Strategic Litigation on International Arms Transfer: Assessing the Role of Domestic Courts

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Abstract: In recent times, the consolidation of an international legal framework in the field of arms transfer has given rise to many opportunities to suit claims on the State's responsibility for unlawful licences, where violations of IHL and IHRL would have been present. In this context, the efforts made by civil society to claim the respect of the arms trade international obligations of the State are relevant. These have been mainly addressed through judicial means against the Governmental decisions to supply arms anyway. This contribution will consider the current role of domestic courts in addressing all the legal issues on the topic.

Keywords: Arms transfers; Strategic litigation; Domestic courts; Judicial review; International Law

1. Preliminary Remarks

The topic of arms transfers has recently obtained greater relevance at the international level[1], although the last decade has shown greater attention to new regulations and concerns on the arms market. Since the conclusion of the Arms Trade Treaty (ATT) in 2013, considered as a general standard of regulation on conventional arms control, the following events (until the war in Ukraine and the conflict in Gaza) involved some concerns about the incidence of arms trade broadly speaking on different kinds of values and goods. By this, the progressive attention to the protection and enjoyment of human rights, sustainable and economic development, and the prevention of international law violations through arms transfer has produced many legal interventions, from legislative, judicial, and scholarly perspectives.

The main problem in this field pertains to the invocation of international obligations on arms transfers before an international court.[2] Since they are conceived as international obligations, there is the only possibility to invoke them by another State party to the treaty or on purpose to recall

[1] As a clarification, "international" will be used in this paper as referring to both International Law and EU Law.

[2] Even if the arms trade is located within the main field of arms control law, the difficulties in bringing a claim before an international court (aside from the lack of jurisdictional clauses in the relevant treaties) are mainly located on the inadequacies of the parties to the dispute to legal argumentation and evidence. In legal literature, see J.D. Fry, S. Nair, *Deconstructing Dud Disarmament Disputes*, in 26(1) *J. Conflict & Sec. L.*, 185 (2021).

DPCE online
ISSN: 2037-6677

that State to act in compliance with its obligations on the protection of fundamental rights or in international humanitarian law (IHL) context.[3] Conversely, the legal system in which this instrument is placed seems to do little for allowing judicial review or adjudication in a broad manner.[4]

Problems are mainly evident for non-state actors invoking the responsibilities of States for IHL or international human rights law (IHRL) violations through arms transfer. Not only one has to consider that the human rights mechanisms in this field lack mandatory jurisdiction or competence on the topic, but also these instruments are not considered proper human rights legal instruments, posing an obstacle to a direct claim before an international judicial or quasi-judicial mechanism.[5]

Therefore, for ascertaining State responsibilities and highlighting the incongruences in licensing processes, the only possibility to invoke these obligations relies entirely on claims brought before domestic courts.[6] Indeed, these are the main institutions in which Governmental action can be challenged and obtain a binding judgment on responsibility for having acted not in conformity with international obligations. These courts are often provided with the power to review Governmental action through the lens of international obligations.[7] Thus, many difficulties in granting access to justice and in asking for a judicial review in this field are the main questions to be further addressed.

This paper will analyse the topic from the perspective of domestic jurisprudence on arms transfer decisions. The main considered issue will be

[3] See now International Court of Justice (ICJ), *Alleged breaches of certain international obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Order on Provisional Measures, 30 April 2024, General List no. 193, in which the international obligations pertaining the arms trade control has been considered as relevant in assessing the responsibility of Germany for assistance in the commission of violation by Israel (par. 16 ff.).

[4] This for example is the case of Com. Pos. 2008/944/CSFP, included in the Common Security and Foreign Policy of the EU, for which the judicial review is not admissible according to Article 24, par. 1, second comma, TEU and Article 275 TFEU.

[5] See European Commission of Human Rights, *Tugar vs Italy*, 18 October 1995, where it was highlighted that the lack of domestic regulation of arms transfer by the Italian Government was not interfering with the right to family and private life of the applicant, because of the high remoteness of the request and the proper conduct of Iraqi Government in placing the land mines supplied by Italy.

[6] This has also been highlighted by the ATT Expert Group Report "*Domestic Accountability for International Arms Transfers: Law, Policy and Practice*", Briefing no. 8, August 2021, par. 2.3. Generally speaking, in the IHL and IHRL litigation the importance of the domestic courts has been widely highlighted: V. Strobel, *Litigating and Enforcing International Humanitarian Law before German Courts: Public Interest Litigation via Individual Rights as a Vehicle for Access to Justice in Situations of Armed Conflict*, in 72(1) *Netherlands Intern. L. Rev.*, 4-6 (2025), doi.org/10.1007/s40802-024-00270-8; T. Hondora, *Civil Society Organisations' Role in the Development of International Law through Strategic Litigation in Challenging Times*, in 25 *Austr. Intern. L.J.*, 115 (2018); B. Theu, *Human rights litigation using international human rights law: The IHRDA experience*, in 17 *L., Dem'y & Dev.*, 504 (2013), at 507.

[7] On the role of judicial review of administrative decisions and discretion, see J. Bell, *Judicial Review in the Administrative State*, in J. de Poorter, E. Hirsch Ballin and S. Lavrijssen (Eds), *Judicial Review of Administrative Discretion in the Administrative State*, Den Haag, 2015, 3.

the emergence of some principles (both having jurisdictional and substantial character) to be applicable in the context of strategic litigation in the field. This purpose will proceed through a comparison among different jurisdictions highlighting what are its points of weakness and strenght.

2. Why Strategic Litigation in Arms Transfer? Supporting Public Interest against Governmental Decisions

The importance of strategic litigation is now undisputed. Despite the difficulties very often encountered in securing both access to justice and advocating the public interest against certain decisions or pushing for policy change, it is through this that International Law on the protection of human rights is very often realised.[8] This purpose seems, therefore, to have touched upon several areas of International Law for which a change of direction was needed in order to enforce the prevention of negative impact on human rights, such as in the case of environmental protection, the fight against climate change, the topic of business and human rights and, within the latter, arms transfers.

The importance of this institution involves both the *identification and support of a transnational public interest* and a *comparative approach* through which a uniform application of those international obligations is highlighted.

The particularity of strategic litigation is that it takes on different guises according to the chosen terminology, through which the main purpose can be detected.[9] At the same time, acting in protection of the public interest through this means makes strategic litigation the most relevant instrument. Therefore, strategic litigation serves the first purpose of providing the necessary support for action by under-represented groups against Government decisions (as well as providing support for damages cases in transnational corporate litigation[10]) and strategically assisting those who

[8] See B. McGonigle Leyh, *Using Strategic Litigation and Universal Jurisdiction to Advance Accountability for Serious International Crimes*, in 16 *The International Journal of Transitional Justice*, (2022) 363 at 366. In a quite sceptical view, see Hondora, *Civil Society* cited, 126-127.

[9] On this point see M. Ramsden, K. Gledhill, *Defining Strategic Litigation*, in 38(4) *Civil Justice Quarterly*, 407 (2019), at 409 ff., where they survey the different terminology, uses and taxonomy of the 'lawyering for the change' litigation; on the same line, Hondora, *Civil Society* cited, at 116. Differences in terminology are highlighted also by McGonigle Leyh, *Using Strategic Litigation* cit., *ibid.*, and Strobel, *Litigating and Enforcing* cited, *ibid.*

[10] Despite not being a case of strategic litigation, we must mention here the disputes brought by the Federal Republic of Mexico before the US judges against several arms producers, through the means of the *parens patriae* procedural institutions. See US District Court for Arizona, *Estados Unidos Mexicanos v. Diamondback Shooting Sport et al.*, CV-22-00472-TUC-RM, judgement of 3rd February 2024. More important the case *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos* brought before the US Supreme Court (to be orally argued on 4th March 2025), aimed at identifying the corporate responsibilities (namely for aiding and abetting in international crimes) in international arms supplies carried on without a proper human rights due diligence. In legal scholarship, see the comments on the case in K. van der Horst, L. Castellanos-Jankiewicz, *Ensuring Access to Courts for Gun Victims: The Case for Repealing PLCAA*, in *Just Security*,

DPCE online
ISSN: 2037-6677

have suffered a serious violation of their freedoms or rights.[11] It is precisely this aspect that seems to emerge quite clearly from national litigation on arms transfers.

If these are the general features of the phenomenon here analysed, it is then necessary to understand what kind of public interest is supported and whether this stems from an international obligation binding the State. On the matter of identifying the public interest, as we shall see, arms transfers have progressively moved from being a matter exclusively included among the international relations of the State (which are generally excluded from the judicial review process and for which the public interest seems limited in many such cases[12]) to a matter affecting various aspects of its economic and social life.

This trend has also been assumed by linking the interest present at the international level with the one present at the national one. One can think, for instance, of the interest to international peace and security,[13] which constantly recurs in this kind of strategic litigation and originates precisely in the international legal order. In such cases, strategic litigation would lead one to consider whether the NGO is acting to protect or support that interest (e.g. because it is provided for in its statute) or whether this interest can be included in the national legal order through a norm of recognition,[14] and by this claiming its compliance.

Properly regarding the State's compliance with international obligations, the first legal aspect to consider relates to the *subjects of the obligation*. Since international obligations primarily bind States,[15] whereas this obligation entails legal modifications of norms at national level, it is solely a matter of domestic jurisdiction.[16] The transposed international obligation will become binding also for non-state actors and may be invoked before national courts for public interest purposes or for contesting not-conforming State

8 September 2022, available at www.justsecurity.org/82922/ensuring-access-to-courts-for-gun-victims-the-case-for-repealing-plcaa/.

[11] Ramsden, Gledhill, *Defining Strategic Litigation* cited, at 419, highlights this peculiarity of strategic litigation concerning public interest litigation, which seems to be a wider group of litigation to claim the respect of public interest by the authorities. In jurisprudence, see US Court of Appeal for Ninth Circuit, *Defence for Children International-Palestine et al. vs John Biden, PotUS, and Anthony Blinken, Secretary of State*, No. 24-704, opinion of 15 July 2024, where the mass claim for reparation of damages occurred during the Gaza Strip military operation was dismissed as a political question.

[12] Z. Yihdego, *Arms Trade and Public Controls: The Right to Information Perspective*, 59(4) *Northern Ireland Legal Quarterly*, 379 (2009), at 393.

[13] On this topic see G. Zyberi, *The role and contribution of international courts in furthering peace as an essential community interest*, in C.M. Baillet (Ed), *Research Handbook on International law and Peace*, Cheltenham, 2020, 424 430.

[14] An example of this can be found in Article 11 of the Italian Constitution.

[15] Se generally: C. Walter, *Subjects of International Law*, in *Max Planck Encyclopaedia on Public International Law*, 2007, par. 1 and 22 ff. (on the concept of international legal personality); J. Klabbers, *The Concept of Legal Personality*, in 11 *Ius Gentium*, 35 (2005).

[16] See generally now the considerations made by D. Shelton, *Introduction*, in D. Shelton (Ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford, 2011, 1, and namely at 3, where she makes clear the problem of having a dualist approach to International Law and the necessity to modify the domestic legal system entirely left to political choices of States.

policies.[17] However, it should be considered that compliance with international obligations can also be enforced through a *transnational diffusion of the public interest*, especially concerning the protection of fundamental rights.[18]

Therefore, if a shared transnational public interest can be identified, the next step will lead to claim it before national courts. In this regard, judicial activity can also be important in evaluating the formation of a widespread practice through which a customary international norm can be identified.[19] As we will see, this aspect also becomes relevant with regard to arms transfers, where the first fundamental step is to ask the court to rule on the legitimacy of the transfers authorised by the State, and subsequently to examine the proper action to be taken in compliance with international obligations.

Since this paper's analysis will consider domestic jurisprudence, a comparative approach will be followed. In International Law, this approach is used to assess how broad the application of international obligations by

[17] D. Dyzenhaus, *The Role of (Administrative) Law in International Law*, in 68(2) *L&CP*, 127, at 132, where he considers the necessary "dualism" of domestic legal order on matter related to national security.

[18] I. Loader, N. Walker, *Locating the Public Interest in Transnational Policing*, EUI Working Paper Law 2007/17, 5 f. They identify a "transnational public interest" on concerns for goods which are important transnationally (and pertaining no more to the sole national level). This allows also to the articulation of an "implementing sentiment" of this interest by a global civil society (at 17). A typical example is climate change litigation: in recent times, precisely because it has increased at the national and international level, climate change has been recognized as impacting on fundamental rights on human health and safety and entails a necessary protection for which a public interest arises. See at last: European Court of Human Rights, *case of Verein KlimaSeniorinnen Schweiz and others v. Switzerland* (Application no. 53600/20), judgement of 9 April 2024, par. 519 and 544; Hague Court of Appeal, Civil Division, *Shell Plc et al. v. Milieudefensie et al.*, case no. 200.302.332/01, judgment of 12 November 2024, par. 7.17. In these cases, the identification of a diffused transnational public interest has been considered prevalent on the presence of a domestic rule of recognition or incorporation.

[19] Hondora, *Civil Society* cited, 130. According to Draft Conclusion 13, par. 2 of the ILC Draft Conclusions on Identification of Customary International Law (in *Y.B.I.L.C.*, 2018, vol. II, Part II), decisions by domestic courts can be considered as relevant national practice if dealing with International Law aspects and being "appropriate" on the existence and content of customary international rules. At the same time, the ILC takes this with caution (Commentary to the Draft Conclusion, par. 6-7); thus, it depends on a lot of factors, like the provision in the domestic legal system of inclusion of international law, or even the expertise of the given municipal court on International legal topics. C. Ryngaert, D. Siccama, *Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts*, in 65 *NILR*, 1-25 (2018), put the accent on a uniformity of methodology in ascertaining the existence of customary international law, rather than on the appropriateness of the judgement. A different perspective is offered by N. Mileva, *The Role of Domestic Courts in the Interpretation of Customary International Law. How Can We Learn from Domestic Interpretive Practices?*, in P. Merkouris, J. Kammerhofer and N. Arajärvi (Eds), *The Theory, Practice, and Interpretation of Customary International Law*, Cambridge, 2022, 453 463 ff. suggests a different role for domestic courts, not only in the application of customary rules, but also in the interpretation and in the development of the same rules.

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ISSN: 2037-6677

States within their legal systems can be.[20] This can be useful for different purposes like: 1) *verifying the effectiveness of international norms* in determining the degree of compliance required from national authorities;[21] 2) *assessing the consistency of the application* of these rules through which the international norm strengthens its position through possible actions of States;[22] 3) *highlighting how the various national courts intervene* in each aspect and whether there is room to consider the reasoning provided by other national courts regarding any regulatory gaps; 4) *understanding how widespread trends can lead to the consolidation of a transnational public interest* in the enjoyment of fundamental rights concerning arms transfer decisions.[23]

3. Assessing the Role of Domestic Courts: Considered Issues

It is well known that the most important tool for strategic litigation (or public interest litigation) is the judicial claim. Through this, a form of participation of civil society is granted against Governmental decisions, while the characteristics of impartiality of the judiciary make it the most suitable means for reviewing Governmental policies and decisions. The jurisdictional and procedural issues in this field are mainly devoted to triggering the judicial authority to decide on the admissibility of standing and the admissibility of the claim on possible violations of international character.

3.1 Procedural Issues: Jurisdiction and Standing on behalf of Public Interest

Standing is a preliminary judicial issue to be considered in cases like these. It denotes the ability of non-state actors (like NGOs) to act in a process in

[20] K. Linos, *Methodological Guidance: How to Select and Develop Comparative International Law Case Studies*, in A. Roberts, P.B. Stephan, P.H. Verdier, M. Versteeg (Eds), *Comparative International Law*, Oxford, 2018, 35 ff. A fair reference must be made also to A. Carcano, *Uses and possible misuses of a Comparative International Law approach*, in *Questions of International Law*, Zoom-in 54, 21 (2018), at 26, where he beware of the possible misconceptions of this approach as a manner to identify International Law as a profession rather than a scholarship, but at the same time highlights (at 28 ff.) the peculiarities of the same approach in studying the differences among domestic legal systems in applying an international norm and make evidence of possible uniformity, since it is assumed comparative approach is a traditional approach to International Law (at 31 f.).

[21] A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford, 2011, 1; Linos, *Methodological Guidance* cited, 36.

[22] D. Sloss, M. Van Alstine, *International Law in Domestic Courts*, in W. Sandholtz, C.A. Whytock (Eds), *Research Handbook on the Politics of International Law*, Cheltenham, 2017, 79 106 ff.

[23] In this respect, International Law increasingly sees the involvement of civil society actors as necessary to act as a counterbalance in the international context and demand compliance with international obligations also at the domestic level. On this point see P.H. Sand, *Principle 27: Cooperation in a Spirit of Global Partnership*, in J. Vinuales (Ed), *The Rio Declaration on Environment and Development: A Commentary*, Oxford, 2015, 617.

support of the public interest. It activates the power to assess the responsibility of the national authorities that issued the license to transfer.[24]

The first step in these proceedings pertains to the *nature of the arms trade*. In principle, arms transfers are usually considered as included within the political sphere of international relations, having a purely Governmental competence through which they are unfettered;[25] at the same time, the transfer of conventional arms is mainly considered strategically relevant for the industrial economy of a given State.[26] Therefore, some courts found themselves in difficulty when reviewing political acts of Governments. Namely, French[27] and Canadian[28] courts expressed this reasoning about the nature of the claimed act. On the contrary, the recent judicial trend denotes an established competence by reasoning on the conformity of these acts to international obligations, while considering the effective impact on human rights or international peace and security. Dutch[29] and Belgian[30] courts have perfectly shown this pattern, while also the South African courts are starting to consider it.[31]

When a court evaluates the power to judge on the claim, the second procedural step pertains to the *proper legal standing of NGOs* on behalf of public interests on arms transfers. On this point, harsh conflicting trends are to be noted.[32] National jurisprudence appears to be primarily bound by the principle of the legal certainty, through which it generally admits the

[24] Nollkaemper, *National Courts* cited, 91 ff. See also S. Pitto, Public interest litigation *e contenzioso strategico nell'ordinamento italiano. Profili critici e spunti dal diritto comparato*, in *DPCE Online*, Special Issue, 1061 (2021), 1072 ff.

[25] Dyzenhaus, *The Role* cited, 132.

[26] Economic studies on the topic are extensive. At last, see J. van Lieshout, R. Beeres, *Economics of Arms Trade: What Do We Know?*, in R. Beeres, R. Bertrand, J. Klomp, J. Timmermans, J. Voetelink (Eds), *Netherlands Annual Review of Military Studies*, Den Haag, 2021, 13 ff.

[27] Administrative Court of Appeal of Paris [2019], N° 19PA02929, Order of 26 September 2019, par. 3.

[28] Federal Court of Appeal, *Daniel Turp v. Minister of Foreign Affair*, 2018 FCA 133, judgement of 6 July 2018.

[29] Court of Appeal of The Hague, *Oxfam Novib Foundation et al v. the State of the Netherlands (Ministry of Foreign Affairs)*, Case no. 200.336.130/01, judgement of 12 February 2024.

[30] The jurisprudence here seems to be consolidated in recent times. Among many, see State CouncilState CouncilState CouncilState Council de la Belgique, Section du contentieux administratif, XV° Chambre, *CNADP c. Région Wallonie*, judgement n. 242.023 of 29 June 2018, A. 223.998/XV-3592.

[31] High Court of South Africa, Gauteng Division, *Southern Africa Litigation Centre (SALC) v. National Conventional Arms Control Committee (NCACC)*, order of 19 July 2024. The document is not yet published. A general resume can be read at www.defenceweb.co.za/editors-pick/high-court-orders-south-africa-to-suspend-arms-exports-to-myanmar/.

[32] Some scholars consider participation in administrative and judicial proceedings as a consolidated general principle: C. Donnelly, *Participation and Expertise: Judicial Attitudes in Comparative Perspective*, in S. Rose-Ackerman, P.L. Lindseth *Comparative Administrative Law*, Cheltenham, 2010, 357 ff.; B. Bugaric, *Openness and Transparency in Public Administration: Challenges for Public Law*, 22 *Wis. Intern. L.J.*, 483 (2004); C. Hunold, *Pluralism and Democracy: Toward a Deliberative Theory of Bureaucratic Accountability*, 14 *Governance* 151, (2001).

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ISSN: 2037-6677

possibility of pursuing a claim based on a domestic procedural rule.[33] Where the procedural law prescribes nothing, the judge may consider that the support to the public interest is sufficient for pursuing a claim.[34] On the former, one can bring the example of the Hague Court of Appeal admitted the standing of NGOs based on as provided by Article 3:305a of the Dutch Civil Code.[35] On the latter, the example of the Administrative Tribunal of Paris, which generally admitted the NGOs based on support to a relevant public interest, namely on the protection of fundamental rights as provided in their statutes.

The previous aspects are also related to the *admission to participate in proceedings*. This aspect generally takes place based on the recognition of NGOs as bearers of a public interest to be claimed before national courts. This interest is usually recognised in relation to the matter of claim (e.g. public interest in support of human rights protection), while it has been considered as separated from the admissibility of a claim regarding the responsibility for failing to properly conduct the arms risk assessment. The relevance of the public interest has emerged in the 2024 Hague Court of Appeal judgement. In considering the legality of sending armaments to Israel, the Dutch Government argued that Oxfam Novib had no real and concrete interest in the claim; therefore, it considered that standing before the national judge to support the interest of "promoting a world society" did not amount to strategic litigation against the arms transfer.[36] The judge rejected this argument by considering that the interest supported by the NGO was, in itself, sufficient to admit the organization before the court while considering that the promotion of world society and international peace necessarily involves a contrast with the Dutch initiatives to send armaments to a State where violations of IHL were so evident.[37] Similarly, in *CAAT v. Secretary of State*,[38] the NGO (supported by Human Rights Watch and Oxfam) submitted a claim based on public interest against the issuing of transfer licenses of military material to Saudi Arabia. The UK High Court of Justice found that the interest represented by the NGO was legitimate and therefore it had the right to claim in support of this interest and bring a case before the Court.[39]

[33] See Donnely, *Participation and Expertise* cited, 370 f.
[34] Administrative Tribunal of Paris [2019], Case N° 1807203/6-2, Decision of 8 July 2019, par. 4. The principle of participation for moral persons on behalf of public interest in France has been highlighted in the judgement of State CouncilState CouncilState CouncilState Council, *Syndicat de Coiffeurs de Limoges*, no. 25521, judgement of 28 December 1906.
[35] On this topic, see also O. Spijkers, *Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code*, in *EJIL Talk!*, 6 March 2020, available at www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/.
[36] Court of Appeal of The Hague, *Oxfam Novib Foundation* cited, par. 5.1.
[37] *Idem*, par. 5.2.
[38] UK High Court of Justice (Queen's Bench Division), *CAAT v. Secretary of State* [2017] EWHC 1726 (QB).
[39] *CAAT v. Secretary of State* [2017] cited, par. 105. Following the authorization to export arms in Saudia Arabia in 2016, the CAAT (supported by Oxfam International and Human Rights Watch) issued a claim against the Secretary of State for not having

The opposite tendency has been highlighted, as admissibility to participate in proceedings has been linked to the exemption of arms trade from judicial review due to its political nature. In the judgment of the *Sala de lo Contencioso* of the Spanish *Audiencia Nacional* in 2013, many NGOs sued the Spanish Secretary of State for Trade (*Secretaria de Estado de Comercio*) for having concluded an agreement of arms supply with Morocco. The Spanish judge held that the claim could not be admitted properly because of the lack of legal standing by NGOs and the general inclusion of arms trade within the political sphere.[40]

When an interest to stand in proceedings has been assessed, the subsequent step is to consider the *admissibility of the claim*. Here, the reasoning of courts could be divided into two significant moments. The first step pertains to *substantial judicial review powers* on Governmental authorization acts for arms transfers. The issue appears double-faced. On one hand, the jurisdiction has been broadly recognized, at least in so far as judges acknowledged their power to rule on both the assessment of authorities' activity in the light of the principle of legality and their conformity to the invoked norms (having an international or national character). In these cases, the judges considered the act of authorization as regulated at least by domestic laws and therefore admitted the claim. For example, the 2024 Hague Court of Appeal decision recognised its power to review the Governmental decision based on the invoked international norms.[41]

Nevertheless, there is still consideration of a certain difficulty in admitting the jurisdiction on matters of national security. In the claim proposed by the NGO *Action Securité Ethique Republicaines* (ASER), it was affirmed the unlawful authorization process for arms export to Saudi Arabia. The NGO claimed that the Government had overthrown any consideration of the procedural aspects of the decision by resorting to its discretionary powers and asked for the declassification of all contractual documents and licenses. While at first instance, the Administrative Tribunal of Paris issued a judgement admitting the claim, considering the activities as directly related to the Government's foreign policy but involving an excessive use of discretion (*excès des pouvoirs*),[42] the Administrative Court of Appeal overthrew the first-instance judgement and rejected the claim. It based its decision on the admissible exercise of discretion by the Government in political matters and the consequent exclusion of jurisdiction.[43] The same was

considered several IHL incidents in its risk assessment. The dispute is now determined by the judgement of the Court of Appeal. On 7 July 2020, the UK Government issued a written Statement (available at questions-Statements.parliament.uk/written-Statements/detail/2020-07-07/HCWS339) where considered the IHL incidents as "isolated", while deciding to not authorize further exports to Saudia Arabia. This part of the ruling has not been reformed by the UK High Court of Appeal, which considered the role of the same organizations to be fundamental in providing documentation to be confronted that possessed and used by authorities (UK Court of Appeals, *CAAT v. Secretary of State* [2019] EWCA Civ 1020, par. 134 ff.).

[40] Audiencia Nacional, Sala de lo Contencioso, n. 285/2010, judgement of 13 March 2013, par. VIII.

[41] Hague Court of Appeal, *Oxfam Novib Foundation* cited, par. 5.30 ss.

[42] Tribunal Administratif de Paris [2019] cited, para. 3.

[43] Cour Administrative d'Appel de Paris [2019] cited, par. 3.

DPCE online
ISSN: 2037-6677

subsequently confirmed by the State Council,[44] which found that the refusal to disclose said documentation concerned the foreign relations of the Government and was therefore excluded by the judicial review, while it considered that no abuse of discretion had occurred in doing so.[45] The same reasoning has been highlighted about provisional measures asked by several NGOs against the transfer of armaments to Israel in the recent conflict in the Gaza Strip.[46]

A second moment can be identified in the admissibility of the claim based on the *concrete interest of the claimant*. While many national court rulings did not address the topic of the nature of export licenses as *ad personam* decisions, other courts considered this nature as not implying a direct impact on public interest to be protected, but only a personal right to be invoked against the national authorities. The Dutch judges considered the claim against an export authorization as admissible only if brought on by the person directly affected by the public measure, according to the Dutch Customs Handbook.[47] The NGOs *Pax*, *Stop Wapenhandel*, and *PILP-NJCM* appealed the granting of an arms trade license by the Dutch Government to Egypt. These appeals before the administrative judge were all rejected both for lack of legal standing and for lack of admissibility of the claim based on proper interest.[48] Nevertheless, a second tranche of these claims has been brought before the Court of the Hague in a civil rights summary proceeding, where the court assessed the interest of the sole *Stop Wapenhandel* and *PILP* as meeting the requirements to bring a claim on public interest to human rights.[49]

Differently, the judge can consider the *interest of the plaintiff to claim a concrete violation of his or her rights* and assess the *support of a general but not speculative public interest*. In the case before the US District Court for DC between the New York Centre for Foreign Policy Affairs (NYCFPA) and the Secretary of State, the district judge evaluated if there was a concrete interest to the claim by assessing "(i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief";[50] then, the judge considered if the interest supported pertains to a member of the organization, by explaining the s.c. *Organizational standing*; in doing so, the judge concluded that the NGO had no legal standing

[44] Conseil d'État [2023], *ASER*, Case no. 436098, Decision of 27 January 2023, par. 4.
[45] *Id.*, par. 5.
[46] State Council [2024], *Amnesty International France*, Case no. 493898, order of 1st May 2024.
[47] *Handboek Douane*, new version applicable from 1st May 2016, available at www.belastingdienst.nl/bibliotheek/handboeken/html/boeken/HDU/.
[48] District Court Amsterdam, case numbers 17/00261, 17/00492, 17/00493, judgement of 17 October 2017, par. 4.14.
[49] District Court Den Haag, case number C-09-618625-KG ZA 21-923, judgement of 23 November 2021, par. 4.6 and 4.7.
[50] US District Court for DC, *NYCFPA, et al. v. US Department of State, and Anthony Blinken*, Civil Action 20-3847 (PLF), Judgement of 12 July 2024, par. II.B, quoting US Supreme Court, *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 378 (2024), judgement of 12 June 2024, at 380.

because it did not suffer a concrete injury to its interest and a lack of legal standing based on Article III of the Constitution.[51]

Moreover, admissibility was also considered through a *coincidence between the public interest* claimed before domestic courts *and the international or transnational interest*, as it is the case for interests of the International Community (IC). The Belgian jurisprudence on arms transfers seems indicative of this trend. On a series of judgements related to the arms transfers to Saudi Arabia in 2016, the NGOs (among which there was *Coordination Nationale pour la Démocratie et la Paix*, CNADP) submitted claims against the Wallonia Region for the grant of licenses to export armaments to Saudi Arabia. The Belgian *Conseil d'État*[52] held that the arms transfer to Saudi Arabia was vitiated by incongruence with the interests of the IC, including international peace and security[53] and non-proliferation of conventional weapons.[54] In this regard, the Court has given relevance to criterion n. 6 of the EU Com. Pos. 2008/944/CFSP, which denotes the parameter of IC concerns for peace and security as a necessary factor in evaluating the risks deriving from arms transfers.

The present considerations demonstrate that courts generally admit jurisdiction on arms trade strategic litigation, especially when a public concern or public interests can be impaired or impacted by those transfers. It is also broadly established that a general legal standing of NGOs in support of public interests against these Governmental decisions is admissible and allows them to strategically intervene in these decisions. A more precise way to support this interest is by referencing the allegedly violated international obligation, while at the same time (as we will see below) it must be fully included in the domestic legal systems.

Hence, legal standing can be easily assessed regarding these cases. But when there is a lack of specific provisions on legal standing, the mere bearing of public interest is not always sufficient to guarantee the admissibility of a claim by civil society members. Thus, this aspect can now be addressed where a transnational public interest exists and is supported by the claiming NGO, allowing for a proper evaluation of the purpose of the litigation. Nevertheless, the impact of these licenses on public interests has been judged as relevant in the claims and therefore compels the judges to admit the supporters of that interest.

3.2 Applicable International Law in Arms Transfers Domestic Claims

Another relevant legal issue in arms trade strategic litigation pertains to the invocation of international legal instruments regulating State conduct on arms transfers. Normally, the national jurisprudence has considered whether these instruments could be applied to the lawsuit and whether they had been

[51] US District Court, *NYCFPA vs Secretary of State* cited, par. III and ff., namely III.B.
[52] See, among many, Belgian State Council, XV° Chamber, *CNADP c. Région Wallonie*, judgement n. 242.023 of 29 June 2018, A. 223.998/XV-3592, par. V.2.
[53] As expressed in the Preamble and Article 1, par. 1 of the UN Charter.
[54] As promoted by UNGA in its Res. A/S – 15/50, 25 June 1988, Fifteen Special session on Disarmament.

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implemented within the domestic legal order;[55] the lack of this second element has been considered a valid basis for rejecting the claim. In a few cases, the court considered also whether these obligations could be invoked by domestic non-state actors against the Government. In this context, the issue of applicable law has been considered aside from the question of jurisdiction and legal standing, properly for its determining value on the admissibility of claim in the merits.[56]

While the jurisprudence on the material law and the derived obligations will be exposed below, here I would like to highlight the *non-admissibility of the claim based on applicable law*, on which the domestic jurisprudence appears scarce; at the same time, this also explains the difficulties in bringing a claim in support of public interest. In *Turp v. Minister of Foreign Affairs*, the main question addressed by the Canadian Federal Court of Appeal pertained to the invocation and applicability of international obligations by non-state actors.[57] After the ratification of ATT by Canada, professor Turp issued a claim against the Government for having licensed arms export to Saudi Arabia in 2016 in violation of IHL obligations and the ATT itself. The Federal Court of Appeal confirmed the rejection of the claim in the first instance,[58] holding that the rules contained in the Geneva Conventions do not impose any obligation on individuals and subjects other than armed groups directly involved in the conflict, even if these obligations are incorporated into the domestic legal system.[59]

In a related way, the Court explained that individuals have no rights to invoke responsibility on this basis. Furthermore, having only been approved and not definitively incorporated into domestic law, the Court held that these Conventions cannot be considered binding for citizens, who are only subject to acts and statutes of Parliament.[60] Nevertheless, given the nature of non-international armed conflict and since Canada was not a party to the armed conflict, the common art. 1 of the Geneva Conventions (on the respect of the same by the High Contracting Parties) did not apply to the Yemeni conflict and the inherent obligations in common art. 3 (on the application of the Conventions to non-international armed conflicts) cannot be considered applicable to the authorized arms transfers to Saudi Arabia, even though the latter was the head of the military coalition in support of the legitimate Yemeni Government.[61] Despite this decision, on 9 April 2020, the Canadian Minister of Foreign Affairs, François-Philippe Champagne, issued a Statement on the lifting of any other export authorization to Saudi

[55] On general invocation of International Law before domestic courts, see A. Nollkaemper, *General Aspects*, in A. Nollkaemper and A. Reinisch (Eds), *International Law in Domestic Courts. A Casebook*, Oxford, 2018, 1, 1.
[56] Generally speaking, see Nollkaemper, *National Courts* cited, 68 ff.
[57] Federal Court of Appeal, *Turp v. Minister of Foreign Affair* cited.
[58] Federal Court of Canada, *Daniel Turp v. Minister of Foreign Affairs*, 2017 FC 84, judgement of 24 January 2017.
[59] Federal Court of Appeal, *Turp v. Minister of Foreign Affairs* cited, par. 27.
[60] *Ibid.*, par. 28.
[61] *Ibid.*, par. 30.

Arabia,[62] emphasising that "Under our law, Canadian goods cannot be exported where there is a substantial risk that they would be used to commit or to facilitate serious violations of international humanitarian law, international human rights law or serious acts of gender-based violence".

The same reasoning has been considered by the French administrative judge in the *ASER* case. The *Tribunal Administratif de Paris* considered that the invocation of Articles 6 (3) and 7 (7) of the Arms Trade Treaty (ATT), together with Art. 2 (4) of the Charter of the United Nations and Art. 1 and 2 of Com. Pos. 2008/944/CFSP, could not be made by civil society actors in general, as these international instruments concern only international relations between States, and no direct effects stem from the international obligation.[63] The same position has been recently confirmed by the *Conseil d'État*.[64]

In contrast, recent trends have shown that the normative construction of the law incorporating the international obligation can readily allow for direct invocation by non-state actors against Governmental acts. In the 2024 Hague Court of Appeal judgement, the invocation of the Com. Pos. 2008/944/CFSP and the ATT have been considered by the judge based on the fact that the inclusion of those international instruments through the means of domestic law involved the possibility of invoking them before national judges.[65] Moreover, the Dutch judge considered that this inclusion must be interpreted as involving the conformity of national law and Governmental acts to international obligations.[66]

4. Addressing the Validity of Arms Risk Assessment by National Authorities

Strategic litigation involves also a claim on the accuracy of the risk assessment conducted by national authorities in granting licenses to export arms, which seems the "lever" through which the Governmental acts are considered as properly performed in conformity with international obligations.

The current international legal framework gives the idea that the arms flow must be controlled, and States must operate as a "filter" for the international market of conventional arms. An uncontrolled proliferation of armaments in the world could lead to a proliferation of low-intensity conflicts, jeopardising collective security and causing consequently gross and systematic violations of human rights.[67] Therefore, the public interest here is put in contrast to highlight the weak points of the decision-making processes on arms transfers.

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[62] Available at www.canada.ca/en/global-affairs/news/2020/04/canada-improves-terms-of-light-armored-vehicles-contract-putting-in-place-a-new-robust-permits-review-process.html.
[63] Administrative Tribunal of Paris [2019] cited, par. 7 and 8.
[64] State Council, *ASER* cited, par. 4.
[65] Hague Court of Appeal, *Oxfam Novib* cited, par. 5.31.
[66] *Ibid.*, par. 5.32.
[67] See at last the resolution of UN Human Rights Council 24/35, 32/12, 41/20, 47/17, and 53/15 on the impact of arms transfers and human rights.

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The question, of course, has no secondary role in national jurisprudence, based on two counts: on one hand, a State must be held accountable at the international level for domestic acts having a transboundary incidence;[68] on the other hand, since the international obligations on arms transfer impose a risk assessment when authorizing the export or other transfer activity, national authorities must conduct it consistently with them and with other obligations related to protection of human rights and international security, even in case of armed conflict.[69]

Nevertheless, since arms trade is still in some way considered as part of the political sphere of international relations, concerns about the discretionary powers exercised by Governments bring some difficulties in how this evaluative process is carried on and how international obligations are applied.

4.1 Accuracy and Rationality of the Arms Transfer Assessment Process

The main substantive claim in this field pertains to the *accuracy and rationality of the evaluation process*: the public interest here requires demonstrating whether the State has conducted the process properly and considered all relevant aspects and risks before licensing the transfer. This claim normally goes deep into the administrative function of national authorities, while evidencing some discrepancies between how it is explained and the scope of the international obligation. Moreover, the judicial review here has also the purpose of evaluating a possible alternative method of assessment based on plausible risks.

This aspect has been highlighted in the 2024 Hague Court of Appeal judgement. When asked to consider if there was a "clear risk" that the parts and components for F-35 fighters were used by Israeli armed forces to commit serious breaches of IHL, the judge considered that the *plausible* conclusion for the risk assessment process as made by the Dutch national authorities was that a clear risk was present and it had considered the actuality of the conflict and the risks as documented by Amnesty International and UN experts.[70]

Nonetheless, in some cases, it was found that the process must rationally highlight some fundamental steps and consider all the risks that could occur, i.e. *it must be fully rational and reasonable*. For example, the Belgian *State Council* highlighted how the Government's assessment could not ignore all

[68] This emerges not only from Article 1 of ILC Draft Articles on Responsibility of State for International Wrongful Acts (DARSIWA, in *Yearbook of International Law Commission*, 2001, vol. 2, part. 2), but also from the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, (in *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 10, A/56/10), where article 2, lett. C) defines the meaning of "transboundary", while article 3 to 7 identify the elements of a general risk evaluation on possible transboundary harmful activities.

[69] This question has also emerged in the ICJ Order on provisional measures cited, par. 17 where the Court considered the administrative system provided for by the Germany (a double process of evaluation of licenses) as sufficient for complying with the international obligations pending on Germany, including ATT.

[70] Hague Court of Appeal, *Oxfam Novib* cited, par. 5.16 ff.

the criteria provided for by Pos. Com. 2008/944/CFSP. In particular, the administrative judge argued:

The committee's opinion is, in fact, silent on this sixth criterion, which concerns "the behaviour of the buyer country towards the IC and in particular its attitude towards terrorism, the nature of its alliances and respect for international law", the Government is invited to consider the history of the purchaser country in the fields in particular of the respect of its international commitments about the non-use of force and international humanitarian law. It follows that the second part of the third plea is, at this stage of the procedure, considered to be serious.[71] Following this approach, the administrative judge highlighted how decisive this failure had been in understanding whether there were risks associated with the export. This approach effectively allows the prevalence of the supranational interest to guarantee international peace and security.

The same conclusion on *rationality in administrative action* was reached by the UK Court of Appeal,[72] which considered the missing evaluation of past incidents reported by the intervening NGOs and relating to IHL violations as fundamental to form a precise picture of the reality to the point of push for a re-assessment of the whole licensing process.[73] In this case, the appeal judge considered the public interest as requiring the Government to act in a fully transparent mode, further limiting its sphere of discretion.[74] However, according to the British judge, this neither highlights an advancement of the degree of due diligence provided for by the non-binding legislation, nor does it affect the entirety of the discretionary sphere in which the Government operates, but it can be said to "mark" a strict line beyond which it can be said as operating in contrast with its international obligations.[75]

On the contrary, some national jurisprudence assessed the full correctness of the administrative licensing process *in the light of the State's interests.* In the case of *Turp v Ministry of Foreign Affair*s, the Canadian Court of Appeal found that the Ministry had taken into consideration all the relevant factors as foreseen both by the Memorandum of Understandings with Saudi Arabia and by the guidelines of the *Handbook on Arms Exports*;[76] among the various factors factored in the assessment, human rights issues and involvement in the conflict in Yemen were also taken into account.[77] However, the judge held that economic, commercial, political, and military relations with Saudi

[71] Belgian State Council, *CNADP c. Région Wallonie* cited, par. V.2, pp. 20-21 (our translation from the original French). See also Belgian State Council, XV° Chamber, *CNADP c. Région Wallonie*, judgement n. 244.804 of 14 June 2019, A. 224.009/XV-3603, par. VII.2, p. 26. On the sentencing, the judge has adopted two different kinds of decisions, establishing the suspension of the first issued authorization and the annulment of the second one.

[72] In general, see UK Court of Appeals, *Kennedy v Charity Commission*, [2015] AC 455, par. 51.

[73] *CAAT v. Secretary of State* [2019] cited, par. 138. This decision overruled the consideration made by the First Instance judgement, where the Government was considered as having taken all the necessary and rational steps for issuing the license to export.

[74] *Ibid.*, par. 152. In legal literature, see D. Galligan, *Discretionary Powers. A Legal Study of Official Discretion*, Oxford, 1990, p. 228 ff.

[75] *CAAT v. Secretary of State* [2019] cited, par. 154.

[76] Federal Court of Appeal, *Turp v Ministry of Foreign Affairs* cited, par. 52.

[77] *Ibid.*, par. 53.

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Arabia did not prevail over those of a humanitarian nature.[78] Nevertheless, the assessment carried out by the Ministry certainly aimed to consider the aspect that Canadian economic and security interests could carry more weight, provided that there was no reasonable risk that the armaments would be used to commit serious human rights violations.[79] Since the *Handbook* is not a binding parameter for authority, and even the ratification of the ATT by the Canadian Parliament still referred to a very high standard of risk,[80] the judge considered this risk *reasonable*, according to the *Export and Import Permits Act*.[81] In this way, the judge ensured that the Ministry retained the correct degree of discretion in following the procedure and assessing the factors at stake.[82]

The question of reasonableness in the assessment procedure has generally been a determinant factor by national jurisprudence to understand also *whether the action to be taken was discretionary* or *whether constraints imposed by international obligations persist*. The *Tribunal Administratif de Paris* held that, given the administrative activity of issuing the license to a private exporter, this was not to be considered flawed in the absence of a favourable opinion from the Study Commission on the effects of the transfer of military weapons.[83] This is followed by the fact that, since the provision was not of a regulatory but a dispositive nature, the administration could not achieve an obligation to repeal it in the absence of the requirements of unlawfulness or lack of the object.[84]

Reasonableness also impacts *a highly technical level of assessment*, as has been highlighted in the case *CAAT v. Secretary of State* before the UK High Court of Justice. The judge held that the process adopted by the Government was "finely based" on assumptions of awareness of the risks and rationality of the decision; also, given the sensitive nature of both arms transfers and the assessment of any IHL incident, the whole assessment was presumed to be fully rational. However, the judge considered that this assessment had a degree of technicality and specificity according to which only the experts would have sufficient and necessary decision-making experience. Following this assessment, the judge regarded it as inherent to discretion and therefore impossible to evaluate in the merits.[85] The same conclusion was reached by the judge of appeal, who held that the criteria indicated in the *User's Guide* were merely receptive to the indications contained in Pos. Com. 2008/944/CFSP.[86]

Moreover, the relevance of reasonableness in *risk assessment processes* assumes a central character. Where this is exercised by even broad administrative discretion, International Law requires the authorities to pass through

[78] *Ibid.*, par. 54-55, and 58.
[79] See *ibid.*, par. 59 f. and concurring opinion of Judge Gleason, par. 91-92.
[80] See Art. 7(4), where it is expressly provided that there must be an "overriding risk" of violations provided at Art. 6.
[81] *Export and Import Permits Act* (EIPA), R.S.C. (1985), c. E-19.
[82] Federal Court of Appeals, *Turp v. Ministry of Foreign Affairs* cited, par 53 ff.
[83] Administrative Tribunal of Paris [2019] cited, par. 5.
[84] *Ibid.*, par. 6.
[85] *CAAT v. Secretary of State* [2017] cited, par. 209.
[86] *CAAT v. Secretary of State* [2019] cited, par. 50 ff.

all the fundamental steps of the procedure.[87] A different consideration can certainly lead to a lack of reasonableness, thus resulting in a legal configuration of abuse of power. The difficult and delicate position that the Government assumes at this juncture was, however, tempered by some meta-legal considerations, such as the one concerning the technicality of the procedure, the complexity and volume of information to be evaluated and so on.

This feature has also been perfectly explained in the recent judgement by the Hague Court of Appeal on armaments to Israel. Here, the Court considered the reasonableness of the evaluation process through the lens of a clear risk of serious violations of IHL and other international obligations. At first, this risk was assessed based on existing international obligations binding the Dutch Government, as deriving from the Geneva Conventions and the First Additional Protocol.[88] Secondly, the Court considered the facts presented by the claimant regarding the current use of arms by the Israeli army and the damages that occurred in the deployment of these arms[89], while deeming the information offered by NGOs to be reliable.[90] Finally, the Court assessed that, based on information about Israel's violations during the conflict and a certain degree of probability that the transferred armaments would be deployed for committing new violations, the risk of serious violations of international obligations was sufficiently clear for inducing the authority to deny the authorization to export.[91]

Hence, the domestic jurisprudence on reasonableness in arms transfer processes has shown that a judicial review of the merits of the process is possible. Nevertheless, this review has addressed the topic of the proper evaluation of information and reconnected risks to the transfer, by highlighting the discretionary powers of the Governments in pounding more economic or political interests over human rights concerns.[92] The correctness and reasonableness of the evaluation must balance these two aspects and limit the abuse of discretionary powers, which are inherently unreasonable regarding compliance with preponderant international obligations.

Based on this indication, this decision-making process seems to require proper due diligence.[93] At the same time, this standard of due diligence, including that of rationality, is not binding at all on the deciding authority,[94] which still has a wide margin of discretion in the approach to the decision while having to reasonably go through all the provided procedural steps.[95]

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[87] Generally speaking, see ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports* 2007, p. 43, at par. 461. A similar concern has been expressed in *Alleged Breaches* cited, par. 17 and 18.

[88] Hague Court of Appeal, *Oxfam Novib* cited, par. 5.4 ff.

[89] *Ibid.*, par. 5.10-5.11.

[90] *Ibid.*, par. 5.12, 5.13, where the Court explained that this information where relevant because supported by public interest and compliance with international obligations (foremost ATT), as well as those coming from UN special rapporteurs in Gaza.

[91] *Ibid.*, par. 5.16-5.19.

[92] Galligan, *Discretionary Powers* cited, 358 f.

[93] For example, as shown in *CAAT v. Secretary of State* [2019] cited, par. 150, and in Hague Court of Appeal, *Oxfam Novib* cited, par. 5.30 ff.

[94] *CAAT vs Secretary of State* [2017] cited, par. 152.

[95] *Ibid.*, par. 154.

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But one point must be remarked here: it is from the provided information that reasonableness must be assessed. When the documentation considered comes from only one institutional subject (such as the country of destination), the representation of reality is directly influenced by the content, which recalibrates the balance of interests in favour of political and commercial ones. On the contrary, an assessment aimed at balancing these interests with compliance with international obligations on the protection of fundamental rights or the preservation of international peace and security can lead to a proper and reasonable result, through which proper due diligence is construed.

4.2 Access to Information and Disclosure in Arms Transfers Decision-processes

The reasonableness of the evaluation is based on the provided information through which national authorities make a risk assessment and a balance of interests at stake. However, the disclosure of confidential information on arms transfers (namely, those utilized by the authorities in the evaluative process) is also crucial.

Indeed, although access to information and transparency are considered principles of legal civilization and part of a modern concept of the Rule of Law,[96] confidentiality was prevalent in early arms transfer jurisprudence. In these cases, the domestic judges evaluated that the protection of national security or the need to maintain certain international relations of the State were preponderant. The different balance of values happened for two reasons: the disclosure of technical information on sold armaments was deemed as compromising national security and their contestation could even have compromised the international relations of the State. Therefore, domestic judges were called to a more difficult balancing of interests, thus determining whether it was necessary to support public interest according to the transparency principle or to give weight to the "existence of the State" itself.

These concerns were brought only in a limited number of cases, where an attempt was made to give relevance to the *right of access to information* for the useful purposes of the proceeding. In the case *CNADP v. Wallonia Region*, the Belgian judge held that a compromise could be made between the confidentiality of the information to be disclosed and the right to take legal action. The *Conseil d'État* established that:

The concern expressed by the authority to avoid prejudice against its international relations therefore allows us to consider that the confidentiality of the documents for which it is requested deserves to be maintained, even if the requesting parties are not in a competitive position *vis-à-vis* FN Herstal or CMI Defense. They should also note that maintaining

[96] See M. Macchia, *The Rule of Law and Transparency in the Global Space*, in S. Cassese (Ed), *Research Handbook on Global Administrative Law*, Cheltenham, 2016, 261, 270-71. On the importance of access to information as a principle of International Rule of Law, see also E. Benvenisti, *Ensuring Access to Information: International Law's Contribution to Global Justice*, in H. Krieger, G. Nolte and A. Zimmermann (Eds), The International Rule of Law: Rise or Decline?, Oxford, 2019, 344; M. Kamto, *Global Justice, Global Governance, and International Law: Comment on Eyal Benvenisti*, in Id., 364.

confidentiality is not such as preventing an effective review of legality, as requested by the requesting parties, from being exercised by the Council of State. However, these reasons do not justify confidentiality going so far as to prevent the requesting parties from correctly identifying the nature of the material concerned by each license.[97]

In other cases, access to information was necessary to demonstrate the *political responsibility of the Government* and has produced a relevant legal standard to be applied to cases where national security was involved. The British case law is properly addressed in this way. In the *Al-Yamamah* case, the British Government was held responsible for failing to control the export of BAE armaments to Saudi Arabia, for the corruption of the public officials, and to Iraq, which was involved in the Iraqi Iranian war (1980-1988) and the crimes committed in the Kurdistan region. The outcome of this case was set in 1996 when a parliamentary commission (the Scott Commission) produced a report[98] outlining the basic guidelines for parliamentary inquiries on authorized arms exports. These guidelines were then transposed into the Freedom of Information Act (FOIA), which enshrines the right to information of citizens on the activities of the Government.[99] However, this right is specifically limited by the provision of the same FOIA: the information cannot be disclosed if there is prejudice to national security (s. 24), defence and armed forces (s. 26), international relations of the State (s. 27) and the national economy (s. 29). These exceptions are in turn counterbalanced: it is not possible to maintain the confidentiality of the requested information if doing so *would override* the public interest.[100] Any limitation of this interest must be "strongly justified".[101] Where this justification is not reasonable or consistent with the provisions of the FOIA, the information on arms transfers cannot be withheld as secret or confident and must be disclosed at least for judicial purposes.[102]

This normative formulation has found application in some subsequent cases of arms transfers. In *CAAT v. The Information Commissioner*, the NGO used information contained in some memoranda of understandings (MoU), arguing that information was needed on the agreed transfer, the nature of the enlisted armaments, and their quantity. However, in this case, the judge found that maintaining relations with Saudi Arabia was in the interest of the State and at the same time there were not only commercial interests at the base but also interests related to national security, as Saudi Arabia was the UK's first ally in the fight against international terrorism.[103]

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[97] Belgian State Council, *CNDAP* [2019] cited, par. IV.2, p. 14, recalling the judgement of Belgian Constitutional Court n°169/2013 of 19 December 2013 (our translation from the original French).

[98] *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, HC 115, 1995-96, section K8 (vol IV, pp 1799-1806), February 1996.

[99] FOIA, Sec. 1(1).

[100] H. Fenwick, *Civil Liberties and Human Rights*, London, 2002, 390 fa.; Yihdego, *Arms Trade* cited, 381.

[101] Scott Report cited, 5.48.

[102] Yihdego, *Arms Trade* cited, at 383.

[103] UK Information Tribunal, *CAAT v. Information Commissioner*, Appeal Number EA/2006/0040, decision of 26 August 2008, par. 79-90.

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Nevertheless, as noted by scholars[104] and provided by legislation[105], *a prevalence of similar interests over the right to information must be strictly interpreted and considered.* Therefore, a request can be made by a party itself or by the court and any refusal must be motivated in detail.[106] Similar considerations were made in the *CAAT v Secretary of State* case, where the UK High Court of Justice[107] and the Court of Appeal[108] held that the information relating to arms transfers to Saudi Arabia was not entirely covered by confidentiality. In both cases, the disclosure was intended as admissible in a proceeding where there was no prejudice to the interests of the State, or there was no prejudice at least to national economy and security and international relations interests. Based on a similar approach, CAAT was allowed to access information also relating to the IHL incidents assessed by the Government and to obtain the integration of this documentation with that produced by the applicant and the panel of UN experts on the conflict in Yemen.[109]

On the contrary, some domestic judges found that the *political and economic interests would have been compromised by the disclosure of information.* The *Tribunal Superior de Justicia de Madrid* denied access to information relating to arms transfers to Morocco, as it was covered by secrecy under the relevant domestic law.[110] Likewise, the French administrative judge, in the *ASER* case, held that the request for disclosure of the opinions of the Study Commission on the export of arms was not relevant to the licensing procedure, but at the same time held that the Governmental assessment must remain in the widest discretion (accorded by the national legal system) as a political act and therefore not knowable by non-institutional subjects, nor it could be reviewed by the judiciary.[111]

The impossibility of accessing information has been also considered as *terminating the process* because the object of the dispute has ceased to exist, as it was in the case before the Amsterdam Court of Appeal, which considered the claimed export license as expired and subsequently considered the *res iudicandi* as extinct.

The observance of a principle of legality seems to imply the respect for confidentiality of such information when a prevalence is provided. However, if the Governmental authority is found to have abused its power, the sanction could be the disclosure of such information. Thus, in many circumstances, this information did not go beyond the disclosure of generic data, like the amount of exported military goods or some details on the end-user.

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[104] Yihdego, *Arms Trade* cited, *ibid.*
[105] See Sec. 11(1) of the Justice and Security Act 2013.
[106] See Sec. 6(1) and (4) of the Justice and Security Act 2013.
[107] *CAAT v. Secretary of State* [2017] cited, par. 2 and Section 4.
[108] *CAAT v. Secretary of State* [2019] cited, par. 85.
[109] *Ibid.*, par. 152. In any case, we must note that the parliamentary inquiry mechanism on arms transfers gives the opportunity to immediately understand if there is any kind of responsibility, although up to now legal responsibilities have reached little result. On this point, see at last L. Ferro, *Western Gunrunners, (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War?*, in 24 *Journal of Conflict and Security Law*, n. 3, 503 (2019).
[110] Madrid Supreme Tribunal of Justice, judgement n. 00369/2010 of 31 March 2010.
[111] Administrative Tribunal of Paris [2019] cited, par. 4; Administrative Court of Appeal [2019] cited, par. 1.

Hence, this type of compromise allows only short access by NGOs to confidential information.[112] There are still cases in which such information is duly externalized for the public interest in the transparent management of administrative affairs.

There have been many complaints about the impossibility of fully exercising the right to information in respect of support of public interest.[113] Therefore, strategic litigation plays a useful role in putting pressure on the State to disclose all the relevant information on arms transfers and showing the accuracy of its risk assessment. Mostly, strategic litigation can slowly but constantly aid the development of a legal standard through which a right to information can be seen as prevalent when concerns of public interest and protection of fundamental rights, or at least the observance of international obligations, are present and raise concerns about potential grave consequences.

5. Concluding Remarks

Strategic litigation on arms transfer decisions has progressively acquired importance. This paper has shown a possible structured role of domestic courts in challenging the legality of such decisions and their conformity with international obligations in the field.

Nevertheless, aside from some steps forward, judicial review remains difficult for different features. In some national legal systems, the *recognition of the public interest* is not sufficient to guarantee the legal standing of civil society's representatives in judicial proceedings. Aside from the consideration of applying jurisdiction on such Governmental acts (which are now completely involved because of the impact on human rights they have), the preliminary problem of standing in support of the public interest against arms transfer is still relevant. The real connection relies on ascertained IHL or IHRL violations committed through the supply of armaments. This delves into a possible transnational public interest, mainly derived from global concerns.[114] Outside of this consideration, the public interest is generally recognized but could depend on an evaluation made by the judge on the importance of the supported interest and the considerations of compliance with obligations for the Government. Public interest support is worth the incorporation of international obligations into domestic legal systems. This stems from direct effects invocable by civil society just because the

[112] For example, the *Commission d'Accés aux Documents Administratifs*, on 15 July 2019, has granted the access to this information, while preserving other information pertaining to business secrecy and international relations of Belgium (as provided in Advisory Opinion n. 304).

[113] L. Bryk, C. Schliemann-Radbruch, *Arms trade and corporate responsibility. Liability, litigation and legislative reform*, Friedrich Ebert Stiftung Study, November 2019, p. 9, available at library.fes.de/pdf-files/iez/15850.pdf.

[114] An example of this kind can be found in cases in which the observance of EU Com. Pos. 2008/944/CFSP was invoked, with reference to provide for the denial of license when there is a possible contrast with the interests of the IC on maintaining international peace and security. See in particular art. 2, criterion 6, letters b) and c).

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ISSN: 2037-6677

domestic judge presumes that domestic regulations comply with international obligations.[115]

Other issues are present and relevant in the *risk assessment*. Here, the use of discretionary powers is in most cases balanced by the possibility for NGOs to collect and report information on possible IHL and IHRL violations by the recipient State; at the same time, this integration of decision-making processes is possible only when a binding rule on transparency is present[116] and the consequent reasonableness of the evaluation could be granted.[117] Thus, although the considered reports cannot determine individual responsibility (where the violations may constitute war crimes) or the specific responsibility of the State for violations of its IHL obligations,[118] they can still be considered as evidence of the risks of potential violations that may be committed through the transferred arms.[119] At the same time, the balance between public interest and State interest (like those relating to international and economic relations of the Government) involves a wide margin of discretion in addressing the decision to authorise the arms transfer. Domestic jurisprudence on this point is progressively advancing, even considering the discretionary power of the Government as being bound by the principle of legality.

Connected to this, there are still difficulties with a *right to access information* on arms transfer decisions, because of the confidentiality of documents and information. What can be taken as a general principle is the *strict functionality* of the disclosure for procedural purposes only. Nevertheless, this disclosure can only pertain to the assessment process, and not to the information of exported goods. The broad transparency still seems strictly connected to national security issues.

Lastly, the current picture of strategic litigation in this field has been decisive in setting a broad talk about how the international obligations on arms transfers can be implemented and shaped through judicial review. This tool is still incomplete and imperfect when considering the little effort put

[115] On this point, see Nollkaemper, *National Courts* cited, 139-140. Here it may also be useful to resort to the "global trusteeship" concept in the IC. The idea, promoted by Sand, *Principle 27* cited, at 625, about the implementation of principles on sustainable development, puts the IC at the top of a hypothetical triangle, while at the base there are the States (as direct recipients of international obligations) and civil society (as an assistant in the implementation of such obligations). This figure can be considered applicable even if the IC and civil society interests coincide and can lead to the immediate application of the rules referred to.

[116] The improved transparency on arms trade cases had been considered as relevant to develop a major accountability of the State when violations occurred. See J. Erickson, *Dangerous Trade: Arms Export, Human Rights and International Reputation*, New York, 2015, 114.

[117] *CAAT v. Secretary of State* [2019] cited, par. 134 ff., namely par. 138 f.

[118] *Ibid.*, par. 158 ff. On reports by international independent commissions, see: D. Weissbrodt and J. McCarthy, *Fact-Finding by Nongovernmental Organizations*, in B.G. Ramcharan (Ed), *International Law and Fact-Finding in the Field of Human Rights*, Den Haag, 1982, 186; T.C. Van Boven, *The Reports of the Fact-Finding Bodies*, in B.G. Ramcharan (Ed), *International Law and Fact-Finding in the Field of Human Rights*, Den Haag, 2014, 180.

[119] *CAAT v. Secretary of State* [2019] cited, par. 139. See also article 2, par. 6 of the Com. Pos. 2008/944 of the EU.

into evidencing the real responsibility of the State for not accomplishing international obligations in the risk assessment process. This aspect still deserves further attention and may be developed into possible analysis at the international level.[120]

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[120] See on this aspect the dispute still going on before ICJ between Nicaragua and Germany, while a possible future outcome will derive from the claim before the European Court of Human Rights against Italy (more information can be found at this link: armstradelitigationmonitor.org/overview/arms-in-yemen-at-the-european-court-of-human-rights/).

DPCE online
ISSN: 2037-6677