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## Converging Dual-Use Export Control with Human Rights Norms: The EU's Responses to Digital Surveillance Exports

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### I. Introduction

Demand for digital surveillance technology has created a thriving market on a global scale. In his UN report entitled 'Surveillance and Human Rights' in May 2019, David Kaye, the Human Rights Council's Special Rapporteur on the freedom of opinion and expression, expressed serious concerns about the status of 'surveillance exports'.<sup>1</sup> In the report, the UN's Special Rapporteur made it clear that digital surveillance is 'no longer the preserve of countries' that have the 'in-house' resources to conduct mass and targeted surveillance.<sup>2</sup> The market of surveillance technology has developed globally in order to allow a wide range of governments to make use of advanced digital surveillance. Privacy International, one of the human rights non-governmental organisations and a member of the Coalition Against Unlawful Surveillance Exports, has identified 528 companies as of May 2016 involved in the selling of various types of surveillance technology.<sup>3</sup> It can serve legitimate law enforcement purposes; yet there is no denying that it can readily be turned into a governmental tool to monitor and oppress dissidents. In view of the growing digital surveillance market at the expense of human

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<sup>1</sup> UN Human Rights Council and Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 'Surveillance and Human Rights' UN Doc A/HRC/41/35 (28 May 2019) para 2.

<sup>2</sup> *Ibid* para 6.

<sup>3</sup> Privacy International, Submission to the Report of the Special Rapporteur (see n 1) at 1–2, [www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2019ReporttoHRC.aspx](http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2019ReporttoHRC.aspx).

rights protection, the UN's Special Rapporteur foremost recommended that states 'impose an immediate moratorium' on the 'export, sale, transfer, use or serving of privately developed surveillance tools' – until 'a human rights-complaint safeguards regime' is in place.<sup>4</sup>

Export control is one of such legal safeguards available to states. More precisely, there is a field of law called 'dual-use' export control which has been applied on a regular basis outside the special frameworks of economic sanctions. Within the EU, the export of dual-use items has been governed foremost by Council Regulation (EC) No 428/2009 of 5 May 2009, which has direct effect in the EU.<sup>5</sup> The scheduled review of the Regulation<sup>6</sup> was caught up by the political controversies in the aftermath of the Arab Spring (2010–2012), which triggered political initiatives within the EU to integrate the assessment of human rights risks into the process of export control. The crux of the matter is that, according to Article 2(1) of Regulation 428/2009, dual-use items have been defined as those which serve 'both civil and military purposes'.<sup>7</sup> A variety of materials, products, facilities, technologies and information that serve civilian purposes could also be employed for building military capacities.<sup>8</sup> As illustrated by the definition of dual-use items, the EU's dual-use Regulation has primarily been justified by the control of 'military' risks. Political resistance has then arisen against the strengthening of the non-military normative pillar in the EU's dual-use export control.

Against this background, this chapter analyses political initiatives within the EU to integrate consideration to human rights risks into the EU's dual-use export control. Such initiatives, in a nutshell, oscillate between *convergence* and *divergence* at multiple levels. On the one hand, given that dual-use export control forms the EU's Common Commercial Policy (CCP), the EU is, in principle, mandated to facilitate convergence of its dual-use export control with human rights and fundamental freedoms (section II). The initiatives for human rights convergence are also in line with the UN's Guiding Principles on Business and Human Rights (UNGPs), which the EU and its Member States have pledged to implement (section III). Yet the integration of human rights into the EU's export control inevitably involves a policy choice which may diverge itself from international human rights law (section IV). Furthermore, the attempts to strengthen human rights protection signify divergence from the international regimes on export control, and more fundamentally, from the idea of regulatory harmonization across participating states (section V). The chapter then concludes (section VI).

<sup>4</sup> UN Human Rights Council and Report of the Special Rapporteur (n 1).

<sup>5</sup> Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L134/1.

<sup>6</sup> *Ibid* Art 25(2).

<sup>7</sup> *Ibid* Art 2(1).

<sup>8</sup> For instance, take the use of high-speed photography. It has been used for film productions, electrical discharge and optics, yet certain high-speed photographic technology can also be applied for developing and testing nuclear weapons: Scott Avery Watson and Michael Robert Altherr, 'On the Export Control of High Speed Imaging for Nuclear Weapons Applications' (Los Alamos National Laboratory, 2017) No LA-UR-XYZQ 2017 (2017) 19, 23–24.

## II. Convergence with the EU's Commitment in its External Action

### A. Political Momentum Following the Arab Spring

The export of digital surveillance technology could be a vehicle for the systematic violation of the right to privacy, freedom of speech and freedom of assembly in the trading partners. For the purpose of this chapter, cyber surveillance technologies are meant to include: mobile telecommunications interception equipment; intrusion software; internet protocol (IP) network surveillance systems; monitoring centres (designed to collect, store and analyse communications data); lawful interception systems and data retention systems (used by service providers to intercept and store data as required by law); and digital forensics (to retrieve and analyse communications data stored in networks, computers and mobile devices).<sup>9</sup>

There are abundant stories of the trade of surveillance technology which has been used to suppress dissidents and human rights activists. During and in the aftermath of the Arab Spring, many incidents came to the surface that revealed the use of exported surveillance technology in those countries which experienced the popular uprising.<sup>10</sup> For example, one of the reported stories pertains to the controversies regarding a software program called FinSpy marketed by Gamma Group, a German-British company. It has been reported that Gamma Group's subsidiary, FinFisher, helped the Government of Bahrain to install the software to monitor pro-democracy activists during the time of the Arab Spring movement.<sup>11</sup> The controversy motivated a group of four pro-democracy activists and politicians to launch legal proceedings in 2018 in the UK against Gamma Group. The claimants argued that the companies involved had sold the spyware to the Government of Bahrain despite the well-documented record of human rights violations.<sup>12</sup> The controversies were also mentioned by the UN Special Rapporteur in his aforementioned May 2019 report.<sup>13</sup>

<sup>9</sup> Mark Bromley, 'Export Controls, Human Security and Cyber-Surveillance Technology: Examining the Proposed Changes to the EU Dual-Use Regulation' (Stockholm International Peace Research Institute, 2017) 6–10; Mark Bromley, et al, 'ICT Surveillance Systems: Trade Policy and the Application of Human Security Concerns' (2016) 2 *Strategic Trade Review* 37.

<sup>10</sup> See, eg, Ben Wagner, 'Exporting Censorship and Surveillance Technology' (Humanist Institute for Co-operation with Developing Countries (Hivos), January 2012); Privacy International, 'Open Season: Building Syria's Surveillance State' (December 2016).

<sup>11</sup> See, eg, Privacy International, 'Six Things we Know from the Latest FinFisher Documents' (*Privacy International*, 15 August 2014), <https://privacyinternational.org/blog/1522/six-things-we-know-latest-finfisher-documents>; C Currier and M Marquis-Boire, 'Leaked Files: German Spy Company Helped Bahrain Hack Arab Spring Protesters' (*The Intercept*, 7 August 2014), <https://theintercept.com/2014/08/07/leaked-files-german-spy-company-helped-bahrain-track-arab-spring-protesters/>.

<sup>12</sup> Leigh Day, 'Pro-democracy Activists Launch Legal Action against British Spyware Companies' (*Leigh Day*, 11 October 2018), [www.leighday.co.uk/News/News-2018/October-2018/Pro-democracy-activists-launch-legal-action-against](http://www.leighday.co.uk/News/News-2018/October-2018/Pro-democracy-activists-launch-legal-action-against).

<sup>13</sup> UN Human Rights Council and Report of the Special Rapporteur (n 1) paras 42, 44.

In response to the controversies in the aftermath of the Arab Spring, the European Parliament made a series of calls for a revision of the EU's dual-use export control Regulation in order to prevent EU-originated digital technologies from being used against the violations of civil and political rights.<sup>14</sup> The European Parliament adopted the resolution entitled 'human rights and technology' in September 2015, in which the Parliament made explicit reference to the impact of intrusion and surveillance systems on human rights in third countries.<sup>15</sup> What is striking in the resolution of September 2015 is that the European Parliament made it clear that the EU's standards, particularly the EU Charter of Fundamental Rights, 'should prevail' in the assessment of dual-use technologies used in ways that may restrict human rights.<sup>16</sup> The Parliamentary call is ultimately in line with the need for ensuring 'coherence between the EU's external actions and its internal policies' relating to informal and communication technologies (ICTs).<sup>17</sup> The political calls to strengthen the control of ICT exports also came from the Council. In its Action Plan on Human Rights and Democracy 2015–19, the Council catalogued the review of the dual-use regulation 'to mitigate the potential risks' associated with the 'uncontrolled export of ICT products' that 'could be used in a manner that leads to human rights violations'.<sup>18</sup> As evidenced by these remarks, the European Parliament and the Council sent a clear signal, especially in 2015, that the EU would take a proactive step in strengthening the control of ICT exports in order to align its external actions with the EU's own commitment to human rights and fundamental freedoms.

## B. The EU's Overall Constitutional Mandate to Foster Human Rights

The integration of human rights risks into export control is particularly pertinent for the EU and its external relations. As noted in the Introduction, the EU's dual-use Regulation forms an integral part of the EU's CCP which includes both trade and investment law and policy. In the EU's external relations, the CCP has been considered as the key field which has also been intertwined with the integration process within the internal market of the Union.<sup>19</sup> As part of the CCP, the EU's

<sup>14</sup> See European Parliament, 'Resolution on the European Defence Union (2016/2052(INI)), P8\_TA(2016)0435 (22 November 2016)' para 21.

<sup>15</sup> European Parliament, 'Human Rights and Technology: The Impact of Intrusion and Surveillance Systems on Human Rights in Third Countries (2014/2232(INI))' P8\_TA(2015)0288 (8 September 2015).

<sup>16</sup> *Ibid* para 39.

<sup>17</sup> *Ibid* para 2.

<sup>18</sup> Council of the European Union, 'Council Conclusions on the Action Plan on Human Rights and Democracy 2015–2019' 10897/15 (20 July 2015) 24.

<sup>19</sup> Urszula Jaremba, Machiko Kanetake and Ingrid Koning, 'Economic and Non-Economic Values and Objectives in the EU's International Trade: Normative Tensions, Actors and Processes' (2019) 3 *Europe and the World: A Law Review* 1, 2.

law and policies on dual-use export control ought to be carried out ‘in the context of the principles and objectives of the Union’s external action’, as instructed by Article 207 of the Treaty on the Functioning of the European Union (TFEU).<sup>20</sup> One of these principles, referred to in Article 21(1) of the Treaty on European Union (TEU), pertains to ‘the universality and indivisibility of human rights and fundamental freedoms’.<sup>21</sup>

Since the mid-1990s, the EU has been taking measures to integrate human rights in its external trade relations. Human rights criteria and clauses have been incorporated in the General System of Preferences and bilateral trade agreements.<sup>22</sup> In the EU Strategic Framework and Action Plan on Human Rights and Democracy, adopted by the Council in 2012, it was pledged that the EU would promote human rights ‘in all aspects of its external action without exception’.<sup>23</sup> Within this overall pledge, the Strategic Framework envisaged, as part of the specific action items to promote the protection of the freedom of expression, the inclusion of ‘human rights violations’ as one of the reasons on the basis of which ‘non-listed items may be subject to export restrictions’.<sup>24</sup>

While Article 207 TFEU and Article 21(1) TEU provide an overall mandate, they do not provide concrete guidance regarding the extent to which human rights and fundamental freedoms should and could permeate into the EU’s trade and investment policies and law. In practice, much relies on the willingness of EU institutions and Member States, as well as the wider political initiatives that affect the institutional and governmental decision-making. With respect to the regulation of ICT exports, particular political momentum has arrived in response to mass demonstrations and revolt across the Middle East and North Africa from 2010 to 2012.<sup>25</sup> As noted above, the reported incidents regarding the use of EU-originated surveillance technology have motivated a series of Parliamentary calls to revise and rewrite the EU’s export control.

### C. The Commission’s September 2016 Proposal

A watershed moment then came in September 2016 when the European Commission submitted a proposal to recast and replace Council Regulation

<sup>20</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47, Art 207(1).

<sup>21</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art 21(1).

<sup>22</sup> Samantha Velluti, ‘The Promotion and Integration of Human Rights in EU External Trade Relations’ (2016) 32 *Utrecht Journal of International and European Law* 41.

<sup>23</sup> Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’ 11855/12 (25 June 2012) 2.

<sup>24</sup> *Ibid* 19.

<sup>25</sup> See, eg, European Commission, ‘Report from the Commission to the Council and the European Parliament on the Implementation of Regulation (EC) No 428/2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items’ COM(2013) 710 final (16 October 2013) 13.

(EC) 428/2009.<sup>26</sup> In response to the aforementioned Parliamentary requests to strengthen the control of ICT exports,<sup>27</sup> the Commission's proposal placed the protection of human rights as one of the normative pillars of the EU's dual-use export control. The proposal aimed to provide an 'effective response to threats for human rights resulting from their uncontrolled export'.<sup>28</sup> Among a broad catalogue of human rights and fundamental freedoms, particular emphasis was placed, given the context of the most immediately affected rights, on respect for the right to privacy, freedom of expression and freedom of association.<sup>29</sup>

In order to mainstream the human rights pillar of export control, the September 2016 proposal introduced a number of elements which reflected the Parliamentary calls. First, and perhaps most fundamentally, the proposal recognised that it is appropriate to 'revise the definition of dual-use items'.<sup>30</sup> On this basis, the proposal included, within the definition of dual-use items, 'cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law'.<sup>31</sup> While the proposal still maintained the basic definition of dual-use items based on 'civil and military' purposes,<sup>32</sup> the proposal's definition effectively went beyond the traditional definition of dual-use items based on military contexts.

Second, one of the most controversial provisions pertained to the human rights due diligence in the context of the so-called 'catch-all' control. It is a residual mechanism to allow authorities to exert export control over items which are not specifically listed by Annex I of the EU's dual-use regulation. According to Article 4(2) of the Commission's proposal:<sup>33</sup>

If an *exporter*, under his *obligation to exercise due diligence*, is aware that dual-use items which he proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraph 1 [including the serious violations of human rights], he must notify the competent authority, which will decide whether or not it is expedient to make the export concerned subject to authorisation.

<sup>26</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Setting up a Union Regime for the Control of Exports, Transfer, Brokering, Technical Assistance and Transit of Dual-Use Items (recast)' COM(2016) 616 final (28 September 2016) Art 2(1).

<sup>27</sup> See, eg, European Parliament, 'Human Rights and Technology' (n 15) para 36; European Parliament, 'Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter (2015/2229(INI))' P8\_TA(2015)0470 (17 December 2015) para 124.

<sup>28</sup> European Commission Proposal (n 26) 6.

<sup>29</sup> European Commission Proposal (n 26) 6.

<sup>30</sup> European Commission Proposal (n 26) 12, recital para 6.

<sup>31</sup> According to the proposal of September 2016, Art 2(1)(b) reads as follows: "dual-use items" shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include: ... (b) cyber surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law, or can pose a threat to international security or the essential security interests of the Union and its Member States': European Commission Proposal (n 26) Art 2(1)(b).

<sup>32</sup> European Commission Proposal (n 26) Art 2(1).

<sup>33</sup> European Commission Proposal (n 26) Art 4(2) (emphasis added).

What is striking in this proposed provision was the element of human rights due diligence on the part of *exporters* (ie, not merely on the part of governments). Under Article 4(2) of the Commission's proposal, exporters themselves were under an 'obligation to exercise due diligence'.<sup>34</sup> Exporters must notify the competent authority if the exporters become 'aware' that non-listed dual-use items are intended for the commission of serious violations of human rights or international humanitarian law in situations of armed conflict or internal repression.<sup>35</sup>

Third, on top of these additions, the September 2016 proposal of the Commission mandated Member States' competent authorities to take into account 'respect for human rights in the country for final destination' as well as respect by that country for international humanitarian law in deciding whether or not to grant an export authorisation.<sup>36</sup> Finally, the Commission's proposal introduced the EU's 'autonomous list'<sup>37</sup> subject to export control. Under Regulation 428/2009, dual-use items have been catalogued in Annex I according to ten groups, from 'Category 0' to 'Category 9'. The Commission's September 2016 proposal launched a new group of controlled items concerning 'cyber surveillance technology'.<sup>38</sup> Under this new 'Category 10', the proposal listed items which had not yet been regulated by the Wassenaar Arrangement.<sup>39</sup> It is one of the most comprehensive international regimes. Although the Wassenaar Arrangement is not based on a treaty, its control list serves as the basis for the EU's export control list. Before the proposal, certain surveillance technologies had already been included in the international list; mobile telecommunications interception equipment (or IMSI catchers),<sup>40</sup> IP network communications surveillance systems and intrusion software<sup>41</sup> had already been added to the list within the Wassenaar Arrangement and subsequently to the EU's control list.<sup>42</sup> Yet these additions did not encompass monitoring centres and data retention systems. While Germany introduced

<sup>34</sup> European Commission Proposal (n 26) Art 4(2). See further section V of this chapter below.

<sup>35</sup> European Commission Proposal (n 26). See further section V of this chapter below.

<sup>36</sup> European Commission Proposal (n 26) Art 14(1)(b).

<sup>37</sup> European Commission Proposal (n 26) 9.

<sup>38</sup> European Commission, 'Annexes to the Proposal for a Regulation of the European Parliament and of the Council Setting up a Union Regime for the Control of Exports, Transfer, Brokering, Technical Assistance and Transit of Dual-Use Items (recast)' COM(2016) 616 final, Annexes 1 to 6 (28 September 2016) 243–44, Annex I, Category 10.

<sup>39</sup> *Ibid.*

<sup>40</sup> The Wassenaar Arrangement, *List of Dual-Use Goods and Technologies and Munitions List*, WA-LIST (12) 1 (12 December 2012), Category 5.A.1.f (mobile telecommunications interception).

<sup>41</sup> The Wassenaar Arrangement, *List of Dual-Use Goods and Technologies and Munitions List*, WA-LIST (13) 1 (4 December 2013), Categories 4.A.5 (intrusion software) and 5.A.1.j (IP network communications surveillance systems); Innokenty Pyetranker, 'An Umbrella in a Hurricane: Cyber Technology and the December 2013 Amendment to the Wassenaar Arrangement' (2015) 13 *Northwestern Journal of Technology and Intellectual Property* 153, 162–64.

<sup>42</sup> Commission Delegated Regulation (EU) No 1382/2014 of 22 October 2014 amending council regulation (EC) No 428/2009 setting up a community regime for the control of exports, transfer, brokering, and transit of dual-use items [2014] OJ L371/1. See the Wassenaar Arrangement, *List of Dual-Use Goods and Technologies and Munitions List*, WA-LIST (17) 1 (7 December 2017), Category 4.E.1.

additional national legislation in 2015 in order to control the export of monitoring centres and retention systems,<sup>43</sup> these items were not part of the EU-wide list of dual-use items. On this basis, the European Commission's September 2016 proposal aimed at autonomously regulating the export of lawful interception monitoring centres and event data retention systems and devices.<sup>44</sup>

The Commission's proposal was by no means the first attempt to integrate human rights in the EU's export control regimes. In particular, one must mention that the EU already has its own autonomous export control over torture-related items. In the so-called anti-torture Regulation, the EU promulgated export control on items which could be used for torture and other cruel treatment.<sup>45</sup> Also, 'human rights considerations' are part of the language of Regulation 428/2009. Under Article 8(1) of the Regulation, a Member State may prohibit (or impose an authorisation requirement on) the export of dual-use items 'for reasons of public security or human rights considerations'.<sup>46</sup> That being said, the Commission's proposal marked a significant departure from these precedents. The dual-use Regulation covers a much wider range of items than the torture Regulation. Article 8(1) of Regulation 428/2009 by no means obliges Member States to prohibit (or require authorisation on) any particular exports on the basis of human rights considerations.

### III. Convergence with International Standards on Business and Human Rights

#### A. UNGPs' Human Rights Due Diligence

In this sense, the September 2016 proposal was a noteworthy attempt to situate human rights as one of the normative pillars of the EU's dual-use export control. The proposal's normative ambition can be defended, not only by Article 207 TFEU and Article 21(1) TEU. It should also be understood as being part of the initiatives to converge the EU's dual-use control with its commitment to promote the implementation of the UNGPs.<sup>47</sup> While the EU has taken a wide range of measures to facilitate the implementation of the Guiding Principles,<sup>48</sup> including

<sup>43</sup> Germany, Submission to the Report of the Special Rapporteur (see n 1) (February 2019) at 1, [www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2019ReporttoHRC.aspx](http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/SR2019ReporttoHRC.aspx).

<sup>44</sup> European Commission Annexes (n 38) 243–44, Annex I, Category 10.

<sup>45</sup> Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in goods which could be used for capital punishment, torture, or other cruel, inhuman, or degrading treatment or punishment [2005] OJ L200/1.

<sup>46</sup> Regulation 428/2009 (n 5) Art 8(1).

<sup>47</sup> United Nations, 'Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04 (2011).

<sup>48</sup> Daniel Augenstein, Mark Dawson and Pierre Thielbörger, 'The UNGPs in the European Union: The Open Coordination of Business and Human Rights?' (2018) 3 *Business and Human Rights Journal* 1.



in its external action,<sup>49</sup> such measures were yet to cover the specific context of ICT exports. In 2013, for instance, the Commission developed the ICT sector-specific guide for the implementation of the UN Guiding Principles.<sup>50</sup> The guide was based on the EU's 2012 Strategic Framework on human rights and democracy, in which the EU pledged that it would encourage and contribute to the implementation of the Guiding Principles.<sup>51</sup> Yet these initiatives did not include any specific reference to the implications of the UNGPs within the context of ICT exports.

The UNGPs, which were endorsed by the UN Human Rights Council in 2011, compiled a set of foundational and operational principles regarding the following three interrelated pillars: the state's duty to protect human rights, the corporate responsibility to respect human rights, and, finally, access to effective remedy. Within the second pillar of corporate responsibility, the UNGPs expect companies to conduct due diligence. According to Operational Principle 17, 'business enterprises' should carry out 'human rights due diligence' for the sake of identifying, preventing, mitigating and accounting for how they address their adverse impacts on human rights.<sup>52</sup> According to the UNGPs, due diligence should cover adverse human rights impacts that the business enterprise 'may cause or contribute to'.<sup>53</sup>

The formulation of the UNGPs is broad enough to cover due diligence in the context of business decisions to develop and export their products and technology. The UN's Special Rapporteur on the freedom of expression also made special reference to the UNGPs, which, in the view of the Special Rapporteur, should be used as a precondition for companies to participate in the surveillance market.<sup>54</sup> The Special Rapporteur ultimately recommended that the states participating in the Wassenaar Arrangement develop a framework by which 'the licensing of any technology' would be 'conditional' upon 'companies' compliance with the Guiding Principles.<sup>55</sup>

## B. Resistance from Industry Associations and Member States

Despite the fact that the Commission's 2016 proposal was in line with the UNGPs, the provision regarding exporters' human rights due diligence invited a great

<sup>49</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility', COM(2011) 681 final (25 October 2011) at 14; European Commission, 'Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play', SWD(2015) 144 final (14 July 2015) at 6–9, 17–21.

<sup>50</sup> European Commission, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' (2013).

<sup>51</sup> Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (n 23) 3.

<sup>52</sup> United Nations Guiding Principles (n 47) 17.

<sup>53</sup> *Ibid* 17 (emphasis added).

<sup>54</sup> UN Human Rights Council and Report of the Special Rapporteur (n 1) para 60.

<sup>55</sup> UN Human Rights Council and Report of the Special Rapporteur (n 1) para 66(f).

deal of controversy. Contestation surrounded the alleged 'political' nature of human rights assessment. The Federation of German Industries (*Bundesverband der Deutschen Industrie*: BDI) had claimed, already before the submission of the Commission's proposal, that companies were 'not in a position to take political decisions'.<sup>56</sup> According to the BDI, a mere reference to 'human rights violations' was found to be too broad to be left in the hands of companies.<sup>57</sup> Instead, the BDI demanded that EU institutions specify human rights violations and list specific countries with the records of systematic human rights violations.<sup>58</sup>

Likewise, DIGITALEUROPE, which represents the digital technology industry in Europe, expressed its concerns regarding uncertainties created by the inclusion of human rights language in relation to the exporters' obligations. A much more preferred option for DIGITALEUROPE was for EU institutions to identify a list of excluded end-users in advance and avoid relying on the broad protection of human rights through a catch-all provision.<sup>59</sup> DIGITALEUROPE regarded that companies were not in the best position to assess human rights risks attached to ICT exports. Instead, in the words of DIGITALEUROPE, '[g]overnments are much better prepared' to identify possible cases of human rights violations as the governments have better access to relevant information.<sup>60</sup>

Despite concerns raised by industry associations, the European Parliament, in its first reading, gave strong support to the Commission's proposal in January 2018; 571 members of the Parliament voted in favour, 29 against and 29 abstained.<sup>61</sup> There were a number of the Parliamentary amendments attached, which have led, for instance, to the exclusion of the critical term 'obligation' under Article 4(2) of the Commission's proposal concerning exporters' due diligence. However, some other amendments appeared to strengthen the catch-all controls under Article 4 even further. The Parliamentary amendments referred to the UNGPs, as well as the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct, in order to provide further normative content to due diligence.<sup>62</sup> According to the Parliament's amendment on Article 4(2), an exporter must notify the competent authority if the exporter becomes aware,

<sup>56</sup> BDI, 'EC Dual-Use: Review of the EC Dual-Use Regulation' (January 2016) at 7, [https://bdi.eu/media/topics/global\\_issues/downloads/201601\\_FINAL\\_BDI-Assessment\\_Reform\\_EC\\_Dual-Use.pdf](https://bdi.eu/media/topics/global_issues/downloads/201601_FINAL_BDI-Assessment_Reform_EC_Dual-Use.pdf).

<sup>57</sup> *Ibid* at 6.

<sup>58</sup> *Ibid* at 6–7.

<sup>59</sup> DIGITALEUROPE, 'European Commission Proposed Recast of the European Export Control Regime: Making the Rules Fit for the Digital World' (24 February 2017) at 3, [www.digitaleurope.org/resources/european-commission-proposed-recast-of-the-european-export-control-regime/](http://www.digitaleurope.org/resources/european-commission-proposed-recast-of-the-european-export-control-regime/).

<sup>60</sup> DIGITALEUROPE, 'Updated DIGITALEUROPE Comments on Proposal for Recast of Export Control Regulation' (30 January 2018) at 2, [www.digitaleurope.org/resources/updated-digitaleurope-comments-on-proposal-for-recast-of-export-control-regulation/](http://www.digitaleurope.org/resources/updated-digitaleurope-comments-on-proposal-for-recast-of-export-control-regulation/).

<sup>61</sup> P8\_TA-PROV(2018)0006 (17 January 2018).

<sup>62</sup> European Parliament, 'Control of Exports, Transfer, Brokering, Technical Assistance and Transit of Dual-Use Items', First reading, P8\_TA-PROV(2018)0006 (17 January 2018), Amendment 11 (Recital 13 a (new)).

while exercising due diligence, that the export ‘may be intended’ for the commission of human rights violations.<sup>63</sup> The amendment appears to further extend the coverage of catch-all control in comparison to the Commission’s 2016 proposal, under which the notification duty arises when the exporter is aware that items ‘are intended’ (as opposed to ‘may’) for ‘serious’ human rights violations.<sup>64</sup>

Among EU Member States, the Dutch Government notably advocated the EU’s proactive role in promoting the regulation of ICT exports on the basis of their human rights risks. In her letter addressed to the House of Representatives in August 2018, the Dutch Minister for Foreign Trade and Development noted that the Netherlands see the EU as a ‘frontrunner’ in overcoming the risks of human rights violations by cyber surveillance technology.<sup>65</sup> While the Dutch Government stressed the need for clarifying the concepts of cyber surveillance technology and related human rights,<sup>66</sup> the Government supported the strengthening of rights-based control. The Netherlands suggested a more explicit reference to corporate social responsibility in a revised dual-use regulation, and favoured the introduction of the ‘due diligence’ term based on the UNGPs and OECD Guidelines, provided that it remains sufficiently clear what is expected from exporters.<sup>67</sup>

Yet the Netherlands’ position stood in stark contrast to that of other EU Member States. The Parliamentary endorsement of January 2018 was followed by dissent from a number of EU Member States against the EU’s autonomous approach. Shortly after the conclusion of the first reading by the Parliament, the 11 EU Member States, in their Working Paper of 29 January 2018, listed their fundamental points of disagreement with the Commission’s proposal.<sup>68</sup> As elucidated in the Working Paper, which was drafted primarily by Germany and France, the Member States preferred not to alter the catch-all controls under Article 4 of Regulation 428/2009.<sup>69</sup> There is ‘no need for additional catch-all controls’, as put by the Working Paper.<sup>70</sup> Each Member State can decide whether to introduce additional control, according to Article 8 of the EU’s dual-use Regulation.<sup>71</sup> According to the 11 Member States, the term ‘due diligence’ should be a matter of self-regulation by companies and their internal compliance programmes.<sup>72</sup>

<sup>63</sup> *Ibid* Amendment 34 (Article 4, para 2).

<sup>64</sup> *Ibid*.

<sup>65</sup> De Minister voor Buitenlandse Handel en Ontwikkelingssamenwerking, ‘Betreft Stand van zaken herziening dual use-verordening en inzet kabinet’, BZDOC-799712230-66 (29 August 2018) at 2.

<sup>66</sup> *Ibid* at 2.

<sup>67</sup> *Ibid* at 3.

<sup>68</sup> Council of the European Union, ‘Working Paper: EU Export Control – Recast of Regulation 428/2009’, WK 1019/2018 INIT (29 January 2018), available via EURACTIV.com, at [www.euractiv.com/wp-content/uploads/sites/2/2018/02/11\\_member\\_states\\_dual-use.pdf](http://www.euractiv.com/wp-content/uploads/sites/2/2018/02/11_member_states_dual-use.pdf). The document was drafted on behalf of the Croatian, Czech, French, German, Italian, Polish, Portuguese, Romanian, Slovak, Slovenian and Spanish delegations.

<sup>69</sup> *Ibid* at 4.

<sup>70</sup> *Ibid*.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid* at 5.

The fundamental disagreements expressed by the 11 Member States are reflected in the Council's negotiating position issued in June 2019.<sup>73</sup> With regard to the residual catch-all control over non-listed items under Article 4 of the EU's dual-use Regulation, the Council's negotiating mandate simply omitted any specific reference to human rights and international humanitarian law.<sup>74</sup> '[H]uman rights considerations' remain part of the grounds on the basis of which each Member State may choose to prohibit or impose an authorisation requirement on additional items.<sup>75</sup> Overall, the Council distanced itself from the Commission's proposal that aimed at strengthening the human rights pillar and the control of cyber surveillance technology.

#### IV. Divergence from International Human Rights Law

Whether or not the Council's negotiating position can be normatively defended touches upon the heart of the recurring issue of how the EU integrates human rights in its external trade relations. This inevitably involves an autonomous policy choice. The narrative of 'obligations' does not inform the direction of policy revision, given that international human rights law has not imposed an obligation to ensure respect for civil and political rights of those individuals who are affected by exported surveillance technology. In this sense, it is worth remembering that human rights considerations in the Commission's proposal go much further beyond pre-existing international human rights obligations, especially those under the International Covenant on Civil and Political Rights (ICCPR).

This is, in essence, due to the basic jurisdictional hurdle provided in the ICCPR. According to Article 2(1) of the ICCPR, states parties' obligations apply to individuals within its territory and subject to jurisdiction.<sup>76</sup> According to the Human Rights Committee, which monitors the implementation of the ICCPR, the jurisdictional clause of the ICCPR should be interpreted broadly so that the Covenant is applicable to anyone within the effective control of a state party, regardless of whether they are within a state's territory.<sup>77</sup> Even if one accepts the Human Rights Committee's interpretation, it is still difficult to argue that the ICCPR is applicable to the context of dual-use export control. Those individuals who may be affected by exported surveillance technology are outside the exporting state's jurisdiction.

<sup>73</sup> Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council Setting up a Union Regime for the Control of Exports, Brokering, Technical Assistance, Transit and Transfer of Dual-Use Items (recast): Mandate for Negotiations with the European Parliament' (5 June 2019) at 4 (recital 5).

<sup>74</sup> *Ibid* at 18 (Art 4(1), (2)).

<sup>75</sup> *Ibid* at 22 (Art 8(1)).

<sup>76</sup> International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (1966) Art 2(1).

<sup>77</sup> Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant' UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 10.

Despite the ICCPR's hurdle that limits its applicability, the Human Rights Committee has already engaged with the deliberation of human rights risks attached to ICT exports. In the Human Rights Committee's Concluding Observations on Italy in 2017, the Committee rendered its observations regarding the 'right to online and digital privacy'.<sup>78</sup> The Committee expressed its concern about allegations that companies based in Italy have been 'providing online surveillance equipment to Governments with a record of serious human rights violations'.<sup>79</sup> On this basis, the Human Rights Committee further noted its concern about the 'absence of legal safeguards or oversight mechanisms regarding the export of such equipment', referred to in Article 17 of the ICCPR concerning the right to privacy.<sup>80</sup> Having expressed its concerns, the Human Rights Committee noted that Italy should review its regulatory mechanisms to ensure that 'all corporations under its jurisdiction, in particular technology corporations, respect human rights standards when engaging in operations abroad'.<sup>81</sup> These remarks of the Human Rights Committee seem to indicate that the ICCPR is applicable to states parties' licensing decisions for the export of certain ICT products and technical assistance.

Nevertheless, despite the indication from the Conclusion Observation, it is by no means clear how the basic applicability test under Article 2(1) of the ICCPR can be overcome in the context of export control. It is safe to say, overall, that it is still premature to conclude that the ICCPR is *strictu sensu* applicable to a state's decision to authorise exports in general. Furthermore, even if the ICCPR is applicable to a state's licensing decisions, the obligations under the ICCPR pertain to those of states parties. Due diligence envisaged by the European Commission's 2016 proposal was that by *exporters themselves*. Therefore, the Commission's proposal was its proactive attempt to go much beyond the framework of international human rights law and to achieve convergence between the EU's external action and the UNGPs' expectation towards business enterprises.<sup>82</sup>

## V. Divergence from International Export Control Regimes

### A. Divergence from the International Level-Playing Field

While the Commission's 2016 proposal has normative foundations in Article 21(1) TEU and the EU's commitment to implement the UNGPs, one of the frequently

<sup>78</sup> Human Rights Committee, 'Concluding Observations on the Sixth Periodic Report of Italy' UN Doc CCPR/C/ITA/CO/6 (1 May 2017) paras 36–37.

<sup>79</sup> *Ibid* para 36.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* para 37.

<sup>82</sup> See section III. A of this chapter.

invoked grounds for resistance against rights-based control pertained to the need for adherence to the international regimes. The EU's dual-use Regulation is indeed based on international treaties and non-treaty export control regimes.<sup>83</sup> At the beginning of Annex I of Regulation 428/2009, which provides the list of dual-use items, it is clearly stated that the list 'implements internationally agreed dual-use controls', including the Wassenaar Arrangement, the Missile Technology Control Regime, the Nuclear Suppliers' Group, the Australia Group, and the Chemical Weapons Convention.<sup>84</sup> In this vein, the Commission's 2016 proposal marked the departure, not merely from the international list of controlled items, but from the assumption that the EU's list reflects an internationally agreed list.

Member States were divided as to whether the EU's export control should diverge itself from the Wassenaar Arrangement and other export control regimes. The Dutch Government was in favour of promoting the EU's leadership role in tightening ICT exports on the basis of human rights risks. According to the letter of August 2018, the Dutch Government, while acknowledging the need to minimise the deviation from the international regimes, expressed the locus of its priority. The Dutch Government took the position that to overcome the risks of human rights violations 'outweighs' the preservation of the international level-playing field.<sup>85</sup>

Yet the Netherlands' stance did not resonate with many other EU Member States. In their working paper of January 2018, the 11 EU Member States, including Germany and France, put forward their strong preference for harmonisation with international regimes. The 11 Member States observed that the 'EU does not work in isolation' in regulating international exports.<sup>86</sup> According to the 11 states, the four international export control regimes (ie, Wassenaar Arrangement, the Missile Technology Control Regime, the Nuclear Suppliers' Group, and the Australia Group) create a 'level-playing field more globally'.<sup>87</sup> The need for adherence to the international or global 'level playing field' was echoed by another working paper, dated 15 May 2018, prepared by nine EU Member States. Expressing their dissent towards the EU's autonomous path, the states observed that the Commission's proposal was a 'fundamental deviation' from the EU's traditional adherence to international regimes.<sup>88</sup> Should the EU take unilateral measures, it could 'seriously undermine the competitiveness of EU-based industry'.<sup>89</sup>

<sup>83</sup> See Machiko Kanetake, 'Balancing Innovation, Development, and Security: Dual-Use Concepts in Export Control Laws' in N Craik, et al (eds), *Global Environmental Change and Innovation in International Law* (Cambridge, Cambridge University Press, 2018) 180.

<sup>84</sup> Regulation 428/2009 (n 5) Annex I.

<sup>85</sup> De Minister voor Buitenlandse Handel en Ontwikkelingssamenwerking (n 65) at 2.

<sup>86</sup> 'Working Paper: EU Export Control' (n 68) 1.

<sup>87</sup> 'Working Paper: EU Export Control' (n 68) 1.

<sup>88</sup> 'Working Paper: Paper for Discussion – For Adoption of an Improved EU Export Control Regulation 428/2009 and for Cyber Surveillance Controls Promoting Human Rights and International Humanitarian Law Globally' WK 5755/2018 INIT (15 May 2018) at 2 (on file with the author). The Working Paper was prepared on behalf of the Czech Republic, Cyprus, Estonia, Finland, Ireland, Italy, Poland, Sweden and the United Kingdom.

<sup>89</sup> *Ibid.*

The repeated emphasis on the international level-playing field then defined the Council's negotiating mandate released in June 2019. The Council put a stronger emphasis on regulatory harmonisation, not just among EU Member States, but between the EU's dual-use export control and international treaties and control regimes. As contrasted with the language of the Commission's 2016 proposal,<sup>90</sup> the Council's negotiating mandate deleted the passage that justified the addition of controlled items on the basis of human rights risks.<sup>91</sup> Based on the assumption that the EU's dual-use export control should be in line with international regimes, the Council also sees the EU's global role – albeit not proactively promoting human rights-based control. The Council's negotiating mandate referred to the need for promoting 'upward convergence'.<sup>92</sup> This means that the Council, the Commission, and Member States should 'promote international adherence' to the rules set out in the EU's dual-use Regulation 'as an international standard' by proactively engaging in international forums and providing assistance to third countries.<sup>93</sup>

## B. Divergence from Military Risks

Member States' resistance on the basis of adherence to international regimes was intertwined with the idea that dual-use export control remains, in essence, designed to mitigate military risks. The idea that export control aims at controlling military risks can be seen in the founding document of the Wassenaar Arrangement.<sup>94</sup> As articulated by the founding document, the Wassenaar Arrangement aims to ensure that transfers of conventional arms and dual-use goods and technologies do not contribute to the development of 'military capabilities' which undermine regional and international security and stability.<sup>95</sup> The concept of military risks is multi-faceted and, perhaps more importantly, human rights risks are already intertwined with the control of military items. Yet this does not change the basic fact that dual-use export control has developed essentially to regulate military risks, especially those associated with the development of the weapons of mass destruction. By taking into account this military rationale, the UN Human Rights Council's Special Rapporteur acknowledged that the Wassenaar Arrangement is 'tailored to reduce threats to regional and international security' and thus that the framework is 'ill-suited' to addressing the 'threats that targeted surveillance posed to human rights'.<sup>96</sup>

<sup>90</sup> European Commission Proposal (n 26) 14 (recital 17).

<sup>91</sup> Council's Negotiating Position of June 2019 (n 73) at 7 (recital 18).

<sup>92</sup> Council's Negotiating Position of June 2019 (n 73) at 11 (recital 29).

<sup>93</sup> Council's Negotiating Position of June 2019 (n 73) at 11 (recital 29).

<sup>94</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, 'Initial Elements', 11–12 July 1996, [www.wassenaar.org/docs/IE96.html](http://www.wassenaar.org/docs/IE96.html).

<sup>95</sup> *Ibid* para I.1.

<sup>96</sup> UN Human Rights Council and Report of the Special Rapporteur (n 1) para 34.

In this sense, the Commission's 2016 proposal invited a sense of discomfort among EU Member States. While the proposal maintained the traditional definition of dual-use items, it suggested, in its recital, that it is appropriate to 'revise the definition of dual-use items.'<sup>97</sup> However, according to the negotiating mandate of June 2019, it was clear that the Council intended to preserve the fundamental definition of dual-use items. While the Council's negotiating mandate referred to cyber-surveillance items, they were absorbed into the catalogue of 'dual-use items' based on, to reiterate, the civilian-military dichotomy.<sup>98</sup> On this basis, the Council's negotiating position removed any reference to human rights and humanitarian law from the basic definition of 'dual-use items'.<sup>99</sup>

## VI. Conclusion: Between Convergence and Divergence

As of 1 December 2019, the recast process of Regulation 428/2009 has yet to be finalised and it remains to be seen how the negotiation progresses among the European Commission, the Council and the European Parliament. Regardless of the outcomes of the EU's legislative process, it is intriguing, in itself, to unpack the deliberation at the Parliament, Council, and various stakeholders regarding the Commission's proposal. In principle, the EU and Member States pledged to implement the UNGPs, and, the Commission's proposal, despite conceptual incoherence and uncertainties, was an important step forward in bringing the EU's export control more in line with its own advocacy for the UNGPs. Yet the idea of situating some of the civil and political rights as a normative pillar of the EU's dual-use export control has invited resistance. Undoubtedly, concerns over the EU's economic competitiveness underlie political resistance on the part of industry associations, a number of EU Member States, and some members of the European Parliament. Yet the EU's overall promise to integrate human rights 'in all aspects of its external action without exception'<sup>100</sup> made it necessary for EU Member States to invoke some non-economic justifications as part of their narrative to contest the Commission's 2016 proposal. One of these narratives was the need for adherence to the international export control regimes and the traditional definition of dual-use items based on military purposes.

Overall, the legislative process and deliberation surrounding the Commission's proposal highlight some of the challenges that the EU encounters in integrating human rights and fundamental freedoms in its external trade relations. Despite the commitment to 'business and human rights', the insertion of human rights norms in the EU's dual-use export control has met strong resistance. One of the

<sup>97</sup> UN Human Rights Council and Report of the Special Rapporteur (n 1) 12, recital para 6. See section II, C of this chapter.

<sup>98</sup> Council's Negotiating Position of June 2019 (n 73) at 4 (recital 5).

<sup>99</sup> Council's Negotiating Position of June 2019 (n 73) at 12 (Art 2(1)).

<sup>100</sup> EU Strategic Framework and Action Plan (n 23) 2.



bases for contestation even pertained to the characterisation of human rights assessment as political, which was presented as if business enterprises are not suitable for assessing human rights risks. Given that dual-use export control would give rise to criminal penalties at the level of the Member States, it is critical to ensure certainty and foreseeability. Yet the narrative employed in response to the Commission's proposal may have revealed some of the pragmatic difficulties at the epistemic level in permeating human rights norms into the decision-making of business enterprises, including within the ICT sector.

Against the EU's overall mandate to integrate human rights into its external action, the stronger emphasis on human rights within the Commission's proposal was a noteworthy attempt. It asked the EU institutions and related stakeholders the critical question of whether the EU could and should take a more proactive position in the development of export control which has been shaped by a strong need for harmonisation across industrialised countries. As highlighted by the debates, however, the EU has been internally torn between the ambition for convergence and the realities that divergence may bring. On the one hand, the EU has articulated its normative ambition to converge its export control with human rights norms envisaged by the UNGPs. On the other hand, however, this leads to the inevitable divergence from international export control regimes, which may put EU businesses in an economically disadvantaged position. Between these two demands, compromise is inevitable; yet this may come at the expense of the human rights of those individuals within the EU's trading partners.

