A clear risk of what? The Egyptian navy, the Dutch arms export policy and linguistic inconsistencies in the EU Common Position

Trampert, J.

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A clear risk of what? The Egyptian navy, the Dutch arms export policy and linguistic inconsistencies in the EU Common Position

On 23 November 2021, the District Court of The Hague delivered its summary judgment in the case filed by PAX, Stop Wapenhandel and the Dutch section of the International Commission of Jurists against the Dutch government's decision to allow the export of military goods and technology to Egypt. The decision exposes certain inconsistencies between the English and the Dutch version of the assessment criteria in the EU Common Position. Could the English wording make a difference on appeal?

The case

On 23 November 2021, the District Court of The Hague delivered its summary judgment in the civil case filed by PAX, Stop Wapenhandel ('Stop Arms Trade') and the Dutch section of the International Commission of Jurists ('NJCM') against the Dutch government's decision to allow the export of military goods and technology to Egypt. The case arose from an export licence worth €114 million issued to a Dutch company (according to the claimants, this is likely to be Thales Netherlands, see summons §14) in July 2020 for the export of radar and 'command, control and communication' (C3)-systems and related services (see also the Minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs' letter to parliament). There are currently nine other export licences for military goods, and the recipient and end-user of all goods is the Egyptian navy (judgment §2.2).

PAX, Stop Arms Trade and NJCM submitted that there is a clear risk that the export of military goods to the Egyptian navy can contribute to or will directly be used for violations of human rights and international humanitarian law ('IHL'), and that allowing the export would be in breach of the Netherlands' international legal obligations under the EU Council Common Position

2008/944/CFSP ('EU Common Position') and the Arms Trade Treaty ('ATT'). The claimants based their case on Article 6:162 of the Dutch Civil Code (the tort provision) and three Criteria in Article 2 of the EU Common Position, namely the human rights situation in the recipient country (Criterion 2a); respect for IHL in the recipient country (Criterion 2c); and the record of the buyer country with regard to compliance with the non-use of force and IHL (Criterion 6b).

The claimants have been litigating Dutch arms exports to Egypt since 2015. The Amsterdam Court of Appeal ruled in 2017 that the NGOs had no legal interest in bringing the proceedings, as the licences did not 'directly and individually concern' them. As this closed the door for further administrative proceedings, the NGOs turned to the civil court. The claimants requested an injunction preventing 'all current and future export of military goods and technology to the Egyptian State and/or the Egyptian navy'. The judge rejected the request with respect to all future exports, as such transfers require an assessment on a case-by-case basis; a total ban would only be possible in the case of an arms embargo. With respect to exports which have already been authorised, the judge recalled that the matter was closely related to questions of security and foreign policy, and deferred to the State's discretionary powers. The judge's review was therefore limited to the question whether the Minister's decision was *reasonable*.

This blog post highlights three main points: (I) the judge's conclusion on the human rights situation in Egypt; (II) apparent linguistic inconsistencies in Criterion 2 of the EU Common Position; and (III) other assessment criteria.

I. The troubling human rights situation in Egypt is "a given"

The State agrees with the NGOs that Egypt is committing large-scale human rights violations. However, after lifting export restrictions to Egypt in July 2019 (the 'presumption of denial' policy (see here, p. 6-7)), the Dutch government now operates under the assumption that where the stated end-user is the Egyptian navy, the regular risk assessment based on Article 2 of the EU Common Position applies. According to the claimants, the distinction between the army and the navy is artificial: the Egyptian navy is an integral part of the Egyptian regime. Moreover, independent conduct on the part of the Egyptian navy has also led to internal repression and violations of IHL, or has at least contributed to it.

In their risk assessment, the government placed considerable weight on the nature of the goods, the end-use and the end-user. It held that there is 'no connection between the concerns about the role of the Egyptian Ministry of Defence regarding human rights violations in Egypt and the supply of [military goods] to the Egyptian navy. As far as is known, the Egyptian navy was and is not involved in human rights violations in or outside Egypt or in the maritime blockade near Yemen. (...) [T]he role of the Egyptian navy within the Yemen coalition was very limited and (...) the deployment of the Egyptian navy was mainly aimed at securing the waterways around the Suez Canal. [Therefore], there was no clear risk that the envisaged transaction would contribute to internal repression, serious violations of human rights or international humanitarian law.' (judgment §4.12) [underlining mine]

Although the provisional-relief judge did not find this conclusion was unreasonable and rejected the claim, the case can still be considered a success: this is the first time that a Dutch court has engaged with the substance. With respect to Criterion 6b, the judge found that the negative outcome of the risk assessment was "beyond dispute". With respect to Criterion 2, the claimants submitted that large scale human rights violations are occurring in Egypt, the State recognised

that the situation is “troubling” and has recently “deteriorated”, and the judge declared this situation “a given”. However, that did not lead the judge to conclude that the licences should not have been granted. This has everything to do with the interpretation of the risk assessment required by Criterion 2a and 2c of the EU Common Position.

II. Might, can, or are military goods used for internal repression and in violation of IHL in Egypt?
The claimants invoked Criteria 2a and 2c of the EU Common Position, which – according to the judge – provide that export licences must be denied when there is a “clear risk” (*duidelijk risico*) that the military equipment or technology to be exported “are used” (*gebruikt worden*) for internal repression or in the commission of serious violations of IHL. The judge concluded that the fact that the goods “can be used” (*kunnen worden ingezet*) for oppression or human rights violations does not mean that a license must be denied (judgment §4.11). Those familiar with the English wording might immediately notice that there seems to be a discrepancy between the Dutch and English version of Criterion 2 with respect to the object of the clear risk.

The English version states:

> *Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.*
>
> *Having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall: (a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;*
> *Having assessed the recipient country’s attitude towards relevant principles established by instruments of international humanitarian law, Member States shall: (c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.*

Compare the Dutch version:

> *Criterium 2: Eerbiediging van de mensenrechten in het land van eindbestemming en naleving van het internationaal humanitair recht door dat land.*
>
> *De lidstaten evalueren de houding van het ontvangende land ten opzichte van belangrijke, in internationale mensenrechteninstrumenten vastgelegde beginselen, en (a) weigeren een uitvoervergunning wanneer er een duidelijk risico bestaat dat uit te voeren militaire goederen of technologie gebruikt worden voor binnenlandse onderdrukking;*
> *De lidstaten evalueren de houding van het ontvangende land ten opzichte van belangrijke, in instrumenten van internationaal humanitair recht vastgelegde beginselen, en (c) weigeren een uitvoervergunning indien er een duidelijk risico bestaat dat de uit te voeren militaire goederen of technologie gebruikt worden bij het begaan van ernstige schendingen van het internationaal humanitair recht.*

The difference is that the English text requires a clear risk that the goods *might be used* for internal repression or in violation of IHL, whereas the Dutch text requires a clear risk that the goods *are used* in such a manner. The use of the present tense in the Dutch version is rather odd, as a risk always relates to something that will happen in the future, not something that is already happening. We could perhaps read this as “will be used”; both “are” and “will” signify a certainty,

either present or future. Still, the difference remains: the standard where the clear risk *might* materialise is surely lower than where the clear risk *will* materialise (or is materialising). The judge explicitly added that the question whether the goods "can be used" for internal repression or in violation of IHL does not mean that a licence must be denied. There is a difference between "might" and "can", which is best illustrated by my colleague's example: when would you be more concerned, if I *can* kill you with this knife, or if I *might* kill you with this knife? The *can* implies *ability*, whereas the *might* implies *possibility*. One would probably be more concerned about the second statement. The distinction between "might" and "will" is obvious: there is a risk I *might* kill you with this knife is surely (slightly) less troubling than the risk I *will* kill you with this knife.

In their summons, the claimants phrased Criteria 2a and 2c as follows: *"(...) een duidelijk risico (...) dat uit te voeren militaire goederen of technologie gebruikt [kunnen] worden voor binnenlandse onderdrukking"* and *"(...) dat de uit te voeren militaire goederen of technologie gebruikt [kunnen] worden bij het begaan van ernstige schendingen van het internationaal humanitair recht."* (See summons §18). The *"kunnen"* in brackets has been added by the claimants. This addition is understandable and makes the most sense. In fact, the government has also used the "gebruikt kunnen worden" standard before in communications to parliament on a number of occasions (see e.g. here on p. 2 and here at §21).

In comparing the French and German versions, further discrepancies can be found:

> *(a) refusent l'autorisation d'exportation s'il existe un risque manifeste que la technologie ou les équipements militaires dont l'exportation est envisagée servent à la répression interne;*
> [ou]
> *(c) refusent l'autorisation d'exportation s'il existe un risque manifeste que la technologie ou les équipements militaires dont l'exportation est envisagée servent à commettre des violations graves du droit humanitaire international.*

The Dutch version resembles the French wording if the French is read as the indicative form.

> *(a) verweigern eine Ausfuhrgenehmigung, wenn eindeutig das Risiko besteht, dass die Militärtechnologie oder die Militärgüter, die zur Ausfuhr bestimmt sind, zur internen Repression benutzt werden könnten;* [oder]
> *(c) verweigern eine Ausfuhrgenehmigung, wenn eindeutig das Risiko besteht, dass die Militärtechnologie oder die Militärgüter, die zur Ausfuhr bestimmt sind verwendet werden, um schwere Verstöße gegen das humanitäre Völkerrecht zu begehen.*

My German is far from fluent, but grammatically speaking, the German text seems closer to the English version with respect to Criterion 2a, and closer to the Dutch version with respect to Criterion 2c. This is puzzling, as the test for the prospect of 'international repression' and 'serious violations of IHL' is identical (see also Lustgarten (2020) p. 74-75).

The "might be used" wording appears in two other places: Criterion 2b and paragraph 4 of the recitals. The English version of the recital reads: *Member States are determined to prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability.* Although not in combination with the "clear risk" formula, the standard of probability that the exported goods end up being used in situations of internal repression or international aggression and regional instability is similar in the Dutch, French and German versions, which use *"kunnen worden gebruikt"*, *"pourraient être*

utilisés", and *"eingesetzt werden könnten"* respectively. The French version uses the conditionnel, which is used to express a possibility. The same verb form is used in the French version of Article 7(1) (b) (ii) of the ATT (*"pourrait servir à"*). The claimants referred to Article 7(1) (b) (ii) in their summons, which dictates that *each exporting State Party (...) shall (...) assess the potential that the conventional arms or items (...) could be used to (...) commit or facilitate a serious violation of international human rights law*. Note that "could" and "might" are virtually the same.

The fourth and last use of the "might be used" phrase appears in Criterion 2b. The English version states: *Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall: (b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established (...). For these purposes, technology or equipment which might be used for internal repression will include, inter alia, technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the technology or equipment will be diverted from its stated end-use or end-user and used for internal repression.* Here, the Dutch, French and German versions speak of *"goederen of technologie die voor binnenlandse onderdrukking kunnen worden gebruikt"*, *"la technologie ou les équipements susceptibles de servir à la répression interne"*, and *"Militärtechnologie oder Militärgüter, die zu interner Repression benutzt werden könnten"*. Once again, where the "might be used" phrase is not employed in combination with the "clear risk" standard, the language versions are fairly consistent.

Given that half of the "might be used" passages have been translated as "kunnen worden gebruikt", I would argue that the "kunnen worden gebruikt" standard is actually more accurate, or at least clearer than the "[zullen] worden gebruikt" wording. The context and the object and purpose of the EU Common Position also support this conclusion. One could argue that the "might be used" versus "can" versus "will" or "are used" is not the key element of the risk assessment; what matters is the "clear risk". But given that the judge explicitly stated that the "kunnen worden gebruikt" standard is not decisive, i.e. the fact that the goods *can* be used for human rights violations or violations of IHL does *not* mean that the licence should be denied, the issue is not merely relevant for (legal) translators and terminologists.

In a legal opinion commissioned by Saferworld and Amnesty International in 2015, Professor Philippe Sands QC, Professor Andrew Clapham and Blinne Ní Ghrálaigh of Matrix Chambers also placed weight on the "might be used" standard:

> 'Neither the EU Common Position itself nor the User's Guide provides guidance as to the meaning of the "clear risk" test which the UK must employ in determining whether military technology or equipment to be exported "might be used" in the commission of serious violations of IHL. The expression is therefore to be given its ordinary meaning. The use of the term "might" underscores that the bar established by Criterion 2, paragraph c, is not high; the possibility of such a risk [materialising, JT] suffices. In explaining the "clear risk" test, the User's Guide stipulates that *"a thorough assessment of the risk... should include" inter alia* an inquiry into the recipient's past and present respect for IHL and *"the recipient's intentions as expressed through formal commitments"*.' (§6.14) [underlining mine]

The recently updated User's Guide also highlights the importance of "might":

> ‘The text of Criterion Two gives an ample set of examples of what constitutes internal repression. But assessing whether or not there is a clear risk that the proposed export might be used to commit or facilitate such acts requires detailed analysis. The combination of “clear risk” and “might” in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression.’ (§2.7) [underlining mine]

In his recent book Law and the Arms Trade, Professor Laurence Lustgarten also explains:

> ‘Thus there should be no question that would-be purchasers whose conduct of warfare has involved attacks on civilians and civilian objects, or medical units, should definitely be denied materiel when the predicate conditions of Criterion Two are satisfied. These conditions are: 1) there is ‘a clear risk’ that the equipment 2) ‘might’ be used in the commission of serious IHL violations. These terms require further analysis. Taking the latter first, ‘might’ is not a demanding test; notably, it is less demanding than ‘would’, the term used in Criteria Three and Four. Anything more than a slight probability ought to suffice.’ (p. 76, fns omitted) [underlining mine]

The Minister found that the information submitted by the NGOs was ‘not concrete enough or insufficient’ to assume that there is a “*duidelijk* risico” that the military goods to be exported “gebruikt worden” for internal repression or serious violations of IHL. The judge concluded that this positive assessment against Criteria 2a and 2c was not unreasonable (judgment §4.17). Had the focus of the clear risk been on the “might” instead of the “are” or “will”, could this conclusion have been different? In light of the above, I believe so.

III. Other Criteria

With respect to Criterion 6b, the NGOs highlighted an inconsistency between the text in the EU Common Position and the User’s Guide. The EU Common Position requires Member States to “take into account” the track record of the buyer country but does not explicitly prohibit the exporting State from issuing a licence. The User’s Guide does add that ‘Member States will not issue a licence where the general evaluation of the buyer country’s record with reference to Criterion Six is not positive.’ (see User’s Guide §6.8 and summons §51). Even though the judge found that the negative outcome of the risk assessment against Criterion 6b was “beyond dispute”, she agreed with the State that the User’s Guide is not legally binding, and that in the event of an inconsistency, the text of the EU Common Position prevails. This means that the State can still decide to allow the export.

The question whether the outcome of the risk assessment leads to an export prohibition is pertinent. Indeed, whereas Criteria 1 - 4 explicitly prohibit the export in certain circumstances (Member States “shall deny”), Criteria 5 - 8 merely require Member States to consider certain factors (Member States “shall take into account”). This allows for even more discretion on the part of the exporting State. For this reason, the claimants may wish to include Criteria 3 and 4 in any future litigation. The Minister for Foreign Trade and Development Cooperation and the Minister of Foreign Affairs specifically referred to Criterion 4 in the letter to parliament hyperlinked above.

Criterion 4 uses the third and final “clear risk” standard. The English version reads: *Member States shall deny an export licence if there is a clear risk that the intended recipient would use the*

military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim.

Compare the Dutch version: *De lidstaten weigeren een uitvoervergunning indien er een duidelijk risico bestaat dat het beoogde ontvangende land de uit te voeren militaire goederen of technologie voor agressie jegens een ander land gebruikt of er kracht mee wil bijzetten aan territoriale aanspraken.*

Again, the Dutch version uses the present tense after the "clear risk", whereas the English version uses "would" (instead of "might"). As mentioned above, Professor Lustgarten is of the view that "would" is more demanding than "might" (see Lustgarten (2020) p. 76). A further peculiarity on the object of the clear risk emerges in the Ministers' letter to parliament referenced above, which states that '*Gelet op het bovenstaande bestaat er geen duidelijk risico dat de huidige transactie bijdraagt aan agressie of het met kracht bijzetten van territoriale aanspraken. Toetsing aan criterium 4 is* ***positief****.*' [bold in original, underlining mine] In English: according to the Ministers, there is 'no clear risk that the current transaction contributes to aggression (...)'. Criterion 4 dictates that the State shall deny the export licence if there is a clear risk of a certain end-use by the intended end-user, not of the transaction contributing to aggression. While this may seem slightly trivial, the object of the "clear risk", given the other authentic language versions and the meaning of the Dutch terms in light of their context and in light of the object and purpose of the EU Common Position, should be interpreted as a possibility, not a certainty.

My final point relates to Criterion 3 – the shortest and seemingly the simplest of all eight, but no less controversial. The claimants did not invoke Criterion 3 in their summons, and naturally, it was not dealt with in the judgment. But it could still be relevant. In contrast to Criterion 4, which focuses on regional peace, security and stability, Criterion 3 focuses on the internal situation. Criterion 3 states: *Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.* Here, the relevant test is whether the goods "would" provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination. According to Rulac, 'Egypt is involved in a non-international armed conflict against Wilayat Sinai, an armed non-State actor that has pledged loyalty to the Islamic State group. Furthermore, it is involved in the non-international armed conflicts in Yemen as part of the Saudi-led coalition and is involved in the non-international armed conflict on its territory.' The Dutch government perhaps considered that the Egyptian navy – by using the radar and C3-systems – would alleviate or shorten the conflict situation in Egypt. But in light of the evidence submitted by the claimants, that conclusion would be highly questionable.

Concluding thoughts

While the outcome of the summary proceedings may be slightly disappointing, it is not very surprising. Summary proceedings never lead to a definitive judgment, and especially in this case, it would have been remarkable for a single, provisional-relief judge to declare the State's conduct to be unreasonable and therefore unlawful. The lawyer for the claimants has welcomed the case as a "good step forward", as a court has finally looked at the substance of the case. The claimants now have three options: accepting the decision as final, initiating a *bodemprocedure* (civil proceedings on the merits), or appealing the decision. Whatever the outcome, the object of the clear risk must be clarified, especially as the Minister of Foreign Affairs has recently informed parliament of another export licence for military goods to the Egyptian navy (see letter to

parliament). With respect to Criterion 2, the Minister wrote: 'Taking into account the deteriorating human rights situation in Egypt, there is no clear risk that this transaction will contribute to internal repression and serious violations of human rights and IHL, given the end-use (maritime operations) and nature of the goods (communication systems). The risk assessment against criterion 2 is **positive**.' [bold in original, underlining mine] If the claimants appeal, the English version of the EU Common Position might provide them with some legal ammunition.

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