

The Common Position on Arms Exports in the EU Context

Introduction

The Common Position 2008/944/CFSP enlists eight criteria.¹ These criteria, which are already discussed above, are binding minimum standards. Because these are *minimum* standards, EU Member states have the opportunity to implement stricter standards in their national legislation.² This opportunity, however, has at least one important limitation: Divergent national applications of the Common Position. In this sense, the essential idea of the Common Position as part of a wider plan aimed to ‘harmonize and strengthen the Member States’ policies in the arms exports area’ is not followed up.³

Overall, the harmonization also depends on the criterion at stake. Bromley and Brzoska argue concerning criterion 2, that “There has been no increase in harmonization with respect to arms exports to countries deemed problematic [...]”.⁴ Another author argues that the Code of Conduct (predecessor of the Common Position) has caused striving towards the *lowest common denominator*.⁵ That is, softening strict arms export controls and strengthening loose arms export controls.

In this paper, I will – in order to enable the reader to make a comparison with other EU Member States - discuss the application of and adherence to the criteria of the Common Position of some EU Member States. These Member States are chosen either based upon interesting ways of applying the criteria or controversial arms exports regarding the second criterion.

This paper will first provide brief overviews of the application of each country discussed and then controversial or interesting situations. On this way, the paper enables the reader to compare the situations of different EU Member States and to see whether the Netherlands is more or less strict on the application of the EU Common Position than other EU Member States.

¹ Council Common Position 2008/944/CFSP of 8 December 2008, 12/13/2008, L 355/99, Official Journal of the European Union.

² *Id.*, Preamble para. 3.

³ *Id.*, For instance Preamble para. 1, 3, 5 and 9.

⁴ Brzoska, M. and Bromley, M., ‘Towards a Common, Restrictive EU Arms Export Policy? The Impact of the EU Code of Conduct on Major Conventional Arms Exports’, *European Foreign Affairs Review* (13) 2008, pp. 333–356, p. 351.

⁵ Holm, K., ‘Europeanising Export Controls: The Impact of the European Union Code of Conduct on Arms Exports in Belgium, Germany and Italy’, *European Security* (15) 2006-2, pp. 213-234, p. 231.

Section 1: **Belgium** – *The Flemish Region*

Belgium has traditionally been regarded as weak in the implementation of arms exports regulations. In 2003, however, it had transposed the EU Code of Conduct into national law.⁶ Some argue this was a consequence of the controversial export in 2002: An export of 5500 FN Herstal light machine guns to Nepal, which export license was denied before by Germany because of the well-known and widespread human rights violations and instability in Nepal.⁷ A further reform took place in August 2003. The validity of this reform, however, was doubted as it shifts responsibility to the regional authorities on the field of arms export control.⁸

1.1. Application of the EU Common Position in Flanders

In 2012, Flemish authorities revised their legislative provisions in order to comply to a new European regulatory measure. The Government of Flanders aimed to transpose European as well as international regulations into national legislation and developed a “coherent and all-encompassing set of ground rules for an efficient control of the arms trade, taking ethical and economic parameters into account as much as possible”.⁹

The result was the draft Flemish Arms Trade Act, which not covered all goods to which a licence was previously necessary. For instance, this Act makes a distinction between trade within the EU (transfer) and trade outside the EU.¹⁰ For transfer, the regime is less severe and sometimes it is even possible to not apply for licenses but just apply existing licenses by authorities. The Brussels-Capital Region followed the Flemish example, but the Walloon Region adopted the already existing federal legislation and revised the procedures for applications. As a result, Belgium does not have uniform legislation on this field.¹¹

More specifically, the in – and outside EU division made by the Act changed an important part of the export control from *a priori* to *a posteriori* control: the end-use should still be controlled, but

⁶ Chambre des Représentants de Belgique, ‘Loi modifiant la loi du 5 août 1991 relative à l’importation, à l’exportation, au transit et à la lutte contre le trafic d’armes, de munitions et de matériel devant servir spécialement à un usage militaire et de la technologie y afférente’, GRIP Data, 26 Mars 2003, www.grip.org, consulted on 10 June 2015.

⁷ N.A., ‘Belgium defends arms sales to Nepal’, 26 August 2002, <news.bbc.co.uk/2/hi/south_asia/2216446.stm> consulted on 10 June 2015).

⁸ Trinchieri, L., ‘Is the 1998 Code of Conduct on Arms Exports Adequate to Support the EU’s Promotion of Human Rights? Assessing the Effectiveness of Criterion 2 in Curbing the Exports of Small Arms to Third Countries’, *Hamburger Beitrage zur Friedensforschung und Sicherheitspolitik* 2008, pp. 1-56, p. 15.

⁹ Vlaams Parlement, ‘Ontwerp van Decreet decreet betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten, ander voor militair gebruik dienstig materiaal, ordehandhavingmateriaal, civiele vuurwapens, onderdelen en munitie’, stuk 1371 (2011-2012) no. 1, 21 November 2011, p. 4 <docs.vlaamsparlement.be/docs/stukken/2011-2012/g1371-1.pdf> Consulted 20 May 2015.

¹⁰ Baum, T. and Duquet, N., ‘Flemish Foreign Arms Trade 2013’, Flemish Peace Institute – Report February 2015, p. 11.

¹¹ *Ibid.*

many transfers no longer need to apply for a license beforehand. However, prior control is still a requirement for transfers for which no general license exists.¹²

Furthermore, the *catch-all clause* is no longer applicable. According to this clause, products destined to support military actions but which are not mentioned on an European or national list including goods for which licenses are required can on this way easily be licensed on *ad hoc* basis.¹³ Around 75% of these exports consisted of visualization screens, but also software, (parts of) aircraft and vessels.¹⁴ The *catch-all clause* is still applicable for trade outside the EU. Nevertheless, the clause is formulated in a highly restrictive way. It is only required for exporting “products, used alone or in combination with one another or with other goods, substances or organisms, that can inflict serious harm to persons or goods and that can be used as a means of violence in an armed conflict or a similar situation of violence”.¹⁵ Therefore, the formulation now emphasizes the nature – instead of the end-use of the products.

When licensing exports, determining the country of destination as well as the end-user is of crucial importance. End-users can either be the government, armed forces, individuals, defence industries or other having interests in arms.¹⁶ Determining the end-user, however, is very difficult in Flanders given the nature of their arms market. Most Flemish arms companies solely export components, which are ultimately incorporated into larger systems.¹⁷ In such situations, defence-industries are officially indicated as end-users, but there is no clarity to Flanders about who the ultimate end-user of the final weapon system will be. To illustrate this, since 2006 the Flemish governments imposed *de facto* embargoes on military material/equipment having an end-user in Israel.¹⁸ It is still possible to provide licenses for products to Israel, but only on the condition that it mentions an end-user in a third country. This cumbersome policy is of importance to Flanders because of its industry specifics: an important Flemish defence company is owned by a large Israeli company, so parts of military goods need to be traded between these companies.¹⁹ This, however, makes the control on end-users highly complicated. There are examples of military equipment ultimately used during attacks in Libya and Afghanistan.²⁰ To prevent this way of infringing the export policy, there is

¹² *Id.*, p.13.

¹³ Michel, Q., ‘The European Union Export Control Regime: Comment of the Legislation: article-by-article’, European Studies - Political Science Department Faculty of Law and Political Science - Liege University – Belgium, March 2011, pp. 1-248, p. 25
<http://csis.org/files/attachments/130828_3EUExportControlRegimeCommentary.pdf> Consulted on 8 June 2015.

¹⁴ Baum, T. and Duquet, N., ‘Flemish Foreign Arms Trade 2013’, p. 13.

¹⁵ *Id.*, p. 20.

¹⁶ Baum, T. and Duquet, N., ‘Flemish Foreign Arms Trade 2013’, p. 14.

¹⁷ *Id.*, p. 18.

¹⁸ *Id.*, p. 19.

¹⁹ Duquet, N., ‘Made in Flanders: The end-use of Flemish military equipment’, Brussels: Flemish Peace Institute, p. 47-48, 2011,
<flemishpeaceinstitute.eu/sites/vlaamsvredesinstituut.eu/files/files/reports/made_in_flanders.pdf> Consulted on 8 June 2015.

²⁰ Baum, T. and Duquet, N., ‘Flemish Foreign Arms Trade 2013’, p. 17.

a clause included in the Trade Act stating possible restrictions regarding re-export. Also, as a consequence to a parliamentary debate, in July 2013 the minister announced to take additional steps on exports to Saudi Arabia. For instance, there should be included an end-user statement for every export to Saudi Arabia, among other stating that the recipient/end-user is only allowed to re-export goods by permission of the Government of Flanders. Also, the export control policy of the country of destination as well as the portfolio of the end-user should be examined by the Government of Flanders.²¹

The Flemish government is increasingly becoming more transparent on its licensing process. Since 2005, the reports are not on a general level anymore but now providing more specific details for every application.²² Moreover, the Government is obliged to submit to Parliament a report every six months and it is – although not required – publishing an overview of approved licenses every month.²³ It is the task of Parliament to supervise the arms export policy. For instance, it asks the Government in committees about the information they provided in their 6 month reports and requests explanations if necessary.²⁴ Besides in specific committees, questions concerning this policy can also be put on the agenda of plenary sessions. For instance a question asked by Jan Roegiers to minister Peeters on march 27 2013, concerning the growing arms export to the Middle East according to a report of the Flemish Peace Institute. The minister only answered that they are very careful in their application process, had already put some controversial countries *on-hold* and that the licenses which were issued, were not explicitly prohibited by European regulations.²⁵ On May 29 2013, two questions were asked concerning the increase of arms exports in 2012. Part of the answer of the minister was that it was not true that there are still many exports to Saudi Arabia: only six since the ratification of the Act. And one of them concerned a specific part of airport relief (luchthavenverlichting), which was not mentioned on the European list of military material. This reasoning somehow implies the Flemish compliance with the European regulations, but does not reflect arguments whether the government itself had also carefully considered this application.²⁶

²¹ *Id.*, p. 18.

²² Duquet, N. (2012), *Flemish foreign arms trade 2011*, Brussels: Flemish Peace Institute, p. 9. Flemish Peace Institute (2006), *Advies over transparantie in de rapportage over de Vlaamse buitenlandse wapenhandel*, (Advisory note on transparency in reporting on the Flemish foreign arms trade), Brussels: Flemish Peace Institute, p. 9. <www.vlaamsvredesinstituut.eu/images/manager/publicaties/adviesnotas/pdf/20061113_adviesnota_transparantie_NL_def.pdf> Consulted on 26 May 2015.

²³ Baum, T. and Duquet, N., 'Flemish Foreign Arms Trade 2013', p. 22.

²⁴ *Ibid.*

²⁵ Vlaamse parlement, actuele vraag 'over de groeiende wapenuitvoer naar het Midden-Oosten, naar aanleiding van het rapport 'Wapenexport naar de Arabische wereld' van het Vlaams Vredesinstituut', by Jan Roegiers to Minister Kris Peeters, 27 March 2013, <www.vlaamsparlement.be/plenaire-vergaderingen/870928/verslag/872914> Consulted on 26 May 2015.

²⁶ Vlaamse parlement, 'actuele vraag over de houding van de Vlaamse Regering ten aanzien van de niet-verlenging van het Europese wapenembargo tegen Syrië' by Karim van Overmeire to minister Kris Peeters and 'actuele vraag over het standpunt van de Vlaamse Regering ten aanzien van eventuele wapenleveringen naar Syrië' by Jan Roegiers to minister Kris Peeters, 29 May 2013, <www.vlaamsparlement.be/plenaire-vergaderingen/878419/verslag/880283> Consulted on 26 May 2015.

The disadvantage of this way of controlling the government is, however, that it is *a posteriori*. The questions concern licenses which were already issued and could thus not be denied anymore. Moreover, the Government may issue many reports, but these reports do not include specific details about why licenses were granted or refused. Therefore, there reasoning is not clear. For instance, the government denied a license concerning metal fuels to Algeria in May 2013, but two months before it accepted the export of equipment to Switzerland having Algeria as end-user.

Interesting case

Gopal Siwakota and NGO's v. Raad van State

There is at least one controversial export in Belgium that found its way to justice. Unfortunately, the case itself is not accessible anywhere, so one has to rely on Belgian press releases for information about it. In this case, on September 16 2002, the Nepalese human rights activist Gopal Siwakota, Mouvement Chrétien pour la Paix, Pax Christi, Vrede vzw, Vrouwen in 't Zwart and Forum voor Vredesactie asked the judge (Raad van State) to suspend an export license concerning FN-Minimi's to Nepal.²⁷ Considering the unwillingness to comply with the EU Code of Conduct, these organisations and their Nepalese lawyer felt that they had to sue the Belgian State. They were only asking for the correct application of the Arms Trade Act.

According to a report of the European Commission and Amnesty International, there were excessive human rights abuses in Nepal during that time. Mainly due to a major armed conflict. Also, there should be clear evidence that weapons were used by the army and police to violate the human rights. The claimants clearly states which articles were infringed:

- Article 4 of the Arms Act of 1991 which – among other – clearly prohibits the approval of arms export licenses when it is clear that these arms will contribute to human rights abuse. Also, when there is civil war in the country of destination.
- According to the EU Code of Conduct of 1998, arms exports should also prohibited to countries envisaging a clear risk that the weapons will be used for internal repression, can contribute to armed conflicts or extending existing tensions.

Moreover, Gopal Siwakota had been a target of an attack intended to kill people by an unknown group of people in January 2001. Although there was national as well as international pressure to investigate this situation, no investigation into the facts had actually taken place.

On November 28 2002, the Raad Van State dismissed the suspension of this export license.²⁸ The Raad van State did not provide a verdict about the legality of the licenses. They did dismiss the

²⁷ Vredesactie, thema – wapenhandel < www.vredesactie.be/nl/nieuws/nepalese-mensenrechtenactivist-en-belgische-ngo%E2%80%99s-vragen-aan-de-raad-van-state-de-schorsing> Consulted on 10 June 2015.

²⁸ Vredesactie, thema – wapenhandel, 'Raad van State verwerpt schorsing export licentie naar Nepal', 28 November 2015, < www.vredesactie.be/nl/nieuws/raad-van-state-verwerpt-schorsing-exportlicentie-naar-nepal> Consulted on 10 June 2015.

interest Gopal Siwakota could have in the export of the FN-Minimi machine guns.²⁹ They argued that they did not believe the FN-Minimi's would be used against Gopal. Therefore, he did not have sufficient interest in challenging this decision.³⁰ Apparently, his interest could only be proved if the arms would effectively be used against him.

All in all, this judgment did not concern the legality of the export license. The Raad van State did only provide arguments about the interest of Gopal Siwakota. The lawyer representing the Belgian State did not provide any argument against the statement that this export license infringed article 4 of the Arms Act.

Also, the divergent applications by the different regions of Belgium can have disastrous consequences. For example, in 2009 Flanders provided a license to the company FN Herstal to export SALW for €11.5 million to Libya.³¹ The Belgian State Court ultimately rejected this license, but later on the Walloon government re-approved the licence.³²

²⁹ De Standaard, 'Raad van State verwerpt schorsing export naar Nepal', 29 November 2015, <www.standaard.be/cnt/dst29112002_009> Consulted on 10 June 2015.

³⁰ *Id.* "Considérant qu'en aucune de ces qualités, il n'apparaît particulièrement exposé à être pris pour cible par l'armée népalaise; que l'affirmation qu'"il est certain que les armes seront mises en oeuvre contre lui personnellement" ne peut se déduire de ces diverses fonctions, ni du fait qu'il a fait l'objet d'une arrestation arbitraire d'une dizaine de jours en 1998, et encore moins de l'agression dont il a été victime de la part de personnes non identifiées en janvier 2001".

³¹ Bromley, M., 'The Review of the EU Common Position on Arms Exports: Prospects for Strengthened Controls', Non-Proliferation Papers, no. 7, January 2012, pp. 1-18, p. 11, <<http://www.sipri.org/research/armaments/transfers/controlling/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>> Consulted on 27 May 2015.

³² Rettman, A., 'EU arms to Libya: fresh details emerge', EUobserver, 23 February 2011, <<http://euobserver.com/9/31863>> Consulted on 27 May 2015.

Section 2: **The United Kingdom**

In the UK, both the EU regulations and the UK national legislation are applicable. Concerning the national legislation, in October 2000, the *Consolidated EU and National Arms Export Licensing Criteria* (Consolidated criteria) were introduced by the Government. These criteria were a combination of national licensing criteria and the criteria of the EU regulations.³³ The government at that time also reviewed the statutory framework concerning the control of arms exports. This resulted in the *Export Control Act 2002*, which came into force in 2004.³⁴ Among other, this Act was intended to increase transparency and accountability in the export control regime by limiting the governments' power to control exports. From then on, the ability to carry out temporary controls were only allowed when approved by Parliament.³⁵ Also, the government should provide annual reports to Parliament on their control policy, which had to be examined by the Committees on Arms Exports Controls.³⁶ This act was extensively reviewed in 2007, resulting in the consolidating Export Control Order 2008.³⁷

In 2011, just like in other EU Member States, there was much criticism on UK exports to the Middle East. This resulted in a review of the exports at stake and cancelling many licenses.³⁸ On 18 July 2011, William Hague (at that time Foreign Secretary) announced that "further work is needed on how we operate certain aspects of the controls".³⁹ Also in the transparency of the exporting system.⁴⁰ What is more, the statement of the Committees on Arms Exports Controls that there would exist an 'inherent conflict' between on the one hand the promotion of exports to controversial countries and on the other hand providing criticism on their protection of human rights, was rejected by the Government.⁴¹

³³ Lunn, J., UK arms export Policy, Library House of Commons: International Affairs and Defence Section, 24 April 2014, p. 2.

³⁴ *Id.*, p. 3.

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ Gov.uk – Guidance – Overview of Export Control legislation, n.d. <<https://www.gov.uk/overview-of-export-control-legislation#european-union-and-uk-statutory-legislation>> consulted on 2 June 2015; Gov.uk – Guidance – Do I need an export license? N.d. <<https://www.gov.uk/beginners-guide-to-export-controls>> Consulted on 2 June 2015.

³⁸ *Supra* no. 37., p. 5.

³⁹ Foreign and Commonwealth Office Export Control Policy (Review), 18 July 2011 : Column 79WS, para. 3, <<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110718/wmstext/110718m0001.htm>> Consulted on 2 June 2015.

⁴⁰ *Ibid.*

⁴¹ House of Commons Business, Innovation and Skills, Defence, Foreign Affairs and International Development Committees, 'Scrutiny of Arms Exports (2012): UK Strategic Export Controls Annual Report 2010, Quarterly Reports for July to December 2010 and January to September 2011, the Government's Review of arms exports to the Middle East and North Africa, and wider arms control issues', First Joint Report of Session 2012-13, Volume 1, p. 6 <www.publications.parliament.uk/pa/cm201213/cmselect/cmquad/419/419.pdf> Consulted on 2 June 2015.

Similarly, since July 2014, there have been many requests for an arms embargo concerning the military actions in Gaza.⁴² Due to these actions, more than 2000 Palestinians were killed and infrastructure and homes were ruined. Consequently, Prime Minister Cameron stated on the 4th of August 2014 that all relevant export licenses needed to be reviewed.⁴³ The Department for business, Innovation and Skills informed about the reviews on the 12th of August that year, but not any license appeared to be suspended. Following the report, suspension was only possible if the ceasefire would fail. It did ultimately fail on the 20th of August, but the UK government did not perceive that failure as ‘enough to warrant a suspension’.⁴⁴ Twelve particular licenses were the licenses CAAT was most concerned about. In order to receive some clarification, it wrote several letters to the BIS and the government. In particular a letter from the Foreign Secretary Hammond of 19 August 2014 is interesting. It appeared that he had assessed the licenses at stake before the announcement at the 12th of August. According to him, there was no ‘clear risk’ at the time the licenses were issued that they would contribute to human rights – and humanitarian law violations.⁴⁵ Accordingly, CAAT lawyers advised not to proceed the legal action, as the chance they would loose was too likely now the procedures had been applied correctly.

Interesting situations/cases

The UK does not provide specific information about decisions to grant export licenses. There are a few legal cases in which licenses are refused, but in these cases it only states the relevant criteria.⁴⁶

Unfortunately, there have not been successful legal challenges to approved export licenses yet. The Committee Against Arms Trade (CAAT) attempted to bring judicial reviews. In these reviews, they argued that licensing decisions had not been made according to the Consolidated National Criteria and the EU export licensing criteria. However, they were not able to prove that the government had not followed the correct process.

⁴² Campaign Against Arms Trade (CAAT), Arms to Israel – Legal Exchange; Legal Review, n.d. <<https://www.caat.org.uk/resources/countries/israel/legal>> consulted on June 11 2015.

⁴³ Mason, R., ‘UK government reviewing £8bn of commercial and military export licences granted to Israel’, The Guardian, August 4 2014, <www.theguardian.com/world/2014/aug/04/uk-government-reviews-arms-sales-israel-gaza> consulted 14 June 2015.

⁴⁴ Parliamentary Documents, Maritime and Coastguard Agency, 8 Sep 2014 : Column 470W, Exports: Israel <www.publications.parliament.uk/pa/cm201415/cmhansrd/cm140908/text/140908w0002.htm#1409093000023> consulted on 14 June 2015.

⁴⁵ Letter Philip Hammond of the Foreign and Commonwealth Office to the Committee on Arms Export Controls, dated 19 August 2014 <www.parliament.uk/documents/commons-committees/Arms-export-controls/140819-Philip-Hammond-Israel-Arms-Exports.pdf> consulted on 13 June 2015.

⁴⁶ Statement Ann Feltham Campaign Against Arms Trade (CAAT) (E-mailcorrespondence).

1997 case Indonesia

The original case is not accessible on the internet and Ann Feltham of CAAT could neither find the original documents about this case. The aim of this case was to see whether there were grounds to force the government to reassess previously granted export licenses for Hawk aircraft and armed personnel carriers. Ultimately, CAAT was told it was a matter of foreign policy discretion.

2004 case Indonesia

In this case, Leigh Day & Co acted on behalf of Mr. Aguswandi (an Indonesian human rights activist; now living in London). They claimed that the licensing of exports (specifically: Hawk jets) to Aceh, Indonesia, infringed both UK and EU arms export control policies.⁴⁷ Because these policies clearly mention that exports should be blocked if there is a risk they will be used for internal repression.

Moreover, we all know that Indonesia is a human rights abuser for quite some time already. Especially in the region at stake, Aceh, the situation has declined extensively since the military launched an offensive in May 2003. This operation still causes dramatic civilian losses, destruction of infrastructure and a tremendous humanitarian crisis.

On March 29, the High Court in London did not permit a judicial review of the continued UK exports of military material to Indonesia. Since the current Government came into power, however, the UK exports control policy has been reviewed and it is now encapsulated in the Consolidated EU and National Arms Export Licensing Criteria. The criteria for assessing licenses is now statutory guidance under the Export Control Act 2002, which came in force on 30 October 2003. To provide even more proof: The value of UK export licenses to Indonesia rose from £2 million in 2000 to £41 million in 2002.

Still, Mr Justice Leveson kept arguing that there was not enough evidence to prove the government had applied the wrong test when assessing license applications. Nevertheless, Mr Aguswandi, even though he was highly disappointed, still intended to proceed with campaigning against the UK policy concerning arms exports to Indonesia.

*Hasan v. Secretary of State*⁴⁸

This case concerns a Palestinian landowner living in a village in Israel, near Bethlehem. In April 2005, the Israeli forces ended this by destroying the trees, fencing of his land property and taking over the

⁴⁷ Indonesian rights activist vows to continue campaign against arms exports, 24 April 2004, <www.leighday.co.uk/News/Archive/2004/April-2004/Indonesian-rights-activist-vows-to-continue-campai> Consulted on 14 June 2015.

The original case is not accessible on the internet nor in other documents.

⁴⁸ High Court of Justice Queen's Bench Division Administrative Court, *R (Hasan) v. Secretary of State for Trade & Industry*, case no. CO/9605/2006, 10 & 11 October 2007 <<http://pil.uk.net/?p=6131>> Consulted on 14 June 2015.

property by stating that it belonged to the Israeli Land Department. He sued the UK for providing export licenses for military equipment to Israel. The claim was originally filed on 15 November 2006. The aim was to overturn the decisions of 28 September 2006 to provide 27 Standard Individual Export Licenses (SIELs) for items on the Military List exported to Israel during the second quarter of 2006. Quarterly reports are made of such decisions, but they are usually not published before the end of the next quarter. So the parties representing the claimant had not been able to receive the information at the moment the claim was filed. Consequently, he wrote a letter asking for review of arms trade to Israel and to suspend licenses for military equipment. The arguments in this letter were based on the 'Wall Opinion' from the ICJ which stated that Israel was guilty of serious human rights breaches of Palestinians in occupied territories. So there was a real risk that the articles on the military list – which were exported by the UK – would be used against Palestinians. Therefore, the claimant tried to attack the arms exporting system.

The defendant, however, provided information (he was not obliged to do so) that showed that the exported SIELs were in compliance with the criteria. Mr. Fordham, who was acting on behalf of the claimant, accepted that and consequently that there was no basis for them to challenge the decision.

Therefore, Mr. Fordham filed amended grounds in February 2007: asserting that the UK should be obliged to provide reasons on each export license granted in the quarterly reports, in order to meet the 'need for transparency' and 'the standards of good administration set by the law'.⁴⁹

The defence argued that there was no link between the licenses granted and what happened to the claimant. Mr. Fordham, however, argued that although the claimant might not be directly affected, he was as being a Palestinian living in the area to which licenses for arms were granted. Mr. Justice Collins agreed with Mr. Fordham that there was sufficient interest: "The claimant as a Palestinian living in a part of the occupied territories affected by Israel's attempts to contain attacks upon its citizens and so indirectly affected by any trade in military equipment to Israel is not a busybody and has in my view sufficient interest to pursue this claim".⁵⁰ The defence did not oppose this.

After discussing the relevant legislation and specific criteria for this export, the focus moves to the transparency of the UK arms export policy. The obligatory reports are provided, but the identification of the export of the SIELs in the quarterly reports does not include more than 'components for military training aircraft' or 'for other equipment which has a military use'. According to Mr. Fordham, these reasons are insufficient.

The defense presents evidence of Mr. Doddrell, who is responsible for the licensing of exports. He argues that, in relation to the available resources, attention should be paid to the fact that it is not always that simple to assess whether information is too confidential or sensitive to be published. It is very time-consuming. Moreover, while information regarding some licenses might not be that

⁴⁹ *Id.*, Para. 4.

⁵⁰ *Id.*, Para. 8.

sensitive in itself, it could be when it – combined with other information – reveals Government concerns, confidential decisions of allies or other confidential information regarding relationships with other countries. The relevant ministers also said in their annual report in 2005 that “The Government has [...] as much information as possible available to the Committee [...]. “Every effort is made to ensure that as much information as possible is made public.”⁵¹ The defence proceeds by providing more clarity of all steps undertaken to make their policy as transparent as possible and the fact that all relevant questions before it have been answered satisfactorily.

Mr. Fordham moves on by stating that transparency does not only apply that policies are made available to the public, but decisions made in accordance with these policies should be available to the public as well. Mr. Justice Collins agrees that the obligation to provide reasons is an essential part of the common law principle that there should be fairness. He also stated that it is always necessary to refer to the statutory scheme to assess whether – in the absence of it – there should be a requirement to give reasons.

In his conclusion, Mr. Justice Collins argues that the public scrutiny as required by the Act through Parliament is fulfilled by the Quadripartite Committee. Also, even though this Committee can access all necessary sensitive information, it cannot always publish it publicly. It asks for much extra work and Mr. Justice Collins has “no doubt that the law does not require this exercise to be undertaken”.⁵² According to him, judicial review is a remedy of last resort and can only be applied when there is no other appropriate remedy available. Therefore, the judge argues that there is enough transparency. If it would not be the case, the Committee should be asked to comment and as the “ultimate judge” Parliament. Mr. Justice Collins therefore states that this claim must fail.

Particularly interesting in this case is the argumentation of the UK government regarding their adherence to the transparency norms. Also, it seems that they do not prefer to go in-depth on that discussion and prefer to turn the attention on the fact they do comply with the EU regulations, the criteria and the transparency norms.

⁵¹ *Id.*, Para. 14.

⁵² *Id.*, Para. 22.

Section 3: Interesting situations in other countries

Sweden

Sweden is traditionally considered as a 'restrictive supplier state'.⁵³ For a long time, arms exports have even been forbidden. According to the Act of Military Equipment of 1992, however, exceptions are possible if there are 'security or defence policy reasons' for the export of military equipment and if the export is in line with Swedish foreign policy.⁵⁴ In 2012, the cabinet emphasized in their annual strategic export control the importance of having regard to the human rights situation in the country of destination.⁵⁵

An interesting example of their strict arms export policy and weight they attach to human rights protection, is the following one. During her visit to Saudi Arabia this year, the Swedish minister of foreign affairs was not allowed to provide a speech at the Arabic Liga to ask attention for women rights.⁵⁶ She did not accept this and neither did the Swedish population: it caused many protests in Sweden. As a result, Sweden decided to end arms exports to Saudi Arabia. This action shows that – if human rights are taken as seriously as in Sweden – abuses of these rights can be highly influential on arms export policies.

Germany

By exporting arms for more than 360 million Euros on a yearly basis, Germany is the third arms exporter of the world. This does not prevent this country, however, from attaching serious weight to the human rights element in the regulations. Just like Sweden they prohibited arms exports to Saudi Arabia this year. The exact reasons are not clear, but the minister of foreign affairs, Frank-Walter

⁵³ Béraud-Sudreau, L., 'Putting arms export promotion under control in France and Sweden', ECPR General Conference-Glasgow 2014, 6 September 2014, p. 2.

⁵⁴ The Military Equipment Act (1992:1300), Section 1. (Unofficial Translation by the Ministry of Foreign Affairs): 'This Act covers weapons, ammunition and other matériel designed for military use which constitute military equipment in accordance with regulations issued by the Government.

Permits under this Act may only be granted for security policy and defense policy reasons and provided they do not conflict with Sweden's foreign policy.

< www.google.nl/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCEQFjAAahUKEwjVoff81JTGAhXCGIwKHQthAP8&url=http%3A%2F%2Fwww.isp.se%2Fdocuments%2Fpublic%2Fse%2Fword%2Fflagar%2F92_1300eng.doc&ei=z1KAVZX-OsKxsASLwoH4Dw&usg=AFQjCNGGjrFdkfcQ28hpwtNIzpe11LDsQ&sig2=huAitMq911M2PUvId0UTJQ&bvm=bv.96041959,d.cWc> Consulted on 3 June 2015.

⁵⁵ Cabinet Communication (2012/13:114) Strategic Export Controls in 2012, p. 71, 'the human rights situation must always be taken in'. in Ronnestig, E., 'Swedish Arms Export: Idealistic goals with realistic means - Three cabinet formations during 2002-2014', Master Thesis in Political Science, Swedish National Defence College Department of Security, Strategy and Leadership, 2014, < www.diva-portal.org/smash/get/diva2:752541/FULLTEXT01.pdf> Consulted on 3 June 2015.

⁵⁶ Eigenraam, A., 'Saoedi-Arabië roept ambassadeur uit Zweden terug om beëindigde wapendeal', NRC.nl, 11 March 2015 < <http://www.nrc.nl/nieuws/2015/03/11/saudi-arabie-roept-ambassadeur-terug-uit-zweden-om-teruggetrokken-wapendeal/#>> consulted on 3 June 2015.

Steinmeier publicly criticised the prosecution of the Islam criticizing blogger Raif Badawi. He received corporal punishment for his blogs.⁵⁷

⁵⁷ N.A., 'Duitsland stopt wapenexport aan Saoedi-Arabie', Het Parool, 25 January 2015 < <http://www.parool.nl/parool/nl/225/BUITENLAND/article/detail/3837142/2015/01/25/Duitsland-stopt-wapenexport-aan-Saoedi-Arabie.dhtml>> consulted on 3 June 2015.

Conclusion

In conclusion, although the EU member states discussed all adhere to the EU regulations and adapted their national policies in accordance to these regulations, there are still many differences between the countries. In short: the aim of harmonizing the arms export policies within the European Union has not been attained yet.

One of the aims of this research question was to discuss the ways of application by EU member states of the second criterion of the EU Common Position, namely the human rights criterion. Unfortunately, the governments do not make their reasons on their application assessment publicly available. This prevented me from comparing the assessments of the different countries. Therefore, attempts are done to compare the different ways EU member states respond to exports to controversial countries. By referring to legal cases where accessible, the media and other relevant sources.

Hopefully, the arguments and information discussed above are useful for research to the application of the EU regulations and EU member states' ways of responding to human rights violating countries.

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