

Dutch law on arms trade

To get a clear picture of how the Dutch law deals with the export of weapons, it is important to first have a clear picture on the juridical part of Dutch law on arms trade. What are the requirements for granting or refusing a license to export weapons? How does this work in practice and what are the results in Dutch litigation?

Military goods

Military goods are the big, dangerous weapons that could have a big impact. Examples include guns, ammunition, tear gas and warships. A comprehensive list of these goods is given by the 'Munitions List' of the Wassenaar Arrangement.¹ This is a treaty to which more than 40 countries are connected. In this convention the rules regarding exports are aligned in international consultations, so there is little difference between the countries. The Netherlands, despite this agreement, uses its own policy when it comes to military goods.² The current policy according to Dutch law will be treated below.

The export of military goods for companies and organizations requires a permit.³ It is requested from the Centrale Dienst voor In- en Uitvoer (CDIU).⁴ Licenses for the export of military goods are issued on the basis of Algemene Douanewet and secondary export control instruments. The CDIU tests on behalf of the Ministry of Foreign Affairs (MFA) the application of the Dutch arms export policy. Use is made of eight criteria, which are reflected in the EU Common Position.⁵

These criteria are that the goods do not jeopardize (1) the international obligations of Member States, (2) human rights and international humanitarian law in the host country, (3) the internal situation in the host country, (4) regional peace, security and stability, (5) the national security of Member States and their allies, (6) the conduct of the host country to the international community, (7) the risk that the goods will be diverted within the recipient country or undesirable exported further and last (8) for social and economic policies of the recipient country. For this paper mainly the second criterion is of interest, the goods shall not constitute a threat to human rights and international humanitarian law in the host country.

According to the law, it is not permitted to export weapons to countries which violate human rights. According to PILP the government still allows military arms to be exported to countries like Bahrain⁶, Egypt⁷ and Saudi Arabia.⁸ And not only the government can authorize the export⁹, but also export weapons to such countries itself.¹⁰

¹ *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*, 19 december 1995, <http://cns.miis.edu/inventory/pdfs/wass.pdf>.

² <http://www.rijksoverheid.nl/onderwerpen/exportcontrole-strategische-goederen/militaire-goederen>.

³ On the basis of Wet Strategische diensten.

⁴ http://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/belastingdienst/douane_voor_bedrijven/veiligheid_gezondheid_economie_en_milieu_vgem/cdiu/cdiu_strategische_goederen/cdiu_strategische_goederen_content.

⁵ GEMEENSCHAPPELIJK STANDPUNT 2008/944/GBVB van de Raad van 8 december 2008 tot vaststelling van gemeenschappelijke voorschriften voor de controle op de uitvoer van militaire goederen en technologie.

⁶ <http://www.amnesty.nl/actiecentrum/groetenlijst/bahrein-mensenrechtenverdedigers>, en <https://www.amnesty.nl/nieuwsportaal/nieuws/kinderen-in-bahrein-opgesloten-mishandeld-en-gemarteld>.

⁷ <https://www.amnesty.nl/nieuwsportaal/nieuws/egypte-celstraffen-voor-homoseksuelen>.

⁸ <https://www.amnesty.nl/sites/default/files/public/mde230182013en.pdf>.

⁹ <http://stopwapenhandel.org/sites/stopwapenhandel.org/files/wereldkaart/tabel20042013.pdf>.

¹⁰ <http://www.stopwapenhandel.org/sites/stopwapenhandel.org/files/zogoedalsnieuw.pdf>.

Allocations and rejections of permits

Since theory and practice seem to diverge somewhat, it is useful to see on what basis these permits are granted and rejected. These data are published by the government on the website <http://www.rijksoverheid.nl/onderwerpen/exportcontrole-strategische-goederen/rapportages-strategische-goederen/rapportages-uitvoer-militaire-goederen>. The latest report is from 2013, in two years the policy may have changed. It could now be stricter or less strict. Nevertheless, use will be made of this (somewhat outdated) data.

It appears from this data that permits for the export of weapons have been granted to the countries Egypt¹¹, Saudi Arabia¹², Colombia¹³, the United States of America¹⁴, India¹⁵, Indonesia¹⁶, Russia¹⁷, Turkey¹⁸, Israel¹⁹ and China²⁰. These are countries that, according to Amnesty International, violate human rights. A short resume of what kind of violations of human rights which are applicable can be found in the Annex. Because these countries violate multiple human rights, according to the eight criteria of the EU Common position, the permits should not have been permitted. In 2013 there was no permit granted for the export of weapons to Bahrain.

In all, three licenses have been rejected with destination Egypt and Saudi Arabia, because of violation of criteria 2 and 3.²¹ To Egypt the rejected good was labeled communication, to Saudi Arabia the rejected goods were labeled various ammunition and cartridges. The end user would have been the government in both countries. It is then quite interesting that there have still been exports to these countries. The kind of goods that eventually were permitted to these countries were military electronics, military training materials, parts and components for weapons and ammunition, parts and components for other military goods.²² Under parts and components for weapons and ammunition is understood especially deliveries of combat aircraft and attack helicopters to the manufacturers of such systems in the United States and deliveries of components for tanks and other military combat vehicles to the German manufacturer of such systems. Under parts and components for other military goods in that period from a multitude of smaller deliveries of parts for military electronic systems and parts for military aircraft and vehicles. The report is not clear why one license to these countries is granted and not the other.

¹¹ <https://www.amnesty.nl/egypte>.

¹² <https://www.amnesty.nl/mensenrechten/landen/saudi-arabie>.

¹³ <https://www.amnesty.nl/mensenrechten/landen/colombia>.

¹⁴ <https://www.amnesty.nl/mensenrechten/landen/verenigde-staten>.

¹⁵ <https://www.amnesty.nl/mensenrechten/landen/india>.

¹⁶ <https://www.amnesty.nl/mensenrechten/landen/indonesie>.

¹⁷ <https://www.amnesty.nl/mensenrechten/landen/russische-federatie>.

¹⁸ <https://www.amnesty.nl/mensenrechten/landen/vrije-meningsuiting-in-turkije>.

¹⁹ <https://www.amnesty.nl/mensenrechten/landen/israel-en-palestina>.

²⁰ <https://www.amnesty.nl/mensenrechten/landen/china>.

²¹ <http://www.rijksoverheid.nl/onderwerpen/exportcontrole-strategische-goederen/documenten-en-publicaties/rapporten/2014/07/25/rapportage-over-het-nederlandse-wapenexportbeleid-2013.html>.

²² Rapportage over het Nederlandse wapenexportbeleid, 2013, p. 23.

For the export to Egypt there is a summary of why the permit was given in a letter from the Foreign Affairs Minister and Minister for Foreign Trade and Development.²³ This is done because parliamentary control is mandatory on arms export requests (over) € 2,000,000 worth of military goods.²⁴ The arms export license issued is worth € 6,000,000. The considerations on the second criterion, the human rights criterion, are as follows: "*Egypt is in a turbulent democratic transition. On the human rights situation is on the one hand talk of improvements, including the installation of a civilian government after democratic elections and the completion of the constitutional process. On the other hand, concerns still remain. Areas of concern are particular instances of torture, impunity of the police crackdown on peaceful protesters, and violence and intimidation against women.*"

The goods for which an export license was granted, can by their nature, not be used in human rights violations. Additionally, the goods are delivered to the Egyptian Navy, which is not involved in established human rights violations, and they cannot be used by security forces in policing protests."²⁵

An argument that is used, is that the goods cannot be used for human rights violations. There may be sections of combat vehicles and combat helicopters exported, how can the government claim that these cannot be used for human rights violations? On this section there aren't a lot of arguments, only a single statement. Another argument is that the Egyptian Navy will receive the goods. The question is however, what guarantees that Egypt does not redistribute the goods within the country. There is a declaration of the receiving country that the Navy are the end users, if there is ill will however, there is no guarantee. It appears therefore, that the Dutch government is somewhat flexible in dealing with the criterion. Aside from that, this extra check is only done when the export permit has a worth of at least € 2.000.000,-.

Case law

The granting or denial of a license is an appealable decision, which means that an objection may be made to the administrative body that took the decision. The aforementioned report on Dutch weapons export policy does not show whether the decisions have been appealed to or not. It is to be found in any decisions resulting from a decision on an objection appeal to the Centrale Bureau van Beroep voor het bedrijfsleven.

In administrative cases there are not many cases regarding the export of weapons. In total there are six cases that are applicable to this paper. The first two cases is the same situation. A compressor would be exported to a Pakistani institute. For this compressor there would be no permit required, however the minister of Foreign Affairs decided that a license was required since the compressor could be applied as a part of a weapon of mass destruction. This was not sufficiently substantiated in the first case, but in the second case, the court ruled that the rejection of the permit should be maintained.²⁶

²³ Kamerstukken II 2012/13, 22 054, nr. 214.

²⁴ Kamerstukken II 2010/11, 22054, nr. 165.

²⁵ Kamerstukken II 2012/13, 22 054, nr. 214.

²⁶ Cbb 27 juni 2001, ECLI:NL:CBB:2001:AB3001 en Cbb 29 oktober 2003, ECLI:NL:CBB:2003:AO0900.

In the third case it was about a permit that was granted to Urenco to export Uranium to Russia. Greenpeace appealed to this permit, but it was concluded that Greenpeace did not have enough interest or privity for this case.²⁷ This means that Greenpeace cannot appeal to this permit. The content of the case is not widely discussed in the case itself, only that the interests mentioned in the statutes of Greenpeace are not directly affected by the decision.

In a case from 2005 involved the export of modification kits to India, the permit was rejected on criteria 3 and 4.²⁸ The problem in this case was that the court concluded that the permit was actually rejected on the seventh criterion, not the third or fourth. Because it is not clear on what the decision of the minister of Foreign Affairs is based, the objection is upheld.

The next case is from 2001, where there were two permits declined based on the third criterion.²⁹ This is supported by the current situation in the country. It concerned the export of military goods to Turkey, these goods can be used by the Turkish army against the Kurds in southern Turkey. The appellants carry the trust principle, saying that there already was a promise made that the permit would be issued. This was rejected because the appellants are aware of the fact that the internal situation in the country is critical, and can change every moment. The appeal was dismissed in this case.

The last case in administrative law, which falls under the tax law and therefore handled by the District Court of North Holland, concerned the question of whether a manuscript is or is not covered by basic research.³⁰ If the manuscript, which includes research on flu, is seen as fundamental research, no permit is required. In this case, the definition of basic research can be found in the Regulation of the European Union no. 428/2009 of the Council of 5 May 2009. These manuscripts do not fall under the definition. Moreover, the court decided the Regulation is aimed at preventing weapons of mass destruction including biological ones. A virus can be used as a weapon, allowing the export authorization to be required.

A different case, that is not about the license itself, but on the reputation of all permits, is from 2005.³¹ It concerned the union of the Liberal Protestant Radio Broadcaster who tried to obtain the documentation of the arms export data from 1990 to 1999. Their request was partly accepted and partly rejected. It appears that in the treatment with the court of first instance, not all the information was provided by the Minister. The court judged therefor that the union was right and a new decision had to have been made.

To conclude, the law on arms trade is that weapons may not be exported to countries where they can be used to violate human rights. In practice this criterion is used very flexible, and the government easily accepts that the exported goods will not be used to violate human rights. The case law has little to say on this subject. There are only a few known cases and they have a different subject than violation of human rights.

²⁷ Cbb 2 december 2008, ECLI:NL:CBB:2008:BG7034.

²⁸ Cbb 9 maart 2005, ECLI:NL:CBB:2005:AT3154.

²⁹ Cbb 31 januari 2001, ECLI:NL:CBB:2001:AA9865.

³⁰ RbNH 20 september 2013, ECLI:NL:RBNHO:2013:8527.

³¹ ABRvS 4 mei 2005, ECLI:NL:RVS:2005:AT5101.

Annex

Human rights violations per country.

Egypt

Prisoners are held captive for unknown period of time and in an unknown place. Prisoners are being tortured and these prisoners are not allowed to file complaints on this mistreatment.³² Police used excessive force against civilians during demonstrations, killing over 1.300 people.³³ Over 500 people sentenced to death for their political beliefs.³⁴

Saudi Arabia

There is a ban on women driving, arbitrary detention of peaceful dissidents and terror suspects, and corruption, among others. The government banned public protests in 2011, tightened press laws, and arrested scores of peaceful rights advocates and protesters.³⁵ Random arrests, unfair trials and torture are becoming more habitual.³⁶ 'Witches' are still prosecuted and sexual preferences that aren't heterosexual are punishable to death.³⁷

Colombia

Since the last few decades internal affairs in Colombia have resulted in thousands of murders, torture, abductions, disappearances, and many people driven from their homes.³⁸ Human rights defenders, trade unionists, journalists, indigenous and Afro-Colombian leaders, and IDP leaders face death threats and other abuses.³⁹

the United States of America

Unhuman treatment of prisoners.⁴⁰ Torture has a different definition in the U.S.A. than the international treaties, the U.S.A. is guilty of torture according to international law. There is police violence, race discrimination, and death sentences on non-adults and the mentally disabled.⁴¹

India

Violence against women, abuse of power by the police against demonstrators, disappearances, discrimination against Dalit's and prosecution on the base of religion.⁴² Human right violators usually have impunity, and in 2012 the rules on censorship were tightened.⁴³ Almost 15.000 people killed in police stations or prisons because of torture.⁴⁴

³² <http://www.ad.nl/ad/nl/1013/Buitenland/article/detail/3793138/2014/11/18/Regering-Egypte-schendt-grondwet.dhtml>.

³³ <https://www.hrw.org/world-report/2014/country-chapters/egypt>.

³⁴ <http://www.knack.be/nieuws/wereld/vn-massadoodstraf-egypte-schendt-internationale-mensenrechten/article-normal-135395.html>.

³⁵ <https://www.hrw.org/middle-eastn-africa/saudi-arabia>.

³⁶ <http://www.zamanvandaag.nl/nieuws/wereld/2079/mensenrechtensituatie-saoedi-arabi%C3%AB-verslechtert>.

³⁷ <http://likud.nl/2012/05/saoedi-arabie-apartheidsstaat-in-het-midden-oosten/>.

³⁸ <http://www.peacebrigades.org/country-groups/pbinderland/projectlanden/colombia/mensenrechten/>.

³⁹ <https://www.hrw.org/americas/colombia>.

⁴⁰ <https://www.amnesty.nl/mensenrechten/landen/verenigde-staten>.

⁴¹ <http://www.ncpn.nl/archief/2001/03/vs.htm>.

⁴² http://kerkinood.nl/index.php?option=com_content&view=article&id=2888:mensenrechten-in-india-steeds-meer-onder-druk&catid=42:azie&Itemid=95.

⁴³ <http://www.dalits.nl/pdf/HRW-IndiaCountrySummary2013.pdf>.

⁴⁴ <http://www.dalits.nl/111121.html>.

Indonesia

Violation of right to fair trial, death penalties for drug trafficking.⁴⁵ Thousands of people are submitted to torture, disappearances, random arrests, detentions, rape and other form of torture. And besides that there is genocide.⁴⁶ There is poor treatment of migrant and asylum-seeking children without giving them a way to challenge their detention.⁴⁷

Russia

There are anti-gay laws, there are restraints on the right to demonstrate and a lack of freedom of speech.⁴⁸ Russia is involved in the annexation of eastern Ukraine.⁴⁹ Violence, neglect, and isolation for children with disabilities in Russian orphanages.⁵⁰ Exploitation of migrant workers for the Olympic Games in Sochi.⁵¹

Turkey

There is discrimination on religion and ethnicity, use of police violence during demonstrations⁵², unfair trials, torture and lack of freedom of speech.⁵³ It is getting better but there are still disappearances and torture happening.⁵⁴

Israel

There is solitary confinement for children⁵⁵ and violence and intimidation⁵⁶, child labor⁵⁷ and abuse of Thai workers.⁵⁸ There are also violations of the right of self-determination, freedom and prohibition of discrimination.⁵⁹

China

There is violations on freedom of media, right to a fair trial, freedom of religion and property laws. There is also systematic use of detention without trial, forced confessions, torture and abuse of prisoners. Besides that, China is the world leader on death sentences.⁶⁰ Police torture of criminal suspects is being done with a 'tiger chair'.⁶¹

⁴⁵ <https://www.aivl.be/nieuws/indonesie-executies-tonen-compleet-gebrek-aan-respect-voor-mensenrechten-eerlijk-proces>.

⁴⁶ http://www.westpapua.nl/2004_01/yale.html.

⁴⁷ <https://www.hrw.org/reports/2013/06/23/barely-surviving>.

⁴⁸ http://www.europa-nu.nl/id/vhkuiga832pv/relatie_eu_rusland.

⁴⁹ <http://www.volkskrant.nl/buitenland/rusland-moet-op-matje-eu-hof-komen-om-schending-mensenrechten~a3798971/>.

⁵⁰ <https://www.hrw.org/reports/2014/09/15/abandoned-state-0>.

⁵¹ <https://www.hrw.org/reports/2013/02/06/race-bottom-0>.

⁵² <http://www.turkije-instituut.nl/detail/posts/8307>.

⁵³ <http://www.elsevier.nl/Europese-Unie/nieuws/2007/1/Turkije-recordhouder-schenden-mensenrechten-ELSEVIER109957W/>.

⁵⁴ <http://www.volkskrant.nl/dossier-archieff/amnesty-ziet-verbetering-mensenrechten-in-turkije~a488324/>.

⁵⁵ <http://nos.nl/artikel/397344-vn-israel-schendt-mensenrechten.html>.

⁵⁶ <http://www.volkskrant.nl/dossier-israelisch-palestijns-conflict/israel-respecteert-mensenrechten-niet~a3357611/>.

⁵⁷ <https://www.hrw.org/reports/2015/04/13/ripe-abuse>.

⁵⁸ <https://www.hrw.org/reports/2015/01/21/raw-deal-0>.

⁵⁹ <http://wijnblijvenhier.nl/25094/waarom-israel-zo-haar-gang-kan-gaan/>.

⁶⁰ <http://chinawebsite.jimdo.com/het-land/mensenrechten/>.

⁶¹ <https://www.hrw.org/reports/2015/05/13/tiger-chairs-and-cell-bosses-0>.