



Access to Justice for Gun Violence

Seeking Accountability for
European Arms Exports

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Access to Justice for Gun Violence. Seeking Accountability for European Arms Exports

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Preface

Accountability for gun violence is alarmingly deficient around the world. According to Amnesty International, some 44 percent of homicides globally involve gun violence. Easy access to guns is among the driving reasons behind this statistic. And although gun deaths are not endemic in the region, European gun exports lack comprehensive due diligence procedures despite being transferred to at-risk areas.

This report shows that the European arms industry enjoys unique legal protections in many jurisdictions, including secrecy for licensing and export agreements through state-approved national security or foreign policy exceptions. Consequently, judicial remedies for victims are alarmingly deficient. The extension of these protections jeopardizes the right to a remedy to which survivors of gun violence are entitled, including under international human rights law.

The report identifies this accountability deficit in terms of access to justice for victims, to assist policymakers in developing a better regulatory regime. In particular, it maps out the legal remedies available to victims of armed violence committed with European-made weapons beyond European borders as a result of negligent or unlawful exports and sales.

Traditionally, Mexico has been an active promoter and advocate of international law, given its benefits to international peace and stability. But unfortunately, Mexico has also directly experienced the negative impact of arms trafficking and diversion. The Mexican Government has therefore implemented a legal strategy in various international fora to reduce armed violence in our country, and to make the arms industry accountable for its lack of due diligence.

I am delighted to present this report, which focuses on access to justice for gun violence in European jurisdictions. It was commissioned by the Office of the Legal Advisor of the Mexican Ministry of Foreign Affairs to address the extraterritorial and downstream damage resulting from irresponsible arms sales, and to contribute to relevant debates on arms production, distribution and export.

This report was written by students of the University of Amsterdam International Law Clinic on Access to Justice for Gun Violence in cooperation with the Asser Institute for International and European Law in The Hague, and the Office of the Legal Advisor of the Mexican Ministry of Foreign Affairs. I thank the students and their supervisor, Dr. León Castellanos-Jankiewicz, for their excellent work.

Engaging with students is very important to us; it empowers younger generations to drive change on the basis of first-hand knowledge. Arms trafficking has become a serious threat in many regions, but does not always feature highly on the multilateral agenda. Understanding the regulatory makeup of arms control while empowering young leaders is an important first step towards changing this.

Alejandro Celorio Alcántara, MA, LL.M.

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Mexico City, July 28th, 2023



Executive Summary

Background

Four of the top ten arms exporters worldwide are EU member states. The UN's Global Study on Arms Trafficking 2020 identified Europe as a "major departure point" for illicit flows. Alarming, European weapons and their components are constantly found in conflict zones and at-risk areas where war crimes, crimes against humanity and serious human rights violations are taking place.

Objective

This report assesses accountability mechanisms to challenge European arms exports when these products have caused injury to victims in third states. Eleven country assessments are presented to measure access to justice in two scenarios: 1) when challenging arms export licenses which have been authorized by states, and 2) when the liability of gun manufacturers is invoked.

Methodology

This report used desk-based research to develop eleven country studies. It includes analysis on Belgium, France, the Netherlands, Germany, Spain, the UK, Austria, Switzerland, Italy, Romania, and Sweden. It draws from primary sources including domestic legislation and judicial decisions, as well as secondary sources from various fields. Wherever possible, primary sources were analyzed in their original languages. International and European human rights law standards on access to justice are used as a yardstick to evaluate each country's regulatory regime and jurisprudence.

Findings

Overall, victims of gun violence seeking redress in European courts for harm caused with European weapons face significant challenges. These problems include deficient regulatory frameworks, absence of information on arms exports and sales, lack of standing to present legal claims, and limited judicial oversight on weapons exports:

1. **Secrecy.** The European arms industry enjoys protections in many jurisdictions, including secrecy for licensing and export agreements through state-approved national security or foreign policy exceptions. Grounds for refusal of this information further include trade secrecy, public safety and national defence.
2. **Deficient reporting.** EU law contains no mandatory rules for EU Member States to provide public data on the import or export of firearms, or on revenues and expenditures under these headings. Reporting mechanisms are therefore deficient and at least one country does not undertake reporting at all.
3. **Lack of standing.** Because of lack of access to information, victims face significant jurisdictional impediments in asserting standing before courts when contesting allegedly negligent exports or licensing decisions. Moreover, NGOs



are explicitly denied standing in some countries when attempting to represent the interests of victims.

4. **Restrictive judicial review.** The scope of judicial review of governmental action in the field of arms exports is very restrictive in many European states. Governments are given a wide margin of discretion to authorize exports without comprehensive oversight.

Taken together, the findings of this report underscore the need to improve access to justice in Europe for victims of gun violence when these individuals have been harmed by European weapons negligently exported to third countries. Failure to do so may result in the breach of international and European human rights obligations on the part of states, and lead to liability of members of the European arms industry.

Recommendations

To States:

1. **Strengthen** regulatory frameworks to eliminate secrecy and increase transparency around arms exports and sales at the national and EU level, where applicable.
2. **Ensure** that victims and NGOs can access information on arms exports and traceability to guarantee their standing before European courts.
3. **Expand** judicial oversight on weapons exports to ensure that governments are held accountable for their licensing and export decisions.

To the arms industry:

1. **Perform** end-user controls to avoid trafficking and diversion.
2. **Cooperate** with national and EU authorities, where applicable, to publicize exports and traceability information.
3. **Mitigate** downstream damage by conducting due diligence and risk assessments in relation to the intended end-user in accordance with international human rights standards.



Abbreviations

ATT	Arms Trade Treaty (2013)
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Common Position (2008)	European Union Common Position on Arms Exports (2008)
EU Regulation (2012)	European Union Regulation Implementing Article 10 of the Firearms Protocol (2012)
Firearms Protocol	Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001)
ICCPR	International Covenant on Civil and Political Rights (1976)
ICJ	International Court of Justice
JIMDDU	Junta Interministerial Reguladora del Comercio Exterior de Material de Defensa y de Doble Uso/Inter-ministerial Regulatory board on foreign trade on defense and dual-use material (Spain)
OECD Guidelines	OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2011/2023)
UAMA	Unit for the Authorization of Armament Material (Italy)
UN	United Nations
UN Charter	Charter of the United Nations (1945)
UNGPs	United Nations Guiding Principles on Business and Human Rights (2011)
WMA	War Material Act (Switzerland)
WMO	War Material Ordinance (Switzerland)



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Introduction

By global standards, between 2018 and 2022, five of the top ten arms exporters were European states.¹ Those with the highest export volume include France, Germany, Italy, the UK and Spain. The European arms industry thus accounts for roughly one quarter of the global arms trade.² These weapons are frequently unlawfully diverted after they have been licitly traded from Europe to elsewhere.

European arms and their components are used for grave violations of international humanitarian law outside of Europe. In recent times, this has particularly caused public outcry in the context of the proxy war in Yemen.³ These patterns of arms export and diversion directly affect the local population in conflict zones who may fall victim to European arms.

The Accountability Deficit

Due to their inherent entanglement with national security interests, national arms industries and arms exports often take on a special position in the politics of many countries. The close ties between the military industrial complex and states are particularly visible in the arms export regime and control thereof. This overall situation merits an assessment of the export (control) regime and access to justice in the event of negligent export authorizations and arms manufacturer's practices.

Thus far, the EU regulatory framework has yet to harmonize all aspects of the arms export regime across all Member States. As a corollary, states still have a considerable degree of discretion regarding the implementation of rules on arms trade. This discretion constitutes one of the focal points of this memorandum, the other one being the liability of the arms industry in different European jurisdictions.

The relevance of these issues emanates from a potential accountability deficit for the far-reaching violations of the rights of victims of illicit trade. Victims of illicit arms trade constitute the last link in the causal chain that commences with the negligent export from arms manufacturers and licensing states. At the time of writing, these victims lack effective paths to access justice for the human rights violations they have suffered.

In general, all European states have entered into international obligations to ensure that they do not contribute to human rights violations within their jurisdiction or elsewhere. This finds further reflection in the broad state support of the UN Guiding Principles on Business and Human Rights that aim at establishing a conclusive framework of standards for responsible business conduct. Nevertheless, the lack of observance of controls concerning arms exports is hampering the possibilities of redress for victims.

¹ SIPRI, *SIPRI Yearbook 2023 Summary* (Solna 2023), 11.

² *Ibid.*

³ See for instance: ECCHR, *Made in Europe, bombed in Yemen*, available at <https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/> (last accessed 16 June 2023).



As the following comparative analysis will show, the regulatory framework of European states often displays deficiencies regarding the personal and material scope of access to judicial controls. Furthermore, many European states restrict the access to relevant information around arms exports, thus reducing the possibilities to challenge license decisions in the courts. Often, this restrictive approach is ostensibly based on secrecy considerations.

The Selected Countries

The present analysis examines national legal frameworks and case law across 11 European countries, namely Belgium, France, the Netherlands, Germany, Spain, the UK, Austria, Switzerland, Italy, Romania, and Sweden. The selection of these countries is based on several factors. Their significance in the realm of international arms trade serves as a primary criterion. Five of the aforementioned countries belong to the top ten arms exporting countries worldwide, while others have an important role in exporting weapons-system components or parts (e.g. the Netherlands) or have engaged in arms transfers to controversial importers over a span of several decades (as exemplified by Belgium).

As a second important factor, the chosen countries are home to prominent arms manufacturers that wield substantial influence in the international arms trade. The export of their products requires export licenses that are obtained from the national governments. Thus, the arms manufacturers as well as the domestic framework on arms exports have a direct impact on international arms trade and its consequences. Multiple arms manufacturers within the five biggest European arms exporting countries operate under a notable accountability gap pertaining to their role in gun violence suffered by numerous victims around the world. In other countries of the following analysis, internationally renowned arms manufacturers still maintain a presence (as observed in Austria) or are wholly state-owned entities (as is the case in Romania).

Third, the selection of countries is predicated on the relatively high accountability deficit regarding the granting of arms export licenses by states and the behavior of negligent arms manufacturers. This accountability deficit arises from various barriers encountered by victims of arms exports or NGOs acting on their behalf when seeking redress in domestic courts in selected countries. These obstacles include the lack of transparency and information surrounding arms exports, issues pertaining to legal standing in administrative courts, and the broad discretion governments have in their licensing practices, resulting in far-reaching protection of their arms export policies from the judiciary.

Access to Justice and Legal Framework

The purpose of this analysis is therefore to measure accountability for European arms exports when these products have caused injury in third states. In that endeavor, every country assessment measures access to justice in two cases: 1) when attempts to challenge the state's arms export licenses is made, and 2) when the liability of gun manufacturers is invoked.



The first part, which comprises the core of this research, provides a country-by-country analysis of the national regulatory framework concerning arms export authorizations and access to information. Each analysis evaluates the degree of access to justice for victims of gun violence within the concerned country, covering legal causes of action against the state as well as against gun manufacturers. The examination of access to European courts assumes that the claimant was injured by an European weapon in a third country. Cases brought by individuals as well as by NGOs are considered.

The second part will cover access to justice under international law. It will assess the possible international legal avenues that may be taken by victims of gun violence or other states. In this regard, states could be held accountable for their insufficient implementation of the international and European framework governing export licenses or inadequate access to justice under international and regional human rights obligations.

The conclusion summarizes the findings and makes an overall assessment. Finally, an annex presents an overview of the international legal framework and EU law applicable to the arms trade, as well as international and European human rights instruments relating to access to justice.



Part 1: Access to Justice under Domestic Law

This part evaluates access to justice standards in eleven European countries for victims of gun violence committed as a result of negligent weapons exports and sales. The main issue addressed here concerns the export of weapons to countries in which a high risk of diversion or (international) criminal misuse exists. These exports are usually authorized by state institutions under domestic law.

Legal claims can be envisioned against negligent authorities issuing the exporting license or against the arms manufacturers for negligent practices. In this regard, the country studies will analyze the avenues for taking action against the licensing authorities for insufficient consideration of the situation in the importing country. They will furthermore consider the (civil and criminal) actions that can be brought against the arms manufacturers.

The part is based on an analysis of the regulatory framework and case law in 11 European countries: Belgium, France, the Netherlands, Germany, Spain, the United Kingdom, Austria, Switzerland, Italy, Romania and Sweden. The countries have been selected given the volume of their international arms exports and the importance of their arms manufacturers.

Structure and Methodology of Country Studies

For each country study, the domestic regulatory framework concerning export licenses is assessed (1). Based on this, legal avenues to challenge export licenses are mapped out and the liability of gun manufacturers is evaluated. (2)

The export licensing regime is based on similar criteria in all countries (1.a). While most of the countries are members of the European Union and thus apply the EU Common Position as well as the EU Dual-Use Regulation, the former instrument leaves room for national interpretation leading to a different application in every country. All countries participate in the Arms Trade Treaty and the Wassenaar Arrangement and incorporate these instruments implicitly or explicitly in their domestic frameworks.

Access to information about arms exports is a necessary prerequisite for bringing action challenging arms exports and for tracing arms exports in order to establish causality in civil proceedings (1.b). The country-studies therefore analyze national legislation on access to public information and the limitations thereto. Most provisions on access to information provide for exceptions concerning foreign policy, state interests and third persons.

Concerning the material access to courts, the country-studies cover the causes of action against the licensing decisions (2.a). These claims are mainly brought in administrative courts and are facing limitations concerning restrictive national standing provisions and the scope of judicial review or possibility of review at all (such as under “acte de gouvernement” doctrines). The case studies will illuminate the domestic legal framework with its standing requirements and limitations and illustrate possibilities and limitations through case law where applicable.



In a second step, causes of action against the gun manufacturers are assessed (2.b). In this regard, mostly civil and criminal law provisions are of relevance. While there is no general EU Due Diligence Framework (yet), some countries have started to implement national due diligence laws. Their possible impact on the civil liability of gun manufacturers is part of the analysis. Whereas some criminal law cases have been brought against gun manufacturers, civil litigation is scarce. This memo therefore aims to map out possibilities and limitations in domestic (tort) law and procedural law. The lack of case law, however, complicates a comprehensive assessment of the practicability of these options.

Every country-study concludes with an assessment of the situation in that specific country (3). The general structure thus prescribes an overview of the domestic situation followed by the assessment of available avenues to access justice for cases of gun violence in that country.

The structure of each case study thus presents itself as follows:

1. Regulatory Framework
 - a. Rules on arms export authorization
 - b. Rules on access to information/state secrecy/national security
2. Access to Justice for Victims
 - a. Causes of action against the state at the national level
 - b. Causes of action against the manufacturers at the national level
3. Assessment

Default Claimant and Damage Occurring in Third States

The analysis of the legal framework and access to courts will fundamentally rely on the assumption of a claimant situated in the country with damage occurring in the country. This allows for a 'neutral' assessment of the legal framework. In this regard, both cases brought by natural persons as well as NGOs will be taken into consideration.

The situation in which a victim from a third state brings a claim against a gun manufacturer in one of the respective state's courts has further implications. Particularly, trans-border civil litigation requires the application of private international law rules on jurisdiction and the applicable law. The EU regime for cross-border cases is widely harmonized under the Brussels and Rome Regulations.

Jurisdiction in EU Member States

The Brussels regime provides that the courts of the state in which the defendant is domiciled have jurisdiction over civil cases brought against the defendant. With a view to corporations, their domicile is defined as the place of the statutory seat, central administration or principal place of business.⁴ According to the ECJ, the application of

⁴ Art. 4, 63 *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*.



a *forum non conveniens* defense is precluded under the harmonized regime.⁵ Thus, the courts of the country in which the gun manufacturer is situated generally have jurisdiction over civil cases brought against it.

Applicable Law

The Rome regime harmonizes the conflict of law rules in the European Union. Rome II designates the law applicable to non-contractual obligations. As a corollary, the law applicable to tort claims is generally the law of the place where the damage occurred. In cases of victims of gun violence situated outside of Europe, this points to the law of the victim's state. The escape clause for cases in which the tort is manifestly more closely connected with another state does generally not apply in business and human rights cases.⁶ Whereas Rome II provides for the option to choose the applicable law in cases of environmental damage, no such exception exists for human rights violations. Hence, the material law applicable in cases of gun violence with victims in third states is most likely the law of the victim's state.

The applicable law may lead to difficulties related to lower protection standards in the law of the host state and deprive the victims of legal remedies.⁷ Rome II provides for two exceptions in which the EU Member State's law can still be applied - the public policy exception and the overriding mandatory provision. Based on these exceptions, it can be argued that the law of the member state can be applied where the foreign law insufficiently protects the victims' human rights or is too restrictive regarding civil liability.⁸ National due diligence laws may also constitute overriding provisions.⁹ These exceptions have however not been applied in practice for holding corporations liable for human rights abuses. Regarding the applicable law, a further difficulty may lie in the proof and interpretation of foreign law.

⁵ ECJ, *Owusu v Jackson and Others*, C-281/02 [2005] ECR I-1383.

⁶ cf. European Commission, Directorate-General for Justice and Consumers, Migliorini, S., Lein, E., Bonzé, C., et al., *Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations*, Publications Office of the European Union, 2021, p. 89.

⁷ cf. European Parliament, Policy Department, Directorate-General for external policies, *Study: Access to legal remedies for victims of corporate human rights abuses in third countries*, EP/EXPO/B/DROI/FWC/2013-08/Lot4/07, 2019, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf) (last accessed 16 June 2023).

⁸ *Ibid.*

⁹ *Ibid.*



I. Belgium

Belgium is an important player among arms exporting countries in Europe. As the regulation of export of arms and dual-use goods lies within the competence of the three Regions in Belgium since 2003, the number of arms exports varies per region. The Walloon Region produces and exports the highest number of weapons in Belgium, with Saudi-Arabia being among the largest importers.¹⁰ Belgian arms manufacturers that have been particularly involved in arms exports to Saudi-Arabia are FN Herstal and CMI Defence.¹¹ Contesting arms export licenses that these companies need to export their products presents certain difficulties. In Belgium, the lack of adequate information on arms exports, which is a prerequisite to effectively challenge licenses, is one of the main barriers that can be identified. As will be elaborated upon below, relevant information on arms exports may be kept confidential due to trade secrecy obligations or the need to protect international relations. Moreover, licenses for exports to a certain destination can only be contested on an individual basis, as there is no legal basis to challenge the totality of arms sales to one designated end-user.

1. Regulatory Framework

As the following sections will show, the authorization of arms exports lies within the competence of the three Belgian regions – Flanders, Wallonia, and Brussels. All regional legal frameworks on arms export regulation explicitly refer to the criteria of the EU Common Position and provide for annual (or monthly) reporting obligations concerning the regional arms export authorization practice. Even though the right to access to administrative documents is a constitutional right in Belgium, disclosure of information relating to export licenses may be restricted, e.g., under secrecy obligations.

a. National framework on arms export authorization

Since 2003, the regulation of import, export, transit and transfer of arms and dual-use goods lies within the competence of the regions in Belgium. The Belgian army and federal Police form the exception to this general rule, as they are federal institutions and consequently apply for their import- and export licenses at the federal level. The competent authority to process those license applications is the *Service des Licences du SPF Economie*. The export policy of the three regions will be dealt with separately below.

i. Flanders

All companies or individuals seeking to export strategic goods must apply to the Strategic Goods Control Service (*Dienst Controle Strategische Goederen*). The final decision regarding the issuance of an export license lies with the competent minister within the department of Foreign Affairs.

¹⁰ G. Gourdin, D. Cops & N. Duquet (Vlaams Vredesinstituut), *Wapenexport in België: gelijkenissen en verschillen*, 11 May 2017, at 12.

¹¹ *Ibid.*, at 22.



Essentially, the regulation of export of military goods is contained in the Arms Trade Decree.¹² This instrument partially implements various European texts that seek to harmonize the rules and EU Member States' policies in this area. The assessment criteria in the Arms Trade Decree, as set out in article 26(1), are based on the EU Common Position. Article 26(2) also contains a provision on the absolute prohibition of export in case of human rights violations, violations of humanitarian law or armed conflict.

The Flanders government is required to report annually on the application of the Arms Trade Decree. Additionally, the government is required by law to publish a monthly report listing all approved, rejected and extended licenses of the previous month.¹³ The Decree also contains a provision that allows the performance of post-shipment control through 'physical verification', which includes on-site inspections.¹⁴ However, no on-site inspections have been carried out so far.¹⁵

With respect to the export of dual-use goods, the EU Dual-Use Regulation is implemented by the 'Decree of the Flemish Government of 14 March 2014 regulating the export, transit and transfer of dual-use items and providing technical assistance'. Accordingly, the export of a selection of dual-use goods to non-EU countries requires a license. Furthermore, it must be assessed whether there is a risk of undesired end-use based on factors such as the nature of the goods, the probability that the goods will be used according to the declared end-use, and the country of final destination.

ii. Wallonia

The competent body in Wallonia to manage the granting of licenses for the import, export and transit of arms and military equipment is the Arms Licenses Directorate (*La Direction des Licences d'Armes*), which is part of the department of Economy, Employment and Research (*SPW Economie, Emploi, Recherche*). This department also manages the issuance of licenses for dual-use goods. The decision to grant or refuse licenses, however, lies within the exclusive responsibility of the Minister-President of the Walloon Region.

The Decree of 21 June 2012 sets out that license applications for the export of military goods should be assessed against the criteria set out in the EU Common Position.¹⁶ The government also has an obligation to report annually on the application of the

¹² *Decreet betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten ander voor militair gebruik dienstig materiaal, ordehandhavingmateriaal, civiele vuurwapens, onderdelen en munitie ("Wapenhandeldecreet")* (Law of 15 June 2012) [2012].

¹³ *Ibid.*, Art. 50.

¹⁴ *Ibid.*, Art. 12(1)(4).

¹⁵ Varisco, Brockmann, Robin, *Post-Shipment Control Measures: European approaches to on-site inspections of exported military materiel*, SIPRI December 2020, at 22; available at https://www.sipri.org/sites/default/files/2020-12/bp_2012_post-shipment_controls.pdf (last accessed 16 June 2023).

¹⁶ Art. 14, *Décret relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense* (Decree of 21 June 2012) [2012].



Decree, providing information on exports from the Walloon Region, details of exported equipment and rejected licenses.¹⁷

The export of dual-use goods to countries outside the EU is prohibited without a license. The license must be granted by the Arms Licence Directorate and signed by the Minister-President, authorizing the export of the products covered by the EU Regulation.

iii. Brussels

In the Brussels Region, the competent body for the issuance of licenses for the export, import and transit of military goods as well as dual-use goods is the Licencing Unit (*Cellule Licences*).

The export of military goods to countries outside the EU is prohibited without a license¹⁸ and each application must be assessed against the criteria set out in the EU Common Position.¹⁹ License applications for the export of dual-use goods are considered according to the EU Dual-Use regulation.

b. National framework on access to information

In Belgium the right to consult administrative documents is enshrined in the Belgian Constitution, namely in article 32. This constitutional right has been given further shape in federal law on public access to administrative documents.²⁰ Thus, in principle, all three regions provide for the public access to administrative documents. However, while this right applies without exceptions in Brussels, Flanders and Wallonia both include permissible grounds under which this access can be restricted including, importantly, obligations to secrecy.²¹

2. Access to Justice

Important cases regarding Belgian arms exports have been brought in administrative law, specifically against the Walloon regional government to challenge issued arms export licenses. One of the main hurdles faced by claimants, i.e. victims of Belgian arms export and NGOs acting on their behalf, is the lack of information about the granting of export licenses and the preceding risk assessment which should be conducted based on the criteria of the EU Common Position. An additional hurdle lies in the lack of a legal ground to challenge the entirety of licenses to one particular end-user, which limits proceedings to challenging individual licensing decisions. This results in the need for separate procedures to challenge new licenses granted for the export to the same country.

¹⁷ *Ibid.*, Art. 24.

¹⁸ Art. 32, *Ordonnantie betreffende de in-, uit-, doorvoer en overbrenging van defensiegerelateerde producten, ander voor militair gebruik dienstig materiaal, ordehandhavingsmateriaal, civiele vuurwapens, onderdelen, toebehoren en munitie ervan* (Order of 20 June 2013) [2013].

¹⁹ *Ibid.*, Art. 36.

²⁰ 11 april 1994 - *Wet betreffende de openbaarheid van bestuur* (Law of 11 April 1994) [1994].

²¹ Art. II.34, *Decreet Bestuursdecreet* (Decree of 7 December 2018) [2018]; Art. 6, *Décret relatif à la publicité de l'Administration* (Decree of 30 March 1995).



a. Causes of action against the state at the national level

i. Administrative law

The Belgian judicial organization and conditions for bringing an action before Belgian courts are laid down in the Belgian Judicial Code. An action may only be admitted if the claimant is an interested party. It was unclear for a long time whether NGOs wishing to bring a claim in relation to human rights, had standing before administrative courts. In 2013 the Constitutional Court clarified the matter, concluding that legal standing of NGOs was provided for by the Constitution.²² As a result of an amendment to procedural law that was passed in 2018, NGOs whose statutory goals include the protection of rights and freedoms may bring a claim based on these rights in administrative proceedings.

The competent administrative court in the context of challenging licensing decisions is the Council of State. The Council of State has the power to annul and suspend administrative decisions.²³ For the suspension of administrative decisions there are two different procedures: an ordinary procedure and an urgency procedure.

ii. Administrative challenges to the Walloon Government²⁴

The four main challenges²⁵ that have been submitted, were against the Walloon Regional government. They have all been made by Belgian NGOs Ligue des Droits de l'Homme (LDH) and Coordination Nationale d'Action pour la Paix et la Démocratie (CNAPD).

The first challenge concerned a series of licenses issued by the Prime Minister for export of arms to Saudi Arabia. The claim argued that these licenses were contrary to applicable law, namely the Decree of 21 June 2012, mainly due to the risk of Saudi Arabia using the arms to commit violations of human rights and IHL in the Yemen conflict. LDH had requested the Prime Minister in October 2017 for a copy of its decisions regarding these licenses, as the information available to the NGOs was based on news reports. However, the response by the Prime Minister merely included general aspects of the licensing policy and did not contain the full decision.²⁶ On 18 December 2017, Belgian NGOs instituted 14 different ordinary proceedings²⁷ to request the

²² Cour constitutionnelle, arrêt no. 133/2013 du 10 octobre 2013, Cour constitutionnelle de Belgique 11/10/2013.

²³ Art. 14 & Art. 17, *Wetten op de Raad van State, gecoördineerd op 12 januari 1973* (Law on the Council of State of 12 January 1973) [1973].

²⁴ cf. Conseil d'État, Section Du Contentieux Administratif, arrêt no. 240.901 du 6 mars 2018 (Judgment of 6 March 2018) & Conseil d'État, Section Du Contentieux Administratif, arrêt no. 242.023 du 29 Juin 2018 (Judgment of 29 June 2018); Conseil d'Etat, Section Du Contentieux Administratif, arrêt no. 247.259 du 9 mars 2020 (Judgment of 9 March 2020); Conseil d'État, Section Du Contentieux Administratif, arrêt no. 248.128-248.129 du 7 août 2020 (Judgment of 7 August 2020); Conseil d'État, Section Du Contentieux Administratif, arrêt no. 249.991 du 5 mars 2021 (Judgment of 5 March 2021).

²⁵ *Ibid.*

²⁶ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 240.901 du 6 mars 2018 (Judgment of 6 March 2018), at 3.

²⁷ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 240.897 – no. 240.910 (6 March 2018).



suspension and annulment of 24 licenses granted by the Walloon government to companies FN Herstal and CMI Defence, claiming their unlawfulness based on the 2012 Decree. As a result of these proceedings, six licenses were suspended²⁸ following urgency proceedings, and eight were annulled by the Council of State in subsequent procedures in 2019.²⁹ Regarding both the suspension and the annulment of the licenses in question, the court argued that the government did not take into account Saudi Arabia's practices concerning its respect for IHRL and IHL and its commitments to the non-use of force.³⁰

The second challenge was, again, initiated by LDH and CNAPD, accompanied by a third NGO, Forum Voor Vredesactie (FVV) and concerned another set of licenses for the export of arms to Saudi-Arabia.³¹ Similar to the first challenge³², the NGOs had requested information from the Prime Minister concerning the issued licenses, which it had denied due to secrecy obligations and the need for protection of international relations.³³ Again, the court ended up suspending the licenses following urgency proceedings, based on the argument that the government had not provided a valid legal basis for maintaining them and that it did not consider the clear risk that Saudi Arabia might use the exported arms to commit serious violations of IHL in Yemen.³⁴ This reflects criterion 2(b) of the EU Common Position, as incorporated in article 14 of the 2012 Decree.

Two subsequent challenges³⁵ resulted from new licenses granted by the Walloon government for arms exports to Saudi-Arabia, after it had canceled the previously suspended licenses. On 7 August 2020 the Council of State delivered two judgments, following a challenge in July 2020 submitted by the NGOs concerning two new licenses granted to FN Herstal and CMI Defence. The first one concerned the suspension of the license granted to FN Herstal for the export of arms to the Saudi National Guard, arguing that the involvement of the National Guard in the Yemen-conflict poses a risk that the exported arms will be used by other parties to the conflict.³⁶ The second judgment, however, maintained the license granted to CMI Defence, as the arms were not destined for the Saudi National Guard, but for the Saudi Royal Guard, which was not considered to be involved in misconduct (i.e., violations of human rights or IHL).³⁷

²⁸ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 242.023, 242.025, 242.209 & 242.030 du 29 Juin 2018 (Judgment of 29 June 2018).

²⁹ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 244.800-244.804 (14 June 2019).

³⁰ cf. Conseil d'État, Section Du Contentieux Administratif, arrêt no. 242.023 du 29 Juin 2018 (Judgment of 29 June 2018), at 20.

³¹ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 247.259 du 9 mars 2020 (Judgment of 9 March 2020), at 2.

³² Judgment of 6 March 2018, *supra* note 26.

³³ Judgment of 9 March 2020, *supra* note 31, at 6.

³⁴ Judgment of 9 March 2020, *supra* note 31, at 30

³⁵ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 248.128 du 7 août 2020 (Judgment of 7 August 2020); Conseil d'État, Section Du Contentieux Administratif, arrêt no. 249.991 du 5 mars 2021 (Judgment of 5 March 2021).

³⁶ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 248.128 du 7 août 2020 (Judgment of 7 August 2020), at 15.

³⁷ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 248.129 du 7 août 2020 (Judgment of 7 August 2020), at 21.



For the fourth time, on 20 February 2021, the NGOs challenged new licenses granted to FN Herstal for exports to the Saudi National Guards through urgency proceedings. Again, the Council of State suspended the licenses, arguing that the government's assessment did not adequately consider the clear risk that the exported arms might be used to commit serious violations of IHL.³⁸

An issue that arises clearly lies in the scope of legal challenges, as they are limited to specific licensing decisions and could not be extended to a broader policy to annul all licenses granted to provide arms to a particular end-user. The licenses suspended by the court need to be annulled through separate procedures. As the Judgments of 7 August 2020 and 5 March 2021 illustrate, the government continues to grant new licenses to FN Herstal for arms export to the Saudi National Guard, regarding which significant evidence of involvement in the Yemen-conflict has been presented, even though previous licenses were suspended.³⁹ Moreover, licenses concerning the export of arms to a different unity within the same country are maintained. There is nothing to prevent the government from adopting new decisions to grant licenses that were deemed illegal, as there is no legal basis to challenge the entirety of arms sales to one particular end-user.

Another issue that became apparent, was the lack of access to information. Even though the Walloon government must present an annual report on approved and rejected licenses according to the 2012 Decree, practice in the Walloon Region is that the public obtains general information on a license about one-and-a-half to two years after its issuance, often just before licenses expire.⁴⁰ In the first and second challenge, proceedings were started based mostly on information made public in news reports. Additionally, when information was requested, these requests were either denied or the information that was made public merely included general aspects of the licensing policy. Some of the claims concerned licenses that were already executed, as a result of which these claims were dismissed.⁴¹ This could have been avoided if information on new licenses was made public in a timely manner. Moreover, most of the information is protected by secrecy obligations and the information that is available to the public does not generally contain for example information on government's assessment of end-uses.

b. Causes of action against gun manufacturers at the national level

i. Civil law

Tort law provisions on liability through intentional or negligent conduct are set out in articles 1382 and 1383 of the Belgian Civil Code. In order to bring a claim on the basis of provisions there should be a causal link between the non-contractual fault or

³⁸ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 249.991 du 5 mars 2021 (Judgment of 5 March 2021), at 16.

³⁹ cf. Conseil d'État, Section Du Contentieux Administratif, arrêt no. 248.128 du 7 août 2020 (Judgment of 7 August 2020), at 12-14.

⁴⁰ ATT Expert Group, *Domestic accountability for international arms transfers: Law, policy and practice* August 2021, at 24.

⁴¹ Conseil d'État, Section Du Contentieux Administratif, arrêt no. 240.898, no. 240.899, no. 240.902 & no. 240.903 (6 March 2018).



negligence and the damage that has been caused. Causality is generally determined by the standard of *conditio sine qua non*, meaning that without the fault or negligent conduct the harm would not have occurred in the way it occurred.⁴² In the context of a victim who suffered harm in Belgium claiming the liability of an arms manufacturer for its negligent behavior, it must be proven that without this negligent behavior the harm would not have occurred in the way it did. This remains to be dealt with by civil courts in Belgium as civil proceedings against arms manufacturers directly have not been initiated yet.

3. Assessment

Belgium is among the European countries with a relatively high level of access to justice. Since 2013, NGOs have legal standing to challenge licensing decisions by the government in the public interest and in the aforementioned cases a significant share of licenses have been suspended by the Belgian court and subsequently canceled by the government. However, several issues remain prominent. First, there is no legal basis to challenge the entirety of arms sales to one particular end-user. Proceedings are thus limited to challenging individual decisions and, when those get suspended, nothing prevents the government from adopting new decisions to grant licenses for arms export to the same end-user. Second, lack of transparency and access to information regarding the issuance of licenses as well as the risk assessments necessary to grant them has proven to be a critical barrier for NGOs to bring claims against the state. Information on approved and rejected licenses is not made public in time, which could mean that licenses have already expired and can therefore not be subjected to judicial review. Additionally, as the challenges against the Walloon government have shown, requests for information concerning export licenses have either been denied based on, e.g., secrecy obligations, or the information that was provided included only generic information on the licensing policy. Initiation of suspension proceedings is only possible when claimants have adequate information on the administrative decision they want to contest.

Even though Belgium is home to two big arms manufacturers in Europe, FN Herstal and CMI Defence, there have not been any proceedings against these companies directly. Thus, civil or criminal claims against arms manufacturers directly remain to be subject to consideration by Belgian courts.

⁴² Hof van Cassatie - arrest nr. N-20191001-3 (P.19.0575.N) d.d. (1 oktober 2019).



II. France

According to SIPRI, France is the third-largest arms exporter globally, collecting a 11% market value.⁴³ This position is primarily attributed to the contribution of six major groups: Thalès, Naval Group, Safran, Dassault Aviation, the CEA, and Nexter. To this list can be added Airbus the world's 7th largest arms manufacturer, and MBDA, a European group that is one of the world's leading missile manufacturers, of which Airbus and BAE are the main shareholders. Egypt, Qatar and India are the three main customers, receiving 55% of French exports. The Middle East will therefore account for 52% of French exports between 2015 and 2019⁴⁴. The French defense industry plays a crucial role in the country's economy, and the exportation of armaments is regarded as a strategic tool in its foreign policy, which shelters it from public and judicial scrutiny.⁴⁵

1. Regulatory Framework

France's existing system falls short in ensuring comprehensive transparency and accountability in the arms export control process. The regulatory framework is characterized by great discretionary power of the government when it comes to arms exports licensing, which plays on two levels. The government does not provide sufficient information in its annual rapport for reasons of national defense secrecy. The main challenge is therefore to give the French Parliament a real power of control. Given the secrecy, the definition of which is left to the government itself, access to information turns out to be a significant hurdle. In addition, NGOs are often denied access to any information pertaining to export licenses that are suspected of violating the regulatory framework.

a. National framework on arms export authorization

According to the French Code of Defence, all exports of military goods require a license.⁴⁶ The export regime is set by Code of Defence⁴⁷. The respective applications are subject to the evaluation or assessment by the Interministerial Commission for the Export of War Equipment (*Commission interministérielle pour l'exportation des matériels de guerre* or CIEEMG). This Commission is composed of representatives of several ministries, such as the Ministry of Defence, the Ministry of Foreign Affairs and the Ministry of International Development. However, the licenses are issued by the Prime Minister after the Commission gives its opinion and are subsequently communicated by the Minister responsible for customs. In the assessment of a license application, the criteria as defined in the EU Common Position as well as those in the ATT are being

⁴³ Stockholm International Peace Research Institute, *Trends in International Arms Transfers, 2021* (2022).

⁴⁴ *Ibid.*

⁴⁵ Assemblée Nationale, *Rapport d'Information sur le Contrôle des Exportations d'Armes*, (13 October 2018).

⁴⁶ Article L2335-3 - Code de la Défense.

⁴⁷ Chapter V Title III of book III (articles L. 2335-1 to L. 2335-18 and Article R. 2335-1 to R. 2335-45).



applied.⁴⁸ Nonetheless, neither of the two instruments are incorporated into the Code of Defence. The law only states the possibility of the prime minister to suspend export licenses if they breach France's international commitments, which includes treaty obligations.⁴⁹ The Prime Minister is furthermore responsible for the policy on arms export control.

The export of dual-use goods to a non-EU country also requires a license by the government. License applications for the export of dual-use goods are considered in light of the provisions in the EU Dual-Use Regulation. In 2012 France introduced a *posteriori* on-site control which includes controls of the end-users certificates.⁵⁰

b. National framework on access to information

Under French law, the right to information is regulated by the Free Access to Administrative Documents law.⁵¹ This law establishes the principle of freedom of access to administrative documents held by public authorities. It requires these authorities to grant access to such documents to any individual who requests them, except in cases explicitly exempted by the law. Article 6 provides for those specific exceptions where documents may not be disclosed. They apply when consultation or disclosure would be prejudicial to the secrecy of government deliberations, the secrecy of national defense, State security or public safety.

Given the fact that export of military equipment is regarded as a matter of national security and falls within the realm of the government's foreign affairs, the system is fundamentally characterized by a lack of transparency. Indeed, the entire assessment process is confidential.⁵²

The legislative control of arms exports is based on a report to the Parliament, which is published annually by the Ministry of Armed Forces.⁵³ However, the report lacks essential information on the type, number and quantity of equipment delivered, and the end-users. Furthermore, the report fails to provide any insights into the assessment process undertaken by French authorities when deciding whether or not to grant an export license.⁵⁴ The information provided is solely at the discretion of the Minister for the Armed Forces. Consequently, this discretionary approach impedes the National Assembly's ability to exercise effective oversight.⁵⁵

⁴⁸ Ministère des Armées, *Contrôle des exportations et régulation du commerce des armes* (2018), available at <https://www.defense.gouv.fr/dgris/approches-thematiques/regulation-internationale/controle-exportations-regulation-du-commerce-armes> (Last accessed 20 June 2023).

⁴⁹ Code de la Défense, L.2335-4.

⁵⁰ JORF n° 0151 du 30 juin 2012.

⁵¹ Law No. 78-753 (17 July 1978).

⁵² Amnesty International, *Ventes d'armes françaises : quelles sont les obligations du gouvernement ?* Accessible at [Transparence dans les ventes d'armes : les obligations de la France - Amnesty International France](#), (Last accessed 16 June 2023)

⁵³ Loi n° 2013-1168 du 18 décembre 2013.

⁵⁴ ECCHR, *France's extraterritorial obligations under the International Covenant on Civil and Political Rights* (2018) at 22.

⁵⁵ Ministère des Armées, *Rapport annuel au Parlement 2020 sur les exportations d'armement de la France* (2020).



2. Access to Justice

French NGOs are exerting increasing pressure on the granting of licenses through administrative challenges. However, despite their efforts, the case law on the 'act of government' still prohibits courts from hearing export licenses. Even if the case law were to be overturned, the lack of transparency from the government poses significant challenges for NGOs in their attempt to challenge licenses. The difficulty is evident when it comes to proving that France failed to uphold its obligations, as information regarding the material exported and specific country of destination can be held secret. France is among the only two studied countries which adopted a legally binding framework regarding companies' due diligence obligations. Nonetheless, numerous gaps in its implementation remain.

a. Causes of action against the state at the national level

i. Administrative law

According to the Code on Relations between the Public and the Administration (CRPA), the person affected by any administrative decision may request the administrative body to review it,⁵⁶ and subsequently appeal to the administrative court according to the provisions laid down in book IV (l'introduction de l'instance de premier ressort) of the French Code of Administrative justice. The Code of Administrative justice provides for ordinary proceedings as well as urgent proceedings. Case law shows that preference is often given to the latter in relation to licensing decisions. The licenses themselves are not made public.⁵⁷ Licencing decisions are particularly challenged either through article L.521-1, which provides for interim relief or suspension of an administrative decision, or through article L.521-2 which provides for protection of fundamental freedoms that are infringed by the administrative decision. Both provisions provide bases for urgent proceedings.

As for standing, the interested party should have been affected by the administrative decision. Legal standing of NGOs before French administrative courts has not been an issue so far. However, issues did arise particularly in terms of jurisdiction. In 2018, a French NGO initiated proceedings before the administrative court in Paris challenging the prime minister's decision not to suspend licenses for arms exports to countries involved in the Yemen-conflict,⁵⁸ as the NGO had requested prior to the initiation of proceedings. Grounds invoked by the NGO included a violation of article L.2335-4 of the Code of Defence, which should be understood as requiring the Prime minister to suspend export licenses when they breach France's international commitments, namely article 6.3 of the ATT and articles 1 and 2 of the EU Common Position. The court decided to dismiss the claim on the grounds that the ATT and EU Common Position do not have direct effect in domestic law and do not confer rights on individuals.⁵⁹ In the appeal case of 26 September 2019, the Court of Appeals found that it did not have jurisdiction over the Prime Minister's decision as it had to be considered an 'acte de

⁵⁶ Code des Relations entre le Public et l'Administration, L.411-2.

⁵⁷ Ibid., *supra* note 43.

⁵⁸ Tribunal Administratif de Paris, Requête Sommaire, (7 May 2018).

⁵⁹ Tribunal Administratif de Paris, Arrêt no.1807203/6-2 (8 July 2019) para. 8.



gouvernement', which may not be detached from French Foreign Policy, over which the Court cannot exercise scrutiny.⁶⁰ After dismissal of a case due to lack of jurisdiction, the court cannot consider a claimant's arguments substantively, nor can it refer the question regarding the status of ATT and EU Common Position in domestic law to the CJEU.

Overall, a large number of NGOs are active in the fight against exports that they consider irresponsible in terms of human rights, and call for more transparency from the government.⁶¹

However, the access to information regarding export licenses is a general issue contributing to the lack of accountability. In administrative proceedings plaintiffs requested the release and presentation of licenses granted for arms export to, for example, Saudi Arabia, as well as evaluations and opinions of the CIEEMG in connection with those licenses.⁶² Without access to these documents, challenging export licenses by providing evidence that export decisions do not comply with assessment criteria in the EU Common Position is made incredibly difficult.⁶³

At the judiciary level, it is not possible to review neither the content of the licenses nor the risk assessment conduct by the authorities granting the licenses. This has been proven in 2018, when the NGO Action Sécurité Éthique Républicaine (ASER) urged the Prime Minister to declassify and communicate the export licenses that have been granted in favor of countries involved in the war in Yemen. These documents were necessary to assess the conformity of licenses with France's international commitments and compliance with the 2008 EU Common Position.⁶⁴ The Court of Appeal concluded that the assessment conducted by French authorities to grant licenses was inherently political and closely tied to France's conduct of foreign relations. As a result, it is not within the jurisdiction of any judge to review these acts through which sovereign power is exercised.⁶⁵ Adding to this, in 2019, the NGO requested an annulment of authorizations granted to Nexter for the export of war material and assimilated material to Saudi Arabia, involved in the war in Yemen. The administrative judge, referred under the urgent procedure, dismissed the claim for lack of urgency.⁶⁶

b. Causes of action against gun manufacturers at the national level

i. Civil law

Civil liability, defined by law in Articles 1240 and 1241 of the Civil Code, creates an obligation for everyone to compensate for unintentional damage caused to others. The

⁶⁰ Cour Administrative d'Appel de Paris, Ordonnance no. 19PA02929 (26 September 2019).

⁶¹ Among them Action contre la faim (ACF), Care France, Amnesty International, Action Sécurité Éthique Républicaines (ASER), Action des chrétiens pour l'abolition de la torture (ACAT), la Fédération internationale pour les droits humains (FIDH), l'Observatoire des armements, Center for civilians in conflict (CIVIC) etc.

⁶² Requête Sommaire, Conseil d'Etat (19 novembre 2019).

⁶³ C Schliemann & L Bryk, *Arms Trade and Corporate Responsibility*, (2019) 9.

⁶⁴ Conseil d'Etat, Section Contentieux, Requête sommaire (7th May 2018).

⁶⁵ Cour Administrative d'Appel de Paris, 3ème chambre, 19PA02929 (26 July 2019).

⁶⁶ Tribunal Administratif de Paris, N° Ordonnance 1909737, (13 May 2019).



liability of companies can be sought on the basis of these Articles, under three conditions; the victim must have suffered a damage, the company must be at fault, and there must be a causal link between the cause and the damage. The plaintiff must establish the role of the company whose liability is being pursued. This regime requires proof that the fault or negligence of the company was the direct cause of the damage suffered by the victim. This high threshold probably explains the absence of legal cases against French gun manufacturers.

ii. Criminal law

By virtue of Article 121-2 of the Criminal Code, legal persons, with the exception of the State, are criminally liable for offenses committed on their behalf by their organs or representatives. Gun manufacturers can be criminally liable for their exports. Article L2339-10 establishes a prison sentence and a fine for breaches of export regulations.

iii. Criminal law - complicity in war crimes

Arms exports can also be challenged on the basis of international criminal law. In France, five judicial investigations had been opened in 2019 and none of these proceedings have resulted in an indictment.⁶⁷ France was accused of allowing the transfer of weapons that could be used to commit war crimes, as set out in the ATT⁶⁸. Although applicants do not face the specific limitations of a civil claim, the requirements of criminal offenses -whether war crimes or complicity in war crimes- are difficult to meet. For example, the burden of proof is very high and remains theoretical. The lack of access to information about exports of materials, the company's knowledge that its weapons could be used to commit crimes, and the causal link between the weapons and the crimes committed are cumulatively very hard to prove in practice. Indeed, the ATT requires that there be a risk that the weapons will be used to commit crimes. However, it is still necessary to prove that this risk exists.⁶⁹ Moreover, a link of causality needs to be established between the crimes and the French arms. In addition, it must be shown that the manufacturer knew that the arms were contributing to the commission of a particular war crime.⁷⁰

The French LaFarge case offered a chance to discuss the difficult requirement of intent in instances of corporate responsibility. Under French criminal law, a person is complicit in a crime when they "knowingly, by aid or assistance, facilitated its preparation or consumption."⁷¹ The Cour de Cassation considered in its judgment of September 7, 2021 regarding the activities of the company LaFarge that a company can be complicit in crimes against humanity without having the "intention" to associate with such crimes or to adhere to the commission of a criminal plan. In other words, the accomplice's motive is irrelevant. It is sufficient that the company had knowledge of the preparation or commission of the crimes by the principal perpetrator and that their aid or assistance

⁶⁷ National Assembly, *Rapport d'Information sur le Contrôle des Exportations d'Armes*, (13 October 2018).

⁶⁸ Articles 6 and 7 of the Arms Trade Treaty.

⁶⁹ Brehm and Greig, *Les transferts d'armes de la France dans le cadre du conflit au Yémen, à compter d'avril 2015 jusqu'à la période actuelle*, Ancile Avocats (2018) 74.

⁷⁰ Article 461-1 French Criminal Code.

⁷¹ Article 121-7 French Criminal Code.



facilitated them.⁷² Through this finding, the Court dismantled one of the biggest challenges in assigning criminal liability to corporations. Nevertheless, the decision highlights a growing legislative and judicial trend to restrict the participation of civil society in criminal proceedings (it only declared ECCHR's claim admissible as civil party), despite their key role in accompanying victims seeking justice. The Court ruled that non-profit organizations cannot be admitted as civil plaintiffs on the grounds of the collective interests they seek to safeguard.⁷³ In May 2022, the Court of Appeal therefore finally confirmed the indictment of Lafarge SA for complicity in crimes against humanity.⁷⁴

Before French courts, there are several criminal complaints brought by NGOs and direct victims. In June 2022, Sherpa, Mwata, and ECCHR introduced a criminal complaint before the Judicial Court of Paris against the armament companies Dassault Aviation, Thalès Groupe et MBDA France for complicity in war crimes and crimes against humanity taking place in Yemen.⁷⁵ Sherpa also initiated a complaint before the national financial Prosecutor's Office against Dassault regarding its supply of aircraft to India, this time based on the anti-corruption law.⁷⁶

The common denominator of these two complaints is the lack of transparency regarding the licensing process in France. When there is a suspicion that French arms have been used in the commission of human rights or international humanitarian law violations, the burden of proof falls on the civil society, individuals and NGOs against State's secrecy, which explains the difficulty of controlling the legality of the exports.⁷⁷

In 2016, the NGO ACAT filed a complaint against the French company Exxelia Technology for complicity in war crimes and involuntary homicide following the bombing of a house in Gaza by the Israeli military using sensors from the said company. The claim was judged admissible by the public prosecutor's office of Paris and is currently ongoing.

In 2011, the NGO Sherpa filed a complaint against Amesys (renamed Nexa Technologies), which exported communications interception equipment to the Libyan regime, allegedly diverting from its legitimate use to monitor the population. The same company was the subject of a new complaint for the sale of cyber-surveillance equipment to the Egyptian state. Both cases are currently under investigation.⁷⁸

⁷² Cour de Cassation, Criminal Chamber, Pourvoi n° 19-87.367 (9 décembre 2019) para 67.

⁷³ Cour de Cassation, Criminal Chamber, Pourvoi n°19-87.031 (7 septembre 2021) para 27.

⁷⁴ Judicial decision not available, see Bjurström, *Lafarge and the judicial twists and turns of corporate liability in France*, justiceinfo 5 July 2022, available at <https://www.justiceinfo.net/en/103141-lafarge-judicial-twists-and-turns-corporate-liability-france.html> (last accessed 16 June 2023).

⁷⁵ Sherpa, *Complicité de crimes de guerre au Yémen : Une plainte déposée contre des entreprises d'armement françaises*, 2 June 2022, available at [Guerre au Yémen : plainte contre des entreprises d'armement françaises - Sherpa \(asso-sherpa.org\)](https://www.asso-sherpa.org/fr/actualites/2022/06/02/complicite-de-crimes-de-guerre-au-yemen-une-plainte-deposee-contre-des-entreprises-d-armement-francaises) (last accessed 16 June 2023).

⁷⁶ Sherpa, *Sherpa dépose une plainte avec constitution de partie civile dans l'affaire de la vente des rafales en Inde*, 28 April 2021, accessible at [Plainte dans l'affaire de la vente des rafales en Inde - Sherpa \(asso-sherpa.org\)](https://www.asso-sherpa.org/fr/actualites/2021/04/28/sherpa-depose-une-plainte-avec-constitution-de-partie-civile-dans-l-affaire-de-la-vente-des-rafales-en-inde) (last accessed 16 June 2023).

⁷⁷ Privey, "Exportations d'Armes Française", *Alternatives Non-Violentes* 2022/2 N° 203, 2022, at 2-4.

⁷⁸ National Assembly, *supra* note 67.



These increasing cases brought by civil society testify to the possibilities of criminal liability for complicity in war crimes. The outcome of the investigations remains to be seen.

iv. Due diligence

The French Vigilance Law (2017)⁷⁹ created an obligation for certain companies to monitor and regulate the activity of their affiliated companies, contractors, and suppliers. The law implemented the UN Guiding Principles on Business and Human Rights by imposing a legal obligation on companies to carry out human rights due diligence in relation to their activities and those of their subsidiaries. These companies are required by law to set up a 'vigilance plan' and must report on its implementation. This plan must include due diligence measures to identify risks and prevent, inter alia, violations of human rights resulting from company activities and activities of companies it controls, directly or indirectly. A failure to comply with the obligations as set out in the law could raise legal actions, which have been made possible in 2019.⁸⁰ Consequently liability of the company can be established independently of the conditions required by the French tort law regime⁸¹, and it may be ordered to compensate for damage, even if the damage takes place abroad.⁸² Indeed, the company may be called upon, in the absence of any damage, by any person who has standing, if it has not published a vigilance plan or if it is considered insufficient.

So far, a few cases concerning human rights violations and environmental damages were brought before the French courts based on the Vigilance law, which will briefly be discussed below. In 2019, Three associations urged the French company TotalEnergie EP to comply with its human rights obligations in relation to two of its oil development projects in Uganda.⁸³ Although the case was declared inadmissible, the judge gave for the first time a definition of the social responsibility of enterprises and called on the government to specify the contours of the law on the duty of vigilance. Indeed, the law is so general that companies are in fact free to define the scope of their own obligations. Consequently, the judges considered that they could only rule on the existence of a plan, and not its content. It is problematic because Total's 2018 Vigilance Plan is insufficient. Despite the fact that Total operates in more than 130 countries and in a number of different sectors that may involve human rights abuses, their 2018 Plan only identifies six risks of serious human rights violations and still contains no specific measures to mitigate the risks identified.⁸⁴ Yet, no monitoring mechanism is established.

⁷⁹ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

⁸⁰ Article L. 225-102-5 - Code du Commerce.

⁸¹ Code Civil, Articles 1240 and 1241.

⁸² Sherpa, *Vigilance Plans Reference Guidance* (2019), available at [Sherpa VPRG EN WEB-
ilovepdf-compressed.pdf \(asso-sherpa.org\)](https://www.asso-sherpa.org/lovepdf-compressed.pdf) (last accessed 16 June 2023)

⁸³ Tribunal Judiciaire de Paris, n° 22/53943 (28 February 2023).

⁸⁴ Les Amis de la Terre France, *Analyse sommaire des insuffisances du plan de vigilance 2019 publié en mars 2020 par Total SA* (2020).



Another example is provided by the case brought against Suez, which is a water supplier in 2021. The Judicial Tribunal of Paris ruled again in favor of the defendant. The Court held that the company could not be sued on the basis of their vigilance plan because the disputed vigilance plan did not specify the exact company within the corporate structure of the Suez Group that held responsibility for the plan.⁸⁵

The case law shows that the French Duty of Vigilance law fails to provide an effective access to justice for victims of human rights violations. So far, the French judge has never ruled on the substance of the law, and kept dismissing claims for procedural grounds.⁸⁶

v. Assessment regarding French gun companies

According to SIPRI, Thales, Naval Group, and Dassault⁸⁷ are among the world's biggest arms-producing and military services companies (2021).⁸⁸ However, those companies tend to make their vigilance plans overall incomplete and insufficiently identify the risks.⁸⁹ Indeed, the French arms manufacturers tend to minimize or completely ignore potential risks associated with human rights. None of the three companies do provide information regarding the risks that may be associated with their activities nor give specific details about their measures to effectively implement vigilance.⁹⁰

Nevertheless, France supplies arms to Saudi Arabia and the United Arab Emirates, which are the two main actors in the war in Yemen. Thales, which is one of the suppliers, does not include any information on how the company operates its exports to both countries. It represents a significant issue given the human rights violations caused by the conflict. Regarding due diligence measures, Thales simply explains that it complies with the OECD Guidelines for Multinational Enterprises and UNGPs and that it supported the adoption of the Arms Trade Treaty.⁹¹

3. Assessment

Given that the decisions on arms exports are considered a matter of national security, they are subject to a high level of secrecy, hindering control of export licenses. Legal actions against the state or gun manufacturers can be pursued through administrative, civil, or criminal law, but there are challenges in meeting the high burden of proof and

⁸⁵ Tribunal Judiciaire de Paris, 3e Chambre, 18/1580 (17 March 2022).

⁸⁶ Business and Human Rights Resources Center, *In wake of health crisis in Chile* (7 June 2021), available at <https://www.business-humanrights.org/en/latest-news/chile-in-wake-of-osorno-health-crisis-water-giant-suez-is-summoned-on-the-basis-of-duty-of-vigilance-law/> (last accessed 16 June 2023).

⁸⁷ Dassault Vigilance Plans can be found at: [Dassault Systemes – liste des entreprises soumises au devoir de vigilance \(plan-vigilance.org\)](#) (last accessed 16 June 2023).

⁸⁸ Stockholm International Peace Institute, *The SPIRI Top 100 armsproducing and military services companies 2021* (2022), available at https://www.sipri.org/sites/default/files/2022-12/fs_2212_top_100_2021.pdf (last accessed 16 June 2023).

⁸⁹ Thales Vigilance Plan, *Document de Référence 2017* (2017).

⁹⁰ Amnesty International and others, *The law of vigilance of parent and outsourcing companies : year 1, companies must do better* (2019) at 25-30.

⁹¹ *Ibid.*



establishing liability. The French Vigilance Law imposes due diligence obligations on corporations, including monitoring supply chains and preventing human rights violations, although its effectiveness and enforcement remain to be seen. Overall, French arms manufacturers' vigilance plans often lack clarity and comprehensive disclosure of potential risks associated with human rights, particularly in relation to exports to countries involved in conflicts like Yemen.



III. Netherlands

The Netherlands is one of the largest arms exporting countries in Europe. It is home to arms manufacturers Thales Nederland, Damen Shipyards, Fokker and Airbus, and plays a significant part in the international arms trade mainly by exporting components of weapons. NGOs such as PAX and Stop Wapenhandel have initiated proceedings to challenge arms export licenses in administrative courts as well as civil courts. In these proceedings NGOs have faced several barriers, as will be highlighted in further detail below. These barriers include the lack of legal standing for NGOs before administrative courts, making it significantly more difficult to effectively challenge export licenses, and the lack of transparency regarding arms exports, as a large amount of relevant information is protected based on secrecy grounds provided for in national law.

1. Regulatory Framework

The Dutch regulatory framework on arms export authorization and access to information regarding this matter ensures that licensing decisions are protected to a relatively high degree. Dutch law on government transparency as well as Dutch customs law provide permissible restrictions for the disclosure of relevant information regarding arms exports. For instance, access to this information may be prevented by customs authorities, which have professional secrecy obligations arising from customs law or by other government authorities invoking the need to protect state interests.

a. National framework on arms export authorization

Licenses for the export of strategic goods (military and dual-use goods) are issued under the 'Strategic Goods Decree' of 24 June 2008, which forms a part of the Dutch General Customs Act. All companies or individuals seeking to export goods or technology included in the EU Common Military List or in the EU Dual-Use Regulation must lodge an application with the Central Import and Export Office (*Centrale Dienst Invoer en Uitvoer* or CDIU). Applications relating to EU, NATO member states, Japan, New Zealand, and Switzerland are submitted to and processed by this authority. Applications relating to all other destinations are forwarded to and processed by the Ministry of Foreign affairs, which is responsible for the policy on export control.

The export of military goods without a license is prohibited.⁹² Each application for the export of military equipment is assessed on a case-by-case basis against the eight criteria of the EU Common Position.⁹³ This assessment considers the destination of the goods, the nature of the goods and the intended end-user, as well as embargoes imposed by the UN or the EU.

The export of dual-use items that require a license are not assessed on the basis of the EU Common Position but in light of the EU Dual-Use Regulation.⁹⁴ Several factors are relevant in the assessment of these applications such as the nature of the goods, the probability that the goods will be used according to the declared end-use, and the

⁹² Art. 11(1), *Besluit strategische goederen* (Strategic Goods Decree; as amended 9 September 2021) [2021].

⁹³ *Ibid.*, Art. 11(3).

⁹⁴ *Ibid.*, Art. 4a.



country of final destination. Further, the responsible authority takes into account UN and EU decisions regarding sanctions and embargoes.

b. National framework on access to information

The Ministry of Foreign Affairs provides details about its arms export policy in its annual reports and publishes additional information online in a User Guide on Strategic Goods and Services. In general, Dutch law provides for information on governmental activities to be publicly accessible. The general obligation of authorities to disclose information upon request is impaired by the exceptions of public safety conflicting state interests.⁹⁵ Furthermore, the customs authorities, as a broadly involved entity in the process of arms export, can refer to their professional secrecy in refusing requests to accessing information.⁹⁶ This has led to the failure of proceedings initiated by NGOs that wanted to attain access to relevant details about the export license of military equipment to Egypt.

2. Access to Justice

As the following sections will illustrate, licensing decisions may be challenged before administrative courts by directly and individually affected parties. NGOs acting on behalf of victims of Dutch arms export are not regarded as directly affected parties and thus do not have legal standing in administrative proceedings, presenting a hurdle for effectively challenging arms export licenses. Dutch civil law, however, provides for a unique legal ground for NGOs to initiate civil proceedings against the state as well as against companies. In civil proceedings against the state, this legal ground can be used to challenge arms export licenses. However, judicial review of licensing decisions is limited, as the state has wide discretion in this regard.

a. Causes of action against the state at the national level

i. Administrative law

Administrative decisions, such as licensing decisions, can be objected to based on 1:5 of the General Administrative Law Act (*Algemene Wet Bestuursrecht* or 'Awb'). The government should then reconsider its decision. It is possible to appeal to an administrative court against this new administrative decision. The person bringing the case must be an interested party within the meaning of article 1:2 Awb. An 'interested party' means a person whose interest is directly affected by a decision by an administrative body. Article 1:2(3) states that, regarding legal persons, their interests shall include the general and collective interests which they particularly promote by virtue of their objectives and as evidenced by their actual activities.

Thus, only those who are directly affected may object or appeal against a decision of an administrative body. It seems like the law provides for a basis for NGOs to institute administrative proceedings on behalf of victims. However, the District Court of Noord-Holland presented a surprising ruling on 25 august 2016 regarding article 1:2(3). The

⁹⁵ Art. 5.1 & Art. 5.2, *Wet Open Overheid* (Law on Open Government of 1 May 2022).

⁹⁶ Art. 12, Regulation (EU) 2013/952 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast). The Union Customs Code is fully implemented by the Dutch General Customs Act (*Algemene Douanewet*).



Court held that the applicable law was the Union Customs Code instead of the General Administrative Act.⁹⁷ The Union Customs Code only allows parties that are directly and individually affected to bring a claim. The claim brought by three Dutch NGOs, challenging an export license, was declared inadmissible, as they were not deemed directly and individually affected by the license.⁹⁸ Thus, the court denies NGOs legal standing when they are not directly and individually affected by the license, which presumably will not be the case for any arms export license.

ii. Civil law

The Dutch Civil Code provides for a quite unique possibility to bring a civil claim against the state which is set out in article 3:305a. Article 3:305a states that any foundation or association may bring a civil claim for the protection of interests of other persons insofar as the foundation or association itself promotes those interests pursuant to its statute. In recent years this provision has been used for public interest litigation before Dutch civil courts on the basis of international law, the Urgenda case being the most significant example. In the context of export licenses granted by the government, 3:305a Civil Code has proven to serve as a possibility of judicial review of licensing decisions. In 2021, three NGOs challenged export licenses granted for export of military goods to Egypt before the District Court in The Hague by resorting to article 3:305a Civil Code. After establishing admissibility, the district court proceeded to deal substantively with the arguments brought by the NGOs. The Court argued that, as the state has considerable discretion in this area, the judicial review is limited to the question of whether the minister could reasonably have arrived at his decision to grant the pending export licenses.⁹⁹ This reasoning was upheld in the subsequent case before the Court of Appeals in The Hague.¹⁰⁰

In the case before the District Court of The Hague, the Court also argued that it is for the NGOs (the claimants) to substantiate the position that the license should not have been granted by the Ministry of Foreign Affairs under criteria of the EU Common Position and thus make it plausible that the minister could not reasonably have decided to grant the licenses.¹⁰¹ Even if the arms export has not taken place, NGOs must demonstrate that these weapons will be used in violations of human rights or humanitarian law. The bar is set at such a high level that it becomes almost impossible for NGOs to obtain sufficient evidence to prove the future use of exported arms in human rights or IHL violations and thus effectively challenge export licenses.¹⁰² This, again, relates to the lack of available information on arms export licenses and the

⁹⁷ Rb. Noord-Holland 25 August 2016, ECLI:NL:RBNHO:2016:7024 (nr. AWB-16, 3036), at para. 8-9 (upheld in: Hof Amsterdam 24 January 2017, ECLI:NL:GHAMS:2017:165 (nr. 16/00435).

⁹⁸ *Ibid.*, at para 9.

⁹⁹ Rb. Den Haag 23 November 2021 (Kort geding), ECLI:NL:RBDHA:2021:12810, at para 4.9.

¹⁰⁰ Hof Den Haag 17 May 2022 (Hoger beroep kort geding), ECLI:NL:GHDHA:2022:834, at para 3.8.

¹⁰¹ Rb. Den Haag 23 November 2021, *supra* note 99, at para 4.10.

¹⁰² PILP (Press release), *Hoger beroep over wapenexport naar Egypte*, 17 May 2022, available at <https://pilpnicm.nl/hoger-beroep-over-wapenexport-naar-egypte/> (last accessed 16 June 2023), cf. European Forum for Democracy and Solidarity, *Human rights violations 'insufficient' to halt weapon exports to Egypt, Dutch court says*, 18 May 2022, available at <https://europeanforum.net/human-rights-violations-insufficient-to-halt-weapon-export-to-egypt-dutch-court-says/> (last accessed 16 June 2023).



refusal of requests to disclose relevant information based on secrecy obligations under customs law.¹⁰³

b. Causes of action against gun manufacturers at the national level

i. Civil law

Even though article 3:305a of the Dutch Civil code has been invoked mostly to start proceedings against the state, it can also provide a basis to initiate proceedings against private persons based in the Netherlands, such as arms manufacturers. So far, civil proceedings to hold arms companies accountable for irresponsible conduct have not been instituted in the Netherlands.

However, in the context of environmental damage, proceedings against corporations have been initiated on the basis of article 3:305a for the protection of human rights against dangerous climate change. In the *Milieudefensie et al. v Royal Dutch Shell* case of 2021, *Milieudefensie* and other NGOs started proceedings against Royal Dutch Shell to, simply put, claim a reduction of CO2 emissions. They based their claim on a tort law provision in Dutch law, namely article 6:162 Civil Code, arguing that Shell had acted unlawfully towards them by causing climate damage. Article 6:162 includes tortious acts on the basis of violation of the 'unwritten standard of due care', interpretation of which *Milieudefensie* claims also includes human rights and soft law such as the UNGPs. The District Court of Den Haag agreed and arrived at this conclusion by interpreting the unwritten standard of due care, *inter alia*, on the basis of the 'widely supported international consensus' that human rights provide protection against consequences of dangerous climate change and the fact that companies must respect human rights.¹⁰⁴ Despite acknowledging that Shell is not solely responsible for mitigating the effects of climate change, the court ruled that it had an individual obligation to uphold human rights which extends to its suppliers and customers.

It should be noted, however, that the applicability of Dutch tort law was only possible through a private international law provision, namely the aforementioned exception to choose the applicable law in cases of environmental damage provided by Rome II.¹⁰⁵

From the above, several observations can be made that are relevant in the context of arms manufacturers' liability. First, Article 3:305a of the Civil Code provides a basis for NGOs to bring a civil claim to protect human rights when they promote these interests in their statutes, *vis-à-vis* the State, but also *vis-à-vis* large companies that cause or contribute to human rights violations. Second, the *Milieudefensie* case shows that Dutch courts are willing to let soft law and human rights play a significant role in the interpretation of the standard of care of 6:162 of the Dutch Civil Code. Third, by contrast, in order to invoke Dutch liability law, a basis for doing so in private international law is required. In the context of arms company liability, this is unlikely to be the case given the current state of the law.

¹⁰³ Regulation (EU) 2013/952, *supra* note 96; cf. Rb. Amsterdam 5 October 2022, ECLI:NL:RBAMS:2022:6419 (nr. AMS 21/37/28).

¹⁰⁴ Rechtbank Den Haag, 26-05-2021, ECLI:NL:RBDHA:2021:5337, para 4.1.3.

¹⁰⁵ Art. 7, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).



3. Assessment

In the Netherlands, challenging licensing decisions by the government would generally take place before administrative courts. However, it has become apparent that NGOs do not have legal standing in the sense of article 1:2 Awb, as they are not to be regarded as 'interested parties' to licensing decisions regarding arms exports. Following the interpretation of the court, only the arms manufacturers exporting the weapons could be categorized as interested parties under 1:2 Awb. Challenging licensing decisions for arms exports has been possible in civil proceedings, namely in 2021.¹⁰⁶ Article 3:305a of the Dutch Civil Code provides a unique ground in civil law for NGOs acting in the public interest to initiate proceedings against the state. In the case of 23 November 2021 and in the subsequent appeal case on 17 May 2022 concerning arms exports to Egypt, which the Dutch government had authorized based on a risk assessment as provided for in the EU Common Position, the judge was able to substantially deal with the matter.¹⁰⁷ However, judicial review of the risk assessment by the government was rather limited, as the judge confirmed the wide discretion that the Dutch government has in this regard. Moreover, lack of information on arms exports due to secrecy obligations in Dutch customs law has made challenging licenses significantly difficult.

Article 3:305a of the Dutch Civil Code has also served as a ground for NGOs to sue companies directly, namely in the context of climate change. Dutch courts seem willing to let soft law and human rights play a significant role in the interpretation of the standard of care of the general tort law provision. However, if there is no basis in private international law for invoking Dutch tort law, civil tort claims against gun manufacturers by NGOs on the basis of article 3:305a will not likely be possible. In the hypothetical case that the victim is situated in the Netherlands with the damage occurring domestically as well, Dutch tort law would be applicable to sue arms manufacturers directly. Article 6:162 Civil Code would serve as a legal ground for the claim. Such a claim in relation to negligent conduct of arms manufacturers has not been brought before the Dutch civil court.

¹⁰⁶ Rb. Den Haag 23 November 2021 (Kort geding), ECLI:NL:RBDHA:2021:12810.

¹⁰⁷ Rb. Den Haag 23 November 2021 (Kort geding), ECLI:NL:RBDHA:2021:12810; Hof Den Haag 17 May 2022 (Hoger beroep kort geding), ECLI:NL:GHDHA:2022:834.



IV. Germany

Germany ranks as the fifth largest arms exporter worldwide.¹⁰⁸ It is home to important arms manufacturers such as Rheinmetall and Thyssenkrupp. Furthermore, the internationally well known small arms manufacturer Heckler & Koch is also German. Before its liquidation in 2020, Sig Sauer was another influential player in the arms exports industry. Both Heckler & Koch and Sig Sauer were part of controversial arms export deals that entailed criminal proceedings and drew considerable international attention to them. While these precedents lead to a situation in which arms exports and issues surrounding them are subject to public discussion, the overall framework of accessing justice still has significant secrecy-hurdles and restrictive procedural requirements. The present situation showcases a lack of access to justice against licenses and gun manufacturers. However, the public discussion has led to considerations of a new law that might provide for better control of licensing decisions and justiciable obligations for gun manufacturers.

1. Regulatory Framework

The German framework concerning export authorizations and access to information is marked by the large margin of appreciation of the government and the protection thereof in judicial proceedings. The inclusion of the main export assessment criteria not in the law but in political documents leaves discretion to the government that can not be controlled by the courts. This predominant operation based on political principles showcases the perception of the field as political and non-justiciable and predetermines the lack of control of export authorizations.

a. National framework on arms export authorization

In Germany, the Constitution requires the manufacturing, transport and distribution of war weapons to be authorized by the government, thus setting the framework of a restrictive arms export regime.¹⁰⁹ The relevant provision is concretised in the War Weapons Control Act (*Kriegswaffenkontrollgesetz*)¹¹⁰ and the law on Foreign Trade and Payments.¹¹¹ There are different procedures and authorities for war weapons and armaments respectively proscribed by German law. For war weapons, the ministry of economy is the responsible authority in accordance with the War Weapons Control Act.¹¹² The export to third countries entails consultations with other relevant ministries. Important export decisions are further discussed in the Federal Security Council (*Bundessicherheitsrat*), a subsidiary body of the government, constituted by the relevant ministers and including other members on a case-by-case basis. As a matter of principle, the export of war weapons is restricted and only to be authorized

¹⁰⁸ *10 largest arms exporters in the world*, 30 March, 2023, available at <https://fairbd.net/10-largest-arms-exporters-in-the-world/#Germany> (last accessed 16 June 2023).

¹⁰⁹ Art. 26 II *Grundgesetz* (Basic Law of the Federal Republic of Germany).

¹¹⁰ *Gesetz über die Kontrolle von Kriegswaffen version of 22 November 1990* (BGBl. I S. 2506), last amended by Art. 25 GG v. 19.12.2022 I 2506 (War Weapons Control Act).

¹¹¹ *Außenwirtschaftsgesetz of 06 June 2013* (BGBl. I S. 1482), last amended by Art. 2 Abs. 11 G v. 20.12.2022 I 2752 (Foreign Trade and Payments Act).

¹¹² § 11 War Weapons Control Act.



in special cases. The War Weapons Control Act includes general provisions on when exports may not be authorized.¹¹³

Contrarily, the export authorisations for armaments and dual-use objects follow the Foreign Trade and Payments Act and Ordinance¹¹⁴. Their export is generally presumed admissible and can only be restricted for specific reasons. The federal office for economic affairs and export control (BAFA) is responsible for issuing the licenses. Only important cases entail the competence of the ministries and the Federal Security Council.

While both the War Weapons act and the Foreign Trade and Payments Law include licensing requirements, they remain rather general. The specific requirements on whether to grant licenses or not, are enshrined in the Political principles of the federal government for the export of war weapons and other military equipment¹¹⁵, a government-internal, political document. These principles reflect the EU Common position and refer to the ATT. In general, Germany does not restrict the export of weapons to EU, NATO and NATO-equivalent countries. Other export decisions are made in concordance with the EU Common Position and the ATT. The political document contains only principles to be considered by the government in its decisions. It affirms that exports to third countries are handled restrictively and that war weapon exports to third countries are only licensed when in the concrete case the foreign policy interests of Germany support the export. Other goods are only to be licensed when security interests, the peaceful co-existence of the international community and foreign policy interests are not endangered. The export of Small Arms to third countries requires the application of the Small Arms principles and is generally to be restricted.¹¹⁶ Both the Political Principles and the Small Arms principles contain no strict justiciable standards but are only guidelines for the considerations of the government. They can thus not be invoked in proceedings before a court.

In 2015, Germany started to include post-shipment controls in its export control regime.¹¹⁷ After an initial pilot-phase that only applied to small arms and light weapons,

¹¹³ Art. 6 War Weapons Control Act.

¹¹⁴ *Außenwirtschaftsverordnung of 2 August 2013* (BGBl. I S. 2865; 2021 I S. 4304), last amended by Art. 10 G v. 19.12.2022 I 2632 (Foreign Trade and Payments Ordinance).

¹¹⁵ Federal Government, *Politische Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern*, 26 June 2019, available at <https://www.bmwk.de/Redaktion/DE/Downloads/P-R/politische-grundsaeetze-fuer-den-export-von-kriegswaffen-und-sonstigen-ruestungsuetern.pdf> (last accessed 16 June 2023).

¹¹⁶ Federal Government, *Grundsätze der Bundesregierung für die Ausfuhrgenehmigungspolitik bei der Lieferung von Kleinen und Leichten Waffen, dazugehöriger Munition und entsprechender Herstellungsausrüstung in Drittländer*, 8 Mai 2015, available at <https://www.bmwk.de/Redaktion/DE/Downloads/G/grundsaeetze-der-bundesregierung-fuer-die-ausfuhrgenehmigungspolitik-bei-der-lieferung-von-kleinen-und-leichten-waffen.html> (last accessed 16 June 2023).

¹¹⁷ Varisco, Brockmann, Robin, *Post-Shipment Control Measures: European approaches to on-site inspections of exported military materiel*, SIPRI December 2020, p 14; § 21 (5) Foreign Trade and Payments Ordinance.



the post-shipment controls are now extended to major weapons and war weapons.¹¹⁸ These controls are mainly conducted with a view on the risk of diversion in a certain country and do not apply to EU, NATO and NATO-equivalent states. The responsible institution is the Federal Office for Economic Affairs and Export Control with support from embassies.

b. National framework on access to information

The right to access information from public authorities is enshrined in the Constitution and in the Law on Freedom of Information.¹¹⁹ While in principle, anyone can request information from public authorities, there are exceptions relating to the protection of public concerns including international relations, as well as ongoing decisions and private interests.¹²⁰ The public has no access to the decisions and consultations of the Federal Security Council concerning weapons exports.¹²¹ This extends even to information about whether or when consultations are held.¹²² The consultations of the Federal Security Council are protected as the core of government's decision-making and under secrecy provisions for the protection of the State.¹²³ The Federal Constitutional Court ruled that the right to information and control of the government that deputies to the parliament enjoy covers the consultations of the Federal Security Council only to a limited extent.¹²⁴ Arms exports are not entirely excluded from parliamentary control although a general right to information is precluded. The government has a duty to provide the parliament with information about authorizations granted, including the importing country, the volume and type of arms exported as well as the German companies involved. This parliamentary right to access information however only applies to the results (authorization or denial thereof) of completed consultations and does not include information about the reasoning and grounds of the decision. In the judgment by the Constitutional Court, deputies had requested information about export authorizations to Saudi Arabia and Algeria. The government had to provide them with the information of whether or not the export of 200 tanks to Saudi-Arabia had been authorized, the answers to further questions were rightfully denied.

¹¹⁸ Foreign Ministry, *Mehr Kontrolle für Rüstungsexporte*, 16. June 2021, available at <https://www.auswaertiges-amt.de/de/aussenpolitik/sicherheitspolitik/abruestung-ruestungskontrolle/post-shipment-kontrollen/2466092> (last accessed 16 June 2023).

¹¹⁹ Art. 5 Basic Law for the Federal Republic of Germany; *Gesetz zur Regelung des Zugangs zu Informationen des Bundes* of 5 September 2005 (BGBl. I S. 2722), last amended by Art. 44 V v. 19.6.2022 I 1328.

¹²⁰ cf. §§ 1, 3, 4, 5 Law on Freedom of Information.

¹²¹ German Federal Constitutional Court, *Right to information of deputies to the parliament about arms exports*, judgment of 21 October 2014, 2 BvE 5/11.

¹²² Hauck, *Wer entscheidet über Waffenlieferungen?*, 13.07.2022 Tagesschau, available at <https://www.tagesschau.de/inland/innenpolitik/bundessicherheitsrat-101.html> (last accessed 16 June 2023).

¹²³ § 4 (1) *Sicherheitsüberprüfungsgesetz* 16. June 2016 (BGBl. I 1634), cf. Federal Administrative Court, *Access to Documents of the Federal Security Council*, judgment of 23 June 2022, BVerwG 10 C 3.21.

¹²⁴ German Federal Constitutional Court, *Right to information of deputies to the parliament about arms exports*, judgment of 21 October 2014, 2 BvE 5/11.



The German government reports annually to the parliament about arms exports and the Federal Ministry for Economic Affairs and Climate Action publishes annual anonymized export lists that exclude information on the volume of exports or justifications.¹²⁵

2. Access to Justice

Prominent cases concerning German arms exports have been brought before criminal courts. The resort to criminal accountability is explainable with a lack of possibilities to bring cases under civil and administrative law. Administrative law sets high procedural requirements and the protection of the governmental sphere in judicial control does not offer reasonable chances of successfully challenging licenses. As a corollary of the lack of remedies basing on the German Due Diligence Law, criminal law is currently the only (to a limited extent) available pathway against arms manufacturers. Victims of German arms and NGOs acting on their behalf are effectively left without judicial recourse since the criminal provisions concerning non-compliance with the export-control regime were found to not protect the victim's interests.

a. Causes of action against the state at the national level

The restricted access to information about concrete licenses provides for significant hurdles in the construction of a case against the licensing decision. Generally, legal action challenging the exporting licenses could be based on German administrative law. German law does not recognise a cause of action in public interest, only parties that are directly affected by the decision have standing. This criterion generally sets the high threshold that an individual right is directly affected by the administrative decision.¹²⁶ Cases challenging licensing decisions or the denial of a license are therefore primarily brought by the gun manufacturers themselves.

An individual right affected by the decision may be based on the victims' human rights. Generally, German courts are favorable to the extraterritorial application of human rights, having ruled positively on extraterritorial human rights obligations of the federal intelligence service¹²⁷ and the existence of a duty to protect extraterritorial victims from attacks carried out by the US through a military base in Germany.¹²⁸ However, it may be difficult to establish a sufficient causal connection and predictability between the state's authorization and the violation of human rights.

Concerning the assessment of the licensing criteria, the German government has a large margin of appreciation that is not subject to judicial control. The principles of the government for export decisions are considered part of the government's core of autonomous executive decision-making (Kernbereich exekutiver

¹²⁵ cf. Federal Ministry for Economic Affairs and Climate Action, <https://www.bmwk.de/Redaktion/DE/Slider/Aussenwirtschaft/publikationen-faq-ruestung.html> (last accessed 16 June 2023).

¹²⁶ cf. § 42 (2) Verwaltungsgerichtsordnung.

¹²⁷ German Federal Constitutional Court, *Federal Intelligence Service - foreign surveillance*, judgment of 19 May 2020, 1 BvR 2835/17.

¹²⁸ German Highest Administrative Court, *State Duty to Protect in connection with acts of other States*, judgment of 25 November 2020, BVerwG 6 C 7.19.



Eigenverantwortung).¹²⁹ This doctrine is applied by the courts on the basis of the separation of powers to respect the sphere inherent to the government. Judicial control of this sphere is precluded. Both the Small Arms principles and the Principles of the government only contain guidelines that do not provide for strict criteria subject to judicial control. Hence, the criterion of possible disturbing of foreign relations is subject to the government's appreciation, which must only distinguish according to "factually justifiable criteria"¹³⁰. The government can change its practice as there are no justiciable standards in the law.¹³¹ The only thing that courts can control is that decisions are not arbitrary.

Another avenue against the state could be based on the state's duty to protect human rights in connection with the acts of private persons or other states. Before administrative courts, a claimant could hold the state to account for not meeting high enough standards in the assessment of exporting licenses. The highest administrative court has found that non-nationals located outside of Germany can have standing for claims based on the human rights duty to protect.¹³² This case involved US drone attacks on Yemen which were led from a US military base in Germany. The duty is conditioned on a close connection to the German state and the ruling of the federal constitutional court on this issue is still to be awaited. The stance on the duty to protect is rather permissive. A duty to protect only exists when due to numerous prior violations of international law, action in violation of international law is to be expected. In fulfilling this duty, the German state has a large margin of appreciation, with the administrative court ruling that discussions and requiring assurances by the United States suffice. Since the state duty to protect has not been invoked in a case of arms exports, its application in such a case would depend on the specific circumstances and the assessment by the courts. The material relief that this avenue could provide for is rather limited since the government has again a large margin of appreciation and discretion.

There are currently discussions in Germany about creating a new Arms Export Control Law for stricter controls of arms exports which might include stricter provisions on how to challenge licensing decisions. Thus, the proposed cornerstones for the new law provide for the inclusion of exporting criteria in the law, making them binding on the government and (with the exception of the government's discretion) justiciable.¹³³ Claims in general interest by certain authorized associations are called for, but the final design of the new law remains to be seen.

b. Causes of action against gun manufacturers at the national level

Action against German arms manufacturers for their production, distribution and exports could generally be based on civil law. The German Due Diligence law provides

¹²⁹ Administrative Court Berlin, judgment of 2 November 2020, VG 4 K 386.19.

¹³⁰ Administrative Court Frankfurt a.M., judgment of 29 November 2012, 1 K 675/12.F.

¹³¹ cf. Administrative Court Berlin, judgment of 2 November 2020, VG 4 K 386.19.

¹³² German Highest Administrative Court, *State Duty to Protect in connection with acts of other States*, judgment of 25 November 2020, BVerwG 6 C 7.19.

¹³³ Federal Ministry for the Economy and Climate, *Eckpunkte für das Rüstungsexportkontrollgesetz*, 14 October 2022, available at https://www.bmwk.de/Redaktion/DE/Downloads/P-R/eckpunkte-ruistungsexportkontrollgesetz-entwurf.pdf?__blob=publicationFile&v=6 (last accessed 16 June 2023).



for additional obligations for companies but does not offer judicial recourses. Since these ways offer limited possibilities, past action against gun manufacturers has been taken based on criminal law. The possibilities of criminal proceedings are however mainly dependent on the taking of action by the public prosecution and do not cover individual interests and redress.

i. Civil law

Under German tort law, companies become liable for damage that would not have resulted but for the intentional or negligent conduct of the company.¹³⁴ In the case of an omission, the liability depends on the existence of a violation of a justiciable protective statute.¹³⁵ Currently, German laws do not include a liability of gun manufacturers for damages arising out of violations of due diligence obligations which is subject to criticism.¹³⁶ In light of these circumstances, civil claims against gun manufacturers have low chances of success. There have been no cases against gun manufacturers based on civil law.

ii. Criminal/export control law

Penal provisions on the matter of arms exports are included in the Foreign Trade and Payments Act.¹³⁷ Just a few years ago, these provisions built the basis for a ground breaking conviction of several employees of German small arms manufacturer Heckler & Koch.¹³⁸ This case concerned the export of small arms to certain federal states in Mexico based on untruthful end-user certificates. Some of these weapons were subsequently used in an unlawful attack of Mexican security forces on college students. While only the employees of Heckler & Koch could be prosecuted, the company itself was sanctioned with a fine. In the course of the proceedings in Germany, an NGO acting on behalf of a victim of the attack requested access to the files. However, the court rejected the request, arguing that the arms export control laws do not cover the interests of individuals. This case marked the first instance of criminal charges for companies for their negligent trade practice. At the same time, however, it demonstrated the limited possibilities of affected individuals to participate in criminal proceedings against arms manufacturers and their employees.¹³⁹

iii. Due diligence

Germany is among those countries having enacted legislation on due diligence obligations for corporations.¹⁴⁰ Importantly, however, the consequences of non-compliance stop short at administrative fines. The law emphasizes that a violation of the due diligence obligations does not create in itself civil liability of the concerned

¹³⁴ c.f. § 823 *Bürgerliches Gesetzbuch* (Civil Code).

¹³⁵ c.f. § 823 (2) *Bürgerliches Gesetzbuch* (Civil Code).

¹³⁶ ECCHR, *Illegale Waffenexporte nach Mexiko und der Schutz der Menschenrechte*, 3, available at https://www.ecchr.eu/fileadmin/user_upload/Lessons_to_learn_fuer_die_neue_Bundesregierung.pdf (last accessed 16 June 2023).

¹³⁷ c.f. § 18 *Außenwirtschaftsgesetz vom 6. Juni 2013* (Foreign Trade and Payments Act from 6 June 2013).

¹³⁸ *Urteil LG Stuttgart vom 21.02.2019 - Az.: 13 KLS 143 Js 38100/10*.

¹³⁹ ECCHR, *supra* note 136.

¹⁴⁰ *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 16. Juli 2021* (Supply Chain Act from 16 July 2021).



company. Consequently, the use of this piece of legislation remains effectively precluded for victims of violence caused by German arms which has been criticized by civil society.¹⁴¹

iv. Proposed new Arms Export Control Law

Currently, a new Arms Export Control Law is in the consultation process. In a publication of the preliminary cornerstones of this new law, the German government referred inter alia to strengthening the rights of individual victims of due diligence violations in front of German civil courts.¹⁴² The proposal thus includes the introduction of “qualified breaches of duties” by gun manufacturers resulting in damage for the victims of German weapons for which civil liability could be established. The requirements for causality and proof could be lowered to effectively open up judicial remedies in Germany. Furthermore, the planned Law aims to improve the rights of individuals in criminal proceedings through incidental action for affected third parties.¹⁴³ However, the document on preliminary cornerstones is thus far only a draft and the design of a (draft) law and discussions in the parliament remain to be awaited.

3. Assessment

The criminal proceedings against weapon manufacturers for their exporting practices have attracted considerable public attention to the issues of arms exports from Germany. Notwithstanding this, the preceding analysis displayed remaining significant obstacles for the actual access to justice against exporting decisions and manufacturers’ practice.

There have been no challenges to export licenses in public interest or in the interest of victims of gun violence. This is due to the restrictive standing requirements in administrative law, requiring claimants to be individually affected by a decision. While German courts have been rather favorable to the extraterritorial application of human rights, the high threshold of proof and causality still constitutes a considerable obstacle for proceedings based on extraterritorial human rights or the state’s duty to protect. Nevertheless, claims based on extraterritorial human rights appear to be a promising avenue to establish standing in future proceedings against the state or against exporting licenses. The substantive review of licensing decisions remains, however, near-impossible due to the restriction of the scope of judicial review and secrecy around the issuing of exporting decisions.

With a view to legal actions against arms manufacturers, civil or criminal law provide for limited options. The German due diligence law shows a growing support for the

¹⁴¹ ECCHR, *Bundestag verabschiedet Lieferkettengesetz: Ein wichtiger Schritt – doch nicht ausreichend für die Betroffenen*, 11 June 2021, available at <https://www.ecchr.eu/pressemitteilung/bundestag-verabschiedet-lieferkettengesetz/> (last accessed 16 June 2023).

¹⁴² Bundesministerium für Wirtschaft und Klimaschutz, *Eckpunkte für das Rüstungsexportkontrollgesetz* (2022), available at https://www.bmwk.de/Redaktion/DE/Downloads/P-R/eckpunkte-ruestungsexportkontrollgesetz-entwurf.pdf?__blob=publicationFile&v=6 (last accessed 16 June 2023), at 7.

¹⁴³ Bundesministerium für Wirtschaft und Klimaschutz, *Eckpunkte für das Rüstungsexportkontrollgesetz* (2022), 8.



establishment of human rights obligations of corporations. However, its exclusion of any recourse and civil liability effectively leaves victims of human rights abuses unprotected. Actions based on general tort liability regularly fail due to the high causality requirements and the intervention of third parties in the causal chain. Criminal proceedings against gun manufacturers have proven that actions against the gun manufacturers' practices can be successful. On the other hand, the lack of provisions protecting the victims of illegal exporting practices is emblematic for the limits in this strain of law. The institution and success of criminal proceedings thus relies on the actions of the public prosecution and does not offer avenues of individual redress.

Against this background, one can conclude that access to justice for victims of gun violence faces significant restrictions. This is moreover observable with a view to the regulatory framework of arms export licenses where the governments' wide discretion in approving arms exports and the mere political nature of the export assessment criteria significantly restricts the judicial review of decisions. The enactment of a new Arms Export Law ought to counteract this development. While the preliminary outline of the new legislation envisages extended rules for arms export control and a broader inclusion of victims and NGOs, the outcome of the drafting procedure and the final law remain to be seen.



V. Spain

Spain ranks among the top ten arms exporting countries, with 3.2 % of global arms sales from 2018-22.¹⁴⁴ Important national defense companies include Navantia, Indra Sistemas, and Santa Barbara Sistemas. The judicial control of conduct of the Spanish state and the arms industry is significantly complicated by a restrictive implementation of the right to access information in Spanish Law as the following analysis will demonstrate. The main challenges have thus far (unsuccessfully) been aimed at accessing information about concrete exporting licenses.

1. Regulatory Framework

The legal framework concerning export licenses and information about those accords significant protection to the licensing decisions. The classification of information surrounding exporting decisions as official secrets restricts the public's and victims' access to information and involvement in the control of licenses and predetermines the missing possibilities for judicial control.

a. National framework on arms export authorization

Arms export authorizations in Spain are mainly governed by Law 53/2007¹⁴⁵ and Royal Decree 679/2014¹⁴⁶. The Law and Royal Decree apply to both defense material and dual use objects. The licensing authority is the Secretary of State for Trade that is attached to the Ministry of Economy and Competitiveness. An Inter-ministerial Regulatory board on foreign trade in defense and dual-use material (JIMDDU) is responsible for reviewing authorizations and preliminary agreements.¹⁴⁷ Furthermore, it issues a report on proposed changes to the regulation of foreign trade in defense material. The Secretary of State is required to duly consider these reports by JIMDDU in the licensing process. Law 53/2007 sets down that transfers of defense equipment, other material and dual use products and technologies are subject to administrative authorization. Art. 8 of the law lists the grounds of refusal of an authorization. These include a reference to the violation of EU guidelines (particularly in their outdated form of the Code of Conduct of 8 June 1998) and the OSCE document on small arms and light weapons¹⁴⁸ as well as other international provisions to which Spain is signatory. The licensing criteria are specified and updated in Royal Decree 679/2014 that features a specific reference to the ATT and the EU Common Position (including its User's Guide) in its stipulation of why authorisations "may" be denied.¹⁴⁹ The Decree defines the categories of defense material and other material subject to authorization,

¹⁴⁴ 10 largest Arms exporters in the World, 30 March, 2023, available at <https://fairbd.net/10-largest-arms-exporters-in-the-world/#Spain> (last accessed 16 June 2023).

¹⁴⁵ *Ley 53/2007, de 28 de diciembre de 2007, sobre el control del comercio exterior de material de defensa y de doble uso*, (Law 53/2007), BOE-A-2007-22437.

¹⁴⁶ *Real Decreto 679/2014, de 1 de agosto de 2014, por el que se aprueba el Reglamento de control del comercio exterior de material de defensa, de otro material y de productos y tecnologías de doble uso*, (Royal Decree 679/2014), BOE-A-2014-8926.

¹⁴⁷ Section 3, Law 53/2007.

¹⁴⁸ Organization for Security and Co-operation in Europe, *OSCE Document on Small Arms and Light Weapons*, 24 November 2000, FSC.DOC/1/00/Rev.1.

¹⁴⁹ Art. 7 (1) Real Decreto 679/2014.



as well as dual-use goods. It contains a provision on when authorizations “may” be denied (Art. 7 (1)) and one on when authorizations “shall” be revoked or denied (Art. 7 (2, 3)). Furthermore, the Decree includes the EU’s simplified procedures for intra-community transfers.

Law 53/2007 already provides for the possibility of including verification and follow-up mechanisms and in 2020, a Royal Decree updated JIMDDU’s competencies to include ex-post controls.¹⁵⁰ On-site inspections may thereby be conducted in exceptional cases by JIMDDU. These exceptional cases are not defined in the law. They are limited to countries and products that are deemed especially sensitive and aim at cases of indication of serious misuse or diversion.¹⁵¹ Such inspections have in fact not yet been conducted.¹⁵²

b. National framework on access to information

Spanish Law 19/2013¹⁵³ specifies the constitutional provision on access to information and provides for access to public information. However, this right is effectively precluded for information and documents concerning the consultations of JIMDDU. The Council of Ministers classified JIMDDU minutes as official secrets under the Official Secrets Law (Law 9/1968) according to the Agreement of March 12 1987.¹⁵⁴

The secrecy surrounding licenses has been challenged in judicial proceedings by Greenpeace. In this regard, in 2020, Greenpeace Spain brought a complaint challenging the rejection of its request for access to documents regarding licenses granted for exports to Saudi Arabia.¹⁵⁵ The Supreme Court rejected the claim on the basis that no sufficient public interest in declassifying the licenses had been shown.¹⁵⁶ An appeal by the NGO to the Supreme Court or the European Court of Human Rights remains to be awaited.

¹⁵⁰ *Real Decreto 494/2020, de 28 de abril 2020, por el que se modifica el Real Decreto 679/2014, de 1 de agosto*, (Royal Decree 494/2020), BOE-A-2020-4708.

¹⁵¹ *Ibid.*

¹⁵² cf. Varisco, Brockmann, Robin, *Post-shipment Control Measures: European Approaches to on-site inspections of exported military materiel*, SIPRI December 2020, p. 19.

¹⁵³ Art. 105 b) Constitution; *Ley 19/2013, de 9 diciembre, de transparencia, acceso a la información pública y buen gobierno*, (Law 19/2013), BOE-A-2013-12887.

¹⁵⁴ *Ley 9/1968, de 5 de abril, sobre secretos oficiales*, (Official Secrets Law), BOE-A-1968-444; *Agreement of 12 March 1987* by the Council of Ministers.

¹⁵⁵ cf. ATT Expert Group, *Domestic Accountability for international arms transfers: Law, policy and practice*, August 2021, p. 32.

¹⁵⁶ *Greenpeace to appeal Spain-Saudi arms deal confidentiality*, Seattle Times, 13 February 2023, available at <https://www.seattletimes.com/business/technology/greenpeace-to-appeal-spain-saudi-arms-deal-confidentiality/> (last accessed 16 June 2023).



There are currently plans to adopt a new Classified Information Act to replace the Official Secrets Law.¹⁵⁷ The concrete proposal is however criticized by civil society organizations.¹⁵⁸

The government issues annual reports on the export of defense and dual-use material and reports before the congress of deputies.¹⁵⁹

2. Access to Justice

The protection of licenses under the Official Secrets Law and restricted access to information constitute the main hurdles for victims of Spanish arms export or NGOs acting on their behalf in their pursuit to access justice. Initiating proceedings against a licensing decision can be compounded where a claim does not refer to a concrete license. The lack of information about concrete exports further restricts the possibilities of founding a (civil) claim against gun manufacturers.

a. Causes of action against the state at the national level

i. Administrative law

Spanish administrative law provides for two types of procedures to challenge administrative decisions and acts - the ordinary procedure and a special procedure for the protection of fundamental rights (cf. Law 29/1998).¹⁶⁰ Standing is generally accorded to natural or legal persons having a legitimate right or interest, as well as corporations or associations affected or legally entitled to defend collective rights and interests.¹⁶¹ The establishment of a sufficient link with a victim's human rights in cases of arms exports however needs to meet a high threshold in practice. Generally, since 1998, judicial review of governmental acts has been possible.¹⁶² The courts do not have the power to review areas of governmental discretion.

ii. Case law

The high threshold for having standing as an NGO is illustrated by the 2013 denial of standing for associations that have the purpose of protecting human rights when it comes to challenging an export license.¹⁶³

The main administrative challenges related to arms transfers in Spain are so far aimed at accessing information about licenses granted. The secrecy surrounding export

¹⁵⁷ González, *Spanish government begins reform of Franco-era Official Secrets Law*, El País, 5 April 2021, available at https://english.elpais.com/spanish_news/2021-04-05/spanish-government-begins-reform-of-franco-era-official-secrets-law.html (last accessed 16 June 2023).

¹⁵⁸ *Spain and State Secrets: Civil Society condemns mid-August consultation on first new secrecy law in over 50 years!*, Access Info, 13 August 2022, available at <https://www.access-info.org/2022-08-13/spain-secrets-law/> (last accessed 16 June 2023).

¹⁵⁹ Art. 16 Law 53/2007.

¹⁶⁰ *Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa*, (Law on Administrative Jurisdiction), BOE-A-1998-16718.

¹⁶¹ Art. 19, 114 *Ley 29/1998*.

¹⁶² Mir, *Administrative Procedure and Judicial Review in Spain*, in *Judicial Review of Administration in Europe*, della Cananea, Bussani (eds.), August 2021.

¹⁶³ Judgment Sala de lo Contencioso-Administrativo Madrid, nr 03440/2010 of 13 March 2013, cf. Schliemann, Bryk, *Arms Trade and Corporate Responsibility*, Friedrich-Ebert-Stiftung, 2019, p. 9.



licenses is an important limitation to judicial proceedings. In this regard, a case by the NGO Sociedad Humana challenging transfers to Saudi Arabia was rejected due to its lack of reference to specific licenses.¹⁶⁴

Requests for information about licenses granted are rejected based on their protected status under the Official Secrets law. There are ongoing judicial proceedings challenging the Official Secrets law and its protection of JIMDDU documents,¹⁶⁵ as well as governmental initiatives to reform this law.

b. Causes of action against gun manufacturers at the national level

i. Civil law

Spanish law provides for reparations for negligently caused damages in its civil code.¹⁶⁶ Liability for damages is contingent to a high standard of proof on the causality between the wrongful act and the occurred damage. With a view to the arms industry, this high threshold could be mitigated if the liability of the arms sector would be subject to administrative regulations. However, under current Spanish law, the industry's civil liability is unregulated. Consequently, a civil claim against a Spanish arms manufacturer will most probably fail in proving a sufficient causal relationship between the manufacturer's conduct and the damage caused by its arms.

ii. Criminal law

The Spanish Criminal Code features a provision penalizing the trafficking of weapons and ammunition for war or defense.¹⁶⁷ This provision ought to give practical effect to Regulation 824/93 on Foreign Trade of Defense and Dual-Use Goods. Accordingly, those who partake in the trade of weapons and ammunition for war or defense without the necessary governmental license become criminally liable. However, up until this point, there are no cases visible in which arms manufacturers have been taken to court based on this criminal provision.

iii. Due diligence

Following the example of Germany, the Spanish government is currently working on a new law imposing due diligence obligations on corporations of a certain minimum size. A public consultation for a future draft of the proposed law emphasized the objective of ensuring access to judicial remedies for individuals affected by human rights violations associated with a company's activity.¹⁶⁸ The exact details of the implementation of this objective, however, remain unclear as the report on the public

¹⁶⁴ cf. ATT expert group, *Domestic accountability for international arms transfers: Law, policy and practice*, August 2021, p. 34.

¹⁶⁵ see above under 1 b.

¹⁶⁶ Art. 1902, *Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil* (Royal Decree), BOE-A-18898-4763.

¹⁶⁷ Art. 566 (1) (3), *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal* (Law 10/1995), BOE-A-1995-25444.

¹⁶⁸ Spanish Government, *Consulta Pública Previa, Anteproyecto de Ley de Protección de los Derechos Humanos, de la Sostenibilidad y de la Diligencia Debida en las Actividades Empresariales Transnacionales* (2022).



consultation was silent on the possibility of a legal pathway for civil claims of adversely affected individuals and a potential criminal liability of arms manufacturers.

3. Assessment

Upon a closer look at arms export in Spain, the main procedural hurdle for the substantive review of arms export licensing decisions is the lack of transparency around those licenses. The classification of information concerning arms exports as official secrets makes public access to this information impossible and restricts the chances of success of meeting the procedural requirements to challenge exporting decisions. The restricted access to information about arms exports could also explain the little cases brought against licensing decisions by victims or NGOs. Thus, so far, no cases have reached the stage of judicial review of the exporting decisions, since the procedural hurdles are too high. The limited information about arms exports also restricts the establishment of causal chains for civil and criminal cases. Available legal avenues for actions against gun manufacturers apparently have not been in extensive use which could hint at exclusively appropriate behavior of the Spanish arms industry. Another explanation could, however, lie in the lack of consideration of affected individuals in the available remedies. The civil liability of arms manufacturers is effectively prevented by demanding causality requirements while existing criminal law restricts liability to the unlicensed export of arms. Similarly to the situation in Germany, advocates for stricter rules on arms export place a lot of hope in the upcoming due diligence legislation in Spain.



VI. United Kingdom

The United Kingdom is the seventh largest arms exporting country. A noteworthy British arms manufacturer of international importance is BAE Systems. In an effort to shed more light on the activities of the arms industry, the British NGO 'Campaign against Arms Trade' initiated proceedings against British arms exports to Saudi Arabia,¹⁶⁹ attracting considerable attention. This judicial challenge produced insightful case law in the realm of administrative proceedings. In contrast, there have been no notable legal actions taken against arms manufacturers in civil or criminal law. The special position of the UK within Europe as a common law country outside of the European Union explains certain fundamental differences in matters of jurisdiction and the application of tort law.

1. Regulatory Framework

Even though the UK is no longer legally bound by the EU Common Position following its departure from the European Union, the regulatory framework of UK arms export does not showcase significant changes. The generally far-reaching access to information in the UK is impeded by a lack of transparency around the procedures leading to particular licensing decisions.

a. National framework on arms export authorization

Military and dual-use items that are enlisted in the UK Strategic Export Control Lists require an export authorization by the government. Empowered by the UK Export Control Act, the Secretary of State for International Trade issues licenses for the export of those items. The applications for those licenses will be processed by the Export Control Joint Unit which draws from the expertise of the Department for International Trade, the Foreign, Commonwealth & Development Office and the Ministry of Defence. Applications for a Standard Individual Export License must include an end-user undertaking of the exporting company for end-use control purposes. Those licenses are restricted to the export of certain strategic controlled items of a stated quantity to a specific recipient or end-user.

Whether an export license will be issued, depends on a case-by-case assessment of the compliance with the UK Strategic Export Licensing Criteria. These criteria are essentially congruent to the criteria within the EU Common Position. However, an update of the UK criteria in the wake of Brexit led to the amendment of the phrase 'if it [the Government] determines' to the risk assessment in several Criteria.¹⁷⁰ It has been argued that this adjustment enables the government to limit their scope of assessment to evidence that supports their conclusion.¹⁷¹

¹⁶⁹ *R (Campaign Against the Arms Trade) v Secretary of State for Business, Innovation and Skills* [2019] EWCA Civ 1020.

¹⁷⁰ c.f. *UK Strategic Export Licensing Criteria*, Criteria 2, 3, 4 and 6.

¹⁷¹ See: World Peace Foundation, *Missing in Action: UK arms export controls during war and armed conflict - Defense Industries, Foreign Policy and Armed Conflict* (Somerville, Massachusetts 2022), 14.



b. National framework on access to information

In general, the UK Freedom of Information Act gives the British public a right to see information held by public authorities. However, the access to more detailed information about arms exports will be barred if the competent authority can prove prejudice to the national security, defense or international relations should the information be provided.¹⁷² The government of the UK¹⁷³ is required to publish annual reports on their strategic export controls,¹⁷⁴ that are accompanied by a quarterly publication of statistical data with commentary.¹⁷⁵ Notwithstanding this transparent measure, the published data has been criticized for not providing information on the content and quantities of actual exports.¹⁷⁶ Instead, these reports solely publish the value of goods that license holders may export. This is particularly problematic with a view to open individual export licenses as they allow a license holder to export an unlimited amount of the approved product. Moreover, the published data does not contain information on how policy decisions were made by the government.

2. Access to Justice

The following analysis will illustrate how affected individuals and NGOs can draw on a substantial judicial control of export licensing decisions. As this judicial control is focused on whether decisions are based on a deficient assessment by the authorities, limitations of access to justice are mainly linked to a lack of transparency around these assessments. Establishing the liability of arms manufacturers under UK law is met with high causality requirements and the limited case law pertaining to arms manufacturer's liability or liability concerning distribution chains obstructs the institution of civil cases.

a. Causes of action against the state at the national level

i. Administrative law

Within the common law system of the UK, export licenses can be challenged in judicial review proceedings in front of the Administrative Court which is part of the High Court. Admissible applications require a sufficient connection of the claimants to the decision, action, or inaction by the public authority. Furthermore, proceedings are open to organizations when they can prove a wider public importance of the concerned governmental decision. A judicial review has traditionally been requested on grounds of illegality, procedural unfairness and irrationality.¹⁷⁷ In principle, judicial review does not provide for an assessment of the merits of a decision but rather examines whether the public authority followed the right procedures. An exception to this principle

¹⁷² c.f. Section 24, 26 and 27, *Freedom of Information Act 2000*.

¹⁷³ More particularly the First Secretary of State and Secretary of State for Foreign, Commonwealth and Development Affairs, the Secretary of State for Defence and the Secretary of State for International Trade and President of the Board of Trade.

¹⁷⁴ Section 10, *Export Control Act 2002*.

¹⁷⁵ accessible at: UK Government, *United Kingdom strategic export controls annual report*, <https://www.gov.uk/government/collections/united-kingdom-strategic-export-controls-annual-report> (last accessed 16 June 2023).

¹⁷⁶ Campaign Against the Arms Trade, *Open? The UK's secret arms sales* (2021), 4, available at <https://caat.org.uk/app/uploads/2021/07/CAAT-Report-v2.2.pdf> (last accessed 16 June 2023).

¹⁷⁷ as established in: *Council for Civil Service Unions v Minister for the Civil Service* [1985] AC 374.



constitutes judicial review based on irrationality requiring an exceptionally high degree of unreasonableness of the decision.¹⁷⁸

ii. Case law

Invoking the ground of irrationality, the British NGO CAAT requested a judicial review of the governmental decision to license the sale of arms to Saudi-Arabia a few years ago.¹⁷⁹ Accordingly, the NGO argued that this decision was irrational considering the amount of publicly available evidence indicating that the exported arms will be used by Saudi-Arabia for the commission of serious violations of International Humanitarian Law. Their case first got dismissed in the High Court before the Court of Appeal eventually ruled in their favor. The key aspect of their decision was that the authorities failed to consider appropriately the historical pattern of breaches of International Humanitarian Law by Saudi Arabia in their licensing decision process. Following the judgment of the Court of Appeal, the UK government reviewed their license decision for export of military equipment to Saudi-Arabia and decided to resume issuing licenses. They based their decision on the rationale that past breaches constituted isolated incidents and thus would not automatically illustrate a clear risk.¹⁸⁰ This decision prompted the same NGO to apply for another judicial review of the decision to renew arms sales to Saudi-Arabia, again arguing with an irrational assessment of past breaches of International Humanitarian Law by Saudi Arabia. However, in this renewed challenge, the High Court disagreed with the NGO and concluded that the assessment of past violations of International Humanitarian Law was considered in a rational manner.¹⁸¹

b. Causes of action against gun manufacturers at the national level

As a common law system, the liability of gun manufacturers in the UK depends on judicial precedent. There have been no cases aimed at establishing liability of gun manufacturers for their practices of producing, selling and exporting weapons.

i. Due diligence

The UK does not have legislation aimed at establishing comprehensive due diligence obligations for corporations. The 2015 Modern Slavery Act does not treat this aspect of the supply chains. The government issued recommendations on the implementation of the business and human rights framework with a commitment to the importance of access to remedy.¹⁸² In practice, human rights due diligence is essentially voluntary under the current framework. There are however initiatives to strengthen the human

¹⁷⁸ as established in: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

¹⁷⁹ *R (Campaign Against the Arms Trade) v Secretary of State for Business, Innovation and Skills* [2019] EWCA Civ 1020.

¹⁸⁰ See: UK Parliament, *Trade Update, Statement made on 7 July 2020*, <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339> (last accessed 16 June 2023).

¹⁸¹ *Campaign Against Arms Trade v SSIT* [2023] EWHC 1343 (Admin).

¹⁸² Government of the United Kingdom, *Good Business - Implementing the UN Guiding Principles on Business and Human Rights*, May 2016, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522805/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_updated_May_2016.pdf (last accessed 16 June 2023).



rights due diligence framework, with businesses speaking out in favor of new legislation.¹⁸³

ii. Civil law

In the absence of specific legislation on the issue of manufacturer's liability for arms exports and use, the general tort law framework applies. To establish a tort for negligence, a duty of care must be breached and lead to causal damage. In the case of arms manufacturers thus, a claimant must prove that their conduct breaches a duty of care that is owed to the victim and that caused the damage suffered.

According to *Donoghue v Stevenson*¹⁸⁴, a duty to take reasonable care is owed to those who are closely and directly affected by the act. The Caparo test¹⁸⁵ bases the duty of care on foreseeability, proximity and fairness. The causation of damage to the claimant must be foreseeable, the claimant must be in a relationship of proximity to the defendant and the imposition of a duty of care must be fair, just and reasonable.

As a matter of principle, intervening third party acts exclude the duty of care.¹⁸⁶ Exceptionally, a duty of care may exist when there is a special relationship between the defendant and the third party, when the defendant creates a source of danger or fails to react to a danger posed by the third party. Under these exceptions, the *Vedanta* and *Okpabi* cases¹⁸⁷ established a duty of care of the parent company for its subsidiaries acting extraterritorially. In these cases, notably the publishing of a corporate human rights policy and the control over the subsidiaries led to the affirmation of the duty of care.

In *Hamnida Begum v Maran Limited (2021)*¹⁸⁸, a duty of care in relation with supply chains was established. In this case, the defendant sold a ship at the end of its service knowing that it would be disposed of in Bangladesh using dangerous working practices.¹⁸⁹ While the principle of non-liability for third party acts applied, the court of appeal affirmed the application of the exception thereto and extended it to third parties in the supply chain. Thus, the UK company was held liable for selling the ship in the knowledge of the human rights abuses the workers in the downstream supply chain would suffer through a third party. However, the court stressed that this was a relatively extreme case and establishing such a duty of care depends on the "precise

¹⁸³ UK: *Businesses and investors call for new human rights due diligence law*, Business & Human Rights Resource Centre, 21 October 2021, available at <https://www.business-humanrights.org/en/latest-news/uk-businesses-and-investors-call-for-new-human-rights-due-diligence-law/> (last accessed 16 June 2023).

¹⁸⁴ *Donoghue v Stevenson* (1932) A.C 562, judgment of 26 May 1932.

¹⁸⁵ *Caparo Industries Plc v Dickman* (1990) 2 AC 605, judgment of 8 February 1990.

¹⁸⁶ *Home Office v Dorset Yacht Co Ltd* (1970) AC 1004, judgment of 6 May 1970.

¹⁸⁷ *Vedanta Resources PLC and another v Lungowe and others* (2019) UKSC 20, judgment of 10 April 2019; *Okpabi and others v Royal Dutch Shell Plc and another* (2021) UKSC 3, judgment of 12 February 2021.

¹⁸⁸ *Hamnida Begum v Maran Ltd* (2021) EWCA Civ 326, judgment of 10 March 2021.

¹⁸⁹ cf. *Simmons+Simmons, Does a company's duty of care extend to the actions of its suppliers?*, 14 April 2021, available at <https://www.simmons-simmons.com/en/publications/cknhbyt501b3u09235b3pfp5m/does-a-company-s-duty-of-care-extend-to-the-actions-of-its-suppliers> (last accessed 16 June 2023).



nature and extent of the danger said to have been created". Regarding the argument of establishing a direct duty of care based on the *Donoghue v Stevenson* principle, the court ruled proximity out as a significant hurdle.

iii. Private International Law in the UK

The UK faces different considerations than the other country studies in the case of claimants and damage situated extraterritorially. After Brexit, the EU rules on private international law do no longer apply in the UK. The choice-of-law rules remain similar, applying the tort law of the country in which the personal injury has been sustained¹⁹⁰ with an exception for when it is substantially more appropriate to apply another law. Generally, the claimant needs to plead and prove the foreign law.¹⁹¹ Courts' jurisdiction over tort claims is triggered by presence, however the application of the *forum non conveniens* argument is no longer precluded by the ECJ's doctrine. This doctrine is a traditional doctrine in common law countries. Hence, when claims are brought in a court in England or Wales, the court may deem itself not competent where a more appropriate forum is available in the interests of the parties and the ends of justice. In the application of these criteria, the courts have broad discretion, and the extent of the re-application of the doctrine after Brexit remains to be seen. There are concerns about the instrumentalisation of this doctrine by businesses as a form of jurisdictional immunity.¹⁹²

iv. Violation of Export Control Act

Weapon manufacturers could be criminally liable for their exports. Part 6 of the 2008 Export Control Act establishes offenses for the noncompliance with the export control regime. As such, export without a license constitutes an offense subject to fines. Furthermore, the failure to comply with the license conditions is marked as an offense.

3. Assessment

The above analysis paints a mixed picture. While the United Kingdom does not provide for specific laws on accountability of arms manufacturers, the access to justice seems to be less restricted than in other countries. Particularly, the accessible standing for NGOs in challenges against licensing and the remarkably active NGO CAAT are important drivers for the access to justice. Notwithstanding this, restricted access to information on arms exports remains difficult and limited legal grounds complicate a profound judicial review of the export licenses. The ongoing proceedings initiated by CAAT might provide for more insights into the substantive possibilities of challenging exporting licenses.

The impact of legal avenues for actions against arms manufacturers in civil and criminal law remain to be seen in practice. However, case law on corporate liability for their subsidiaries and human rights abuses abroad could serve as an important basis for future proceedings. Particularly, the establishment of liability for the acts of third parties in the (downstream) supply chain as an exception to the rule of non-liability for

¹⁹⁰ Section 11 (2) (a) Private International Law (Miscellaneous Provisions) Act 1995.

¹⁹¹ cf. *Belhaj & Anor v Straw & Ors*, [2014] EWCA Civ 1394, judgment of 30 October 2014, 143, 158.

¹⁹² Farrington, *A return to the doctrine of forum non conveniens after Brexit and the implications for corporate accountability*, *Journal of Private International Law*, (2022) Vol. 18 Issue 3, 399-423.



third parties could provide for an important precedent concerning the downstream distribution of weapons. However, this type of liability is still exceptional and not indicative for the operability and establishment of a sufficient connection and causality in a case concerning victims of gun violence in third states.



VII. Austria

As measured by its export volume, Austria is not among the most important arms exporters. The value of its annual exports amounted to 14 Million USD in 2022.¹⁹³ However, it is home to the internationally well known small arms manufacturer Glock Ges.m.b.H. Austrian law does not have specific provisions relating to the responsibility of arms manufacturers and there has been no case law relevant to this study. In general, little public attention has focused on arms exports. As the following sections will illustrate, Austria sticks out in this comparative analysis of European countries with a view to its far-reaching official secrecy guidelines.

1. Regulatory Framework

The regulatory framework underlying arms export in Austria resembles the one in many other European countries. Importantly, however, the role of official secrecy facilitates opacity around the issuance of export licenses in Austria.

a. National framework on arms export authorization

Austrian law distinguishes between military and dual-use goods on the one hand, and war material on the other. The former is regulated in the Foreign Trade Act which proscribes the export of military goods and dual-use goods without authorization in §§ 14 and 15. Relevant criteria in the assessment of an authorization are covered in §§ 3-12. With a view to a thorough assessment of the potential implications of the export, § 13 emphasizes the importance of end user certificates. The deciding authority on license applications for military goods covered by the Foreign Trade Act is the Ministry for Economic Affairs, Family and the Youth. Said ministry is also competent to control the compliance of licensed manufacturers with the requirements of the law according to § 63. This provision, however, does not include ex-post controls of exports. The Regulation on Foreign Trade sets down which products require authorization before being exported and is oriented towards the 'Wassenaar Control List' and the EU Common Military List.

War material is regulated in the War Material Act. An obligation to receive authorization prior to the export of war materials follows from § 3 of the War Material Act and refers to all goods determined by the Regulation on War Material. Decisions on the authorization of exports of war material are taken by the Ministry of the Interior in cooperation with the Ministry for European and International Affairs and the Ministry for Defense. Similarly to military and dual-use goods, the ministry can conduct controls of the compliance of licensed companies according to § 4 of the Act. These, however, also do not cover ex-post export controls. In general, the Ministry for European and International Affairs conducts an evaluation for both kinds of goods in light of foreign policy aspects and international law (incl. the EU Common Position).

¹⁹³ Statista, *Rüstungsexporte aus Österreich von 2012 bis 2022*, available at <https://de.statista.com/statistik/daten/studie/911571/umfrage/ruestungsexporte-aus-oesterreich/#:~:text=Im%20Jahr%202022%20wurden%20R%C3%BCstungsg%C3%BCter,R%C3%BCstungsexporte%20im%20Vergleich%20zum%20Vorjahr> (last accessed 16 June 2023).



The criteria of the EU Common Position were incorporated into Austrian law in the assessment criteria of the Foreign Trade Act. Their practical application by the ministries remains rather unclear due to far-reaching official secrecy restrictions that apply in Austria.

b. National framework on access to information

Public access to information has been a controversial issue for several years in Austria.¹⁹⁴ Austria is the only remaining country in the EU in which official secrecy holds a constitutional status pursuant to Art. 20 (3) of the Austrian constitution. This official secrecy relates to all information protecting public peace, order or safety as well as national defense, foreign relations or economic interests of a public body. In light of the various grounds on which information must be withheld by public authorities and the lack of a public information act, it does not come as a surprise that there is a lack of transparency around the process of export licensing decisions.

As a further corollary of Austria's restrictive access to public information, there is scarce statistical data about the scope and details of the export licenses that the government issued. A recently lodged parliamentary motion to establish the obligation of the government to publish annual reports of that kind got rejected in parliament.¹⁹⁵

2. Access to Justice

The judicial control of export license decisions in Austria is not particularly developed in Austria. Similarly, Austrian law does not provide for provisions explicitly referring to consequences of irresponsible arms export.

a. Causes of action against the state at the national level

In general, appeals against administrative decisions are exclusively open to their addressees on the ground of unlawfulness. Said unlawfulness can relate to the procedural or material aspects of the decision. Some laws contain statutory provisions extending the right to appeal to third parties. However, in the realm of export license decisions, the relevant laws contain no such provisions. Consequently, the right to appeal an export licensing decision is reserved to the parties of the administrative proceedings and excludes other affected individuals or organizations.

b. Causes of action against gun manufacturers at the national level

There have been no cases against gun manufacturers in civil or criminal courts in Austria.

¹⁹⁴ Access Info Europe, *Legal analysis of the Austrian Freedom of Information Act (2021)*, available at https://www.access-info.org/wp-content/uploads/Legal-Analysis-of-Austrian-FOIA_-_Access-Info-Europe.pdf (last accessed 16 June 2023).

¹⁹⁵ Austrian Parliament, *Selbständiger Entschließungsantrag, Antrag der Abgeordneten Julia Elisabeth Herr, Kolleginnen und Kollegen betreffend "Verpflichtende Berichte über Waffenexporte Österreichs"* (2023), available at https://www.parlament.gv.at/dokument/XXVII/A/3162/imfname_1533682.pdf (last accessed 16 June 2023).



i. Civil law

Austrian law does not have specific provisions on human rights due diligence or human rights obligations for corporations nor are there provisions regulating the accountability of gun manufacturers.

Where the conduct of a gun manufacturer violates individual rights protected by the law, general liability may provide for recourse. Under general domestic tort law, § 1295 ABGB provides for a right to claim reparation for the negligent or intentional damage inflicted by another. § 1311 further includes accidental damage in situations where a law or duty of conduct has been violated. Under this provision, liability can be established for creating a source of risk (Verkehrssicherungspflicht) even if the risk only manifests itself after intervention of a third person.¹⁹⁶ The affectedness of the claimant must however be objectively foreseeable. However, the provision on liability for created risks thus far has been mainly applied for risks in public spaces such as the security of sidewalks and maintenance of buildings. There have been no cases invoking liability for the danger created through the distribution of products. Furthermore, Austrian courts have not dealt with cases against corporations for their human rights abuses and responsibility concerning their supply chains.

ii. Criminal law/export control law

Arms exports without license or in violation of the license are subject to penal sanctions. Both the Foreign Trade Act and the War Material Act contain criminal provisions (§ 81 Foreign Trade Act and § 7 War Material Act respectively) in that regard. There have been no remarkable proceedings based on these provisions.

3. Assessment

In conclusion, Austrian law appears not to be particularly sensitive to the negative impact of irresponsible arms export. On the one hand, this becomes evident with a view to the non-existing right of affected third parties to appeal licensing decisions. In general, the process around these licensing decisions is rather opaque mainly due to the extensively restricted access to public information in Austria. On the other hand, civil and criminal law do not prescribe legal grounds for effective action against arms manufacturers but restrict themselves to general provisions on tort liability and the penalization of violating export control rules.

¹⁹⁶ European Justice Portal, Business and Human Rights in Austria, https://e-justice.europa.eu/580/EN/business_and_human_rights?AUSTRIA&member=1 (last accessed 16 June 2023).



VIII. Switzerland

Swiss arms manufacturers exported close to 1 billion CHF worth of war material in 2022.¹⁹⁷ By international comparison, this volume does not rank them among the largest exporters of arms. However, within this comparative analysis, Switzerland sticks out since one of its most important arms manufacturers, RUAG, is partially state-owned.

1. Regulatory Framework

Switzerland is not a member of the European Union and thus not legally bound by the EU Common Position. Nonetheless, its regulatory framework on arms export does not deviate significantly from other European countries as the following analysis will illustrate.

a. National framework on arms export authorization

In Switzerland, the export of war weapons is regulated by the War Material Act (WMA)¹⁹⁸ and the War Material Ordinance (WMO).¹⁹⁹ War Material is defined in Art. 5 WMA. The act requires the licensing of all exports by the State Secretariat for economic affairs (SECO) and depending on the case also by other ministries.

The War Material Act distinguishes between the general authorization for production and trade with war material on the one hand, and the specific licenses required for the concrete export on the other. According to Art. 20 WMA, contracts on the sale of war weapons require prior authorization.

The criteria for export authorizations were initially included in Art. 5 WMO. However, a popular initiative led to the strengthening of the criteria as the criteria were subsequently included in the law as of May 2022. Hence, Art. 22a WMA enumerates criteria to be considered in the assessment of requests.²⁰⁰ Art. 22a (2) provides for situations in which contracts and exports of material “will not be approved”²⁰¹ adding additional specific criteria relating to the compliance with international law and Swiss foreign policy. Art. 25 WMA extends the prohibitions of exports to embargos according

¹⁹⁷ SECO, Dossier: Ausfuhr von Kriegsmaterial im Jahr 2022, 7 March 2023, available at <https://www.news.admin.ch/news/message/attachments/75798.pdf> (last accessed 16 June 2023).

¹⁹⁸ *Bundesgesetz 514.51 über das Kriegsmaterial*, 13 December 1996, last amended 1 Mai 2022 (War Material Act).

¹⁹⁹ *Verordnung 514.511 über das Kriegsmaterial*, 25 February 1998, last amended 1 Mai 2022 (War Material Ordinance).

²⁰⁰ Art. 22a (1) WMA: maintenance of peace, international security, internal situation in the country of destination, in particular respect for human rights, Switzerland's efforts in development cooperation, the attitude of the country of destination towards the international community, the attitude of countries that participate with Switzerland in international export control regimes.

²⁰¹ Art. 22a (2) WMA: the country of destination is involved in an internal or international armed conflict, the country of destination seriously and systematically violates human rights, high risk that the war material will be used against the civilian population, high risk that the war material will be transferred to an undesirable end recipient.



to the Swiss embargo law.²⁰² Overall, while Switzerland is not legally bound by EU legislation, the relevant criteria for the assessment of arms exports widely resemble those of the EU Common Position.

The SECO is generally competent to issue licenses. It decides in conjunction with the competent authority of the Department for foreign affairs and depending on the circumstances with other authorities. In case of disagreement of the authorities, the Swiss federal council decides.²⁰³ In cases of immense importance for external and security policy, the competence to decide over the license goes over to the federal council.²⁰⁴

The export control for dual-use goods is grounded in the Goods Control Act of 1996 (Güterkontrollgesetz) and the respective ordinance. According to Art. 6 of the Act, authorizations are denied when they would be contrary to international treaties, non-binding international law, embargoes or when terrorism or organized crime could plausibly be supported.

In 2006, Switzerland introduced post-shipment controls and adopted them in Art. 5a (3) WMO in 2012.²⁰⁵ According to the law, SECO has the discretion to introduce provisions on post-shipment controls for arms exports to countries that have a high risk of diversion. In practice, Switzerland requires consent to post-shipment verifications for items on the List of War Materials. The post-shipment controls are limited to state entities and do not apply to the selling to private entities.²⁰⁶ The controls are conducted by the SECO and prepared with embassies and the Federal Department of Foreign Affairs. They are based on a country-risk matrix classifying specific aspects of risks.²⁰⁷ Switzerland conducts 5-10 inspections per year.

b. National framework on access to information

Art. 16 of the Swiss Constitution establishes the freedom of information. This provision is specified in the Federal Act about the principle of public access to the administration.²⁰⁸ Official documents and information may be accessed except for cases posing threats to the security of Switzerland or involving foreign policy interests and international information.²⁰⁹ Authorities cannot deny access to information without a substantiated justification. Following a judgment of domestic courts,

²⁰² *Bundesgesetz 946.231 über die Durchsetzung von internationalen Sanktionen*, 22 March 2002, last amended 1 January 2022 (Sanctions Act); under this law international embargoes of the UN and OSZE are implemented.

²⁰³ Art. 14, *War Material Ordinance*.

²⁰⁴ Art. 29 (2), *War Material Act*.

²⁰⁵ Varisco, Brockmann, Robin, *Post-Shipment Control Measures: European approaches to on-site inspections of exported military materiel*, SIPRI December 2020, p. 10-11.

²⁰⁶ *ibid.*, p. 11.

²⁰⁷ Bromley, Brockmann, Varisco, *Post-Shipment on-site Inspections of military materiel: challenges and responses*, SIPRI December 2021, available at https://www.sipri.org/sites/default/files/2021-12/pb_2112_on-site_inspections.pdf (last accessed 16 June 2023).

²⁰⁸ *Bundesgesetz über das Öffentlichkeitsprinzip der Verwaltung*, 17 December 2004 (Federal Act about the principle of public access to the administration).

²⁰⁹ Art. 7 Federal Act about the principle of public access to the administration.



journalists are to be provided access to the information on weapon manufacturers requesting export authorizations.²¹⁰ In the concerned case, a journalist requested a list of all the companies submitting requests to export war material in 2014. The first instance argued that the requested information is protected by the secrecy of parliamentary consultations as the concerned report would be only prepared for parliament.²¹¹ The appeal stressed that the information relating to the export of war materials is of increased public interest. It thus affirmed the right to access information about export license requests. The requested information in this case, however, only related to the manufacturers and the volume of exports requested and those that were denied. Concrete information about the importing countries was precluded from the request.

The SECO annually publishes information about the weapons exports.²¹² These reports provide statistical data about the volume of exports and the importing countries. However, they do not refer to the assessment process behind the decision to issue an export license.

2. Access to Justice

The scope of permissible judicial challenges of export licensing decisions in Switzerland is restricted to a rather exclusive circle of affected persons. Referring to the accountability of arms manufacturers, Swiss law lacks effective legally binding provisions. These circumstances account for the lack of proceedings brought against export licenses and arms manufacturers.

a. Causes of action against the state at the national level

i. Administrative law

Decisions taken on the basis of the War Material Act and the Goods Control Act can be controlled according to general administrative law. The Federal Administrative Court and the Federal Court could thus be competent to deal with challenges of licensing decisions as these constitute acts of the administration based on administrative law.

However, unless otherwise prescribed by law, acts by the Federal Council are excluded from judicial review according to Art. 189 (4) of the Swiss Constitution. A respective exception concerning the export authorizations can be seen in Art. 29 (3) WMA which prescribes the application of general administrative law for appeals against respective licensing decisions. Thus, the general exemption of Federal Council Acts from judicial review does not apply to arms exports.

Furthermore, the review of decisions concerning internal and external security of the country is excluded from review following Art. 32 of the Administrative Court Act.

²¹⁰ Federal administrative court, *Jirát v. Staatssekretariat für Wirtschaft SECO*, judgement of 28 March 2018, A-6108/2016.

²¹¹ *ibid.*

²¹² For 2022 for instance: SECO, *Dossier: Ausfuhr von Kriegsmaterial im Jahr 2022*, available at <https://www.newsd.admin.ch/newsd/message/attachments/75798.pdf> (last accessed 16 June 2023).



According to the jurisprudence, this exception needs to be interpreted narrowly and excludes in essence governmental acts from judicial control.²¹³ Typically, governmental acts are defined by their political character and the large discretion accorded to the administrations. Therefore, they predominantly rely on political considerations.²¹⁴ Decisions on the export of dual use goods are typically subject to judicial control unless qualified political interests or immense foreign policy considerations are involved as affirmed by the Federal Court.²¹⁵ Similarly, decisions based on the war material act can generally be controlled.²¹⁶ In a case concerning the suspension of export authorizations until the federal prosecution finished investigations on the Swiss company 'Crypto' producing manipulated encoding devices and its involvement in international spying,²¹⁷ the Federal Administrative Court decided that the decision could not be reviewed due to the immense political interests involved.²¹⁸ This limitation to judicial review is, according to the court, compatible with the right to access justice and the ECHR.

A judicial review of licensing decisions according to administrative procedural law requires a special affectedness of the claimants by the challenged decision.²¹⁹ In addition, the concerned decision must touch a protected interest of the claimant. These requirements apply to natural and judicial persons equally. Appealing a decision based on public interest is not an available pathway in Swiss administrative law. Consequently, appeals by potential victims of irresponsible arms trade or by others acting in their interest are significantly complicated by the standing requirement of a special affectedness by an explicit license decision.

b. Causes of action against gun manufacturers at the national level

i. Civil law

Liability for damage caused intentionally or negligently is established in Art. 41 of the Code of Obligations. The causality requirements in that regard presuppose that the damage would either not have occurred but for the concerned conduct or the violation of legal due diligence obligations. Establishing this kind of direct causal relationship is almost impossible as it could be argued that perpetrators could have relied on arms from another source instead. Legally binding due diligence obligations, on another note, have not yet been incorporated into Swiss law as will be returned to later. Effectively, these requirements prevent the liability of arms manufacturers for damage resulting from their licensed exports.

²¹³ Federal Court, *NLM Capital Ltd. and EM Ltd. v. Département fédéral des affaires étrangères*, judgment of 22 November 2011, BGE 137/371 E. 1.2.

²¹⁴ cf. Federal Administrative Court, *X. AG v SECO*, judgment of 2 December 2020, B-3515/2020, at 4.

²¹⁵ *ibid.*

²¹⁶ cf. Federal Administrative Court, *Rieder & Lenz AG v. Eidgenössisches Departement für Wirtschaft, Bildung und Forschung WBF*, judgment of 28 August 2019, A-3542/2018.

²¹⁷ *Swiss Crypto AG spying scandal shakes reputation for neutrality*, BBC, 16 February 2020, available at <https://www.bbc.com/news/world-europe-51487856> (last accessed 16 June 2023).

²¹⁸ Federal Administrative Court, *X. AG v SECO*, judgment of 2 December 2020, B-3515/2020.

²¹⁹ cf. Art. 48 (1) of the Federal Law on the administrative procedure.



The Swiss state owns the two independently operating companies 'RUAG MRO' and 'RUAG International'. While the former is foremost tasked with the maintenance of the Swiss army, the latter mainly operates in the aerospace market. In recent years, the Swiss government started pursuing the strategy of privatizing 'RUAG International' and has already started selling certain sectors of the company.²²⁰ The ownership structure of the RUAG does not prevent civil liability of the corporation for conduct where the state acted as a private actor outside of the performance of public interests.

ii. Criminal law/export control law

Consequences for violations of license requirements are covered in the penal provision of Art. 33 WMA and are prosecuted by the General Prosecutor of the Confederation (Art. 40 WMA). Relevant case-law concerning illicit export of military goods is scarce. In 2012, two siblings and their father got sentenced to prison for the illicit export of parts used for nuclear weapons.²²¹

In the wake of the war in Iraq, a subsidiary of the state-owned RUAG defense company continued supplying the US with parts of fighter jets, even after the federal council made a public decision to restrict the export of war material to the US until further clarification. This prompted the Socialist Party of Switzerland to bring a legal action against the company for breaching the War Material Act. However, the competent Federal Prosecution Service rejected the action referring to the observation that the accused company was not yet officially instructed to suspend exports to the US at the time of the delivery of parts.²²²

iii. Due diligence

In 2020, a popular initiative on establishing far-reaching due diligence obligations for transnational corporations reached a majority of the votes in absolute numbers. However, only a minority of the votes in the respective 26 cantons approved the initiative resulting in an overall failure thereof. Instead, the Swiss parliament adopted changes in Art. 964 of the Code of Obligations introducing reporting obligations for corporations. The effects of the new provisions remain to be seen as the reporting mechanism only became compulsory in 2023. However, significant effects could be hampered by the lack of a penal mechanism for the non-compliance of companies.²²³

3. Assessment

To conclude, Swiss administrative law provides a clear regulatory framework for the issuance of appeals against export licenses. Notwithstanding this, similarly to other states, the general standing requirements for a judicial review of administrative decisions effectively exclude organizations or individuals acting on behalf of victims. Furthermore, while statistical data on arms export are published annually, the

²²⁰ Federal Department of Defence, Civil Protection and Sport, *RUAG*, available at <https://www.vbs.admin.ch/en/ddps/enterprises-affiliated/ruag.html> (last accessed 16 June 2023).

²²¹ BSTGer, SK 2011.29, 25.09.2012.

²²² Swissinfo, *Waffen-Exporte unter der Lupe*, <https://www.swissinfo.ch/ger/waffen-exporte-unter-der-lupe/3241960> (last accessed 16 June 2023).

²²³ Bueno and Kaufmann, 'The Swiss Human Rights Due Diligence Legislation: Between Law and Politics', 6(3) *Business and Human Rights Journal* (Cambridge) (2021), 7.



assessments on which the responsible ministries base their licensing decisions remain opaque which further complicates a successful initiation of a judicial review.

With a view to the liability of the arms industry, civil, administrative and export control law do provide for legal avenues to hold a gun manufacturer accountable. However, the requirements of these instruments do not consider damage resulting from licensed arms exports in that a lawfully obtained license excludes any further liability. In that regard, a substantive due diligence law extending the scope of obligations for arms manufacturers could have strengthened the access to justice for victims of irresponsible arms trade.



IX. Italy

Italy is the third biggest arms exporting country in Europe.²²⁴ Arms manufacturers headquartered in Italy, such as Beretta S.p.A. and RWM Italia S.p.A., are private companies that have been involved in the international arms trade for a long time. In criminal proceedings, attempts have been made to prosecute both the managers of arms manufacturers and government officials for their respective roles in the export of arms to Saudi-Arabia and the UAE.²²⁵ However, the high threshold of culpability in criminal law has proven to be difficult to overcome and the lack of transparency regarding arms exports forms a barrier to initiation of any legal proceedings. It should also be noted that there have not been any attempts yet to challenge licensing decisions before administrative courts.

1. Regulatory Framework

The Italian regulatory framework on arms export authorization recognizes the principles set out in the EU Common Position and provides for an annual reporting obligation. Despite this, the lack of sufficient information on arms export presents a challenge for victims of Italian arms exports or NGOs acting on their behalf prior to starting legal proceedings against the state or against arms manufacturers.

a. National framework on arms export authorization

The control of export of strategic goods is regulated by Law no.185/1990. In 2012, the Unit for the Authorization of Armament Material (UAMA) was established, which is the competent body within the Ministry of Foreign Affairs responsible for the issuance of arms export licenses.²²⁶ Companies wishing to export arms must obtain two separate authorizations; one authorization to initiate negotiations on supply contracts with the country of final destination and another authorization to actually carry out the export. Moreover, when applying to the Ministry of Foreign Affairs for the export authorization, they must include an import certificate issued by the recipient country confirming the end-use.²²⁷ Importantly, it should be noted that the authorization for contract negotiations does not give the company the right to obtain a subsequent export authorization, as these are subject to a separate evaluation procedure. First, the UAMA can decide within 60 days upon notification of negotiations by the exporting party, to prohibit the discontinuation of negotiations.²²⁸ Second, when negotiations were authorized to continue, a copy of this authorisation must be included in the

²²⁴ 10 largest Arms exporters in the World, 30 March, 2023, available at <https://fairbd.net/10-largest-arms-exporters-in-the-world/#List of the 10 largest arms exporters in the world> (last accessed 16 June 2023).

²²⁵ ECCHR (Case report), *European responsibility for war crimes in Yemen – Complicity of RWM Italia and Italian arms export authority?* (2018); ECCHR (Press release), *Italy fails victims of war crimes in Yemen despite proof of violation of Arms Trade Treaty*, 15 March 2023.

²²⁶ Art. 7-bis, *Legge 9 luglio 1990, n. 185, "Nuove norme sul controllo dell'esportazione, importazione e transito dei materiali di armamento"* (Law no.185/1990 of 9 July 1990) [1990].

²²⁷ *Ibid.*, Art. 13.

²²⁸ *Ibid.*, Art. 9.



subsequent application for an export license, which the UAMA examines on a case-by-case basis.²²⁹

According to article 1(11-bis) of the law, the export of military goods will be carried out in accordance with the principles set out in the EU Common Position. Law no.185/1990 does not mention the ATT, but this international instrument has been ratified through the Law 118/2013, making its rules binding for Italian authorities. Regulation of the export of dual-use goods is covered by the EU Dual-Use Regulation.

According to articles 1(5) and 1(6) of Law no.185/1990, licensing decisions by UAMA should not conflict with either article 11 of the Italian Constitution, which rejects war as a means of settling international disputes, or with Italy's international obligations to prohibit arms exports to embargoed countries, countries involved in violations of Article 51 UN Charter or countries responsible for serious violations of international humanitarian law.

The 'control activity' of the UAMA concerns the control of arms export in the phases preceding and those following the export, which is performed through 'checks and inspections'.²³⁰ However, post-shipment controls are not expressly referred to in the law. The post-shipment verifications so far were based on information from embassies, international organizations and research institutes. In the current regulatory framework, the UAMA prioritizes preventive controls in the phase preceding the export and does not carry out on-site inspections in third countries.²³¹

b. National framework on access to information

Legislative Decree no. 33 of 14 March 2013²³² governs the (re)organization of the rules concerning the right of access to information. Article 5 governs the civic access to public documents. It sets out an obligation for public administrations to publish documents, information or data, and stipulates the right for anyone to request disclosure of public information. However, many requests for information on arms exports have been denied because of secrecy obligations or the need to protect existing economic and political relations. For example, a civic access request, pursuant to article 5, for information regarding the sale of military equipment to Egypt, was denied due to protection of international relations and private interests such as trade secrecy.²³³

²²⁹ *Ibid.*, Art 11 & Art. 13.

²³⁰ *Ibid.*, Art. 20(bis).

²³¹ Varisco, Brockmann, Robin, *Post-Shipment Control Measures: European approaches to on-site inspections of exported military materiel*, SIPRI December 2020, at 22, available at https://www.sipri.org/sites/default/files/2020-12/bp_2012_post-shipment_controls.pdf (last accessed 16 June 2023).

²³² *Decreto legislativo 14 marzo 2013, n. 33, Riordino della disciplina riguardante il diritto di accesso civico e gli obblighi di pubblicità, trasparenza e diffusione di informazioni da parte delle pubbliche amministrazioni*, (Decree no. 33/2013) [2013].

²³³ Elenco delle Richieste di Accesso Civico Generalizzato (FOIA) ex Art. 5, CO. 2 del D.LGS. 33/2013 - ANNO 2020 (List of Requests for Generalised Civil Access (FOIA) ex Art. 5, CO. 2 of Legislative Decree 33/2013), available at https://www.esteri.it/wp-content/uploads/2022/09/registro_richieste_accesso_civico_generalizzato_foia_2020.pdf (last accessed 16 June 2023).



Law no. 185/1990 requires the government to disclose to Parliament the information obtained from all governmental bodies involved in authorizing arms exports, such as quantity of exports, monetary values and final destinations.²³⁴ However, the reports generally do not provide all the data necessary to get a full picture of the arms export practices.²³⁵ Moreover, the information provided in these documents is one of the few sources of information available to the public and is increasingly aggregated, making it difficult to identify the quantity of weapons, the type of weapons and their final destination. Namely, in recent reports, it is no longer specified which individual weapon systems are exported to individual recipient countries.²³⁶ The resulting lack of transparency presents a barrier to adequately challenge licenses or bring judicial claims against arms export practices in general.

2. Access to Justice

Proceedings to challenge the Italian arms export by victims or NGOs acting on their behalf have not been initiated before either administrative or civil courts. Attempts at contesting Italian arms export have been made mainly through criminal complaints and subsequent criminal proceedings. Not only is bringing criminal complaints (or any legal claim) made difficult through a lack of adequate information on arms exports, successful criminal proceedings are also significantly difficult to achieve due to high standards regarding the burden of proof. Additionally, as will be highlighted in the next sections, the Italian government enjoys a considerably wide margin of discretion with respect to its licensing practice regarding arms export.

a. Causes of action against the state at the national level

i. Administrative law

In Italy, judicial review of administrative acts is carried out by administrative courts: a court of first instance, the Tribunale Amministrativo Regionale (TAR), established in each region, and the Consiglio di Stato (Council of State), which acts as an appellate court. Proceedings before these courts are regulated by the Code on Administrative Procedure (CAP).²³⁷ Article 29 CAP provides for an action of annulment before an administrative court on the grounds of violation of the law, lack of competence and excess of power.

Article 7(1) of the CAP states that administrative courts have jurisdiction over the protection of legitimate interests against the public administration. A claimant must

²³⁴ Art. 5, Law no.185/1990, *supra* note 226.

²³⁵ Transparency International Defence & Security, *Defence industry influence in Italy: Analysing Defence Industry Influence on the Italian Policy Agenda* (2021), at 32, available at <https://ti-defence.org/wp-content/uploads/2021/04/ENG-Defence-Industry-Influence-in-Italy-Transparency-International-Defence-Security.pdf> (last accessed 16 June 2023).

²³⁶ Rete Italiana per il Disarmo, *30 anni della Legge 185/90 sull'export militare: dati ed analisi di tre decenni di vendita di armi italiane*, 9 July 2020, at 6, available at <https://www.disarmo.org/rete/docs/5346.pdf> (last accessed 16 June 2023).

²³⁷ *Decreto legge n. 104 del 2 luglio 2010 Attuazione dell'articolo 44 della legge 18 giugno 2009, n. 69, recante delega al Governo per il riordino del processo amministrativo* (Gazzetta Ufficiale n. 156 del 7 luglio 2010) (Law no.104/2010 on Administrative Procedure) [2010].



have a legitimate interest in contesting the administrative decision, which must relate to the exercise of administrative power. However, acts or measures issued by the government in the exercise of political power cannot be challenged. It is unclear whether licensing decisions for arms exports are regarded as ‘exercise of political power’ and whether they may be challenged before an administrative court, as there is no case law (yet) on this matter in administrative procedures.

ii. Complaints against Italian government

As previously mentioned, there are no administrative procedures to date in which licensing decisions taken by the government have been challenged. However, incipient action against the state aimed at challenging authorisations for arms exports has been initiated. After Giulio Regeni, an Italian PhD researcher studying trade unions in Egypt, was heavily tortured and murdered by Egyptian National Security officials, investigations were opened by the Public Prosecutor’s Office in Rome into these National Security Officials.²³⁸ This trial is still ongoing. In the meantime, Italy proceeded to sell defense equipment to the Egyptian government, including 50 missiles and 2 FREMM frigates.²³⁹ In December 2020, the parents of Giulio Regeni filed a complaint at the prosecutor’s office in Rome (in connection with the ongoing Regeni case) against the Italian government for violating the Law 185/1990, which prohibits the export of arms to countries in which serious human rights violations are taking place.²⁴⁰ As the Regeni case is still ongoing, the complaint relating to the Law 185/1990 remains to be dealt with. This case could provide for more insight on taking legal action against the state in relation to arms export authorizations.

Moreover, a criminal complaint was filed by NGOs requesting investigation into the criminal liability of government officials, namely the officials of UAMA, the responsible body for the issuance of arms export licenses.²⁴¹ As this complaint also included a request for investigation into the criminal liability of arms manufacturer RWM Italia and both matters are interconnected, the complaint and subsequent proceedings will be dealt with in the following section on causes of action against arms manufacturers.

b. Causes of action against gun manufacturers at the national level

i. Civil law

When a victim of gun violence in Italy wishes to sue a gun manufacturer that is also headquartered in Italy, domestic tort law could provide for a ground to do so. Article

²³⁸ cf. Michaelson & Tondo, ‘Italy charges Egyptian security agency officials over murder of Giulio Regeni’, *The Guardian* (2020), available at <https://www.theguardian.com/world/2020/dec/10/italy-charges-four-egyptians-over-of-giulio-regeni> (last accessed 16 June 2023); Giuffrida, ‘Giulio Regeni: court calls Italy’s PM and foreign minister as witnesses’, *The Guardian* (2023), available at <https://www.theguardian.com/world/2023/feb/14/giulio-regeni-court-calls-italys-pm-and-foreign-minister-as-witnesses> (last accessed 16 June 2023).

²³⁹ SIPRI, Arms Transfers Database (general trade registers), Arms transfers from Italy to Egypt in period 2019-2021.

²⁴⁰ Foschini, ‘Ecco perché denunciemo l’Italia’. *Le accuse dei Regeni al governo*, *Repubblica* (2021), available at https://www.repubblica.it/politica/2021/01/07/news/ecco_perche_denunciemo_l_italia_le_accuse_dei_regeni_al_governo-281444996/ (last accessed 16 June 2023).

²⁴¹ ECCHR, *supra* note 225.



2043 of the Italian Civil Code stipulates the general tort provision, providing that any intentional or negligent act, that causes damage to others, obliges the one who committed the act to compensate for the damage. In addition, article 2050 of the Civil Code provides a specific legal norm on ‘strict liability’ for damages resulting from ‘dangerous activities’. This provision entails a higher standard of due care compared to article 2043 and the burden of proof for negligence lies with the defendant instead of the claimant. Whether the activities are to be categorized as ‘dangerous’ depends on the probability of damage and the inner nature of the activity. Exporting arms involves inherent risks of damage, as arms can potentially be used to cause harm and violate human rights in the recipient country. However, it is unclear whether the activity of exporting arms could qualify as ‘dangerous’.

Regarding the pharmaceutical industry, the Italian Supreme Court has held that the manufacture of drugs, including the marketing of the finished product, is ‘dangerous’, given the existence of law and regulations that provide for special due care obligations for the production, trade, export and import, and for criminal penalties in the event of a breach of these obligations.²⁴² By analogy, it could be argued that the categorization of activities as ‘dangerous’ depends on the presence of public safety laws or special rules regulating the execution of these activities, which, for arms exports, would be set out in Law 85/1990. However, it is unclear whether a judge would categorize the export of arms under ‘dangerous activities’, as there have been no civil cases on (strict) liability of gun manufacturers under article 2050, nor under the regular tort law provision in article 2043. In addition, gun manufacturers are not under special due care obligations that are provided by national law.

ii. Criminal law

Individuals, including managers of arms manufacturers and government officials, may be criminally prosecuted for complicity in murder or personal injury caused by the weapons made by Italian manufacturers and authorized to be exported by the government. The Italian Criminal Code stipulates both voluntary and involuntary manslaughter, respectively in articles 575 and 589. The commission of personal injury is stipulated in articles 582 (voluntary) and 590 (involuntary). These crimes require satisfaction of the element of intent (*mens rea*). For example, gross negligence might be enough to prove involuntary murder or personal injury, but this level of intent is not enough to prove the voluntary kind. Government officials may also be prosecuted for abuse of power under article 323 of the Italian Criminal Code. Abuse of power requires the complainant to show that a public official breached a specific rule expressly laid down by law that leaves no margin of discretion. In the context of licensing decisions for arms exports, this is a significantly high threshold, considering the discretion that EU governments generally have when it comes to granting export licenses.

In 2018, three NGOs filed a criminal complaint to the Prosecutor in Rome requesting initiation of investigation of both the corporate managers (specifically the CEO) of RWM Italia S.p.A. and officials of the UAMA, which had granted RWM Italia licenses to export arms to Saudi Arabia and the UAE. After an airstrike in Yemen that resulted in the death of six civilians, a field monitor of one of the NGOs visited the scene and

²⁴² Corte di Cassazione, sentenza 15 luglio 1987, n.6241, *Il Foro Italiano* (1988).



found remnants of a bomb that had been produced by RWM Italia. The request concerned investigation of the criminal liability of both sets of individuals for involuntary murder and personal injury (through gross negligence) as well as voluntary murder and personal injury. Regarding the UAMA officials, NGOs requested an additional investigation into abuse of power, arguing that conduct of the UAMA officials violated applicable legislation (Law no. 185/1990), given existing evidence that exported arms could be used in the commission of IHL or human rights violations.²⁴³ Investigations were only opened for abuse of power by UAMA officials. After the first dismissal by the Prosecutor, the NGOs appealed to the Judge for Preliminary Investigations, which only deals with the possibility of proceeding to trial. In the 2021 case, the judge ordered the Prosecutor to continue and improve its investigation and further confirmed that the Law no.185/1990 should be interpreted in accordance with the ATT and EU Common Position (which were confirmed to be directly applicable).²⁴⁴ Importantly these proceedings have also allowed public access to information about decision-making processes and risk assessments carried out by the government.

However, in the 2023 case, following another dismissal by the Prosecutor, the Judge for Preliminary Investigations found that it was not possible to establish the intent of the UAMA officials that is needed for ‘abuse of power’ even though there was ample evidence confirming UAMA’s conduct was in violation of the ATT and EU Common Position. The judge found, *inter alia*, that UAMA officials acted in accordance with the government’s foreign and defense policy regarding the arms export authorization process, and thus complied with relevant Italian legislation, by acting based on the opinions that were legally required in this process. Moreover, the conduct of the CEO of RWM Italia was not considered at all by the judge, despite the evidence that was gathered during the investigation which showed that the company continued to apply for export licenses while aware of the serious human rights violations caused by the Saudi-UAE-led coalition in Yemen.²⁴⁵

3. Assessment

In Italy, licensing decisions for arms exports have only been challenged in criminal proceedings, mainly against UAMA officials individually. Due to substantial barriers in criminal law, e.g., high burden of proof standards for abuse of power, it has been significantly complicated to successfully challenge licensing practices.²⁴⁶ However, even though the access to information concerning arms exports generally presents a barrier for the initiation of any legal proceedings, these criminal proceedings have provided access to certain information, *inter alia*, on risk assessments carried out by UAMA. Access to this kind of information is generally denied when requested through civic access requests.

²⁴³ ECCHR Case Report, ‘*European responsibility for war crimes in Yemen – Complicity of RWM Italia and Italian arms export authority?*’, last updated: 2018.

²⁴⁴ ATT Expert Group, *Domestic Accountability for international arms transfers: Law, policy and practice*, August 2021, at 27.

²⁴⁵ ECCHR Press release, ‘Italy fails victims of war crimes in Yemen despite proof of violation of Arms Trade Treaty’, March 2023.

²⁴⁶ *Ibid.*



Challenging UAMA decisions in administrative proceedings remains an option that could potentially overcome these high standards that have to be satisfied in criminal law. That is, if licensing decisions would not be seen as an ‘exercise of political power’, which in France has barred judicial review altogether.

Legal action against Italian gun manufacturers has not been initiated in civil law, which could potentially serve as a ground for liability when a victim of gun violence is situated in Italy. Relevant provisions would either be article 2043 or article 2050, if arms exporting activities would be deemed as ‘dangerous’ activities. However, this will be for a judge to decide, as ‘dangerous’ activities are not specified in the law. On the other hand, a criminal complaint aimed at holding both the CEO of arms manufacturer RWM Italia and UAMA officials criminally liable for their respective roles in arms exports to Saudi Arabia and the UAE has been filed by NGOs. This resulted in investigations into both sets of persons. However, despite evidence found during investigations that RWM Italia continued to request arms export authorizations while aware of human rights violations taking place in the Yemen conflict, the conduct of the company’s CEO was not considered at all by the Judge for Preliminary Investigations.

The Judge for Preliminary Investigations only dealt with the abuse of power by UAMA officials, for which the intent element required in criminal law could not be satisfied, as the judge found that UAMA officials complied with Italian legislation by acting in accordance with foreign and defense policy. This decision was reached despite overwhelming evidence that UAMA’s conduct was in violation of the ATT and EU Common Position. Even though these international and EU law instruments as well as Law no.185/1990 require the Italian government to conduct thorough risk assessments on arms exports with the aim of avoiding violations of human rights or IHL, a precedent such as the one set by the Judge for Preliminary Investigation disregards this aim by affirming the government’s wide margin of discretion concerning its licensing practices and the resulting lack of accountability.



X. Romania

Until the fall of Romanian dictator Nicolae Ceaușescu in 1989, Romania ranked among the top ten arms exporting countries.²⁴⁷ Following the market liberalization, the arms sector declined and became privatized. The national defense company ROMARM is held 100% by state capital and is under the supervision of the Ministry of Economy.²⁴⁸ The issue of arms exports and their regulation attracts limited public attention in Romania and no cases falling in the scope of this research have been brought.

1. Regulatory Framework

Romania implements the EU Common Position in its national export control regime. However, the regulatory framework in Romania restricts access to information about arms exports. There have been no cases that allow for an in-depth assessment of the application of the export control regime and access to information about arms exports in practice.

a. National framework on arms export authorization

According to Art. 1 of the Government Ordinance No. 158/1999, the export of military goods is subject to the control of the National Agency for Export Controls. Applicants for an export license are required to give a full account on the export to the National Agency for Export Controls pursuant to Art. 18 of the Ordinance. Post-shipment controls are regulated in Art. 25 of the Ordinance and follow a substantiated request of the authorities. Art. 8 of the Ordinance further contains factors that ought to be taken into account in the assessment of a license application that include the criteria of the EU Common Position.

b. National framework on access to information

Art. 31 of the Romanian Constitution provides that the right to access public information should not be restricted. The implementation of this right constitutes the core of Law No. 544/2001 on free access to information of public interest. Art. 5 of this law prescribes far reaching obligations for the communication of information of public interest. Exemptions of the right to access information are iterated in Art. 12 and include inter alia information relating to national defense, safety and public order as well as to economic and political interests of Romania. In reality, however, the implementation of access to public information has been subject to criticism for unnecessarily complicating the release of information.²⁴⁹

²⁴⁷ *INVESTITII: In transeele industriei de armament*, 8 February 2006, available at <https://www.businessmagazin.ro/actualitate/investitii-in-transeele-industriei-de-armament-979654> (last accessed 16 June 2023).

²⁴⁸ *About ROMARM*, <https://romarm.ro/en/informatii-despre-companie/> (last accessed 16 June 2023).

²⁴⁹ International Press Institute, *Right to information suffers further in Romania during pandemic*, available at <https://ipi.media/right-to-information-suffers-further-in-romania-during-pandemic/> (last accessed 16 June 2023).



The above-mentioned ANCEX publishes reports on the arms export controls on a quarterly basis.²⁵⁰ These reports confine themselves to statistical data on the volume of issued licenses and do not refer to the assessments conducted by authorities.

2. Access to Justice

No remarkable cases have been brought against Romanian arms manufacturers or against export licenses. This might point to the lack of public engagement with the issues of arms exports or to the lack of avenues to challenge arms exports and manufacturers. Overall, administrative law restricts the review of licenses and the legal avenues against arms manufacturers appear to be limited. The important market position of the state-owned company ROMARM is not reflected in the laws, with the state not showing additional protection of human rights in ROMARM's undertakings.

a. Causes of action against the state at the national level

The right to lodge an appeal against an administrative decision is open to everyone capable of proving the violation of a right or legitimate interest according to Art. 1 of Law No. 554/2004. Additionally, this legitimate interest can be of public or private nature, effectively establishing a considerably wide scope of claimants. Organizations are, however, excluded from this scope.

b. Causes of action against gun manufacturers at the national level

i. Civil law

The Romanian Gun Manufacturer ROMARM has the unique predisposition of being entirely owned by the state and acting under the supervision of the Ministry of Economy. *Compania Națională ROMARM S.A.* is incorporated as a Romanian limited company and can thus be respondent in civil proceedings like any other company.

There are no specific laws providing for access to justice for victims of gun violence in Romania. Claims could therefore be based on the tort law provisions in the Romanian Civil Code. Thus, Art. 1349²⁵¹ provides for delictual responsibility based on the breach of a rule of conduct. However, pursuant to Art. 1352, this delictual responsibility is precluded in cases where the victim or third parties take action and intervene.

The Romanian legal system does not have specific provisions on corporate human rights obligations. According to the State, human rights violations can trigger civil, administrative and disciplinary liability.²⁵² The Human Rights Council affirms that states have stronger obligations under their obligation to protect from human rights violations

²⁵⁰ Ministerul Afacerilor Externe, *Departamentul Pentru Controlul Exporturilor - ANCEX, Reports*, available at <https://ancex.ro/military-goods/reports/> (last accessed 16 June 2023).

²⁵¹ Art. 1349 *Noul Cod Civil*.

²⁵² Business and Human Rights, Romania, 26 April 2023, available at https://e-justice.europa.eu/580/EN/business_and_human_rights?ROMANIA&member=1 (last accessed 16 June 2023).



regarding the acts of companies owned by them.²⁵³ Romanian law does however not specifically implement this.

Overall, there have been no cases against Romanian gun manufacturers brought in courts in Romania.

ii. Criminal law/export control law

Ordinance No 158/1999 provides for criminal provisions concerning the violation of the export control regime and non-compliance with the end-user certificate which are punishable by fines.

3. Assessment

In conclusion, there has been little public engagement with arms exports and control of decisions and acts by manufacturers in Romania which is underlined by the lack of case law. Mechanisms for challenging export licenses and controlling manufacturers are lacking and access to information is difficult. Notably, the fact that NGOs do not have standing in administrative procedures hinders accountability for arms exports. Regarding civil liability, the exclusion of responsibility in causal chains where third parties intervene make the establishment of a link difficult. Even though the defense company is state-owned, due diligence provisions and commitments to human rights are lacking. Overall, the situation of access to justice regarding arms exports thus seems to be severely restricted.

²⁵³ cf. Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016, A/HRC/32/45.



XI. Sweden

From 2009 to 2019, Sweden was among the world's ninth largest arms exporters with a cumulative value of \$14.3 billion. Currently five large defense companies are active in Sweden: Saab, BAE Systems Bofors, BAE Systems Hägglunds, Kockums and Nammo Sweden. In 33rd place, Saab is the only Swedish company on SIPRI's 2021 list of the top 100 arms producers.²⁵⁴ On the domestic plane, the country faces high rates of gun violence, being the only European country in which fatal shootings have significantly increased in the last two decades.

The country is impregnated with contrast. On the international scene, Sweden has gained a reputation for neutrality and commitments to human rights. For instance, Sweden significantly contributed humanitarian aid to Yemen since the conflict began.²⁵⁵ Despite this effort, it is also notable that some of the largest importers of Swedish weapons and ammunition are Saudi Arabia and the United Arab Emirates, both actively engaged in the Yemeni war.²⁵⁶

1. Regulatory Framework

Sweden is characterized by strict export control legislation. This has been particularly noticeable since the adoption of an additional export control criterion in 2018, namely the democratic situation of the recipient country. This has been particularly noticeable since the adoption of an additional control criterion in 2018, specifically regarding the democratic situation of the recipient country. Under this new criterion, licenses must be evaluated based on the country's political situation and human rights record. This measure is part of the government's commitment to increasing transparency in the public sphere. However, the Swedish exports remain covered by secrecy, preventing civil society from accessing information about the licensing assessment process.

a. National framework on arms export authorization

The regulatory framework for Swedish export controls consist of the Military Equipment Act (1992:1300)²⁵⁷, the Military Equipment Ordinance (1992:1303) and the Dual-Use Products and Technical Assistance Act (2000:1064) along with the principles and guidelines on exports of military equipment which were established based on government practice. They must be applied in conjunction with the written laws when examining license applications. In principle, Swedish arms exports are prohibited. However, exception can be made by the government, which allows for

²⁵⁴ Stockholm International Peace Institute, *The SIPRI Top 100 Armsproducing and Military Services Companies 2012*, (2022).

²⁵⁵ Mikael Bjuremalm, *Nine years on – Swedish help has been vital in aiding the people of Yemen*, UNHCR, 26 April 2023, available at [Nine years on – Swedish help has been vital in aiding the people of Yemen – UNHCR Northern Europe](#) (last accessed 16 June 2023).

²⁵⁶ Human Rights Watch, *Yemen: Latest Round of Saudi-UAE-Led Attacks Targets Civilians*, available at [Yemen: Latest Round of Saudi-UAE-Led Attacks Targets Civilians | Human Rights Watch \(hrw.org\)](#) (last accessed 16 June 2023).

²⁵⁷ The law has been amended in 2018 (SFS 2018:135), reflecting the ATT and the EU Common Position.



exports to take place²⁵⁸. Under Section 1 of the 1992 Military Equipment Act, such equipment may only be exported if there are security or defense policy reasons for doing so and provided that there is no conflict with Sweden's international obligations or foreign policy.

The Inspectorate of Strategic Products (*Inspektionen för strategiska produkter*, or ISP), is a central administrative authority responsible for controlling and ensuring compliance of defense material and dual-use products. As an independent authority, it assesses license applications in accordance with the aforementioned regulatory framework. In addition to processing export licenses, the ISP reviews the notifications required from companies and authorities when they sign contracts relating to the export of military equipment. All export matters are reported to the Export Control Council (ECC), a parliamentary advisory body consisting of twelve members appointed by the government. The ECC is bound by absolute secrecy and is consulted on any contract with a new client country that may be controversial.

Since 2018, Sweden has strengthened its export control system through the introduction of the Government Bill 2017/18:23. The bill provides that export licenses for arms and ammunition shall not be granted in cases of serious violations of human rights or "grave deficiencies" in the democratic status of the recipient country. The introduction of this 'democracy criterion' aims to reinforce the ability of civil-society organizations and political actors to exercise strict oversight of the export licenses granted to the arms sector. However, this regulation only applies to new deals, as the government of Sweden allows the export of so-called sequential deliveries based on existing licenses. Consequently, exports to countries that would be denied permits under the new regulations may still be allowed.²⁵⁹

The Swedish government publishes an annual report to the Parliament on arms exports. However, the public cannot access the risk assessment that has been conducted by the Inspectorate of Strategic Goods when granting the licenses.²⁶⁰

The Swedish legislation does not currently provide for post-shipment controls. However, since 2015 there is ongoing discussion for establishing a system of on-site inspections. In 2018 the ISP issued a report analyzing existing practices, for instance in Switzerland, and presenting different alternatives for the government.²⁶¹

b. National framework on access to information

The Freedom of the Press Act (Swedish Code of Statutes SFS1949:105) includes provisions on the right to access to official documents submitted to or drawn up by authorities. Under Article 1, "every Swedish Citizen shall be entitled to have free access

²⁵⁸ Military Equipment Act (1992:1300) Section 1.

²⁵⁹ Appendix III 2020/21:114, *Inspektionen för strategiska produkter om viktiga tendenser inom svensk och internationell exportkontroll*.

²⁶⁰ Woman International League for Peace and Freedom, *The Swedish Arms Trade and Risk Assessment: Does a Feminist Foreign Policy Make a Difference?* (2016).

²⁶¹ Swedish Inspectorate of Strategic Products (ISP), *Investigation of follow-up inspections abroad*, Annex 2 (29 Mar. 2018).



to official documents”. In principle, all official documents are considered public and must be made available to anyone who wishes to read them.

However, there are provisions on secrecy that place limitations on the right to access official documents. These provisions can be found in the Public Access to Information and Secrecy Act which supplements the Freedom of the Press Act by providing additional regulations regarding the right to obtain official documents. By virtue of Chapter 15 § 1, secrecy may cover the “protection of national security or its relations with other states or international organizations”, and pursuant § 2, military secrecy may be applicable. The matter of secrecy must be evaluated on a case-by-case basis when an authority receives a request to access a document. The level of secrecy required may vary depending on the purpose for which the information is being sought. Consequently, the authority cannot make a definitive and legally binding decision on secrecy for a document in advance.

Anyone who has requested access to public documents has the right to appeal a decision denying the disclosure of information. These appeals are handled by the administrative courts.

2. Access to Justice

According to our research, there has been no case law involving arms export licenses, nor litigation against gun manufacturers. This is a real paradox when we consider that Sweden is home to a large number of arms companies and is one of the world’s biggest arms exporters.

a. Causes of action against the state at the national level

i. Administrative law

Administrative appeals against the decisions of the ISP are governed by the Administrative Procedure Act (Förvaltningslagen, SFS 2017:900). For individual administrative decisions, the Swedish Administrative Procedure Act states that they may be appealed to a general administrative court. However, both the Parliament and the Government have the authority to prescribe that a decision should not be appealable. This is because the Act is considered subsidiary to conflicting provisions in both acts of law and governmental ordinances²⁶². As a result, it is still possible for specific administrative regulations to contain so-called “appeal bans”, which prevent a decision from being appealed to an administrative court.²⁶³

In several instances, appeal bans have been proven to be in conflict with the right to judicial review under both Article 6.1 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union.²⁶⁴ According to case law, if an appeal ban contravenes either the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union, it

²⁶² Administrative Procedure Act (2017:900) Section 4.

²⁶³ Larsson, *Indirect review of administrative action in Sweden*, 14 February 2023, REALaw.blog, available at <https://realaw.blog/?p=2215> (last visited 08 June 2023).

²⁶⁴ See *The Yearbook of the Supreme Administrative Court cases HFD 2015*.



should be set aside. However, in some cases, the appeal ban could be upheld, if the right to effective judicial review could instead be fulfilled through an action in a general court where the decision could be indirectly reviewed.

b. Causes of action against gun manufacturers at the national level

i. Civil law

The Swedish law, specifically the Tort Liability Act (Skadeståndslag [1972:207]), provides for civil liability. This act serves as a framework law with broadly formulated provisions. Under this law, both intentional and negligent acts are covered, although the terms themselves are not explicitly defined within the Statute. Through court praxis, it has been established that the act in question must have been a 'necessary condition' for the damage to occur (condition sine qua non). Moreover, in many cases, the act must have been the decisive factor that caused the damage.

There is no case law involving arms manufacturers. However, in 2013 a claim was filed before the County Court of Skellefteå against a corporation regarding environmental damage occurring abroad.²⁶⁵ The plaintiff, an NGO representing the victims, claimed that the defendant, Boliden Mineral AB, a large Swedish mining corporation was involved in human rights and environmental damage due to its operation in Chile. In the claim, the plaintiffs aimed to show Boliden's negligence in the act of exporting toxic waste, that led to the damages suffered by the plaintiffs, in essence, that Boliden owed a duty of care directly to the victims.

Because of the general nature of the law, the most contentious issue was around defining negligence and determining whether Boliden could be held responsible for the tortious act. Based on a preliminary examination of the complaint, it appears that all criteria for culpability were met. However, the evidential requirements and burden of proof, which is entirely placed on the plaintiffs, is likely to be very challenging to meet and may pose a considerable obstacle.

As the case unfolded, the Court of Appeal held that the case is time-barred since the export of the toxic waste occurred over ten years ago²⁶⁶. As a result, the Court ruled in favor of Boliden Mineral AB and dismissed the claims of Arica Victims KB. Regardless of the outcome, the lawsuit against Boliden held significant potential for setting a precedent. It served as an important initial indication regarding the viability of foreign direct liability claims in Sweden. Moreover, it highlighted the necessity for legal and institutional reforms aimed at improving access to justice for individuals who have suffered harm due to the transnational activities of Swedish corporations.

ii. Criminal law

²⁶⁵ *Arica Victims KB v Boliden Minerals AB*, Skellefteå tingsrätt [Skellefteå District Court], T 1021-13, 8 March 2018.

²⁶⁶ As provided by the Limitations Act (Preskriptionslag [1981:130]).



Section 24 of the Military Equipment Act contains criminal liability provisions for intentional or negligent violations of the export control rules. However, this has not given rise to any case law concerning arms manufacturers.

iii. Complicity in war crimes

Under Swedish criminal law, corporations cannot commit criminal acts and therefore cannot be liable to a criminal sanction. Instead, criminal liability may be attributed to the representatives or employees of the corporation who committed the offense. In such cases, the corporation may be subject to corporate fines and administrative sanctions. It is important to note that there are no specific rules that exclusively apply to the heads or directors of the corporations in this context.

According to the PAX report on Lundin Consortium activities²⁶⁷, the company's representatives may have been complicit in the commission of war crimes and crimes against humanity by providing material support to the Sudanese government²⁶⁸. As a result, widespread international crimes occurred in the region, as the government attempted to gain control forcefully over the oil fields exploited by the company. This case in Sweden echoes the French Lafarge case²⁶⁹. The outcome could establish a precedent regarding the accountability of corporate representatives for serious violations of international law. It would shed light on the definition of complicity in this particular context and contribute to the growing global efforts to hold companies accountable and discourage similar misconduct.

3. Assessment

Swedish arms trade is shaped by national interests in economic development, upholding an interest-driven economy towards the arms industry. Despite provoking significant national debate, Sweden's substantial and consistent arms exports have attracted very little attention and effort for legal claims. The analysis of Sweden shows a contradiction between the objectives set by Swedish politics and legislation. Despite Sweden's efforts to enforce tight arms export controls, in particular by adopting regulation with human rights considerations, the country persists in exporting arms and ammunition to countries involved in conflicts. This contradiction suggests that the commitments in relation to arms exports lack practical significance. The absence of case law against arms export licenses and arms manufacturers does not necessarily imply that there are no concerns about the issue. The government has been heavily criticized for its double standard.²⁷⁰

²⁶⁷ PAX, *Unpaid Debt, The Legacy of Lundin, Petronas and OMV in Sudan, 1997-2000*, (2010).

²⁶⁸ Among other things, by building infrastructure that "expanded the geographic reach of armed groups, enabled year-round access to formerly isolated communities, and facilitated the Sudan Armed Forces (SAF) and armed groups to violently displace much of the population" in the area where the company was operating, see PAX, *ibid*.

²⁶⁹ Cour de Cassation, Criminal Chamber, Pourvoi n° 19-87.367 (9 décembre 2019).

²⁷⁰ Gabriella Irsten, *Swedish arms exports - an obstacle to feminist foreign policy*, The Swedish Development Forum, 20 October 2015, available at [Swedish arms exports - an obstacle to feminist foreign policy - FUF.se](https://www.fuf.se/en/2015/10/20/swedish-arms-exports-an-obstacle-to-feminist-foreign-policy) (last accessed 8 June 2023).



Part 2: Access to Justice under International and European Law

Beyond the access to justice against exporting licenses at the domestic level or against gun manufacturers, (individual) action at an international level might be possible. In this regard, states could be held to account for their insufficient implementation of the international and European framework for export licenses or for the insufficient access to justice under international and regional human rights norms. Hence, this section will assess the different avenues that are possible for victims of gun violence or other states beyond the domestic legal framework.

I. Claims against States

1. International Court of Justice

The International Court of Justice, the main judicial organ of the UN, may only entertain state-to-state cases. In particular, it deals with contentious cases on legal disputes between States and requests for advisory opinions on legal questions referred to it by UN organs and specialized agencies.

a. Contentious Cases

The Court is competent to entertain a dispute between States in a contentious case only if both States have accepted its jurisdiction pursuant to article 36 ICJ Statute. Jurisdiction of the ICJ may either be accepted through a special agreement, by virtue of a jurisdictional clause in a treaty, or by reciprocal effect of declarations made by States under the ICJ Statute accepting the compulsory jurisdiction of the Court.

Article 19 of the ATT provides that States Parties must, by mutual consent, cooperate to pursue the settlement of any dispute that may arise with regard to interpretation or application of the ATT. This includes dispute settlement through adjudication. States will have to mutually consent to the jurisdiction of the ICJ in order to bring a dispute regarding application or interpretation of the ATT.

Article 16 of the UN Firearms Protocol provides that any dispute between two or more States Parties concerning the interpretation or application of the Protocol should in the first place be settled through negotiations. Paragraph 2 stipulates that if these negotiations fail to settle the dispute within a reasonable amount of time, the dispute may be subject to arbitration, at the request of one of the States. If State Parties cannot agree on the organization of the arbitration within six months, the State Parties may refer the dispute to the ICJ, provided that its jurisdiction is accepted in accordance with the ICJ Statute. Article 16(3), however, provides for an opt-out of this dispute settlement clause, stating that each State Party may declare that it does not consider itself bound by paragraph 2. This reservation also has reciprocal effect, meaning that a state will not be bound by paragraph 2 with respect to any state with such a reservation.



For a referral of a dispute concerning the interpretation or application of the ATT to the ICJ, it is thus necessary that both States are party to the ATT and that both States have accepted jurisdiction of the ICJ separately, as the ATT does not provide for a dispute settlement clause expressly referring these disputes to the ICJ. Similarly, referral of a dispute concerning the interpretation or application of the UN Firearms Protocol to the ICJ requires mutual acceptance of ICJ jurisdiction as well as prior negotiations and an attempt at settling the dispute through arbitration. Moreover, states may make use of the opt-out provision, which also removes the option for arbitration.

b. Advisory Opinions

Advisory proceedings before the ICJ may only be brought by five organs of the UN and 16 specialized agencies of the UN family. The UN General Assembly as well as the UN Security Council may request advisory opinions on 'any legal question', as stipulated in article 96(1) of the UN Charter and in article 65 of the ICJ Statute. Other UN organs and the specialized agencies can only request advisory opinions with respect to 'legal questions arising within the scope of their activities' (article 96(2) UN Charter).

2. UN Human Rights Committee

The UN Human Rights Committee acts as the supervisory organ for the implementation of the International Covenant on Civil and Political Rights (ICCPR), one of the most essential human right instruments on a global level. Introducing the possibility of an individual complaint mechanism, the First Optional Protocol to the ICCPR, constituted an important addition to the ICCPR. While a substantial majority of states in the international community ratified the Covenant, there are more outlier states observable regarding the ratification of the Protocol. Noteworthy mentions in the European context are the UK and Switzerland. Furthermore, several European countries issued reservations relating to the jurisdiction of the Committee in cases that have already been dealt with by other international complaint mechanisms (e.g. France and Austria).

Considering the broad implications of arms trade, there is a wide scope of affected ICCPR-rights. Accordingly, it could touch inter alia the right to life, freedom from torture and other forms of cruel, inhuman or degrading treatment, liberty and security of person, freedom of thought, conscience and religion. The wide range of affected rights can be explained by the essential role arms export plays in the fueling of violent conflicts.

In principle, according to Art. 1 of the First Optional Protocol, the individual complaint procedure of the ICCPR is open to everyone alleging to be personally and directly affected by a law, policy, practice, act or omission of a state that has ratified the Protocol. Complaints can also be lodged on behalf of an alleged victim provided that there is sufficient authorization. Other formal requirements encompass a sufficient substantiation of a complaint, prior exhaustion of domestic remedies and no ongoing examination of the claim under other international settlement mechanisms. Consequently, individuals capable of proving a sufficient link between the irresponsible issuance of an export license and the violation of their right(s) could lodge a complaint



with the Human Rights Committee. As of now, the Committee has not dealt with complaints of this kind. Coming back to the preceding analysis of limitations in the domestic access to justice, this could stem from a lack of transparency around the license decisions and the incoherent legal framework of relevant criteria on the admissibility of exports.

II. Claims against States in EU Law, ECHR, Advisory Opinions

1. Claims before the European Court of Justice

Under EU law, there is no (direct) judicial recourse for individuals against the acts of member states implementing EU law. Art. 263 IV of the Treaty on the Functioning of the European Union provides for individual recourse against acts that individually concern natural or legal persons. This recourse can only be directed against acts conducted by organs of the Union.

In principle, acts of the common foreign and security policy are not subject to judicial control by the ECJ. The Common Position as part of the Common Foreign and Security Policy could therefore not be controlled by the Court. However, the ECJ clarified in *Rosneft* that it can control the division of competences according to Art. 40 and acts restricting the rights of natural or legal persons.²⁷¹ The control would thus be possible as far as human rights can be invoked. However, the Common position does not (directly) touch upon human rights and therefore does not open up avenues for judicial control.²⁷² The control in *Rosneft* was based on sanctions against natural and legal persons, making this direct-affectedness the primary case for the exception.

Domestic courts provide for the primary review of decisions based on the Common Position and its national implementation. To clarify the requirements of EU law such as the Common Position or the Dual Use regulation, or to question the compatibility of domestic practices with the EU Charter of fundamental rights, domestic courts can (and under certain conditions are required to) request guidance by the ECJ according to Art. 267 TFEU. Whereas the Dual Use Regulation and the Charter of Fundamental Rights are subject to judicial control by the ECJ, control and interpretation of the Common Position is again restricted by the above-mentioned exceptions.²⁷³

An additional recourse under EU law is provided by Art. 348 II TFEU. Under this provision, the Commission and member states can call the ECJ to verify whether Member States' practice that is diverging from the Common Position or the Dual Use Regulation can be based on the exception of Art. 346 I b. Art. 346 I b TFEU provides for the option for Member States to take measures diverging from EU law based on their national security interests "connected with the production of or trade in arms, munitions and war material". Member States have discretion when it comes to their

²⁷¹ ECJ, *Rosneft*, case C-72/15, judgment of 28 March 2017, ECLI:EU:C:236.

²⁷² German Parliament, 'Zur innerstaatlichen Geltung des Gemeinsamen Standpunkts 2008/944/GASP' (on the domestic application of the Common Position), PE 6-3000-002/19, available at <https://www.bundestag.de/resource/blob/628806/d7ca0848c31d112316ccd37456d135cf/PE-6-002-19-pdf-data.pdf> (last accessed 16 June 2023).

²⁷³ ECJ, *Rosneft*, C-72/15, 28 March 2017.



security interests and their decisions are only subject to control of abuse of rights. However, the ECJ clarified that the provision is subject to strict interpretation and that Member States need to prove the necessity of having recourse to the derogation in order to protect their interests.²⁷⁴

2. Individual Action before the ECtHR

An individual could bring a claim before the European Court of Human Rights to assert a violation of their human rights. The claim could be directed against the state's involvement in the exporting decision through the license if the export and the license contravene and endanger the human rights of people in the importing country or in countries where the arms are diverted to. Another implication of the ECHR could be in the provision of the right to access justice and have an effective remedy. Thus, in cases where no review of licensing decisions is possible or where the pursuit of civil litigation against the gun manufacturers is significantly hindered, a claim might be based on the state's obligation to provide effective remedies and access to courts.

a. Individual Applications Procedure

According to Art. 34 ECHR, individuals and NGOs have the right to file individual applications to the European Court for Human Rights. The individual filing a claim must assert to be a victim of a violation of its Convention rights by one of the Council of Europe Member States. The filing of a claim by an NGO in general interest is thus not permitted. The Convention does not provide for an *actio popularis* or abstract control of norms and practices.²⁷⁵

As a procedural precondition, the ECHR requires the exhaustion of domestic remedies (cf Art. 35). Thus, claimants need to bring their complaint before domestic courts first in order to let them determine the compatibility of the domestic situation with the Convention. Thereby, the complaint only needs to be raised in substance. Only those domestic remedies that are available in theory and in practice and can reasonably provide redress need to be exhausted. Remedies must be both effective and available. The application to the ECtHR must be made within 4 months of the last domestic decision.

b. Jurisdiction of the ECtHR

Fundamentally, the ECtHR must have jurisdiction to hear the case. In this regard, the jurisdictional foundation of the Convention's rights of Art. 1 ECHR becomes relevant again.

Jurisdiction under the ECHR is primarily territorial.²⁷⁶ Exceptionally, extraterritorial jurisdiction can be affirmed when a state exercises effective control over an area outside its national territory. Furthermore, that jurisdiction could be based on the acts

²⁷⁴ ECJ, *Commission v Finland*, C-284/05, judgment of 15 December 2009, ECLI:EU:2009:778, para 45, 46.

²⁷⁵ ECtHR, *Practical Guide on Admissibility Criteria*, 31 August 2022, p 11.

²⁷⁶ ECtHR, *Bankovic and Others v Belgium and Others*, *Decision as to the Admissibility*, 52207/99, 12/12/2001, §§ 61, 67.



of a state's authorities producing effects outside their own territory.²⁷⁷ The establishment of a sufficient link with the State is however exceptional and was mainly found in cases of effective control over an area or the exercise of authority and control over certain persons.²⁷⁸ The mere impact of decisions taken at the national level on persons outside the territory does not establish jurisdiction.²⁷⁹ Concerning the situation of victims of gun violence that are situated in third states and impacted by the exporting decisions, the exporting state does not exercise any kind of control over the territory or the individuals in question. It therefore seems highly unlikely for the ECtHR to affirm jurisdiction in these scenarios.

Another basis for establishing jurisdiction can be seen in the initiation of proceedings in or against a state. This procedural model encompasses situations in which a state exercises control over people through procedural or legal means. Thus, "once a person brings a civil action in the courts or tribunals of a state, there indisputably exists a jurisdictional link between that person and the state, in spite of the extraterritorial nature of the events alleged to have been at the origin of the action"²⁸⁰. In such a manner, the court found in *Markovic and Others v Italy*²⁸¹ that Italy had jurisdiction over Serbia and Montenegro nationals that brought tort law claims against the Italian state in its courts. The procedural affirmation of jurisdiction is however of limited scope and the court only affirmed jurisdiction for the purpose of Art. 6 (1) ECHR but not the other provisions invoked.²⁸² In *MN and Others v Belgium*²⁸³, a procedural jurisdictional link for the purpose of invoking violations of Art. 3 ECHR was rejected. Thus, the court affirms that "the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction" in order to prevent "near-universal application of the convention on the basis of the unilateral choices of an individual"²⁸⁴.

The establishment of jurisdiction based on the institution of domestic investigations or proceedings concerning acts that happened abroad must also be seen as exceptional. Such a link must be based on the special features of the case or the domestic framework prescribing obligations to investigate.²⁸⁵

Overall, the establishment of jurisdiction based on the implication of the state in the exporting decision and its negative effects on victims situated in third states is unlikely. In the case of a victim bringing a claim in a domestic court, jurisdiction for the purpose of Art. 6 (1) ECHR might be established.

²⁷⁷ ECtHR, *Drozd and Janousek v France and Spain*, 12747/87, 26/06/1992, § 91.

²⁷⁸ ECtHR, *Al Skeini v UK*, 55721/07, 07/07/2011, para 130-140.

²⁷⁹ ECtHR, *M.N. and Others v Belgium*, 3599/18, 05/05/2020, para 112.

²⁸⁰ ECtHR, *Practical Guide on Admissibility Criteria*, 31 August 2022, p 59.

²⁸¹ ECtHR, *Markovic and Others v Italy*, 1398/03, 14/12/2006.

²⁸² cf. *Markovic and Others*, para 51.

²⁸³ ECtHR, *M.N. and Others v Belgium*, 3599/18, 05/05/2020.

²⁸⁴ *ibid.*, para 123, citing ECtHR, *Abdul Wahab Khan v United Kingdom*, 11987/11, 28/01/2014.

²⁸⁵ ECtHR, *Güzelyurtlu and Others v Cyprus and Turkey*, 36925/07, 29/01/2019, para 190; ECtHR, *Hanan v Germany*, 4871/16, 16/02/2021, para 136-145.



c. Substantive Violations of the ECHR

Substantively, Art. 6 (1) ECHR requires the right to access a court to enforce civil rights and obligations. The right that is claimed must exist on an arguable basis. However, the provision only safeguards the procedural access to a court but the court does not examine limitations to the substantive law. In this respect, in *Markovic and Others*, the substantive limitation of restricted review of acts of war as part of the state's foreign policy did not fall under the scope of Art. 6 (1).²⁸⁶

In a similar manner, Art. 13 ECHR protects the right to an effective remedy for claims based on the ECHR's provisions that go beyond civil rights. It encompasses action against all acts of the administration and executive. While the provision does not require an established violation of a right, it must be invoked in connection with an arguable complaint about the violation of a Convention right. In this regard, the lack of jurisdictional basis for other claims based on the ECHR most likely leads to their being manifestly ill-founded and not arguable.

3. Request of an Advisory Opinion by the ECtHR

The European Court of Human Rights furthermore has the competence to give advisory opinions. However, the advisory function is less developed in the system of the ECHR than in other regional human rights systems.

Under Art. 47 ECHR and Protocol 2 to the Convention, the Committee of Ministers of the Council of Europe may request advisory opinions. They can however not relate to the "scope of the rights or freedoms" of the Convention and Protocols. Under this provision the advisory opinions requested relate mainly to the selection of candidates.

Protocol No. 16 introduced an advisory function in relation to member states' institutions. Under this protocol, Member States' highest courts and tribunals may request advisory opinions relating to the application and interpretation of the rights and freedoms of the convention. These requests while treating questions of general importance must however be related to a pending case before the national court or tribunal.

It would therefore be possible to request an interpretation of the ECHR's rights and obligations in relation to arms exports and the role of manufacturers, but only in the limited context of a concrete case pending before domestic jurisdiction. An abstract elaboration on these questions is not possible under the current framework of the ECHR.

²⁸⁶ *Markovic*, para 114-115.



Conclusion

This memorandum illustrates that despite variations in their respective legal systems, European countries face similar challenges in the regulation of arms exports. The current EU and international frameworks on arms export controls are intended to promote greater transparency and accountability. Particularly, the Arms Trade Treaty and the EU Common Position, which require human rights risk assessments, form a promising basis for conducting more restrictive and responsible transfers. However, most legal orders do not give direct effect to the ATT and the broad discretion enjoyed by states in their implementation of the EU Common Position criteria within their domestic legal systems leads to inconsistencies in export decisions, thereby weakening the overall legal regime.

The extent of oversight over arms export licenses varies among countries. Unfortunately, the majority of governments' management of arms transfers has led to an opaque system with little public accountability. In many jurisdictions, export licensing processes are covered by secrecy under the guise of national security or foreign policy exceptions. The resulting lack of transparency shields arms exports from any public oversight. In such jurisdictions where parliamentary oversight is particularly lacking, exports to conflict and at-risk zones continue to take place. Another significant issue is the difficulty to initiate judicial challenges against licensing decisions. Secrecy exceptions and restrictive procedural requirements effectively shield them from judicial scrutiny that could potentially suspend or prevent the transfers from occurring in the first place. These aspects hinder the right to remedy for victims of gun violence, which, in practice, remains alarmingly deficient across Europe.

Despite the inherently harmful nature of its activities, the arms industry has not been subject to the same level of scrutiny as other sectors. It is now widely accepted that companies bear an obligation to uphold human rights in the conduct of their business. This is expressly recognized in the UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises. Corporate responsibility is further supported by the emergence of domestic laws on mandatory human rights due diligence, such as the existing French law on the duty of vigilance and the German law on the duty of care in supply chains. These promising developments, as well as the anticipated EU Corporate Sustainability Due Diligence Directive, open up more avenues for victims to seek remedy and accountability. Nonetheless, significant barriers prevent cases from simply being brought to court, or judged on the merits. Exclusion of the arms industry from these instruments or the lack of civil remedies altogether paint a mixed picture concerning the access to justice for victims and efforts of holding arms corporations accountable.

The use of judicial mechanisms to hold companies accountable for human rights violations has been receiving growing attention. However, it has been observed that no claims arising from tort or criminal law have been lodged against arms companies in Europe. This absence of civil legal claims can be attributed to the difficulty of proving a direct causal relationship between the company's fault or negligence and the sustained harm. Where criminal liability can be established, high standards of proof represent unreasonable obstacles to holding those actors accountable. Throughout the



research, only one successful case against an arms manufacturer has been identified, which further highlights the inadequacy of legal systems to provide effective remedy to victims of gun violence. Despite the currently opaque system in most countries, rising public awareness of the issues of arms exports may lead to the institution of more actions challenging the industry and its exports or a strengthening of the legal frameworks.



Annex: International (Human Rights) and EU (Human Rights) Law Framework

I. International Framework on Arms Trade

The international legal framework on arms trade provides a point of orientation for European states and is often referred to in domestic laws. Especially instruments relating to the control of arms transfers are widely ratified, including by the selected countries. All selected countries have their own national control system for arms exports in place, in which they refer to instruments dealt with in this section. The international framework also contains soft law instruments on corporate responsibility of enterprises, which is relevant in relation to responsibilities of the arms industry.

1. 2001 Firearms Protocol

In 2001 the UN General Assembly adopted the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, also referred to as 'Firearms Protocol'. As a legally binding instrument, the Firearms Protocol provides for a framework for State Parties to adopt and implement the strongest possible legislation consistent with their national legal systems to prevent, investigate and prosecute offenses arising from the illicit manufacture of and trafficking in firearms.²⁸⁷ One of the specific measures that should be taken by State Parties is contained in article 10, which states that each State Party must establish an effective system for the authorisation of arms export licenses. All selected countries are party to the Firearms Protocol, with the exception of the United Kingdom.

2. 2013 Arms Trade Treaty

The UN Arms Trade Treaty or 'ATT' establishes common international standards for the regulation of international trade in conventional arms and aims to prevent illicit trade and diversion of these arms. ATT State Parties will each set up an effective and transparent national control system for arms transfers and designate national responsible authorities within the system.²⁸⁸ The ATT also covers which transfers are prohibited. According to article 6, a State Party will not authorize a transfer in three situations. First, a transfer will not be authorized if it would violate obligations under measures adopted by the UN Security Council acting on its Chapter VII powers, including UN-imposed arms embargoes. Second, a transfer will not be authorized if it would violate relevant obligations under international agreements to which the state in question is a party. Third, a transfer will not be authorised if the state knows at the time of authorisation that the arms or items would be used in commission of genocide, crimes against humanity, grave breaches of the Geneva Convention of 1949 or other war crimes as defined by international agreements to which the state is a party.

²⁸⁷ UN Office on Drugs and Crime, *The Firearms Protocol*, available at <https://www.unodc.org/unodc/en/firearms-protocol/the-firearms-protocol.html> (last accessed 16 June 2023).

²⁸⁸ Art. 5, Arms Trade Treaty [2013].



If the transfer is not prohibited under article 6, an exporting State will, prior to authorisation of the export, conduct a risk assessment. It will assess whether there is an 'overriding risk' that the arms or items would undermine peace and security or could be used to commit or facilitate, inter alia, serious violations of human rights or humanitarian law.²⁸⁹ However, this risk is not further defined in the ATT. Therefore, states parties to the ATT, including all selected countries, have considerable room for interpretation when conducting the risk assessment. This has created inconsistency in export decisions between (European) countries, where, for example, the end-user is the same.²⁹⁰

3. Soft Law Instruments

There are a number of soft law instruments that are relevant in the context of arms export control, the 1996 Wassenaar Arrangement (WA) being the most extensive one. It is a voluntary export control regime that provides for a guiding framework for transfers of conventional arms as well as dual-use goods. As a voluntary regime, the WA is not legally binding, only politically binding.

To promote transparency and effectiveness, members are called upon to maintain and regularly update common control lists and to voluntarily disclose information on their export activities. The WA includes a 'munitions list' and a 'dual-use and technologies list', in which a distinction is made between basic dual-use items and sensitive items. Exchange of information regarding transfers of conventional arms as well as transfers of 'sensitive' dual-use items to non-Wassenaar countries takes place every six months. The exchange of information also concerns best practices regarding end-user assurances, to be used by the participating states at their discretion. All selected countries participate in the Wassenaar Arrangement.

II. European Framework on Arms Trade

The European framework on arms trade consists of a number of instruments that have been implemented to a large extent in national laws on arms exports in the selected countries. Regarding the export of military goods, the EU Common Position provides a list of common rules that EU countries should adhere to, including the criteria of assessment for the issuance of arms export licenses. While the EU Common Position is applicable to exports of military equipment, the 2012 Regulation Implementing Article 10 of the UN Firearms Protocol applies to the export of civilian firearms. This report will focus most on the exports of military goods based on the EU Common Position, as these are most prominent in the European context.

²⁸⁹ *Ibid.*, Art. 7.

²⁹⁰ Schliemann & Bryk, *Arms trade and corporate responsibility: Liability, Litigation and Legislative Reform* (2019), at 4.



1. 2008 EU Common Position on Arms Exports

a. Common Position

The legally binding 2008 EU Common Position defines common rules governing control of exports of military technology and equipment and is part of an EU approach to harmonize the arms export policies of Member States. The Common Position sets out eight common principles, which serve as criteria of assessment of license applications for the export of items on the EU Common Military List. Every Member State will assess the license applications for the export of military goods on a case-by-case basis against the criteria of assessment.²⁹¹

Article 2 of the EU Common Position sets out the eight criteria of assessment:

1. Respect for international obligations and commitments of Member States, in particular the sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations
2. Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law
 - a. In light of the assessment of this criterion a Member state shall deny an export license if there is a 'clear risk' that the military technology or equipment to be exported might be used for internal repression (criterion 2, sub (a)).
 - b. An export license shall also be denied if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law (criterion 2, sub (b)).
3. Internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts
4. Preservation of regional peace, security and stability
5. National security of the Member States and of territories whose external relations are the responsibility of a Member State, as well as of friendly and allied countries
6. Behavior of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.
7. Existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions.
8. Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defense needs with the least diversion of human and economic resources for armaments

²⁹¹ Art. 1, Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (*EU Common Position*) [2008].



Reliable information on the end-use in the country of final destination of the weapons is a crucial part of the consideration of whether a license may be granted. This is recognised in article 5. It is therefore important that an end-use certificate is attached to the application and thoroughly checked by the competent national authority before the license is granted.

In order to promote transparency, Member States exporting items featured on the EU Common Military List, will publish a national report on their exports, providing information for the EU Annual Report on the implementation of the Common Position as stipulated in the User's Guide (see below).²⁹²

Similar to the ATT, the EU Common Position contains a risk assessment (see e.g., criteria 2 and 8), where the terms 'clear risk' or just 'risk' are not further defined. This has resulted in 27 different implementations of the criteria in the EU Common Position, causing inconsistency between EU countries in export decisions. The User's Guide (see below) provides a more concrete application of the rules set out by the EU Common Position, e.g., by listing best practices on the issuance of arms export licenses on the basis of the Common Position. However, the User's Guide remains a recommendation. The EU Common Position and its User's Guide, providing a relatively high degree of government discretion, have not been enough to bring about consistent licensing practices regarding arms exports in the EU.

b. User's Guide to Council Common Position 2008

The User's Guide to the Common Position is a recommendation that sets out best practices when it comes to the issuance of licenses in domestic systems. It serves as a tool to help Member States apply the Common Position and summarizes agreed guidance for the interpretation of its criteria and the implementation of its articles. It is directed at export licensing officials, i.e., the organs involved in the license granting process in Member States. Regarding criterion 2 of the EU Common Position, the User's Guide suggests a number of practical questions that Member States can use to assess the risk of serious violations of international humanitarian law.

Regarding the end-user certificates, the User's Guide sets out what should at a minimum be included in these certificates, such as name and address of the end-user and the country of final destination. These are minimal criteria. Member States might, at their discretion, add additional required elements, such as a clause prohibiting re-export of the goods.²⁹³ The User's Guide also contains a section on post-shipment verification. Here, post-shipment control is emphasized as an important supplementary tool to strengthen the effectiveness of national arms export control. Member States may implement post-shipment control at their discretion.

²⁹⁴

c. 2020 EU Common Military List

²⁹² *Ibid.*, Art. 8(2) & Art. 8(3).

²⁹³ User's Guide to Council Common Position 2008/944/CFSP, at 18-19, available at <https://www.sipri.org/sites/default/files/research/disarmament/dualuse/pdf-archive-att/pdfs/eu-users-guide-to-council-common-position-2008-944-cfsp-defining-common-rules-governing-the-control-of-exports-of-military-technology-and-equipment.pdf> (last accessed 16 June 2023).

²⁹⁴ *Ibid.*, at 20.



The 2020 EU Common Military List is a list of military equipment referred to in the EU Common Position and updated regularly to align with the latest developments in the area of military goods.

2. 2012 EU Regulation Implementing Article 10 of the UN Firearms Protocol

As the title expressly states, this EU regulation serves as an implementation of article 10 of the UN Firearms Protocol in EU law and applies to the export of civilian firearms. Article 1 stipulates the subject of the Regulation. The Regulation establishes the rules on export authorization, and import and transit measures for firearms, their parts and components and ammunition.²⁹⁵

3. 2021 EU Dual-Use Regulation

The aim of the EU Dual-Use Regulation is to ensure that when it comes to the transfer of dual-use items, the EU and its Member States take full account of all relevant considerations. Relevant considerations include international obligations, national foreign and security policy considerations, human rights, and considerations on intended end-use. Dual-use items are items, including software and technology, which can be used for both civil and military purposes.²⁹⁶ A license for the export of dual-use items listed in Annex I to the Dual-Use Regulation is required according to article 3.

4. (Draft) Corporate Sustainability Due Diligence Directive

In early 2022, the EU Commission issued a proposal for the Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. This Directive would set down rules on due diligence obligations of companies regarding their own operations, operations of subsidiaries and value chain operations as well as rules for violations thereof. The new obligations ought to motivate corporations to incorporate more responsible conduct and harmonize the available remedies for adversely impacted persons. In the proposal, the Commission envisioned a considerably broad scope of obligations referring to the value chain encompassing up- and downstream business activities. This would have far-reaching consequences for arms manufacturers and entail extensive due diligence obligations relating to the use and disposal of their products. However, in its negotiating position in December 2022, the EU Council expressed its disapproval with the proposed scope of business due diligence obligations and instead suggested leaving out the use of products and provision of services. Furthermore, it proposed the exclusion of the distribution, transport, storage and disposal of military goods from liability as they are already subject to national export control regimes.

A similar disagreement between Commission and Council emerged with a view to the scope of business liability. Whereas the Commission envisaged liability for damages

²⁹⁵ Regulation (EU) No 258/2012 of the European Parliament and of the Council of 14 March 2012 implementing article 10 of the UN Firearms Protocol [2012].

²⁹⁶ Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 (*EU Dual-Use Regulation*) [2021].



caused by direct and indirect business partners of a corporation, the Council opts for restricting liability to ‘established businesses’. As a next step, the proposal will now enter the consultation process between Commission, Council and Parliament to achieve an agreement on the final text. The result of this process will decide over the impact of the Directive on the conduct of arms manufacturers. As the following part of this memo will demonstrate, there are significant differences in the national implementation of arms export control regimes and availability of remedies for adversely affected persons.

5. Proposal for a Regulation on Import, Export and Transit Measures for Firearms, their Essential Components and Ammunition

In October 2022, the European Commission presented a proposal for a regulation on import, export, and transit measures for firearms. The proposal seeks to establish an updated set of rules that would improve the traceability of arms, facilitate the exchange of information and harmonize export rules at the EU level. The proposal primarily aims to reduce the circumvention of embargos, prevent the diversion of civilian firearms, and further coordinate controls between EU Member States in order to improve traceability of firearms and establish a harmonized legal framework for their import, export, and transit.

The draft regulation seeks to promote convergence among EU Member States in adopting and implementing stricter export policies through the establishment of a common standard of risk assessment for exports to problematic countries, as defined by the EU Common Position. It suggests transferring the authority over arms export issues to the EU Common Commercial Policy, thereby creating a legally enforceable framework that provides legal avenues to the Court of Justice of the European Union (CJEU), which is currently not possible under the EU Common Position.

Currently, the common standards listed in the EU Common Position hold a legally binding status. However, each member state retains the authority to undergo its own risk assessments. This has resulted in inconsistencies and differences in how Member States assess and interpret the risks associated with arms exports, which may result in divergent decisions on similar export licenses applications. This undermines the coherence and effectiveness of the Common Position. Thus, the proposal aims to improve the eight existing criteria provided by the Common Position and establish a Common Risk Assessment Body. This body would be responsible for proposing a list of concerning destinations and providing a unified and detailed risk assessment for them.

Under the current rules, it is not mandatory for Member States to provide information on civilian firearms, which is essential to prevent firearms trafficking. Hence, the proposal aims to enhance data management and exchange of information among member states’ national authorities. One significant risk is that firearms are shipped to a non-EU country and are re-exported to countries subject to EU embargoes or sold to criminals or armed groups. The proposal includes further safeguards against this type of trafficking by creating a comprehensive and centralized database that tracks international movements of firearms across all Member States. Furthermore, data-exchange on refusals to grant licenses between national authorities would further



reduce the risks of “licence-shopping”, among EU states to obtain such authorisation, which is a prevailing concern.

III. International Human Rights and Access to Justice Framework

1. International Framework on Business and Human Rights

Also relevant in this context are the soft law instruments relating to arms trade and corporate responsibility. These are the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct. Firstly, the UNGPs are based on three pillars, dealing respectively with the state duty to protect human rights, the corporate responsibility to respect human rights and principles related to access to remedy for human rights abuses through business activity. The corporate responsibility to respect human rights (principle 11) requires businesses to avoid causing or contributing to adverse human rights impacts and to address these impacts when they do occur.²⁹⁷ By way of implementation of this general principle, the UNGPs recommend adoption of policy commitments aimed at respecting human rights, a process of human rights due diligence and processes to remedy adverse human rights impacts.²⁹⁸ The two OECD instruments provide a comparable set of recommendations relating to the respect for human rights by enterprises and can be read together with the UNGPs. Read together, they establish a common standard for what is expected from businesses when it comes to respect for human rights.

2. Access to Justice under the ICCPR

The selected countries are under general obligations to provide access to justice and effective remedies, based on national, international and European law.

The UN Declaration on the Rule of Law emphasizes the importance of the right of access to justice.²⁹⁹ The right to an effective remedy is recognized in article 2(3) of the International Covenant on Civil and Political Rights (ICCPR). This provision requires that states must ensure that individuals have accessible and effective remedies to vindicate the rights protected in the ICCPR. A person claiming an effective remedy should have access to competent judicial, administrative, or legislative authorities.³⁰⁰ Moreover, the right to access to a court or tribunal is provided for by article 14 ICCPR. Article 14 stipulates a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings as well as the entitlement to a fair and public hearing by a competent, independent and impartial tribunal established by law. The

²⁹⁷ Principle 11, UNHRC, *Guiding principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, [2011].

²⁹⁸ *Ibid.*, principle 13.

²⁹⁹ UNGA *Declaration on the Rule of Law*, para 14, A/RES/67/1.

³⁰⁰ UN Human Rights Committee, *General Comment No. 31 on the nature of the general legal obligation imposed on states parties to the covenant*, 24 May 2004, CCPR/C/21/Rev.1/Add.13.



right to access to courts and tribunals must be available to all individuals on the territory or subject to the jurisdiction of the State party, regardless of nationality or status.³⁰¹

The obligation to provide access to justice and effective remedies is also incorporated in regional systems. The Inter-American system, the American Convention on Human Rights sets out the right to a fair trial and the right to judicial protection respectively in article 8 and article 25. The IACHR has recognized not only their negative obligation not to obstruct access to effective remedies, but also their positive duty to organize their institutional mechanisms so that all individuals can access these remedies.³⁰² The African Convention on Human and Peoples' Rights recognizes the right to access to justice in article 7, which provides that every individual shall have the right to have his cause heard. Access to justice in the European regional system will be dealt with in the section below.

IV. European and ECHR Human Rights and Access to Justice Framework

1. Access to Justice in the European Convention on Human Rights

The European Convention on Human Rights provides for specific human rights obligations and recourse in its Member States. The Convention applies in the 46 Council of Europe Member States which include all countries in this study. The Convention rights and obligations need to be considered in the domestic legal framework and breaches of the Convention can be brought before the European Court of Human Rights (see Section D. II.).

The ECHR provisions could be relevant at multiple instances in the studied scenarios. Art. 2 and 3 ECHR bind states to observe the right to life and prevent inhumane treatment. The right to an effective remedy where rights and freedoms of the convention are violated is included in Art. 13 ECHR. Furthermore, Art. 6 ECHR postulates a right to access justice "in the determination of ... civil rights and obligations".

However, the human rights and access to justice obligations set forth in the ECHR are limited to the Convention's scope of application. Art. 1 ECHR restricts the Convention's application to the jurisdiction of the Contracting Parties. The scope is primarily territorial, with limited extraterritorial exceptions based on effective control over territory or persons. It is unlikely to establish a sufficient link to the respective states in the case of victims of gun violence situated in third states and affected only indirectly by the state's exporting decisions. The obligations of States under the ECHR and the

³⁰¹ UN Human Rights Committee, *General Comment No. 32 on article 14 ICCPR: right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32.

³⁰² Inter-American Commission on Human Rights, 'Access to justice as a guarantee of economic, social, and cultural rights. A review of the standards adopted by the inter-american system of human rights' (Executive Summary).



possibility of bringing a claim to the ECtHR will be further elaborated on in Section D. II.

2. Access to Justice in the EU Charter of Fundamental Rights

In the context of the European Union, the right to access justice is included in Art. 47 of the Charter of fundamental rights of the European Union. This provision provides that “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy...”. The Charter of Fundamental rights applies to the EU institutions and the Member States when they are implementing or acting in the scope of EU law.³⁰³ Hence, the right of access to justice exists in relation to the Member States’ institutions. Concerning the extraterritorial application of the Charter, the Charter itself does not include a clause limiting its territorial scope. It is therefore argued that “fundamental rights obligations simply track all EU activities, as well as Member State action when implementing EU law.”³⁰⁴ The extraterritorial application of the charter has not yet been finally ruled on by the Court of Justice. While the General Court assumed the extraterritorial application in the *Front Polisario* case, Advocate General Wathelet argued for a control-based approach.³⁰⁵ Without a specific territorial limitation to the application of the charter, the human rights obligations and the obligation to provide access to justice can be assumed to apply to all Member State actions in carrying out EU law. In granting export licenses, the Member States carry out the EU Common Position on arms exports, and are therefore bound to respect the Charter of Fundamental Rights and provide access to justice where such rights may be infringed upon.

In addition to this international and European framework of rights to access justice, the national law and constitutions include provisions on a right to access justice.

³⁰³ Art. 51 Charter of Fundamental Rights of the European Union; cf. ECJ, *Åkerberg Fransson*, case C-617/10, judgment of 27 February 2013, ECLI:EU:C:2013:105.

³⁰⁴ Moreno-Lax, Costello, *The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model*, in Peers et al (eds), *Commentary on the EU Charter of Fundamental Rights*, 2014, 1657-1683, 1658.

³⁰⁵ ECJ, *Council of the European Union v Front Polisario*, *Opinion of AG Wathelet*, Case C-104/16 P, judgment of 21 December 2016, EU:C:2016:677, 270-272.



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