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State responsibility

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Dutch Ships in Libya: Export Licencing and State Liability

Background

Zawiya is one of the main departure points on Libya's western coast for migrants and refugees hoping to enter Europe.¹ The Libyan coastguard – part of the Ministry of Defence² – intercepts their boats and brings them back to Libya; a practice which is supported by the EU and results from a deal with Italy in particular.³ The head of the Zawiya coastguard branch, Mr. al-Rahman Milad, aka al-Bija, is reportedly involved in smuggling himself.⁴ On 7 June 2018, Al-Bija was included on the UN Security Council 'Libya Sanctions List'. The listing states that his coastguard unit is 'consistently linked with violence against migrants and other human smugglers. (...) Several witnesses in criminal investigations have stated they were picked up at sea by armed men on a [coastguard] ship called *Tallil* (used by al-Bija) and taken to the al-Nasr detention centre, where they are reportedly held in brutal conditions and subjected to beatings.' In addition, the UN Panel of Experts on Libya has found that al-Bija is 'directly involved in the sinking of migrant boats using firearms.'⁵ His main patrol vessel, the Talil 267, was built in the Netherlands by the Dutch company Damen Shipyards. Damen delivered four Stan Patrol 1605 vessels to the Libyan coastguard in 2012, and four more in 2013.⁶ On 21 October 2016, the Talil 267 was used in a violent operation against a rubber boat carrying migrants and/or refugees. The NRC and Lighthouse Reports are investigating how and why heavily armed ships from the Netherlands are being used by the Libyan coastguard.

The patrol vessel mountings: military or strategic goods?

According to a confidential EU report, three of Damen's Stan Patrol 1605s, including the Talil 267,

are used by the Libyan coastguard. Footage and photos show that machine guns are attached to the vessels' mountings. The Dutch government permitted these vessels to be transported without a licence, classifying them as non-strategic and not subject to authorisation.⁷ Remarkably, Damen was eager to arm the vessels in 2014. In accordance with the arms embargos of the UN and the EU, the government denied permission.⁸ Now it appears the Dutch vessels are indeed armed and have been used in violent, high-risk operations against vulnerable people at sea, PAX, Stop Wapenhandel, and the Dutch Section of the International Commission of Jurists (NJCM) are investigating what the responsibilities of the Dutch government and Damen are in this regard, and are considering bringing a case. This blog post discusses the responsibility of the State, i.e. responsibility for aiding or assisting another in the commission of an internationally wrongful act, focusing on the element of knowledge.⁹

As a rule, military or strategic equipment is subject to authorisation. The terminology is relevant here: there is a difference between 'strategic goods' and 'military goods'. Military goods are included in the 2012 Common Military List of the European Union, whereas strategic goods are military or dual-use goods.¹⁰ The Common Military List includes 'mountings' or hard points for certain listed weapons in Article ML 9 (a)(2)(a). However, according to the Dutch government, the mountings are not designed to install the weapons on the Common Military List. The mountings are generic in nature and can also be used to bear flags, search lights or antennae.¹¹ The Dutch government has stressed the *actual end use* of the equipment, i.e. the arming of the vessels with machine guns, is not the determining factor.¹² In a similar vein, the government maintains the 2009 Dual-Use Regulation is inapplicable. As such mountings are not listed in Annex I, an export licence would not be required. Besides being 'non-military', the vessels are considered 'non-strategic'.

Knowledge of Damen, knowledge of the State

Even if we accept that the actual end use is not to be taken into account under the current export licence regime, the Dutch government's narrative is not completely satisfying. Certain members of parliament have asked the Minister of Foreign Affairs and the Minister for Foreign Trade and Development Cooperation why Damen's previous brochure for these vessels illustrated the mountings with machine guns.¹³ The Foreign Trade Minister responded that 'it is not important which brochure a Dutch company uses in the commercial process', thus dismissing this as a relevant factor. It is worth noting that the link to the brochure in the summary of the parliamentary questions is broken, and that the page or file *may have been moved or deleted*. The current product sheet of the Stan Patrol 1605 dates back to 2017 and does not include the mountings in the drawings. However, the photo of the Stan Patrol 1605 on Damen's website continues to show them. Based on the sequence of events, it is crucial to establish if Damen or indeed the State knew – or perhaps ought to have known – that these vessels were intended to be armed and used to commit human rights violations. Relatedly, it is important to establish what knowledge Damen and the State had of the buyer of the vessels, i.e. the Libyan coastguard.

The volatile situation in the Mediterranean Sea did not appear out of the blue, after the last order of the Stan Patrols in 2013. Libya has been under an arms embargo since 2011 and civil war and atrocities at the hands of the government have been ongoing since before. Damen Shipyards proudly states that it had a business relation with Libya since 1975. Damen's online magazine tells us that the Libyan Naval Forces 'have become an important client' and explicit mention is made of

the delivery of the eight Stan Patrol 1605s in 2012-2013. The piece continues: 'In 2012/13 Damen also trained more than 80 people for the Libyan Naval Forces in the Netherlands and Libya, who are largely working on the eight [Stan Patrol] 1605 vessels.' In addition, the Stan Patrols are marketed as vessels for 'defence & security' on their website, and not as 'civilian', the classification the Dutch government used. In light of this, it is highly unlikely Damen had no knowledge of their client and how they intended to use the vessels. Lastly, as pointed out above, Damen requested to arm the Stan Patrols in 2014; a request which the State denied. This brings us back to the Dutch government's knowledge of the circumstances of the wrongful act, i.e. the human rights violations at the hands of the Libyan coastguards, facilitated by the delivery of the patrol vessels. The incident under investigation took place in 2016. Other incidents involving the Talil 267 have occurred since. Moreover, al-Bija has been listed on the Libyan Sanctions List in 2018. The Netherlands has stated that once they became aware of this, they subjected Damen to authorisation on an *ad hoc* basis.¹⁴ It is not evident that late 2012, the Netherlands could have known of the circumstances of the wrongful acts.

Human rights risk assessments

At the time of the deliveries, the Dutch government decided to classify the Stan Patrol 1605s as civilian goods. In the case of military and dual-use equipment, States are obliged to conduct a risk assessment. Export licence applications made to EU Member States for items on the Common Military List are assessed on a case-by-case basis against the criteria in Article 2 of the 2008 Common Position. This Article's second criterion provides that export licences shall be denied if approval would result in inconsistency with human rights in the country of final destination. Furthermore, Article 8(1) of the Dual-Use Regulation stipulates Member States 'may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security or human rights considerations.' Thus, the argument of the Minister of Foreign Affairs that the Dual-Use Regulation is not applicable, is not necessarily the end of the story. Still, the fact the State *could* have listed the vessels for human rights considerations does not mean it *should*. Lastly, there are other government bodies that conduct risk assessments based on human rights before engaging in international cooperation. In a recent report, the Review Committee for the Intelligence and Security Services (CTIVD) concluded that the Dutch AIVD and MIVD failed to conduct an adequate risk assessment for their collaboration with foreign intelligence and security services. One of the criteria for determining this is respect for human rights. It is debatable why patrol vessels – exported to a country where human rights violations are widespread – should not also be subject to a case-by-case risk assessment. The current test, namely the intended end use of the goods, apparently leaves much to be desired.

Conclusion

Looking at the criteria for State responsibility under article 16 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts and the recent case law of the European Court of Human Rights, the material element of assistance – the actual conduct and the causal link – and the cognitive element may arguably be fulfilled. The entire dynamics of the Dutch export licence regime could amount to a key contribution to the serious harm as it occurred in Libyan waters; had the Stan Patrol 1605s been classified as military or strategic instead of civilian, a human rights assessment would have taken place. One may assume the outcome would have

been negative, as with the 2014 arms order, and the vessels would not have been delivered. The knowledge element seems harder to establish. Human rights courts are increasingly applying a standard of constructive knowledge (i.e. 'ought to have known'). If that is accepted here, the awareness of the State could be established. The date of the lost Damen brochure may be significant.

1. Final report of the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) par. 258.
2. See Council of the European Union, European External Action Service, EUBAM Libya Initial Mapping Report Executive Summary, Brussels, 25 January 2017, p. 40.
3. For a comprehensive overview of the policies from 2000-2017, see also *Mare Clausum, Italy and the EU's undeclared operation to stem migration across the Mediterranean*, A report by Forensic Oceanography, affiliated to the Forensic Architecture agency, Goldsmiths, University of London, May 2018 <<https://www.forensic-architecture.org/case/sea-watch/>> p. 19-56.
4. See *Mare Clausum, Italy and the EU's undeclared operation to stem migration across the Mediterranean*, A report by Forensic Oceanography, affiliated to the Forensic Architecture agency, Goldsmiths, University of London, May 2018 <<https://www.forensic-architecture.org/case/sea-watch/>> and Final report of the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) par. 59.
5. Final report of the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) par. 105.
6. See also document nr. 30, E-mail exchange 2014, Decision following a request under the Public Access to Government Information Act regarding the delivery of ships and other vessels by Damen Shipyards Group (Besluit Wob-verzoeken levering van schepen en andere vaartuigen door Damen Shipyards Group) <<https://www.rijksoverheid.nl/documenten/wob-verzoeken/2018/07/30/besluit-wob-verzoeken-levering-van-schepen-en-andere-vaartuigen-door-damen-shipyards-group>> p. 54.
7. See also document nr. 28, Memo arms export Libya 19.12.2014, Decision following a request under the Public Access to Government Information Act regarding the delivery of ships and other vessels by Damen Shipyards Group (Besluit Wob-verzoeken levering van schepen en andere vaartuigen door Damen Shipyards Group) <https://www.rijksoverheid.nl/documenten/wob-verzoeken/2018/07/30/besluit-wob-verzoeken-levering-van-schepen-en-andere-vaartuigen-door-damen-shipyards-group> p. 48-53.
8. *Ibid.*
9. Cf. article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: Annual Report of the International Law Commission on the Work of Its Fifty-third Session, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two. According to the International Court of Justice, the rule in draft article 16 reflects customary international law. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, 43, at p. 217, para. 420.
10. Source: Douane, Belastingdienst, Handboek VGEM, 30.06.00 Strategische goederen, 2 'Begripsbepaling en wetgeving'.
11. *Kamerstukken II*, vergaderjaar 2018-2019, Aanhangsel, nr. 900, antwoord op vraag 3 t/m 6, p.

2.

12. *Ibid.*

13. *Id.*, p. 1, en *Kamerstukken II*, vergaderjaar 2018-2019, Aanhangsel, nr. 698, vraag 5, p. 2.

14. *Kamerstukken II*, vergaderjaar 2018-2019, Aanhangsel, nr. 900, vraag en antwoord 8, p. 2-3.

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