



Mwatana for Human Rights



**Rome/Berlin/Sana'a, 13 March 2023**

### **Preliminary legal analysis**

On March 10<sup>th</sup>, 2023 the Judge for Preliminary Investigations (GIP) in Rome decided to dismiss the criminal proceedings against Michele Esposito, Francesco Azzarello and Alberto Cutillo, former and current directors of the Italian Unit for the authorization of armament material UAMA, and the CEO of the arms manufacturer RWM Italia S.p.A., Fabio Sgarzi. The criminal investigation had been opened by the Italian prosecutor in April 2018 following a complaint filed by the Yemeni organisation Mwatana for Human Rights, the European Center for Constitutional and Human Rights (ECCHR), the Italian Disarmament Network (RIPD) and Yemeni victims of a deadly aerial attack allegedly conducted by the Saudi/UAE led coalition with arms produced and exported by RWM Italia. Although the complainants had requested the prosecutor to open an investigation into the crimes of involuntary manslaughter, personal injury and abuse of power, an investigation was only opened for the latter. The GIP's decision responds to the prosecutor's second request for dismissal and the corresponding appeal lodged by the complainant organisations, who had requested the judge to proceed to trial.

Despite the gravity of the allegations presented in the case and the compelling evidence gathered within the course of almost five years of investigations, our analysis finds that the arguments underpinning the judge's decision appear factually and legally flawed. Some of the most salient shortcomings of the decision are as follows:

1. The ruling explicitly recognises that, *“following the interventions of the UN, the European Parliament, in view of parliamentary questions on the issue and complaints by NGOs”*, UAMA directors were *“certainly aware of the possible use of the arms sold by RWM to Saudi Arabia in the conflict in Yemen to the detriment of civilians.”* Nevertheless *“they continued to issue arms export licences to the company RWM even in the following years, in violation of at least art. 6 and 7 of the Arms Trade Treaty (ATT), ratified by Italy in April 2014, a binding legal instrument, establishing that a state must not authorise arms exports if it is aware of their possible use against civilian targets.”*

In spite of this serious findings, the GIP found that it is not possible to establish the intent (subjective element) of the suspects to procure a pecuniary advantage or an unfair damage, given that they complied with the relevant Italian legislation from a procedural point of view, meaning that they obtained and acted based on the opinions legally required from other offices involved in the licensing procedure, which the GIP finds *“were always favourable”*. First, this assessment ignores what had already been acknowledged by the Judge for Preliminary investigations in its 23.02.2021 [decision](#) on the same case, which reiterated the *“non-binding nature of the opinions issued by the various Offices within the limits of their area of competence”* concluding that *“UAMA is ultimately responsible for adopting the final authorisation measure”*. Second, it blatantly disregards relevant evidence in the file, which had been explicitly highlighted by the complainants in their appeal writ. This evidence precisely demonstrates that such opinions were not always favourable to issuing a licence, but on the contrary overly averted the high risks attached to export authorizations granted to RWM. One of the several examples, is the Protocol No. 222098 of 12 November 2016 in which the DGAP (Directorate General



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for Political and Security Affairs) suggests UAMA to “*initiate a pause of reflection*” in relation to the licences granted to RWM to export bombs to Saudi Arabia, “*in view of the growing media and parliamentary attention being paid to the serious collateral damage caused to the Yemeni civilian population by the Saudi-led coalition's aerial bombardments*”. Thus, the judge based their decision on a false premise, as the evidence clearly demonstrated that the documents and opinions on which UAMA's final decisions were allegedly based were far from unequivocal as to the legality of granting the export authorisations.

Following the judge’s reasoning on this matter would lead to the illogical situation in which government officials cannot be held responsible on the grounds that procedural formalities were formally observed even when the granting of licences resulted in a clear breach of the law - clearly foreseeable by the officials- that contributed to potential war crimes in Yemen.

2. Furthermore, the judge seems to conflate political and legal considerations by determining that, by acting in accordance with the opinions received by other offices involved in the process, the directors of UAMA “*acted in conformity with the orientation of the foreign and defence policy of the state, (...) thus with the aim of achieving a public purpose.*” This assessment completely overlooks the fact that UAMA was created as technical authority with the obligation to assess applications for arms export authorisations on the basis of a thorough risk analysis as required by the applicable legal framework: national, supranational and international binding regulations as well as international human rights law. These norms have been put in place precisely to protect human rights within the framework of an inherently lethal industry independently of foreign policy orientation of states.

3. Moreover, the decision does not make any distinction in relation to the different positions held by the public officials (UAMA directors) and that of the private actor under investigation (Fabio Sgarzi). The conduct of RWM Italia’s CEO was not considered at all by the GIP, despite the fact that evidence gathered in the investigation proves that the company continued to seek authorisations and to export bombs in full knowledge of the serious human rights violations that Saudi Arabia and the UAE were allegedly committing in Yemen with such weaponry. Similarly, the judge entirely neglected that considerations on doubling the turnover of the company and granting employment were actively put forward, by both the company and Italian public officials, throughout the licensing decision-making process, as a justification to grant authorization for the export of bombs. As already established by the GIP in its 23.02.2021 [decision](#) on the same case, “*this is far from excluding the subjective element of the offence. On the contrary it provides further confirmation of it - as it makes clear the firm intention to favour the private individual, the achievement of an unfair profit (i.e. a profit made contra jus)*”.

### **Denial of access to justice**

It should be noted that with this ruling, the judge was not deciding on a conviction of the suspects, but only on the possibility of proceeding to trial, which, based on the compelling evidence available in the case file and the gravity of the facts under investigation, would have been warranted to guarantee the right of access to justice to the victims of the Deir Al Hajari attack in particular and, in general, to all Yemenis whose lives have been severely affected by a war fuelled by Italian weapons .