

**ATT EXPERT GROUP**

Domestic accountability  
for international arms  
transfers:  
Law, policy and practice

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Its genesis can be traced to a two-day workshop in September 2019 on *Arms Export Control and the Yemen Conflict: Taking Stock and Refining Legal Strategies*, convened by GLAN, Oxfam and Saferworld and hosted by the Amnesty International Secretariat in London. We are grateful to Hayden Fairburn of GLAN for producing a meticulous transcript of this workshop. An earlier working draft of this paper was presented at a virtual meeting of the ATT Expert Group in March 2021.

The following people supported the background research and provided comments and feedback on various sections of the draft:

Sara Del Rio, Greenpeace España

Laura Duarte, European Centre for Constitutional and Human Rights (ECCHR)

Laurence Greig, ANCILE Avocats

Hans Lammerant, Vredesactie

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Benoît Muracciole, Action Sécurité Éthique Républicaine (ASER)

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Drafts of this report have also been reviewed by:

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Maya Brehm, International Committee of the Red Cross

We are grateful to all of the above for their generosity with their time and thoughts in supporting this project; however, ultimate responsibility for the content rests solely with the authors.

We are also grateful to the German and Swiss governments for their generous financial support for the production of this paper and for their ongoing support for Saferworld's ATT Expert Group project.

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# Contents

<b>1. Introduction: Yemen-linked arms litigation</b>	<b>1</b>
<b>2. Domestic Accountability and International Law</b>	<b>4</b>
2.1 Accountability as ATT implementation	5
2.2 Accountability for direct involvement in violations	6
2.3 Domestic accountability as remedies for victims	8
<b>3. A Survey of Domestic Proceedings</b>	<b>10</b>
3.1 Netherlands	10
3.1.1 PILP-NJCM, PAX and Stop Wapenhandel v. Minister of Foreign Affairs I	11
3.1.2 PILP-NJCM, PAX and Stop Wapenhandel v. Minister of Foreign Affairs II	12
3.2 United Kingdom	14
3.2.1 CAAT first challenge 2016	14
3.2.2 CAAT second challenge 2020	17
3.3 Belgium	19
3.3.1 First administrative challenge against the Walloon Government 2017	20
3.3.2 Second administrative challenge against the Walloon Government, 2019	21
3.3.3 Third challenge against the Walloon Government, 2020	23
3.3.4 Fourth challenge against the Walloon Government, 2021	23
3.4 Italy	24
3.4.1 Criminal complaint v. UAMA and RWM Italia spa	25
3.5 France	27
3.5.1 Action Sécurité Éthique Républicaine (ASER) v. Prime Minister of France (ASER I challenge)	28
3.5.2 ASER v. Prime Minister of France (ASER II challenge)	29
3.5.3 ASER v. Prime Minister of France and French Minister of Action and Public Accounts (ASER III challenge)	30
3.5.4 Action des Chrétiens pour l'Abolition de la Torture (ACAT) v. Minister of Action and Public Customs (ACAT I challenge)	31
3.5.5 ACAT v. Minister of Action and Public Customs (ACAT II challenge)	31
3.6 Spain	32
3.6.1 Greenpeace Spain v. Minister of Industry, Commerce and Tourism	32
3.7 Canada	35
3.7.1 Turp v. Minister of Foreign Affairs I	35
3.7.2 Turp v. Minister of Foreign Affairs II	38
3.7.3 Turp v. Minister of Foreign Affairs III	39
3.8 United States	40
3.8.1 New York Center for Foreign Policy Affairs (NYCFPA) v. US Department of State and US Secretary of State	41
3.9 South Africa	42
3.9.1 Southern Africa Litigation Centre and Open Secrets v. Chairperson of the National Conventional Arms Control Committee and Minister of Defence	43
3.10 International Criminal Court (ICC)	45
<b>4. The state of domestic accountability for arms transfers</b>	<b>47</b>
<b>5. Challenging Yemen-linked arms transfers: implications for the ATT</b>	<b>51</b>
Partner profiles	54



## 1

# Introduction: Yemen-linked arms litigation

The armed conflict in Yemen – which began in September 2014 with the takeover of Sana'a by the Houthi militia and the subsequent armed intervention by a coalition led by Saudi Arabia and the United Arab Emirates (UAE) in March 2015 – has been characterised by widespread and systematic crimes against international law, including war crimes and crimes against humanity, committed by all parties to the conflict, including those in the coalition.<sup>1</sup>

Since the very early days of the conflict and the unfolding humanitarian crisis in Yemen, inter-governmental bodies and leading human rights organisations have called for an end to the arms sales that have certainly fuelled violations and likely protracted the conflict.<sup>2</sup> The United Nations (UN) Group of Eminent Experts on Yemen<sup>3</sup> has on at least three occasions, most recently in its September 2020 report, called for a cessation of all transfers of arms that could be used by parties to the conflict, particularly Saudi Arabia and the UAE, due to patterns of serious violations of international law, including *prima facie* war crimes.<sup>4</sup>

Despite this scrutiny, numerous states continue to authorise or allow the export of significant quantities of weapons, munitions and other military equipment to Saudi Arabia, the UAE and other parties to the conflict in Yemen.<sup>5</sup> From 2015 to 2018, at least 20 countries exported major conventional weapons to Saudi Arabia, while at least 17 exported such equipment to the UAE.<sup>6</sup> This data is obscured by secrecy, non-disclosure of item quantities and values, and international interdependence in

<sup>1</sup> Individual criminal responsibility for these offences has not yet been adjudicated by an international court, but the commission of such international crimes has been repeatedly alleged and suspected by states and UN bodies and experts, including: UN Human Rights Council (HRC) (2020), 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Detailed Findings of the Group of Eminent International and Regional Experts on Yemen (Yemen Detailed Findings)', A/HRC/45/CRP.7, 29 September; HRC (2019), 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Report of the Detailed Findings of the Group of Eminent Regional and International Experts on Yemen (Yemen Report of Detailed Findings)', A/HRC/42/CRP.1\*, 3 September.

<sup>2</sup> Amnesty International (2017), 'Yemen: USA, UK and France Risk Complicity in Collective Punishment of Civilians', 17 November (<https://www.amnesty.org/en/latest/news/2017/11/yemen-usa-uk-and-france-risk-complicity-in-collective-punishment-of-civilians/>); Human Rights Watch (2016), 'Yemen: Embargo Arms to Saudi Arabia', 21 March 2016 (<https://www.hrw.org/news/2016/03/21/yemen-embargo-arms-saudi-arabia>)

<sup>3</sup> The Group was established and its mandate defined by HRC Resolution 36/31, UN Doc A/HRC/RES/36/31, 29 September 2017, and subsequently renewed.

<sup>4</sup> HRC (2020), Yemen Detailed findings, *supra* note 9; cf. HRC (2019), Yemen Report of Detailed Findings, *supra* note 9, para. 59.

<sup>5</sup> These countries include Canada, China, France, Italy, the Republic of Korea, Russia, South Africa, Spain, Turkey, the UK, and the US: David E et al. (2019), 'Opinion on the International Legality of Arms Transfers to Saudi Arabia, the United Arab Emirates and Other Members of the Coalition Militarily Involved in Yemen', International Peace Information Service, 10 December (<https://ipisresearch.be/publication/opinion-legality-arms-transfers-saudi-arabia-united-arab-emirates-members-coalition-militarily-involved-yemen/>)

<sup>6</sup> Over the four calendar years from 2015 to 18, according to official figures, the UK issued standard licences for the export of military items to Saudi Arabia to the value of over £4.7 billion. There were in addition 27,407 separate deliveries of military items from the UK under open licences, for which no value data is available. According to the annual reports of BAE Systems, their sales to Saudi Arabia from 2015 to 18 were worth almost £13.5 billion.

the manufacture and supply of major conventional arms, including their parts and components.<sup>7</sup> The United States (US), the United Kingdom (UK) and France, among other countries, have also provided logistical and intelligence support to the coalition. This support has even extended to company personnel secondments to service the Royal Saudi Air Force (RSAF).<sup>8</sup> States have also provided material support to the naval blockade imposed on some of Yemen's main ports, which has played a significant part in Yemen's deadly humanitarian crisis.<sup>9</sup> The UN Group of Eminent Experts has maintained that the conflict is being perpetuated by arms transfers to its parties.<sup>10</sup>

The arms trade is regulated by international law, in particular the Arms Trade Treaty (ATT), adopted by the UN General Assembly in 2013 through Resolution 67/234B and which entered into force in 2014. The ATT presently has 110 States Parties and 31 signatories. However, in the absence of any hard-edged international regulation and accountability mechanisms to accompany the ATT or to more generally address international arms exports that constitute wrongful acts, domestic legal processes have been the primary means for enforcing states' international arms trade-related obligations. This is particularly critical for the regulation of arms sales with negative human rights or humanitarian consequences. Domestic jurisdictions are the principal means of enforcing the ATT as well as other international laws and rules that prevent or prohibit state or corporate actors from contributing to such consequences. In the Yemen context, domestic accountability processes in arms-supplying states can sometimes offer an effective remedy for victims of international humanitarian law (IHL) and international human rights law (IHRL) violations.<sup>11</sup>

Since 2016, efforts by civil society to achieve accountability for the Yemen conflict have brought about an unprecedented amount of litigation and advocacy. This reflects an increasingly coordinated policy-oriented legal platform to challenge states, primarily from the Global North, and business enterprises that help to arm bad actors, facilitate wartime atrocities and fuel protracted armed conflict. It includes administrative cases that seek the review of licensing decisions by arms-transfer regulators that permit the sale of arms to serious international law abusers. It also includes legal actions to enforce accountability for wrongful assistance that contributes to serious violations of international law by state and corporate actors. Domestic proceedings, launched across at least nine African, European and North American jurisdictions, have provided a variety of remedies grounded in both international and domestic law and standards. They have also been supported by sustained advocacy by international civil society before regional and global institutions.

This discussion paper provides a critical review and reflection on the effects of recent legal challenges to licences granted by states for the international transfer of conventional arms as a consequence of the war in Yemen. It demonstrates inherent variations in the form and scope of such challenges from one jurisdiction to another, but also the overall impact of obstacles and barriers to proper and effective review and genuine accountability for the implementation of the ATT and states' general obligations under international law. The paper provides the first dedicated survey of domestic proceedings concerning Yemen-linked arms sales in several European jurisdictions, the US, Canada and South Africa.

<sup>7</sup> David E et al. (2019), 'Opinion on the International Legality of Arms Transfers to Saudi Arabia, the United Arab Emirates and Other Members of the Coalition Militarily Involved in Yemen', International Peace Information Service, 10 December (<https://ipisresearch.be/publication/opinion-legality-arms-transfers-saudi-arabia-united-arab-emirates-members-coalition-militarily-involved-yemen/>)

<sup>8</sup> Lewis M, Templar K (2018), 'UK Personnel Supporting the Saudi Air Forces – Risk, Knowledge and Accountability,' (<https://www.mikelewisresearch.com/RSAFfinal.pdf>)

<sup>9</sup> Disclose (2019) 'Made in France: Yemen Papers', 15 April (<https://made-in-france.disclose.ngo/en/chapter/yemen-papers/>); Direction du renseignement militaire (2018), 'Principaux matériels des forces yéménites, émiriennes et saoudiennes', 25 September (<https://en.calameo.com/read/005893118a67c18db94fe?page=1>)

<sup>10</sup> UN Human Rights Council (2020), 'Report of the Group of Eminent International and Regional Experts on Yemen', 28 September, para. 25.

<sup>11</sup> See, for example, Cavallaro J, O'Neal B, Nagra R (2019), "'Day of Judgment": The Role of the US and Europe in Civilian Death, Destruction, and Trauma in Yemen', Mwatana for Human Rights, University Network for Human Rights and PAX, March 26 ([https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen-report-draft\\_3.5\\_PDF-w-cover.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen-report-draft_3.5_PDF-w-cover.pdf))

The remainder of the report is structured into three parts. Part II reviews the sources of international legal obligations that enable domestic accountability processes under international law, including the ATT. Part III provides a detailed survey of various administrative and criminal proceedings in ten jurisdictions – nine domestic and one international – that are part of an ongoing effort to challenge continuous arms sales and services to the parties to the conflict in Yemen. Part IV applies these standards to the revelations made through Yemen-linked arms litigation and critically examines the implications of these serious shortcomings with regard to domestic accountability for the implementation of the ATT. This part of the paper also considers the policy preferences that have informed international regulation of the global arms trade.

# 2

## Domestic accountability and international law

A broad array of individual and collective rights protected by international law are impacted by arms transfers. These rights are guaranteed under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and seven other principal human rights treaties as well as the optional protocols.<sup>12</sup> Each of these treaties indirectly places obligations on its State Parties not only to respect human rights by desisting from deploying arms for human rights violations, but also to protect persons within their jurisdiction from such harms caused by third parties, including business enterprises.<sup>13</sup> Additionally, both IHL and any arms embargoes imposed by the UN Security Council need to be considered.

The ATT obligations supplement and particularise these existing obligations. The ATT prohibits States Parties from authorising arms transfers that would ‘violate [a State Party’s] relevant international obligations under international agreements to which it is a Party’<sup>14</sup> or if it ‘has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.’<sup>15</sup> The ATT further requires an assessment prior to authorising exports of arms, ammunition/munitions or parts and components, in particular to assess the potential that they:

- a) would contribute to or undermine peace and security
- b) could be used to:
  - i. commit or facilitate a serious violation of international humanitarian law
  - ii. commit or facilitate a serious violation of international human rights law
  - iii. commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting state is a party; or
  - iv. commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organised crime to which the exporting state is a party.<sup>16</sup>

<sup>12</sup> A comprehensive list is available at: Office of the UN High Commissioner for Human Rights (2014), *The Core International Human Rights Treaties* (New York and Geneva: United Nations) ([https://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties\\_en.pdf](https://www.ohchr.org/Documents/Publications/CoreInternationalHumanRightsTreaties_en.pdf))

<sup>13</sup> See, for example, UN Human Rights Committee, General Comment 31, ‘The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, CCPR/C/21/Rev.1/Add.13; ‘UN Guiding Principles on Business and Human Rights’, endorsed by UN Human Rights Council Resolution 17/4 (2011), Part I, ‘the State Duty to Protect Human Rights’.

<sup>14</sup> Arms Trade Treaty (ATT), art. 6(2).

<sup>15</sup> ATT, art. 6(3).

<sup>16</sup> ATT, art. 7(1).



International legal obligations, including under IHRL and IHL, are typically implemented and enforced through domestic laws and procedures, and the ATT is no exception. Domestic accountability processes are a central form of human rights protection and a means of redressing human rights violations. Under international law, states must provide effective remedies and reparations for victims of serious human rights and IHL violations.<sup>17</sup> Where these violations constitute crimes under international law, states have an obligation to hold perpetrators criminally responsible in their domestic jurisdiction, through extradition to another State of jurisdiction, or for those States Parties to the Rome Statute, through the International Criminal Court in line with the principle of complementarity. In states that recognise corporate criminal liability, this may apply to business enterprises such as arms manufacturers, and in any jurisdiction officers and employees may be subject to criminal liability.

## 2.1 Accountability processes as ATT implementation

Domestic accountability processes are the ATT's primary enforcement function. The ATT's international institutional regime is restricted to a single organ established under Article 17 – the Conference of State Parties (CSP). The CSP's mandate under Article 17(4) is limited to facilitating state coordination and cooperation, including through the CSP Working Groups on effective treaty implementation, transparency and reporting and treaty universalisation.<sup>18</sup> State reporting obligations include an initial report on 'national laws, national control lists and other regulations and administrative measures taken to implement the treaty, and annual reports on actual or authorised exports and imports of arms over the year.' The ATT does not carry any specific mandate to assess the compliance of States Parties or to enforce the treaty in cases of transgression; Article 19 provides for disputes arising from the interpretation or application of the Treaty to be settled by means of mutual consent between the parties involved. The practice of other international institutions, including human rights bodies, toward violations by end-users arising from arms sales is also limited.<sup>19</sup> States Parties have been entrusted to implement and enforce the ATT, but without international scrutiny or oversight.

States Parties to the ATT are required to implement its provisions in good faith and to transpose them into domestic law, subjecting responsible state decision-making authorities on arms export licensing to administrative and judicial scrutiny and accountability processes.<sup>20</sup> The ATT affords States Parties considerable discretion in determining the exact form, structure and legislative foundation of their national control system. These systems are an essential part of the ATT enforcement regime and are critical to preventing and addressing breaches both of the ATT and of other international laws, such as IHL and IHRL. In the absence of an international supervisory body, the compliance of licensing decisions with international laws and standards must be subject to administrative and executive oversight and judicial review procedures in the forms provided for under each state's administrative, public and constitutional laws. This parallels the regulation of government officials' actions

<sup>17</sup> UN General Assembly (2006), 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', resolution/adopted by the General Assembly, A/RES/60/147; International Commission of Jurists (2018), 'The Right to a Remedy and to Reparation for Gross Human Rights Violations ? Practitioners' Guide no. 2' (<https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>)

<sup>18</sup> ATT, art. 17(4). See also Worster W (2005), 'The Arms Trade Treaty Regime in International Institutional Law', *University of Pennsylvania Journal of International Law*, 36 (4).

<sup>19</sup> The only ECHR case on arms sales is European Court of Human Rights, *Tugar v. Italy*, decision on admissibility of 18 October 1995. See also Office of the UN High Commissioner for Human Rights (2017), 'Impact of arms transfers on the enjoyment of human rights', UN Doc A/HRC/35/8, 3 May.

<sup>20</sup> ATT, art. 5: General implementation.

and the control of business enterprises and their officers and employees by domestic civil and criminal law.

Under international law, all persons have the right to effective remedies and reparations for serious violations of IHRL and IHL. The primary IHRL and IHL treaties must be considered together with obligations under the ATT when establishing domestic legal obligations vis-à-vis remedies. Access to remedies is first and foremost a function of the transposition of the ATT into domestic law, both for domestic acts (that license commercial dealings) and as part of a state's extraterritorial actions (with extraterritorial effects). The ATT is a preventive regime. States are required to review and assess the conduct of buyer states and end-users in line with their obligations under international law, with the presumption that the supply of arms to buyers involved in certain international law violations would contribute to such violations. The effective implementation of the ATT consists of procedural measures, including subjecting national licensing decisions to judicial oversight and administrative review, in cases where such risky arms transfers do occur and are not prevented. The possibility of mounting a challenge to arms exports at the national level within supplying states is also linked to the states' obligations to provide effective remedies for victims of arms sales-related rights violations.

## 2.2 Accountability for involvement in violations of international law

Enabling the proper reviewability of licensing decisions is essential to ensuring the implementation of several cognate bodies of international law – including IHRL, IHL and international criminal law (ICL) – which States Parties are required to interpret and apply in line with international laws and rules on state responsibility. Various aspects of these rules have been streamlined into state decision-making on arms export licensing through the specialised ATT regime. Domestic accountability is also key to the implementation by states and corporate actors of their responsibilities under international business and human rights laws and standards.<sup>21</sup>

States are required to make domestic accountability processes available and accessible in order to implement their substantive obligations, particularly to respond to violations of international law, specifically IHL and IHRL, for which they may bear direct or indirect responsibility.

States must act to ensure their own good conduct and that of persons subject to their jurisdictions, and must avoid causing or contributing to violations of international law. States are prohibited from aiding other states' wrongful acts and from treating certain wrongful acts as lawful in the context of interstate or transnational dealings, including those of businesses they support or closely regulate. These rules are codified in Articles 16 and 41, respectively, of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts.

States are obliged to criminalise, investigate and prosecute serious violations and abuses amounting to crimes against international law, including IHRL or IHL.<sup>22</sup>

<sup>21</sup> UN Guiding Principles, A/HRC/17/31; See also Schliemann C, Bryk L (2019), 'Arms trade and corporate responsibility: Liability, litigation and legislative reform', Friedrich-Ebert-Stiftung, November (<http://library.fes.de/pdf-files/iez/15850.pdf>)

<sup>22</sup> See UN Economic and Social Council (2005), 'UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity', E/CN.4/2005/102/add.1, 8 February, principle B: 'As used in these principles, the phrase "serious crimes under international law" encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalise, such as torture, enforced disappearance, extrajudicial execution, and slavery.'

Under IHRL, these violations include enforced disappearance, torture and serious ill-treatment, extrajudicial executions, rape and other forms of sexual and gender-based violence and slavery.<sup>23</sup> Under IHL and ICL, states are obligated to implement the Geneva Conventions and the Rome Statute of the International Criminal Court through domestic law. States are required to enable the investigation and prosecution of both foreign and domestic actors for engaging or assisting in alleged grave breaches of IHL, genocide, war crimes, crimes against humanity and of aggression.<sup>24</sup> Making judicial fora accessible in such matters is a way for states ‘to respect and to ensure respect’ for the Geneva Conventions under their Common Article 1 by adopting measures to prevent and ensure they do not become complicit in violations committed by end-users.<sup>25</sup>

The obligation to protect human rights applies not just within a state’s territory but extraterritorially as well.<sup>26</sup> For instance, with respect to the protection of the right to life under Article 6 of the ICCPR, the Human Rights Committee has affirmed that States Parties must take measures to avert any harmful extraterritorial impacts of their administrative actions on the right to life in a direct and reasonably foreseeable manner.<sup>27</sup> It has also stated that ‘States Parties engaged in the deployment, use, sale or purchase of existing weapons and in the study, development, acquisition or adoption of weapons, and means or methods of warfare, must always consider their impact on the right to life.’<sup>28</sup> This certainly extends to active decisions to license an arms transfer or to adopt a compromised position on the necessary effects of buyer states’ illegal actions on licensing decision-making processes. A decision by omission not to engage in the post-export control of dealings under an existing licence may also constitute a serious infraction given the privileged knowledge or position of influence of the supplying or licensing state vis-à-vis the wrongdoing state.<sup>29</sup>

States are also required to regulate corporations headquartered or located within their territory and to require that they take appropriate measures to ensure that all their business operations respect human rights. Even though states are not required to regulate all the extraterritorial activities of their nationals, their own domestic laws require them to ensure that their businesses do not assist in breaches of IHL or IHRL, or become complicit in crimes against international law. IHRL and standards governing business and human rights, most prominently the UN Guiding Principles on Business and Human Rights, set out states’ duties to protect human rights, companies’ responsibility to respect human rights, and victims’ right to access

<sup>23</sup> UN General Assembly (1984), ‘Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984’, United Nations, Treaty Series, vol. 1465, p 85, art. 4; UN General Assembly (2006), ‘International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006’, art. 4; African Union (2003), ‘Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003’ (Maputo Protocol), art. 4; United Nations (1989), ‘Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 24 May 1989’, principle 1; UN Human Rights Committee (HRC) (2004), ‘General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004’, CCPR/C/21/Rev.1/Add.13, para. 18; League of Nations (1926), ‘Convention to Suppress the Slave Trade and Slavery, 25 September 1926’, 60 LNTS 253, Registered No. 1414, arts. 2, 6–7.

<sup>24</sup> International Committee of the Red Cross (ICRC) (2005), ‘Customary IHL Study’, rule 158 ([https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule158](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158))

<sup>25</sup> See, on the measures arms supplying states are expected to adopt in order to prevent arms transfers under CA 1 in the new ICRC Commentaries to the Geneva Conventions, footnote 71 referring to Arms Trade Treaty (2013), Preamble, 5th paragraph of the ‘Principles’.

<sup>26</sup> HRC (2004), ‘General comment no. 31’, para. 10; ETO Consortium (2011), ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’ ([https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23))

<sup>27</sup> UN General Assembly (1966), ‘International Covenant on Civil and Political Rights, 16 December 1966’, United Nations, Treaty Series, vol. 999, p. 171, art. 6; HRC (2019), ‘General comment no. 36, Article 6 (Right to Life), 3 September 2019’, CCPR/C/GC/35, para. 63.

<sup>28</sup> UN General Assembly (1966), ‘International Covenant on Civil and Political Rights, 16 December 1966’, United Nations, Treaty Series, vol. 999, p. 171, art. 6; HRC (2019), ‘General comment no. 36, Article 6 (Right to Life), 3 September 2019’, CCPR/C/GC/35, para. 65.

<sup>29</sup> ETO Consortium (2011), ‘Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, particularly Principle 9.

remedies for corporate human rights abuses.<sup>30</sup> A business' domicile-country (home-state) is also required to provide judicial remedies for victims of wrongful conduct by the business,<sup>31</sup> especially if these victims are denied access to justice in the state where the harm occurred (the business' host-state). This includes removing all procedural or substantive access barriers to home-state courts, including financial and information barriers.<sup>32</sup>

## 2.3 Domestic accountability as remedy for victims

States are also obligated to provide proper domestic accountability processes in order to uphold the right to effective remedies and reparations for victims of IHL and IHRL violations.<sup>33</sup> In situations involving serious human rights violations and armed conflict (as a result of IHRL's complementary application with IHL),<sup>34</sup> victims should be allowed to bring claims in the allegedly responsible state's courts on the basis of the right to a remedy under IHRL.<sup>35</sup>

States Parties to key IHL and IHRL treaties, including the Geneva Conventions and the ICCPR, are obliged to establish domestic remedies capable of ending and redressing human rights violations. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law capture customary rules of international law that require all states to 'ensure that their domestic law is consistent with their international legal obligations by:

- a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
- b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

<sup>30</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (2017), 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017', E/C.12/GC/24, particularly paras 25 ff. and OECD (2019), OECD Due Diligence Guidance for Responsible Business Conduct OECD Publishing, <https://www.oecd.org/daf/inv/mne/duo-diligence-guidance-for-responsible-business-conduct.htm>. See, on the application of these to the defence sector, Christian Schliemann and Linde Bryk (2019), 'Arms trade and corporate responsibility: Liability, litigation and legislative reform', Friedrich-Ebert-Stiftung, November, p 19, (<http://library.fes.de/pdf-files/iez/15850.pdf>).

<sup>31</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) (2017), 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017', E/C.12/GC/24, particularly paras 38 ff.

<sup>32</sup> United Nations Human Rights Council (2011), 'Guiding Principles on Business and Human Rights', A/HRC/17/31, 21 March, commentary on Principle 26. See also ETO Consortium (2011), 'Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', principle 25: 'States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances: a) the harm or threat of harm originates or occurs on its territory; b) where the non-State actor has the nationality of the State concerned; c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned; d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory; e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.' See also De Schutter O, et al. (2012) 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly* 34, pp 1137 ff.

<sup>33</sup> International Commission of Jurists (2004), 'Legal Consequences of a Wall in the Occupied Palestinian Territory (Advisory Opinion)', 136, para. 109. See also International Commission of Jurists (2018), 'The Right to a Remedy and to Reparation for Gross Human Rights Violations? Practitioners' Guide no. 2', pp 52 ff.

<sup>34</sup> International Commission of Jurists (2004), 'Legal Consequences of a Wall in the Occupied Palestinian Territory (Advisory Opinion)', 136, para. 106. See also Evans C (2012), *The right to reparations for victims of international law in situations of armed conflict* (Cambridge: Cambridge University Press).

<sup>35</sup> UN General Assembly (1966), 'International Covenant on Civil and Political Rights, 16 December 1966', United Nations, Treaty Series, vol. 999, p. 171, articles 2(3); UN General Assembly (1984), 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984', United Nations, Treaty Series, vol. 1465, p. 85, articles 13–14; Council of Europe (1950), 'European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950', ETS 5, article 13; Organization of American States (OAS) (1969), 'American Convention on Human Rights', 22 November, article 25; African Union (1981), 'African Charter on Human and Peoples' Rights' 12 October 1986, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), articles 7(1)(a). See also: States must provide remedies also under the ICESCR: Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (art. 2, para. 1, of the Covenant), UN Doc. E/1991/23, 14 December 1990, para. 5.

- c) Making available adequate, effective, prompt and appropriate remedies, including reparation...;
- d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.<sup>36</sup>

This part of the UN Basic Principles, which were adopted by consensus of all states in the UN General Assembly, applies to *all* human rights violations, not only gross violations, as well as serious IHL violations.

The concept of ‘remedy’ has two dimensions, procedural and substantive. The procedural dimension involves the right to have access to a competent body, which may be judicial or administrative depending on the seriousness of the violation. The substantive dimension concerns the right to reparation, which includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. All remedies must be effective, that is they must be accessible, enforceable and capable of providing effective redress, including by stopping ongoing violations.<sup>37</sup>

To ensure the effectiveness of review and accountability mechanisms, states must commit to transparency and must guarantee public access to critical information.<sup>38</sup> Making information available about licences, transfers and decision-making processes is key to enabling people to challenge them, which resonates with states’ reporting and cooperation obligations under the ATT.<sup>39</sup> This extends to the measures a prospective supplying state takes in order to review and assess the conduct of buyer states and to analyse privileged information about the end use of their weapons, insofar as the state may be required to make public its reasoning for maintaining certain licences.

Transparency in decision-making processes around arms export authorisations is especially critical when arms exports result in IHL and IHRL violations. Providing access to relevant information is essential to ensuring the effectiveness of domestic remedies for victims. The UN Basic Principles and Guidelines on the Right to Remedy provide that ‘victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of [IHRL] and serious violations of [IHL] and to learn the truth in regard to these violations.’ Transparency enables the conduct of adequate and effective investigations into alleged IHL and IHRL violations connected with potentially unlawful arms exports.

<sup>36</sup> UN General Assembly (2006), ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution/adopted by the General Assembly, 21 March 2006’, A/RES/60/147.

<sup>37</sup> ‘The nature of the general legal obligation imposed on States Parties to the Covenant,’ HRC General Comment 31, paras. 15–16.

<sup>38</sup> See, for example, Open Society Justice Initiative (2013), *Global Principles on National Security and the Right to Information* (Tshwane Principles) (New York: Open Society Foundations).

<sup>39</sup> ATT arts. 13 and 15. See also in the EU, art. 8 of the Council of the European Union (2008), ‘Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment’ and the accompanying Council of the European Union (2015), User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, p 152 (<https://www.consilium.europa.eu/media/40659/st12189-en19.pdf>)

# 3

## A survey of domestic proceedings

This section explores legal practitioners' work, often in conjunction with non-governmental organisations (NGOs), to litigate and legally advocate for the review and remediation of apparently unlawful licensing decisions as per the requirements of the ATT. It also reviews the issue of accountability by state and corporate actors for their conduct in facilitating harms caused by the use of the weapons they have transferred. Since the surveyed proceedings took place within the jurisdiction of States Parties to the ATT, presumably domestic legislation must be applied in conformity with the ATT regardless of whether the proceedings make direct reference to the ATT.

Each country case study covers four aspects: a) the facts concerning the dealings and the state or corporate actors challenged; b) the domestic and international legal obligations and causes of action pursued by the claim; c) any legal procedures that the case has undergone or is projected to undergo, including any decisions issued or pending; and d) the obstacles to and limitations of the proceedings, and any other impediments faced by those who initiated the challenge. This survey is based on a review of court documents and interviews with lawyers and NGO representatives associated with each set of proceedings.

### 3.1 The Netherlands

The Netherlands' arms exports are regulated by the Strategic Goods Decree of 2008, which requires licences to respect international obligations.<sup>40</sup> Export licences are issued in accordance with the General Custom Act (Awd), which 'serve[s] the purpose of fulfilling obligations arising from' the ATT, and 'binding EU legal acts' such as the EU Common Position.<sup>41</sup> The authority responsible for arms export control policy is the Ministry of Foreign Affairs, which provides binding advice to the Customs Central

<sup>40</sup> Ministry of Justice (Netherlands) (2008), 'Decree of 24 June 2008 containing rules with regard to the import, export and transit of dual-use goods and military goods (Strategic Goods Decree)', arts 11 and 18 (<https://wetten.overheid.nl/BWBR0024139/2015-04-01>)

<sup>41</sup> Government of the Netherlands, 'Legislation, treaties and international agreements on the export of strategic goods' (<https://www.government.nl/topics/export-controls-of-strategic-goods/laws-and-rules-on-the-export-of-strategic-goods>)

Import and Export Office (CDIU)<sup>42</sup> under the Ministry of Finance, which processes export applications.<sup>43</sup>

The relevant admissibility requirements before administrative courts are set out in: Article 1.2 (3) of the General Administrative Law Act (Awb), which considers organisations that represent broad or collective interests to be interested parties;<sup>44</sup> and Article 44.1 of the Union Custom Code Regulation, which requires claimants to be ‘directly and individually’ affected by the challenged decision.<sup>45</sup>

### 3.1.1 PILP-NJCM, PAX and Stop Wapenhandel v. Minister of Foreign Affairs I

On 12 October 2015, three Dutch NGOs – The Public Interest Litigation Project (PILP), which is part of the Dutch Section of the International Commission of Jurists (NJCM), PAX and Stop Wapenhandel – filed a ‘notice of objection against the permit,’ asking the Minister of Foreign Affairs to cancel a licence for the export of military material (including radar and C3 systems and related integration technology) to the Egyptian navy.<sup>46</sup> Despite recognising that serious human rights violations were taking place in Egypt and that the country was involved in the war in Yemen, the Minister concluded that ‘there are no indications that the goods to be exported are related to the observed human rights violations or internal repression.’<sup>47</sup>

The claimants argued that the Minister had failed to apply the EU Common Position by neglecting to take into account the Egyptian Navy’s direct involvement in alleged IHL and IHRL violations related to the blockade of Yemen as well as its record of lethal attacks on refugee boats. Most of the arguments in the case revolved around the question of NGOs’ standing to challenge such decisions before an administrative court.

#### Arguments and process<sup>48</sup>

On 1 June 2016, the Minister submitted that the administrative complaint was inadmissible, arguing that the claimants were not entitled to challenge a decision concerning arms exports since they had no interests that were directly affected by the Minister’s decision. The claimants appealed the Minister’s decision on admissibility on 6 July 2016 before the District Court of Noord-Holland, submitting that they had a direct interest that was affected by the adoption of the licence under Article 1.2 (3) of the General Administrative Law Act (Awb), regarding broad or collective interests.

<sup>42</sup> Customs Administration of the Netherlands, Ministry of Finance, ‘Central Import and Export Office (CDIU) - General’ ([https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/customs/safety\\_health\\_economy\\_and\\_environment/cdiu\\_cluster/cdiu\\_general/central\\_import\\_and\\_export\\_office\\_cdiu\\_general](https://www.belastingdienst.nl/wps/wcm/connect/bldcontenten/belastingdienst/customs/safety_health_economy_and_environment/cdiu_cluster/cdiu_general/central_import_and_export_office_cdiu_general))

<sup>43</sup> Minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs (2020), Dutch Arms Export Policy in 2019, 4 September (<https://www.government.nl/documents/reports/2020/09/04/dutch-arms-export-policy-in-2019>)

<sup>44</sup> Government of the Netherlands, ‘General Administrative Law Act’ ([https://www.acm.nl/sites/default/files/old\\_publication/publicaties/15446\\_dutch-general-administrative-law-act.pdf](https://www.acm.nl/sites/default/files/old_publication/publicaties/15446_dutch-general-administrative-law-act.pdf)), art. 1.2(3): ‘“Interested party” means a person whose interest is directly affected by an order ... As regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.’

<sup>45</sup> European Parliament and Council of the European Union (2013), ‘Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code’, art. 44.1 (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0952>): ‘Any person shall have the right to appeal against any decision taken by the customs authorities relating to the application of the customs legislation which concerns him or her directly and individually.’

<sup>46</sup> Public Interest Litigation Project (2020), ‘Arms Trade and Human Rights’, 2 September (<https://pilpnjcm.nl/en/dossiers/arms-trade-and-human-rights/>). According to the Dutch administrative legal system, the government body that takes an initial decision has to consider whether to review that decision.

<sup>47</sup> Ministry of Foreign Affairs (Netherlands) (2015), ‘Afgifte vergunning voor export militair materieel naar Egypte via Frankrijk’, 1 September (<https://stopwapenhandel.org/sites/stopwapenhandel.org/files/kamerbrief-over-vergunning-export-militair-materieel-naar-egypte-via-frankrijk.pdf>)

<sup>48</sup> For a further summary of this case see Public Interest Litigation Project (2016), ‘Summary of Dutch Court ruling: Peace and human rights organisations voiceless against arms trade’ 21 September (<https://pilpnjcm.nl/wp-content/uploads/2015/01/Arms-Export-Court-ruling-and-summary-English.pdf>); judgement available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBNO%3A2016%3A7024>.

On 25 August 2016, the Court dismissed the claim, finding that the organisations could not challenge the Minister's decision to grant the export licence. The Court held that the applicable law was the Union Custom Code Regulation, which only allows for intervention by parties that are 'directly and individually' affected. The Court concluded that the claimants were not directly affected by this licence, and their claim was therefore declared inadmissible.<sup>49</sup>

On 3 October 2016, the claimants appealed this judgement before the Court of Appeal, arguing that there were grounds to sustain that the claimants met the legal standing criteria required under the Union Custom Code Regulation, and that the District Court did not substantiate its decision that the claimants could not be interested parties under EU law.<sup>50</sup>

On 24 January 2017, the Court of Appeal dismissed the appeal because the licence in question had expired in September 2016 and therefore the claim in question was moot.<sup>51</sup>

### Challenges

This case comes on the back of a 2002 decision by a civil court concerning a demand that the government stop the sale to Israel of arms used in international law violations in occupied Palestinian territory. Although the court at that time recognised that the NGOs bringing the case had standing under Article 3:305a of the Dutch Civil Code (*Burgerlijk Wetboek*), stating that 'this case concerns a decision that directly affects the interested parties in their [NGO] interest,' it dismissed the claim to stop the sales on the grounds that the legal remedy of an administrative appeal was available to the NGOs before administrative courts.<sup>52</sup>

Notwithstanding the 2002 decision, the question of the standing of NGOs in administrative proceedings remains contentious and constitutes a potential obstacle to leading civil society groups seeking to initiate such proceedings. The Dutch courts have so far not reviewed the decision to maintain licences for sales to members of the coalition on the merits.

There were also shortcomings in access to information, since the claimants were not aware that the licence had expired in September 2016 until December, which was after their appeal had been submitted.

### 3.1.2 PILP-NJCM, PAX and Stop Wapenhandel v. Minister of Foreign Affairs II

On 23 December 2016, the claimants filed a second case concerning their standing to administratively challenge the lawfulness of the Minister of Foreign Affairs' decision on 21 September 2016 to grant a licence to export arms to the Egyptian Navy – renewing the licence issued in September 2015 and expiring in September 2016 (see previous case) – on the basis that the Minister had failed to apply the EU Common Position because the Egyptian Navy was directly involved in IHL and IHRL violations in the context of the conflict in Yemen.

<sup>49</sup> For further information on the 2002 civil case see *Stop Wapenhandel* (2002), 'Netherlands to face lawsuit on arms trade with Israel', 3 May (<https://stopwapenhandel.org/actueel/persberichten/20012005/english%20stopexportlsr.html>). The decision is available in Dutch at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2002:AE3271>.

<sup>50</sup> See Gerechtshof Amsterdam (2016), 3 October (<https://pilpnjcm.nl/wp-content/uploads/2016/10/Hoger-beroep-wapenhandel-beroepschrift-PILP-1.pdf>)

<sup>51</sup> Judgement available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2017:165>.

<sup>52</sup> See <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2002:AE3271>.



## Arguments and process

As in the previous case, the claimants appealed the Minister's decision to dismiss their objection, asking the District Court to recognise that they had legal standing and to provisionally suspend the licence. As in their first claim, the claimants argued that Dutch law was applicable in this case and that organisations defending collective interests were entitled to take legal action against public authorities' decisions.

On 20 April 2017, the Court dismissed the claim, arguing that a) the applicable law was the Union Custom Code Regulation and b) the claimants had no direct interest as required by EU law.

The Court of Appeal upheld this decision on 19 October 2017, holding that 'the appellants are therefore not individually concerned by the permit they challenge and are therefore not entitled to a right of objection and appeal.'

## Challenges

More recently, the government rejected a freedom of information request made by Dutch NGOs regarding licences, indicating that it may have changed its policy on disclosure. Currently, information about sales is only available in the periodic aggregated reports the government is required to submit to Parliament. This information is not sufficient for NGOs to initiate legal proceedings against the government.

Now that the matter has been turned down by the administrative courts, a question arises as to whether it would lend itself to civil law proceedings. Dutch civil courts are considered a residual jurisdiction for matters that administrative courts cannot handle (N.B. The Netherlands does not have a constitutional court). NGOs with a mandate to act in the public interest can initiate civil proceedings against the Dutch government under Articles 6:162 and 3:305(a) of the Dutch civil code, on the grounds that a licensing decision that violates directly applicable rules of the ATT and EU Common Position is a tortious act, since international law is deemed directly applicable in the Dutch legal system and supersedes national laws, as per Articles 93 and 94 of the Dutch constitution.<sup>53</sup>

The challenge is that, as was the case in 2002, civil courts may not consider arms control issues to be within their jurisdiction, judging that they are 'political' in nature. If the civil court refers a case back to the administrative courts and the limitation period for an administrative suit has passed, the case will be deemed inadmissible.

In November 2018 the Dutch government adopted a policy of 'presumption of denial' in relation to sales linked with the Yemen conflict based on the first report of the UN Group of Eminent Experts on Yemen. This policy was applied to all arms exports to Egypt, Saudi Arabia and UAE at risk of being used in the Yemen conflict, though Egypt was exempted in July 2019.<sup>54</sup> Due to the many barriers denying access to Dutch courts to challenge arms exports, the 2018 policy has not yet been adjudicated.

<sup>53</sup> Spijkers O (2020), 'Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code', *Blog of the European Journal of International Law*, 6 March (<https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/>&sa=D&source=editors&ust=1612799157137000&usg=AOvVaw1DwFWYFgxmUh\_q4gpiMxM)

<sup>54</sup> Government of the Netherlands (2019), 'Presumption of denial for countries engaged in the Yemen conflict', 1 August (<https://www.government.nl/topics/export-controls-of-strategic-goods/documents/publications/2019/08/01/presumption-of-denial-for-countries-engaged-in-the-yemen-conflict>)

## 3.2 The United Kingdom

The UK's primary legislative instrument regulating its export of arms and military equipment is the Export Control Act of 2002. The UK Secretary of State for International Trade (hereinafter the Secretary of State) also enacted the Export Control Order of 2008, which imposes a general prohibition on the export of military goods (Article 3) with the exception of goods exported pursuant to a licence granted by the Secretary of State (Article 26). The Secretary of State also has the power to amend, suspend or revoke a licence already granted (Article 32).

The Consolidated EU and National Arms Export Licensing Criteria (Consolidated Criteria) provided a further framework for licensing decisions.<sup>55</sup> These Criteria are based on the EU Common Position of December 2008.<sup>56</sup> The EU User's Guide<sup>57</sup> subsequently developed and updated by the EU member states was an essential resource for the Criteria's proper interpretation.

### 3.2.1 CAAT's first challenge (2016)

On 9 March 2016 the Campaign Against Arms Trade (CAAT), a UK-based NGO that campaigns to end the international arms trade, formally filed a case entitled *Campaign Against Arms Trade v. Secretary of State for International Trade*. The core of the case concerned the lawfulness of the Secretary of State's decision not to suspend but rather to continue to grant licences for the export of arms and military equipment to Saudi Arabia, despite a strong body of evidence indicating that the coalition conducting military operations in Yemen has committed serious violations of international law, particularly IHL.

CAAT based its claim on public evidence from international bodies including the UN, EU institutions and reputable international NGOs, showing that Saudi Arabia had committed serious and repeated IHL violations during the conflict in Yemen. Four other NGOs – Amnesty International, Human Rights Watch, Oxfam and Rights Watch (UK) – intervened in the proceeding, filing further arguments concerning Saudi conduct and the UK's complicity.

#### Arguments and process

CAAT argued that the Secretary of State's decisions to grant licences for the export of arms to Saudi Arabia were in breach of Criterion 2(c) of the Consolidated Criteria because the Secretary of State had failed to properly take into account publicly-available evidence clearly indicating a pattern of serious IHL violations by Saudi Arabia in the conflict in Yemen. The Secretary of State's conclusion that there was no 'clear risk' of violations was therefore unlawful under UK public law.

<sup>55</sup> Statement by the UK's then-Secretary of State for Business, Innovation and Skills, Vince Cable, to Parliament, 25 March 2014 (<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140325/wmstext/140325m0001.htm#14032566000018>)

<sup>56</sup> EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, as amended by Council Decision (CFSP) 2019/1560, 16 September 2019 (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02008E0944-20190917>)

<sup>57</sup> User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, COARM 153 CFSP/PESC 683, 16 September 2019 (. Paragraphs 2.1 to 2.15 of Chapter 2 of the User's Guide address Criterion 2. Particularly relevant is paragraph 2.13, which offers guidance on the interpretation of the concept of clear risk: 'Clear risk. A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of a serious violation of international humanitarian law 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. Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. **Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.**' [Emphases added]

The claim was based on three grounds:

1. The Secretary of State had failed to ask relevant questions or make sufficient inquiries to enable a lawful risk assessment, in particular questions regarded as significant by the EU User's Guide.<sup>58</sup>
2. The Secretary had failed to apply the 'suspension mechanism,' which requires extant licences to be suspended where a proper risk assessment cannot meaningfully be conducted due to the lack of key information and evidence.<sup>59</sup>
3. The Secretary had reached an irrational conclusion that the threshold in Criterion 2(c) of the Consolidated Criteria had not been met. According to CAAT, since there was overwhelming evidence of IHL violations by Saudi Arabia, and given that the Secretary of State failed to take into account such evidence in his risk assessment or to provide a rational basis for disagreeing with the NGOs' findings, the decision-making process was wrong and the decision unlawful.<sup>60</sup>

Relying on sensitive government material reviewed in a closed proceeding (with special advocates acting on behalf of the claimants), the Secretary of State contested CAAT's claim, arguing that decision-making processes had been conducted 'at the highest levels of government and on the basis of careful assessments of relevant information.' On this basis, the Secretary of State concluded that the assessment of no clear risk of IHL violations by Saudi Arabia was rational.<sup>61</sup>

The Divisional Court accepted the Secretary of State's position and dismissed CAAT's claim on all three grounds:

1. The EU User's Guide is non-binding and so it does not oblige the Secretary of State to carry out risk assessments in a prescribed way.<sup>62</sup>
2. The Secretary of State's decision not to suspend the granting of licences was rational and lawful since he was able to assess gaps in his own knowledge, to test and assess the reliability of the UN and NGO findings against the other sources of information at his disposal and to assess Saudi Arabian investigations into individual incidents.<sup>63</sup>
3. The risk assessment was conducted by the Secretary of State with appropriate caution and on the basis of adequate and sufficient evidence (Paragraph 201 of the decision). The Court held that the Secretary of State was rationally entitled to conclude that 'there was no 'clear risk' that there might be 'serious violations' of International Humanitarian Law (in its various manifestations) such that UK arms sales to Saudi Arabia should be suspended or cancelled under Criterion 2c.'<sup>64</sup>

CAAT then appealed the Divisional Court's judgement to the Court of Appeal on four grounds:

1. The Secretary of State was fundamentally deficient in his consideration of Saudi Arabia's past and present respect for IHL, including whether a pattern of violations could be discerned.
2. The Secretary of State had failed to ask the questions identified in the EU User's Guide.
3. The Divisional Court had adopted an incorrect approach to the standard of review in the case.

<sup>58</sup> See Campaign Against Arms Trade (2016), 'Statement of Facts and Detailed Statement of Grounds', pp 43–51 (<https://caat.org.uk/wp-content/uploads/2020/09/2016-03-09-caat-v-bis-claim.pdf>)

<sup>59</sup> *Ibid*, pp 52–55.

<sup>60</sup> *Ibid*, pp. 56–61.

<sup>61</sup> See Secretary of State's Open Skeleton Argument for Hearing 7, 8, 10 February 2017, <https://caat.org.uk/wp-content/uploads/2020/09/2017-02-03.defendant-skeleton.pdf>.

<sup>62</sup> Judgement of the Divisional Court, p 192. The Court found that, although the Secretary of State did not address the questions suggested by the User's Guide, 'the evidence shows beyond question that the apparatus of the State, ministers and officials, was directed towards making the correct evaluations for the purposes of the Consolidated Criteria' (<https://caat.org.uk/wp-content/uploads/2020/09/2017-07-10.judgment.pdf>)

<sup>63</sup> *Ibid*, p 198.

<sup>64</sup> *Ibid*, p 210.

4. The Divisional Court had failed to answer whether the term ‘serious violations’ of IHL in Criterion 2(c) was synonymous with ‘grave breaches’ of the Geneva Conventions and war crimes under international law or, as CAAT submitted, referred to serious violations of IHL more generally.<sup>65</sup>

CAAT was granted permission to appeal on Grounds 1, 2 and 4 while Ground 3 was refused, with the Court of Appeal stating ‘it is not arguable that the Divisional Court misdirected itself to the nature or character of the Review it had to conduct.’<sup>66</sup> As with the lower court, the case was heard partly in open and partly in closed session.

In its judgement on 20 June 2019, the Court of Appeal dismissed CAAT’s appeal on Grounds 2 and 4. As regards Ground 2, the Court of Appeal agreed with the conclusions of the Divisional Court, noting that the User’s Guide did not require that each and every question therein be answered in every case.<sup>67</sup> With regard to Ground 4, the Court of Appeal affirmed that the Divisional Court had not misunderstood the term ‘serious violations,’ and this had not led to any error in its decision-making process.<sup>68</sup> The Court also declined to provide guidance on the meaning of ‘serious violations.’<sup>69</sup>

The Court of Appeal accepted CAAT’s position on Ground 1, namely that the Secretary of State’s consideration of Saudi Arabia’s past and present record of respect for IHL, including whether a historical pattern of violations could be discerned, was fundamentally deficient. Since open evidence clearly indicated this pattern, rationality dictated that the Secretary of State should give proper reasons for rejecting such evidence.<sup>70</sup> More precisely, CAAT’s argument on Ground 1 ‘was not that the Secretary of State had reached the wrong factual conclusion on this question. It was that, on his own evidence, he had failed to reach any conclusion (even in private); and that as a result he had failed to have regard to a centrally and obviously relevant factor. This was a classic public law error, which vitiated his decision (which the evidence showed had been ‘finely balanced’). The Divisional Court’s failure to identify this error was itself an error of approach, which this Court can and should correct.’<sup>71</sup>

The Court of Appeal accepted CAAT’s argument, concluding that the question of whether or not there was a historical pattern of breaches of IHL on the part of the coalition, and Saudi Arabia in particular, should have been considered. Even if it could not be answered in every case, ‘at least the attempt had to be made.’<sup>72</sup> According to the Court, the requirement to evaluate whether or not there had been a violation of IHL appeared to follow from the adoption of the Consolidated Criteria as the licensing framework by the Secretary of State.<sup>73</sup>

## Challenges

**Malleable decision-making criteria.** On 7 July 2020, the Secretary of State announced that she had completed a review of the UK’s licensing process as ordered by the Court of Appeal, and had determined that any violations of international law

<sup>65</sup> Judgment of the Court of Appeal, p 49, <https://caat.org.uk/wp-content/uploads/2020/09/2019-06-20.judgment.pdf>.

<sup>66</sup> Ruling of the Court of Appeal, civil division (Leave to Appeal), 4 May 2018 (<https://caat.org.uk/wp-content/uploads/2020/09/2018-05-04.appeal-permission-granted.pdf>)

<sup>67</sup> Judgment of Appeal, pp 150–153.

<sup>68</sup> *Ibid*, pp. 158–162.

<sup>69</sup> *Ibid*, p 165.

<sup>70</sup> See CAAT’s Amended Skeleton Argument in Support of Permission to Appeal, p 31 (<https://caat.org.uk/wp-content/uploads/2020/09/2018-02-06.amended-caat-skeleton.pdf>)

<sup>71</sup> *Ibid*, p 32.

<sup>72</sup> Judgment of Appeal, p 138.

<sup>73</sup> *Ibid*, p 142: ‘We cannot accept the argument... that it was in some way inappropriate for the Secretary of State to make such an assessment. That is a difficult proposition to make in the face of the Common Position, and represents something of a contradiction with the proposition that the Secretary of State was in a markedly better position to assess events than the NGOs, the UN or others’; and p. 144: ‘the most important reason for making such assessments is that, without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support and other inputs by the UK, or the effect of any high level assurances by the Saudi authorities?’

were ‘isolated incidents’ that did not amount to a ‘pattern.’<sup>74</sup> She affirmed that there was no ‘clear risk’ of serious violations of IHL,<sup>75</sup> and that the UK was therefore permitted to resume granting new licences for arms sales to Saudi Arabia.<sup>76</sup> CAAT challenged this new position by submitting a fresh claim, arguing that it was an erroneous determination of the facts that fell foul of UK law, as well as the UK’s international law obligations regarding the arms trade.

**Limited scope of judicial review.** One structural limitation of judicial review proceedings under UK public law is that UK judges are unable to substantively scrutinise the merits of the Secretary of State’s decisions. They are instead required to restrict their adjudication to the question of whether the government’s approach to any decision is unlawful on one of a number of long-established grounds of judicial review - that is, whether ‘the Secretary of State has erred as a matter of law in the approach taken to the assessment of those merits.’<sup>77</sup> The ground available to CAAT –irrationality– is an exceedingly high bar to overcome, particularly in the present context.

**Unscrutinised gaps in government evidence.** CAAT and the four intervening NGOs submitted a large body of evidence of Saudi Arabia’s past breaches of IHL.<sup>78</sup> In addition, the UK Ministry of Defence, in compiling ‘the Tracker,’ a database of known incidents giving rise to IHL concerns, was unable to identify a ‘legitimate military target’ in the majority of incidents. However, the Divisional Court found that this did not mean that there was in fact no legitimate target.<sup>79</sup>

**Limited relief.** The Court of Appeal could have used its discretion to impose a blanket order stopping all exports. However, this would have been very unusual. The actual order did not go so far: the Secretary of State was instructed not to grant new licences, but was not required to suspend or revoke existing licences. The impact of this order proved to be limited, with many transfers continuing under extant standard and open licences. The licensing process review had concluded without any substantive effect on licensing decisions.

### 3.2.2 CAAT’s second challenge (2020)

On 26 October 2020, CAAT filed a fresh judicial review claim challenging the Secretary of State’s July 2020 decision to grant new licences and not to suspend extant licences for the transfer of military equipment to Saudi Arabia based on the risk that this equipment could be used in Yemen.

#### Arguments and process

CAAT claimed that the Secretary of State had failed to conduct a proper risk assessment as required by Criterion 2 (c) of the Consolidated Criteria on four grounds:<sup>80</sup>

<sup>74</sup> Statement by the Secretary of State: ‘We have similarly looked for patterns and trends across the incidents which have been assessed as being unlikely to be breaches of IHL and those for which there is insufficient information to make an assessment. This analysis has not revealed any such patterns, trends or systemic weaknesses. It is noted, in particular, that the incidents which have been assessed to be possible violations of IHL occurred at different times, in different circumstances and for different reasons. The conclusion is that these are isolated incidents’ (<https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCVS339>)

<sup>75</sup> Ibid: ‘Having now re-taken the decisions that were the subject of judicial review on the correct legal basis, as required by the Order of the Court of Appeal of 20 June, it follows that the undertaking that my predecessor gave to the Court – that we would not grant any new licences for the export of arms or military equipment to Saudi Arabia for possible use in Yemen – falls away. The broader commitment that was given to Parliament, relating to licences for Saudi Arabia and its coalition partners, also no longer applies.’

<sup>76</sup> Statement by the Secretary of State for International Trade, 7 July 2020.

<sup>77</sup> Judgment of the Court of Appeal, p 56.

<sup>78</sup> Ibid, pp 106–113.

<sup>79</sup> Judgment of the Divisional Court, pp 183–185.

<sup>80</sup> Ibid, p 7.

1. The Secretary had failed to identify any IHL violations committed by Saudi Arabia in Yemen or to offer an appropriate basis for concluding that the number of cases was generally ‘small,’ despite public evidence establishing a compelling *prima facie* case of repeated serious IHL violations.<sup>81</sup>
2. The Secretary had reached the irrational conclusion that the identified IHL breaches were isolated incidents that did not constitute a pattern, and had failed to consider other violations including torture and enforced disappearances during ground operations as well as unlawful conduct of airstrikes, which amounted to a ‘pattern.’<sup>82</sup>
3. The Secretary had failed to account for a ‘clear risk’ of future violations irrespective of the determination that there had to date been only ‘isolated violations.’<sup>83</sup>
4. The Secretary had failed to consider the ‘seriousness’ of IHL violations and the extent of the impunity for such serious violations in Saudi Arabia. This was a ‘leapfrog’ ground of appeal carried over from CAAT I.<sup>84</sup>

On 22 January 2021, the Secretary of State responded, calling on the court to dismiss CAAT’s claim on the grounds that it was not justiciable. On 20 April 2021 CAAT was granted permission to advance its challenge to the High Court, which will establish whether the government’s decision to resume licensing arms sales was lawful, with a hearing to take place in late 2021 (at the earliest).<sup>85</sup>

On 20 April 2021 the Yemeni NGO Mwatana for Human Rights was granted permission to intervene. Mwatana’s intervention followed its detailed evidential and legal submission to the Secretary of State in August 2019, in which it pointed out what it considered to be clear patterns in the coalition’s conduct. Mwatana’s arguments were intended to assist the court by highlighting the ongoing nature of such patterns and outlining clear deficiencies in the coalition’s responses to previous incidents of concern. Mwatana’s submissions invited the court to analyse not only the extensive factual picture they provided, but also its implications for the degree to which the Secretary of State should trust information and assurances from Saudi Arabia meant to counterbalance credible evidence of civilian harm. Amnesty International and HRW also applied to intervene.

### Challenges

**Closed procedures.** The use of closed evidence remains a key challenge, along with the Secretary of State’s refusal to provide a detailed account of the new assessment. CAAT acknowledges the need for a closed session. While there will be a Special Advocate in any closed session to argue CAAT’s case, CAAT will not be privy to any of the session’s deliberations, and thus will have to prove that the risk-assessment process is inadequate without having access to all the relevant details. The Secretary of State has maintained that the classified information to which she has access trumps the information in the public domain. However, she has also admitted (in defence of her reluctance to make conclusive IHL assessments) that she does not have access to the key operational information needed to make an IHL assessment in each individual case, such as information regarding the exact target and any steps taken to verify its military value.

<sup>81</sup> Ibid, pp. 51–55.

<sup>82</sup> Ibid, pp. 56–61.

<sup>83</sup> Ibid, pp 62–63.

<sup>84</sup> These issues were addressed in the case CAAT v. Secretary of State for International Trade, where the Court of Appeal held that ‘whether there was impunity in KSA for breaches of IHL was not a relevant consideration that the Secretary of State was required to take into account’ (p 65.1) and ‘the Secretary of State had not misdirected herself as to the meaning of a ‘serious violation’ of IHL.’ (p 65.2). CAAT was granted permission to appeal to the Supreme Court on these points but agreed with the Secretary of State that it would be more appropriate for these issues to be determined on the basis of up-to-date facts and current decisions. Ibid, pp 64–66: ‘If and to the extent that any part of the Court of Appeal’s decision binds the Court in this claim, the Court will be invited to grant permission to appeal, in light of the permission to appeal previously granted by the Court of Appeal.’

<sup>85</sup> See CAAT (2021), ‘Arms sales to war in Yemen back in Court’ 22 April (<https://caat.org.uk/news/arms-sales-to-war-in-yemen-back-in-court/>)

**‘Rationality’ without evidence.** CAAT will have to show that the new assessment is ‘irrational’ without knowing which evidence the government is considering and how it is assessing its legality (given the shortcomings of the “Tracker” database, which included 516 incidents from 2015 until 4 July 2020).<sup>86</sup> Recent statements by a former government lawyer involved in decisions around arms export licensing cast serious doubt over the impartiality of processes by which information concerning serious violations is obtained and analysed in the context of such decisions.<sup>87</sup>

### 3.3 Belgium

In Belgium, responsibility for arms export control is conferred on the regional governments (Flanders, Wallonia and Brussels Capital), which have promulgated legislative measures regulating the export of arms by economic operators in their respective territories. The Belgian Federal Government, which is responsible for these devolved decision-making powers, is only directly competent with regard to international transactions involving arms and military equipment from the Belgian Defence Forces and Federal Police.<sup>88</sup>

In Wallonia, the 21 June 2012 Decree ‘on import, export, transit and transfer of civilian weapons and defence-related goods’<sup>89</sup> established an ‘Advisory Committee on Arms Export Licences’ responsible to make licensing decisions on the basis of geostrategic, ethical and economic analyses (Article 19).<sup>90</sup> Article 14 of the Walloon Decree explicitly transposes the EU Common Position into Belgian law.<sup>91</sup>

Under the Royal Decree of 12 January 1973,<sup>92</sup> the Council of State, the main Belgian administrative court, has the power to annul (Article 14) and suspend (Article 17) administrative acts and decisions. Article 17 provides two different suspension mechanisms: an ordinary procedure (Paragraph 1) and an extreme urgency procedure (Paragraph 4).

Domestic proceedings in Belgium have consisted of four administrative challenges against the Walloon Government: in 2017 (ended in 2019), 2019 (ended in 2020), 2020 (ended in 2021) and 2021 (ongoing). A fifth challenge was launched in 2020 against the Belgian customs authority; as it remains in its formative stages, it is not covered below.

<sup>86</sup> See Written Question for Ministry of Defence and related answer dated 13 July 2020, <https://questions-statements.parliament.uk/written-questions/detail/2020-07-03/68798>; Doward J (2021), ‘Lethal airstrikes in Yemen “left off” confidential UK record,’ *The Guardian*, 3 January (<https://www.theguardian.com/world/2021/jan/03/lethal-airstrikes-in-yemen-left-off-confidential-uk-record>); and Deverell J and Mulready M (2021), ‘The UK must stop arming Saudi Arabia,’ *The Spectator*, 7 January (<https://www.spectator.co.uk/article/the-uk-must-stop-arming-saudi-arabia>)

<sup>87</sup> Deverell J and Mulready M (2021), ‘The UK must stop arming Saudi Arabia,’ *The Spectator*, 7 January (<https://www.spectator.co.uk/article/the-uk-must-stop-arming-saudi-arabia>)

<sup>88</sup> For relevant national and regional legislation see Arms Trade Treaty (2016), ‘Initial report on measures undertaken to implement the Arms Trade Treaty, in accordance with article 13(1)’, January (<https://thearmstradetreaty.org/download/a31a7b65-4805-3069-9f37-cb9f2eaff4b3>)

<sup>89</sup> Service Public de Wallonie (2012), ‘Décret relatif à l’importation, à l’exportation, au transit et au transfert d’armes civiles et de produits liés à la défense’, 21 June (.)

<sup>90</sup> In its ruling No. 169/2013, the Constitutional Court annulled the words ‘and confidential for the sole attention of the Government’ contained in the first paragraph of this Article 19.

<sup>91</sup> See further relevant criteria in art 14: ‘Applications for exports are rejected on the basis of the following criteria:

- 14.2 (Criterion 2): Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law;
- 14.4 (Criterion 4): Preservation of regional peace, security and stability;
- 14.6 (Criterion 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.’

<sup>92</sup> Lois sur le Conseil d’État, Coordonnées le 12 Janvier 1973 ([https://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg\\_2.pl?language=e&fr&nm=1973011250&la=F](https://www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=e&fr&nm=1973011250&la=F))

### 3.3.1 First administrative challenge to the Walloon Government (2017)

The claimants in this case were the Belgian NGOs Ligue des Droits de l'Homme (LDH) and Coordination Nationale d'Action pour la Paix et la Démocratie (CNAPD). Amnesty International Belgium supported the case as an *amicus curiae*. The respondent was the Walloon Regional Government.

The claim argued that several licences for the export of arms to Saudi Arabia contravened applicable law due to a) the risk that Saudi Arabia would directly use such arms to commit human rights and IHL violations, especially in the context of the conflict in Yemen; and b) Saudi Arabia's overall misconduct and failure to preserve regional peace, security and stability or to effectively combat terrorism.

On 19 October 2017, following news reports that the Walloon Region had granted various licences for the export of arms to Saudi Arabia, LDH requested a copy of this decision from the Minister-President, but the response they received merely outlined general aspects of the policy on export permits and did not contain the full decision.<sup>93</sup>

On 13 November 2017, LDH and CNAPD formally requested that the Council of State urgently suspend the licences, but this claim was rejected on the basis that it had been submitted with excessive delay, 23 days after LDH and CNAPD had become aware of the licences' existence. According to the court 'the applicants did not make every effort to refer the matter to the Council of State in the shortest possible time.'<sup>94</sup>

On 18 December 2017, LDH and CNAPD started 14 different ordinary procedures asking for the suspension and the annulment of 24 licences granted on 18 October by the Walloon Government to the companies FN Herstal and CMI Defence for the export of military goods to Saudi Arabia, claiming that these were unlawful under the Walloon Decree. Eventually, as a result of these proceedings six licences were suspended and eight were annulled by the courts.

#### Arguments and process

LDH and CNAPD claimed that the Government had erred on three grounds:<sup>95</sup>

1. It had violated Articles 14(1) and 19 of the Walloon Decree, which state that the government shall grant licences for export outside the EU on the basis of a determined procedure (Article 14) in accordance with the opinion of the Advisory Committee (Article 19). The claimants argued that due to its failure to implement these articles, the Walloon Government's decision was unlawful since it had 'necessarily been adopted outside of any procedure established by the Government and without having been the subject of a consultation of the Advisory Committee on the basis of the modalities of functioning previously and validly established.'<sup>96</sup>
2. It had violated Articles 1, 2 and 10 of the EU Common Position and Articles 14(2) (Criterion 2), 14(4) (Criterion 4) and 14(6) (Criterion 6) of the Walloon Decree in its failure to provide a formal justification for its administrative acts in line with Articles 2 and 3 of the Belgian Law of 29 July 1991. The government had failed to provide any information about its assessment of Saudi Arabia's human rights record, its capacity to effectively combat terrorism or its alleged involvement in serious IHL violations in Yemen.<sup>97</sup>

<sup>93</sup> See Judgment of the Council of State n.240.901, 6 March 2018, pp 2–3 (<http://www.raadvst-consetat.be/Arrets/240000/900/240901.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=33677&Index=c%3a%5csoftware%5cdtsearch%5cindex%5cArrets%5ffr%5c&HitCount=2&hits=20+21+&1327292021111>)

<sup>94</sup> Judgement n.239.962, 24 November 2017 (<http://www.raadvst-consetat.be/Arrets/239000/900/239962.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=33145&Index=c%3a%5csoftware%5cdtsearch%5cindex%5cArrets%5ffr%5c&HitCount=2&hits=20+21+&02313120212821>)

<sup>95</sup> The claimants also claimed a violation of the EU Common Position by the government (Grounds 2 and 3), but the court held that, 'since the Common position does not constitute a directive or regulation...it does not constitute a rule of law a violation of which may be invoked before a court,' see Judgment n. 240.901, 6 March 2018, pp. 12–13.

<sup>96</sup> Judgment 240.901, 6 March 2018, p 6.

<sup>97</sup> Ibid, pp. 8–10.



3. It had violated the principles of good administration, due diligence (or as referenced in the case, ‘care and prudence’) and prohibition of abuse of power. The government had committed a manifest error of assessment in failing to meet Criteria 2, 4 and 6, given the clear risk (based on UN and NGO evidence) that arms exported to Saudi Arabia might be used for both human rights and IHL violations. The claimants pointed out that Criterion 6 required an assessment of the overall behaviour of the purchasing country irrespective of the specific arms transferred.<sup>98</sup>

On 6 March 2018, the Council of State dismissed four of the 14 claims on the basis that the contested licences had already been executed.<sup>99</sup> As regards the other 10 claims, the Court dismissed Grounds 1 and 2, but accepted Ground 3.<sup>100</sup> On Ground 1, the Court held that despite the government’s failure to follow the procedure required by the law, ‘it does not appear that this failure constitutes an irregularity that is likely to influence the direction of the decision taken.’<sup>101</sup> On Ground 2, the Court held that the lack of a formal justification could not affect the validity of the decision since the contested licences were renewals, which is ‘sufficient to implicitly but certainly refer to the reasons that led to the attribution of the original license.’<sup>102</sup>

On 29 June 2018, the Council of State suspended six export licences on the basis of Ground 3.<sup>103</sup> The Court held that the Advisory Committee, on whose confidential opinion the Government relied, had conducted a proper evaluation of the risk that peace, security and regional stability may be threatened (Criterion 4) but failed to properly assess Saudi Arabia’s attitude towards the international community, terrorism and respect for public international law (Criterion 6). The Advisory Committee (and consequently the government) failed to take into account Saudi Arabia’s past practices concerning its international commitments to the non-use of force and to respect IHRL and IHL.<sup>104</sup>

On 14 June 2019, the Court annulled, in five different decisions, eight of the licences challenged by the claimants for the same reasons set forth in the previous decisions.<sup>105</sup>

### 3.3.2 Second administrative challenge to the Walloon Government (2020)

The same parties who brought the first challenge also filed a second one, with the addition of a third Belgian NGO, Forum Voor Vredesactie (FVV). The case concerned a further tranche of licences for arms transfers to Saudi Arabia, issued in December 2019.<sup>106</sup>

On 19 February 2020, LDH, CNAPD and FVV submitted a claim before the Council of State through an extreme urgency procedure challenging ‘the decision(s) taken at an unknown date by the Minister-President of the Walloon Region to grant one or more licences for the export of arms to the Kingdom of Saudi Arabia.’<sup>107</sup>

<sup>98</sup> Judgement n.242.023 of 29 June 2018, pp 15–17, <http://www.raadvst-consetat.be/Arrets/242000/000/242023.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=34333&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=1b+1c+&1324492021111>.

<sup>99</sup> Judgements n. 240.898, 240.899, 240.902 and 240.903, 6 March 2018. See for all judgements n. 240.899, p 5 (<http://www.raadvst-consetat.be/Arrets/240000/800/240899.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=33675&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=20+21+&1350362021214>).

<sup>100</sup> Judgements n. 240.897, 240.900, 240.901, 240.904 – 240.910, 6 March 2018. See for all judgements n. 240.901, p 15.

<sup>101</sup> Judgement 240.901 of 6 March 2018, p 7.

<sup>102</sup> Ibid, pp. 14–15.

<sup>103</sup> Judgements n. 242.030, 242.029, 242.023 and 242.024, 29 June 2018.

<sup>104</sup> Judgement n. 242.023, 29 June 2018, p 20.

<sup>105</sup> Judgements n.244.800-244.804 of 14 June 2019. See for all judgements n.244.800 (<http://www.raadvst-consetat.be/Arrets/244000/800/244800.PDF#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=35924&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=18+19+&03132021112>).

<sup>106</sup> Judgement of the Council of State n. 247.259, 9 March 2020, p 3 (<http://www.raadvst-consetat.be/Arrets/247000/200/247259.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=37287&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=1a+1b+&2353252021114>).

<sup>107</sup> Ibid, p 1.

### Arguments and process

The claim challenged the lawfulness of the Walloon Government's decision to grant new licences for arms export to Saudi Arabia on the following grounds:

1. It violated several provisions of international law, namely Articles 1 and 6(2) of the ATT, Article 1 common to the four Geneva Conventions and the obligation of customary international law 'to ensure respect, in all circumstances, for humanitarian law.'
2. It failed to respect human rights by ensuring that administrative decisions are not contrary to 'elementary considerations of humanity' and do not constitute abuses of power.
3. It lacked a formal basis for the decision and committed manifest errors in conducting the risk assessment in accordance with Article 14 of the Walloon Decree.<sup>108</sup>

The core argument concerned the lack of formal justification. The claimants maintained that the government had failed to properly justify its decision, since it gave no reasons for concluding that there was no risk that the arms transferred to the Saudi National Guard would be used for human rights and IHL violations in the Yemen conflict.

On 9 March 2020, the Council of State suspended the licences as the government had not provided a valid legal basis for maintaining them. The court held that the government had failed to consider whether Criterion 2 under Article 14 of the Walloon Decree was met: 'the contested acts were not adequately assessed with regard to the clear risk that the military technology and equipment to be exported might be used to commit serious violations of international humanitarian law in Yemen.'<sup>109</sup> The government had also ignored the opinion of the Advisory Committee that this risk existed.<sup>110</sup> Accordingly, the Council of State suspended all the arms export licences challenged by the claimants.

### Challenges

A key challenge in both the first and second cases was the lack of access to information on the government's assessment of end-uses and its reasoning for deciding to maintain or grant licences, as well as the opinions of the Advisory Committee on whether licences should be issued. Important information concerning the category of military material exported remained confidential throughout the proceedings.

In the first challenge, the case was not considered 'extremely urgent' and some licences were not suspended because they had already been executed.<sup>111</sup> This decision was taken even though information about new licences was not made available on a timely basis.

The scope of both legal challenges was limited to specific decisions and cannot be extended to a broader policy on selling arms to a certain buyer. Following the suspensions and annulments by the Council of State, the Government simply adopted a new decision to grant fresh licences for exports to Saudi Arabia and argued that it was inappropriate to unilaterally suspend this aspect of relations with Saudi Arabia in the absence of a common position on the matter by the EU.<sup>112</sup>

<sup>108</sup> Ibid, p 20.

<sup>109</sup> Ibid, p 30.

<sup>110</sup> Ibid, pp 29–30.

<sup>111</sup> Judgements n. 240.898, 240.899, 240.902 and 240.903, 6 March 2018, and judgements n.242.022, 242.027, 242.028, 242.031, 242.026, 242.024, 29 June 2018.

<sup>112</sup> See Ligue des Droits Humains (2018), 'Ventes d'armes à l'Arabie saoudite: une décision immorale et irresponsable du gouvernement wallon', (<https://www.liguehdh.be/ventes-darmes-a-larabie-saoudite-une-decision-immorale-et-irresponsable-du-gouvernement-wallon/>)

### 3.3.3 Third challenge to the Walloon Government (2020)

After cancelling the previously suspended licences on 11 April 2020, the Walloon government granted two new licences on 8 July 2020 to the companies FN Herstal and CMI Defence on the basis of new opinions from the Advisory Committee. On 15 July 2020, the same NGOs who brought the previous challenges filed a new challenge against this decision before the Council of State under the ‘extreme urgency procedure.’

#### Arguments and process

The claim relied on the same grounds as the second challenge, namely violation of international law (the ATT and Article 1 common to the Geneva Conventions) and the Walloon Decree (Criteria 2, 4 and 6) and failure to justify the granting of contested licences.

On 7 August 2020, the Council of State handed down two separate judgements. The first decision suspended the licence granted to FN Herstal, finding that the Saudi National Guard’s involvement in Yemen presented a risk that the arms could end up in the hands of other parties to the conflict.<sup>113</sup> The second decision maintained the licence granted to CMI Defence, accepting the government’s position that the military goods were not destined for the Saudi National Guard but the Saudi Royal Guard, regarding which no evidence of misconduct had been presented.<sup>114</sup>

On 24 November 2020, the government withdrew the licence that was suspended by the 7 August 2020 judgement.

### 3.3.4 Fourth challenge to the Walloon Government (2021)

On 19 December 2020, following a positive opinion from the Advisory Committee, the government granted new licences to the company FN Herstal for further arms exports to the Saudi National Guard. On 20 February 2021, the same claimants as above challenged the new decision through an extreme urgent procedure.

#### Arguments and process

The claimants’ challenge relied on the same legal basis as in the previous two cases (see 3.2 and 3.3 above). On 5 March 2021 the Council of State suspended the contested licences, finding again that the government’s assessment did not adequately consider the clear risk that the military goods exported could be used for internal repression or to commit serious violations of IHL in Yemen.<sup>115</sup>

Following the judgement, on 18 March 2021 the Government withdrew the suspended licences once again and asked the Council of State to lift the suspensions of the cancelled licences. Through three different decisions (two dated 27 April 2021<sup>116</sup> and one dated 23 June 2021), the Council of State declared the proceedings closed as the contested licences had been withdrawn.

<sup>113</sup> Judgement of the Council of State n. 248.128, 7 August 2020, pp 10–14 (<http://www.raadvst-consetat.be/Arrets/248000/100/248128.pdf>)

<sup>114</sup> Judgment of the Council of State n. 248.129, 7 August 2020, pp 15–16 (<http://www.raadvst-consetat.be/Arrets/248000/100/248129.pdf>)

<sup>115</sup> Judgement of the Council of State n. 249.991, 5 March 2021, p 17 (<http://www.raadvst-consetat.be/Arrets/249000/900/249991.pdf>)

<sup>116</sup> See judgements of the Council of State n. 250.445 and n. 250.446 (<http://www.raadvst-consetat.be/Arrets/250000/400/250445.pdf> and <http://www.raadvst-consetat.be/Arrets/250000/400/250446.pdf>)

## Challenges

Transparency is a central challenge that both limits the scope of and acts as a barrier to the initiation of proceedings, as the introduction of a suspension procedure is only possible based on adequate reference to the contested administrative decision. The public comes to know about a licence – the material exported and its destination – one-and-a-half to two years after its issuance, often just before many licences expire. All cases in Belgium were started based on information made public in newspapers or in answers to parliamentary questions.

It has been revealed through the various challenges that the government considers the use of the licensed weapons in the Yemen conflict to be decisive to its denial of a licence. However, such consideration appears to be limited to violations caused by airstrikes, and it ignores violations in the context of ground operations in Yemen or as part of internal repression in Saudi Arabia. The government's risk assessments are based on the use by particular named units or end-users of certain kinds of weapons, without the need to show that Belgian material was actually used in connection with specific violations.

The claimants invoked laws regarding access to information about goods that cause environmental harm to prove an imminent risk of ongoing exports, and successfully demonstrated the urgency of the proceedings. The government went before the Constitutional Court to challenge its own information procedure, presumably as a tactic to delay the procedure until it became moot.

While the August 2020 decision suspended licences for items under military list category 1 (ML1 – small arms), the annulment procedure, which is necessary to maintain the suspension, continues. The role that civil society must play to animate these processes is arduous and is impaired by procedural barriers and informational disadvantages. However, in contrast to the lack of legal standing that NGOs face in certain jurisdictions, NGOs in Belgium have benefitted from the Constitutional Court's clarification in 2013 that NGOs' legal standing in such administrative procedures was provided for by the Belgian Constitution. The Council of State has adapted its jurisprudence accordingly.

Since there is no legal basis to challenge the totality of arms sales to a designated country, proceedings are limited to challenging individual decisions. The government has clearly adopted a strategy of withdrawing old licences and issuing new ones, particularly regarding exports destined for Canada and then onwards to Saudi Arabia, where there may be questions regarding compensation costs for non-fulfilment of contract. There is nothing to prevent the government from adopting decisions that were previously deemed illegal in relation to old licences, other than the risk of being ordered to pay legal fees.

## 3.4 Italy

Italy's export of arms and military equipment is regulated by Law n.185/1990<sup>117</sup> and Legislative Decree n.105/2012, which implemented EU Directive 2009/43/EC<sup>118</sup> and '[took] into account' the 2008 EU Common Position. The ATT is also applicable, as ratified by Law n.118/2013. An inter-ministerial advisory committee<sup>119</sup> provides

<sup>117</sup> Law n. 185/1990 ([http://www.edizioneuropee.it/LAW/HTML/43/zn7\\_03\\_017.html#\\_ART0001](http://www.edizioneuropee.it/LAW/HTML/43/zn7_03_017.html#_ART0001))

<sup>118</sup> Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

<sup>119</sup> Composed of representatives of the Ministries of Foreign Affairs, the Interior, Defence and Finance.

opinions, while the competent licensing authority within the Ministry of Foreign Affairs is the Unit for the Authorisation of Armament Materials (UAMA).<sup>120</sup>

According to Articles 1.5 and 1.6 of Law n.185/1990, the UAMA's licensing decisions should not contravene either Article 11 of the Italian Constitution, which repudiates war as a means for resolving international disputes, or Italy's international obligations to prohibit arms exports to countries that are involved in armed conflict in breach of Article 51 of the UN Charter, subject to an embargo or responsible for serious IHL violations.

### 3.4.1 Criminal complaint against UAMA and RWM Italia S.p.A.

In April 2018, the European Centre for Constitutional and Human Rights (ECCHR), Rete Italiana Pace e Disarmo and Mwatana for Human Rights jointly filed a complaint to the Public Prosecutor's Office in Rome (Procura della Repubblica del Tribunale di Roma) asking it to investigate two sets of individuals regarding their criminal liability for their role in a deadly airstrike in Yemen: a) corporate managers of RWM Italia S.p.A. (a subsidiary of the German company Rheinmetall AG), a company that manufactures arms and military equipment, and b) officials of the UAMA, the competent national authority that granted RWM Italia licences to export arms to Saudi Arabia and the UAE.

On 8 October 2016, an airstrike on the village of Deir Al-Hajari in Yemen, allegedly carried out by the coalition, resulted in the death of six civilians including four children and a pregnant woman. On 9 October 2016, a field monitor of the Yemeni NGO Mwatana for Human Rights visited the scene and found remnants of a bomb deployed during the airstrike, including a suspension lug (a device used to attach the bomb to its aircraft) that had been produced by RWM Italia.<sup>121</sup>

The complaint filed in April 2018 asked the prosecutor to investigate the defendants for offences under the following provisions of the Italian Criminal Code:

1. Complicity in multiple murders under Article 575 (voluntary murder) and Article 589 (involuntary murder).
2. Complicity in the commission of personal injury under Article 582 (voluntary) and Article 590 (involuntary)
3. Abuse of power under Article 323 (2) (only regarding the UAMA officials).

#### Arguments and process

The complainants requested the investigation of UAMA officials and RMW Italia managers for two offences:

1. Involuntary complicity (through negligence) in multiple murders and personal injuries, in addition to the 'aggravating circumstance' (article 61(3)) of their being able to 'foresee the criminal event', i.e. the use of the arms for the commission of war crimes (gross negligence, *colpa cosciente*).
2. Intentional complicity in murder and injury. The complaint also requested an investigation into alleged 'abuse of power' by UAMA officials under article 323(2) of the Italian Criminal Code.

<sup>120</sup> Autorità nazionale – UAMA (Unità per le autorizzazioni dei materiali di armamento), see <https://www.esteri.it/mae/it/ministero/struttura/uama>.

<sup>121</sup> For a summary of the case see European Center for Constitutional and Human Rights (ECCHR) (2018), 'European responsibility for war crimes in Yemen – Complicity of RWM Italia and Italian arms export authority?', April ([https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport\\_RWMItalia\\_Dec2020.pdf](https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_RWMItalia_Dec2020.pdf))

Qualification of the type of crime, in this case dependent on qualification of the subjective element (*mens rea*), is established at the discretion of the public prosecutor according to the outcomes of its investigation. The complainants' position was that the defendants had been – voluntarily or due to gross negligence – part of a chain of events that led to the airstrike that took place on 8 October 2016, in which six people died. Specifically, the UAMA officials' liability was connected to their role in granting export licences, while the RWM Italia managers' liability related to the physical delivery to Saudi Arabia of the weapons used in the airstrike.

The complainants relied, *inter alia*, on the following information:

1. RWM Italia's shareholder meeting, which showed that the company's managers had been aware of the situation in Yemen and of the risks related to arms exports.
2. Reports by UN agencies.
3. European Parliament resolutions repeatedly denouncing the serious violations of IHL committed by the coalition in Yemen.

The complaint accused the UAMA officials of abuse of power under Article 323(2) of the Italian criminal code<sup>122</sup> for unlawfully granting RWM Italia licences for the export of arms to Saudi Arabia. Such conduct violated applicable legislation, given existing evidence that the exported arms could be used in the commission of IHL and IHRL violations by Saudi Arabia in Yemen. Such unlawful licensing provided an unjust financial benefit to RWM Italia while causing unfair damages to others.

In October 2019, the prosecutor requested dismissal of the case, arguing that its investigation indicated no serious factual and legal grounds for proceeding.<sup>123</sup> The prosecutor found that the mental element for abuse of power had not been met since UAMA conducted a proper risk assessment before granting the export licence in question, and that there was no proof of any agreement to commit a crime by the public officials involved in the licensing decision. The UAMA officials, therefore, could not have reasonably foreseen that the arms would be used to commit crimes. The prosecutor further noted that to not grant the licence would have been against the public interest, as it would have caused serious damage to the national economy. The prosecutor did not review or give reasons for its dismissal of the murder and personal injury charges.

Despite this dismissal, the prosecutor confirmed that its investigation showed that the suspension lug used in the October 2016 airstrike in Yemen belonged to a batch manufactured by RWM Italia and shipped to Saudi Arabia and the UAE between 9 April and 15 November 2015, after the coalition had begun its military operations in Yemen.

The complainants appealed this decision to the Judge of Preliminary Investigations (*Giudice per le Indagini Preliminari* – GIP). They argued that the prosecutor had reached the wrong conclusion by failing to consider the murder and personal injury charges, and had failed to properly review the lawfulness of the licensing procedure. The prosecutor had focused on only one licence when considering the charge of abuse of power, despite an investigation conducted by the Italian police that revealed flaws in the licensing proceedings for several other licences granted between March 2015 and December 2018.

<sup>122</sup> Art 323: 'a public official or a person in charge of a public service who, in the exercise of his functions or service, **in violation of specific rules of conduct expressly provided by the law** or by acts having the force of law and from which there is no margin of discretion, or by omitting to abstain in the presence of his/her own interest or that of a close relative or in the other prescribed cases, intentionally **procures for himself/herself or others an unjust financial advantage or causes others unjust damage**, shall be punished with imprisonment from one to four years.' [Emphases added]

<sup>123</sup> ECCHR (2019), 'The case against UAMA and RWM Italia is not about negligence, it's about Italy's role in deadly Saudi/UAE-led-Coalition airstrike', 8 October (<https://www.ecchr.eu/en/press-release/the-case-against-uama-and-rwm-italia-is-not-about-negligence-its-about-italys-role-in-deadly-saudiuae-led-coalition-airstrike/>)

On 22 February 2021 the GIP ordered the prosecutor in Rome to continue with the investigation and to name the UAMA officials and RWM Italia managers under investigation, in order to allow them to exercise their rights as defendants. The judge further ordered the prosecutor to conduct specific investigative acts. The GIP rejected the need for a common criminal accord among the officials involved in the licensing process and held that UAMA officials could independently decide whether or not to grant a licence as the opinions of other offices were not binding. The decision clarified that the ATT and the EU Common Position were directly applicable and that Italian law on arms transfers should be interpreted in accordance with these along with Italy's relevant international obligations.

### Challenges

Abuse of power is a high threshold that requires the complainant to show that a public official acted in violation of a rule 'that leaves no margin of discretion.'

UAMA's decisions had not previously been challenged before administrative courts, but this remains an option that could overcome the high threshold of culpability under criminal law. Criminal proceedings so far have provided access to certain documents that were not previously available through freedom of information requests, including those on licensing decision-making processes and risk assessments carried out by the government that could be used in such challenges. The GIP decision on 22 February 2021 requiring the prosecutor to continue its investigation may further expand access to information, as it included an instruction to produce additional licences granted and denied for exports to Saudi Arabia and UAE during the relevant time period.

## 3.5 France

Under the French Code of Defence,<sup>124</sup> all exports of military goods are subject to a licence granted by the Prime Minister on the basis of a recommendation provided by the Commission Interministérielle pour l'exportation des Matériels de Guerre (Inter-Ministerial Commission for the Study of War Material Exports – CIEEMG).<sup>125</sup> Based on advice from the CIEEMG,<sup>126</sup> the Prime Minister can suspend, amend and revoke licences.<sup>127</sup> The Code of Defence does not explicitly incorporate the ATT or the EU Common Position, nor does it clarify whether they can be invoked in court.

Licensing decisions can be challenged under the French Code of Administrative Justice, particularly under Article L.521-1 on interim relief or suspension of a decision for urgent reasons<sup>128</sup> and Article L.521-2 on the protection of fundamental freedoms infringed by an administrative decision.<sup>129</sup>

<sup>124</sup> In particular, Title III of Book III of the second legislative section and Title III of Book III of the second regulatory section ([https://www.legifrance.gouv.fr/codes/texte\\_lc/LEGITEXT000006071307](https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071307))

<sup>125</sup> Ibid, see art. L2335-2, L 2335-3 and R2335-11.

<sup>126</sup> Ibid, art. R2335-15.

<sup>127</sup> Ibid, art. L2335-4: 'L'autorité administrative peut à tout moment, dans les conditions fixées par un décret en Conseil d'Etat, suspendre, modifier, abroger ou retirer les licences d'exportation qu'elle a délivrées, pour des raisons de respect des engagements internationaux de la France, de protection des intérêts essentiels de sécurité, d'ordre public ou de sécurité publique ou pour non-respect des conditions spécifiées dans la licence.'

<sup>128</sup> Code of administrative justice, art L.521-1: 'Quand une décision administrative, même de rejet, fait l'objet d'une requête en annulation ou en réformation, le juge des référés, saisi d'une demande en ce sens, peut ordonner la suspension de l'exécution de cette décision, ou de certains de ses effets, lorsque l'urgence le justifie et qu'il est fait état d'un moyen propre à créer, en l'état de l'instruction, un doute sérieux quant à la légalité de la décision.'

<sup>129</sup> Ibid, art. L.521-2: 'Saisi d'une demande en ce sens justifiée par l'urgence, le juge des référés peut ordonner toutes mesures nécessaires à la sauvegarde d'une liberté fondamentale à laquelle une personne morale de droit public ou un organisme de droit privé chargé de la gestion d'un service public aurait porté, dans l'exercice d'un de ses pouvoirs, une atteinte grave et manifestement illégale. Le juge des référés se prononce dans un délai de quarante-huit heures.'

<sup>130</sup> 'Demande de suspension des licences d'exportation de matériels de guerre et matériels assimilés à destination des pays membres de la coalition menée par l'Arabie saoudite et impliqués dans la guerre au Yémen', Letter, 1 March 2018 ([https://aser-asso.org/wp-content/uploads/2018/03/Demande-de-suspension\\_ASER\\_01-mars-2018.pdf](https://aser-asso.org/wp-content/uploads/2018/03/Demande-de-suspension_ASER_01-mars-2018.pdf))

### 3.5.1 Action Sécurité Éthique Républicaine (ASER) v. Prime Minister of France (ASER I challenge)

On 1 March 2018, the French NGO Action Sécurité Éthique Républicaine (ASER) requested that the Prime Minister formally suspend all licences for the export of arms and military goods to countries involved in the conflict in Yemen.<sup>130</sup> ASER based its claim on these licences' violation of Article 6 of the ATT, based on a large body of evidence indicating serious IHL and IHRL violations by the coalition in Yemen and on public information concerning export from France since 2014 of arms and military goods to countries in the coalition.<sup>131</sup>

On 7 May 2018, absent a reply from the Prime Minister, ASER submitted a claim before the Administrative Court of Paris challenging the lawfulness of the implicit decision not to suspend the arms export licences. ASER asked the court to order the Prime Minister to disclose and communicate all information concerning the licences and the decision-making processes that led to their adoption, and to render null and void those decisions and order the Prime Minister to suspend the licences.<sup>132</sup>

#### Arguments and process

The claimant challenged the Prime Minister's implicit refusal to suspend the arms export licences on the following grounds:<sup>133</sup>

1. Procedural rules governing the licencing process had been violated. The claimant argued that the contested licences were unlawful as they had been issued without prior consultation with the CIEEMG, and it could not be established that they had been issued by a competent authority in accordance with the prescribed procedure.<sup>134</sup>
2. The licences were in violation of Article L.2335-4 of the Code of Defence, which requires the Prime Minister to suspend export licences if they breach France's international commitments, including treaty obligations and public policy positions.<sup>135</sup> The claimant argued that the Prime Minister had knowledge at the time of authorisation that the arms or items would be used to commit war crimes as defined by international treaties to which France is party, and that he had committed a manifest error in violation of Articles 6.3 and 7.7 of the ATT and Articles 1 and 2 of the EU Common Position.
3. The Prime Minister had violated Article L. 243-2 of the 'code of relations between the public and the administration,' according to which the administration is obliged to annul an 'unlawful or irrelevant regulatory act (*acte réglementaire illégal ou dépourvu d'objet*).'<sup>136</sup>

The respondent replied on 23 November 2018, contesting all the above grounds and arguing that the Administrative Court did not have jurisdiction because the contested measure constituted an *acte de government*, which was not justiciable, and also that

<sup>131</sup> Ibid, Annex (<https://aser-asso.org/wp-content/uploads/2018/03/Annexe-1-demande-de-suspension-transfert-darmes-du-gouvernement-fran%C3%A7ais-vers-la-coalition-des-pays-en-guerre-au-Yemen.pdf>)

<sup>132</sup> ASER (2018), 'Requête Sommaire', 7 May (<https://aser-asso.org/wp-content/uploads/2018/07/Saisine-Tribunal-Administratif-transfert-darmes-du-gouvernement-fran%C3%A7ais-vers-la-coalition-des-pays-en-guerre-au-Yemen-ASER-07-Mai-2018.pdf>)

<sup>133</sup> Ibid, pp. 4–6.

<sup>134</sup> Under art. R2335-11 and R2335-15 of the Code of Defence, before granting, suspending or revoking an export licence the Prime Minister must be advised by the 'interministerial commission for the study of war material exports,' established by decree n° 55-965 of 16 July 1955 and composed by representatives of the Ministers of Foreign Affairs, Defence, and Economy and Finance.

<sup>135</sup> Code of Defence, art. L2335-4: 'The administrative authority may at any time, under the conditions set by a decree in Council of State, suspend, modify, revoke or withdraw the export licenses it has issued, for reasons of compliance with France's international commitments, protection of the basic interests of security, public order or public safety, or for failure to comply with the conditions specified in the licence.'

<sup>136</sup> Code des relations entre le public et l'administration, art. L. 243-2: 'L'administration est tenue d'abroger expressément un acte réglementaire illégal ou dépourvu d'objet, que cette situation existe depuis son édicition ou qu'elle résulte de circonstances de droit ou de fait postérieures, sauf à ce que l'illégalité ait cessé.'



the grounds underlying the legal challenge were unfounded.<sup>137</sup> On 25 January 2019 the claimant replied, maintaining that the contested decision fell within the court's jurisdiction.<sup>138</sup>

In a judgement dated 8 July 2019,<sup>139</sup> the court recognised its own jurisdiction, ruling that the Prime Minister's decision was an administrative decision detachable from France's political conduct in foreign policy and therefore subject to judicial review.<sup>140</sup> However, it proceeded to dismiss the claim on all three grounds, arguing in particular that the ATT and the EU Common Position govern interstate relations and do not have direct effect in domestic law, nor do they give individuals justiciable rights, 'either directly or in support of an action alleging failure to comply with Article L. 2335-4 of the Defence Code.'<sup>141</sup>

On 8 September 2019, the claimant appealed the judgement before the Court of Appeal of Paris, arguing that the Administrative Court had erred in concluding that the provisions contained within the ATT and the EU Common Position did not amount to 'international commitments' under Article L.2335-4 of the Code of Defence.<sup>142</sup>

On 26 September 2019, the Court found that it had no jurisdiction over the Prime Minister's decision and dismissed the appeal by order without a contentious hearing between the parties. The Court held that the contested licensing decision had to be considered an *acte de government*, which has an intrinsically political nature and is not detachable from French foreign policy, on which the Court cannot exercise any scrutiny.<sup>143</sup>

On 19 November 2019, the claimant appealed this decision to the Council of State, where it is still pending.<sup>144</sup> Several NGOs, including Action des Chrétiens pour l'Abolition de la Torture (ACAT), Action contre la Faim, Médecins du Monde, Salam4Yemen and the strategic litigation NGO Association Sherpa have supported the case through third-party interventions.

## Challenges

The breadth of the challenge against the Prime Minister's decisions resulted in the French courts' dismissal of the case concerning a 'political question.' After the case was dismissed, the courts did not consider either the claimant's request to receive the licences or for the court to refer the claimant's questions concerning EU law to the Court of Justice of the European Union.

### 3.5.2 ASER v. Prime Minister of France (ASER II challenge)

On 7 May 2019, ASER submitted a second claim before the Administrative Court of Paris against the Prime Minister's implicit refusal to suspend licences for the export of

<sup>137</sup> See ASER (2018), 'Mémoire En Réplique', 25 January, p 4 (<https://aser-asso.org/wp-content/uploads/2019/03/Memoire-en-replique-Tribunal-administratif-transfert-darmes-du-gouvernement-fran%C3%A7ais-vers-la-coalition-des-pays-en-guerre-au-Yemen-ASER-25-janvier-2019.pdf>)

<sup>138</sup> Ibid.

<sup>139</sup> Arrêt n° 1807203 Tribunal administratif Paris, 8 July 2019 (<https://aser-asso.org/wp-content/uploads/2019/07/Arr%C3%AAt-n%C2%B0-1807203-Tribunal-administratif-Paris-mardi-9-juin-2019.pdf>)

<sup>140</sup> Ibid., p. 4. 'La décision par laquelle le Premier ministre refuse de suspendre une licence d'exportation d'armes pour l'un des motifs prévus à l'article L. 2335-4 du code de la défense revêt le caractère d'une décision administrative détachable de la conduite des relations diplomatiques de la France, qui est susceptible de faire l'objet d'un recours pour excès de pouvoir. Par suite, contrairement à ce que soutient la secrétaire générale de la défense et de la sécurité nationale, la juridiction administrative est compétente pour connaître de la requête de l'association « Action sécurité éthique républicaines.'

<sup>141</sup> Ibid, p 8.

<sup>142</sup> ASER (2019), 'Requête et Mémoire d'Appel', 8 September, pp 10–22 ([https://aser-asso.org/wp-content/uploads/2019/09/Requ%C3%AAt-e-et-m%C3%A9moire-dappel\\_Cour-administrative-de-Paris-ASER-08-septembre-2019.pdf](https://aser-asso.org/wp-content/uploads/2019/09/Requ%C3%AAt-e-et-m%C3%A9moire-dappel_Cour-administrative-de-Paris-ASER-08-septembre-2019.pdf))

<sup>143</sup> Ordonnance n°19PA02929 Cour administrative d'appel, 26 September 2019 (<https://aser-asso.org/wp-content/uploads/2019/11/Ordonnance-n%C2%B019PA02929-Cour-administrative-dappel-26-septembre-2019.pdf>)

<sup>144</sup> ASER (2019), 'Requête Sommaire', 19 November (<https://aser-asso.org/wp-content/uploads/2019/11/Requ%C3%AAt-sommaire-Conseil-dEtat-ASER19-novembre-2019.pdf>)

arms to members of the coalition.<sup>145</sup> The claimant relied on the same grounds raised in the first case but requested that the case be considered through the urgency procedure (Article L.521-1 of the Code of Administrative Justice) based on new evidence indicating that a contract had been signed in December 2018 between the French arms company NEXTER and Saudi Arabia for the delivery of military material to the latter in 2019,<sup>146</sup> and a shipment of French arms was to depart to Saudi Arabia from the port of Le Havre on 9 May 2019 on the Saudi-flagged cargo ship ‘Bahri Yanbu.’<sup>147</sup>

The claimant relied on Article L521-1 of the Code of Administrative Justice, which states that the ‘interim relief judge’ may order an application to annul or modify a decision if the conditions of urgency prescribed under Article L.521-1 of the Code of Administrative Justice are met.<sup>148</sup>

On 13 May 2019, the Court dismissed the claim, arguing that there was no urgency because the shipment scheduled for 9 May 2019 had been cancelled. ASER’s request to annul the export licences remains pending.<sup>149</sup>

### 3.5.3 ASER v. Prime Minister of France and French Minister of Action and Public Accounts (ASER III challenge)

On 5 February 2020, ASER submitted a third claim, requesting that the Administrative Court of Paris urgently cancel customs permits obtained by the Saudi cargo ship ‘Bahri Yanbu,’ which was transporting French arms to Saudi Arabia and was expected to arrive at the port of Cherbourg on 6 February 2020.<sup>150</sup> The claim concerned the granting of customs permits for the transit of a specific cargo ship from a French port.<sup>151</sup>

The claimant relied on Article L.521-2 of the Code of Administrative Justice to request urgent measures to protect a fundamental freedom from being infringed upon by an administrative decision. The claimant argued that there was a clear link between the authorisation of the export of war materiel to Saudi Arabia and serious violations of civilians’ rights to life and to freedom from inhuman and degrading treatment. The claimant characterised the emergency as a need to intervene within a window of a few hours, before the ship departed for Saudi Arabia.<sup>152</sup>

On 7 February 2020, the court dismissed ASER’s urgent request.<sup>153</sup> It recognised that the right to life and protection against inhuman and degrading treatment and punishment (under Articles 2 and 3 of the European Convention on Human Rights) constituted fundamental freedoms under Article L. 521-2 of the Code of Administrative Justice (p. 3), but found that the claimant had failed to provide sufficiently precise and detailed information about how customs authorisations were to be implemented and how such implementation would infringe upon these rights.

<sup>145</sup> ASER (2019), ‘Requête et Mémoire d’Appel’, 9 May (<https://aser-asso.org/wp-content/uploads/2019/05/Requ%C3%AAte-et-m%C3%A9moire-R%C3%A9f%C3%A9r%C3%A9-Suspension-Tribunal-administratif-ASER-07-mai-2019.pdf>)

<sup>146</sup> The claimant referred to research published in April 2019 by the investigative media outlet *Disclose* (2019), ‘Itinéraire d’une livraison secrète’, 15 April (<https://made-in-france.disclose.ngo/fr/chapter/the-route-of-a-secret-shipment/>)

<sup>147</sup> The claimant referred to *Le Monde* (2019), ‘Guerre au Yémen: la France confirme un “chargement d’armes” sur un cargo saoudien’, 8 May ([https://www.lemonde.fr/international/article/2019/05/08/guerre-au-yemen-la-france-confirme-un-chargeement-d-armes-sur-un-cargo-saoudien\\_5459649\\_3210.html](https://www.lemonde.fr/international/article/2019/05/08/guerre-au-yemen-la-france-confirme-un-chargeement-d-armes-sur-un-cargo-saoudien_5459649_3210.html))

<sup>148</sup> Code of administrative justice, art L.521-1: ‘Quand une décision administrative, même de rejet, fait l’objet d’une requête en annulation ou en réformation, le juge des référés, saisi d’une demande en ce sens, peut ordonner la suspension de l’exécution de cette décision, ou de certains de ses effets, lorsque l’urgence le justifie et qu’il est fait état d’un moyen propre à créer, en l’état de l’instruction, un doute sérieux quant à la légalité de la décision.’

<sup>149</sup> Ordonnance n° 1909737 Tribunal administratif Paris, 13 May 2019 (<https://aser-asso.org/wp-content/uploads/2020/02/Ordonnance-n%C2%B0-1909737-Tribunal-administratif-Paris-13-mai-2019-.pdf>)

<sup>150</sup> ASER (2020), ‘Requête et Mémoire’, 5 February (<https://aser-asso.org/wp-content/uploads/2020/02/Requ%C3%AAte-et-m%C3%A9moire-R%C3%A9f%C3%A9r%C3%A9-Libert%C3%A9-Tribunal-administratif-ASER-05-f%C3%A9vrier-2020.pdf>)

<sup>151</sup> The competent authority to issue such permits is the Minister of Action and Public Accounts (Ministre de l’Action et des Comptes Publics), following the approval of the Prime Minister.

<sup>152</sup> *Ibid*, pp 17–22.

<sup>153</sup> Arrêt n°2002311 Tribunal administratif Paris, 7 February 2020 (<https://aser-asso.org/wp-content/uploads/2020/02/Arr%C3%AAt-n%C2%B02002311-Tribunal-administratif-Paris-07-fevrier-2020.pdf>)

The Court concluded that ‘Under these conditions, even though there is a link between such authorisations and the suffering of the Yemeni population, the conditions likely to characterise an emergency situation of such a nature as to justify the use of the specific powers ... by Article L. 521-2 of the Code of Administrative Justice are not met. As a result, the application is manifestly unfounded.’<sup>154</sup>

### 3.5.4 Action des Chrétiens pour l’Abolition de la Torture (ACAT) v. Minister of Action and Public Customs (ACAT I challenge)

On 9 May 2019, ACAT asked the Administrative Court of Paris to cancel the customs permits authorising the transit and the exit from France of the Saudi cargo vessel ‘Bahri Yanbu,’ which was transporting French arms to Saudi Arabia from the port of Le Havre on the same day.<sup>155</sup> ACAT relied on Article L.521-2 of the Code of Administrative Justice, arguing that the customs permits had to be cancelled as a matter of urgency in order to protect Yemen’s civilian population.

On 9 May 2019, the court dismissed the claim, denying that the contested permits could ‘directly and instantly’ affect the fundamental rights of persons in Yemen: ‘Assuming that the Caesar guns that would be loading in the port du Havre on a cargo ship bound for Saudi Arabia are likely to be used in areas of Yemen where there are civilian populations, the customs clearance authorisation for these weapons does not create a marked and imminent danger to the lives of people. In which case this authorisation does not result in a seriously and manifestly illegal interference with liberty or the fundamental principle of the right to respect for life in conditions liable to constitute a particular emergency that justifies the use of powers that the judge derives from Article L. 521-2 of the Code of Administrative Justice.’<sup>156</sup>

### 3.5.5 ACAT v. Minister of Action and Public Customs (ACAT II challenge)

On 28 May 2019, ACAT submitted a second claim pursuant to Article L.521-2 of the code of administrative justice. This claim asked the Administrative Court to cancel the customs permits that would allow the cargo ship ‘Bahri Tabuk,’ allegedly transporting French arms to Jeddah in Saudi Arabia, to transit from the French port of Fos-sur-Mer on 28 May 2019. The claimant argued that this was necessary to protect the rights to life and freedom against inhuman treatment of the civilian population. This identical claim was also dismissed on 29 May 2019, under the same reasoning put forward by the previous court, namely that ‘the customs clearance authorisation for these weapons does not create a marked and imminent danger to the lives of people.’<sup>157</sup>

<sup>154</sup> Ibid, p 4.

<sup>155</sup> This is the same episode to which ASER referred in its second challenge, when it asked for the urgent suspension of arms export licences to Saudi Arabia pursuant to art. L521-2 of the code of administrative justice, in light of the imminent shipment of arms to Saudi Arabia.

<sup>156</sup> Unofficial translation of the third claim, also based on art. L521-2. ASER referred to such decision. See ASER (2020), ‘Requête et Mémoire’ (III challenge), 5 February, p 18: ‘En admettant que les canons Caesar qui seraient en cours de chargement dans le port du Havre sur un cargo à destination de l’Arabie saoudite soient susceptibles d’être utilisés dans des zones du Yémen où se trouvent des populations civiles, l’autorisation de sortie douanière de ces armements ne crée par un danger caractérisé et imminent pour la vie des personnes. Dès lors, cette autorisation ne porte par une atteinte grave et manifestement illégale à la liberté fondamentale que constitue le droit au respect de la vie dans des conditions susceptibles de constituer une situation d’urgence particulière et de nature, en conséquence, à justifier l’usage des pouvoirs que le juge des référés tient de l’article L.521-2 du code de justice administrative. La requête est ainsi manifestement mal fondée.’

<sup>157</sup> Ordonnance n° 1911393/9 Tribunal administratif de Paris, 29 May 2019.

## 3.6 Spain

Spain's main legal authority regulating the export of arms and military equipment is Law 53/2007,<sup>158</sup> which establishes that all transfer operations shall be subject to governmental authorisation and issued by the Ministry of Industry, Commerce and Tourism (Articles 4 and 6). The Junta Interministerial Reguladora del Comercio Exterior de Material de Defensa y de Doble Uso (JIMDDU), an inter-ministerial body composed of representatives of the Ministries of Industry, Tourism and Trade, Foreign Affairs and Cooperation, Defence, Economy and Finance and the Interior (Article 13) provides opinions on licensing.<sup>159</sup>

Royal Decree 679/2014<sup>160</sup> provides *inter alia* that arms licences shall not be granted if they contravene either the ATT (ratified by Spain in 2014) or the EU Common Position.<sup>161</sup> Royal Decree 494/2020<sup>162</sup> introduced a special procedure according to which the JIMDDU can choose to carry out ex-post controls on the basis of documentation provided by the buyer country.

There are several relevant pieces of Spanish legislation on access to government information. Law 19/2013 of 9 December 2013 'on transparency, access to public information and good governance' addresses the right to access information under Article 105.b) of the Spanish Constitution. Law 9/1968 of 5 April 1968 on Official Secrets (LSO) addresses classified information (articles 2 and 4) including JIMDDU minutes on arms export licensing (Agreement of 18 March 1987 adopted by the Council of Ministers).

The legal instrument governing administrative disputes is Law 29/1998, which provides two types of procedure for challenging administrative decisions and acts: an ordinary procedure, regulated in Articles 43 to 77, and a special procedure for the protection of fundamental rights, regulated by Articles 114 to 122.<sup>163</sup>

### 3.6.1 Greenpeace Spain v. Minister of Industry, Commerce and Tourism

On 24 November 2020, Greenpeace submitted a complaint against the Minister of Industry, Commerce and Tourism before an Administrative Court through the 'special procedure for the protection of fundamental rights' regulated by Articles 114 and following of Law 29/1998. The complaint challenged the lawfulness of the Minister's decision to reject Greenpeace's request for access to governmental documents relating to licences granted by the JIMDDU for the export of arms to Saudi Arabia. Alakran 120 mm mortar carrier systems, manufactured by the Spanish company New Technologies Global Systems (NTGS) and transferred in 2017 and 2018 based on a 2016 contract

<sup>158</sup> Ley 53/2007, 28 December 2007, sobre el control del comercio exterior de material de defensa y de doble uso (<https://www.boe.es/buscar/act.php?id=BOE-A-2007-22437>)

<sup>159</sup> Ibid, p 13. 'Junta Interministerial Reguladora del Comercio Exterior de Material de Defensa y de Doble Uso.'

<sup>160</sup> Available at [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-8926](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-8926).

<sup>161</sup> Ibid, art. 7.1, letters c) and d).

<sup>162</sup> Available at [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2020-4708](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-4708), '11. La JIMDDU podrá establecer, de manera excepcional, mecanismos de verificación, seguimiento y colaboración respecto de la mercancía exportada en determinadas operaciones con la colaboración del gobierno del país importador, para lo cual deberá iniciar un expediente en el que se definirán todos los términos de la verificación. En estos casos, el documento de control que se requerirá será el certificado de último destino de control ex post que incluye una cláusula de verificación en destino, y que será emitido por la autoridad competente del país destinatario del producto. Los gastos derivados de la aplicación de este mecanismo serán financiados con cargo a las disponibilidades presupuestarias de cada Departamento interviniente.'

<sup>163</sup> Ley 29/1998, 13 July 1998, reguladora de la Jurisdicción Contencioso-administrativa (<https://www.boe.es/buscar/act.php?id=BOE-A-1998-16718>)

with Saudi Arabia for the purchase of more than 100 ‘mortar carrier systems,’ were being used by Saudi Arabia in the conflict in Yemen.<sup>164</sup>

On 20 August 2020, Greenpeace requested ‘a copy of the administrative file or files referring to the authorisations or licences granted, as well as renewals thereof, for the export to Saudi Arabia of Alakran 120 mm mortar carriers, of the company NTGS, from 2016 to the present.’ Greenpeace asked for copies of the licences, the minutes of the meeting in which JIMDDU decided to authorise the export and documents containing JIMDDU’s formal justification for granting the licences.

On 15 September 2020, the Minister – represented by the General Director for Trade Policy – rejected Greenpeace’s request, citing the Agreement of 1987 that gives all of JIMDDU’s documents ‘classified’ status under Law 9/1968 on Official Secrets (LSO).<sup>165</sup>

### Arguments and process

The claimants have filed two cases to challenge the decision not to disclose these documents. The first claim was a ‘fundamental rights’ challenge that argued that the Minister’s decision constituted an unlawful restriction of the claimants’ freedom of expression and information, which is a fundamental right enshrined in Article 20(1) of the Spanish Constitution and protected by the European Convention on Human Rights (ECHR). Any limits on this fundamental right should therefore be provided by the law (principle of legality), have a legitimate purpose and respect the principle of proportionality.

This fundamental rights claim was deemed admissible on 26 November 2020. This is an important albeit procedural victory, since the right to freedom of expression was previously not explicitly considered to include a right to access information under Spanish law. The admissibility decision does not address this explicitly, short of noting that the state advocate did not oppose the claimant’s arguments.

The government responded on 2 February 2021, opposing the claimants’ arguments on two grounds:

1. The right of access to information is an ordinary right rather than a ‘fundamental’ right and therefore the claimants were not entitled to use in this case the special procedure for the protection of fundamental rights.
2. The information requested by the claimants was secret, for the legitimate purposes of protecting the economic interests of the exporting company – NTGS – and commercial relations between Spain and Saudi Arabia.

Shortly after filing its first claim, Greenpeace submitted a second challenge to the Minister’s decision (within a day of the NGO request) to deny it access to government documents concerning the granting by JIMDDU of ‘authorisations or licences for the export of artillery ammunition manufactured by EXPAL SYSTEMS to the United Arab Emirates and/or Saudi Arabia between 2017 and the present day.’ The request noted that the company had submitted a request for the export of military goods to Saudi Arabia in February 2020. The pending claim, filed on 27 November 2020 through an ‘ordinary administrative procedure,’ requests the annulment of the decision to refuse disclosure on the basis that the secrecy of JIMDDU documents was unlawful on two broad grounds:

<sup>164</sup> See Greenpeace España (2020), ‘Morteros made in Spain apuntando a Yemen’, 6 August (<https://es.greenpeace.org/es/noticias/morteros-made-in-spain-apuntando-a-yemen/>) and Pareja P (2020), ‘Morteros españoles usados por Arabia Saudí en la frontera de Yemen: la prueba de que España sigue incumpliendo las leyes de exportación de armas’, *El Diario*, 5 August ([https://www.eldiario.es/politica/morteros-espanoles-frontera-yemen-prueba-espana-sigue-incumpliendo-leyes-exportacion-armas\\_1\\_6139973.html](https://www.eldiario.es/politica/morteros-espanoles-frontera-yemen-prueba-espana-sigue-incumpliendo-leyes-exportacion-armas_1_6139973.html)). For information concerning 2018–2019, see Greenpeace España (2020), ‘Análisis de las exportaciones españolas de material de defensa, otro material y productos y tecnología de doble uso de 2018 y 2019’, 26 June (<https://es.greenpeace.org/es/sala-de-prensa/documentos/analisis-de-las-exportaciones-espanolas-de-material-de-defensa-otro-material-y-productos-y-tecnologia-de-doble-uso-de-2018-y-2019/>)

<sup>165</sup> Resolución del Director General de Política Comercial, 15 September 2020.

1. It violated the Agreement of the Council of Ministers of 18 March 1987 and Law 9/1968 on Official Secrets (LSO). The Agreement of 1987 referred to a body that no longer existed, and was not clearly applicable to JIMDDU. Also, restriction of access to information had to serve a legitimate 'national security' purpose (Article 2 of the LSO). This decision wrongfully favoured economic interests over Spain's laws and international obligations to control arms exports that posed a threat to peace and fundamental rights.
2. It violated Law 19/2013 'on transparency, access to public information and good governance,' which provides limits on the right of access that were not in this case offset by a 'national security' interest. The Minister failed to offer adequate justification for concluding that the relevant criteria for secrecy under Article 14(1), namely national security, defence, professional secrecy, intellectual and industrial property and the need to safeguard the confidentiality or secrecy of decision-making processes, had been met.

The claim submitted that by limiting access to this information without a legitimate reason, the government was preventing the NGO from monitoring its compliance with domestic law and international legal obligations.

### Challenges

The main strategic aim of these challenges was to further transparency in the area of arms transfers. Different NGOs and lawyers have tried to challenge the government under administrative, civil or criminal law, but the main obstacle is represented by the secrecy surrounding JIMDDU's decisions. In 2020, for instance, the NGO Sociedad Humana tried to take a case against transfers to Saudi Arabia, but it was rejected for failing to reference specific JIMDDU licences.

The fundamental rights claim has the potential to end up before the European Court of Human Rights. The challenge in Spain is that there is no precedent recognising the link between the rights to access information and to freedom of expression.<sup>166</sup>

This claim, in arguing the unconstitutionality of Law 9/1968 on Official Secrets (LSO), was significant for its challenge laws that are a legacy of the Franco regime and the Spanish counterinsurgency against ETA. Due to its scope and political sensitivity, it is also likely to be a hard case to win.

Without access to the relevant documents relating to arms export licensing, it is difficult if not impossible to gain access to the jurisdiction of Spanish administrative courts in order to challenge specific administrative decisions such as allegedly unlawful arms export authorisations. The proceedings are unique in claiming the right to challenge unlawful arms transfers by challenging the impunity resulting from secrecy around Spanish arms exports and government decision-making. These efforts are challenging the fundamental procedural obstacle that bars access to courts and remedies relating to arms transfers.

<sup>166</sup> See, relatedly, the Tshwane Principles endorsed by the Parliamentary Assembly of the Council of Europe.

## 3.7 Canada

Canada's exports of arms and military equipment are regulated by the September 2019 Export and Import Permits Act (EIPA),<sup>167</sup> which codified Canada's accession to the ATT. The 'Export and Brokering Controls Handbook' (hereinafter the Handbook)<sup>168</sup> provides guidance on the Minister of Foreign Affairs' decision-making process. Also relevant is the Geneva Conventions Act of 1985,<sup>169</sup> which transposes the Geneva Conventions into Canadian law.

Domestic proceedings in Canada have consisted of three administrative cases filed by Prof Daniel Turp of the University of Montreal against the Minister of Foreign Affairs in 2016, 2017 and 2020.

### 3.7.1 Turp v. Minister of Foreign Affairs I (2016)

On 21 March 2016 Daniel Turp, a professor of constitutional and international law at the University of Montreal, filed an application for judicial review of the Minister of Foreign Affairs' 8 April 2016 decision to grant six licences for the export of light armoured vehicles (LAVs) to Saudi Arabia.<sup>170</sup> The claimants argued that the issuance of these licences was unlawful due to Saudi Arabia's involvement in serious violations of human rights in the Yemen conflict.<sup>171</sup>

Without knowing whether the licences had been granted, the claimant asked the Federal Court of Canada 'in the event that one or several export permits have already been issued unbeknownst to the public, [to] declare those permits void.'<sup>172</sup> After becoming privy to further information, the claimant amended his application on 21 April 2016.

#### Arguments<sup>173</sup>

The claim as amended on 21 April 2016 was based on the following two grounds:

1. The Minister had violated Sections 3 and 7 of the EIPA by failing to carry out the risk assessment required by the governmental Guidelines of 1986 (recalled in the Handbook).<sup>174</sup> The Minister's conclusion that risks were not present was unreasonable as it was guided by considerations other than Saudi Arabia's respect for fundamental rights and IHL. The Minister had failed to consider critical facts concerning Saudi Arabia's compliance with international law and had applied the wrong test in assessing risk. According to the claimant, risk assessment did not require 'evidence demonstrating that the arms have been so used. Saudi Arabia's past and present conduct were sufficient to establish that risk.'
2. The licences violated Article 2 of the Geneva Conventions Act due to Saudi Arabia's serious IHL violations and failure to 'ensure the respect for the Conventions in all circumstances' as required under Article 1 common to the Conventions.

<sup>167</sup> Export and Import Permits Act (<https://laws-lois.justice.gc.ca/eng/acts/e-19/>)

<sup>168</sup> Export and brokering controls handbook, amended August 2019 ([https://www.international.gc.ca/trade-commerce/controls-controles/reports-rapports/ebc\\_handbook-ccc\\_manuel.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/controls-controles/reports-rapports/ebc_handbook-ccc_manuel.aspx?lang=eng))

<sup>169</sup> Geneva Conventions Act (<https://laws-lois.justice.gc.ca/eng/acts/g-3/>)

<sup>170</sup> See Judgement of the Federal Court of Canada of 24 January 2017, pp 2–4, [https://www.lexsage.com/documents/Turp%20v\\_%20Minister%20of%20Foreign%20Affairs.pdf](https://www.lexsage.com/documents/Turp%20v_%20Minister%20of%20Foreign%20Affairs.pdf).

<sup>171</sup> Claimant's Application for Judicial Review, 21 March 2016 (<https://theintercept.com/wp-uploads/sites/1/2016/03/Turp-Lawsuit-1.pdf>). See Judgement of the Federal Court of 24 January 2017, pp 13–16.

<sup>172</sup> *Ibid*, p 5.

<sup>173</sup> The legislative regime in force at the time had not been amended yet for implementing the ATT, which occurred in September 2019 (see above legal framework, p 3). We therefore refer to former Section 7.01 of the EIPA and the 2017 version of the Handbook.

<sup>174</sup> Handbook, amended August 2017, p 54.

On 24 January 2017, the Federal Court dismissed the claim for judicial review on all grounds, maintaining that the Minister had acted within his discretionary powers and reached a reasonable conclusion. The Court's specific responses to the claimants' two grounds were as follows:

1. Neither the EIPA nor the Handbook contained any export prohibitions, implying that the Minister 'remains free to issue an export permit if he concludes that it is in Canada's interest to do so, considering the relevant factors.' The Handbook (and the Guidelines of 1986 therein recalled) was not a binding instrument and did not restrict the Minister's discretion. Also, the Minister had taken into account all relevant factors set out in the Handbook, including human rights and humanitarian concerns. The court also affirmed that the risk assessment did not show 'at least ... some connection between Saudi Arabia's alleged human rights violations and the use of the exported goods.' Therefore, the Minister had properly exercised his discretion.<sup>175</sup>
2. The claimant had no standing to raise a violation of Article 1 of the Geneva Conventions because the conventions' domestic transposition did not 'confer any rights on individuals.' Since Canada was not directly involved in the Yemen conflict, the government was not bound by obligations applicable to parties to the conflict under the conventions.<sup>176</sup>

On 17 February 2017, the claimant appealed the Federal Court's decision before the Court of Appeal, claiming that it erred on three different grounds:<sup>177</sup>

1. It erred in concluding that the Minister had exercised his discretion in a reasonable manner, given that several considerations were not sufficiently addressed by the Federal Court: first, the Minister did not give adequate weight to the criteria set out in the Handbook; second, the Minister failed to properly assess whether there was a reasonable risk that the LAVs would be used to violate IHL; and third, the Minister's decision-making process lacked transparency, making it impossible to determine the nature and extent of the assessment.<sup>178</sup>
2. It erred in refusing to consider the claimant's argument that 'the Minister had already made his decision before looking at the file, or he felt compelled to make that decision. His mind was closed to any other possibilities.'<sup>179</sup> Furthermore, 'the judge was wrong to find that [the claimant] could not mention the fact that the Minister had found in favour of exporting LAVs even before rendering his decision. According to the claimant, the duties of impartiality and procedural fairness apply in the case even if the Minister's decision had a political component.'<sup>180</sup>
3. It erred by rejecting the claimant's arguments based on Article 1 common to the Geneva Conventions. The claimant argued that the Federal Court wrongfully ruled he did not have the appropriate standing to complain of a violation of the Geneva Conventions through the Canadian Geneva Convention Act.<sup>181</sup>

On 6 July 2018, the Court of Appeal dismissed the claimant's appeal, concluding that the Federal Court had made no errors and its conclusion that the Minister had correctly exercised its discretion – and therefore reached a lawful decision – was reasonable.<sup>182</sup> The court offered the following specific responses to the claimant's three grounds:

<sup>175</sup> See Judgement of the Federal Court of 24 January 2017, pp 40–54: 'In short, the scope of this Court's judicial review power is limited to making sure that the Minister's discretion was exercised in good faith on the basis of the relevant considerations. In this case, the Court is satisfied that it was so exercised. It therefore cannot intervene, as the Minister's decision constitutes a possible, acceptable outcome that is defensible in respect of the facts and law.'

<sup>176</sup> Ibid, pp 55–74.

<sup>177</sup> See Judgement of the Court of Appeal of 6 July 2018, p 32 (<https://tj.quebec/wp-content/uploads/2017/03/2018-07-06-Judgment-Federal-Court-of-Appeal.pdf>)

<sup>178</sup> Ibid, pp 45–51.

<sup>179</sup> Judgement of the Federal Court, p 15.

<sup>180</sup> Ibid, p 71.

<sup>181</sup> Ibid, pp 74–76.

<sup>182</sup> Ibid, p 33.



1. The Court held that the Minister had considered all relevant factors, including international humanitarian law and human rights issues. It found that the Memorandum on which the Minister relied in taking his decision addressed in detail relevant human rights considerations concerning Saudi Arabia and properly considered whether there was a reasonable risk that the LAVs would be used to commit human rights or IHL violations in Saudi Arabia or Yemen. Since all that was required by export legislation was to take into account relevant factors, with no order of priority, the Court concluded that '[t]he Minister could, despite the reasonable risk that the exported equipment will be used against a civilian population, decide to issue permits because, in his opinion, exporting LAVs was in Canada's interest in compliance with the EIPA.'<sup>183</sup>
2. The Court declared that '[i]n my opinion, insofar as the Minister's actions are compliant with the statutory regime in force, namely that all the appropriate factors were taken into account, his decision satisfies the test of legality.'<sup>184</sup>
3. The Court of Appeal accepted the Federal Court's conclusion that the claimant did not have standing to raise a violation of the Geneva Conventions, arguing that 'the individuals or persons affected by the violation cannot seek any remedy against the state responsible for violating the Geneva Conventions. That is the sole right of a signatory state that is not responsible for the violation.'<sup>185</sup>

On 27 September 2018, the claimant appealed the judgement before the Supreme Court of Canada, formally submitting an application for leave to appeal, relying on three grounds that he formulated as questions to the Court:<sup>186</sup>

- a) In the context of a judicial review instituted in the public interest, does a plaintiff have the interest required to raise violations of international treaties to which Canada is a party, *a fortiori* when Parliament has incorporated these treaties into Canadian law?

The applicant argued that the Supreme Court has ruled more than once that Canada's international obligations are highly relevant in analysing the reasonableness of a decision subject to judicial review, and argued that 'it seems clear to us that a litigant with the capacity to act in the public interest must be able to invoke before Canadian courts international standards that condition domestic legislative interpretation.'<sup>187</sup>

- b) Is the discretion to authorise the export of arms, as set out in section 7 of the EIPA, restricted in any way by international treaty obligations ratified by Canada and by the Guidelines established by the government to ensure the export of arms implementation? If so, how?

The Guidelines of 1986 adopted by the Government – and recalled in the Handbook – 'do not constitute the expression of a vague and changing policy that can be ignored according to economic imperatives. Rather, these clear and concrete guidelines are an implementation of Canada's fundamental values and international obligations.' Such provisions certainly framed and constrained the Minister's discretionary power.<sup>188</sup>

- c) In assessing the reasonable risk of weapons being used against civilian populations, what criteria should the Minister of Foreign Affairs consider and what level of evidence is required to conclude that such a risk exists?

The Minister erred in his risk assessment, since he only relied on the lack of formal proof that Canadian-manufactured LAVs had been used against civilian populations in the past, without considering Saudi Arabia's overall compliance with international law. Moreover, the claimant argued that the memorandum on which the Minister's

<sup>183</sup> Ibid, pp 52–70.

<sup>184</sup> Ibid, pp 72–73.

<sup>185</sup> Ibid, pp 77–81.

<sup>186</sup> See Claimant's application for leave to appeal, 27 September 2018, p 24.

<sup>187</sup> Ibid, pp 26–35.

<sup>188</sup> Ibid, pp 36–47.

decision was taken did not contain any analysis of such risk, instead simply concluding there was no evidence that Canadian arms had been used for the commission of IHL violations.<sup>189</sup>

On 11 April 2019, the Supreme Court dismissed the claimant's application for leave to appeal without providing any reasons, which is the usual practice of the Court with regard to such applications.<sup>190</sup>

### Challenges

The courts did not scrutinise the merits of the Minister's decision, as they only focused on the question of whether the Minister had properly exercised his discretionary powers. The Court of Appeal held that the Minister could, 'despite the reasonable risk that the exported equipment will be used against a civilian population, decide to issue permits because, in his opinion, exporting LAVs was in Canada's interest in compliance with the EIPA.'<sup>191</sup>

The Canadian courts' interpretation of the relevant test was too narrow for a proper assessment. They erroneously maintained that to establish a risk that the exported arms would be used for IHL violations, it is necessary to prove the actual use of the specific Canadian-manufactured arms in the commission of violations. A correct test would be much broader and would consider the serious misconduct of end-user forces, including but not limited to their use of certain types of armaments.

### 3.7.2 Turp v. Minister of Foreign Affairs II (2017)

This case involved the same parties as the previous case and concerned the same six licences from 2016 for the export of LAVs to Saudi Arabia.

On 3 August 2017, the claimant addressed a letter to the Minister of Foreign Affairs pointing out that new evidence clearly indicated that the LAVs manufactured in Canada had been used by Saudi Arabia for the commission of IHL violations in Yemen and asking the Minister to immediately suspend all approvals granted in 2016.<sup>192</sup>

On 27 September 2017, having not received an answer from the Minister, the claimant submitted an application to the Federal Court for judicial review of the Minister's implicit refusal to cancel the licences.

### Arguments

The claimant asked the Federal Court to determine whether it was legal and reasonable for the Minister to expressly or implicitly refuse to suspend or cancel the export licences pursuant to Section 10 of the EIPA.<sup>193</sup> The claimant argued that in light of new evidence clearly indicating the use of Canadian arms by Saudi Arabia to commit war crimes in Yemen, the 'reasonable risk' of violations had been met in a way that was not the case in the previous challenge.

On 18 October 2017, the Minister submitted a request to strike the application down as it was 'plain and obvious that the application has no chance of success, that it is redundant and that, ultimately, it is an abuse of process.'<sup>194</sup> The Minister's position

<sup>189</sup> Ibid, pp 48–57.

<sup>190</sup> See Judgement of the Supreme Court, 11 April 2019.

<sup>191</sup> See Judgement of the Court of Appeal, 6 July 2018, p 66.

<sup>192</sup> Attached to the letter were the following sources: Sevunts L (2017), 'Ottawa ready to review Saudi arms deals amid crackdown', *CBC News*, 29 July (<https://www.cbc.ca/news/politics/saudi-arms-deal-canada-shia-1.4227018>) and Chase F, Fife R (2017), 'Ottawa calls for probe into apparent Saudi use of Canadian-made armoured vehicles against citizens', *The Globe and Mail*, 28 July (<https://www.theglobeandmail.com/news/politics/saudi-arabia-appears-to-be-deploying-canadian-made-armoured-vehicles-against-its-own-citizens/article35831864/>)

<sup>193</sup> See Judgement of the Federal Court, 9 January 2018, p 1.

<sup>194</sup> Ibid, p 5.

was that the claimant was essentially trying to reopen the previous challenge, which was at the time pending before the Court of Appeal, asserting that ‘to avoid any risk of contradictory judgements, the judgement dated January 24, 2017, must now be followed by the Court, unless it is overturned on appeal. Also, the Court should summarily strike this application for judicial review.’<sup>195</sup>

On 9 January 2018, the Federal Court dismissed the Minister’s request, finding that the new application for judicial review raised ‘a new cause of action in light of the new facts alleged in the notice of application.’<sup>196</sup> The court concluded that ‘the parameters have undeniably changed since the 2016 ministerial approval... [and] it is incumbent on this Court to assess the reasonableness of the Minister’s new decision at a hearing on the merits. It is not because the Court decided in 2017 that the Minister’s balance of the factors was reasonable in April 2016, that the same finding is required with respect to the refusal to suspend or cancel the export permits based on the new facts and evidence in the record.’<sup>197</sup>

On 23 April 2019, the claimant discontinued the specific application due to the procedural limitation on the introduction of new facts in an existing claim.

### 3.7.3 Turp v. Minister of Foreign Affairs III (2020)

This case involves the same parties as the previous cases and concerns the same issue, namely the lawfulness of the Minister of Foreign Affairs’ decision of 8 April 2016 to grant six licences for the export of LAVs to Saudi Arabia.

On 17 September 2019, the Claimant addressed a letter to the Minister pointing out that, following Canada’s accession to the ATT on 19 June 2019 and the consequent amendment of the EIPA, the Minister had to take into account new mandatory criteria governing the export of arms, including higher expectations of the conduct of buyer countries. Given the large body of evidence regarding Saudi Arabia’s international law violations in Yemen, the claimant asked that the licences for the export of the LAVs be annulled.

On 30 September 2019, the Minister refused to cancel the licences. On 10 October 2019, the claimant submitted an application for judicial review of the Minister’s ongoing failure to cancel existing permits for the export of arms and military equipment to Saudi Arabia, and his decision communicated on 30 September to refuse to cancel such permits.

#### Arguments and process

The claimant challenged the Minister’s decisions on the following grounds:<sup>198</sup>

1. The Minister failed to properly assess whether there was a ‘reasonable risk’ that the arms would be used to commit serious violations of international law, as per amended Section 7.3.1 of the EIPA, and failed to make sufficient enquiries and take into account material and relevant evidence to enable a lawful decision to be reached.
2. The Minister reached an irrational conclusion that the risk assessment required by law had been satisfied with respect to the export of military equipment to Saudi Arabia. Overwhelming evidence of IHL and IHRL violations by Saudi Arabia existed, including the authoritative findings of UN agencies and officials with a mandate to monitor and investigate IHL and IHRL violations in Yemen. The Minister offered no rational basis to suggest that the findings of these bodies were so clearly wrong that it

<sup>195</sup> Ibid, p 73.

<sup>196</sup> Ibid, p 75.

<sup>197</sup> Ibid, p 83.

<sup>198</sup> The applicable legal framework is the amended EIPA (see above legal framework, p 3). We therefore refer to amended Section 7.3 and to the 2019 version of the Handbook.

could be said there was no ‘substantial risk’ that violations ‘would result in any of the negative consequences.’

Due to the COVID-19 pandemic, these proceedings have been put on hold.

### Challenges

Canadian courts apply a restrictive and narrow test for establishing risk, which is limited to the misuse of Canadian arms. This ignores the specific conduct of end-users and the general attitude of buyer states towards their obligations under international law.

Despite the Minister of Foreign Affairs’ assessment in 2020 that Saudi forces were committing serious violations of international law in Yemen,<sup>199</sup> the courts did not consider how this reflected the general attitude of Saudi Arabia toward its obligations under international law and how other security forces were involved in serious IHRL violations in the context of internal repression inside Saudi Arabia.

The third application is still pending before the Federal Court of Canada.

## 3.8 United States

The US Arms Export Control Act (AECA)<sup>200</sup> prohibits all exports of US arms to foreign countries unless, *inter alia*, the government finds that these sales ‘will strengthen the security of the United States and promote world peace.’<sup>201</sup> The competent authority for approving arms exports is the State Department on behalf of the President. When the monetary value of an export exceeds a certain threshold, the government must formally notify the Senate Foreign Relations Committee and the House of Representatives Foreign Affairs Committee, which have 30 days to respond.<sup>202</sup> Should both the House and the Senate vote against the Department’s proposed arms export in the form of a joint resolution, that resolution is sent to the President. The President has the power to veto the joint resolution, which Congress can then override on the basis of a two-thirds majority of both chambers.<sup>203</sup>

Under the US Administrative Procedure Act (APA),<sup>204</sup> government agencies’ decisions are subject to judicial review and can be declared unlawful by a competent court if they are found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’<sup>205</sup> According to consolidated case law, all executive agencies must provide a reasoned justification for their decisions, including a rational connection between facts and judgement. They cannot depart from prior policy without providing valid justification for such a change.

The US signed the ATT on 25 September 2013 but has never ratified it. On 18 July 2019, the US government under President Donald Trump informed the UN Secretary General that the US did not intend to become a party to the ATT and regarded itself as having no related legal obligations.<sup>206</sup> The US was, however, an active participant in the ATT negotiations, with a view to ensuring that the ATT would not create any

<sup>199</sup> See Government of Canada (2020), ‘Final report: Review of export permits to Saudi Arabia’, modified 16 April (<https://www.international.gc.ca/trade-commerce/controls-contrôles/memo/annex-a-ksa.aspx?lang=eng#gene>)

<sup>200</sup> Arms Export Control Act, 22 U.S.C. § 2751 et seq. (<https://www.law.cornell.edu/uscode/text/22/chapter-39>)

<sup>201</sup> *Ibid*, Section 2753 (a) (1).

<sup>202</sup> *Ibid*, Section 2776 (b).

<sup>203</sup> See Congressional Research Service (2021), ‘Arms Sales: Congressional Review Process’, updated 24 May (<https://fas.org/sgp/crs/weapons/RL31675.pdf>)

<sup>204</sup> Administrative Procedure Act, 5 U.S.C. § 551 et seq. (<https://www.archives.gov/federal-register/laws/administrative-procedure>)

<sup>205</sup> *Ibid*, Section 706 (2) (a).

<sup>206</sup> Communication from the US Government to the UN Secretary General, 18 July 2019 (<https://treaties.unoda.org/a/att/unitedstatesofamerica/sig/un>). See, on the significance of this position: Article 18, Vienna Convention on the Law of Treaties.

obligations for the US on top of existing national law. It remains to be seen whether the Biden administration will change US posture on this issue.<sup>207</sup>

### 3.8.1 New York Center for Foreign Policy Affairs (NYCFPA) v. US Department of State and US Secretary of State

On 1 November 2020, Secretary of State Mike Pompeo announced that the State Department had decided to allow the export to the UAE of arms and military goods including 50 F-35 jets, one of the world's most advanced fighter planes. Congress was notified of the decision, as it crossed the value threshold for Congressional oversight. Congress did not vote against the export,<sup>208</sup> and on 20 January 2021, just hours before the Trump Administration left office, a Letter of Offer and Acceptance was signed to approve the sale.

On 20 December 2020, the New York Center for Foreign Policy Affairs (NYCFPA) filed a complaint before the US District Court for the District of Columbia asking for judicial review of this authorisation of arms exports to the UAE.

#### Arguments and process

The NYCFPA challenged the lawfulness of the State Department's decision on the basis of Section 706 (2) (a) of the APA, according to which a reviewing court may 'hold unlawful and set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'

The claimant maintained that the Department's rushed authorisation (similar export processes have taken years to complete) resulted in an arbitrary and capricious decision. The Department's only public statement justifying the export was that it addressed 'UAE's need for advanced defense capabilities to deter and defend itself against heightened threats from Iran,' and that the sale 'will make the UAE even more capable and interoperable with US partners.' According to the claimant, such justification did not constitute a valid 'reasoned explanation' as required by the APA.

The claimant challenged the decision on the following grounds:

1. The Department failed to provide any evidence that it had adequately considered the AECAs requirement that the arms sale would 'strengthen the security of the United States and promote world peace.' The claimant argued that the Department had failed to take into account public evidence clearly indicating that arms exported to the UAE might be used in ongoing conflicts in Yemen and Libya, thus threatening world peace, and might be diverted to actors that seek to undermine US national security, such as Al Qaeda-linked fighters in Yemen and the Libyan National Army. The claimant drew on UN and NGO reports, the findings of the State Department's own Office of the Inspector General (OIG), and several US Senators' public statements and letters addressed to the State Department.
2. The Department failed to provide proper justification for the change in the government's policy on arms exports. The claimant argued that the Department's decision was in clear contrast with its prior policy on the export of the same arms. The claimant referred to the Department's refusal to export F-35 jets to Turkey in 2019 due to a military agreement between Turkey and Russia, which was considered a threat to US security. Although the UAE had signed a strategic partnership with Russia in

<sup>207</sup> See, for example, Abramson J, et al. (2021), 'At 100 Days, Grading Biden's Progress Toward a More Responsible US Arms Trade Policy,' *Just Security*, 28 April (<https://www.justsecurity.org/75929/at-100-days-grading-bidens-progress-toward-a-more-responsible-us-arms-trade-policy/>)

<sup>208</sup> See Lovett S (2020), 'Trump administration facing legal action over "rushed" sale of arms to UAE', *The Independent*, 29 December (<https://www.independent.co.uk/news/world/americas/us-politics/trump-uae-arms-sale-weapons-b1779974.html>)

2018, this was not considered a valid reason to deny the export of the F-35 jets to the UAE. The Department did not provide any reason for disregarding a circumstance that underlaid the previous policy.

In light of the above, the claimant asked the court to declare that the State Department's authorisation of these arms exports to the UAE was in violation of the APA and to order the Department to withdraw the authorisation and refrain from acting in a manner inconsistent with such withdrawal.

On 28 May 2021, the State Department filed a motion for the Court to dismiss the claim, on the following grounds:

1. The claimant had no standing to bring the action under the APA, as it did not suffer any direct injuries to its activities due to the contested decision.
2. The claimant's interest did not fall within the 'zone of interest' of the AECA, which was designed only to serve the national security interests of the US.
3. The contested decision to authorise the sale of weapons to the UAE was subject to 'unreviewable agency discretion' and was a non-justiciable political question.

On 18 June 2021, the claimant opposed the motion to dismiss, arguing that:

1. It had legal standing as the contested decision 'directly frustrates NYCFPA's mission' and 'has caused NYCFPA to expend significant resources tracking and countering the effects of the Department's rushed authorization of the Arms Sale.'
2. It had an interest that fell within the zone of interest of the AECA, as the arms export framework included humanitarian goals as well as national security goals, such as ensuring that weapons sold by the US were not used to foster or increase military conflicts.
3. Judicial review was not precluded as the claim was not related to political and strategic considerations concerning the sale of weapons to the UAE, but was focused on the alleged lack of procedural compliance, in particular whether the State Department made the findings required by the AECA, and why it failed to provide a reasoned explanation for its decision or to explain its change in policy.

The Court decision as to whether to grant the State Department's motion to dismiss or move to trial to address the merits of the claim is still awaited.

### Challenges

While NYCFPA argues that it could not be inferred that a proper 'reasoned analysis occurred behind closed doors, given that the available evidence instead supports the conclusion that the Department entirely failed to consider important aspects of the problem,' the State Department may claim that its decision was justified on the basis of classified evidence that it is not at liberty to share.

## 3.9 South Africa

Under South Africa's National Conventional Arms Control Act (NCAC Act),<sup>209</sup> all exports of conventional arms must be authorised by the National Conventional Arms Control Committee (NCACC), the competent authority for evaluating and taking decisions over permit applications that enable the export of arms. The NCACC is

<sup>209</sup> Full text available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a41-020.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a41-020.pdf).

made up of ministers and deputy ministers appointed directly by the president, and is assisted by the Directorate of Conventional Arms Control (DCAC), a secretariat that sits in the Ministry of Defence.

Section 15 of the NCAC Act provides a list of guiding principles and criteria that the NCACC must respect when considering applications for arms exports. These include the following:

1. The NCACC must prevent transfers of arms to governments that systematically violate or suppress human rights and fundamental freedoms.
2. It must avoid transfers of arms that are likely to contribute to the escalation of military conflicts, endanger peace or otherwise contribute to regional instability.
3. It must adhere to international law and South Africa's international obligations and commitments. As regards this last criteria, South Africa has been a State Party to the ATT since it entered into force in December 2014.

According to Section 6 of the Promotion of Administrative Justice Act (PAJA),<sup>210</sup> a court or tribunal has the power to judicially review an administrative decision if *inter alia*: the decision is unlawful or unconstitutional, the authority reached the decision without taking all relevant factors into account, the decision is unreasonable or irrational and/or the decision was taken because of the unauthorised or unwarranted dictates of another person or body.

### 3.9.1 Southern Africa Litigation Centre and Open Secrets v. Chairperson of the National Conventional Arms Control Committee and Minister of Defence

On 3 June 2021, the Southern Africa Litigation Centre (SALC) and Open Secrets jointly filed an application before the North Gauteng High Court in Pretoria seeking two reliefs: first, they sought an order by the court requiring the NCACC to either disclose the names of the entities that held or had applied for permits enabling the export of arms to Saudi Arabia and the UAE, or serve these entities with notice of the suit and copies of relevant court documents; and second, they sought a judicial review of the NCACC's decisions to grant such permits.<sup>211</sup>

The applicants' core argument was that the NCACC's decision on whether to grant the contested permits had failed to take into serious consideration the public evidence indicating Saudi Arabia's and the UAE's involvement in violations of human rights and international law in Yemen, thereby failing to comply with the criteria and guiding principles set out in Section 15 of the NCAC Act.

#### Arguments and process

In the first part of the application (Part A), the applicants asked the Court to order the Chairperson of the NCACC to provide within seven days to the applicants the names and contact details of entities holding, or having applied for, permits to export arms to Saudi Arabia and the UAE, so as to allow the applicants to serve them the notice of motion and founding affidavit and annexures. Alternatively, they could serve within 10 days a copy of the notice of motion and the founding affidavit and annexures to the entities that hold such permits. As permit holders have an interest in the outcome of review applications that might affect the permits they have received, such entities need to be given the opportunity to join the proceedings if they wish to do so.

<sup>210</sup> Full text available at [https://www.gov.za/sites/default/files/gcis\\_document/201409/a3-000.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a3-000.pdf).

<sup>211</sup> See the Notice of Motion and the attached Founding Affidavit submitted by the applicants ([https://www.opensecrets.org.za/ncacc/#dearflip-df\\_5209/1/](https://www.opensecrets.org.za/ncacc/#dearflip-df_5209/1/))

On 15 June 2021, the Court heard Part A of the application on an urgent basis and accepted the applicants' alternative relief. The Court ordered the NCACC to serve within 10 days the notice of motion and founding affidavit and annexures to the concerned entities.

With respect to the request for judicial review (Part B), the applicants asked the Court to set aside the NCACC's decisions to grant the contested permits and to substitute them with decisions to refuse the permits or to refer the decisions back to the NCACC for reconsideration in light of proper criteria and principles.

The applicants relied on four grounds for their challenge:

1. The NCACC's decisions were unlawful and unconstitutional. The applicants argued that the decisions were taken in breach of South African law and South Africa's binding obligations under international law. As for national law, the applicants claimed a violation of section 15 of the NCAC Act, in particular the provisions contained in letters c), d), e), f) and k), according to which the NCACC must not grant permits in certain specific circumstances, e.g. to countries that systematically violate or suppress human rights and fundamental freedoms, or where the weapons transfers are likely to escalate regional military conflicts. As for international law, the applicants relied on Article 1 common to the Geneva Conventions and Article 7 of the ATT, arguing that by not complying with these binding obligations of international law, South Africa might bear responsibility under international law.
2. The NCACC had failed to make relevant considerations. The applicants argued that the NCACC had failed to take into proper account evidence relevant to the criteria provided by Section 15, letters d), e), f), g) and k) of the NCAC Act when granting the contested permits. In particular, evidence of alleged human rights violations and unlawful acts by Saudi Arabia and the UAE in Yemen was detailed in reports by the UN Group of Eminent Experts on Yemen.
3. The NCACC's decision was unreasonable and irrational. The applicants argued that the NCACC knew or ought to have known about the grave violations committed by Saudi Arabia and the UAE in Yemen, especially considering that South Africa was a non-permanent member of Security Council in 2019 and 2020 and in this period of time made 12 statements expressing concern about the humanitarian crisis in Yemen. According to the applicants, it would be unreasonable and completely contradictory for South Africa to claim through the NCACC that it had no knowledge of the conduct of Saudi Arabia and the UAE in Yemen.
4. The NCACC had improperly referred to diplomatic channels when considering the grant of arms export permits. To sustain this, the applicants referred to a statement by the Head of the NCACC Secretariat, Ezra Jele, who declared on 13 May 2021 that if there were issues with arms exports, such issues would be dealt with through diplomatic channels. According to the applicants, the NCACC should conduct an independent assessment of whether a permit should be granted according to the criteria dictated by the NCAC Act, without relying on diplomatic entities that represent political interests.

This proceeding is ongoing.

### Challenges

The NCACC's annual reports indicate all arms shipments from South Africa and their intended destinations. These reports, however, which are the only official publicly available source of information on arms exports, are backwards-looking and often delayed, such that information about weapons exports is usually published long after the exports have taken place. The reports do not indicate which companies are provided with permits or which companies are behind each export.



### 3.10 International Criminal Court (ICC)

On 11 December 2019, six NGOs – ECCHR, Mwatana for Human Rights, Amnesty International, CAAT, Centre d'Estudis per la Pau J.M. Delàs (Centre Delàs) and Rete Italiana per il Disarmo – submitted a formal communication to the Office of the Prosecutor (OTP) of the ICC. The communication asked the OTP to investigate whether the managers of certain arms exporting companies and the governmental officials who granted the authorising export licences might be criminally liable for contributing to war crimes committed by the coalition in the Yemen conflict, over which the ICC has jurisdiction.<sup>212</sup>

Under Article 15 of the Rome Statute of the ICC, the OTP may initiate investigations on its own initiative (*proprio motu*), on the basis of information received by other sources (e.g. individuals and NGOs). In such cases, the OTP initiates a preliminary examination on the basis of this and other information, considering whether the alleged crimes fall within the court's jurisdiction and the case is admissible, in line with the requirements established in the Rome Statute. If it finds a reasonable basis to proceed, the OTP has a duty to open an investigation and request authorisation for the investigation from the Pre-Trial Chamber.

#### Arguments and process

The communication argued that the corporate managers of several EU and UK companies manufacturing and exporting arms,<sup>213</sup> as well as government officials of the UK, France, Italy, Spain and Germany who were responsible for granting arms export licences, were involved in aiding and abetting war crimes. It requested that the OTP investigate alleged contributions to the commission of war crimes by the coalition in Yemen under Article 8 (2) (c) (i) and Article 8 (2) (e) (i), (ii), (iii) and (iv) of the Rome Statute for direct attacks against civilians and civilian infrastructure.<sup>214</sup>

This communication presented a large body of factual information aimed at demonstrating that the coalition had committed serious and repeated IHL violations in Yemen, constituting war crimes under the Rome Statute, and that the accused had been directly involved in the export of military products (e.g. bombs and military aircraft) to coalition members. The evidence included information on 26 airstrikes alleged to have been deliberately conducted against civilians and civilian objects, on the corporate structure and business activities of the companies and on governmental control of arms exports in the above-mentioned states.

The complainants argued that through the export of arms and military equipment to members of the coalition, the accused directly contributed to the commission of war crimes by substantially aiding and assisting the primary perpetrators. The complainants relied on Article 25(3) (c) of the Rome Statute, according to which a person shall be criminally responsible for a crime if 'for the purpose of facilitating the commission of such a crime, [he/she] aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'

<sup>212</sup> See ECCHR Case Report, available at [https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport\\_ECCHR\\_Mwatana\\_Amnesty\\_CAAT\\_Delas\\_Rete.pdf](https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf).

<sup>213</sup> The communication concerns the following companies: Airbus Defence and Space S.A. (Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc. (UK), Dassault Aviation S.A. (France), Leonardo S.p.A. (Italy), MBDA UK Ltd. (UK), MBDA France S.A.S. (France), Raytheon Systems Ltd. (UK), Rheinmetall AG (Germany) through its subsidiary RWM Italia S.p.A. (Italy), and Thales France. See *ibid*.

<sup>214</sup> Notably, these provisions refer and apply to armed conflicts not of an international character, where the hostilities take place between governmental authorities and organised armed groups. This is indeed the case with the war in Yemen, where the Yemeni government, supported by the Saudi-led coalition, is fighting against the Houthi rebels. Such norms do not apply to situations of internal tensions (such as riots and other isolated and sporadic acts of violence), but only to cases where the threshold requirements of the intensity of the violence and the organisation of the armed group are met. See RULAC, 'Non-international armed conflicts in Yemen' (<https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse3accord>)

This communication submitted that the material and mental elements under Article 25(3)(c) were met in the present case, since the accused individuals provided weapons that the coalition used to commit war crimes, thus ‘providing the means for their commission.’ These individuals were aware of the coalition’s criminal behaviour, and thus exported the arms with the ‘purpose of facilitating the commission’ of war crimes. The accused individuals’ ‘purpose’ could be deduced from their attitude towards the assisting conduct in question and not from a requirement that the accused be specifically aware of the crimes to which they were contributing.<sup>215</sup>

### Challenges

Under Article 15 of the Rome Statute, the OTP may decide to initiate an investigation if it concludes that there is a reasonable basis to proceed following a preliminary examination. The 2020 Annual Report of the OTP notes that it will decide in 2021 whether to move to Phase II of a preliminary examination.<sup>216</sup> Following a preliminary examination, the OTP can proceed to open an investigation, in the context of which victims may make representations (Article 15(4) of the Rome Statute).

Unlike administrative procedures, for the OTP to incriminate arms suppliers, including governmental officials, requires a strong link between the accomplice and the crime. The claimants maintained that despite limited access to physical evidence such as the remnants of weapons exported by the accused companies being found at relevant attack sites, the scale of dependence on European arms suppliers means that their substantial contribution is *prima facie* established without such physical evidence. With almost half of the coalition air fleet maintained by European military exports, this provides a substantial if not instrumental contribution to the commission of serious IHL violations, including war crimes.

Some exporting companies have argued that they have properly relied on government licensing to ensure the legality of their acts. The *mens rea* standard in Article 25 (3) (d), the claimants argued, is at odds with the standard applied for *mens rea* in cases before the *ad hoc* tribunals established by the UN Security Council in the former Yugoslavia and Rwanda, which focused on the requirement of knowledge without any further evidence of an ‘intention to commit the act of facilitation,’ as some maintained is proscribed by the phrase ‘for the purpose of.’

The ICC’s jurisdiction complements national criminal jurisdictions (Article 1 of the Rome Statute), meaning that the Court will only prosecute an individual if states are unwilling or unable to carry out an investigation or prosecution. The OTP may hold back on initiating an investigation if meaningful proceedings are ongoing in the jurisdiction of the concerned States Parties, who may be required to provide evidence that they are willing or able to effectively investigate and prosecute the same acts, which are the focus of the ICC proceedings.

<sup>215</sup> See Aksenova M and Bryk L (2020), ‘Extraterritorial Obligations of Arms Exporting Corporations: New Communication to the ICC’, *OpinioJuris*, 14 January (<http://opiniojuris.org/2020/01/14/extraterritorial-obligations-of-arms-exporting-corporations-new-communication-to-the-icc/>)

<sup>216</sup> Office of the Prosecutor of the International Criminal Court (2020), ‘Report on Preliminary Examination Activities 2020’, 14 December, para. 35 (<https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf>)

# 4

## The state of domestic accountability for arms transfers

Domestic law relating to the licensing of arms exports, as with most domestic law that regulates the acts and conduct of public officials, subjects administrative decisions to administrative, public and constitutional law standards. These standards, and the procedures available to challenge administrative decisions, vary from country to country. The breadth, longevity and geographic spread of arms-sales litigation linked to the Yemen conflict has illuminated many key challenges in the current state of domestic accountability for arms transfers, and thus also in the implementation and enforcement of the ATT as discussed below.

In most of the jurisdictions surveyed, which represent most major ATT-related litigation, domestic judges are not granted a formal basis to review the licensing authority's decisions as to whether an arms export is in compliance with ATT obligations, or for EU member states, the EU Common Position. Most courts apply a highly deferential standard of review, considering whether the public authority used the correct process to reach its decision. Under UK public law, for example, the test is whether the decision itself was 'rational'. In the US the standard is whether the decision was 'arbitrary' or 'capricious'. If not, the court must refer the decision back to the authority for it to reconsider its assessment. Judicial processes are, in this way, separated from both executive interpretations of domestic legal criteria and from legislative decisions on the transposition of the international obligations into domestic law (for example, the UK's principle of 'parliamentary supremacy' makes Parliament the supreme authority in the UK for creating or repealing any law, which the courts cannot overturn). More limiting still, in most countries administrative judges can only assess the reasonableness, rationality or non-arbitrariness of a decision to grant a specific licence. So far, only in the UK has the licensing *policy* of the state in relation to a specific end-user – as opposed to specific licences – undergone judicial review.

The conduct of both state and corporate officials regarding arms sales can also be reviewed under domestic civil and criminal law, although such proceedings seldom engage in a review of the lawfulness of relevant licensing decisions. There have been very few criminal and civil lawsuits against Yemen-linked arms suppliers since, in addition to the legal and jurisdictional hurdles, such procedures place an onerous burden on claimants to engage actual victims of the end-user's misconduct, and to clearly demonstrate the contribution made by the sale to the primary criminal offense

or civil wrongdoing, under detailed evidentiary standards that can seldom be met in situations of ongoing foreign armed conflict.

The endemic disparity in the availability, accessibility and quality of domestic judicial review processes stands out when comparing different jurisdictions, as illustrated in the following comparison of five issues – standing, transparency, justiciability, applicability of the ATT and available form of relief – across seven national jurisdictions:<sup>217</sup>

### 1) Legal standing of claimants

**The Netherlands:** The court has denied NGOs legal standing where they are not directly affected by the contested licence.

**United Kingdom and Belgium:** The legal standing of NGOs has been affirmed.

**Canada:** The court has denied standing to raise a violation of Article 1 of the Geneva Conventions.

**This issue has not arisen in proceedings in Italy, France or Spain.**

### 2) Transparency regarding licensing

**The Netherlands:** The only source of transparency is periodic reports to the Parliament. No information is available on new licences. There is a lack of transparency as to licences' expiry dates.

**United Kingdom:** The government has relied heavily on secret evidence, which has been assessed in closed proceedings before special advocates.

**Belgium:** No public information is available as to export permits with the exception of the buyer and the material. Claims have been dismissed due to licences having been executed.

**Italy:** Criminal proceedings pursuant to court order have been allowed to access previously unknown information about decision-making processes and risk assessments carried out by the government.

**France:** The court has denied a request to disclose documents relating to licences and decision-making processes on domestic law-based secrecy grounds.

**Spain:** All licensing-related documents are covered by state secrecy; hence, legal claims have focused on transparency to enable challenges against specific arms transfers.

**Canada:** Court proceedings have enabled claimants to access the 'Memorandum for Information' providing the reasoning for decisions to grant licences.

### 3) Justiciability of licensing decisions

**The Netherlands:** Courts have not had the chance to substantively review licences, having been focused on questions of jurisdiction and standing.

**United Kingdom:** Courts have addressed narrow questions related to the rationality of licensing decisions and the licensing process, not the merits of the Secretary of State's assessment of the available evidence.

**Belgium:** The court has held that the government's assessment can be based on the use of the exported arms generally in Yemen, without the need to show that Belgian arms have been used to commit specific violations.

<sup>217</sup> The South Africa, US and ICC cases have not been included on the grounds that these cases are at an early stage.

**Italy:** The prosecutor has been ordered to open an investigation, which may not extend to the lawfulness of the relevant licensing decisions.

**France:** The court has held that licensing decisions are *actes de gouvernement* – political acts inseparable from French foreign policy that courts are not competent to scrutinise.

**Spain:** The question of whether the right of access to information is a fundamental freedom protected by the Spanish Constitution and the ECHR is awaiting adjudication.

**Canada:** The court has focused on the proper exercise of discretion and not the merits of decisions to grant licences or whether the government took all relevant factors required by the law into consideration.

#### 4) Applicability of the ATT and the EU Common Position

**The Netherlands:** The ATT and the EU Common Position are considered fully applicable in domestic courts and can in principle be invoked before civil courts under the Dutch civil code.

**United Kingdom:** The EU Common Position has been fully implemented in national law. The court has held that the EU User's Guide does not impose any procedural obligations that the court can enforce, but should be treated as an authoritative source for the interpretation of the criterion of 'clear risk.'

**Belgium:** The EU Common Position has been fully implemented in national law.

**Italy:** The court has rejected the government's argument that the ATT and the EU Common Position are not directly applicable to national licensing decisions.

**France:** The courts have held that the ATT and the EU Common Position only govern interstate relations and do not have direct effect in domestic law.

**Canada:** ATT provisions have been implemented in national law since 2019.

**This issue was not considered in the proceedings in Spain.**

#### 5) Form and scope of relief

**The Netherlands:** Courts have dismissed administrative cases for lack of NGO legal standing.

**United Kingdom:** Courts can in principle impose a mandatory blanket order to stop all exports and halt licensing, but in its ruling on the case brought by CAAT the court allowed extant licences to remain operative.

**Belgium:** The government has issued new licences to replace those it has been ordered to annul, due to lack of a judicial basis to stop the granting of new licences. The licences suspended by the courts will need to be annulled through a separate procedure.

**France:** The courts have deemed cases inadmissible for lack of jurisdiction over 'political' acts.

**Canada:** The courts have stated that only the misuse of Canadian-manufactured equipment is deemed justiciable and not the broader question of the misuse of similar equipment manufactured elsewhere.

**This was not an issue during proceedings in Spain and Italy.**

The highlighted variations in the procedural and substantive aspects of domestic proceedings relevant to the ATT are not, in themselves, an indication of a comprehensive failure by states to fully implement international law. International law offers relatively limited guidance on the way states should implement and enforce the ATT, and Article 5 of the ATT on ‘General Implementation’ defers to states on the establishment and maintenance of national control systems and on the necessary measures to implement the Treaty provisions. While states have some degree of latitude in how they implement their international law obligations under IHRL and IHL, there is an extensive body of international jurisprudence that sets out legal obligations, standards and best practices, such as the UN Basic Principles and Guidelines discussed in Part II above.

The various obstacles and barriers faced by those seeking access to justice in the surveyed domestic jurisdictions clearly attest to the absence or shortage of effective means to trigger judicial oversight for decisions relating to arms transfers. The lack of transparency or availability of a bare-minimum level of information about the reasoning behind decisions granting licences and allowing materiel exports has been a structural entry-level hurdle that has, for instance, blocked NGOs from filing any proceedings in Spain, and which resulted in repeated filings in several other jurisdictions. In some jurisdictions, such as Belgium or France, NGOs that file a claim do so without proper information regarding the scope and duration of arms sales and export licences.

In the July 2020 report of the UN Human Rights Council’s Special Rapporteur on extrajudicial, summary and arbitrary executions, Professor Agnès Callamard highlighted the important role of domestic courts in ensuring the accountability of states that, for example, have facilitated US drone strikes by permitting the use of their airbases.<sup>218</sup> This role is equally important for the transfer of arms and services to end-users that are actively involved in the commission of serious IHL and IHRL violations. Therefore, ‘effective parliamentary and judicial mechanisms to oversee, review and/or approve a State’s use of lethal force’ are necessary checks on State decisions to lend support to state violence by others.<sup>219</sup> The cumulative effect of the various obstacles to domestic accountability processes within supplying states results in the denial of justice to victims of serious IHL and IHRL violations, to which arms-supplying states and relevant corporate actors may contribute under certain circumstances.<sup>220</sup>

Given the many shortcomings in domestic-level access to judicial review and remedies, NGOs have begun to turn to international fora including the ICC and quasi-judicial human rights bodies.<sup>221</sup> Due to limitations on the enforcement powers and mandates of such institutions, it may take time before any such decision has an actual impact on state conduct relevant to ATT obligations.

As discussed in Part II, the ATT regime entrusts States Parties with the primary responsibility for implementation and enforcement of treaty obligations. The role of national courts has naturally assumed an increasing importance since the ATT’s entry into force, and domestic courts are likely to remain the primary forum for legal challenges to arms transfers.

<sup>218</sup> HRC (2020), ‘Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions’, A/HRC/44/38, 29 June, para. 22 onwards ([https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A\\_HRC\\_44\\_38\\_AUV.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_38_AUV.docx))

<sup>219</sup> Ibid, para. 29.

<sup>220</sup> See, for example, *Noor Khan v. The Secretary of State for Foreign and Commonwealth Affairs* (<https://hsfnotes.com/wp-content/uploads/sites/4/2014/01/R-on-the-application-of-Khan-v-Secretary-of-State-for-Foreign-and-Commonwealth-Affairs-2014-EWC.pdf>)

<sup>221</sup> See, for example, with regard to the Inter-American Human Rights Commission, Leah Feiger and Nick Turse (2021), ‘A Yemeni family was repeatedly attacked by IS drone. Now, they’re seeking justice’, *Vice*, 26 January, [www.vice.com/en/article/3anj33/a-yemeni-family-was-repeatedly-attacked-by-us-drones-now-theyre-seeking-justice](https://www.vice.com/en/article/3anj33/a-yemeni-family-was-repeatedly-attacked-by-us-drones-now-theyre-seeking-justice).

## 5

## Challenging Yemen-linked arms transfers: implications for the ATT

At the end of 2014, when the ATT entered into force, legal challenges to arms sales were extremely rare. In the years since, arms transfers have been subject to legal challenges in at least nine states. Of these, eight are ATT States Parties.

What factors have led to this upsurge, and what role might the ATT have played in this shift? All these challenges revolve around one context: the military intervention carried out by the Saudi- and UAE-led coalition in Yemen, which began shortly after the ATT entered into force. It is too early to say whether similar developments might take place with respect to other contexts.

One important factor relating to Yemen is that all parties to the conflict, including coalition members, have clearly and repeatedly violated IHRL and IHL on a widespread and systematic basis. This may trigger the international obligations, particularly under the ATT, of arms-supplying states, to ensure that their exported weapons and equipment are not being used to commit international law violations.

For many established arms-producing countries, supplying the conflict in Yemen highlights the contradictions between legal obligations, political commitments and rhetorical statements on the one side, and actual decision-making and conduct on the other. Several coalition members, including Saudi Arabia, the UAE and Egypt, have long been major export markets for the supplier states, despite these countries having deplorable human rights records. This notwithstanding, some suppliers have maintained or even increased their arms exports to coalition members. Indeed, the conflict in Yemen has prompted an upswing in the demand for and sale of certain types of arms, which have been used to commit or facilitate serious IHL and IHRL violations in Yemen. In such cases, it is hard to understand how authorising these transactions has not contravened the supplying states' obligations under international law and the ATT.

A growing number of arms-supplying states in Europe, including Austria, Denmark, Finland, Germany, Ireland, Norway, Sweden and Switzerland,<sup>222</sup> have introduced restrictions on the transfer of military items considered at risk of being used in the ongoing hostilities in Yemen. For civil society representatives contemplating whether to seek legal remedy, the knowledge that an increasing number of states are opposed to

<sup>222</sup> See, for example, Maletta G (2021), 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen,' *The International Spectator* 56 (1), 5 February, pp 73–91 (<https://doi.org/10.1080/03932729.2021.1876862>)

some or all arms supplies in this context – especially in the territory of the EU where member states operate within the same legal framework – is encouraging. Still, such proceedings have taken place in countries with relatively strong and transnationally-linked civil societies, courts that are often used to challenge government decisions in other areas, and comparatively sophisticated and long-standing regulatory frameworks for arms transfers.

All European states are bound by the EU Common Position and the ATT. South Africa has been party to the ATT since it first entered into force in December 2014. Canada has been a party to the ATT since September 2019, whereas the US, having not ratified the ATT, remains bound by domestic law regulating arms transfers.<sup>223</sup> However, all states are bound by other areas of international law, including IHL, IHRL, the UN Charter and the law of international responsibility, which include norms that are relevant to arms transfers. The UN Guiding Principles and the Organisation for Economic Cooperation and Development (OECD) Guidelines on Multinational Corporations are also relevant to clarifying the obligations of companies and their domicile-countries to avoid harmful impacts of business operations.

Even in the absence of comprehensive empirical research, it is possible to argue that the ATT has played an important role in subjecting arms transfers to domestic legal proceedings. The ATT, however, has not been central to the proceedings before domestic courts discussed above. Most courts have referred instead to domestic legislation that implements the ATT, simply because their domestic legal orders do not give direct effect to international treaties and instruments. Regardless of the formal status of the domestic legal order's relationship with international law, some judges have made explicit references to the standards contained in the ATT. At the same time, the adequacy of states' transposition of the ATT into domestic law, or states' interpretation of domestic criteria to ensure compliance with the ATT, has not yet been the subject of adjudication.

The ATT has certainly had an impact on the broader environment in which export decisions are taken, and in which they are challenged through advocacy and before domestic courts. The ATT's annual Conference of State Parties is the key international forum where states and external actors, including civil society, can examine the current state of arms export controls at the global level with a view to encouraging states to harmonise their approaches to and practice of licensing. This reinforces an understanding that states who supported, and indeed in some cases played leading roles in advancing the Treaty's adoption, should not be among the prime arms suppliers for the parties to the Yemen conflict. It is only appropriate, if not expected of States Parties to the ATT, that they provide the opportunity to challenge and hold to account licensing decisions that enable such transfers.

Whether the current spate of litigation will prove to be short-lived or will become a catalyst for broader changes in approach to the ATT's effective implementation by national systems might be determined in part by the outcomes of the extant challenges. ATT-related litigations may also be affected by broader reforms that seek to adjust the relationship between the executive and judiciary. In the UK in 2020, for instance, the government launched an 'independent review of administrative law,' claiming it would ensure that judicial review 'is not abused to conduct politics by another means or to create needless delays.'<sup>224</sup>

<sup>223</sup> Although as noted in the US section it did sign the ATT in 2013, under the Trump Administration in 2019 the US declared that it did not intend to become a party to the ATT and thus had no related legal obligations. Communication from the US Government to the UN Secretary General, 18 July 2019 (<http://disarmament.un.org/treaties/a/att/unitedstatesofamerica/sig/un>)

<sup>224</sup> The Conservative and Unionist Party Manifesto 2019, p 48 ([https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba\\_Conservative%202019%20Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf))



Whatever happens in the future, cases continue to be heard, despite the barriers to access and the onerous evidentiary and substantive standards that claimants have to overcome for their challenges to succeed. While full-scale success has been elusive, many cases have not been dismissed outright. In the UK and Belgium, courts have ruled against the government. In other jurisdictions, cases are still ongoing. Such legal processes, of course, do not occur in a vacuum; they actively interact with politics and public opinion. In Italy, while the courts were considering the prosecutor's attempt to dismiss a criminal challenge, the parliament requested the government to revoke export licences for missiles and aerial bombs to Saudi Arabia and the UAE. While it is difficult to quantify the impact that the legal process had on this political outcome, it can hardly be irrelevant.

It appears that the recent upsurge in domestic proceedings has been due to a range of factors, including the adoption of the ATT. This trend is likely to continue in the future, and approaches to the enforcement of arms export controls appear to be shifting. Legal challenges are gradually becoming a pragmatic response in the face of apparently unlawful decisions by arms exporting states. Governments should recognise this shift and the possibility that their decisions on arms exports will increasingly be subject to legal challenges before domestic courts. Their decisions must be able to withstand judicial oversight and must conform with obligations under both international and domestic law.

## Partner profiles

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## ATT Expert Group @ATTExpertGroup





The ATT Expert Group is convened by Saferworld. Its purpose is to help develop common understandings among government and civil society experts from all world regions on issues relevant to ATT implementation, with a view to promoting progressive interpretation of the Treaty's provisions and the development of a robust ATT regime.

Since 2013, the ATT Expert Group has met at a variety of locations around the world, including Canada, Costa Rica, Ghana and Ireland. With the onset of the COVID pandemic, the ATT Expert Group shifted online, with a series of eight meetings so far, covering subjects such as the ATT and stockpile management, understanding and applying terrorism and transnational crime provisions within an export assessment process, transparency and reporting, and how to achieve consistency of ATT implementation in situations of crisis. An earlier working draft of this paper was presented at a virtual meeting of the ATT Expert Group in March 2021. The views and ideas expressed herein should not be taken as reflecting the official view of those States or individual experts that have participated in this process.

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Registered charity no. 1043843  
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ISBN: 978-1-912901-26-5