal/2014-10-24.tsol-to-ld.pdf>.

including the potential effect on the UK's economic, and commercial interests, and the potential effect on the UK's international relations.<sup>143</sup>

The Treasury Solicitor argued that on 12 August 2014, while a ceasefire was in place, the Foreign Secretary assessed that there was not a clear risk of the export being used in human rights or humanitarian law violations. This assessment was based on sufficient information, and included relevant considerations such as the holding of the ceasefire, and the withdrawal of ground troops.<sup>144</sup> The Treasury Solicitor argued the correctness of the decision to suspend only in the case of resumption of significant hostilities based on the events in Gaza after August 12, 2014.<sup>145</sup> Moreover, the circumstances in Gaza were not that of a significant resumption of hostilities.<sup>146</sup> The Treasury Solicitor submitted that the claim by CAAT lacked merit, which ultimately was accepted by the CAAT.

### *Conclusion: UK Arms Trade Regulations*

This third section of the memorandum briefly outlined the current arms export regulations in the UK. As a member state of the EU and also a party to the ATT, the UK has obligations related to these instruments. The UK has incorporated the EU Common Position criteria – including consideration of human rights violations – into its Consolidated Criteria at the national level. The Export Control Organization (part of the Department for Business, Innovation and Skills) is responsible for examining license applications for arms exports on a case-by-case basis.<sup>147</sup> While there is political oversight to this process, involving various Committees, to date the judiciary has played a limited role in reviewing such administrative decisions.

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<sup>143</sup> Department of Business, Innovation & Skills, *Consolidated EU and National Arms Export Licensing Criteria*, (Nov. 21, 2012), available at: <https://www.gov.uk/government/publications/consolidated-eu-and-national-arms-export-licensing-criteria>.

<sup>144</sup> Department of Business, Innovation & Skills, *In the Matter of a Proposed Claim for Judicial Review: R (Campaign Against Arms Trade) v Secretary of State for Business, Innovation and Skills*, 5 (Oct.24,2014), available at: <https://www.caat.org.uk/resources/countries/israel/legal/2014-10-24.tsol-to-ld.pdf>

<sup>145</sup> Department of Business, Innovation & Skills, *In the Matter of a Proposed Claim for Judicial Review: R (Campaign Against Arms Trade) v Secretary of State for Business, Innovation and Skills*, 6 (Oct.24,2014), available at: <https://www.caat.org.uk/resources/countries/israel/legal/2014-10-24.tsol-to-ld.pdf>

<sup>146</sup> Department of Business, Innovation & Skills, *In the Matter of a Proposed Claim for Judicial Review: R (Campaign Against Arms Trade) v Secretary of State for Business, Innovation and Skills*, 6 (Oct.24,2014), available at: <https://www.caat.org.uk/resources/countries/israel/legal/2014-10-24.tsol-to-ld.pdf>

<sup>147</sup> Export Control Organization, *About us: what we do*, available at: <https://www.gov.uk/government/organisations/export-control-organisation/about..>

The section also analyzed court cases and applications initiated to challenge the granting of arms export licenses on the basis of human rights concerns. This focused on challenges to export licenses granted to Indonesia during the conflict in Aceh, and challenges to licenses to Israel during an operation in Gaza. The UK has few instances of successful judicial claims against arms export licenses. There may be multiple reasons for this. First, there is a lack of transparency when it comes to arms export licenses. This was made clear by the court's ruling that there was not an obligation on the Government to publish reasons for its determinations. Another difficulty seen from these examples was gaining reliable evidence from the place of the alleged violations. Due to the situation on the ground, as in Aceh in 2004, is it difficult to find out about the actual current and future use of the exported materials.

Finally, an important reason for the difficulty in challenging cases in the UK is the flexibility of the European guidelines. The terms within the EU criteria and the UK's Consolidated Criteria are open for interpretation and require a balancing of interests. Like with France and Belgium, ultimately decisions on granting arms export licenses are made by political bodies that have to date endured limited public scrutiny.

#### **IV. Arms Trade Regulations in the US**

This section of the memorandum presents an overview of the current legal framework for arms trade controls in the US. First, it sets out the regulatory framework, the keystone of which is the Arms Export Control Act. The memorandum details the obligations on the executive branch of government to report to Congress (the Federal House of Representatives and the Senate) regarding the authorized arms exports and military assistance. It then covers the export restrictions and the reasons why a state can be banned from receiving arms or military equipment from the US. Finally, this section provides a brief analysis of the role the judiciary in arms control in the US.

##### *US Regulation of Arms Control*

The arms control system in the US involves various laws, governmental agencies, and branches of the Government. Anyone wishing to export defense equipment must submit a license request with all the relevant governmental agencies (the relevance of the agency is determined by the item the broker

wishes to export).<sup>148</sup> License requests pass through an extensive review process, which includes revision by a variety of governmental agencies, such as the Department of Defense, Department of Energy, NASA, intelligence organs, and the Department of State.<sup>149</sup>

During this licensing process each of these agencies will review different aspects of the license request, such as: the eligibility of the applicant; the parties involved in the export; compliance of the export with the legal framework; national security risks; and the quality and quantity of the items to be exported. Finally, also to be considered are any foreign policy factors such as the effect the export could have on the stability of the region, arms control systems, and human rights.<sup>150</sup>

Arms trade in the US is regulated by several legal instruments; the key one being the Arms Export Control Act (AECA) (1976). The AECA authorizes the President to control the import and export of arms based upon certain factors that have to be taken into consideration. These factors include the impact that the proposed arms export will have on an arms race; the development of weapons of mass destruction; international terrorism; the outbreak of an armed conflict; or on the development of a bilateral or multilateral arms control agreement.<sup>151</sup> The process can be summarized in a two-stage model. In the first stage, the US Government will determine whether or not the receiving party is eligible to receive arms based on the criteria set by the AECA,<sup>152</sup> and in the second stage the Government will decide on the quantity and quality of the exported goods.<sup>153</sup>

However, the AECA is not the only relevant legislation with regard to arms trade. Another key instrument is the US Code. This Code prohibits the sale or lease of arms unless the President determines that the transfer will strengthen US security, promote world peace, and that the receiving

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<sup>148</sup> Secretary of State of the United States, Overview of US Export System available at, <http://www.state.gov/strategictrade/overview/>.

<sup>149</sup> The Department of State is the US Government's foreign ministry. Secretary of State of the United States, Overview of US Export System available at, <http://www.state.gov/strategictrade/overview/>.

<sup>150</sup> Secretary of State of the United States, Overview of US Export System available at, <http://www.state.gov/strategictrade/overview/>.

<sup>151</sup> *Arms Export Control Act* Sec 38 (United States, 1976), available at <http://fas.org/asmp/resources/govern/aeca00.pdf>.

<sup>152</sup> *Arms Export Control Act* Sec 38 (United States, 1976), available at <http://fas.org/asmp/resources/govern/aeca00.pdf>.

<sup>153</sup> Shannon Lindsey Blanton, *Foreign Policy in Transition? Human Rights, Democracy, and U.S. Arms Exports*, 49 INTERNATIONAL STUDIES QUARTERLY 647, 650 (2005).

state/organization ensures that it will not transfer the export to any third party.<sup>154</sup> The US Government also has to consider the Foreign Assistance Act (FAA), which governs the economic and military assistance the US provides to other states.<sup>155</sup> The FAA prohibits the US Government from providing assistance to any government responsible for consistent gross violations of human rights. Such prohibition includes assistance to any law enforcement body of the country and any license export under the AECA.<sup>156</sup>

The FAA expands the term ‘gross human rights violation’ to include torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges and trial; enforced disappearance or abduction and clandestine detention; and any other flagrant denial of the right to life, liberty, or the security of person.<sup>157</sup> To determine if the intended recipient is responsible for gross violations of human rights, the President also has to consider if the it has engaged in or tolerated serious violations of religious freedom.<sup>158</sup> However, if the President considers that there are extraordinary circumstances demanding military assistance to a state responsible for gross human rights violations, he is required to communicate such circumstances to Congress.<sup>159</sup>

### *Reports to US Congress*

In addition to these exceptional reports to Congress regarding exports to states responsible for human rights violations, other regular reports are required to Congress. The executive branch is also required to present two reports to Congress. The first type of report must be presented annually,<sup>160</sup>

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<sup>154</sup> *United States Code* §2753 (United States), available at <https://www.law.cornell.edu/uscode/text/22/chapter-39>.

<sup>155</sup> *Foreign Assistance Act* Introduction (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>156</sup> *Foreign Assistance Act* Sec 502B(2) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>157</sup> *Foreign Assistance Act* Sec 502B(d)(1) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>158</sup> *Foreign Assistance Act* Sec 502B(4) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>159</sup> Specifically, such circumstances have to be communicated by written letter to the head of Congress, the Chairperson of the Senate Committee on Foreign Relations, and the Chairperson of the Senate Committee on Banking, Housing, and Urban Affairs. *Foreign Assistance Act* Sec. 502B(2) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>160</sup> *Foreign Assistance Act* Sec. 655A (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

while the second report will only be presented when required by either the House of Representatives or the Senate.<sup>161</sup>

The first report is the Annual Military Assistance Report, which is to be presented no later than 1 February every year,<sup>162</sup> and has to contain the military goods and services (including indications of cost and quantity) that have been provided to other states or international organizations.<sup>163</sup> The Annual Military Assistance Report specifies whether the goods or services provided were a grant, financial assistance, or if they were a regular export. This report has to be made public by the Federal Department of State.<sup>164</sup>

The second type of report is to be presented by the Secretary of State to the House of Representatives (including the Committee on Foreign Affairs) or the Senate upon their request.<sup>165</sup> The report has to refer to the state(s) requested, and include a detailed description of the relevant state's practice regarding its human rights obligations.<sup>166</sup> The report is to include how the US has promoted respect for human rights in that state and discouraged any practice that might be detrimental to internationally recognized human right.<sup>167</sup> The report should also include steps taken by the US to call attention to and separate itself - and the security assistances it provides - from any practice that could affect internationally recognized human rights.<sup>168</sup> Despite human rights violations in the recipient state, if the Secretary of State considers that extraordinary circumstances and the US national interest requires security assistance, he has to indicate so with a description of such circumstances and the extent to which the assistance has to continue.<sup>169</sup>

If the report is presented within 30 days, based on the report Congress may decide to continue, restrict or terminate the military assistance to the

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<sup>161</sup> *Foreign Assistance Act* Sec. 502B(c)(1) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>162</sup> *Foreign Assistance Act* Sec. 655A (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>163</sup> *Foreign Assistance Act* Sec. 655B (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>164</sup> *Foreign Assistance Act* Sec. 655B (1)-(3) & 655C (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>165</sup> *Foreign Assistance Act* Sec. 502B(c)(1) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>166</sup> *Foreign Assistance Act* Sec. 502B(c)(1)(A) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>167</sup> *Foreign Assistance Act* Sec. 502B(c)(1)(B) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>168</sup> *Foreign Assistance Act* Sec. 502B(c)(1)(B) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>169</sup> *Foreign Assistance Act* Sec. 502B(c)(1)(C) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

relevant state(s).<sup>170</sup> For example, in 1999 Congress approved a ban on the sale of small arms to Indonesia for six years - a measure taken in an effort to protect human rights and democracy.<sup>171</sup> If the report is not presented to Congress within the 30 days, the security assistance will be suspended, unless the law specifically authorizes it, until the report is presented.<sup>172</sup> The President can seek to lift a prohibition if there has been a significant improvement regarding human rights protections.<sup>173</sup>

### *US Export Restrictions*

There are five different categories into which a state can fall in order to be automatically excluded from receiving certain (or any) military equipment or assistance.<sup>174</sup> The categories are: 1) where the export would not further world peace or US foreign policy or security; 2) where the US has imposed an arms embargo unilaterally; 3) where the US Government considers the state to be a sponsor of terrorism; 4) where the UN Security Council has imposed an arms embargo; and 5) where arms export licenses can only be granted on a case-by-case basis.

The first category of states to which the US Government will not exports arms to are those where the export would not further world peace and the US's security and foreign policy.<sup>175</sup> Under this category, the US Government has a policy to deny arms export licenses to Belarus, Cuba, Eritrea, Iran, the Democratic People's Republic of Korea, Syria and Venezuela.

The second category of states banned from receiving defense material from the US includes those states upon which the US has imposed a unilateral arms embargo - such as Burma, the People's Republic of China, and the

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<sup>170</sup> *Foreign Assistance Act* Sec. 502B(c)(4)(A) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>171</sup> Shannon Lindsey Blanton, *Foreign Policy in Transition? Human Rights, Democracy, and U.S. Arms Exports*, 49 *INTERNATIONAL STUDIES QUARTERLY* 647, 649 (2005).

<sup>172</sup> *Foreign Assistance Act* Sec. 502B(c)(3) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>173</sup> *Foreign Assistance Act* Sec. 502B(g) (United States, 1961), available at <http://www.usaid.gov/ads/policy/faa>.

<sup>174</sup> *Code of Federal Regulations* Sec. 126.1c (United States), available at <https://www.law.cornell.edu/uscode/text/22/2753>.

<sup>175</sup> *Code of Federal Regulations* Sec. 126.1(a) (United States), available at <https://www.law.cornell.edu/uscode/text/22/2753>.

Republic of Sudan.<sup>176</sup> Until 2014, Vietnam was also on the embargoes list, which the US refused to lift due to concerns regarding its poor human rights records.<sup>177</sup> The embargo imposed upon China was also based on human rights concerns after the events at Tiananmen Square in 1989. In recent years, the US held diplomatic conversations with European countries that also imposed sanctions to China in 1989 to secure that the embargo is not lifted until human rights conditions have improved.<sup>178</sup>

The third category includes states excluded from receiving US military equipment because the US Government considers them to be sponsors of terrorism, such as Cuba, Iran, the Republic of Sudan, and Syria.<sup>179</sup> In April 2015 the Secretary of State presented to the US Congress a report where it recommended removing Cuba from this list.<sup>180</sup> Cuba was officially removed on May 29, 2015.<sup>181</sup> The fourth category of states are those that cannot receive arms in compliance with an embargo imposed by the UN Security Council under Chapter VII of the UN Charter - such as Lebanon, the Democratic People's Republic of Korea, Somalia, and the Republic of Sudan.<sup>182</sup>

The last of the five categories contains those states where it is the policy of the US to deny licenses or approvals for exports of defense articles and services, but where a license/approval may be issued only on a case-by-case basis. The states in this last group are generally banned from receiving defense equipment, however, an exception could be made on a case-by-case basis. Some examples include Afghanistan, Vietnam, Somalia, Cyprus, Lebanon and Iraq.<sup>183</sup>

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<sup>176</sup> *Code of Federal Regulations* Sec. 126.1(a) (United States), available at <https://www.law.cornell.edu/uscode/text/22/2753>.

<sup>177</sup> Xin Qianq, *US-Vietnam Security Cooperation: Development and Prospects*, CHINA INSTITUTE OF INTERNATIONAL STUDIES, (May 11, 2015), available at [http://www.ciis.org.cn/english/2015-05/11/content\\_7894319.htm](http://www.ciis.org.cn/english/2015-05/11/content_7894319.htm).

<sup>178</sup> Shirley A. Kan, *U.S.-China Military Contacts: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, 10 (Jul. 29, 2014), available at <https://www.fas.org/sgp/crs/natsec/RL32496.pdf>.

<sup>179</sup> *Code of Federal Regulations* Sec. 126.1(d) (United States), available at <https://www.law.cornell.edu/uscode/text/22/2753>.

<sup>180</sup> Recommendation to Rescind Cuba's Designation as a State Sponsor of Terrorism, Secretary of State of the United States, available at <http://www.state.gov/secretary/remarks/2015/04/240687.htm>.

<sup>181</sup> Felicia Schwartz, *Cuba officially removed from U.S. State Sponsor of Terrorism List*, The Wall Street Journal, May 29<sup>th</sup>, 2015, available at <http://www.wsj.com/articles/cuba-officially-removed-from-u-s-state-sponsor-of-terrorism-list-1432913160>.

<sup>182</sup> *Code of Federal Regulations* Sec. 126.1c (United States), available at <https://www.law.cornell.edu/uscode/text/22/2753>.

<sup>183</sup> *Code of Federal Regulations* Sec. 126.1(g), (l), (m), (r), (t) & (f) (United States), available at <https://www.law.cornell.edu/uscode/text/22/2753>.

*Arms Control in Domestic US Courts*

After thorough research, no domestic US case law was found that could show if the judicial system is able to influence the Government's arms control practices/policies based on human rights arguments. A reason for this lack of case law could be the high bar set regarding the required standing for those who seek to challenge in court a Government decision regarding arms exports. 'Standing' determines the right of a person to file a lawsuit or petition before a court. In order to have standing, a person has to demonstrate a "personal stake" in the dispute and that the injury suffered is particularized to the complainant.<sup>184</sup> US courts in particular have been very hesitant to grant standing to persons who present generalized grievances,<sup>185</sup> or where the assertion of harm is too speculative or too remote to be recognized as real.<sup>186</sup>

US courts have required that the petitioner has to have personally suffered an actual injury or a threat of injury which can be connected to the challenge of governmental action, and that the injury is likely to be redressed by the court.<sup>187</sup> With this, the courts have set three necessary elements to grant standing, namely: injury in fact; causation; and redressability.<sup>188</sup> If a person/organization demonstrates only interest but no real affectation, then it cannot be said to enjoy standing in court.<sup>189</sup> The courts will also study the circumstances of each case in order to find a causal connection between the injury (the real affectation) and the conduct complained of (the decision of the government to export arms).<sup>190</sup> The existence of such a link is difficult to determine when the affectation in question is doubtful. The US courts lastly require a "substantial likelihood" that if granted by the court, the relief sought would remedy the harm.<sup>191</sup>

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<sup>184</sup> *Raines et al v. Byrd et al*, 521 US 811, 821 (C.D. Col. 1997), available at <https://supreme.justia.com/cases/federal/us/521/811/case.html>.

<sup>185</sup> *Schlesinger v. Reservists Committee*, 418 U.S. 208 (D.C. Col. 1974), available at <https://supreme.justia.com/cases/federal/us/418/208/case.html>.

<sup>186</sup> *Laird v. Tatum*, 408 U.S. 1 (United States Supreme Court 1972), available at <https://supreme.justia.com/cases/federal/us/408/1/>.

<sup>187</sup> *Valley Forge Christian College v. Americans United*, [454 U.S. 464](#), [472](#) (U.S. Supreme Court 1982) available at <https://supreme.justia.com/cases/federal/us/454/464/>.

<sup>188</sup> *Valley Forge Christian College v. Americans United*, [454 U.S. 464](#), [472](#) (U.S. Supreme Court 1982) available at <https://supreme.justia.com/cases/federal/us/454/464/>.

<sup>189</sup> *Schlesinger v. Reservists Committee*, [418 U.S. 208](#), 217 (U.S. Supreme Court 1974), available at <https://supreme.justia.com/cases/federal/us/418/208/>.

<sup>190</sup> *Lujan v. Defenders of Wildlife*, [504 U.S. 555](#), [595](#) (Court of Appeals 8<sup>th</sup> District. 1992), available at <https://supreme.justia.com/cases/federal/us/504/555/>.

<sup>191</sup> *Lujan v. Defenders of Wildlife*, [504 U.S. 555](#), [595](#) (Court of Appeals 8<sup>th</sup> District. 1992), available at <https://supreme.justia.com/cases/federal/us/504/555/>.

As such, to bring a claim before a US court regarding an arms export, a person would have to demonstrate a personal stake in the export, including real injury arising from the trade, and seek a remedy within the court's power. While US courts grant standing to third parties, they are required to demonstrate a level of injury such that they cannot be a mere interested party to the alleged violation being challenged.<sup>192</sup> These criteria for standing make it difficult for parties (such as NGOs) opposing arms exports on the basis of human rights arguments to appeal to US courts for relief.

### *Conclusion: US Arms Trade Regulations*

Legislation in the US regulates the trade and export of arms, military assistance and services, and provides mechanisms to prohibit such exports on grounds of human rights concerns. However, the protection of human rights is just one of the reasons why the US may prohibit an export of arms to another state. Arms exports can also be prohibited when the export would not further world peace or US foreign policy or security, or where the state is considered to be a sponsor of terrorism. Exports may also be prohibited on the basis of a unilateral arms embargo by the US or according to a UN Security Council embargo.

The arms trade system in the US is a largely a political process whereby the main actors are the executive branch (through the Secretary of State), and the legislative branch (through Congress and its committees). A positive aspect of the process is the participation of Congress. They receive an annual report on arms exports by the executive, and are also entitled to request detailed reports of the human rights situation of a specific state receiving military assistance. Importantly, Congress has the faculty to suspend US military assistance if it considers that the human rights situation in the recipient state warrants a halt to the assistance. However, exceptions exist and military assistance can be provided even in the face of human rights violations if extraordinary circumstances are considered to prevail.

The judicial branch seems to be quite restricted in respect to arms control. While there are criminal cases where the state has prosecuted individuals for violations of the Arms Export Control Act on account of unlicensed exports, no case attempting to block a licensed export by the state could be found. One reason that could explain the inactivity of the courts in

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<sup>192</sup> *Barrows v. Jackson* (1953) [346 U.S. 249](https://supreme.justia.com/cases/federal/us/346/249/), 249 (U.S. Supreme Court 1953), available at <https://supreme.justia.com/cases/federal/us/346/249/>.

this matter is the high bar set regarding granting standing to those who would seek to initiate an action against the state to stop it from exporting arms.

## Conclusion

A persistent issue regarding legal arms trade is that it can nevertheless contribute to human rights abuses and international crimes. As such, states have implemented laws in their national systems to regulate arms trade, including specifically to limit trade when arms may be used to commit crimes or abuse human rights. This memorandum identified and analyzed the legal instruments and regulations in various national systems that control and monitor the export of arms. The national systems addressed are Belgium, France, the United Kingdom (UK) and the United States (US). The memorandum focused on the safeguards present in these systems to prevent states from exporting arms to other states that will or could use these arms for internal repression, international crimes, or human rights abuses.

The memorandum set out the relevant legal framework in Belgium, France, the UK, and the US, outlining the available control mechanisms on arms exports. France, Belgium and the UK are also European Union (EU) member states, and as such must comply with relevant EU Common Position on arms trade.<sup>193</sup> Equally, all of them but the USA have ratified the Arms Trade Treaty and are therefore also subject to its provisions. While these states all require certain criteria to be taken into account when considering an arms export, the decision-making processes differ as well as the enforcement and oversight mechanisms.

All states included in this memorandum have a mechanism in place to assess requests for arms export licenses. The human rights situation in the state of destination is always one of the concerns. The decision whether or not to grant the export license is taken by the executive power. Problematic in this regard is the fact that often, the decision-making process lacks transparency and openness. It is also problematic that the assessment weighs various interests including human rights, and in some states, like France and the USA, other considerations can prevail. For example in France, human rights concerns are taken into account in theory, but in practice none of the requests for an arms export license in 2013 were denied on the basis of the poor human rights situation in the state of destination.

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<sup>193</sup> The main EU instrument is the European Council Common Position on arms trade, which is also detailed in the above mentioned memorandum provided to PILP dated July 2015.

Belgium is somewhat unique in that it has decentralized the licensing process by delegating it to the provinces, which may create issues in terms of consistency and enforceability. However, parts of Belgium should be recognized for exceeding the level of protection required by the EU Common Position by introducing additional human rights related criteria. The adoption of such additional human rights criteria could be encouraged in other jurisdictions.

In theory, the human rights situation in the state of destination is always one of the points to be taken into account when determining an arms export license. However, differences of interpretation exist and in practice it seems hard to enforce conformity with this criterion through legal action. As mentioned in the section on the UK, for example, the Government is not obliged to provide reasons for its decisions on the arms export license. Moreover, some states do not allow citizens or civil society actors to contest an arms export license before a competent judicial body. This is particularly the case in the US, where a person has to show a ‘personal stake’ to be granted standing before the judicial authorities. This is a high bar in cases of arms export to human rights violating states since it will be nearly impossible to prove that a person suffers personal harm from the arms export.

In states where there have been cases of individuals contesting arms export licenses before a court, particularly in Belgium and the UK, these cases led to quite some political turmoil. This illustrates the sensitivity of such cases. Problematic in this regard, is that court proceedings can take quite some time, during which the arms can easily be exported. A later court decision confirming the illegality of the arms export license then becomes somewhat moot.

Nevertheless, some useful strategies can be derived from the examples discussed in this memorandum. First, there is a lot to gain in terms of transparency. Requiring governmental institutions to be transparent when taking arms export decisions, or trying to reform the law in this regard, could ultimately lead to more insight into the decision-making process and the reasons for granting or denying arms export licenses. This could also open avenues for litigation challenging the assessments. In cases where petitioners are allowed to challenge arms export licenses in court, such as the recognition of NGOs in Belgium, this approach could be particularly useful to gain judicial review of the legality of the arms export license. Finally, the export of

arms to human rights violating states is a sensitive topic. Advocacy by citizens and civil society actors could be useful to both place the subject higher on the political agenda, and make citizens more aware of the problems with exporting arms to such states.

### About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, operates as a non-profit, global *pro bono* law firm providing free legal assistance to its clients, which include governments, sub-state entities, and civil society groups worldwide. PILPG specializes in the following practice areas:

- **Peace Negotiations**
- **Post-Conflict Constitution Drafting**
- **Transitional Justice and War Crimes Prosecution**
- **Policy Planning**
- **Democracy and Governance**

Through its work, PILPG promotes the use of international law as an alternative to violent conflict for resolving international disputes. PILPG provides legal counsel to *pro bono* clients during peace negotiations, advises on the creation and operation of transitional justice mechanisms, provides expertise during the drafting of post-conflict constitutions, and advises on ways to strengthen the rule of law and effective institutions. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

In January 2005, a number of PILPG's *pro bono* clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial *pro bono* legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."

In addition to a staff of full-time attorneys that implement PILPG's programs, PILPG leverages volunteer assistance from international lawyers, diplomats, and foreign relations experts, as well as *pro bono* assistance from major international law firms. Annually, PILPG is able to provide over \$20 million worth of *pro bono* international legal services.

PILPG is based in Washington, D.C., New York, and The Hague. To date, PILPG has maintained project offices in: Bosnia and Herzegovina, Côte d'Ivoire, Egypt, Georgia, Iraq, Kenya, Kosovo, Libya, Nepal, Somaliland, South Sudan, Sri Lanka, Tanzania, Tunisia, Turkey, and Uganda.

Over the course of the past two decades, PILPG has provided assistance to *pro bono* clients in Afghanistan, Armenia, Bosnia and Herzegovina, Botswana, Burma, Cambodia, Côte d'Ivoire, Darfur, Dutch Antilles, East Timor, Egypt, Estonia, Ethiopia, Georgia, Iraq, Kenya, Kosovo, Lebanon, Liberia, Libya, Macedonia, Mauritius, Montenegro, Nepal, Philippines, Rwanda, Seychelles, Somalia, Southern Cameroons, Somaliland, South Sudan, Sri Lanka, Sudan, Syria, Tanzania, Tunisia, Uganda, Yemen, and Zimbabwe. PILPG has also provided *pro bono* legal assistance to all of the international and hybrid war crimes tribunals.