

European Regulations on Arms Trade

Application in the Netherlands

Dutch section of the International Commission of Jurists (ICJ)

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1. Introduction

The Netherlands ranks 9th as an arms exporting country, with 1 billion euros worth of arms export licensing on an annual basis.

Some of the arms that are being exported are destined for conflict areas or areas where there are serious concerns regarding the human rights situation. Weapons from the Netherlands have been exported to countries like Saudi Arabia, Bahrain, Pakistan, and Israel.¹

Under European regulations, most notable the Council Common Position 2008/944/CFSP, the Netherlands has to check arms export license applications against criteria related to human rights, international humanitarian law, the internal political situation, and regional stability.

This research examines how the European regulations are applied in the Dutch arms export policy, and whether the Dutch policy is in line with the European regulations and UN human rights conventions. Furthermore, the research assesses the usefulness of the Common Position in the Dutch court, for countering arms exports to countries where there are concerns in relation to human rights and (the risk of) armed conflict.

¹ See *Lessons From MENA: appraising EU transfers of military aid and security equipment to the Middle East and North Africa. A contribution to the review of the EU Common Position*. Edited by An Vranckx, Frank Slijper and Roy Isbister, Academia Press, Gent, November 2011, p. 17 and 27. And see also *Analyse Nederlandse wapenexportvergunningen 2008*, Campagne Tegen Wapenhandel, November 2009, Frank Slijper. And see *Het Nederlandse wapenexportbeleid in 2012; Rapportage over de uitvoer van militaire goederen*. Minister of Foreign Trade and Development Cooperation, and the Minister of Foreign Affairs, The Hague, November 2013

2. European regulations on arms trade: a summary

In the early 1990s EU Member States began to harmonize and strengthen the regulation of European arms exports. In 1991 and 1992, at the Luxembourg and Lisbon European Councils respectively, the European Union adopted Common Criteria that ought to apply to arms exports. Subsequently, on 8 June 1998, these Criteria were expanded upon in the European Code of Conduct on Arms Exports², which set out eight criteria against which Member States should assess export license applications for military equipment.

Finally, in 2008, the European Union adopted Council Common Position³, which translated - with slight changes - the eight criteria listed in the Code of Conduct into provisions binding upon Member States. The Common Position constituted a significant step in harmonizing the rules that govern the control of exports of military technology and equipment.

By adopting the Act, EU Member States aim to “prevent the export of military technology and equipment which might be used for internal repression or international aggression, or contribute to regional instability”.⁴

Under article 1 (1) of the Common Position, Member States are obliged to check export license applications for items included in the EU Common Military List on a case-by-case basis against the following eight criteria, listed in article 2 of the Position:

1. Respect for the international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations;

² European Union Code of Conduct on Arms Exports, 8675/2/98, *Official Journal of the European Union*, Vol. 58, 5 June 1998, Council of the European Union. Last accessed on 28 May 2015 at <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>

³ Council Common Position, ‘defining common rules governing control of exports of military technology and equipment’, 2008/944/CFSP, 8 December 2008, Council of the European Union. Last accessed on 28 May 2015 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

⁴ Council Common Position, Preamble, paragraph 4

2. Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law;
3. Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts;
4. Preservation of regional peace, security and stability;
5. National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries;
6. Behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law;
7. Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions;
8. Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments.

Under the Common Position, Member States are legally obliged to implement a licensing system in which license applications for the export of military technology and equipment are checked against the eight criteria. The goods governed by the Common Position are listed in the EU Common Military List.⁵ It is important to note that the text of the first four criteria stipulate that Member States “shall deny an export licence” when the application appears incompatible with the requirements of the criteria.

In order to assist Member States, in particular export licensing officials in the application of the eight criteria and other provisions of the Common Position, the Council of the European Union published a User’s Guide to the Common Position, which was drawn up and is supposed to be regularly updated by the Working Party on Conventional Arms Exports. The Guide, of which

⁵ Common Military List of the European Union, Official Journal of the European Union, C 107/1, adopted by the Council on 17 March 2014, Last accessed on 25 May 2015 at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.2014.107.01.0001.01.ENG

the last version dates from 2009, “summarises agreed guidance for the interpretation of its criteria and implementation of its articles”.⁶

Article 1 (2) of the Common Position stipulates that export license applications cover not only applications for licenses for ‘physical export’ but also applications for ‘transit’ or ‘transshipment’ licenses, as well as situations of brokering, and intangible transfers of technology.⁷ Section 5 of the User’s Guide defines ‘transit as movements in which the goods (military equipment) merely pass through the territory of a Member State’.⁸ Transshipment is defined as “transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport”.⁹

However, it is important to note the passage at the end of article 1 (2): “Member States’ legislation shall indicate in which case an export license is required with respect to these applications”. This leaves it to Member States to decide on which export, brokering, transit, or transshipment of arms, or transfer of technology they apply a licensing system. There does not appear to be a common European State practice in this regards. Once a State has imposed a licensing obligation for particular forms of arms transfers, it must follow the provisions of the Common Position in relation to its licensing system.

In relation to dual-use items, the Common Position covers dual-use goods and technology as specified in Annex I to Regulation (EC) No 1334/2000 where there are serious grounds for believing that the end-user of dual-use goods or technology will be the armed forces or internal security forces or similar entities in the recipient country. Article 6 of the Common Position states that in such cases the eight criteria as well as the notification procedure under article 4

⁶ User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, Secretariat of the Council of the European Union, 9241/09, Brussels, 29 April 2009, last accessed on 3 June 2015 at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT> (Hereafter ‘User’s Guide’)

⁷ See also European Union External Action, European External Action Service, Undated web page: ‘Arms Export Control’. Last accessed on 28 May 2015 at http://www.eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm

⁸ User’s Guide, paragraph 2.5.4. page 23

⁹ Ibid.

apply without prejudice to Regulation (EC) 1334/2000. Council Regulation (EC) 428/2009, adopted in May 2009 and applying to all Member States, forms the last amended version of Regulation 1334/2000 and contains the most up to date European rules on dual use items. The Regulation aims to enhance a common control system for a free movement of dual-use items inside the EU while ensuring adherence to the principle of non-proliferation. The Regulation provides a “regime for the control of exports, transfer, brokering and transit of dual-use items”, meaning “items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices”. Annex I lists goods for which export licenses to countries outside of the EU are required. Annex IV lists items for which export licensing is required, even for transfers within the EU. Determining the exact scope of application of this regime, and procedures to be followed, is left to the domestic authorities. Under article 4 of the Regulation items not listed in Annex I should be subjected to an export licensing obligation when they are or may be used, in part or entirety, in connection to chemical, biological or nuclear weapons or nuclear explosive devices, or when the destination country is subjected to an arms embargo of the OSCE or UN Security Council and the items in question are or may be intended, in part or entirety, for a military end-use.

3. Application of European regulations in the Netherlands

3.1 Arms exports licensing system in the Netherlands

In the Netherlands, the General Customs Act¹⁰ forms the legal basis for all decisions and regulations in relation to in- and export of strategic goods. The Act governs all licensing applications for the export of military goods. Additionally, the Decision on Strategic Goods¹¹ sets out rules in relation to export of strategic goods and dual-use items.

Export license applications for goods or technology included in the EU list of military goods are assessed against the eight criteria of the Common Position on a case-by-case basis.

Consideration is given to the “nature of the product, its country of final destination, and end user”.¹²

All license applications must be sent to the Central Import and Export Service (*Centrale Dienst Voor In-en Uitvoer, CDIU*). This agency sits within the Tax and Customs Service/North (*Belastingdienst/Douane Noord*) Department of the Ministry of Finance.

If the destination country listed in the application is a NATO or EU member State or an equated status country (Australia, Japan, New Zealand, or Switzerland), the review of the application is - in principal - processed by the CDIU. The issuing of licenses is authorized by the Ministry of Foreign Trade and Development Cooperation.

Often, the Ministry of Foreign Affairs is consulted regarding the applications and provides advice which strongly influence the decision-taking process. In absence of objections against the

¹⁰ *Algemene Douanewet*, 1 August 2008

¹¹ *Besluit Strategische Goederen*, 24 June 2008

¹² Annual Report on the Netherlands Arms Export Policy, 2011 (Original title: *Jaarrapport Nederlands wapenexportbeleid 2011*), p. 9. Published by the Minister of Economic Affairs, Agriculture and Innovation, the Minister of Foreign Affairs, and on behalf of the Secretary of State on Development Co-operation, the Hague, 31 October 2012. (Hereafter: ‘Annual Report of 2011’) The English version can be found here: <http://www.government.nl/issues/export-controls-of-strategic-goods/documents-and-publications/annual-reports/2013/05/13/annual-report-on-the-netherlands-arms-export-policy-in-2011.html>

requested export, the Minister of Foreign Trade and Development Cooperation issues the export license.¹³

3.2 Dual use items

Council Regulation (EC) 428/2009 forms the legal framework of the Dutch export policy regarding dual-use goods.¹⁴

In relation to the export of dual use items, the Netherlands has domestically adopted the above mentioned Decision on Strategic Goods, as well as the Strategic Services Act¹⁵, which governs the transfer of software and technology, provision of technical support, and provision of brokering services, for military as well as dual-use goods.

In the Netherlands, dual-use items listed in Annex I, and not included in Annex IV of the Council Regulation are, in principal, not subjected to mandatory licensing by the Netherlands when exported to another EU Member State.¹⁶ However, it is required that the documents related to the exporting of the items mention that the goods will be subject to a check when being exported out of the EU. Dual-use goods listed in Annex IV are subject to a mandatory export licensing system, also within the European Union. Finally, an export license is also required for Annex I items when destined for a country outside of the EU.

If an exporter seeks to export goods not listed in Annex I, but he is aware that the goods are or may be used - in part or entirety - in connection to chemical, biological or nuclear weapons or

¹³ Until 2011, the authorizations of license issuing was the responsibility of the Ministry of Economic Affairs, Innovation, and Agriculture. Furthermore, where the export license application concerned a destination country which appeared on the OECD/DAC list of developing countries an additional step was followed; the Minister of Foreign Affairs would consult with the Minister of Development Cooperation before issuing his advice to the Secretary of State of Economic Affairs, Innovation and Agriculture.

¹⁴ See also Letter from Minister of Foreign Trade and Development to Parliament, '*Exportcontrolebeleid voor dual-use goederen en gelijk speelveld*', The Hague, 14 March 2014, p. 2

¹⁵ *Wet Strategische Diensten*, 1 January 2012

¹⁶ See also paragraph 4.1.2 of the *Handboek Strategische Goederen en Diensten* ('Handbook Strategic Goods and Services'), Ministry of Foreign Affairs, September 2013, <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2006/10/23/handboek-strategische-goederen.html>

nuclear explosive devices, or when the destination country is subjected to an arms embargo of the OSCE or SUN Security Council and the items in question are or may be intended - in part or entirety - for a military end-use, the exporter is obligated to notify the Ministry of Foreign Affairs. The Ministry will then decide whether an export license must be obtained. This policy stems from article 4 (4) of the Council Regulation.

A point of criticism raised in relation to the Dutch policy regarding the export of dual use goods is that it lacks a systematic check on the transit of dual-use goods, including when such goods are transferred from a non-EU/NATO State to another non-EU/NATO State. Checking of such goods almost exclusively takes place on the basis of information provided by intelligence services.¹⁷ NGOs have recommended that such transit of goods is regulated by an arms export licensing system.¹⁸

3.3 Transit and transshipment

Article 1 (2) of the Common Position leaves discretion to all Member States to indicate in which cases an export license is required in relation to applications for exports. As noted by the Dutch authorities in their Annual Report of 2011, the transit licenses fall within “within the ambit of the Common Position where in a member state such activities are subject to mandatory licensing”.¹⁹

In relation to transit of arms through the Netherlands to or from the EU Member States and States with a similar status (Australia, Japan, New Zealand, Switzerland, and NATO Member States) the Dutch exporters are exempt from the export license system. A notification of the transit is sufficient under Dutch law, which seems to fall within the discretion granted to national legislators under article 1 (2) of the Common Position. The stated reason for applying the duty to notify is to enable the Dutch authorities to track the nature and amount of military

¹⁷ Vrij Verkeer: Nederlandse wapendoorvoer onder de Algemene Douanewet, Campagne tegen Wapenhandel, Frank Slijper, Januari 2011, p. 24

¹⁸ Ibid., p. 25. See also paragraph 4.3.3 of the *Handboek Strategische Goederen en Diensten* ('Handbook Strategic Goods and Services'), Ministry of Foreign Affairs, September 2013.

¹⁹ Annual Report on The Netherlands arms export policy, 2011, p. 10

goods passing through its territory, on the basis of which they can decide whether or not a company should apply for an export license.²⁰

Until 1 July 2012, the same rule of notification applied to transshipments of arms to and from above mentioned countries: under Dutch law there was only a duty on the company to notify the authorities.²¹

However, this policy came under scrutiny, both by internal policy review and NGO reporting²² since the vast majority of weapons transfers passing through the Netherlands, from a third country to the next, would remain unchecked with regard to the nature and destination. For illustration; in 2009, transit and transshipment of weapons through the Netherlands accounted for 98% of the exports of that year, and was - due to the legislation in place at that time - not subjected to an export license system.²³ In other words, only 2% of all arms leaving the Netherlands in 2009 was checked against the criteria of the Common Position. In an analysis of the arms transits and transshipments via the Netherlands that took place between 1 August 2008 and 30 June 2010, it was pointed out it was doubtful whether some of those weapons transfers - which were only subjected to a notification policy - would have passed the test for an export license from the Netherlands.²⁴ One of the cases that drew particular attention was the unchecked transfer of a large quantity of machine guns via the Netherlands, from Czech Republic to Sri Lanka, not long before escalation of hostilities in the country of destination.²⁵

²⁰ Annual Report on the Netherlands Arms Export Policy, 2013 (Original title: *Het Nederlandse wapenexportbeleid in 2013*), p. 6. Published by the Minister of Foreign Trade and Development Cooperation, and the Minister of Foreign Affairs. The Hague, The Netherlands, 25 July 2014. (Hereafter: 'Annual Report of 2013') The Dutch version (no translation available yet) can be found here: <http://www.rijksoverheid.nl/onderwerpen/exportcontrole-strategische-goederen/documenten-en-publicaties/rapporten/2014/07/25/rapportage-over-het-nederlandse-wapenexportbeleid-2013.html>

²¹ Annual Report on The Netherlands arms export policy, 2011, p. 9

²² See also IOB Evaluatie (Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie), *Beleidsdoorlichting van het Nederlandse exportcontrole- en wapenexportbeleid*, nr. 325, October 2009. (Hereafter 'IOB Evaluation'), p. 43, and see *Vrij Verkeer: Nederlandse wapendoorvoer onder de Algemene Douanewet, Campagne tegen Wapenhandel*, Frank Slijper, Januari 2011.

²³ *Vrij Verkeer: Nederlandse wapendoorvoer onder de Algemene Douanewet, Campagne tegen Wapenhandel*, Frank Slijper, Januari 2011, p. 10

²⁴ *Vrij Verkeer: Nederlandse wapendoorvoer onder de Algemene Douanewet, Campagne tegen Wapenhandel*, Frank Slijper, Januari 2011, p. 12-13.

²⁵ 'Nederland laat wapendoorvoer ongemoeid', 17 January 2011, nu.nl

Campaigning efforts by civil society, political debate, and awareness that “with the port of Rotterdam and Schiphol airport, the Netherlands harbors two of the main transit points in the European Union”²⁶, eventually led the Dutch authorities to introduce an export licensing obligation for arms transshipments to and from these countries from 1 July 2012 onwards.²⁷

3.4 Overview of Dutch arms exports

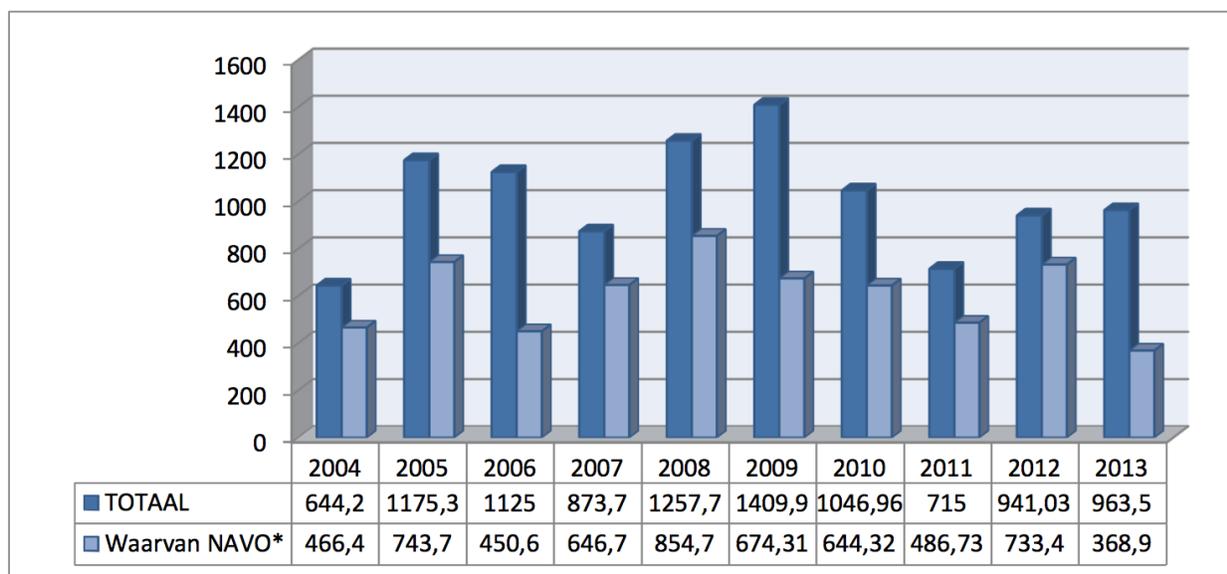
Over the past years, the Netherlands has been among the world’s major arms exporters, with annual exports ranging between 357 and 783 million U.S. dollars, as shown in the table below. This data was compiled by the Stockholm International Peace Research Institute (SIPRI). The amounts listed represent the institute’s “Trend Indicator Value” (TIV), which is based on constant, relative prices instead of the actual value of the exported goods.

Rank 2008-2014	Rank 2007-2013	Supplier	2008	2009	2010	2011	2012	2013	2014	2008-2014
1	1	United States	6814	6822	8169	9111	9018	7384	10194	57512
2	2	Russia	6264	5102	5993	8556	8402	8462	5971	48749
3	3	Germany (FRG)	2388	2547	2725	1359	1161	942	1200	12322
4	4	France	2063	1959	911	1770	1067	1578	1978	11326
5	5	China	591	1138	1459	1336	1666	2068	1083	9340
6	6	United Kingdom	990	1021	1101	1010	930	1484	1704	8239
7	7	Spain	602	961	277	1437	546	733	1110	5665
8	8	Italy	393	493	524	939	828	953	786	4916
9	9	Ukraine	378	377	470	534	1450	708	664	4581
10	11	Israel	347	734	647	587	530	756	824	4426
11	10	Netherlands	460	485	381	538	783	357	561	3564
12	12	Sweden	457	419	664	705	488	407	394	3534
13	13	Switzerland	461	227	238	310	250	193	350	2029
14	14	Canada	229	180	242	321	341	258	234	1804
15	15	South Korea	178	269	197	331	218	235	153	1581
		Others	1592	1574	1632	1266	1224	1400	1102	9791
		Total	24207	24308	25631	30108	28902	27916	28308	189380

²⁷ See also Letter of Secretary of State Economic Affairs, Agriculture and Innovation, and the Minister of Foreign Affairs to the President of Parliament, subject: “Aanpassingen in het wapenexportbeleid”, the Hague 10 June 2010.

Source: SIPRI Arms Transfers Database

The graph below illustrates the total value (in million euros) of weapons exports licenses issued by the Dutch authorities from 2004 to 2013. The light blue bar indicates the proportional amounts that were related with NATO members as destination countries.



Source: *Nederlandse wapenexport 2004-2013, Ministry of Foreign Affairs.* (Report on Dutch weapons exports 2004-2013, 2013, annex 2)

Since 2008, the year in which the Common Position entered into force, Dutch arms were exported to a wide variety of countries, as shown in Annex I, with Morocco, Jordan, Indonesia, and Turkey being among the main destination countries. Among the types of arms exported by the Netherlands, ships make up the most significant proportion of the overall exports, as illustrated in this table:

	2008	2009	2010	2011	2012	2013	2014	Total
Aircraft		68	92	137			8	305
Air defence systems	10		10		10		54	84
Armoured vehicles	66	56	2	39	110	70	35	377
Artillery				22	31			53
Missiles	7	8	14		5			33
Sensors	51	71	120	170	235	212	328	1186
Ships	326	282	144	171	392	74	136	1525
Total	460	485	381	538	783	357	561	3564

Source: SIPRI Arms Transfers Database

3.5 Application of Common Position criteria

Export license applications are assessed on a case-by-case basis, and checked against the eight criteria of the Common Position. In analyzing how the Dutch authorities conducted their assessment, one encounters the following difficulties:

- The wording of the Common Position leaves a large room for interpretation of the eight criteria by Member States;²⁸
- 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 how the applications were checked against the eight criteria of the Common Position. This makes it very challenging to gain meaningful insight into the factors that played a role in the decision making process, and how;²⁹
- Only export license applications with a value above two million euros are submitted to the parliament expeditiously, along with considerations for approving the application;
- A lack of detail in reporting on the arms exports further challenges an in depth analysis of Dutch policy. Although the Dutch authorities maintain a high level of transparency compared to most other Member States, there remains a delay in the release of detailed, meaningful information that goes beyond the total value, destination country, and broad indication of category of items;³⁰
- License export applications receive scores based on a check against the eight criteria of the Common Position. However, in cases where an explanation of the score and/or granting of the license would be warranted, no such explanation is given. In addition, the report suggests

²⁸ See also User's Guide, p. 24. Some European NGOs and think tanks advocate for identifying difference in member states' application of the Common Position, possibilities for strengthening the application, and areas of best practice as there "continue to be broad differences in terms of which government ministries are involved in assessing licence applications, what powers states have to suspend or revoke previously granted export licences, and how states handle the export of 'civilian' SALW.'" See SIPRI, *The review of the EU Common Position on arms exports: prospects for strengthened controls*, Non-Proliferation Papers, no. 7, January 2012, Mark Bromely.

²⁹ See SIPRI, *The review of the EU Common Position on arms exports: prospects for strengthened controls*, Non-Proliferation Papers, no. 7, January 2012, Mark Bromely.

³⁰ See Analyse Nederlandse Wapenexport 2013, Stop Wapenhandel, September 2014, Wendela de Vries en Mark Akkerman, p. 21

there ought to be an explanation where an application receives a negative score on one or more of the criteria, but the export license is nevertheless granted on the basis of, for example, the security interest of the destination country.³¹

In 2009, the Dutch Inspection of Development Cooperation and Policy Evaluation publish a policy review of the Dutch export control and arms export policy, covering the period from 2004 to 2008.³² The policy review expressed criticism on the Dutch application of criteria of the EU Code of Conduct - which had been translated into the Common Position in 2008 -, in particular in relation to criteria 2 (human rights), internal stability (3), regional stability (4), and the technical and economic capacity (8).³³ Dutch policy in relation to those four criteria will be discussed in further detail below.

In June 2011 the Dutch government released a document titled “Modifications in the arms export policy”³⁴, following internal consultations between the different ministries involved in shaping and executing the arms export policy. In relation to criteria 2 and 3, the government concluded that they would give more weight to risk analysis in their decision making process regarding export licensing. In case of “observable risks that with time could lead to violent development in which the goods to be exported could potentially be used” the government would be “hesitant” to issue a license. The other side of the coin pointed to by the government is the fact that “grounds for rejection [of the license] would have to be legally justifiable in appeal procedures”. In relation to criteria 8 the government recognizes that it “is clear that there are still a lot of discrepancy between the different interpretation of the criteria” among

³¹ IOB Evaluatie (Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie), Beleidsdoorlichting van het Nederlandse exportcontrole- en wapenexportbeleid, nr. 325, October 2009. (Hereafter ‘IOB Evaluation’), p. 109

³² IOB Evaluatie (Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie), Beleidsdoorlichting van het Nederlandse exportcontrole- en wapenexportbeleid, nr. 325, October 2009. (Hereafter ‘IOB Evaluation’)

³³ IOB Evaluatie (Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie), Beleidsdoorlichting van het Nederlandse exportcontrole- en wapenexportbeleid, nr. 325, October 2009. (Hereafter ‘IOB Evaluation’), p. 109

³⁴ Communication from the Secretary of State of Economic Affairs, Agriculture and Innovation, and the Minister of Foreign Affairs to the President of Parliament, titled “Modifications in the arms export policy”, 10 June 2011, the Hague, p. 3-4

European countries. This is mainly due to the high level of technical analysis required for assessing an application against this criteria.

It should be noted that the first four criteria of the Common Position require that a Member State “shall deny an export license” if an application appears incompatible with the standard set forth in the criteria. This prohibitive language has been recognized as such by the Dutch government; no license can be granted if the application is incompatible with one or more of the first four criteria.³⁵

Considering that there is no public information about the decision making process underlying the Dutch arms exports, one of the main ways of studying the policy is by looking at individual licensing decisions taken. Below follows an analysis of how criteria 2, 3, 4, and 8 have been applied by the Netherlands. First, each of these criteria will be discussed separately, after which Dutch arms export policy in relation to particular countries will be discussed in further detail (in alphabetic order), where it involves concerns in relation to multiple criteria. Since the Common Position entered into force in 2008, and the most recent available annual report on arms exports from the Netherlands covers 2013, the exports included in the analysis date from 2008 to 2013.

Criteria 2: human rights

“Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law. Having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall:

- a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;*
- b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe; [...]*

³⁵ Tweede Kamer 2008-2009, 22054, Wapenexportbeleid, nr. 146: 60

Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law." (Criteria 2)

The User's Guide points out that an assessment of the risk that a proposed export might be used to commit or facilitate serious human rights violations in "requires detailed analysis".³⁶ There is no set 'formula' for conducting such analysis, but the Guide does point to factors that can be look at in the case-by-case assessment, including:

- current and past record of the proposed end-user with regard to respect for human rights;
- current and past record of the recipient country in general with regard to respect for human rights, *inter alia*: the policy line of recipient country's government; recent significant developments; effective protection of human rights in constitution; human rights training among key actors (e.g. law enforcement agencies); impunity for human rights violations; independent monitoring bodies and national institutions for promotion or protection of human rights;
- the country's respect for, and observance of all human rights and fundamental freedoms, *inter alia*: the commitment to respect and improve human rights and to bring human rights violators to justice; implementation of relevant international and regional human rights instruments through national policy and practice; ratification of relevant international and regional human rights instruments; the degree of cooperation with international and regional human rights mechanisms (eg UN treaty bodies and special procedures); and the political will to discuss domestic human rights issues in a transparent manner, including with the EU or with other partners including civil society;
- For determining the whether violations are serious, case-by-case assessment must be carried out, which can look at factors such as: the nature and consequences of the violation in question, whether the violations are widespread and/or systematic (this is an aggravating factor rather than a requirement), description of the situation by competent bodies of the UN, EU or Council of Europe.

³⁶ User's Guide, p. 39-41

The User's Guide further emphasizes that the "combination of "clear risk" and "might" in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression."³⁷

For assessing the risk that military technology or equipment will be used for serious violations of international humanitarian law, the User's Guide states that such an assessment "should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law."³⁸

In relation to the human rights criteria (criteria 2), the 2009 IOB policy evaluation pointed to situations in which Dutch authorities gave positive scores, without explanation, to countries with an apparently bad human rights track record. It further questions the signal that is sent by the Dutch State when it sells its surplus military goods to countries with a worrying human rights situation. Egypt is mentioned as an example.³⁹

The Dutch government has expressed the view that "the fact that a bad human rights situation exists in a certain country, does not necessarily mean that there will be a negative assessment against criteria 2".⁴⁰ This statement was made after internal consultations between ministries regarding Dutch arms export policy.

Furthermore, inconsistencies in the application of the criteria is raised as a concern in the IOB Evaluation. For example: Saudi Arabia receives positive scores on the human rights criteria,

³⁷ User's Guide, p. 41

³⁸ User's Guide, p. 44

³⁹ IOB Evaluatie (Inspectie Ontwikkelingssamenwerking en Beleidsevaluatie), Beleidsdoorlichting van het Nederlandse exportcontrole- en wapenexportbeleid, nr. 325, October 2009. (Hereafter 'IOB Evaluation'), p. 109

⁴⁰ Communication from the Secretary of State of Economic Affairs, Agriculture and Innovation, and the Minister of Foreign Affairs to the President of Parliament, titled "Modifications in the arms export policy", 10 June 2011, the Hague, p. 4

because violation of human rights law mainly take place in the sphere of the judiciary, without involvement of the military. However, for Pakistan, where the army is responsible for human rights violations, the scoring on the human rights criteria is also positive.⁴¹ Therefore, the review recommends more clarity in the application of the human rights criteria.

Another arms export that drew attention in relation to criteria 2, was the delivery of nearly 2 million euros worth of military communication systems and simulation equipment to Saudi Arabia in 2008.⁴² Despite the well documented widespread and systematic human rights violation in the country,⁴³ Saudi Arabia is an important destination country of Dutch arms exports, raising questions about the adherence to criteria 2 of the Common Position.

In their analysis of the Dutch annual report, the Dutch NGO 'Stop Wapenhandel' points to unclear policy for the granting and denial of export permits for night vision equipment.⁴⁴ For example, licenses for export of night vision equipment were issued for deliveries to Saudi Arabia while they were rejected for Algeria, despite have a comparably concerning human rights situation. Furthermore, the report observes to what appears to be inconsistent policy in relation to export licensing for night vision equipment destined for India and Pakistan; licenses for the same equipment to the same destination were sometimes issued and sometimes rejected, without a clear indication of decisive factors in the decision making process.

Finally the 2009 IOB Evaluation, observed that the army of the recipient State is no regarded as a single entity, also not when the export concerns surplus military goods.⁴⁵ Such an approach seems to ignore the part of the User's Guide which encourages authorities to ask the following

⁴¹ IOB Evaluation, p. 109

⁴² See also *Analyse Nederlandse wapenexportvergunningen 2008*, Campagne Tegen Wapenhandel, November 2009, Frank Slijper.

⁴³ See also *World Report 2008: events of 2007*, Human Rights Watch, 31 January 2008, http://www.hrw.org/sites/default/files/reports/wr2k8_web.pdf . Page of the report 516: "Curbs on freedom of association and expression, unfair trials, arbitrary detention, mistreatment and torture of detainees, restrictions on freedom of movement, and lack of official accountability remain serious concerns. Saudi law and policies discriminate against women, foreign workers, and religious minorities, especially Shia and Ismaili Saudis."

⁴⁴ *Analyse Nederlandse wapenexportvergunningen 2008*, Campagne Tegen Wapenhandel, November 2009, Frank Slijper, p. 27

⁴⁵ IOB Evaluation, p. 110

questions, in relation to criteria 2 and the prevention of diversion: “Would we issue a licence if the end-user were another part of the security apparatus of the recipient state? Do the different branches of the security forces have separate procurement channels? Is there a possibility that equipment might be redirected to a different branch?”⁴⁶

Criteria 3: internal stability

“Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts. Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.” (criteria 3)

Providing guidance on how criteria 3 should best be interpreted, the User’s Guide identifies some key factors to be looked at when conducting case-by-case assessments of proposed exports:⁴⁷

- the internal situation in the country of final destination (economic, social and political developments and stability within the borders);
- function of the existence of tensions or armed conflicts: what is the nature of the tensions/armed conflict, who is involved and how, and how could equipment be used in such a situation?
- nature of the equipment: could the equipment be used in an armed conflict? And could the internal tensions turn into an armed conflict when the equipment is obtained by the proposed end-user?
- the end-user: what is the end-user’s role in the country of final destination and role in problems and/or solutions? Is the end-user involved in the conflict or tensions? Here the risk of diversion must also be taken into account.

In relation to criteria 3, the 2009 IOB Evaluation observes that the reviewing authorities only check whether the exported goods could increase the tensions.⁴⁸ This approach appears to be at

⁴⁶ User’s Guide, p. 46

⁴⁷ User’s Guide, p. 56

odds with the provision, which states that exports which would provoke or prolong armed conflicts should also be denied.

Developments in the context of the 'Arab Spring' have illustrated how Dutch arms ended up being used in internal conflicts and oppression, including in Bahrain and Egypt.⁴⁹ Over a period of twenty years, the Netherlands exported 30 million euros worth of military - mostly surplus - material to Bahrain.⁵⁰ This raises concerns about the weight that has been given to the indicators for internal stability of the destination countries.

Criteria 4: regional stability

"Preservation of regional peace, security and stability. Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim. When considering these risks, Member States shall take into account inter alia:

- a) the existence or likelihood of armed conflict between the recipient and another country;*
- b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;*
- c) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;*
- d) the need not to affect adversely regional stability in any significant way." (criteria 4)*

The User's Guide notes that the wording 'shall deny' means that if license assessment establishes that "there is a clear risk that the proposed export would be used aggressively against another country or to assert by force a territorial claim, the export licence must be

⁴⁸ IOB Evaluation, p. 110

⁴⁹ See also *Analyse Nederlandse Wapenexport 2013, Stop Wapenhandel*, September 2014, Wendela de Vries en Mark Akkerman, p. 14. And see 'Dutch armoured vehicles in Bahrain', *Campagne tegen Wapenhandel, Press release*, 18 February 2011.

⁵⁰ See also *Lessons From MENA: appraising EU transfers of military aid and security equipment to the Middle East and North Africa. A contribution to the review of the EU Common Position*. Edited by An Vranckx, Frank Slijper and Roy Isbister, Academia Press, Gent, November 2011, p. 17 and 27.

denied regardless of the outcome of the analysis with respect to the other criteria set out in Article 2 of the Common Position, or any other considerations”.⁵¹

Similar to criteria 3, factors to look at for assessing criteria 4, listed in the User’s Guide, include:

- preservation of regional peace, security, and stability;
- the existence or likelihood of armed conflict between the recipient and another country;
- a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force;
- the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient;
- the need not to affect adversely regional stability in any significant way;
- the nature of the equipment;
- the end-user: if the equipment is directly supplied to the military / government, the assessment must take into account whether the equipment will be used in any military action against another country.⁵²

In relation to criteria 4, the IOB Evaluation observes that the reviewing authorities only check whether the exported goods could increase the tensions.⁵³ However, the User’s Guide indicates that “a judgement would need to be made as to whether there is a clear risk that supplying this piece of equipment would hasten the advent of conflict” or whether there is a clear risk that the equipment “will prolong an existing conflict or bring simmering tensions into armed conflict”.⁵⁴

A Dutch NGO campaigning against arms trade has repeatedly pointed to large arms exports to regions in which regional unrest/instability (Middle East, north Africa), and apparent arms

⁵¹ User’s Guide, p. 62

⁵² User’s Guide, p. 65

⁵³ IOB Evaluation, p. 110

⁵⁴ User’s Guide, p. 62

ances (north Africa, south Chinese sea) could have been a reason to deny an export license.⁵⁵ However, in light of the flexible formulation of the fourth criteria, the Dutch authorities maintained that the delivery of weapons would not adversely affect the regional stability, or that the tensions are only of a political nature, without risk of a military escalation.

Criteria 8: economic capacity

“Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments. Member States shall take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They shall consider in this context the recipient country’s relative levels of military and social expenditure, taking into account also any EU or bilateral aid.” (criteria 8)

The User’s Guide provides a two-stage “filter” system to assist Member States in identifying export license applications which might require assessment against this criteria. Stage one concerns country-level development concerns while stage two focuses on the relative financial significance of the application for the recipient country.⁵⁶ Paragraphs 3.8.3 to 3.8.10 of the Guide also provide a long list of elements and factors that can be looked at when assessing the proposed export in relation to the human and economic capacity of the recipient country. In relation to the economic capacity, the assessment should take into account the impact the export would have on the country’s financial and economic resources for other purposes in the immediate, medium, and long term. The capital cost, life-cycle costs, capabilities of replacing current arms, and the source of financing, are factors that can be looked at.⁵⁷

⁵⁵ *Analyse Nederlandse Wapenexport 2013*, Stop Wapenhandel, September 2014, Wendela de Vries en Mark Akkerman, p. 20. *Analyse Nederlandse wapenexportvergunningen 2008*, Campagne Tegen Wapenhandel, November 2010, Frank Slijper.

⁵⁶ Annex A User’s Guide

⁵⁷ User’s Guide, p. 95

The IOB Evaluation of 2009 raised concerns about how criteria 8 is applied in the Dutch export policy. A negative score on criteria 8 does not appear to be a reason for rejecting the license application Dutch authorities. More significantly, there seem to be inconsistencies in the way criteria 8 is applied. For example, an imbalance between military and social sector expenditures sometimes leads to a negative score (Pakistan) and sometimes to a positive score (Bangladesh, Yemen). It has been unclear which factors are decisive in such decisions, although sometimes the argument is used that the export would not influence the distribution of expenditures. Finally, it is important to note that most applications in relation to poor countries received positive scoring on criteria 8. Besides, even where there was a negative scoring this did not lead to a final negative advice regarding the license application.⁵⁸

In 2009, the largest export license issued was for the export of three frigates to Morocco, for the value of 555 million euros. This license raises concern in relation to criteria 8, as Morocco ranked 130 in the Human Development Index that year.⁵⁹ When assessing Morocco's scoring on criteria 8, a rather dubious approach was adopted, where the Dutch authorities accepted Morocco's reasoning that major military expenditures (are made with funds origination from outside the defense budget).⁶⁰

Weapons exporting to Indonesia might also require a closer look, in relation to criteria 8. Over the past 10 years, Indonesia quadrupled its defense budget, that reached 7.3 billion U.S. dollars in 2014. This makes the defense budget higher than the budget of any other Indonesian ministry.⁶¹ However, this criterium does not appear to receive attention in the assessment of export license applications for Indonesia. In 2013, the Netherlands exported 345 million euros worth of military equipment to the Indonesian navy. A letter from the Ministry of Foreign Trade and Development Cooperation and Ministry of Foreign Affairs to the Dutch parliament

⁵⁸ IOB Evaluation, p. 110. See also p. 103 regarding the export of corvettes and equipment to the Indonesian navy from 2006 to 2008.

⁵⁹ Human Development Index <http://hdr.undp.org/en/data>

⁶⁰ Vragen Vaste Commissie voor Economische Zaken (VCEZ) over het jaarrapport wapenexportbeleid 2009 (*Questions of Permanent Commission for Economic Affairs regarding the Annual Report on Arms Export Policy 2009*), Minister of Economic Affairs, the Hague, 10 August 2010, p. 4

⁶¹ *Analyse Nederlandse Wapenexport 2013*, Stop Wapenhandel, September 2014, Wendela de Vries en Mark Akkerman, p. 4

regarding that export illustrates that criterium 8 was not considered to form a significant element of the assessment.⁶²

3.6 Country-specific cases

China

Then, in December 2008, despite the internal human rights situation in China⁶³ - in particular in relation to Tibet and the Uyghur minority - and the EU arms embargo⁶⁴, the Netherlands exported image intensifier tubes to China, with a value of 1.4 million euros. This could be regarded as contrary to criteria 2, 3, and 6.

Israel

In 2012, the Netherlands denied export license applications for a variety of weapons destined for Israel, based on criteria 2, 3, 4, 6, and 7 of the Common Position. However, in that same year an export license with 900,000 euro worth of military technology and programming equipment was approved.⁶⁵ In 2009, an export license for the value of 13 million euros was granted for the transit of radar equipment, originating from Israel, via the Netherlands to the United Arab Emirates.⁶⁶ Purpose of the equipment is unknown, and there were no diplomatic relation between the UAE and Israel at that time.⁶⁷

Pakistan

⁶² In the letter from both ministers to the Dutch Parliament, titled Weapons Export Policy (*Wapenexportbeleid*), 22 054, nr. 223, 4 June 2013, the Hague, the ministries illustrate their assessment of the license application in light of criteria 2, 3, 4, and 7.

⁶³ For documentation in relation to human rights issues in China, see also Amnesty International, section on China, here; <http://www.amnesty.org.uk/issues/China>

⁶⁴ See also *EU arms embargo on China*, SIPRI, last updated 20 November 2012, http://www.sipri.org/databases/embargoes/eu_arms_embargoes/china

⁶⁵ *Het Nederlandse wapenexportbeleid in 2012*; Rapportage over de uitvoer van militaire goederen. Minister of Foreign Trade and Development Cooperation, and the Minister of Foreign Affairs, The Hague, November 2013, p. 26, 31, Annex 3, and Annex 4.

⁶⁶ License 28476248, dated 4 September 2009. See the Monthly Report on export of military goods, Ministry of Foreign Affairs, September 2009. <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/rapporten/2010/04/16/maandrapportage-militaire-goederen-september-2009/september-2009.pdf>

⁶⁷ *Vrij Verkeer: Nederlandse wapendoorvoer onder de Algemene Douanewet, Campagne tegen Wapenhandel*, Frank Slijper, Januari 2011, p. 10

In 2008 the Netherlands exported 4.21 million euros worth of military goods to Pakistan destined for updating of its F-16 fighter jet fleet, and contributing to the Erieye spy plane. Total value of the export was 4.21 million euros. Considering Pakistan's internal and external security situation⁶⁸, and the impact of internal unrest and military romance on the social-economic development⁶⁹ of the country, the export can be considered to conflict with criteria 2, 3, 6, and 8.

United States

Another major issue in relation to the Dutch arms export policy, is the issuing of arms export licenses where the final destination of the goods are not specified in the license application. In 2008, the Netherlands exported at least 27 million euros worth of military goods for the production of F-16 fighter jets and apache helicopter, mostly to the United States, but without the Dutch authorities knowing the final destination of those goods. The United States is known to have exported apache helicopters to countries including Egypt, Saudi Arabia, Israel, and the United Arab Emirates.⁷⁰ The total export of F-16 and apache related items could be even higher, since several significant size licenses issued in 2008 do not specify the type of aircraft the military goods are destined for.⁷¹ In 2009, again, significant export licenses were issued for military parts of F-16 fighter jets and apache helicopters, with 178 million euros worth of export licenses to the United States.⁷² The final destination of the exported goods is often unknown but considering existing orders with U.S. firms at that time, supplies for F-16 fighter jets could have been destined for Egypt, Iraq, Morocco, Oman, or Pakistan, while parts for apaches could have

⁶⁸ See *Universal Periodic Review of Pakistan*, Human Rights Watch, 6 May 2008, <http://www.hrw.org/news/2008/05/04/universal-periodic-review-pakistan>, and see also Jane Parlez, "By Air and Ground, Pakistani Soldiers Penetrate Militant Heartland", *New York Times*, 19 oktober 2009.

⁶⁹ In 2008, Pakistan ranked 141 in the Human Development Index <http://hdr.undp.org/en/data>

⁷⁰ *AH-64A/D Apache Attack Helicopter, United States of America*, [army-technology.com](http://www.army-technology.com), Undated article, <http://www.army-technology.com/projects/apache/>

⁷¹ *Analyse Nederlandse wapenexportvergunningen 2008*, Campagne Tegen Wapenhandel, November 2009, Frank Slijper.

⁷² *Annual Report on the Netherlands Arms Export Policy in 2009 (Jaarrapport Wapenexportbeleid 2009)*, Ministry of Economic Affairs, Ministry of Foreign Affairs, and Ministry of Development Cooperation, 23 June 2010, <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2010/06/23/rapport-het-nederlandse-wapenexportbeleid-in-2009.html>

gone to Egypt, Saudi Arabia, and Taiwan.⁷³ Some of such destinations could raise concerns in relation to criteria 2, 3, 6, or 8 of the Common Position.

3.7 Transparency

The Dutch authorities often make reference to their perceived transparency on the issue of arms exports, in particular compared to other member states.⁷⁴

Despite the publication of export figures, and release of monthly reports on arms exports (which is exceptional in the EU), the provided disclosure does not always give meaningful insight in the arms exports in relation to the types of arms exported, and the decision making process for granting licenses.

Firstly, the check conducted of export license applications against the criteria of the Common Position is not made public, which makes oversight near to impossible. As the annual report of 2011 notes, in notifications related to licensing decisions, “an explanation *can* be given regarding the checking against the criteria and the considerations that played a role in the decision making process”.⁷⁵ The 2009 IOB Evaluation found that decision making process in relation to the license applications was not transparent, as it is not clear what weight is given to the different criteria in the final decision or which interests were prioritized.⁷⁶ This leaves it up to the authorities whether insight into the assessment of license applications will be provided. In most cases such details are not provided, unless a case is followed up extensively by members of parliament.

⁷³ *Analyse Nederlandse wapenexportvergunningen 2008*, Campagne Tegen Wapenhandel, November 2010, Frank Slijper.

⁷⁴ See the annual reports on the Netherlands arms exports 2008-2013 where the authorities report on transparency measures and practice in relation to arms exports

⁷⁵ Annual Report on the Netherlands Arms Export Policy in 2011 (*Het Nederlandse wapenexportbeleid in 2011*), Secretary of State of Economic Affairs, Agriculture and Innovation, and the Minister of Foreign Affairs, 31 October 2012, p. 9. <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/10/31/het-nederlandse-wapenexportbeleid-in-2011.html>

⁷⁶ IOB Evaluation, p 112-113

Furthermore, the IOB Evaluation concluded that, despite the overall transparent practice of the Dutch authorities (including monthly reports to parliament on granted and rejected applications), there is room for improvement. The information provided is insufficiently recent. The Evaluation report states that “a period of three months between issuing of the license and the publication is acceptable, but this period is generally exceeded”.⁷⁷ This situation has not changed since the issuing of the IOB Evaluation report, and these delay prevents members of parliament from reviewing, and where needed, questioning issued export licenses.

Following a motion filed in parliament in 2011⁷⁸ to speed up the reporting to parliament in relation to large export license applications, the threshold for fast track reporting on license applications was lowered from 5 to 2 million euros. This change took effect in 2012. Parliament is notified, confidentially, of important decisions within two weeks after they were taken.

⁷⁷ IOB Evaluation, p. 112

⁷⁸ Motion in Parliament (*Tweede Kamer*), Parliamentary year 2011-2012, 22054, no. 181

5. Dutch arms exports and UN human rights instruments

Under the UN Charter, all UN Member States have positive obligations to cooperate for the protection and fulfillment of universal human rights. States are required to “take joint and separate action” individually and together with the UN to this end.

There are countless UN human rights instrument that have been developed over the past decades. However, for assessing a potential transfer of conventional arms against a human rights criterion, there are mainly UN human rights treaties with great relevance; the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Netherlands is a State Party to all three conventions.

Besides obligations under the above mentioned human rights treaties, the Netherlands also has the responsibility to exercise “due diligence” to protect persons against human rights abuses committed by the private actors.⁷⁹

In conjunction with the Netherlands’ obligations under the ICCPR, ICESCR and CAT, one can look at art. 16 of the Articles on State Responsibility which reads as follows: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”⁸⁰

⁷⁹ See also the *Principles on the Prevention of Human Rights Violations Committed with Small Arms* (adopted in 2006 by the Sub-commission on the Protection and Protection of Human Rights) states that “A state agent includes any person or persons acting at the instigation of or with the consent or acquiescence of a public official.”

⁸⁰ See Article 16 of the International Law Commission’s *Articles on the Responsibility of States for Internationally Wrongful Acts*, (Articles on State Responsibility), commended by the General Assembly, A/RES/56/83, 12 December 2001

Should it be found that an export license issued by the Netherlands constitutes a violation of its duties under the human rights conventions - for example by knowingly providing weapons to a violent regime that uses it against their citizens -, the authorities could be held responsible for the consequences.⁸¹

Organizations like Amnesty International stress the importance of preventative rather than punitive approach when it comes to trade in conventional weapons. It states: "In order to create a more responsible trade in conventional arms and ammunition, decisions on transfer authorizations based on international human rights obligations should be viewed primarily as a means to prevent serious human rights violations or abuses. Therefore, the decision making process should occur within a "preventative approach" framework. Such an approach would aim to prevent arms transfers where there is credible and reliable information indicating there is a substantial risk that a particular group, such as the security forces, will use those arms for serious violations or abuses of human rights. Where there is such information on a substantial risk then the presumption should be to prohibit that transfer of arms until the risk for such further serious violations or abuses with such arms has been curtailed."⁸² What is of great importance is that the licensing authorities maintain a clear and consistent method for assessing the risk of exported arms being used in serious human rights violations. As referred to in chapter three, the User's Guide lists many factors to be looked at when assessing the human rights risks that exist in a destination country, all of which related - in one way or another - to the ICCPR, ICESCR, and CAT.

⁸¹ This was reiterated by the Economic and Social Council in its Report of the Third Committee of the General Assembly, draft resolution XVII, 14 December 1982, A/37/745, p. 50: "[A] State may incur responsibility if it (...) provides material aid to a State that uses the aid to commit human rights violations. In this respect, the UN General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations."

⁸² Amnesty International, *How to apply human rights standards to arms transfer decisions*, October 2008, AI Index: ACT30/008/2008

6. Common Position - useful in court?

Under article 1 (2) of the Common Position, it is up to the Member States to indicate, in their legislation, in which case an export license is mandatory. Therefore, only situations that have been made subject to a licensing system by the Dutch authorities can be subjected to a check against the provisions of the Common Position.

The Common Position is a legally binding instrument, but is not legally enforceable and does not have a direct legal effect.⁸³ Considering that it is a Common Foreign and Security Policy (CFSP) instrument⁸⁴, it leaves ample room for interpretation of the criteria, making it unfeasible to demand compliance via the European Court of Justice.⁸⁵ It is up to Member States to adopt laws and policy that are in line with the Common Position. Then it is those laws and practices that can be challenged in court.

Furthermore, there is limited to no weight that can be accorded to State practice in the regard of arms exports from the EU. The criteria of the Common Position are flexible to a variety of interpretations, leading to different decisions on license applications across countries. Furthermore, very little information about export policy decisions are made public by authorities, making it difficult to identify a common practice. The User's Guide contains a chapter on best practices for interpretation of the eight Common Position criteria. The chapter aims to "achieve greater consistency among Member States in the application of the criteria [...] by identifying factors to be considered when assessing export licence applications". However, this dissemination of best practices does not constitute "a set of instructions" as the Guide points out that "individual judgement is still an essential part of the process, and Member States are fully entitled to apply their own interpretations".⁸⁶ Due to the space for interpretation of the criteria and the absence of identifiable State practice, it seems that cases suitable for litigation should include objective factors that can be identified regardless of the authorities' independent interpretation of the criteria. For example, when an application is - objectively - irreconcilable

⁸³ See also the IOB Evaluation, p. 83

⁸⁴ See also the section on Common Foreign and Security Policy (CFSP) of the European Union of the European Union External Action website http://eeas.europa.eu/cfsp/index_en.htm

⁸⁵ Ibid.

⁸⁶ User's Guide, p. 24

with one (or more) of the first four criteria, or there is strong evidence to suggest that certain arms exports would be used in violations.

There is limited jurisprudence in the Netherlands regarding the country's arms export policy decisions. In 2002, 22 Dutch civil society organizations filed a civil lawsuit against the Dutch government (Ministry of Economic Affairs and Ministry of Foreign Affairs) over an export license that was issued for military goods destined for Israel.⁸⁷ The lawsuit was dismissed as the plaintiff lacked the required 'direct interest' in the case.⁸⁸ The judge ruled that under art. 3:305a of the Civil Code, foundations and societies with full legal status can file claims for the protection of interests of other people "to the extent that that these organizations pursues those interests by means of their statute".⁸⁹ This implies that, in order for a lawsuit against the Dutch authorities in relation to arms export licensing to be admissible, the plaintiff must have a direct interest, for example being from a destination country and fearing that the arms are used for the commission of gross human rights violations, war crimes, or crimes against humanity in his country. Whether a plaintiff would need to personally be at risk in order for him to have a 'direct interest' is not clear in the above mentioned verdict.

The lack of insight into the decision making process concerning license applications, as discussed in chapter 3, creates challenges for plaintiffs seeking to litigate against licensing decisions. In order to build a strong case, it will be important to understand how authorities assessed the different criteria when issuing a license.

Parliamentary checks and balances, such as letters of inquiry by members of parliament can be an important tool in identifying cases as well as will obtaining insight and information regarding the application of the Common Position in relation to certain countries.

⁸⁷ Ruling, Court of The Hague, Civil Law section, Verdict in summary proceedings of 29 May 2002, case number KG 02/571. The verdict can be found here in Dutch:

<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2002:AE3271>

⁸⁸ Ibid., para. 4.6

⁸⁹ Art. 3:305a Burgerlijk Wetboek

7. Conclusion

Through its General Customs Act, Decision on Strategic Goods and subsidiary decisions and regulations on in- and export of strategic (and dual use) goods, the Dutch authorities have developed a legal framework in line with the Council Common Position. Furthermore, in terms of exercising transparency related to its arms exports, the Netherlands appears to perform better than most Member States.

However, the text of the Common Position leaves room for a discretion of Member States in deciding in which areas to apply the Common Position. This creates certain vulnerabilities where arms exported from the Netherlands can still end up being used in human rights violation, war crimes, or crimes against humanity.

Firstly, dual-use items listed in Annex I, and not included in Annex IV of the Council Regulation are, in principal, not subjected to mandatory licensing by the Netherlands when exported to another EU Member State. This means that the Netherlands would trust licensing decisions of other EU Member States possibly applying lower thresholds in their review of license applications.

Secondly, transit of arms through the Netherlands to or from the EU Member States and States with a similar status (Australia, Japan, New Zealand, Switzerland , and NATO Member States) is also exempt from the export license system. Furthermore, the Dutch export policy lacks a systematic check on the transit of dual-use goods, including when such goods are transferred from a non-EU/NATO State to another non-EU/NATO State. This creates further risks of allowing transits which could go against non-proliferation principles.

The third problem relates to the limited possibility to check the Dutch arms export licensing decisions against the criteria of the Common Position. The assessment made by authorities is not made public, which makes oversight near to impossible. Considering that there is very little public information about the decision making process underlying the Dutch arms exports, one of the main ways of studying the policy is by looking at individual licensing decisions taken.

As outlined in chapter 3, the primary concerns in relation to the Dutch arms export policy relates to the application of criteria 2, 3, 4, and 8. Over the past years several licensing decisions have been criticized as they appeared incompatible with the Common Position. In particular in relation to criteria 2, 3, and 4, this could imply some decisions violated the Common Position since the first four Common Position criteria require a licence denial in case of a negative assessment.

Regarding the feasibility of lawsuits against the Dutch authorities over their arms export policy, a few factors must be taken into account. The Common Position is a legally binding instrument, but is not legally enforceable and does not have a direct legal effect. Furthermore, it leaves ample room for interpretation of the criteria, making it unfeasible to demand compliance via the European Court of Justice. It is about challenging the laws and practices that the Netherlands operates in relation to the Common Position. Also, due to the space for interpretation of the criteria and the absence of identifiable State practice, cases suitable for litigation should include objective factors that can be identified regardless of the authorities' independent interpretation of the criteria. Finally, for a civil claim challenging (part of) the Dutch arms export policy to be admissible the plaintiff must have a 'direct interest' in the case. In case of foundations and societies filing the complaint, they must have file their claim for the protection of interests of other people "to the extent that that these organizations pursues those interests by means of their statute". It is not completely clear what a 'direct interest' would look like in relation to challenges licensing decisions.

Finally, parliamentary checks and balances could prove to be an important tool in identifying cases as well as will obtaining insight and information regarding the application of the Common Position in relation to certain countries.

Annex I

Source: SIPRI Arms Transfers Database

Destination country	2008	2009	2010	2011	2012	2013	2014	Total
Jordan		68		47	83	37	88	323
Latvia	44			22				66
Malaysia						3	3	5
Mexico					20		10	29
Morocco				149	312			461
Norway						5	5	10
Oman						35	17	52
Peru			24				64	88
Portugal	18	183	137					338
Saudi Arabia				13	25	25	25	88
South Korea	10		10		10			30
Thailand						7		7
Turkey	13	13	13	42	38	50	55	224
Turkmenistan				5	5	10	14	33
United Kingdom			35	15	30	30		110
United States					46	46	46	139
Venezuela		13	13	75	21		10	132
Total	460	485	381	538	783	357	561	3564

The amounts listed are in million U.S. dollars. These numbers represent SIPRI's Trend Indicator Value (TIV), not the actual value of the exported goods.

Destination country	2008	2009	2010	2011	2012	2013	2014	Total
Bahamas							10	10
Barbados	10	10						20
Belgium	127	5	1		7	3	5	147
Brunei				14			5	19
Canada	19			13	16	32	82	162
Cape Verde					10			10
Chile	6		68	138				212
Colombia					40	20	20	79
Denmark					43		85	128
Ecuador					4	9	4	17
Egypt	26					12		37
Estonia			2	1	2	1	2	8
France			30		13			43
Germany (FRG)	10				59	15		84
Greece	28	20	28	5				81
Honduras						20		20
India		10	20	1	1		10	41
Indonesia	149	149					3	300
Italy		15						15