How Europe Dodges the International Arms Control Regime

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Introduction

In December 2023, Lt. Gen. Michael Schmidt, the director of the F-35 programme, told the press that Israel's F-35 fighter jets had performed "absolutely outstanding" in the war in Gaza. The F-35 Lightning II, a fifth-generation fighter aircraft and the world's most expensive weapons programme, is a prime example of the globalisation of defence supply chains. The fighter jet is designed and manufactured by Lockheed Martin, with the United States as the main customer and investor. A number of other NATO states, such as the Netherlands, the UK and Denmark, are partners in the development, production and financing of the fighter jet. In addition, F-35's are sold to foreign military sales participants, amongst them Japan, Israel and Singapore. Dutch industry is a major contributor to the program: "every F-35 contains components manufactured by Dutch companies".

This post argues that the legal basis for Dutch exports in the F-35 programme shows a worrying disregard for international law regulating arms exports. Dutch legislation does not require the government to carry out a detailed and prior assessment of the export of F-35 components. This is a clear breach of the Arms Trade Treaty (ATT). What's more, the Netherlands is not the only European state that blatantly ignores its procedural obligations under the ATT, but countries such as Denmark and the UK have adopted a similar approach. Hence, one wonders whether dodging the ATT regime by European states in the F-35 programme is part and parcel of the negotiation package on commercial contracts with the US – a country that has 'unsigned' the ATT under the Trump administration and that has sought international cooperation in the F-35 programme "as a way to 'prime the pump' for export sales of the aircraft."

Conventional Arms Control and the ATT

The ATT, to which the Netherlands and all other EU Member States are state parties, covers conventional weapons and their components (Articles 2 and 4). It contains a clear prohibition on the transfer of weapons and their components if it is known at the time of transfer that they will be used in the commission of genocide, crimes against humanity or war crimes or if they violate arms embargoes by the Security Council (Article 6). The ATT moreover requires that "prior to authorization of the export" of arms and their components, states must assess whether they may be used to undermine international peace and stability; in serious violations of international humanitarian law or human rights violations; or for committing terrorist or transnational criminal offences (Article 7 para 1). If States, after such an assessment, and after having considered mitigating measures, conclude that there exists an overriding risk that the arms will be used in this way, they shall deny the export license (Article 7 paras 2 and 3).

To meet these substantive obligations, states have to establish a "national system of export controls" that is "effective and transparent" (Article 5). States are also required to ensure that licenses for the export of arms and their components, are "detailed and issued prior to export" (Article 7 para 5). As I will explain below, the Netherlands discards the procedural obligations of ensuring an effective and transparent system of export controls when it comes to exports in the F-35 programme. For clarity's sake: I leave aside legal questions that relate to obligations of a more substantive character in the ATT, for example how much discretion

states have in assessing the risk that arms exports violate international humanitarian law.

Dutch Export Practice in the F-35 Programme

In the Netherlands, the Minister for Foreign Trade has established different rules for the transfer of military equipment in the F-35 program than those that usually apply to the export of arms and their components. Indeed, the export control process for F-35 parts is distinctive in that it has been "streamlined", according to the Minister. Exports take place from a so-called European Regional Warehouse, located at Woensdrecht Air Base. In 2016, a Ministerial Decree was adopted (hereafter Regulation NL009), which stipulated that companies, after a one-time registration, may indefinitely transit or export F-35 goods to the partners within the F-35 program. The Minister has no prior knowledge of such transfers. These only become visible after the export, in an ex-post report on effected transfers. As a matter of fact, as early as in 2017, answering questions about a possible F-35 deal with the United Arab Emirates, the Minister confirmed that "the Netherlands benefits from the unfettered export of F-35 components."

In response to questions by the Dutch parliament about the exports to Israel in November 2023, the government confirmed this course of action under Regulation NL009 and indicated that it did not want to interfere with it. Changing it, for example by requiring detailed export licenses prior to the exports, would allegedly undermine the expectations of F-35 partners and harm the Netherlands as it would no longer be seen as a reliable ally. Furthermore, it would negatively affect the participation of Dutch companies in the F-35 program. These arguments reflect nearly word for word the way in which Lockheed Martin advertises its fighter jet on the webpage of the project: the jet allegedly "strengthens national security, enhances global partnerships and powers economic growth". As such, this reasoning by the Dutch government reflects the intricate linkage between the interests of the private defence industry and national strategic and commercial interests. Such linkage is unavoidable in a world where arms trade for private profit is a reality. Nonetheless, it is well known that too close a relationship between arms dealers and sovereign states carries a risk of fostering corruption. This is primarily worrisome in terms of the human suffering illicit arms exports cause, but such practices are also "deeply damaging to the governance of exporting countries".

The ATT came into being precisely to curtail the negative consequences of a too intimate link between private defence industries and sovereign states. It does so by obliging the latter to conduct a risk assessment before allowing the export of arms or their components. Obviously, there is no exception to this obligation when it comes to exports to allies or to other states with which an (commercial or strategic) agreement has been concluded. Indeed, that would undermine the very object and purpose of the Treaty. In sum, the ATT requires a national control system in which licenses are granted with limited validity for specific transfers, and the ATT obligations are incompatible with general licenses with unlimited validity directed at an open-ended group of importing countries.

Transnational Constructions and Global Partnerships

It has been argued by the Dutch government that the exports within the F-35 program concern equipment owned by the United States and that therefore, different rules would apply. But even when it comes to American equipment, the Netherlands must comply with the ATT. Obviously, the obligations of the ATT cannot be circumvented by a shrewd transnational construction involving production in and export from Country A, while ownership of the equipment lies with Country B. It goes without saying that (implicitly) qualifying actual exports as transit is contrary to the ATT. Moreover, the argument that the Netherlands does not have to carry out prior and detailed export assessments because the equipment is American, has the consequence that Dutch companies profit from the arms trade without the Dutch state having to comply with the corresponding international legal obligations. That sort of reasoning is more fitting for a multinational that resorts to transfer pricing to avoid taxes than for a country which has committed itself in its

Constitution to promote the development of the international legal order.

The Netherlands is not the only European state that acts in contravention of its export control obligations in the particular context of the F-35 programme. Apparently, Denmark also fails to carry out prior export controls in the programme. In the UK, the export of F-35 components is covered by a so-called Open General License (OGEL). An OGEL is a pre-approved licence issued by the government, with an indefinite validity and may cover many destination countries. British companies have a 15% share in the programme and "the fingerprints of British ingenuity can be found on dozens the F-35's key components." Against this background, it is surprising that the UK government has stated that "since 7 October 2023, the UK Government has provided no lethal or military equipment other than medical supplies to Israel." That is unlikely, as "all F-35's contain British components". Moreover, such a statement is misleading because the British government has pre-approved exports to F-35 states, including Israel and it has not retracted these licenses since. Amongst many other parts, British industry produces the release system that allows the F-35 to release its bombs, which could well have been distributed to Israel via the European Supply Warehouse in the Netherlands. This example illustrates the inherently problematic nature of general licenses with unlimited validity, even more so when they are issued in a global supply chain of military goods.

Conclusions

The way in which exports in the F-35 programme are regulated by a number of the European partner countries raises the question what exactly has been agreed upon with the US government, when contracts were being negotiated with European states and their companies. The US, the main partner in the F-35 programme, has not ratified the ATT. It played an important role in the negotiation of the Treaty and signed it under the Obama government, but in 2019 Trump announced that the US was "taking its signature back". So far, the Biden administration has not recommitted to the ATT. In the meantime, it has continued in "a robust dialogue with the United Arab Emirates" on a possible F-35 deal. Moreover, it considers welcoming Türkiye back in the programme, after having suspended the country from participating because it acquired a Russian air defence system. Apparently, as a result of Turkey's constructive attitude towards Sweden's accession to NATO, re-entering the F-35 programme is currently being discussed again.

It goes without saying that in today's world, a strong European defence industry is not an unnecessary luxury. The same applies to a good relationship with Europe's transatlantic allies. The preamble of the ATT explicitly recognises the legitimate political, security, economic and commercial interests of States in the international trade in conventional arms. But such interests can and should be pursued in a transparent and responsible way, with due regard to legal rules regulating the international trade in conventional arms. European states' obligations under the ATT should not be seen as weakening their commitment to international and regional peace and stability, neither by their own governments, nor by the US. On the contrary, these obligations, by ensuring a responsible, accountable and transparent arms trade, contribute to the reduction of human suffering and promote a more stable and peaceful international order. What's more, strict adherence to the arms export regime ultimately also serves national security. The fact that weapons technology from Europe continues to find its way to Russia, reportedly through countries such as the United Arab Emirates and Türkiye, is a case in point. Such diversion serves as (yet again) an unfortunate reminder of the importance of transparent and effective arms controls systems, especially in a globalising world. Privileging the pursuing of global strategic partnerships and economic growth over a commitment to clear and unequivocal legal obligations under international law does not make the world a safer place – quite the contrary.

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