

Public Interest Litigation Project Strategisch Procederen voor **Mensenrechten**

SUMMARY OF RESEARCH ON ARMS TRADE AND HUMAN RIGHTS

1. Dutch Law on Arms Trade (Claudia Wenker)

Summary: This research briefly describes the Dutch regulatory framework dealing with foreign arms exports. It also examines on what basis licenses to export weapons have actually been granted or rejected by the Dutch government. Finally, the research discusses the way in which Dutch courts have dealt with litigation on the topic of foreign arms trade.

Conclusion: According to the Dutch regulatory framework, respect for human rights and international humanitarian law are among the criteria that the Dutch government has to consider when deciding upon an arms export license. The Council Common Position 2008/944/CFSP, which is legally binding on all EU member states, requires the Dutch government to exercise special caution in issuing licenses to countries where serious violations of human rights have been established by the UN, the EU or the Council of Europe. In practice, however, the Dutch government has demonstrated great flexibility in dealing with this ‘human rights criterion’ and has readily accepted that arms exports to Egypt, for instance, would not be used to violate human rights. There is little case law on the subject of foreign arms trade. The few cases available on this topic do not discuss human rights in the country of final destination.

2. Previous Dutch Arms Trade Cases: Legal Arguments and Lessons Learned (Saskia Brill)

Summary: This paper attempts to answer the following question: *What lessons can be learned from previous Dutch arms trade cases to prevent arms trade to human rights violators?* It presents a total of four cases, describing the legal arguments that the different parties brought forth in each case and the verdicts that the courts reached.

Conclusion: The legal arguments brought forward in the cases discussed here were mainly based on humanitarian law and on international customary law. With regard to the verdicts, the researcher concludes that all three civil cases in which NGO’s sued the Dutch state were deemed inadmissible because these cases were either too abstract or too politically charged. The author further notes that a criminal case against the Dutch state is currently impossible due to state immunity. However, she adds that it may be possible to hold the Dutch state liable for exporting arms in the future on the basis of the *Van Anraat* case.

3. Mothers of Srebrenica v. the Netherlands (2014) and Shell/Nigeria (2013) (Emma Bree)

Summary: This research discusses two cases that concern the liability of the Dutch State and of corporations for their actions abroad, namely the case of *Mothers of Srebrenica v. the Netherlands* from 2014 and the *Shell/Nigeria* case from 2013.

Conclusion: The researcher concludes that so far, Dutch courts have given limited extraterritorial application to international human rights law.¹ This is in accordance with the *Al Skeini* judgment of the European Court of Human Rights. In other words, the Dutch courts accept only limited application of international human rights outside the territory of the Dutch state: “only in very extreme cases does a state [party] have jurisdiction beyond the borders of its own territory.”² Consequently, as a result of the strict interpretation of the concept of ‘jurisdiction’ by the Dutch courts, a claim holding the Dutch state liable for its unlawful actions abroad will not be upheld in court if it is solely based on the European Convention, the ICCPR, or any other human rights instrument. However, the researcher concludes that on the basis of the *Shell/Nigeria* judgment, Dutch courts may be more flexible in holding corporations liable for their unlawful actions abroad.

4. Provisional Trade Agreement on the Sale of Dutch Leopard 2A6 Tanks to Indonesia (Hein-Jan van Ingen)

Summary: In 2011, the Dutch and Indonesian governments reached a provisional agreement on the sale of 80 Dutch Leopard 2A6 tanks to Indonesia. After debates in the Dutch parliament, this trade agreement was cancelled as the majority of the parliament opposed the sale. This research outlines the arguments brought forth by both the opponents and the proponents of the trade agreement during the parliamentary discussions.

Conclusion: The parliamentary debate focused on two matters, namely the use of force by the Indonesian government against its own people – which could be exacerbated by the sale of the Leopard 2A6 tanks – and the question of whether the provisional trade agreement between the Netherlands and Indonesia was in accordance with the EU Code of Conduct on arms export.

5. Sweden’s defense-industrial cooperation with Saudi Arabia (Hein-Jan van Ingen)

Summary: Sweden used to export arms to Saudi Arabia. In 2015, the Swedish ruling government decided not to prolong its defense-industrial cooperation with this state. This decision was based on Saudi Arabia’s poor track record with regard to human rights.

¹ See, for instance, the case of *Mothers of Srebrenica v. the Netherlands*: Rb. Den Haag 16 juli 2014, ECLI:NL:RBDHA:2014:8748.

² See the case of *Mothers of Srebrenica v. the Netherlands*: Rb. Den Haag 16 juli 2014, ECLI:NL:RBDHA:2014:8748.

Conclusion: Two factors contributed to the Swedish decision not to prolong its defense-industrial cooperation with Saudi Arabia. The first factor was that Saudi Arabia sentenced Raif Badawi to 1000 lashes and 10 years of imprisonment. The second factor was the fact that Saudi Arabia prevented a speech of Swedish Minister for Foreign Affairs, Margot Wallström, from taking place during a meeting of Arab ministers in Cairo. This was meant as a reprimand for statements Wallström had previously made on democracy and human rights in Saudi Arabia.

6. European Regulations on Arms Trade - Application in the Netherlands (Lydia de Leeuw)

Summary: This research examines whether the Dutch policy on arms trade is in accordance with the EU Common Position 2008/944/CFSP. Furthermore, the research assesses whether the Common Position on arms trade could be of use for countering arms exports to countries with poor human rights situations in Dutch courts.

Conclusion: The researcher has found that it is difficult to check whether Dutch arms export licensing decisions are in accordance with the eight criteria set out in the Common Position. In reporting on the approved and denied export license applications, only limited details – and often only after inquiries from members of parliament – are made available about the manner in which the applications were checked against the eight criteria enshrined in the Common Position. This makes it challenging to gain insight into the factors that played a role in the decision-making process, as well as the manner in which these factors played a role.

7. The Common Position on Arms Exports in the EU Context (Bianca Hettinga)

Summary: This paper discusses the extent to which the following EU member states apply and adhere to the criteria encapsulated in the Common Position: Belgium, the United Kingdom, Sweden, and Germany. Specifically, the author attempts to examine the way in which these states have applied the human rights criterion enshrined in the Common Position.

Conclusion: The authorities of the states discussed in this paper do not publicize their assessments of arms export license applications. Consequently, the author was unable to find any information on the assessment of the human rights situation in the country of final destination that member states have to conduct before granting an arms export license.³ For this reason, the author simply compared the manner in which the different EU member states have dealt with arms exports to “controversial countries.”

8. International Trade in Arms: National Regulatory Systems (Public International Law and Policy Group)

³ According to the EU Common Position 2008/944/CFSP.

Summary: This memorandum identifies and analyzes the legal instruments relevant for regulating the export of arms in Belgium, France, the United Kingdom, and the United States. The memorandum focuses on any safeguards against arms exports that could lead to or contribute to human rights abuses or international crimes.

Conclusion: 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.

9. The Arms Trade Treaty: Key Principles Limiting Trade to Human Rights Violating States (Public International Law and Policy Group)

Summary: This memorandum analyzes the primary international treaty regulating international arms trade: the Arms Trade Treaty (ATT). The memorandum focuses on the Treaty's safeguards against arm trades that could lead to crimes or human rights abuses in the destination state. The memorandum also analyzes the relationship of the ATT to the EU Common Position on arms trade.

Conclusion: The ATT provides that states may not export arms in certain circumstances, such as when the arms could be used in the commission of or to facilitate human rights abuses or international crimes. The key provisions in the ATT for limiting trade are Articles 6 and 7.⁴ While uncertainties remain regarding how these provisions are operationalized, and states retain discretion under the Treaty, they are important provisions to challenge arms exports to human rights violating states.

10. Challenging Arms Exports to Human Rights Violating States on the Grounds of International Humanitarian Law (Lingxi Zhong)

Summary: This research explores the possibility of holding states liable – on the grounds of international humanitarian law – for exporting arms to human rights violating states.

⁴ Article 6 prohibits the export of conventional arms, ammunitions and components if, for example, it violates measures adopted under Chapter VII of the UN Charter, or if at the time of the export authorization, the exporting state has knowledge that the arms would be used in the commission of international crimes. Article 7 requires states parties to consider a number of factors when authorizing an export, including whether it would undermine peace and security or contribution to violations of international human rights and humanitarian law.

Conclusion: According to the author, no theoretical foundations or concepts exist that could be used to effectively hold states liable for exporting arms to human rights violating states. The author proposes holding states liable for such actions on the following ground: by exporting arms to human rights violating states, governments neglect their obligation to refrain from activities that further increase the risk of human rights violations taking place in another state.