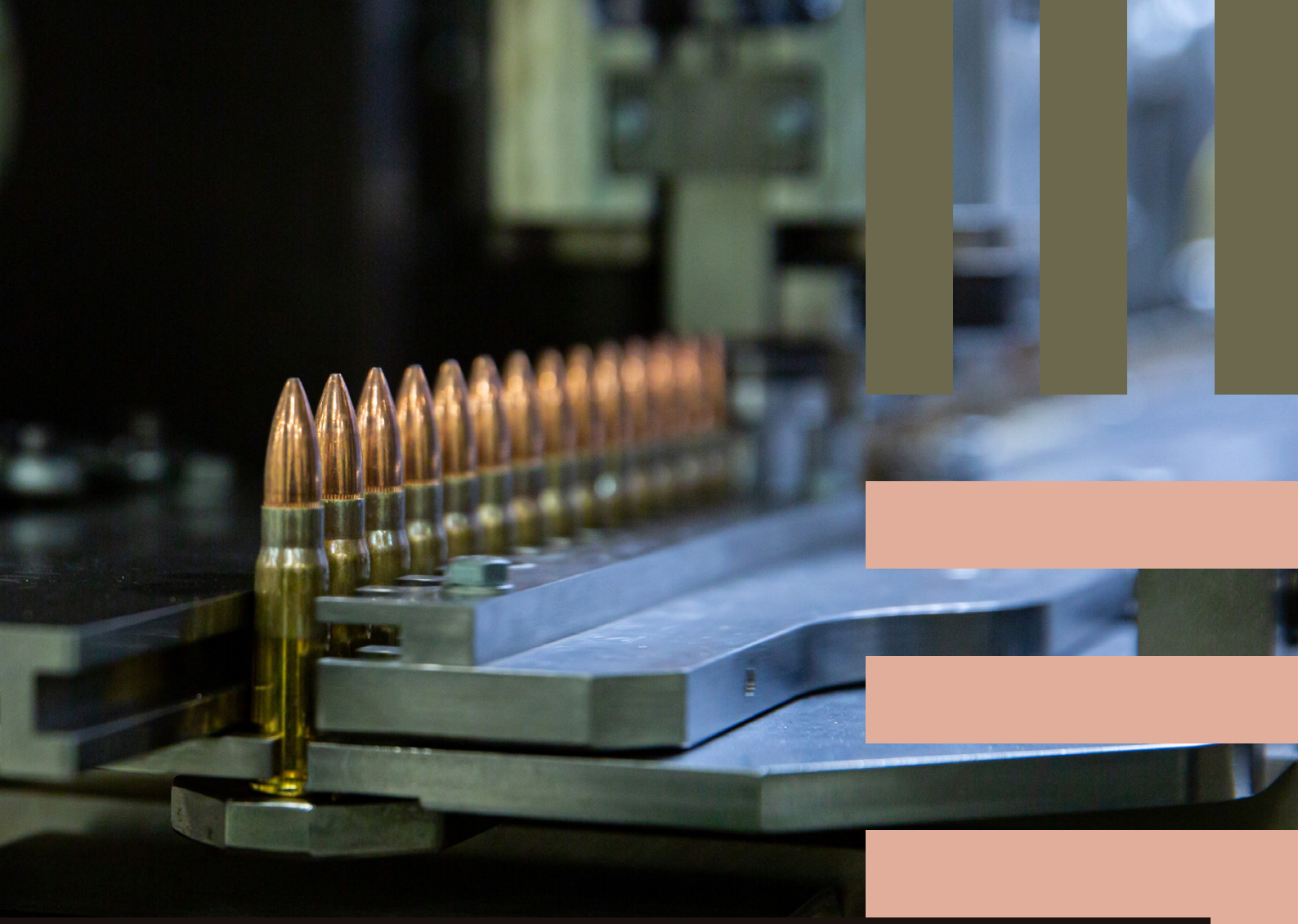

Due diligence and corporate accountability in the arms value chain

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Editorial

Due diligence and corporate accountability in the arms value chain

Antwerp - Brussels, March 2024

Front cover image:
Production bullet for automatic rifle. 7.62 mm bullet for automatic rifle - Adobestock

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Suggested citation:
L. Lizarazo-Rodriguez, IPIS. Due diligence and corporate accountability in the arms value chain. IPIS, VUB, March 2024.

The authors thank Hans Lammerant and Didier Verbruggen for their useful and insightful comments and suggestions.

International Peace Information Service (IPIS) is an independent research institute providing tailored information, analysis, capacity enhancement and policy advice to support those actors who want to realize a vision of durable peace, sustainable development and the fulfilment of human rights.

D/2024/4320/02

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This publication has been produced with the financial assistance of the Belgian Directorate-General for Development Cooperation and Humanitarian Aid (DGD). The contents of this document are the sole responsibility of the authors and IPIS and can under no circumstances be regarded as reflecting the position of the Belgian Development Cooperation or of the Brussels School of Governance (Vrije Universiteit Brussel).

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Table of contents

List of acronyms

ALC	Arms Life Cycle
ATT	Arms Trade Treaty
BHR	Business and Human Rights
BPUFF	Basic Principles on the Use of Force and Firearms
CAHRAS	Conflict-Affected and High-Risk Areas
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on ESCR
CFSP	European Union Common Foreign and Security Programme
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CSRD	EU Corporate Responsibility Reporting Directive
EC	European Commission
ECCHR	European Centre for Constitutional and Human Rights
ECDR	European Commission Delegated Regulation
ECOWAS	Economic Community of West African States
EDF	European Defence Fund
EEA	European Economic Area
ESRS	European Sustainability Reporting Standards
EU	European Union
GC	General Comment
GVC	Global Value Chain
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICP	Internal Compliance Programme
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILO	International Labor Organisation
LEO	Law Enforcement Officials
NGO	Non-Governmental Organisation
OCSE	Organization for Security and Co-operation in Europe
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
PLCAA	Protection of Lawful Commerce in Arms Act
PRI	United Nations Principles for Responsible Investment
SALW	Small Arms and Light Weapons
SDG	Sustainable Development Goal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
UNGC	United Nations Global Compact
UNGP	United Nations Guiding Principles on Business and Human Rights

Executive summary

This report presents a comprehensive overview of the possibility and necessity of establishing corporate responsibility and accountability of companies active in the arms value chain. The main questions are, first, to what extent are the companies active in the arms value chains required to incorporate into their risk assessments, the adverse and salient human rights impacts that their activities or the misuse of their products may cause or contribute to, and second, to what extent should the duty of conducting such risk assessments to obtain export licences entail the obligation to implement due diligence procedures.

The international legal framework consists of several mandatory and non-mandatory instruments that require states to regulate arms value chains, notably under international human rights law, international humanitarian law and international arms control law such as the Arms Trade Treaty or the Firearms Protocol. On the regional level, EU law provides the most elaborate rules on arms transfer control, which nevertheless leaves some assessments under the responsibility of companies themselves.

The study is based on a review of the academic and grey literature as well as international and regional legislation, to outline the current situation and identify existing gaps to be filled by states, international organisations and companies regarding human rights compliance in the arms value chain. The analysed areas are International Human Rights Law and International Humanitarian Law. This report takes a global perspective and refers to specific countries (or to regions) as examples for illustrative purposes. Likewise, this study focuses on the end-use of exported conventional arms (their parts, components and ammunition) and dual-use goods that may have an impact on human dignity. Other arms that are regulated by treaties imposing a total ban on the production, use, development, transfer, or storage (e.g. chemical and biological weapons, anti-personnel mines, and cluster bombs), are not part of this analysis. This study focuses on specific phases of the arms value chain, notably the tiers related to the production, transfer, end-use and post-delivery phase of arms. Other tiers, such as the sourcing of minerals or waste management are not covered and therefore, environmental, climate and governance aspects that are relevant for these value chains, are not addressed in this study.

▲ **Focus of the study: Downstream value chain**

From a normative perspective, the study investigates the control frameworks in place and the responsibilities that companies have under (domestic) arms control law, such as a duty to provide information to the state authorities. From the analysis of the current regulatory framework, there are grounds for implementing adequate due diligence procedures, particularly in countries where companies' human rights due diligence duties have already been introduced through Internal Compliance Programmes (ICPs).

This study highlights state duties to regulate corporate conduct in the arms value chain as part of their due diligence and to align with Sustainable Development Goal 16 (SDG 16) which aims at significantly reducing all forms of violence, and illicit financial and arms flows (see targets 16.1 and 16.4). States are expected to progressively implement or consider introducing due diligence duties in the arms value chain. This has triggered discussions about this sector, and particularly about its geopolitical complexities. However, from a human rights perspective, it is clear that states and companies have shared responsibilities regarding the respect of human rights throughout the whole arms value chain. The next paragraphs summarise the duties of states and companies in the arms value chain, following the three pillars of the UNGPs.

Regarding **Pillar I**, a state's duty of care entails the regulation of companies' duties to align their behaviour with international standards, and to define their responsibility and liability when they are involved in adverse impacts to human rights. Considering the nature of the commercialised products by arms value chains, and their potentially devastating impacts on human dignity, states have a stricter obligation to control operators in this sector. This obligation is even stronger when these products are destined for conflict-affected and high-risks areas (CAHRAS), with an aggravated risk of international human rights and humanitarian law violations. Although carrying out impact assessments to obtain export licences is mandatory, states are expected to require companies in the arms value chain to implement ongoing due diligence processes assessing upstream and downstream sustainability practices, in addition to state export controls.

Three aspects further increase the level of the responsibility of states to regulate the arms value chain.

1. Many arms are destined for or used by state agents.
2. Arms are frequently destined to CAHRAS, which entails a strengthened duty of care.
3. Many companies controlling arms value chains are state-owned.

These characteristics imply that the obligation of states to regulate operations of companies in the arms sector to prevent misuse, diversion or smuggling, and to analyse risks in terms of human dignity, applies more strongly than in other economic sectors.

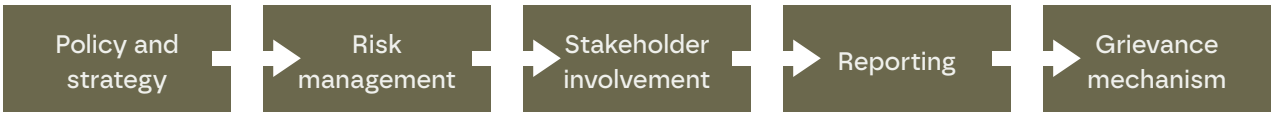
Regarding **Pillar II**, the corporate responsibility to respect international standards on international human rights and humanitarian law, among others, is complementary but independent from a state's duty to protect and fulfil its due diligence obligations established in international law. The Organisation for Economic Cooperation and Development (OECD) has emphasised that the "independent" character of corporate responsibility does not shift the duties of states to companies. This means that companies are not accountable for failures of the state or for or for the inability of victims to hold states accountable. Companies are responsible for their actions and accountable for their conduct.

Companies' legal duty of care arises when state due diligence obligations under international law are concretised through the establishment of norms holding companies in their jurisdiction accountable for respecting international human rights and humanitarian law. The United Nations Guiding Principles on Business and Human Rights (UNGPs) emphasise that corporate responsibility to respect human rights is a global standard of conduct applying to all companies, while the scope of requirements depends on circumstances and the severity of possible impacts (Principle 14). The corporate standard of conduct is given by the international legal framework, even when the national context prevents companies to implement this (UNGP, Principle 11).

The UNGPs recall two concrete duties that should guide the way companies conduct the analysis of their risks:

- A passive duty to avoid causing or contributing to adverse human rights impacts through their own activities (UNGPs, Principle 11).
- An active duty to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services in their value chain, even if their partners have not contributed to those impacts (UNGPs, Principle 13).

Compliance with export licence requirements does not discharge leading companies in the arms value chain of their responsibility to respect human rights and humanitarian law. Risk assessments conducted by the state granting a licence does not discharge companies of their duty to address actual or potential adverse impacts they may cause as a result of their activities or products. This includes the use, misuse, diversion, unauthorised, or illegal use of arms. Companies are expected to implement due diligence procedures aligned with international standards and national or regional organisations' binding norms.



▲ **The Corporate Due Diligence process**

The due diligence process entails the steps visualised above: First, companies are expected to establish publicly available policy commitments related to corporate sustainable conduct aligned with international standards, and take concrete steps to implement them. Companies are expected to train their personnel to comply with international standards, and to exercise leverage to minimise risks for themselves and for others.

Second, companies are expected to conduct permanent risk assessments of salient and severe risks in the value chain. This operational assessment should cover activities in the entire value chain, from the sourcing of raw materials until the post-delivery phase of transfers, including the role of investors and funders of operations. Special attention should be paid to adverse impacts to vulnerable communities, particularly in CAHRAS.

Third, until now, stakeholder consultation and access to information has not been part of arms export licencing processes. This gap is evaluated from two opposing perspectives. Civil society expects participation channels in matters of general interest. States deem it not convenient to open channels of stakeholder involvement and transparency in the licencing processes given their geopolitical interests. However, several United Nations (UN) documents reiterate the importance of facilitating access to information and participation to CSOs as they can better inform leading arms value chain companies about the human rights and humanitarian risks of their operations. As such, they will be able to report in a more comprehensive manner on adverse impacts they could not have identified without stakeholder input. Stakeholders are agents of transformation by promoting and managing multi-stakeholder initiatives, that gather parties interested in enforcing international standards in any value chain with a transnational reach.

Many countries, such as those in the EU, require certain companies in the arms value chain to release sustainability reports as part of their due diligence to communicate to shareholders and stakeholders how they address their risks and to render this information transparent, public and accountable. So far, the EU

is the only regional organisation where reporting requirements concern large and listed small and medium size companies in the arms value chain. It is ***sector agnostic***, this is, companies active in any economic sector are expected to report on how they address their sustainability risks.

Finally, Pillar III on access to justice, ensures that due diligence processes are not dead letter. Companies leading arms value chains are expected to create complaint or grievance mechanisms about the impacts that they, their subsidiaries or their business partners, cause or may cause to the communities where they operate or where their products are used. They aim at being the official platform for stakeholders and affected persons to raise concerns, provide feedback, and claim remedies when they have been affected. Grievance mechanisms should avoid rigid legal formalities and allow for preventive measures correcting and avoiding adverse impacts before a harm occurs. When grievance mechanisms are insufficient to prevent or mitigate harm, states need judicial or non-judicial mechanisms to guarantee the protection of human dignity of affected persons. Effective access to state-based remedy mechanisms is a crucial complement to businesses' due diligence responsibilities.

This report presents a non-exhaustive summary of the way states have fulfilled the duty to guarantee access to justice. It illustrates that complaint channels generally do not connect with the obligation of companies to implement due diligence mechanisms, which means that there is still a long way to go in the arms sector. By conducting a panoramic view on how courts and other grievance mechanisms have decided in cases relating to the accountability of companies active in the arms value chain, it shows that the few cases have been framed in human rights or humanitarian law terms, and that cases on the need of conducting due diligence on the activities of arms value chains have rarely been considered.

In conclusion, preventing and remedying the misuse of transferred arms, and serious breaches of international human rights and humanitarian law, are a shared responsibility of both states and companies active in arms value chains. The idea of shared responsibility is an essential contribution to the debate on due diligence and corporate accountability in the arms value chain. This study shows that to some extent, this understanding is already emerging in arms transfer control mechanisms. Some governments, e.g. in Flanders, already consider due diligence as a requirement for obtaining an export licence. The next step would be to require due diligence for all the activities of a corporate group or a value chain, and not only for licencing purposes.

Finally, responsible corporate behaviour also implies engagement with stakeholders and representatives of civil society. Leading private, public or state-owned companies in arms value chains need to find channels of engagement with stakeholders, and to create mechanisms for redress or remediation, to benefit from the feedback of civil society organisations when conducting impact assessments of their transnational activities, and to provide opportune responses to affected persons' claims.

Introduction

This paper presents a broad and comprehensive overview of the discussions surrounding the possibility and necessity of establishing corporate responsibility mechanisms for companies active in the arms value chain, in light of the possible negative impacts their activities, and/or the use of their products, may have on human rights, particularly in countries in a state of armed conflict. This responsibility can be assumed through the implementation of due diligence mechanisms for the identification and management of risks related to these areas, but also through other mechanisms.

A milestone in the debate was when in 2019 the European Centre for Constitutional and Human Rights (ECCHR) and partner organisations officially requested the International Criminal Court (ICC) to hold governments accountable for approving export licences for arms allegedly used in the commission of war crimes. Their request also called upon the ICC to investigate the liability of corporate executives of arms producers and exporters.[3] This issue begs two interrelated questions that are central to the present analysis. First, to what extent are the companies active in the arms value chains required to incorporate into their risk assessments, the adverse and salient human rights impacts that their activities or the use or misuse of their products may cause or contribute to, and second, to what extent should the duty of conducting such risk assessments to obtain export licences entail the obligation to implement due diligence procedures.

The need to hold companies active in the arms value chain accountable (Ambos, 2020)[4] has been debated in multiple arenas and several perspectives on the matter have emerged. Salient issues include the accountability of private military and security companies for the end-use of arms resulting in violations of human rights and international humanitarian law (De Groot & Regilme, 2022; Lopez, 2017; Tougas, 2022), the role of producers and exporters (Kanetake & Ryngaert, 2023), the extraterritorial obligations of states regarding the arms trade (Aksenova, Marina, 2022) and the higher level of care companies should take in relation to conflict-affected and high-risk areas (CAHRAS) (Alwishewa, 2021). Furthermore, cases of liability and litigation in the sector have been reported (Schliemann & Bryk, 2019). Progressively, investors and financial companies that support arms producers or exporters, are appearing on the radar (Oudes & Slijper, 2023).

The specificity of the arms value chain

Numerous authors argue in favour of developing corporate accountability schemes applicable to the arms value chain and devote a lot of attention to the factors that purportedly hinder the imposition and implementation of such corporate duties. Frequently the risks related to the use of arms have not been the focus of literature from the Business and Human Rights (BHR) framework.[5] It can be explained by the fact that arms exports are connected with (exporting) states' geopolitical, national security and strategic interests, and with their defence and foreign policies (Schliemann & Bryk, 2019).[6] This is, as arms exports are highly regulated and subjected to a strict licencing process and the state must control that these licences are only granted after conducting an impact

3 The European Center for Constitutional and Human Rights (ECCHR), Mwatana for Human Rights from Yemen, the International Secretariat of Amnesty International, the Campaign Against Arms Trade (CAAT), Centre d'Estudis per la Pau J.M. Delàs (Centre Delàs), and Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L.). Case Report: Made in Europe, bombed in Yemen: How the ICC could tackle the responsibility of arms exporters and government officials. https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf

4 (Katz, 2022a) p.4 refers to companies that provide defense articles and services on the global market. This study systematically refers to value chains to indicate all companies active in the value chain that produce and export conventional arms, their parts and ammunition, as well as value chains that produce, trade and export goods that may have a dual use for defence purposes.

5 This framework, based on the United Nations Guiding Principles on Business and Human Rights (UNGPs), is grounded on three pillars: the obligation of states to regulate the conduct of companies headquartered in their territory; the establishment of mechanisms to hold these companies accountable for violations of human rights, including international humanitarian and environmental law; and the obligation of states and companies to create mechanisms to ensure an effective remedy when adverse impacts occur.

6 See also Working Group on the issue of human rights and transnational corporations and other business enterprises (2022). *Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights – Information Note by the UN Working Group on Business and Human Rights,* p. 4.

assessment of the activities involved, the corporate accountability has somehow gone unnoticed.

Some stakeholders oppose the regulation of corporate accountability in the arms value chain, emphasising precisely that arms export controls are a function and prerogative of the state due to their close links with geopolitical and foreign policy objectives. In this line of reasoning, links to state interests would exonerate the arms value chain from separate human rights impact assessments.[7]

So far, arms exporters have been operating under the state regulatory shield, especially through the export risk assessments conducted during the licencing process. When companies export arms without a valid export licence or in violation of the terms of the licence, this can undoubtedly result in criminal liability. Controversy surrounds the question of whether granting an export licence could transfer the responsibility to the state.[8] Furthermore, it is questioned whether due diligence obligations of the leading companies of arms value chains could "override" the authorisation granted by the state. This is because companies acting in good faith could legitimately afford to trust the risk assessment undertaken by a "functioning state under the rule of law", which may have implications from a criminal law perspective, when obtaining a licence could discard criminal responsibility of companies (Ambos, 2020).g

It has been highlighted the "lack of political will" of states to restrict arms transfers on human rights grounds.[9] Some reasons that explain this "symbiotic relationship" between the state as a controller and the economic actors involved in the sector are the prominent role of arms value chains for some states, and the use of arms transfers as tools of geopolitical diplomacy as they are connected to national security interests abroad (Schliemann & Bryk, 2019, p. 7). Some Non-governmental organisations (NGOs) align with this critical view of the intertwining and interdependency of states and the arms sector, flagging the latter's economic and military relevance for some states.[10] The close linkage between the arms value chain and states implies that arms export decisions are not exclusively dictated by their political considerations and political will, as economic profit plays an important role with the arms sector exerting considerable influence in that regard (Alwishewa, 2021, pp. 529, 533). The other side of the coin is that the intertwining with the state's role of the arms value chain, in addition to its political and economic power, should confer the latter a corresponding degree of accountability. From this perspective, such accountability would be commensurate with the economic profits the sector derives from its activities (Alwishewa, 2021, p. 537).

Whether it is an obligation or not, the fact that a state grants a valid export licence does not prevent a company to independently implement a corporate accountability mechanism to fulfil its human rights responsibilities (Amnesty International, 2019). Corporate accountability mechanisms do complement the state duty to control exports for a variety of reasons. Firstly, there is a period between the granting of the (individual) licence and the actual export as export licences can be valid for several years (European Center for Constitutional and Human Rights et al., 2022). Therefore, a licencing authority's risk assessment before authorisation of an export might be obsolete at the time of actual delivery (Schliemann & Bryk, 2019, p. 22) Secondly, the obligation of states, and its implementation by state authorities, to ensure responsible arms transfers might not sufficiently guarantee that human rights risks involved in a transaction are well identified and addressed (Katz, 2022a, p. 16; Schliemann & Bryk, 2019, pp. 19, 26). Sometimes, licences do not follow a strict test in accordance with criteria related to human rights and humanitarian law.[11] In addition, even in

7 See Lockheed Martin Corporation (2022). *Proxy Statement & Notice of Annual Meeting of Stockholders,* https://www.sec.gov/Archives/edgar/data/936468/000093646822000033/lmt2022proxystatement.pdf, p. 77.

8 Assemblée Nationale/Commission des Affaires Etrangères (2020). *Rapport d'information sur le contrôle des exportations d'armement,* https://www.assemblee-nationale.fr/dyn/opendata/RINFANR5L15B3581.html.

9 Working Group on the issue of human rights and transnational corporations and other business enterprises (2022). *Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights – Information Note by the UN Working Group on Business and Human Rights,* p. 4.

10 Campaign Against Arms Trade (2020). *The Revolving Door,* https://caat.org.uk/challenges/government-support/political-influence/revolving-door/. Amnesty International (2019). *Outsourcing Responsibility: Human Rights Policies in the Defence Sector.* ACT 30/0893/2019, p. 10

11 Working Group on the issue of human rights and transnational corporations and other business enterprises (2022). *Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights – Information Note by the UN Working Group on Business and Human Rights,* p. 1, 4.

the case of states operating according to the rule of law, their risk assessments and decisions authorising arms transfers have been contested and should not necessarily be relied on (Katz, 2022b).

From this perspective, the arms value chain would require an extra layer of protection because of the "significant destructive potential" of the products involved, their possibly "severe human rights and humanitarian implications", and "the irreversible consequences" of failing to conduct comprehensive and accurate risk assessments (Alwishewa, 2021, p. 537; Schliemann & Bryk, 2019, p. 22). This extra layer would consist of corporate accountability, as an addition to mechanisms to hold states accountable when they grant licences without adequately covering human rights and humanitarian risks in their assessments.[12]

To flesh out the notion of corporate accountability, the concept of due diligence has come to the fore in many discussions. Due diligence is a permanent process that goes beyond a single ex-ante risk assessment. It should consider a company's operations on an ongoing basis and establish checking mechanisms to timely identify and address or mitigate risks. However, its implementation may require a more robust regulatory framework and the establishment or improvement of the judicial review of licencing decisions (Schliemann & Bryk, 2019, p. 19). Some critics take a sceptical stance towards the problem solving potential of corporate accountability and due diligence in the arms value chain because of high risks of corruption (Perlo-Freeman, 2020, pp. 5–19).

The literature also highlights various incentives for the arms sector to conduct adequate human rights, humanitarian, and environmental due diligence. The reasoning here is that an export licence is not a sufficient safeguard against various business risks connected to the adverse impacts of arms transfers (Katz, 2022a, p. 4). Companies in arms value chains are indeed exposed to multiple risks that can materialise if they are reluctant to implement due diligences procedures. Most often invoked are "reputational", "financial" and "governance" risks - e.g. investors might turn away and shareholders might question business practices - or "regulatory and policy risks" connected to the increasing focus on human rights impacts and the fact that export licences may be challenged in court. In addition, companies are exposed to "legal risks" through criminal and civil liability.[13] Given this high-risk business environment, the issue of the corporate accountability of arms exporters stretches well beyond the realm of theory.

Methodology, research design and scope of the paper

The methodology for this study consists of a review of academic and grey literature as well as international and regional legislation, with the purpose of outlining the current situation and identifying gaps that need to be filled by states, international organisations and companies regarding the implementation of mechanisms to hold leading companies of arms value chains accountable in two areas: international human rights law (IHRL) and International Humanitarian Law (IHL). This review includes a panoramic view on how courts and other grievance mechanisms have decided on this matter, particularly whether IHRL and IHL or due diligence requirements have been considered. This enables us to offer a panoramic view of the topic without, however, including the legal analysis of liability and the type of remedies needed goes beyond the scope of this study. Likewise, the research did not include case-law from human rights courts dealing with related topics, such as the right to life or the prohibition of torture.

The arms value chain is a vast field of study. The scope (geographic, product types, tiers of the value chain, thematic) of this analysis therefore is limited to the aspects most relevant for the issue of IHRL and IHL related accountability.

First, although the arms value chain encompasses multiple actors and jurisdictions, this report takes a global perspective, i.e. it does not focus on specific countries but refers to them (or to regions) for the sake of example.

Second, this study focusses on the end-use of exported conventional arms (their parts, components and ammunition) and dual-use goods that may have an impact on IHRL and IHL. Other arms, e.g. those that are regulated by treaties imposing a total ban on the production, use, development, transfer, or storage, such as chemical and biological weapons, anti-

12 Ibid.

13 Ibid., p. 9 – 10. See also: Assemblée Nationale/Commission des Affaires Etrangères (2020). *Rapport d'information sur le contrôle des exportations d'armement,* https://www.assemblee-nationale.fr/dyn/opendata/RINFANR5L15B3581.html.

personnel mines, and cluster bombs, are not part of this analysis.[14]

Third, the main focus of the analysis are the tiers in the arms value chain related to the transfer and the end-use of arms, namely the production process and the post-delivery phase. The analysis does not include other tiers of the chain, such as the sourcing of minerals required for production.

Fourth, environmental, climate and governance (anti-corruption) aspects are not part of this analysis even though they should be integrated in value chain due diligence, following the example of the European Union (EU) legislative initiatives that are progressively incorporating them. Neither does this study cover the topics of widespread, long-term, and severe damage to the natural environment potentially considered as war crimes,[15] nor the crime of ecocide.[16] The reason is twofold: first, the arms considered in this study do not have the capacity to cause such massive environmental impacts; second, this study does not cover pre-production (i.e. the supply of raw materials) or waste management activities.

1. International legal framework applying to the arms value chain

From the context we outlined above, it is clear that arms value chains are strongly connected with foreign security, strategic and geopolitical interests of states and of the international community. Simultaneously, the human cost of irresponsible arms transfers is undeniable. Therefore, arms value chain activities should align with international, regional, and domestic legal rules and standards seeking to ensure that arms transfers are in line with the states' international legal obligations concerning International Human Rights Law (IHRL) and International Humanitarian Law (IHL).

The following sections present the central aspects of international law establishing the framework of action for states to regulate arms value chains, and to incorporate into their operations risk assessments of adverse impacts they can cause on persons in their countries and in countries where their products are transferred to.

1.1. International Human Rights Law

The Universal Declaration of Human Rights (UDHR)[17] established human rights as general principles and standards that entitle human beings to be treated with dignity and without discrimination. These rights are all interrelated, interdependent, and indivisible and all the UN member states committed to apply the UDHR at the World Conference on Human Rights (Vienna 1993). The International Bill of Human Rights is the main framework that states must enforce, while non-state actors have the responsibility to respect human rights. The bill consists of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Although the IHRL frequently does not refer to regional human rights treaties or constitutions, they

14 The main treaties are: the Treaty on the Non-Proliferation of Nuclear Weapons (1968); the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on their Destruction (1972); the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997); the Convention on Cluster Munitions (2008).

15 See also the Draft Principles on the Protection of the Environment in Relation to Armed Conflicts adopted by the International Law Commission on 20 May 2022 (A/CN.4/L.968). The Rome Statute and related customary international law stipulate that attacks likely to cause such impacts can be considered as war crimes.

16 There are initiatives to have the crime of ecocide adopted by the Rome Statute.

17 UN Doc A/810 at 71 of 10.12.1948.

too are binding legal frameworks that shape the scope and content of state and non-state duties to respect human rights. Regional treaties and national constitutions cover the main rights protected by the international human rights bill, and other rights, such as the ones denominated as third generation human rights, e.g. environmental, consumer protection rights, the general interest and peace.

Regarding the arms value chains, several mandatory and non-mandatory instruments require states to regulate them. The Charter of the United Nations (UN Charter), Article 26, stipulates that "to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments".

The UN Human Rights Council Resolution on the impact of arms transfers on human rights[18] recalled that, where arms value chains are concerned, states are bound by the International Human Rights Bill, by IHL[19], but also by the Convention on the Rights of the Child (CRC), by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), among other instruments, and by the Vienna Declaration and Programme of Action. Furthermore, various Human Rights Council Resolutions[20] have been progressively shaping the duty of states to regulate the conduct of companies operating in the arms value chain in their jurisdictions. The Report of the Office of the UN High Commissioner for Human Rights (OHCHR)[21] on the impact of arms transfers on the enjoyment of human rights, also reiterated the relationship between arms transfers and human rights law, and recommended states to strengthen efforts to protect human rights. Since arms are used in conflict and non-conflict situations, their value chain bears a substantial risk that its products may be used to violate several human rights. For the same reason, the Committee on ESCR (CESCR) recommended states to conduct detailed impact assessments prior to granting licences for arms exports, and to refuse or suspend these licences when they note risks that the exports could lead to violations of human rights.[22] Within the framework of the IHRL, various comments and recommendations have been released by some treaty bodies.

The CESCR General Comment (GC-24)[23] on state obligations in the context of business activities highlighted that companies should assume their responsibilities regarding the ICESCR within their sphere of influence, even if states fail to regulate their activities within their jurisdiction. It concerned all economic activities at the national or transnational level, independently of capital ownership (including state-owned), size, sector, location, and structure (Paragraph 3). GC-24 also reminded states of the need to adopt crucial actions. First, they should impose sanctions if companies affect ESCR or if they don't act with due diligence to mitigate risks and affect human rights. These sanctions can involve the withdrawal of licences and subsidies, revision of public procurement contracts, export credits and other advantages (Paragraph 15). Second, states should require that companies exercise due diligence regarding any kind of business partner in the value chain they operate in (Paragraph 16) as states' extraterritorial obligations imply that they are expected to control companies' activities headquartered in their jurisdiction when they may influence situations located outside their territories (Paragraph 28). Third, states should require companies to "deploy their best efforts" to employ their leverage to ensure respect for IHRL, and to act with due diligence to identify, prevent and address abuses to the ESCR (Paragraph 33). Importantly, GC-24 among others aligns with GC-16 (2013) of the Committee on the Rights of the Child on state obligations regarding the impact of companies on children's rights.

18 UNGA A/HRC/RES/47/17 of 26.7.2021.

19 See The Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949, the Additional Protocols of 1977.

20 See UN HRC Resolutions 24/35 of 27.9.2013, 32/12 of 1.7.2016, 38/10 of 5.7.2018, 41/20 of 12.7.2019 and 45/13 of 6.10.2020. See also UNGA Resolution 74/64 of 12.12.2019 on youth, disarmament, and non-proliferation.

21 UN GA A/HRC/35/8 of 3.5.2017.

22 See E/C.12/GBR/CO/6, para. 12 (c), cited by UN GA A/HRC/35/8 of 3.5.2017

23 CESCR, E/C.12/GC/24 of 23.6.2017.

CEDAW General Recommendation 30/2013[24] on women in conflict prevention, conflict and post-conflict situations, also recalls states to address the gendered impact of international transfers of arms, especially small and illicit arms, in line with the Arms Trade Treaty (ATT). This implies the duty to monitor the impact of the misuse and illicit trade of small arms and light weapons (SALW) on women, particularly in CAHRAS, and to ensure that arms producers monitor and report on the use of their arms in violence against women.[25]

In summary, those GC and recommendations recall states that they are expected to meet the following expectations:

- To regulate the corporate conduct of companies operating the arms value chain.
- To incorporate children and women in the impact assessments of arms exports prior to issuing export licences, particularly to states where arms may be used to violate their rights.
- To adopt legislation to regulate arms exports with a robust gender perspective and to prohibit the sale or smuggling, export and/or transit of arms to countries where children may be recruited or used in conflicts.
- To report and publish information on weapon exports including information on the end-users if possible; to ensure transparency regarding arms transfers.

1.2. International Humanitarian Law

International humanitarian law (IHL) defines the responsibilities of states and non-state armed groups during a conflict to mitigate the adverse impacts of armed conflicts, particularly on civilians. If parties to a conflict do not respect IHL, they become criminally or civilly liable. The International Committee of the Red Cross (ICRC), whose legal mandate derives from the Geneva Conventions of 1949, their additional protocols and statutes, has developed the area known as IHL.

States are required to conduct due diligence to address risks concerning IHL violations within their jurisdiction and to prevent that the conduct of private actors involves state responsibility when such conduct is not regulated (Longobardo, Marco, 2019, pp. 79–80). In IHL there is, however, not a unique due diligence standard applicable to each obligation of conduct because the requirement of lower or higher standards will depend on the way substantial or primary obligations are established by the international conventions (Longobardo, Marco, 2019, p. 80) Although the IHL does not explicitly refer to arms value chains, states are expected to ensure that actors operating in their jurisdiction do not engage in conducts that breach IHL, particularly when their products are used in CAHRAS, where states' obligations under IHL and International Criminal Law apply.

As mentioned above, the ICC was activated in 2019 to hold government officials accountable for approving export licences for arms allegedly used in serious human rights breaches and was requested to investigate the possibility of holding corporate executives liable.[26] The petitions consider that government officials and corporate directors may be liable when arms are used for the commission of war crimes regulated by the Rome Statute, article 25(3)(c). In any case, it is necessary to demonstrate the knowledge and awareness of the consequences of the arms transfer on behalf of the actors involved (Bryk & Saage-Maaß, 2019, p. 1117)

1.3. The Arms Trade Treaty (ATT)

The Arms Trade Treaty (ATT)(2013) is the main global instrument regulating the international trade in conventional arms (Woolcott, 2021). States are

24 The UN Committee on the Elimination of All Forms of Discrimination Against Women adopted the CEDAW General Recommendation No 30 of 18.10.2013 on "Women in conflict prevention, conflict and post conflict situations" https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FGC%2F30&Lang=en

25 The Committee on the Rights of the Child has also issued several recommendations to states related to arms exports. See CRC/C/SWE/CO/5, para. 54, CRC/C/OPAC/NLD/CO/1, para. 24, CRC/C/OPAC/BRA/CO/1, para. 34, CRC/C/OPAC/TKM/CO/1, para. 24, CRC/C/DEU/CO/3-4, para. 77, cited by UN GA A/HRC/35/8 of 3.5.2017.

26 The European Center for Constitutional and Human Rights (ECCHR), Mwatana for Human Rights from Yemen, the International Secretariat of Amnesty International, the Campaign Against Arms Trade (CAAT), Centre d'Estudis per la Pau J.M. Delàs (Centre Delàs), and Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L.). *Case Report: Made in Europe, bombed in Yemen: How the ICC could tackle the responsibility of arms exporters and government officials.* https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf

required to establish "national control systems" to implement the treaty's provisions on arms transfers (export, import, transit, trans-shipment and brokering).[27] It has been ratified by 113 states including important arms producers. However, other important countries in the value chain have signed but still not ratified it.[28] The ATT aims at establishing the highest possible standards for regulating the international trade in conventional arms, and at preventing and eradicating their illicit trade as well as their diversion to the illicit market (Article 1).

In addition, through its preamble the ATT recognises various aspects that justify the need to hold states and companies accountable when they are involved in illicit and unregulated trade in conventional arms that has serious security, social, economic, and humanitarian consequences. The same goes for arms trade that affects peace and security, development and IHRL, with particular attention to women and children, because these are pillars of the UN system. Importantly, the ATT assigns a prominent role to regional organisations in assisting states parties with the implementation of the treaty, and to civil society organisations (CSOs) and the industry, as they can raise awareness on the relevance of implementing the ATT.

Article 6 of the treaty establishes concrete prohibitions on international arms transfers (Vestner, 2019). It requires states not to authorise any transfer of conventional arms if the transfer would violate their obligations related to Chapter VII of the UN Charter, in particular arms embargoes, or their obligations under international agreements, or if they have knowledge that the transferred arms would be used in the commission of international crimes or breaches of IHL.

Article 7 requires exporting states parties to establish a procedure prior to authorisation of the export of conventional arms in an objective and non-discriminatory manner. Considering inter alia information provided by the importing state, the exporting state should assess the potential that the conventional arms or items would undermine peace and security, and whether they could be used to commit or facilitate, among others, a serious violation of IHL or IHRL. If the overriding risk of any of these negative consequences is identified, the export licence should not be granted even though the required assessment includes potential mitigating measures regarding identified risks. The state should also, upon request, disclose relevant information about the authorisation in question to the importing state party, to the transit or trans-shipment states parties, in compliance with its national laws, practices, or policies. The licence can also be re-evaluated if this appears to be necessary from new information.

The treaty further highlights the relevance of regional organisations for its implementation by states. However, besides the EU (see below) only two regional organisations have taken steps in this direction, namely by setting up criteria for states to control the trade in conventional arms, dual-use goods or specific categories of arms such as small arms and light weapons (SALW).[29] Firstly, the Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006), Article 6 (3) requires states to forbid arms transfers if their use can violate IHL or affect human and peoples' rights and freedoms. Secondly, the Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and All Parts and Components that Can Be Used for their Manufacture, Repair and Assembly (2010), aims at protecting people in the region who can be affected by the illicit trade and trafficking in SALW. As a result, states must deny the authorisation for the transfer when the arms concerned might be used to commit violations of IHL and IHRL.

Although the ATT shows clear progress in the regulation of the arms sector, various aspects of it have raised concerns. First, the introduction of possible mitigation measures as part of the risk assessment could create normative loopholes vis-à-vis the protection of persons (Kytömäki, 2015). Second, the export criteria adopted to assess the risks of arms

27 See Principle 6 of the Preamble of the Arms Trade Treaty (ATT) as well as Art. 5(2) ATT. The UN Resolution A/HRC/35/8, footnote 3, clarifies that "arms transfer" generally covers the export, import, sale, lease or loan of arms from the jurisdiction and/or control of one state to that of another. See also (Caonero & Wetterwik, 2021) p. 93.

28 At the time of writing, this is the case for Angola, Bahrain, Bangladesh, Burundi, Cambodia, Colombia, Comoros, Republic of the Congo, Djibouti, Eswatini, Haiti, Israel, Kiribati, Libya, Malawi, Malaysia, Mongolia, Nauru, Rwanda, Singapore, Tanzania, Thailand, Turkey, Ukraine, United Arab Emirates, United States, Vanuatu, Zimbabwe.

29 UN General Assembly A/HRC/35/8 of 3.5.2017. The Report of the Office of the United Nations (UN) High Commissioner for Human Rights (OHCHR) on the Impact of arms transfers on the enjoyment of human rights.

being used for serious violations of IHL and IHRL remain unclear (Vestner, 2019). Third, although the ATT establishes that states have the duty to disclose information, and to prepare an annual report on the export licences assessed in the preceding year (Coetzee, 2014; Martínez, 2018, p. 206), this information is only destined for the treaty secretariat and the countries involved in arms transfers, and does not include CSOs as addressees, which is not in line with the preamble.

1.4. Protocol against the illicit manufacturing of and trafficking in firearms, their parts, components, and ammunition (the Firearms Protocol)

The Firearms Protocol[30] aims at fostering and strengthening inter-state cooperation to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts, and components. It requires states parties to regulate the economic sector to prevent the diversion of arms and trafficking of arms. To date, 122 states have ratified it but, as is also the case with the ATT, various countries playing a central role in the arms global value chains have not signed or adhered to it.[31]

Article 3 defines what constitutes "illicit manufacturing" or assembling of firearms. Illicit manufacturing means that parts and components or ammunition of firearms were illicitly trafficked, that firearms are manufactured without a licence or authorisation from the state, or that they are not marked at the time of manufacture. The notion of "illicit trafficking" in the protocol means cross-border imports, exports, acquisitions, sales, deliveries, movements or transfers of firearms, in case one of the states concerned does not authorise it or if the firearms are not duly marked. In addition, states parties need to implement a "tracing" process to systematically track firearms.

Regarding the scope of application, the protocol does not cover state-to-state transactions or state transfers when these norms "would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations" (Art. 4.2). It further requires states to regulate certain aspects of the arms value chain that may pose a greater risk to citizens of the countries where the weapons are to be used.[32] This is, states are required to:

- Adopt criminal offences when (economic) state or non-state actors commit illicit manufacturing or trafficking of firearms (Art. 5). This includes conducts that supports or directs these activities.
- Implement "an effective system of export and import licencing or authorization, measures on international transit, for the transfer of firearms" (Article 10).
- Verify, prior to "issuing export licences or authorizations for shipments" that importing states have also issued the corresponding licences or authorisations and that transit states have notified their knowledge of the transit and they do not object it (Article 10).
- Ensure that licencing or authorisation procedures are secure and that the authenticity of licencing or authorisation documents can be verified or validated. Moreover, states must adopt security and preventive measures to detect, prevent and eliminate the theft, loss, or diversion of and the illicit manufacturing of and trafficking in firearms (Article. 11).
- Support and cooperate with manufacturers, dealers, importers, exporters, brokers, and commercial carriers of firearms to prevent and detect the illicit activities regulated by the Protocol (Article 13.3), and cooperate, providing technical assistance when possible, with other states to improve the control mechanisms (Article 14).
- Consider the regulation of activities of brokers operating within their jurisdiction, such as requiring mandatory registration, licencing or previous authorisation, or "disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction." (Article 15).

30 This protocol supplements The United Nations Convention Against Transnational Organized Crime. Adopted by Resolution 55/255 of 31.5. 2001 and entered into force on 3.7.2005.

31 This is the case of the USA, the UK, China, Japan, Canada, and Australia.

32 States can establish simplified procedures for the temporary import and export and the transit of firearms for verifiable lawful purposes (hunting, sport shooting, evaluation, exhibitions, or repairs).

Regarding the exchange of information, the protocol (article 12) stipulates that, considering articles 27-8 of the Convention against Transnational Organised Crime, states are expected to share information among themselves on domestic legal and administrative systems, and case-specific authorized producers, dealers, importers, and exporters. However, states are also required to "guarantee the confidentiality of and comply with any restrictions on the use of information that it receives from another State Party pursuant to this article, including proprietary information pertaining to commercial transactions, if requested to do so by the State Party providing the information." This article appears to prioritise geopolitical and security interests by permitting the confidentiality of information about the companies involved in each transaction. However, under Article 28 of the Convention, disclosure may be made also for scientific and academic purposes and for the purposes of international or regional regulation or surveillance of unlawful activities. From a corporate accountability viewpoint, both the Convention and the Protocol did not establish options for stakeholders to get access to the companies that are active in specific transactions.

2. The EU Legal framework

This section examines the EU legal framework as it is the most elaborate regional arms control regime. The EU legal framework sets out member states' obligations regarding the arms export control systems they need to have in place. Thereby, it addresses the respective responsibilities of states and companies in arms export controls, e.g. in the licencing process.

In the EU, several instruments apply to the arms trade sector: the EU Common Position 2008/944/CFSP regulates the control of exports of military technology and equipment;[33] Directive 2009/43/EC lays down the conditions for intra-EU transfers of defence-related products;[34] and EU Regulation 2021/821[35] (EU Dual-Use Regulation) establishes a regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items.

EU Member states are required to assess export licence applications against certain criteria, such as those contained in the EU Common Position.[36] Licencing is required to export certain categories of arms that feature on control lists maintained on a national, supranational and international level.[37] Items not included in control lists can still require an export licence when they are captured under so-called "catch-all" clauses covering non-listed goods that are intended for a military end-use for instance.[38] The "catch-all" clauses may have a limited scope of application.[39] Products that feature on a control list

33 Council Common Position 2008/944/CFSP of 8.12.2008. *OJ L 335, 13.12.2008, p. 99–103*

34 Directive 2009/43/EC of the European Parliament and of the Council of 6.5.2009 simplifying terms and conditions of transfers of defence-related products within the Community. OJ L 146, 10.6.2009

35 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20.5.2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items. PE/54/2020/REV/2 *OJ L 206, 11.6.2021, p. 1–461*

36 See Art. 1 and 2 of EU Common Position 2008/944/CFSP.

37 These control lists are linked to legal instruments requiring licences. For example, the national control lists of EU countries concerning the export of conventional military arms are based on the Common Military List of the EU, adopted by the Council (2020/C 85/01). For the export control of dual-use items within the EU legal framework, the controlled items are listed in Annex I to the Dual-Use Regulation. Controlled civilian firearms are listed in Annex I to Regulation (EU) No 258/2012 of the European Parliament and of the Council of 14.3.2012 implementing Article 10 of the UN Firearms Protocol, and establishing export authorisation, and import and transit measures for firearms, their parts, components, and ammunition. The ATT, for the controlled conventional arms categories of Art. 2(1) (a)-(g), refers to major conventional arms covered by the UN Register of Conventional Arms (see Art. 5(3) ATT). Also, there is the Munitions List of the Wassenaar Arrangement.

38 See e.g., Art. 4 of the EU Dual-Use Regulation.

39 The EU Dual-Use Regulation only applies its catch-all clause concerning intended military end-use (Art. 4(1)(b) of the Dual-Use Regulation) to cases where "the purchasing country or country of destination is subject to an arms embargo."

may be exempted from the licencing requirement, e.g. in cases of certain intra-EU transfers.[40]

2.1. Types of licences

Member states issue various sorts of export licences with varying levels of control. For certain exports or transfers state control is limited, in which case, companies may have (self) control responsibilities of their own. This section provides an overview of arms export licencing systems. It covers licencing systems applicable to the export of conventional arms designed for military use. This includes certain SALW but not firearms for civilian use.[41] The EU Dual-Use Regulation regulates the licencing system for the transfer and export of dual-use items, which comprises the same types of licences as for conventional military arms, i.e. individual, global, and general licences.[42]

EU Directive 2009/43/EC introduced global and general transfer licences as two additional licences that EU member states must make available for transfers within the EU, next to individual licences.[43] They may be used for exports to non-EU countries, in which case member states commonly restrict the application of general – but not of global – licences to exports to specific non-EU countries such as European Economic Area (EEA) states or to NATO members.[44]

Global licences authorise individual applicants to transfer or export specific products or even, in contrast to individual licences, specified categories of products. Contrary to individual licences, global licences allow an indefinite number of transfers or exports of an unspecified quantity of these products to more than one specified and authorised (category of) recipient(s) in more than one (member) state, without the need for a separate licence for each single transfer or export.[45] Global licences are granted for a period of three years with the possibility of renewal.

Unlike individual and global licences, *general licences* are neither applied for or granted. They are published by the EU member states and sellers that meet the attached conditions are allowed directly – without prior authorisation by the licencing authorities – to transfer or export those (categories of) products that are specified per different type of published general licence to certain recipients in another (member) state.[46] EU member states have to publish various types of general licences, one of them covering the case that the recipient is a certified company, i.e. a company deemed reliable in the receiving EU member state.[47] Another general licence type is for transfers between member states involved in intergovernmental cooperation programmes.[48] In contrast to global licences, EU member states usually restrict the use of general licences to certain categories of arms of the EU's Common Military List, with differences depending on the type of general licence (Cops et al., 2017, p. 99 et seq.).

The use of global and general licences goes hand in hand with limited state control concerning ensuing transfers or exports. In the case of global licences, there is no concrete state control before every individual transfer or export concerning the end-use in the final destination, and, in the case of general licences, there is no a priori state control at all. This means that states are only informed about a transfer or export based on these licences after it has occurred.[49] In case a transferred product is further

40 Intra-EU transfers of conventional military arms from the Common Military List of the EU may be exempt from the authorisation requirement in certain cases (see Art. 4(2) of Directive 2009/43/EC of the European Parliament and of the Council of 6.5.2009 simplifying terms and conditions of transfers of defence-related products within the Community). Intra-EU transfers of dual-use items are exempt from licencing requirements, except for certain sensitive items listed in Annex IV of the Dual-Use Regulation, see Art. 11(1) of the Dual-Use Regulation.

41 The EU legal framework distinguishes between firearms for military and civilian use, see, for example, Art. 3(1)(b) Regulation (EU) No 258/2012. Directive 2009/43/EC and the EU Common Position 2008/944/CFSP only apply to the arms with military use of the Common Military List of the EU.

42 See Art. 2(12), (13), (16) and Art. 12 of the EU Dual-Use Regulation.

43 *Individual licences* are issued to an individual applicant for a single transfer or export to one specific recipient of a specified quantity of specific products (Directive 2009/43/EC, Art. 7).

44 For general licences, see: (Cops et al., 2017, p. 104 et seq.). For global licences, see *ibid*., p. 109-10.

45 See Art. 6 of Directive 2009/43/EC.

46 See Art. 5(1) of Directive 2009/43/EC.

47 Art. 5(2)(b) and 9(2) of Directive 2009/43/EC.

48 Art. 5(3) of Directive 2009/43/EC.

49 See the reporting requirements concerning the use of the licences referred to in Art. 8(3) of Directive 2009/43/EC.

exported to a non-EU country (possibly after being integrated into a completed product), the export is subject to the (a priori) export control of the recipient EU state applying its own standards. In these cases, the initial EU member state can impose (re-)export restrictions.[50] But the control of compliance with such restrictions is limited to the receiving member state requiring a declaration from the recipient to this effect.[51] The use of global and general licences is said to grant the arms trade sector a substantial degree of self-control regarding end-use risks (Grebe & Roßner, 2013, p. 15).

2.2. End-use/r control and risk assessment

Even when there is concrete a priori control for every transfer concerning the end-use and the risk of diversion by the state from which the products are first transferred or exported, as is the case for individual licences, gaps in controls remain. The risk assessment criteria against which EU member states have to evaluate licencing applications, should apply with respect to the country of end-use of the product in the country of final destination. The problem lies in cases where a product is transferred to a country (of first destination) not being the country of final destination, as is the case for components. The outcome of the risk assessment is determined by what state authorities consider to be the country of end-use whereas a study found that EU member states sometimes consider the country of first destination, where a product is integrated into another product, as the country of end-use/final destination, especially when this country is a "friendly" state (Cops et al., 2017, pp. 134-6.). Furthermore, EU member states apply the risk assessment only in relation to what they *know* to be the end-use/r and this depends on the information the state is availing itself on a possible end-use/r beyond the first recipient of a product (Cops et al., 2017, p. 136). However, certain information might not be available to the state and, therefore, it relies on the company applying for the export licence to provide it (Katz, 2022a, p. 9). End-use/r documentation, such as the end-use/r certificate, is an important instrument for the state to gather that information and to conduct a proper end-use and diversion risk assessment.

2.3. End-use/r documents

The EU Common Position requires export licences to be issued on the basis of reliable knowledge of the end-use and, therefore, endorses the use of end-user certificates.[52] End-use/r certificates are official documents provided by the end-user that must be submitted to the export licencing authority by the exporter to specify the intended end-use of the arms (Bromley & Griffiths, 2010; Cops et al., 2017, p. 137). Authenticated by the licencing authorities of the exporting state, end-use/r certificates might need to be supported by other documents, such as import licences, to allow the licencing authorities to undertake a complete verification process regarding the correctness of the information provided as well as the legitimacy of end-use and end-user (Cops et al., 2017; Wood & Danssaert, 2011)(Wood & Danssaert, 2011).

Although there is considerable variation as to what states require to be included in end-use/r certificates, certain elements are common per international and EU standards.[53] According to EU Council Decision (CFSP) 2021/38[54], for instance, EU member states shall require essential elements including the details of the exporter, end-user and possible broker, a description of the goods as well as the intended end-use.[55]

Furthermore, the end-user regularly has to include certain assurances or commitments in the end-use/r certificate, notably that the arms will not be used by

50 For the transfer of components, Directive 2009/43/EC prevents the EU member state from which the transfer emanates, from imposing any (re-)export restrictions, unless the member state assesses the transfer as being sensitive (Art. 4(8) of Directive 2009/43/EC). European cooperation project agreements stipulate that the cooperating state, from which products are transferred to another cooperating state, shall not oppose the eventual export by the latter state, see e.g. Art. 1 and Art. 2 of the French-German-Spanish agreement on export controls in the defence domain: Übereinkommen über Ausfuhrkontrollen im Rüstungsbereich vom 24.9.2021, Bundesgesetzblatt Jahrgang 2021 Teil II Nr.22 (https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl221s1094.pdf%27%5D__1675686331669).

51 See Art. 10 of Directive 2009/43/EC.

52 EU Common Position 2008/944/CFSP (Art. 5) defines common rules on export controls of military technology and equipment.

53 *bid.*, pp. 31 et seq.

54 Council Decision (CFSP) 2021/38 of 15/1/2021 establishing a common approach on the elements of end-user certificates in the context of the export of small arms and light weapons and their ammunition.

55 Art. 5(1) of Council Decision (CFSP) 2021/38 of 15.1.2021 establishing a common approach on the elements of end-user certificates in the context of the export of small arms and light weapons and their ammunition. For the international standards concerning SALW, see UN (2018). *National controls over the end-user and end-use of internationally transferred small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.21, p. 5-6.

another party than the declared end-user and not for purposes other than the declared end-use.[56] Exporting states also commonly restrict the end-user's right to re-export the product, either by plain prohibition or pending prior approval by the exporting state.[57] Optional commitments include providing the exporting state with a delivery verification certificate[58] or even permitting the exporting state to conduct post-shipment on-site verification visits.[59]

Sometimes simplified procedures might apply. For global and general licences, the requirements by EU member states as to the end-use/r documentation and the information to be included, are said to be less strict, if such documentation is required at all (Cops et al., 2017, pp. 138–139).[60] As end-use/r certificates are only issued for exports to states as end-users, alternative end-use/r documentation is provided in the case of exports to non-state end-users, such as an import licence, an (international) import certificate or a private end-use/r statement(Bromley & Griffiths, 2010; Holtom, 2017, p. 17).[61] Import certificates are issued by a "trusted third party" instead of the end-user (Bromley & Griffiths, 2010, p. 2; Wood & Danssaert, 2011, p. 37). Although EU law and international guidance basically require the same elements to be included in private end-use/r statements as in those of public end-users, for both it is sufficient that a private company re-selling the products on the local market is stated as the end-user, with the end-use being described as "commercial sale on the domestic market".[62] For arms intended for commercial sale in the recipient state or for international import certificates, "(non-)re-export" clauses are limited to a commitment not to re-export the product without export authorisation by the recipient state, rather than a commitment not to re-export the product without prior approval of the exporting state.[63]

3. The due diligence duty of states

Building on the international and regional regulatory framework described above, this and the next sections elaborate on and distinguish between the due diligence obligations of states and their obligation to regulate the due diligence obligations of leading companies in arms value chains.

Due diligence obligations of states are grounded in the "diligence" element intrinsically connected to risk management, and in obligations of conduct, as opposed to duties of result (Ollino, 2022, pp. 96–111). Due diligence obligations are flexible and are applied to many areas of international law, including IHRL, IHL, and peace and security issues (Krieger et al.,

56 Art. 5(2)(a) of Council Decision (CFSP) 2021/38. UN (2018). *National controls over the end-user and end-use of internationally transferred small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.21, p. 5. See also: (Holtom, 2017, p. 17; Wood & Danssaert, 2011, p. 23).

57 Art. 5(2)(b) of Council Decision (CFSP) 2021/38. UN (2018). *National controls over the end-user and end-use of internationally transferred small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.21, p. 5. See, however, the limited application of non-re-export clauses mandated by Directive 2009/43/EC as regards intra-EU transfers of components. Some EU member states limit the application of non-re-export clauses even further by dispensing with this requirement in regard to all re-exports (not just of components) e.g., to EU and NATO member states except for "sensitive goods" (See for Flanders:(Cops et al., 2017, p. 142) p. 142).

58 United Nations (2018). *National controls over the end-user and end-use of internationally transferred small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.21, p. 5.

59 Art. 6 of Council Decision (CFSP) 2021/38.

60 Some EU member states do not require end-use/r certificates for certain countries of end-use (Cops et al., 2017) p. 139.

61 See EU Council Decision (CFSP) 2021/38, Art. 5(1) which also refers to private end-users within the context of end-user certificates.

62 United Nations (2018). *National controls over the end-user and end-use of internationally transferred small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.21, pp. 6 and 7. Art. 5(1)(b) of EU Council Decision (CFSP) 2021/38.

63 See: UN(2018). *National controls over the end-user and end-use of internationally transferred small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.21, p. 5. See also (Wood & Danssaert, 2011, p. 38).

2020). The UNGA[64] highlights the principles of due diligence and the responsibility of aiding or assisting in the commission of a wrongful act in IHRL and public international law.

In 1990 the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[65] (LEO) reiterated that states (i.e. governments and LEO) must adopt and enforce rules on the use of force and firearms. These principles recall states that they are expected to regulate the use of firearms by their LEO with due regard of:

- The restrictive use of means capable of causing death or injury to persons.
- The establishment of criminal offences for the arbitrary or abusive use of force and firearms.
- The circumstances when LEO may carry firearms and the types of firearms and ammunition permitted.
- The control, storage and surrender of firearms, including procedures to ensure that LEO are accountable for the firearms and ammunition issued to them.
- The discharge of firearms.
- The reporting system when LEO use firearms.
- The training that LEO must undergo to make them accountable when carrying firearms, which should include police ethics, human rights, alternatives to the use of force and firearms.
- The procedures for reporting and reviewing all incidents (principles 6 and 11).
- The mechanisms for independent administrative or prosecutorial authorities to investigate irregularities or casualties and to hold superiors accountable if they played a role when LEO under their command made unlawful use of force and firearms.

IHL also requires states to conduct due diligence when complying with obligations related to the implementation of IHL, the protection of persons *hors de combat*, and situations of occupation and non-international armed conflicts (Longobardo, Marco, 2019). These state obligations to implement due diligence to comply with primary or substantial IHL obligations, are not autonomous rules or general principles of international law (Pisillo-Mazzeschi, 1993, p. 9, 2018, pp. 332–336) quoted by (Longobardo, Marco, 2019, pp. 52–53). Some substantial obligations of IHL require states to implement due diligence procedures to comply with obligations of conduct that can be formulated in a very variated manner. For instance IHL norms can refer to "duties of care," or to requirements of conduct, or to do "everything possible," or to undertake "feasible measures" regarding substantial obligations (Longobardo, Marco, 2019, p. 54), to "ensure respect" (Longobardo, Marco, 2019, pp. 57 and 62), or to determine whether the use of a new weapon breaches IHL.[66]

The due diligence duties of states in relation to arms value chains seek to delineate their international legal obligations (Lammerant, 2021), which may also emerge in the framework of state responsibility for the acts of non-state actors (Askin, 2017). States are expected to adopt "reasonable steps to prevent, investigate, punish and ensure reparations for human rights violations and abuses committed by private persons or entities, including companies and non-state armed groups."[67] The International Law Commission's draft articles on responsibility of states for internationally wrongful acts (article 16), recognised that states are responsible for aiding or assisting *another state in the commission of an internationally wrongful act*. States can also be held accountable *for failing to exercise due diligence* when they do not take *the necessary preventive measures* in the transfer of arms in

64 UN GA A/HRC/35/8 of 3.5.2017.

65 United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 1990 https://www.ohchr.org/sites/default/files/firearms.pdf

66 First Additional Protocol to the Geneva Conventions of 12.8.1949 on the Protection of Victims of International Armed Conflicts, 8.6.1977, (article 36) and (Ronzitti, 2012, pp. 553–595) cited by (Longobardo, Marco, 2019, p. 65).

67 The preliminary report of the Special Rapporteur on the prevention of human rights violations committed with SALW (E/CN.4/Sub.2/2003/29), paras. 36-43 grounded this duty in general comments and case law such as Inter-American Court of Human Rights (ICtHR), Velasquez-Rodriguez v. Honduras, judgment of 29.7. 1998, paras. 172 and 174; European Court of Human Rights (ECtHR), Akkoç v. Turkey, judgment of 10.10.2000, paras. 77-78 and Tugar v. Italy, decision on admissibility of 18.10.1995.

case they knew they will be used to commit a serious violation of IHRL.[68]

Therefore, arms value chains should comply with IHL and IHRL, particularly with human rights obligations of the recipient state.[69] Due diligence duties of exporting states require them to conduct detailed and informed human rights risk assessments prior to granting licences for arms transfers. This means that states should consult UN treaty bodies and mechanisms,[70] regional human rights bodies and the secretariat of the ATT, national diplomatic missions, human rights institutions, relevant military information of the recipient state, and reports from non-governmental organisations (NGOs), research institutes and think tanks with expertise on the topic.[71]

A comprehensive human rights impact assessment in principle has the following requirements:[72]

- It is a case-by-case exercise, covering risks to vulnerable communities and identifying the potential or actual use of the arms to be transferred.
- It must adopt a forward-looking approach that enquires into the human rights record of the recipient state and assesses future human rights risks.
- It must identify: a) the durability of the arms to be transferred, to prevent that they are used in unintended or unforeseen ways over the long term; b) the cyclical patterns of heightened risks of disturbance and human rights violations or abuses in the recipient country; and c) events or circumstances that can deteriorate the human rights situation.

Other UN resolutions and reports have reiterated these due diligence duties for states regulating arms value chains. This is, states are required to prevent the diversion of arms and unregulated or illicit arms transfers, i.e. to unauthorised end-users. There is robust evidence that most illicit firearms used by non-state actors were manufactured legally and were used in legal supply chains before being diverted and yet, no international legal definition of diversion has been adopted.[73] Therefore, states' due diligence duties also involve the duty of implementing processes to identify the impact of unregulated or illicit arms transfers and diversion. Particularly, the impact on the rights of vulnerable communities should be part of the assessment, which should consider their fundamental freedoms, and their rights to an adequate standard of living, health and education.[74] The UN High Commissioner reiterated that the principle of due diligence *implies that a state may be held responsible for its failure to take reasonable positive measures to reduce domestic diversion,* to control unregulated or illicit arms trade, and to prosecute and ensure access to remedy when human rights abuses are committed by non-state actors.[75]

In short, the reports mentioned above define states' due diligence duties regarding arms value chains, stating that they should:

- Ensure that all activities conducted in their jurisdiction respect the right to life of people outside their territory.
- Regulate corporate conduct of companies operating in their jurisdiction in line with the UN Guiding Principles on Business and Human Rights (UNGPs) and guarantee the right to obtain effective remedy to victims.

68 UN GA A/HRC/35/8 of 3.5.2017. Para 20-21.

69 States are expected to ratify IHRL and the ATT, and establish mandatory rules to protect human rights under the international standards ratified, with attention to vulnerable communities: women, gender-based violence and children. States must also establish mechanisms to get access to justice and educate the armed forces in IHL, and the police and law enforcement officials in IHRL. Complementary duties refer to reporting human rights incidents, particularly in internal conflicts, or persistent patterns of discrimination or oppression, etc. See UN GA A/HRC/35/8 of 3.5.2017.

70 More specifically special procedure mandate holders like the OHCHR, the Security Council, the International Court of Justice (ICJ), ad hoc courts and tribunals, and the ICC.

71 UN GA A/HRC/35/8 of 3.5.2017

72 UN GA A/HRC/35/8 of 3.5.2017

73 UNGA Report of the UN High Commissioner for Human Rights, A/HRC/44/29 of 19.6.2020 on Impact of arms transfers on human rights.

74 UNGA A/HRC/44/29 of 19.6.2020.

75 See UN GC36 CCPR/C/GC/36, Par.22 on the duty of state to regulate corporations cited by UNGA A/HRC/44/29 of 19.6.2020, paragraphs 26-8.

- Regulate and prevent unregulated or illicit arms *transfers occurred* under their jurisdiction.[76]

- Prevent, investigate, prosecute, punish, and provide reparations for acts or omissions by non-state actors that result in gender-based violence against women, including corporate activities realised extraterritorially.[77]

- Implement the ATT and prevent diversion, and unregulated and illicit arms transfers, cooperate with other states and provide information to verify end-user destinations.[78]

Some authors distinguish between the state responsibility grounded in the principle of due diligence differs from the effort to avoid being complicit in the commission of an international wrongful act that is no longer the framework of reference (Brehm, 2008; Martínez, 2018, pp. 212–214). Due diligence responsibility requires states to prevent and investigate human rights violations, even if they are committed by non-state actors, and this responsibility goes beyond the threshold of having certain knowledge, as the new "threshold is whether they knew or ought to have known the existence of a real risk of human rights violations" (Brehm, 2008; Martínez, 2018, pp. 212–214).

4. State duty to regulate corporate behaviour

While the international regulatory framework does not apply directly to non-state actors, states have the due diligence obligation of ratifying international treaties, and consequently, regulating the conduct of companies involved in the arms value chain. Moreover, the 2030 Agenda for Sustainable Development, specifically Sustainable Development Goal (SDG) 16, recognises the crucial role states have in regulating arms transfers to contribute to sustainable development and human rights protection. Targets 16.1 and 16.4 ask states to significantly reduce all forms of violence and related death rates everywhere, and to significantly reduce illicit financial and arms flows, strengthen the recovery, return of stolen assets, and combat all forms of organised crime.[79]

Although corporate conduct has been primarily regulated by non-binding rules, and under different conceptual schemes such as risk assessment, corporate social responsibility (CSR) and certification schemes, from a civil law perspective the standard employed is the duty of care. Pillar I of the UNGPs summarises the duties of states to protect and fulfil human rights in their jurisdiction. Particularly, it defines the scope of state duties regarding the regulation of corporate conduct with respect to human rights.

76 Ibid, paragraph.29.

77 See Committee on the Elimination of Discrimination against Women, general recommendation No. 35, para. 24 (b), cited by UNGA A/HRC/44/29 of 19.6.2020, paragraph 30.

78 UNGA A/HRC/44/29 of 19.6.2020, paragraphs 31-40.

79 UN GA A/HRC/35/8 of 3.5.2017, paragraph 17. See also (Nave, 2019).

UNGPs' definition of state duties to regulate corporate conduct and actions expected from states

- To protect against human rights abuse within their territory and/or jurisdiction.
- To ensure that companies headquartered in their territory and/or jurisdiction respect human rights.

  Actions:

  a. To enforce laws requiring companies to respect human rights.

  b. To ensure that other laws and policies governing companies enable them to respect human rights.

  c. To guide on value chain respect for human rights.

  d. To encourage and require companies to communicate how they address their human rights impacts.

- To protect against human rights abuses by companies owned or controlled by the state, or receiving substantial support and services from state agencies,

  Actions:

  a. To require human rights due diligence.

- To comply with IHRL when they contract with, or legislate for, companies to provide services that may impact upon the enjoyment of human rights.
- To consider the higher risk of gross human rights abuses and provide for a higher standard to ensure and support companies operating in CAHRAS,

  Actions

  a. To support companies to identify, prevent and mitigate the human rights related risks of their value chains.

  b. To support companies to assess and address the heightened risks of abuses, in particular of gender-based and sexual violence.

  c. To deny access to public support and services for companies involved in gross human rights abuses and refusing cooperation in addressing the situation.

  d. To implement effective policies, legislation, regulations, and enforcement measures to address the risk of company involvement in gross human rights abuses.

Based on the UNGPs.

4.1. Corporate responsibility or due diligence duties?

States' due diligence obligations under international law are concretised through the establishment of norms that hold companies in their jurisdiction accountable for respecting human rights. Furthermore, in line with international standards, states should adopt norms that require companies to implement due diligence mechanisms to prevent human rights violations in their value chains. Due diligence entails risk assessment with respect to human rights, the environment and breaches of IHL.

The UNGPs have systematised the international standards that states should follow when requiring responsible corporate conducts. The corporate responsibility to respect human rights entails a passive duty of avoiding any infringing on human rights and an active duty to address adverse human rights impacts that companies may cause. It is a global standard of conduct that applies to all companies independently of their size, sector, operational context, ownership and structure, but the specific requirements depend on these factors and on the severity of the impacts (UNGPs, Principle 14). Furthermore, corporate responsibility is independent of the state capacity to regulate companies' conduct or to protect human rights. It goes beyond compliance with national laws because the corporate standard of conduct is given by the international legal framework, even when the domestic context prevents companies to implement this standard of responsibility (UNGP, Principle 11).[80]

Corporate responsibility to respect has three dimensions. Firstly, companies should *avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.* Secondly, they should take action to *prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services* in their value chain, even if their partners have not contributed to those impacts (UNGPs, Principle 13). Thirdly, they should avoid being complicit of human rights abuses by contributing to adverse human rights impacts caused by their partners or by benefiting from an abuse committed by other entities (UNGPs, commentary to Principle 17). Concretely, companies are expected to identify salient risks in their value chains, this identification being grounded in *internal and/or independent external human rights expertise,* and in consultation with potentially affected groups and stakeholders to shape the chain and the context of the activities (UNGPs, Principle 18). They should assess the risk of causing or contributing to gross human rights abuses as a legal compliance issue in any country (UNGPs, Principle 23). This is crucial in CAHRAS, where the risks of being complicit in gross human rights abuses committed by other actors increase. They may be held liable as a result of extraterritorial civil claims, and of claims grounded on the Rome Statute in jurisdictions that provide for corporate criminal responsibility, or for responsibility of corporate directors, in the case of acts qualified as gross human rights abuses (UNGPs, commentary to Principle 23).

Due diligence materialises the corporate responsibility to respect international standards. Besides being a standard of conduct, it is also a process seeking to identify, prevent, mitigate, and account for how companies address actual and potential adverse impacts in their own operations, their supply chain and other business relationships (Macchi, 2022). This "cascade" of due diligence requirements from international law through states duties to regulate the conduct of companies, makes companies accountable for human rights violations at the national level. That way, the gap of not having considered the normative value of UDHR for state and non-state actors is filled, as the horizontal effect of human rights has not been universally applied (Macchi, 2022). Even if the UNGPs state that companies have the responsibility to respect human rights, there are legal grounds to affirm that they also have a duty to respect them (Bernaz, 2021; Bernaz & Pietropaoli, 2020). This duty responds to a fairness argument as companies are protected by international law, particularly by treaties regulating trade and investment, and therefore, they should also have duties, even if international enforcement mechanisms are still lacking (Macchi, 2022).

Corporate responsibility and accountability are often used interchangeably, but they cover different dimensions (Morgera, 2020, p. 15). Corporate responsibility seeks to influence corporate conduct by both shareholders' interests and societal needs grounded in international law, wherever companies operate and independently of the capacity or willingness of host states to implement pertaining standards (Morgera, 2020, p. 16). Corporate responsibility is operationalised by the

80 See also: OECD (2011), *OECD Guidelines for Multinational Enterprises*. OECD Publishing, p.32.

implementation of risk management or due diligence procedures aligned with international law (Morgera, 2020, p. 17). Corporate accountability, on the other hand, requires companies to disclose information to shareholders and stakeholders who could be affected by the company's operations, in any type of economic sector (Bovens, 2007). This means that companies should (or must in some jurisdictions) disclose how they identify, assess and address their risks through reporting schemes that guarantee transparent operations (Morgera, 2020, pp. 20–21).

These concepts have been extended to the management of global value/supply chains when companies have fragmented their production and have organised complex corporate networks. While the notion of 'supply chains' refers to the entire production process from sourcing to final-consumption/use, the concept of global value chain (GVC) also covers *how value is created and captured therein* (Gereffi & Fernandez-Stark, 2016, p. 4) and (Gereffi & Lee, 2012).

The concept of governance of GVCs implies a top-down view of how lead firms and global corporate groups are organised. The upgrading of GVCs implies a bottom-up view of how countries, regions and other economic stakeholders are positioned in the global economy (Gereffi & Lee, 2012, p. 25). GVC governance seeks to extend the scheme of corporate governance to the organisation of the chain, particularly taking into account *how corporate power can actively shape the distribution of profits and risks in an industry,* and how leading firms are the drivers of these powers, whose location depends on the type of chain (Gereffi & Lee, 2012, p. 25). Although upgrading is crucial for the social and economic objectives of countries, governance is more relevant for arms value chains, because the identification and distribution of benefits and risks allows to determine the degree of responsibility of actors involved in them.

Value chain governance also involves investors and financial supporters, as leading firms care about their financial results obtained through globalising production (Kano et al., 2020, p. 613). This could justify a finance-driven approach to corporate governance because investors could have more leverage on corporate behaviour. This is why in some jurisdictions investors conduct regulations seek to encourage investors to exercise their leverage in the economic sectors where they invest to implement due diligence mechanisms.

CSR standards aim at supporting companies in the implementation of governance models in order to fairly distribute benefits and risks in their value chain activities, thereby preventing that only shareholders benefit and that operations result in human rights abuses (Barrientos et al., 2011) cited by (Gereffi & Lee, 2012, p. 29). However, the corporate responsibility to respect human rights goes beyond CSR, which mainly has a voluntary character and focusses on the company's own interest as it expects companies to assess how their activities affect citizens (UNGPs Principle 11 and (Macchi, 2022, p. 64).

So far, three standards have guided the implementation of due diligence procedures or risk management systems into the governance of value chains. The UN Global Compact (UNGC, 1999), inspired by the UDHR, requests companies to support and respect the protection of IHRL and to avoid being complicit in human rights abuses (principles 1 and 2). It also requests companies to respect rights at work, with the ILO Declaration on Fundamental Principles and Rights at Work as a basis, to respect the environment with the Rio Declaration on Environment and Development as a basis, and to fight corruption as outlined in the UN Convention against Corruption.

In turn, the OECD Guidelines, jointly addressed by governments and intended as recommendations for companies, also incorporated human rights aspects. The 2000 review of the OECD Guidelines, requested companies (not yet using the concept of supply chains) to reject exceptions to international standards on social and environmental protection, and on good governance in host countries.[81] This review of 2000 referred for the first time to the need to respect human rights in the context of business operations, which is also grounded in the UDHR. They further provided detailed guidance on disclosure expectations regarding non-financial information.

Aligning the OECD Guidelines with the UNGPs, the revisions of 2011 are considered as good practices consistent with laws and international standards. Although they are not legally enforceable, some

81 OECD, Development. Directorate for Financial, Fiscal, Enterprise Affairs, Development. Committee on Fiscal Affairs, & Development. Working Party No. 6 on the Taxation of Multinational Enterprises. (2000). The OECD Guidelines for Multinational Enterprises: Review 2000. DAFFE/IME/WPG (2000)15/FINAL 31.10.200.

issues covered may also be regulated by national or international law, such as the duty of companies to respect internationally recognised human rights. This is operationalised by the corporate duty to obey domestic laws and to refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental protection, health, safety, labour, taxation, financial incentives, or other issues.

The UNGPs innovate the OECD and the UNGC approach in three aspects: First, they concretise the due diligence duties of states to regulate corporate responsibility for human rights through the establishment of due diligence duties to respect human rights, encompassing their value chains. Second, although the UNGPs clarify that states under IHRL are not required to regulate the extraterritorial activities of companies domiciled in their territory and/or jurisdiction, they do not prevent them to regulate corporate responsibility when there are jurisdictional grounds for it (UNGPs Commentary to Principle 2). Third, some human rights treaty bodies recommend home states to regulate corporate responsibility and accountability for the respect of human rights abroad, and this in a more stringent way when the state owns, controls or supports the companies concerned (Katz, 2022b; Schliemann & Bryk, 2019) .

The OECD Guidelines were updated in 2023 and include new due diligence expectations for companies active in value chains. Relevant for the arms value chain is that companies must align with international standards on climate change and biodiversity. They are also expected to implement due diligence procedures for the development, financing, sale, licencing, trade and use of technology, including data collection and processing. This could imply the need to implement due diligence for value chains of goods that may have dual uses and that may be involved in violations of human rights or of IHL (Kanetake, 2019). Due diligence processes are also expected to assess risks related to acts of corruption and lobbying activities. Finally, the OECD guidelines highlight that companies should pay special attention to adverse impacts on vulnerable communities, and should adopt reporting mechanisms on their activities and those of the value chains in which they operate.

4.2. Due diligence in CAHRAS

The UNGPs and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAS emphasise that states are required to protect human rights, by in turn requiring their companies with value chains extending into CAHRAS to conduct risk assessments on their activities and value chains. Leading companies in the arms value chain may have governments in conflict situations as their main customers and, therefore, due diligence should also cover IHL. Various non-binding guidelines connect the international legal framework with the UNGPs regarding corporate responsibility, accountability and in some cases liability of leading firms of these value chains.

The International Committee of the Red Cross[82] released a guidance that reiterates that IHL prohibits the development, production and transfer of specific weapons (anti-personnel landmines or biological and chemical arms). Furthermore, it indicates that arms value chain regulation is crucial because of the challenges to prevent that end-users violate IHL. Similar challenges occur with dual-use goods that are not conventional arms, but of which suppliers know they can be used to perpetrate war crimes. Although complicity has been the most frequent way to hold arms value chain companies accountable for the commission of war crimes, the guidance flags that it is necessary to demonstrate that the company should have known that the arms would facilitate the crime.

The Toolkit for Addressing Security and Human Rights Challenges in Complex Environments(Schliemann & Bryk, 2019)[83] promotes responsible corporate conduct in CAHRAS and contains tools to carry out an analysis of arms end-users for the public and private sectors. Although it refers to companies operating in CAHRAS, some aspects may apply to companies in arms value chains regardless of the location where they operate. For instance, the risk assessment of the transaction should consider whether national legal systems effectively

82 International Committee of the Red Cross *Business and International Humanitarian Law: an introduction to the rights and obligations of business enterprises under international humanitarian law* 11-09-2006. Ref: 0882 https://www.icrc.org/en/doc/resources/documents/publication/p0882.htm 2006

83 The Geneva Centre for the Democratic Control of Armed Forces (DCAF) and The International Committee of the Red Cross (ICRC) *Addressing Security and Human Rights Challenges in Complex Environments toolkit* 3rd edition 2019 https://www.securityhumanrightshub.org/sites/default/files/2019-10/ASHRC_Toolkit_V3.pdf

address security and human rights issues, as well the risk for the company to incur in acts of complicity in violations of IHL.[84] This toolkit connects to the UNGPs that recall that companies should assess the risk of causing or contributing to gross human rights abuses as a legal compliance issue (UNGP: Principle 25). They also should be aware that implementing due diligence is not the only action required to absolve the company from liability for causing or contributing to human rights abuses (UNGP: Principle 19).

Also when working with private security providers (MacLeod, 2015), companies need to implement risk and impact assessments. The Security and Human Rights Knowledge Hub[85] provides information for companies on human rights issues in the countries where they may operate. Companies are also recommended to consult with potentially affected groups and other stakeholders to obtain information for the risk assessment.

The PRI (Principles for Responsible Investment) initiative and the UN Global Compact Guidance on Responsible Business in CAHRAS[86] also provide a detailed list of guiding points that are relevant for arms value chains. For instance, regarding their business relationships, Guidance Point #1 recommends adapting existing due diligence measures to the specific needs of CAHRAS. Guidance Point #5 recommends monitoring transactions and flows of funds and resources, and implementing a supply chain management system both upstream and downstream when CAHRAS are involved. Regarding companies' relations with governments, Guidance Point #1 recommends guiding by example in order to support peace. Guidance Point #2 recommends avoiding complicity in human rights violations by states, while Point #3 recommends companies to promote transparent relations with host governments and to be as transparent as possible with other stakeholders regarding their relationships with the government.

So far, the EU and the OECD have also issued guidance for sourcing minerals from CAHRAS. The EU Conflict Minerals Regulation[87] requires EU importers to ensure that their supply chain policy standards, contracts, and agreements are consistent with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, in turn, sought to nudge responsible business conduct in value chains related to the exploitation of mineral resources, particularly because many of these resources are in CAHRAS. These frameworks focus on sourcing minerals that can contribute to armed conflict and gross human rights violations, and, although the EU Conflict Minerals Regulation refers to the OECD Guidance, it is clear that its adoption was also strongly influenced by the US Dodd-Frank Act[88] (Vlaskamp, 2019). The purpose is to promote global responsible supply chains to avoid that economic actors contribute to conflict. Although the sourcing of minerals is connected to the production tier of the arms value chain, it is not covered by this study.

Finally, other guidelines refer to the assessment that companies and the states where they are headquartered should undertake to prevent serious violations of IHRL and IHL. The Voluntary Principles on Security and Human Rights[89], a multistakeholder initiative of the US and UK governments, NGOs *and companies* were adopted to *guide companies in conducting a comprehensive human rights risk assessment in their engagement with public and private security providers, to ensure human rights are respected*.

4.3. EU mandatory due diligence through binding norms in sustainability reporting

Although companies are accountable in some countries but not at the international level, states are

84 Ibid. p.149.

85 See DCAF-ICRC https://www.securityhumanrightshub.org/

86 PRI initiative and the UN Global Compact: *Guidance on Responsible Business in Conflict-Affected & High-Risk Areas: A Resource for Companies and Investors: to implement responsible business practices in CAHRAS consistent with the Global Compact.* https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FPeace_and_Business%2FGuidance_RB.pdf

87 Regulation (EU) 2017/821 of of 17.5. 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN

88 The Dodd–Frank Wall Street Reform and Consumer Protection Act (The Dodd–Frank Act) was enacted in the United States as a federal law in 2010. Section 1502 requires companies trading on U.S. securities exchanges to report whether their products contain conflict minerals sourced in the Democratic Republic of Congo or neighbouring countries to the Securities and Exchange Commission.

89 https://www.voluntaryprinciples.org/

progressively taking steps to hold them accountable for violations of human rights or environmental standards. This holds relevance for the arms value chain as well, as it is continuously growing [90] with benefits probably increasing considerably because of the ongoing wars since 2022.

This report coincides with the publication of the consolidated version of the EU's draft Directive on Cross-Sectoral Due Diligence (CSDDD).[91] Although there is uncertainty about its adoption, this consolidated version excludes from the definition of the value chain, particularly downstream activities, "the disposal of the product by consumers and distribution, transport, storage and disposal of the product being subject to the export control under the Regulation (EU) 2021/821 of the European Parliament and of the Council or the export control relating to weapons, munition or war materials, after the export of the product is authorised" (Article 3, first paragraph, point (fa)(g)(ii)). Furthermore, the Whereas recital 18 excluded from the Directive "the distribution, transport, storage and disposal of a product that is subject to export control of a Member State, meaning either the export control under the Regulation (EU) 2021/821 (...) or the export control of weapons, munition or war material under national export controls, **after the export of the product is authorised**."

The EU argues that the CSDDD is complemented by the above-mentioned acts, which also address negative human rights or environmental impacts. However, it appears that the EU has adopted the interpretation that export controls and related impact assessments are sufficient to assess risks to human rights and humanitarian law. This study shows in detail how export controls are not the same as the obligation to carry out an ongoing due diligence process in accordance with the UNGPs and the OECD Guidelines. While the intention may have been to avoid "duplication" of controls, [92] the reality is that international law requires states to regulate the activities of companies active in the arms value chain. The exclusion only applies for the period "*after* the export of the product is authorised". This means that everything that happens before the licence is granted is not excluded, and therefore the CSDDD still applies to pre-export activities.

Furthermore, there is an increasing awareness that companies active in arms value chains can be held accountable through requiring them to report their sustainability risks.[93] Reporting is the mechanism that allows to hold companies accountable because it fulfils the requirements of making information transparent, public and accountable, which translates into making that information actionable (World Bank Group, 2017) p.248. Reporting on sustainability aspects is necessary regardless of the specificity of the sector. Besides CSOs and other stakeholders putting out claims for more accountability, investors increasingly require disclosure in terms of ecological footprint and better governance (e.g. transparency regarding commercial transactions related to arms).[94] The main trigger of this phenomenon has been the recent enactment of EU law seeking to implement the Green Deal[95], particularly the EU Taxonomy[96], which limits the scope of what can be considered as sustainable financing, and which did not include defence stocks. In fact, investments in controversial arms are considered to be in the same group as the tobacco and

90 The Stockholm International Peace Research Institute (SIPRI), reported in 2021 that arms sales by the Top 100 companies had grown to $531 billion in 2020, quoted by CEOBS (2021).

91 Proposal for a DIRECTIVE on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (Text with EEA relevance) 2022/0051(COD) DRAFT [CSDD 4CT Post ITM on 22-23.1.2024 (final)] 24-01-2024 at 20h39 (Non-official version at CS3D 4CT final.pdf - Google Drive)

92 Council of the European Union, General Secretariat, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937– Consolidated table of comments on doc. 13256/22, Brussels, 26 October 2022, WK 14420/2022 INIT, p. 82.

93 See the analysis of the environmental reporting of 15 major arms companies conducted by (Parkinson, 2020). See also Conflict and environmental observatory (CEOBS), (Dec 2021) *Environmental CSR reporting by the arms industry* https://ceobs.org/environmental-csr-reporting-by-the-arms-industry/

94 Pfeifer, S. (01.12.2021) *Aerospace & Defence Rise of ESG adds to pressure on European defence companies,* Financial Times, London. Rise of ESG adds to pressure on European defence companies | Financial Times (ft.com)

95 EC COM(2019) 640 final of 11.12.2019, at https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX%3A52019DC0640

96 Regulation (EU) 2020/852 of 18.6. 2020 on the establishment of a framework to facilitate sustainable investment, OJ L 198, 22.6.2020, p. 13–43, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0852

coal sectors, which are excluded from funds.[97] The EU Taxonomy also defined the economic activities that can be considered as environmentally sustainable. Furthermore, it established the minimum safeguards, understood as the efforts economic actors should make to implement procedures to ensure alignment with the OECD Guidelines for Multinational Enterprises and the UNGPs, the eight ILO core conventions and the International Bill of Human Rights. The EU Taxonomy further requires economic actors to adhere to the principle of 'do no significant harm' referred to in the EU Regulation on sustainability related disclosures in the financial services sector (Article 2.17).[98]

To complement these regulatory developments, the EU Corporate Responsibility Reporting Directive (CSRD)[99] harmonises the CSR approach with that of the UNGPs. It requires economic actors to report on their own risks and those of communities regarding global warming, ecosystems, human rights and governance, resulting from their own operations and from their value chains, which is known as the concept of double materiality. The CSRD covers several categories of companies headquartered in the EU and certain third-country companies with at least one subsidiary or branch in the EU. The CSRD aligns with international standards such as the UNGPs, the OECD Guidelines, the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance)[100], sectoral guidelines, the Global Compact, the International Labour Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the SDGs, ISO 26000 standard, and the UN Principles for Responsible Investment (CSRD, para. 31 and 45). Furthermore, the CSRD requires companies to align with the following standards when they disclose information about human rights related risks: the International Bill of Human Rights and other core UN human rights conventions, including the UN Convention on the Rights of Persons with Disabilities; the UN Declaration on the Rights of Indigenous Peoples; the UN Convention on the Rights of the Child; the ILO Declaration on Fundamental Principles and Rights at Work; the fundamental conventions of the ILO; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Social Charter; and the EU Charter of Fundamental Rights (CSRD, art.29).

The CSRD also defined the due diligence duty of companies, i.e. as a duty to "(…) carry out to identify, monitor, prevent, mitigate, remediate or bring an end to the principal actual and potential adverse impacts connected with their activities and identifies how undertakings address those adverse impacts. Impacts include impacts directly caused by the undertaking, impacts to which the undertaking contributes, and impacts which are otherwise linked to the undertaking's value chain" (CSRD, Par.31). This means that a company headquartered in the EU needs to conduct due diligence processes that cover the whole value chain, i.e. " (…) its own operations, its products and services, its business relationships and its supply chains" (CSRD, Par.31). Further, the CSRD defined the notion of principal adverse impact as the one that "(…) ranks among the greatest impacts connected with the undertaking's activities based on: the gravity of the impact on people or the environment; the number of individuals that are or could be affected, or the scale of damage to the environment; and the ease with which the harm could be remediated, restoring the environment or affected people to their prior state" (CSRD, par 31).

The CSRD constitutes a major step in the direction of hardening sustainability reporting of value chains to address their sustainability related risks. The CSRD already involves various steps of the due diligence process. The CSRD[101] further clarifies that the information to be disclosed needs to include forward-looking and retrospective information, and both qualitative and quantitative information based on conclusive scientific evidence. The CSRD also requires companies to submit their sustainability report in accordance with European Sustainability Reporting Standards (ESRS) that the European Commission

97 Pfeifer, S. (01.12.2021). As a response to requests for transparency in sustainability matters, Spacecraft companies announced more sustainability reporting in 2021. See New spacecraft sustainability rating targets space junk | Space

98 Regulation (EU) 2019/2088 of 27.11.2019 on sustainability related disclosures in the financial services sector.

99 Directive (EU) 2022/2464 of 14.12. 2022, as regards corporate sustainability reporting. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464

100 OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, https://mneguidelines.oecd.org//OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf

101 When amending articles 19a and 29a of Directive 2013/34/EU.

(EC) will progressively adopt by delegated acts that define the content and, where relevant, the structure of these reports.

In 2023, the EC released common sustainability reporting standards for all sectors. The EC Delegated Regulation (ECDR)[102] requires companies to report in accordance with European Sustainability Reporting Standards (ESRS) that incorporate the main elements of the due diligence process (ECDR, paragraph 61) and, if applicable, should cover information about the own operations and the value chain of companies, i.e. their products and services, and business relationships (*ECDR, Annex 1 p.7*). Annex 2 to the ECDR (p.7) defines business relationships of companies as comprising their business partners, entities in their value chain, and any other non-state or state entity directly linked to their business operations, products or services. This definition also covers indirect business relationships in the value chain beyond the first tier, and shareholding positions in joint ventures or investments.

The ESRS illustrate how due diligence steps become an implicit requirement because all companies bound by the CSRD are expected to engage with affected stakeholders, identify and assess negative impacts on people and the environment, address negative impacts on people and the environment, and trace the effectiveness of these efforts. The ESRS are "sector-agnostic" because they apply to all companies under the scope of the CSRD, regardless of the sectors they operate in. The ESRS also recall that the CSRD requires to assess the double materiality that covers the financial impacts to the company and the impact materiality, i.e. "the actual or potential, positive or negative impacts on people or the environment over the short, medium or long term" *(ECDR, Annex 1 p.7)*. More importantly, the materiality assessment of negative impacts *is* "(...) informed by the due diligence process defined in" the UNGPs and the OECD Guidelines *(ECDR, Annex 1 p.7).* When analysing the severity of the negative impacts on human rights, "(...) the severity of the impact takes precedence over its likelihood" *(ECDR, Annex 1 p.8).*

Regarding the arms value chain, two aspects are of relevance. Firstly, the ESRS require companies dealing with controversial weapons to release a statement about this and indicate the related revenues in their business strategy. This duty aligns with the EC Delegated Regulations to the Regulation on minimum standards for EU Climate Transition Benchmarks[103] that exclude from the EU Paris-aligned benchmarks companies involved in controversial weapons, "(...) as referred to in international treaties and conventions, United Nations principles and, where applicable, national legislation". But companies that are in breach of the UN Global Compact or the OEDC Guidelines are also excluded from these Paris-aligned benchmarks. Secondly, the main ESRS to consider for the arms value chains are the ESRS S3 (ECDR, Annex 1 p. 26) and the ESRS G1 (ECDR, Annex 1 p.26). ESRS S3 refers to affected communities' economic, social and cultural rights, particularly access to food, water and sanitation, land, and security-related impacts. It also covers communities' civil and political rights, particularly the freedom of expression and of assembly, and impacts on human rights defenders and on indigenous people's rights. ESRS G1 covers impacts on corruption and bribery.

102 The EC Delegated Regulation (EU) ... of 31.7.2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standard (pending formal adoption) see https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=PI_COM:C(2023)5303

103 See Commission Delegated Regulation (EU) 2020/1818 of 17.7.2020 supplementing Regulation (EU) 2016/1011 as regards minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks (Article 12) and Delegated Regulation (EU) 2020/1816 of 17.7. 2020 supplementing Regulation (EU) 2016/1011 as regards the explanation in the benchmark statement of how environmental, social and governance factors are reflected in each benchmark provided and published (Annex II).

5. The arms value chain

The previous sections illustrate how states have the duty to regulate the activities conducted by undertakings active in the arms trade value chain, with the goal of preventing that arms transfers are in breach of the state international legal obligations. That is why it is expected that domestic legal frameworks adopt these international standards and translate them into requirements that companies must fulfil to operate in the sector.

However, the arms value chain is very complex. Companies active in this chain conduct several activities such as "research, development, design, production, delivery, maintenance, repair and overhaul of military weapons systems, subsystems, parts, components, and ancillary equipment."[104] This is, these companies can be active in sectors as diverse as mining, manufacturing, distribution, financial services, research & development, maintenance, transport, to mention only a few.

This reflects the complexity of regulating these activities in conformity with international standards and it also shows the difficulty of identifying and conceptualising the concrete obligations of the companies operating in each segment of the chain. This chapter highlights concrete legal commitments of states to regulate business activities and requirements that companies operating in the arms value chain should fulfil, while it also reveals gaps in this regulatory landscape. These regulatory gaps are explained by connecting them to the tiers of the arms value chain, illustrating practical aspects of the value chain and the role of companies in the most frequented tiers.

5.1. Main tiers of the value chain (upstream and downstream)

In the framework of the UNGPs, "a business enterprise's value chain" is defined as encompassing "the activities that convert input into output by adding value. It includes entities with which a company has a direct or indirect business relationship and which either (a) supplies products or services that contribute to the enterprise's own products or services, or (b) receives products or services from the enterprise."[105] The GVC of a product covers all the activities "necessary for the provision of goods or services from conception to delivery to the final consumer through the various phases of manufacturing" (Oudot & Bellais, 2019, p. 186). Companies active in the sector should map their value chains as part of their due diligence duties.[106]

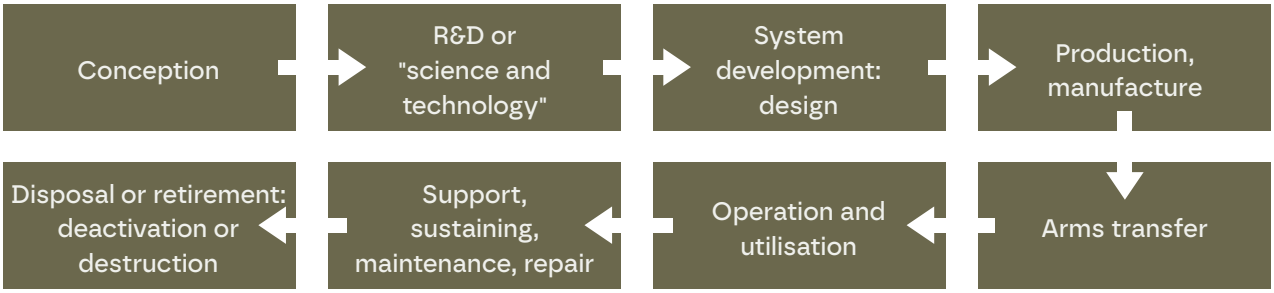
The arms value chain runs parallel to the "life cycle" of an arm. Although there are various value chains or life cycles of the sub-sectors within the defence industry, such as the life cycle of SALW and that of larger weapon systems like aerial or naval systems, in general a "product life cycle" comprises the "consecutive and interconnected phases of a product system, from raw material acquisition or generation of resources to post-use".[107] Accordingly, the "weapon life cycle" ranges from "the decision on the necessity of its existence, until its withdrawal" (Zikos et al., 2022, p. 1038).

104 Working Group on the issue of human rights and transnational corporations and other business enterprises (2022). *Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights – Information Note by the UN Working Group on Business and Human Rights,* p. 1. Available at: https://www.ohchr.org/en/documents/tools-and-resources/responsible-business-conduct-arms-sector-ensuring-business-practice.

105 United Nations Human Rights, Office of the High Commissioner (2014). *Frequently Asked Questions about the Guiding Principles on Business and Human Rights.* United Nations, p. 46.

106 See: European Parliament (2020). *Corporate due diligence and corporate accountability: European Parliament resolution of 10.3.2021 with recommendations to the Commission on corporate due diligence and corporate accountability.* 2020/2129(INL), para.32.

107 (Moro, 2018, p. 104) referred to the standard ISO 14040:2002.



▲ **Phases in the arms life cycle (ALC)**

Graph based on (Zikos et al., 2022, p. 1039); (Moro, 2018, p. 105); (Kirkpatrick, 2019, pp. 286–287); (Parker, Sarah & Wilson, Marcus, 2014, pp. 21–22)[108].

An overarching activity that occurs from the outset of the ALC is the investment in and the financing of the arms trade sector. It is a very sensitive sector with several studies having analysed the relationship of financial institutions and investors with arms transfers, and the IHL and IHRK related risks that should be identified and prevented (Oudes et al., 2022; Oudes & Slijper, 2023; van Loenen et al., 2020).[109]

In the production phase, the supply chains of "prime contractors" or "lead system integrators"[110] assembling large complete weapon systems can consist of three or even up to five tiers of (sub)contractors and can include several hundred companies.[111] The supply or production chains in the arms trade sector have been increasingly internationalised (Cops et al., 2017, p. 27). Yet, the structure and complexity of the supply chain varies among defence sectors, also with respect to the degree of globalisation of the supply chains.[112] Moreover, the supply chains also differ among system integrators themselves depending on whether they rely on outsourcing or rather on "vertical integration".[113]

Manufacturers of specific final products, such as SALW producers, with likely less complex supply chains than the larger system integrators, might operate as lower-tier contractors of these integrators (Duquet, 2014, p. 8).

After the production phase, the transfer stage consists of the export, import and transit/trans-shipment of the arms. Brokering is also part of the transfer as it can facilitate each of those activities. The arms can be either transferred to a non-government or to a government user (Parker, Sarah & Wilson, Marcus, 2014, p. 22). Therefore, as illustrated by the life cycle of SALW, besides their use and possession, various post-transfer activities can be distinguished, and different risks are associated with the nature of the clients. Regarding non-governmental clients, risks are related to the "storage" of the arms, the recovery of the arms by the state through a "buyback" or "collection programme" and state seizures of SALW (Parker, Sarah & Wilson, Marcus, 2014). For governmental use and possession, SALW might end up in stockpiles ("stockpile management") or as "surplus" with potential subsequent "destruction" or "deactivation"(Parker, Sarah & Wilson, Marcus, 2014).

108 See also (Chao, 2005; Hagelin et al., 2006, p. 247).

109 See also Facing Finance (2013). *Dirty Profits 2: Report on Companies and Financial Institutions Benefiting from Violations of Human Rights*.

110 The term "system integrators" denotes companies that are "capable of managing very large, complicated acquisition programs that require amalgamating several disparate pieces of military hardware (and, increasingly, software) into a single functioning system of systems", see: (Bitzinger, 2009, p. 176),

111 EC (2013). *Commission Staff Working Document on Defence - Accompanying the document* Communication Towards a more competitive and efficient defence and security sector. SWD (2013) 279 final, p. 23. (Hartley, 2017, pp. 29–30). See also Pat Research. *All about aerospace and defense industry: value chain, segments, and competitive advantage* (https://www.predictiveanalyticstoday.com/what-is-aerospace-and-defense-industry-top-software-in-aerospace-and-defense-industry/).

112 See: EC (2013). *Commission Staff Working Document on Defence - Accompanying the document* Communication Towards a more competitive and efficient defence and security sector. SWD (2013) 279 final, p. 23. This study found that the supply chains of the "lead system integrators" in the EU are multiplied and complex, and that the supply chains of the aerospace and electronics industries in Europe are more globalised than the naval and land industries.

113 Chao, P. A. (2005). *The Structure and Dynamics of the Defense Industry*. Security Studies Program Seminar (http://web.mit.edu/SSP/seminars/wed_archives05spring/chao.htm). According to a study on the globalised nature of defence companies, with France as a case study, vertical integration or "deep globalisation" remains the exception for defence companies, see (Oudot & Bellais, 2019). They identify that arms-producing states might "expect to preserve a certain strategic autonomy by requiring a domestic production" as a limit to the globalisation of arms production (p. 185-6).

A critical moment in the ALC occurs prior to the deactivation or destruction of arms because if this does not occur, they may be re-transferred (re-exported), possibly with a change of user. Re-transfers are part of the "repeatability" of the ALC with another user or the "'spiral' lifecycles of military-oriented products" (Moro, 2018, p. 103). Repeatability can also refer to the relaunch or revitalisation of a military product without necessarily involving a re-transfer (Moro, 2018, pp. 103–105).

Finally, SALW and other conventional arms are at risk of being diverted to the illicit market at any stage of their life cycle (Parker, Sarah & Wilson, Marcus, 2014, p. 22); (Danssaert, 2019; Wood & Holtom, 2020, p. 3). This risk is so critical that the UN has detailed the regulatory duties of states in this respect (see section 4).

5.2. Downstream value chain

Each stage in the ALC involves a number of aspects that needs state regulation (Parker, Sarah & Wilson, Marcus, 2014, pp. 20–21) and control because it involves serious risks of misuse of the arms. Also, a diversity of actors is involved in each stage of the ALC. This section zooms in on activities in the arms trade value chain that states need to adopt measures for to prevent the misuse of arms because actors involved can be held responsible for such cases and their consequences. This section focusses on those activities that have a substantial connection with the end-use of the arms. Although other serious risks may arise in further activities of the value chain, more specifically in the sourcing stage of materials employed in arms production, these are beyond the scope of this study.

▲ **Downstream value chain**

5.2.1. Production phase

Arms production entails challenges that states and companies must address in their due diligence processes in order to prevent their misuse. A two-fold perspective is important, with the applicable regulatory framework on the one hand, and the geographic distribution of arms production on the other.

5.2.1.1. Regulation and control of arms production: the case of SALW

The regulation of SALW production, as well as of their parts/components and ammunition, is crucial in exercising effective control over these items.[114] In practice, states generally control and regulate the production of SALW, but they do so to different degrees (King & McDonald, 2015, p. 58). In addition, licencing requirements for the production or manufacture are not restricted to SALW as they can apply to other categories of conventional arms.[115] However, this study only convers SALW. Concretely, states are expected to:

- Regulate and control the production of SALW to prevent their illegal manufacture and illicit trafficking, or their diversion to unauthorised recipients.[116]
- Establish licencing or authorisation systems for the manufacture or assembly of firearms, their parts, and components as well as ammunition.[117]

114 United Nations (2018). *National controls over the manufacture of small arms and light weapons*. Modular Small-arms-control Implementation Compendium (MOSAIC) 03.10, p. v.

115 See , for example, art. 26(2) of the German Basic Law ("Weapons designed for warfare may be manufactured, transported or marketed only with the permission of the Federal Government.") and section 2(1) of the German War Weapons Control Act ("Anyone who intends to produce war weapons shall need a licence."). The covered "war weapons" are listed in the War Weapons List in the Annex to the Act and include combat aircraft, vessels of war, and combat vehicles among others. For other examples of states requiring licences to manufacture defence-related goods, see (Cops et al., 2017) p. 90-1.

116 See *UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* (UN Programme of Action) A/CONF.192/15, II. 2.

117 This obligation is for states parties to the UN Firearms Protocol, Article 3(d)(ii), defining "illicit manufacturing" as "the manufacturing or assembly of firearms, their parts and components or ammunition [...] [w]ithout a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place".

International standards have established conditions to obtain a licence. Manufacturers are expected to:

- Establish mechanisms for "quality control" and for ensuring the adherence to applicable "technical norms" (The Organization for Security and Co-operation in Europe, 2003) p.5.

- Implement facilities and practices that can guarantee the safety of manufacture and storage of the arms; possess the necessary (technical) qualifications; pass background checks.[118]

Issue production/manufacture licences with the description of the authorised activities and the concrete types of arms that may be produced.[119] The arms trade sector is expected to disclose relevant information in relation to the arms to be manufactured (The Organization for Security and Co-operation in Europe, 2003), p. 6.

Issue licences for a specific, limited amount of time, e.g. with a validity of not more than five years (The Organization for Security and Co-operation in Europe, 2003), p. 12.

Require a marking system of arms and their components at the time of SALW production (The Organization for Security and Co-operation in Europe, 2003), p. 8-9.[120] That way, the arms' traceability can be ensured and the diversion to the illicit market and trafficking can be tracked (The Organization for Security and Co-operation in Europe, 2003), p. 2 and 4. The marking should be unique, identify the country of manufacture and provide information to enable states to identify and trace each weapon.[121] Some states have already adopted rules along these lines (King & McDonald, 2015) p.60.

Require SALW manufacturers to collaborate with states by acting swiftly upon tracing requests and providing relevant information.[122]

Finally, the use of "new technologies" in the production and design of SALW could undermine existing manufacturing regulation and control, especially in relation to marking and tracing (King & McDonald, 2015, pp. 60–61).[123] Undertakings therefore play a relevant role in terms of collaborating with states to improve, update and promote technologies that enhance marking and tracing mechanisms.[124]

Three examples illustrate the importance of SALW manufacturers contributing to controls through technology. First, they could contribute by developing techniques to guarantee that markings on surfaces like polymer cannot be easily removed or modified.[125] Second, the use of real-time locating technology such as radio frequency identification might be considered.[126] Third, new technologies could involve features that directly prevent the use of arms by an unauthorised person, such as personalised "smart guns".[127]

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118 United Nations (2018). *National controls over the manufacture of small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.10, pp. 8/9.

119 United Nations (2018). *National controls over the manufacture of small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.10, p. 10, 12.

120 See also UN Firearms Protocol, Article 8, the EU (Firearms) Directive 2021/555 of the European Parliament and of the Council of 24.3. 2021 on control of the acquisition and possession of weapons, article 4.

121 UN Programme of Action, II. 7. The *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons* (International Tracing Instrument), II. 7. – 10., specifies the marking requirement in greater detail.

122 United Nations (2018). *National controls over the manufacture of small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.10, p. 13.

123 Cf. also UNGA. A/CONF.192/BMS/2022/1. *Report of the Eighth Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, para. 9.

124 See: UNGA, A/CONF.192/BMS/2022/1 *Report of the Eighth Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.* A/CONF.192/BMS/2022/1, para. 67.

125 Kingdom of Belgium (2022). *Recent developments in the production, technology and design of small arms and light weapons (SALW): The need to recommend the establishment of an open-ended technical expert group.* Working paper submitted by Belgium, Eighth Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects New York, 27 June–1 July 2022, p.2. See also: UN(2022). *Marking and recordkeeping.* Modular Small-arms-control Implementation Compendium (MOSAIC) 05.30, p.1. UN(2018). *National controls over the manufacture of small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.10, p.13.

126 *Ibid.*, para. 68. (Danssaert, 2019; The Organization for Security and Co-operation in Europe, 2003), p. 7.

127 "Smart guns" function with user verification systems that recognise the authorised user, e.g. by way of biometric systems. See (Kanetake & Ryngaert, 2023; Kauffman et al., 2003; Kessel, 2021; Pacuic, 2022, pp. 198–225), (Greene, 2013)

It is crucial to implement SALW arms manufacture controls "to prevent the destabilizing accumulation and uncontrolled spread of such weapons" (OSCE 2003 p.2). Yet, existing rules might not ensure that arms are produced responsibly, as states have focussed on responsible arms *trade* rather than responsible *production* (Piccini, 2020, pp. 93–99). Accordingly, the "widespread legality of semi-private and mass-market production of SALW" leads to a higher risk of "illicit proliferation and misuse of SALW" (Piccini, 2020, pp. 92–99).

To enhance controls on manufacturing, it has been proposed that for "export-oriented SALW production", export risk assessment criteria should be considered during the production licencing process (OSCE 2003 p4.). A risk assessment separated from the assessment conducted during the export licencing process, would be especially useful in cases where the production process starts before an export licence has been issued. Otherwise an export licence is already applied for and issued following a risk assessment before production begins.[128] This occurs when arms are produced for "off the shelf" purchases, as opposed to "tailor-made" arms (Hartley, 2017, p. 105) or production based on "contractual orders" (Lifshits, 2003, p. 162) . A licence for such "off the shelf" production could contain *a priori* restrictions as to the later recipient of the arms.[129] Imposing such restrictions from the outset, and not just at the time of export licencing, would disincentivise mass-production of arms. In the absence of such regulation, and with companies operating "outside the reach of effective control"(Piccini, 2020, p. 100), requirements regarding corporate responsibility in the manufacturing tier are clearly necessary.

5.2.1.2. The geographic distribution of arms production

Arms production is internationalised in two ways: first, large arms-producing companies generally operate transnationally; second, arms-producing companies collaborate in regional or international cooperative projects. Arms-producing companies often duplicate a certain production unit abroad, rather than vertically integrate production by putting in place distinct specialised production capacities along the GVC (Oudot & Bellais, 2019, pp. 172–173). Shifting arms production to subsidiaries in other countries[130] can increase the risk of evading stricter export controls of the parent company's home state. Delocalising arms production to states with looser export controls is referred to as "system shopping" through the "diversification of company structures" or the "strategic offshoring/relocation of production." (Kytömäki, 2014; Pérez Ricart & Ramhorst, 2018; Schliemann & Bryk, 2019, p. 7).

The geographic distribution of arms production is more complex in system integrator cases. International defence cooperation projects are notably implemented among European arms-producing companies (Oudot & Bellais, 2019, p. 173) with EU member states engaging in bilateral or multilateral cooperation projects to assemble complete weapon systems in one member state using components that emanate from other member states.[131] Joint programmes between companies headquartered in the EU and non-EU member states also exist.[132]

So far, there is no EU-wide approach ensuring a common (high) export standard when the ensuing products are transferred to third countries. At the same time, European cooperation agreements regularly stipulate that member states contributing components cannot object to the export of the final

128 See e.g., the Walloon Decree of 21.6.2012 (*Décret relatif à l'importation, à l'exportation, au transit et au transfert d'armes civiles et de produits liés à la défense*), art. 17(1,2), which sometimes requires the issuance of an export licence before the start of the production of arms.

129 See: United Nations (2018). *National controls over the manufacture of small arms and light weapons.* Modular Small-arms-control Implementation Compendium (MOSAIC) 03.10, p.12.

130 For example, in the case of SALW production, (King & McDonald, 2015) see: Small Arms Survey (2014). *Producers of Small Arms, Light Weapons, and Their Ammunition.* Research Notes, Number 43, p.1, https://smallarmssurvey.org/resource/producers-small-arms-light-weapons-and-their-ammunition-research-note-43.

131 European Parliament (2020). *European Parliament resolution of 17 September 2020 on Arms export: implementation of Common Position 2008/944/CFSP.* 2020/2003(INI), 2021/C 385/06, para.27.

132 See: *Commission Staff Working Document on Defence - Accompanying the document* Communication Towards a more competitive and efficient defence and security sector. SWD (2013) 279 final, p.26.

product to third countries,[133] while they are possibly subjected to lower risk assessment standards.[134] Moreover, when transferred parts and components are integrated into larger weapon systems by another company (system integrator) in another state, the final end-use/r of the items might be unknown or uncontrolled at the time the part/component is transferred (Duquet, 2011, p. 11).

Since the contributing state has limited control regarding the export of the completed product, component producing companies could be held responsible for the potential misuse of assembled arms, but this has not been explicitly regulated. In addition, companies contributing components might not have strong leverage regarding the export of completed products (Cops & Viaene, 2022, p. 60).

Finally, there are concerns about the European Defence Fund (EDF), which has been created to develop arms and to contribute to the EU's strategic defence autonomy. There is a risk that EDF-funded arms can be exported to non-EU States while there is no clear mechanism to prevent IHRL and IHL violations from occurring. Therefore, also the EDF would need to implement measures to mitigate risk of illegal exports of arms produced with its funding (Vroege, 2022, p. 1575).

5.2.2. Arms Transfers

The next phase in the arms value chain is that of arms transfers. A definition of the term "transfer" can be found in the ATT where the term covers export, import, transit, trans-shipment and brokering.[135] This study focusses on the processes connected to the export phase. As noted above, the production and the export stage might be interwoven, namely when parts/components to produce larger weapons systems are exported.

The EU Dual-Use Regulation defines "export" when it refers to the procedure that applies to goods leaving the EU customs territory. It requires an export customs declaration and the presentation of the exported goods at the customs office.[136] The EU-Dual-Use Regulation (Art.2(2)(c)) defines an "exporter" as the (natural or legal) person that "holds the contract with the consignee in the third country and has the power to determine the sending of the items out of the customs territory of the Union".

The global arms export market has traditionally been contrasted with the commercial and competitive market for civilian goods ((Lifshits, 2003, p. 161 et seq.). This view, however, rests on the fact that economic analyses of the arms trade generally focus on one specific type of exports, namely transfers of completed large weapon systems (such as combat aircraft, missiles, tanks and warships) by prime contractors or system integrators to governments (Hartley, 2017, p. 42). In this view, governments are described as the only or at least the major buyers of such arms, which leaves room for possible monopolies (Hartley, 2017, pp. 42, 69; Lifshits, 2003, p. 162; Sköns & Dunne, 2008, p. 117) with a single or major buyer dominating the arms supply side (Hartley, 2017, pp. 69–79). The perceived dominance of buying governments is mirrored by the equally reduced competition on the suppliers' side, with the likely existence of oligopolies or even monopolies (Hartley, 2017, p. 423 134; Lifshits, 2003, p. 162). The arms export market is further characterised by the close relationship and "interdependence" between companies and governments, as opposed to the greater independence and distance between parties in the civilian market (Hartley, 2017, p. 142; Lifshits, 2003, p. 162).

In addition to the "whole unit" arms trade, the trade in components and services is increasing (Brauer, 2007, p. 175). Parts and components can be referred to as such in the strict sense, i.e. if they are specifically designed for the incorporation into arms, but they can also be dual-use goods or goods for civilian use to be integrated into weapons systems (Cops et al., 2017, p. 27; Oudot & Bellais, 2019, p. 173). The latter category has opened the arms trade market

133 See , for example, the French-German-Spanish agreement on export controls in the defence domain: Übereinkommen über Ausfuhrkontrollen im Rüstungsbereich vom 24.09.2021, Bundesgesetzblatt Teil II Nr.22 (https://www.bgbl.de/xaver/bgbl/start.xav#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl221s1094.pdf%27%5D__1675686331669).

134 European Parliament (2020). *European Parliament resolution of 17.09. 2020 on Arms export: implementation of Common Position 2008/944/CFSP.* 2020/2003(INI), 2021/C 385/06, para.33.

135 Art. 2(2) ATT. Furthermore, the UN Resolution A/HRC/35/8, footnote 3 clarifies that "arms transfer" covers the export, import, sale, lease, or loan of arms from the jurisdiction and/or control of one state to that of another.

136 The Union Customs Code, Art. 269 (Regulation (EU) No 952/2013 of 9.10.2013). See also: EC, "Export procedure": https://taxation-customs.ec.europa.eu/customs-4/customs-procedures-import-and-export-0/what-exportation/export-procedure_en.

to companies traditionally operating in the civilian market and purportedly having less experience and knowledge about their obligations within the framework of arms export controls (Cops et al., 2017, p. 60), p. 60. Therefore, the current arms trade market encompasses a wide spectrum of actors with wide product ranges, both defence-related and civil, who transfer their products to different points in the value chain (Sköns & Dunne, 2008, p. 114).[137]

Finally, there are various types of transactions in the arms trade market, namely transfers between governments, transfers from companies to governments, transfers from governments to non-state actors and transfers between non-state actors (including companies) themselves (Pearson et al., 2008, p. 125). Transfers between governments can either occur without the involvement of arms-producing companies of the selling country, as in sales from government stocks, or by way of a selling government that procures arms from a producing company on behalf of a buying government.[138] The more the arms-producing company is involved in the transfer, the more insight into and influence on the transfer modalities, as well as leverage on the buyer, the company is said to have (possibly exceeding the information and influence of state authorities in the exporting country) (Katz, 2022a, pp. 9–12).

5.2.2.1. The stages of an arms export

The export stage starts with negotiations and conclusion of a contract between seller and buyer, possibly following a procurement process if the buyer is a government. The contracting phase in arms exports involves complex deals and negotiations of the contract parameters, especially in the case of tailor-made large weapon systems (Hartley, 2017, p. 105; Lifshits, 2003, p. 170). Besides the delivery of the goods, the contracts often include offsets (Hartley, 2017, p. 117; Lifshits, 2003, pp. 245–273). Offset deals allow the buyer to contribute to the execution of the contract, for instance through co-production or licenced production taking place in the importing country (Brauer, 2007, pp. 985–988).[139] In long-term contracts, the terms are possibly renegotiated at a later stage (Lifshits, 2003, p. 170). Hence, the contracting stage involves close and extended contacts between the two parties, which can continue after the delivery of the arms. Contractual relationships can also include various "through-life care" services for the transferred arms, including training and maintenance (Lifshits, 2003, p. 245).[140]

After the conclusion of the contract, the exporter is required to apply for an export licence. Licencing requirements and control might also apply to the *transport* (logistics) and *transit/trans-shipment* of the arms (Cops et al., 2017, p. 90; Cops & Vanheuverswyn, 2022, p. 34 et seq.). Therefore, companies active in sectors that are relevant to ensuring a responsible arms transfer are expected to conduct serious impact assessments as well (Holtom & Mensah, 2023, p. 25).

Other possible intermediary stages and actors should be considered regarding sales in the civilian or commercial market, particularly when the products risk entering the illegal cross-border market. Concerned here are the *marketing*[141] and *distribution*[142] of completed products such as SALW, and dual-use goods or certain parts and components, including civilian technology with potential military end-use. Several cases illustrate that manufacturing companies selling their products domestically or transferring

137 Conversely, traditional suppliers of defence products diversify their production by including civilian products in their range, see: EC (2013). *Commission Staff Working Document on Defence - Accompanying the document* Communication Towards a more competitive and efficient defence and security sector. SWD (2013) 279 final, p.29.

138 See e.g., the US law on "Foreign Military Sales" (as opposed to "Direct Commercial Sales", i.e. sales directly by US companies to foreign end-users): US Arms Control Act (22 USC Ch. 39), §2761 and §2762. See also: Defense Security Cooperation Agency. *Foreign Military Sales FAQ* (https://www.dsca.mil/foreign-military-sales-faq).

139 For a description of offsets, see also: US Department of Commerce, Bureau of Industry and Security. *Offsets in Defense Trade – Frequently Asked Questions* (https://www.bis.doc.gov/index.php/documents/pdfs/1677-offsets-in-defense-trade-faqs-final/file).

140 See EC (2013). *Commission Staff Working Document on Defence - Accompanying the document* Communication Towards a more competitive and efficient defence and security sector. SWD (2013) 279 final, p.29.

141 "Marketing" is part of a company's value chain. See: Holly, G., Tansey, S. & Nagaoka, J. (2023). *Due diligence in the downstream value chain: case studies of current company practice.* The Danish Institute for Human Rights, p. 7. At https://www.humanrights.dk/files/media/document/Due%20diligence%20in%20the%20downstream%20value%20chain%20-%20case%20studies%20of%20current%20company%20practice.pdf

142 Some risks of arms distribution are analysed by (Pearson et al., 2008, p. 128)

them to distributors or resellers, are at increased risk of their products being misused[143] and various transnational cases of misuse of such products have been reported.[144] Clearly, it is difficult to identify and control the end-use of the products concerned because such exercise involves a complex chain of activities and actors, including the network of third-party distributors.[145] It is, however, expected that manufacturing companies take measures to address these risks.[146]

Arms trade can occur through intermediaries. Contacts between sellers and buyers, including cases where governments are involved, can be established by arms *brokers* (Wood, 2021, p. 220). Brokers facilitate and organise arms transfers, often merging these activities with others such as trading, shipping and financing.[147] The role of arms brokers has been documented as involving a high risk of "opaque" structures, and various states have established regulations nor national control systems for these intermediaries (Wood, 2021, pp. 220–228).

5.2.2.2. The duty to provide information to the state authorities

While the duty of companies to provide relevant information about their activities to state authorities potentially applies to all stages of the arms value chain, it is especially discussed within the context of the transfer stage. Companies active in the arms trade sector must provide information to assist states with their duty to conduct risk assessments (Wood et al., 2019, pp. 15–26), for instance to fight diversion and illicit trafficking of SALW. The UN Firearms Protocol (Art.13.3) requires states to "seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect" illicit trafficking in firearms. The impact of diversion (Wood & Holtom, 2020), p.13 and the "technical expertise, market know-how and contacts"(Wood et al., 2019, p. 42), of companies justify this duty of cooperation with states.

The system of end-use/r documentation implies that companies applying for an export licence must provide information to the state, but this duty goes beyond the ambit of end-use/r documentation. Companies are required to provide information at various stages of the export licencing process, this is, during the whole period of validity of an export licence. First, to assess the risk of diversion prior to the issuing of a licence, applicants must inform about transfer details such as the envisaged transport route, particularly when this route is not straightforward.[148] Second, since export licences are valid for several years and the actual export might occur after the licence was issued, exporters are required to keep states informed about the actual use of the licence at certain time intervals during its validity. For instance, EU member states apply these reporting requirements to intra-

143 See cases of illegal cross-border trade of SALW that have been decided in the United States District Court, District of Massachusetts, Mexico, plaintiff, v. Smith & Wesson brands, inc.; Barrett firearms manufacturing, inc.; Beretta corp.; Century international arms, inc.; Colt's manufacturing company, LLC; Glock, inc.; Sturm, Ruger & co., inc.; and Witmer Public Safety Group, inc. d/b/a interstate arms, defendants. civil action no. 21-11269-fds.

144 See, Special Advisory Council for Myanmar (2023). *Fatal Business: The Myanmar Military's Weapon Production.* Report, p. 38 (https://specialadvisorycouncil.org/wp-content/uploads/2023/01/SAC-M-REPORT-Fatal-Business-ENGLISH-1.pdf); International Partnership for Human Rights (IPHR) & The Independent Anti-Corruption Commission (NAKO) (2023). *Enabling War Crimes? Western-Made Components in Russia's War Against Ukraine.* Report, p. 34 (website); (Bryne et al., 2022). *Deadly Trade - As Russian missiles struck Ukraine, Western tech still flowed* (https://www.reuters.com/investigates/special-report/ukraine-crisis-russia-missiles-chips/,; CNN (2023). *A single Iranian attack drone found to contain parts from more than a dozen US companies* (https://edition.cnn.com/2023/01/04/politics/iranian-drone-parts-13-us-companies-ukraine-russia/index.html; The Wall Street Journal (2022). *Ukrainian Analysis Identifies Western Supply Chain Behind Iran's Drones* (https://www.wsj.com/articles/ukrainian-analysis-identifies-western-supply-chain-behind-irans-drones-11668575332; NOS (2023). *Miljoenen chips Nederlandse fabrikanten belanden in Rusland ondanks sancties* (https://nos.nl/artikel/2461459-miljoenen-chips-nederlandse-fabrikanten-belanden-in-rusland-ondanks-sancties. France 24, 2022) *How EU-made shotgun cartridges ended up being used to repress protests in Iran* (https://observers.france24.com/en/middle-east/20221125-iran-protests-eu-shotgun-cartridges-cheddite-sanctions; Il Manifesto (2022). *After Italian bullets discovered in Myanmar, legislators focus on arms loopholes* (https://global.ilmanifesto.it/after-italian-bullets-discovered-in-myanmar-legislators-focus-on-arms-loopholes/.

145 See Politico (2022). *The chips are down: Putin scrambles for high-tech parts as his arsenal goes up in smoke* (https://www.politico.eu/article/the-chips-are-down-russia-hunts-western-parts-to-run-its-war-machines/.

146 See, Special Advisory Council for Myanmar (2023). *Fatal Business: The Myanmar Military's Weapon Production.* Report, p.38 (https://specialadvisorycouncil.org/wp-content/uploads/2023/01/SAC-M-REPORT-Fatal-Business-ENGLISH-1.pdf).

147 United Nations Security Council (2011). *Small arms: Report of the Secretary-General.* S/2011/255, p.2.

148 For the transport by air of SALW, see the Wassenaar Arrangement (2007): *Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons (SALW) through Air Transport*, point 2.1. See also, (Wood & Danssaert, 2011, p. 24).

EU transfers and to extra-EU trade (Cops et al., 2017, p. 116).[149] This allows the state to react to changed circumstances, e.g. by suspending or withdrawing the licence in case future uses are not aligned with the terms of the licence.[150] In France, the state conducts *a posteriori* controls independent of any information they may receive from the companies. The French authorities check whether the exporter used the licence in conformity with any condition that might have been attached to the licence.[151]

5.2.3. Post-delivery phase

Once the transferred arms are delivered to the final end-user and are in use, the contact between companies active in the arms value chain and their clients does not end.

5.2.3.1. Post-sale services

For complex weapon systems, companies in the arms trade sector provide "support" or "post-sale" services such as installation, maintenance, repair, overhaul, providing spare parts, replacement, upgrade, testing and training (Amnesty International, 2019, p. 47; Azarova & Trevisan, 2020, p. 9). The companies concerned can therefore have leverage over their clients and influence their behaviour, e.g. through contractual clauses requiring the respect for human rights and IHL (Amnesty International, 2019, pp. 40, 48). In the post-delivery phase, companies can also get access to information that might not be readily available to state authorities (Katz, 2022b). Post-sale services have been considered as taking place in a "legal grey area"(Amnesty International, 2019, p. 47). They may either fall within the scope of the initial export licence for the arms to which they relate, or they may necessitate a separate licence (Azarova & Trevisan, 2020, p. 10).[152]

The ATT requires states to control the transfer of goods that could be used to carry out these services, notably the transfer of parts and components. However, the ATT (Art 4.) only requires states to control the export of parts and components "where the export is in a form that provides the capability to assemble the conventional arms", which means the requirement does not include other forms of exports, e.g. exports for the purpose of repair or maintenance (Wood, 2021, p. 81).

EU rules concerning the export of military equipment tie the licencing requirement to the goods that are used in the post-sale services, but not to the services themselves. The Common Military List of the European Union includes equipment such as "software"[153] and "technology".[154] While the latter category explicitly covers technology "required [...] for [...] maintenance (checking), repair, overhaul or refurbishing of items specified in the EU Common Military List"[155], it excludes technology "that is the minimum necessary for the [...] maintenance (checking) or repair, of those items which are not controlled or whose export has been authorised".[156]

Some states provide for licencing requirements with respect to the post-sale services themselves. In Germany, for example, a licencing requirement exists for certain types of "technical support", among others for support in a country subject to an arms embargo in relation to an exported good with military end-use.[157] "Technical support" is defined as relating to "the repair, the development, the manufacture, the assembly, the testing, the maintenance or any other technical service."[158]

However, post-sale services are generally not subject to special scrutiny or assessment criteria, particularly if they are not covered by the initial export licence

149 See Art. 8 of Directive 2009/43/EC.

150 See EU Common Position 2008/944/CFSP (art.1a) and ATT (Art. 7(7)). Flanders requires the licence holder to inform the state of any change of circumstances of the export during the validity of the licence. (Cops et al., 2017, p. 141).

151 Ministère des Armées (2022). *Rapport au Parlement sur les exportations d'armement de la France*, pp. 40-2.

152 Depending on where the post-sale service is executed – in the country of end-use or in the country where the company providing the services is located – an import or an export licence might be required (Azarova & Trevisan, 2020).

153 Category ML21 of the Common Military List of the European Union.

154 Category ML22 of the Common Military List of the European Union.

155 Category ML22 a. of the Common Military List of the European Union.

156 Note 2 to Category ML22 of the Common Military List of the European Union.

157 Section 50(1) of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*).

158 Section 2(16) of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*).

procedures (Azarova & Trevisan, 2020, p. 5,32,37). Frequently, the establishment of a subsidiary in a third state and the execution of post-sale services by such a subsidiary do not require a licence (Azarova & Trevisan, 2020, p. 49).

5.2.3.2. Post-delivery verification

Post-delivery control can also occur in the context of post-delivery verification measures, such as on-site post-delivery verification inspections or longer-term on-site end-use monitoring. Following the United States, a growing number of – mostly European – states have introduced the instrument of on-site post-delivery verification inspections. But the number of states having actually conducted on-site visits is low.[159] The verification might be limited to the export of specific types of arms, such as SALW, or to specific end-users, e.g. governments.[160] The right of the exporting state to perform on-site visits in the state of end-use may be stipulated in the end-use/r certificate where the end-user commits to allowing the inspections.[161] While on-site post-delivery verification visits are organised by the state authorities and diplomatic missions, the companies involved could also collaborate in these inspection missions, given their technical expertise (Holtom & Mensah, 2023, p. 26).[162]

6. Due diligence responsibilities within the export licencing process and Internal Compliance Programme

In the previous chapter, we presented selected stages of the arms value chain while discussing their respective business activities and related practical aspects in light of the arms trade's general regulatory framework. This chapter highlights and evaluates some examples of what could amount to companies' concrete due diligence responsibilities within the arms export licencing process.

6.1. Flanders: Leading by example

In the Flemish arms export control framework, human rights due diligence "obligations and expectations" are embedded in the legal requirement for the exporter to implement an Internal Compliance Programme (ICP).[163] An ICP is defined as the internal measures and procedures a company should observe to ensure its transactions occur in conformity with regulations, and as the framework for identifying the risks related to the trade in strategic goods.[164] The ICP thus helps the exporter to comply with the export control rules and

159 See the overview in: SIPRI (2021). *Post-Shipment On-Site Inspections of Military Materiel: Challenges and Responses.* SIPRI Policy Brief, p.1.

160 See, the German practice: Federal Ministry of Economic Affairs and Energy (2015). *Key points for the introduction of post-shipment controls for German arms exports* (https://www.bmwk.de/Redaktion/EN/Downloads/eckpunkte-einfuehrung-post-shipment-kontrollen-deutsche-ruestungsexporte.pdf?__blob=publicationFile&v=2). Federal Ministry of Economic Affairs and Energy (2021). *Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im ersten Halbjahr 2021.* Rüstungsexportbericht, p.4.

161 See Council Decision (CFSP) 2021/38 of 15.01. (Art. 6(c)), on a common approach on the elements of end-user certificates in the context of the export of small arms and light weapons and their ammunition.

162 See also, Arms Trade Treaty, Eighth Conference of States Parties (2022), Working Paper presented by the President of the Eighth Conference of States Parties to the Arms Trade Treaty (ATT): Post-shipment controls coordination – Effective export verification and good-faith cooperation between exporters and importers – Status quo and guidance ("Toolbox"), ATT/CSP8/2022/PRES/732/Conf.PostShip, 22.07.2022, p.8.

163 For an overview about the Flemish defence industry, see: (Cops & Viaene, 2022).

164 Dienst Controle Strategische Goederen. *Compliance.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/compliance, last access 23/5/2023). Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 7.

avoid violations of them,[165] and serves as a precondition for obtaining a "prior authorisation" (*voorafgaande machtiging*) and a "certificate of certified businesses".[166] A "prior authorisation" is required to apply for an export licence and to use a general licence.[167] A "certificate of certified person" is required to receive defence-related products originating from another EU member state within the framework of a general licence and attests to the reliability of the receiving company when it comes to observing possible export limitations imposed by the EU member state of origin.[168] The Flemish ICP Guide establishes the key elements that companies need to consider for effective implementation:[169]

- A *mission statement* or similar document, an adequate *organisational structure* to comply with export control requirements, and staff training on the export control regulation.

- A *transaction screening*, i.e. a risk analysis determining whether the products concerned are on the export control lists and comprising a screening of the end-use/r. To this end, companies should:

  - Inform who is the end-use/r, and provide the end-use/r documents (*eindgebruikersverklaring*).[170]

  - Carry out their own risk assessment regarding possible diversion and/or misuse of their products and implement their own decision-making process.[171] The risk assessment is guided by a "red flag" system to detect suspicious transactions.[172]

- Regarding data *registration* and *reporting* requirements companies must:

  - Provide information including on the phase after the use of the granted licence.

  - Report about any change of circumstances of the export during the validity of the licence.[173]

  - Maintain a system to record the relevant export data.

- Implement *monitoring, audits and corrective actions*.

- Adopt measures to *protect* their products *physically and digitally* from theft or unauthorised access.

While the transaction screening could go beyond the export control framework,[174] its main purpose seems to ensure compliance with export regulations. The Flemish ICP Guide specifies that the transaction screening ensures that transactions occur under

165 Cf. Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 8.

166 Dienst Controle Strategische Goederen. *Compliance.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/compliance, last access 23/5/2023). In addition, an ICP is a requirement to obtain a global export licence for the export of dual-use goods (Art. 15(2) of the Dual-Use Regulation), see: Dienst Controle Strategische Goederen (2022). Gids voor het opstellen van een intern nalevingsprogramma. Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 9.

167 Dienst Controle Strategische Goederen. Voorafgaande machtiging. Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/voorafgaande-machtiging, last access 23/5/2023). A "prior authorization is also required for a licence for intra-EU transfers and for transit/transshipment. A "prior authorisation" is not required for the export and transfer of civilian firearms and is valid indefinitely but is re-evaluated every three years. The purpose of a "prior authorisation" is to ascertain that the applicant has the "necessary morality and reliability" to exercise activities with respect to defence-related products (see Art. 10, § 2 of the Flemish Arms Trade Decree).

168 Art. 5(2)(b) and Art. 9(2) of Directive 2009/43/EC. Art. 14, § 2, 2° and Art. 14, § 3, 1° of the Flemish Arms Trade Decree. A "certificate of certified businesses" is valid for three years, see: Dienst Controle Strategische Goederen. *Certificaat van gecertificeerde persoon.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/certificaat-van-gecertificeerde-persoon).

169 Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, pp.14–31.

170 *Ibid.*, p.22.

171 *Ibid.* Companies need to consider the export criteria of the Flemish Arms Trade Decree and the EU Common Position 2008/944/CFSP and verify publicly available elements. See also: Dienst Controle Strategische Goederen. *Due diligence inzake mensenrechten.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/due-diligence-inzake-mensenrechten, last access 23/5/2023).

172 See the illustrative list of red flags in: Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, pp. 32 and 33.

173 Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 23. Dienst Controle Strategische Goederen. *Due diligence inzake mensenrechten.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/due-diligence-inzake-mensenrechten, last access 23/5/2023).

174 Dienst Controle Strategische Goederen. *Due diligence inzake mensenrechten.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/due-diligence-inzake-mensenrechten, last access 23/5/2023).

the required licence and do not breach applicable sanctions.[175] While it aims at contributing to international peace and security, the role of companies is limited to contributing to the efforts of state authorities by providing information[176] and their own risk assessment aims at scoping whether their licence application is likely to be approved.[177] In short, the ICP requires companies to comply with the arms export control framework.

The ICP interacts with due diligence responsibilities and legal obligations flowing from the export control regime.[178] Some elements of the human rights due diligence are merged into the elements of the ICP (especially in the transaction screening) which is closely linked to the export control framework, but it is not framed as an independent duty of the exporters asking for the licence. The Flemish guidance affirms that human rights due diligence goes further than (compliance with) the export control regulatory framework but it does not develop the farther-reaching due diligence expectations and obligations.[179]

Nevertheless, the ICP and due diligence guidance reflect the UNGPs by referring to businesses' "autonomous responsibility" to respect human rights as well as to the "shared" responsibility between states and companies to exert export control and to prevent the misuse of their products.[180] Furthermore, companies are required to inform the licencing authority about changed circumstances after the licence has been granted as long as the licence is valid, and to act themselves in accordance with the information they acquired in case of suspected misuse of their products, independently from measures taken by the licencing authority and regardless of when the information is obtained.[181] Companies are also required to use their "leverage" in the relation with their clients, for instance through human rights clauses in contracts.[182]

To be more aligned with the UNGPs, however, the Flemish ICP and due diligence guidance would need to include other aspects as well, such as stakeholder engagement and grievance mechanisms. Other limitations concern, for example, the risk assessment carried out by the Flemish licencing authority – and by extension the risk assessment that companies are required to undertake within the framework of an ICP and human rights due diligence – with regards to the transfer of components to be integrated into a larger weapon system. In the case of the transfer of so-called "non-essential components"[183], the Flemish licencing authority refrains from attaching any limitations or conditions to the transfer in view of potential end-use risks in relation to the export of the finished product.[184]

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175 Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 20.

176 See *ibid.*, p. 9.

177 Dienst Controle Strategische Goederen. *Richtsnoeren voor risicobeoordeling door bedrijven – screening van eindgebruik en betrokken partijen.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/sites/default/files/2022-03/dCSG_Inschatting%20toelaatbaarheid%20transactie_Richtsnoeren.pdf, last access 26/5/2023), p. 1-2. Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 7.

178 Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p. 6. Dienst Controle Strategische Goederen. *Due diligence inzake mensenrechten.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/due-diligence-inzake-mensenrechten, last access 23/5/2023).

179 Dienst Controle Strategische Goederen. *Due diligence inzake mensenrechten.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/due-diligence-inzake-mensenrechten, last access 23/5/2023).

180 *Ibid.* Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, pp.5-6.

181 Dienst Controle Strategische Goederen. *Due diligence inzake mensenrechten.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/due-diligence-inzake-mensenrechten, last access 23/5/2023). Dienst Controle Strategische Goederen (2022). *Gids voor het opstellen van een intern nalevingsprogramma.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken, p.23.

182 *Ibid.*

183 Components are considered "non-essential" if their nature and significance in relation to the product into which they are integrated are limited, see: Dienst Controle Strategische Goederen. *Bijzondere regeling bij overbrenging van "niet-essentiële onderdelen" naar andere lidstaten van de EU.* Vlaamse overheid, Departement Kanselarij & Buitenlandse Zaken (https://www.fdfa.be/nl/bijzondere-regeling-bij-overbrenging-van-niet-essentiele-onderdelen-naar-andere-lidstaten-van-de-eu).

184 *Ibid.* Although this practice flows from an interpretation of Art. 4(7) and (8) of Directive 2009/43/EC and thus concerns intra-EU transfers, it is also applied in relation to extra-EU transfers of components, see, for example, the Flemish government's replies to parliamentary questions in relation to the export of components to the UK for the construction of the A400M aircraft ultimately exported to Turkey: Vlaams Parlement. *Verslag vergadering Commissie voor Buitenlands Beleid, Europese Aangelegenheden, Internationale Samenwerking en Toerisme,* 15/6/2021 (https://www.vlaamsparlement.be/nl/parlementair-werk/commissies/commissievergaderingen/1528204/verslag/1532043, last access 22/1/2024); Vlaams Parlement.

This means that the risk assessment performed and required by the Flemish licencing authority with respect to the transfer of such components stops at the first recipient that integrates the component into the own product, and does not include the actual end-use/r of the finished product.

6.2. ICPs in other legal frameworks

Other countries also have an ICP as a legal condition to obtain certain authorisations in the licencing process. In the German export control system, the issuance of an export licence for military equipment as well as the confirmation that a certain export does not require a licence ("zero notice") can be conditioned upon the reliability of the applicant.[185] Reliability is "the ability to ensure compliance with applicable laws and regulations" and requires the implementation of an ICP.[186] Companies may be relieved of a review of the ICP for individual licences. But for global licences and the certification for the use of general licences, the effectiveness of a company's ICP is strictly reviewed in light of the advantages these licences hold over individual licences.[187] Regarding the criteria to be met by ICPs, the central element is the risk analysis. This involves the "assessment of compliance risks" and of the legal provisions that must be adhered to.[188] To this end, the "customer and transaction check" assesses the end-use and the risk of diversion by using a "red flag" system to identify the need for deeper investigation.[189]

The Netherlands has issued a guidance on the use of ICPs for the export of strategic goods. Similarly to German companies, Dutch companies must implement an ICP for exports based on global licences.[190] They are encouraged to assess human rights risks in the export (end-use/r) screening procedure - and this is based on the UNGPs -, but guidance to this effect is more limited than in Flanders.[191]

The EU Dual-Use Regulation requires exporters, among other stakeholders, to carry out, as part of the ICP, "transaction-screening measures, also known as the due diligence principle," to assess "risks related to the export of the items to end-users and end-uses" and to enable compliance with the Regulation.[192] It further refers to the exporter's due diligence regarding possible IHRL or IHL violations in relation to cyber-surveillance items. If the exporter's due diligence findings show that cyber-surveillance items without an export authorisation requirement could have serious risks of violating IHRL or IHL, the exporter must notify the licencing authority, which can require an authorisation for the export.[193] Like in Germany and the Netherlands, the EU Dual-Use Regulation singles out the use of global export licences as a prime case in which an ICP is required.[194] The EU Commission has published guidelines for setting up and implementing an ICP in line with the Dual-Use Regulation.[195] Further guidance on ICPs with respect to dual-use goods is provided within the framework of the Wassenaar Arrangement.[196]

In these regulatory frameworks as well as in the literature, the common view is that ICPs primarily aim at ensuring compliance with export control laws and

185 Section 8(2) of the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*).

186 German Federal Office for Economic Affairs and Export Control (BAFA) (2018). *Internal Compliance Programmes – ICP: Company-internal export control systems,* p.4.

187 *Ibid*., pp.10-11.

188 *Ibid*., p.13.

189 *Ibid*., p.17.

190 Dutch Ministry of Foreign Affairs (2019). *Internal Compliance Programme: Guidelines for compiling an Internal Compliance Programme for Strategic Goods, Torture Goods, Technology and Sanctions*. Version 1.2, p.5.

191 See, *ibid*., p. 8, 11 and 14.

192 EU Dual-Use Regulation, Recital 7 and Art.2(21).

193 EU Dual-Use Regulation, Art.5(2).

194 EU Dual-Use Regulation, Recital 18 and Art.12(4).

195 See, Commission Recommendation (EU) 2019/1318 of 30.7.2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009, OJ L 205, p. 15 – 32.

196 See, Participating States of the Wassenaar Arrangement (2011). *Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies.*

regulations.[197] Moreover, by conducting a preliminary risk assessment of their own, companies prepare the licencing process(Wood & Holtom, 2020, p. 14). In fact, a company's screening of a transaction and end-use/r might seek to establish whether an export licence is required, especially for catch-all clauses establishing a licencing requirement for non-controlled products in case of a given end-use.[198] Another objective of ICPs commonly invoked is to support the licencing authorities in their risk assessment and to promote cooperation between the state and companies to achieve effective export controls.[199]

7. Case law on state and corporate accountability in arms value chains

In several countries, cases related to corporate accountability have been brought to courts by activating various types of legal actions seeking to hold companies liable for serious violations of IHRL, or IHL that have been translated into national norms. Only in a few cases, mainly filed to OECD National Contact Points (NCP), it has been claimed that companies failed to implement due diligence procedures. This section presents a non-exhaustive overview of frequently initiated types of actions, indicating whether they fall within the area of IHRL or IHL, and whether there is any reference to the responsibility to implement due diligence procedures in arms value chains to avoid or mitigate risks related to IHRL or IHL breaches.

Some court cases have been initiated by persons affected by the end-use of arms or by (human rights) organisations on their behalf. Frequently, they lodge criminal complaints seeking to establish the complicity of a company (in countries that provide for corporate liability), or of individuals acting in a "corporate capacity" for the company, when crimes were allegedly committed with the arms they produced and/or exported. Some claims refer to international crimes (tried before international courts/tribunals), others to crimes incorporated into domestic criminal law, such as war crimes, or (domestic) crimes such as manslaughter.

Several complaints against arms manufacturers have been filed in the United States, both under civil and criminal procedures. Three complaints, with a national scope, related to mass killings in schools and other public spaces and resulted in a favourable outcome. Two of them ended in settlements while another authorised the victims to sue the company. These cases recognise that the companies acted negligently in the marketing and merchandising of the weapons involved.

Other cases relate to the liability in value chains, without explicitly referring to this term. Some of these lawsuits concerned the export of arms or war material in breach of licencing regulations. Some judgements convicted the companies, mainly on the basis of violations of the US Arms Export Control Act.[200] These judicial decisions however do not directly refer to due diligence duties to prevent crimes committed with the weapons concerned.[201] Cross-border arms trafficking cases of this nature are frequent (Dungel & Fabre, 2022, p. 47; Langlois et al., 2022) and concern

197 See, German Federal Office for Economic Affairs and Export Control (BAFA) (2018). *Internal Compliance Programmes – ICP: Company-internal export control systems*, p. 3. Dutch Ministry of Foreign Affairs (2019). *Internal Compliance Programme: Guidelines for compiling an Internal Compliance Programme for Strategic Goods, Torture Goods, Technology and Sanctions.* Version 1.2, pp. 3 and 5. Recital 18 and Art. 2(21) of the EU Dual-Use Regulation. Commission Recommendation (EU) 2019/1318 of 30.7.2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009, OJ L 205, pp. 15 and 21. (Wood et al., 2019) p.23.

198 See, Commission Recommendation (EU) 2019/1318 of 30.7.2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009, OJ L 205, p.23.

199 See, German Federal Office for Economic Affairs and Export Control (BAFA) (2018). *Internal Compliance Programmes – ICP: Company-internal export control systems*, p. 3. Dutch Ministry of Foreign Affairs (2019). *Internal Compliance Programme: Guidelines for compiling an Internal Compliance Programme for Strategic Goods, Torture Goods, Technology and Sanctions.* Version 1.2, p.3-5; (Wood et al., 2019, p. 23).

200 Cf. Search results for "arms exports" in: https://search.justice.gov/search?affiliate=justice&sort_by=&query=%22arms+export%22 (last access 23/3/2023).

201 See Annex 1, Section I.

arms transfers executed outside of the licencing and export control system, and often carried out in the framework of other illegal activities.

Two tort actions were brought by Mexico in the US against companies for facilitating cross-border arms trafficking. The first of these actions, filed in 2021, involved nine counts (inter alia negligence, public nuisance, negligence per se, gross negligence). The complaint argued that the companies, for the most part arms manufacturers, deliberately "design, market, distribute, and sell guns in ways they know routinely arm the drug cartels in Mexico".[202] Thereby, the companies were said to facilitate the "unlawful trafficking" of their weapons to cartels in Mexico and "aid and abet" killings and injuries perpetrated by these cartels.[203] The Court dismissed the case by holding that the Protection of Lawful Commerce in Arms Act (PLCAA) barred the common law claims (i.e. negligence) while the remaining claims failed on other grounds.[204] Mexico affirmed that companies should have a standard of conduct and care that materialises in accountability for, firstly, safely distributing arms to avoid their use for criminal purposes, and secondly, identifying and avoiding, or reducing, the risk that their arms would be trafficked into Mexico.[205] It also argued that companies have "common law standards of care"[206] that cover compliance with the law in Mexico[207] and the USA[208] (statutory duties[209]). Mexico further claimed that in both countries companies should operate in a responsible manner, control and oversee "their downstream distributors and dealers", and set appropriate "standards (and) conditions" for the arms trade.[210] Companies should also be required to "refrain from inflammatory and reckless marketing likely to attract criminal users".[211] Finally, Mexico included arms design in the activities that should be assessed, so that "military-style assault weapons" can only be sold to civilians under strict control that restricts their use.[212]

Another civil action was filed recently by Yemeni nationals against several US companies under the Torture Victim Protection Act for aiding and abetting war crimes and extrajudicial killings through the delivery of arms to the Saudi-led coalition in the war in Yemen.[213]

In Europe, six criminal complaints have been filed over the last five years in France, Italy, Germany and Belgium (McIntyre-Mills et al., 2018). They either relate to some kind of complicity in killings perpetrated with exported arms, to irregularity in the use of licences or to breaches of arms export regulations. All but two are based on national criminal law norms. Only the two complaints filed in France grounded the claims on war crimes, with one having been rejected while the other is still pending. Although there were two dismissals, two complaints resulted in some kind of conviction or sanction for corporate executives in Germany, while the other cases are still pending. These outcomes can be considered

202 See Annex 1, section I, Civil Action 1:21-CV-11269-FDS, Complaint, para.3.

203 *Ibid*., para. 1 and 15.

204 See Civil Action No. 21-11269-FDS, US District Court's (District of Massachusetts) Memorandum and order on defendant's motion to dismiss, p. 3.

205 Civil Action 1:21-CV-11269-FDS, Complaint, para. 49 et seq, 106 and 507.

206 Civil Action 1:21-CV-11269-FDS, Plaintiff's memorandum of law in opposition to defendants' joint motion to dismiss, p.1.

207 Namely import restrictions, gun control laws, tort law that includes a "duty not to create any risk that harms a person or entity in Mexico" and "to act with the greatest possible skill and care, taking necessary precautions to avoid causing any damage to others," see Civil Action No. 1:21-CV-11269-FDS, Complaint, paras. 60 and 62.

208 Namely arms export control law, federal and state gun control law, US tort law, *ibid.* paras. 63 et seq.

209 Cf. *ibid*., para. 524.

210 *Ibid*., paras. 77 and 78. See also *ibid*., para. 21. Specifically, Mexico refers to a 2001 US Department of Justice report "Gun Violence Reduction: National Integrated Guns Violence Reduction Strategy" that recommend that arms distributors, manufacturers and importers should: "identify and refuse to supply dealers and distributors that have a pattern of selling guns to criminals and straw purchasers; develop a continual training program for dealers and distributors covering compliance with guns laws, identifying straw purchase scenarios and securing inventory; and develop a code of conduct for dealers and distributors, requiring them to implement inventory, store security, policy and record keeping measures to keep guns out of the wrong hands, including policies to postpone all gun transfers until [background] checks are completed." (*ibid*., para. 91).

211 *Ibid*., para.104.

212 Exhibiting specific enhanced dangers (lethality) and characteristics (easy modification into fully automatic machine guns), and (therefore) being of special usefulness for drug cartels (their "weapon of choice"), see *ibid*., paras. 281-5 et seq.

213 See Annex 1, Section I, Civil action under Torture Victim Protection Act against Raytheon, Lockheed Martin, and General Dynamics by Yemeni nationals.

as positive, although nuance is required as it is unclear whether victims got compensation.

After the establishment of the international criminal liability in the Nuremberg trials against Krupp (Goldman, 2017), to our knowledge two cases have reached international jurisdictions, despite the great number of incidents involving arms in violation of IHL. The first case, at the Trial Chamber of the Special Court for Sierra Leone, condemned an individual for arms trafficking. The second case, against Airbus and other commercial partners, is pending before the Office of the Prosecutor of the ICC.

Another group of cases filed in Europe and Israel has been brought before criminal jurisdictions, mainly on complicity charges against manufacturers or distributors of products that are claimed to be dual-use. Many of these complaints have been partially successful. The three complaints that were filed in France and the one that was filed in the Netherlands, are based on national criminal law and also on IHL. Of these cases, three show some positive outcome with respect to the applicability of IHL in criminal cases filed against companies in national jurisdictions.[214] Furthermore, in February 2024, the civil court in The Hague (the Netherlands) ordered the government to suspend the supply of F35 aircraft parts to Israel on the grounds that it did not comply with international law. This decision was based on national, European and international law and sets a precedent for the possibility of using summary proceedings in cases of armed conflict in serious situations.[215]

The previous groups of cases presented in this section mainly refer to breaches of licencing processes or to the abusive use of licences, but they do not refer to the corporate responsibility to implement due diligence processes to avoid IHRL and IHL violations. However, public interest litigation has been another mechanism used before administrative and civil courts, namely in Spain, France, Belgium, the UK and the Netherlands. Some of these actions also had the character of transnational litigation, seeking to establish IHL responsibility for crimes committed in countries such as Yemen, Egypt and in the Western Sahara. These actions, however, were not successful, mainly due to the lack of standing of the claimants, who are mostly NGOs.[216] In Belgium, however, the Belgian Council of State suspended export licences on procedural grounds.[217]

So far, only four cases explicitly refer to the corporate responsibility to implement due diligence in the arms value chain. They concern requests of mediation lodged before OECD NCPs, which are not adjudicating authorities but merely mediators who assess whether the actors implicated followed the OEDC Guidelines. In 2013, the UK OECD NCP received a complaint against a company that exported surveillance equipment to Bahrain. The NCP published a statement acknowledging that the company did not act in line with the OECD Guidelines and that due diligence procedures should be implemented. In contrast, three complaints were filed in 2016 against leading companies of arms value chains headquartered in the US, France and the UK, because the goods commercialised through their chains were used in attacks perpetrated by Saudi Arabian and Bahrain forces against Yemenis. Only the French NCP released recommendations on how to implement due diligence processes in accordance with the OECD Guidelines.[218]

Although criminal complaints have had some positive results, there is no systematic trend in national or international jurisprudence to require governments and companies to implement the UNGPs or the OECD Guidelines to comply with their legal obligations on IHRL and IHRL. Although licencing is a manifestation of the duty of care of states, and in some cases of companies, most countries do not translate the requirement to obtain a licence into real obligations to implement permanent due diligence processes, which would mainstream the identification of risks and their resolution as a permanent process and an obligation in companies' operations. This may explain why it is so seldom referred to in case law. However, criminal law does show a certain degree of effectiveness, but at a punitive rather than a preventive level.

214 See Annex 1, Section V.

215 See Annex 1, Section V.

216 See Annex 1, Section VI.

217 See Annex 1, Section II.

218 See Annex 1, Section IV.

8. The way forward: The need to implement due diligence procedures in the arms value chain

The international regulatory framework requires states to honour their due diligence obligation to ratify treaties on IHRL and IHL, and, consequently, to regulate corporate conduct in the arms value chain. States play a crucial role in regulating arms transfers in light of the realisation of sustainable development and human rights protection (Targets 16.1 and 16.4 of SDG 16, and UNGPs, Pillar I). SDG 16 further highlights the duty of states to significantly reduce all forms of violence, and illicit financial and arms flows.[219]

While it is true that companies are not subject to obligations at the international level, it also true that states have due diligence obligations that entail the ratification of international treaties and the regulation of the conduct of companies involved in the arms value chain. Although responsible corporate conduct has been mainly shaped by non-binding rules, it is undeniable that companies have a substantial duty of care to respect IHRL and IHL incorporated into national law in states where they operate. The "cascade" of due diligence requirements from international law through state law makes companies accountable for human rights violations at the national level.

So far, corporate conduct has been primarily regulated by non-binding rules. This trend is changing and, progressively, more states implement or consider introducing due diligence duties in the arms value chain.[220]

8.1. Pillar I States duties

From the viewpoint of international law, states are undoubtedly required to protect human rights, in times of peace and war, even beyond their jurisdiction. Given the nature of the products commercialised by arms value chains, and their potentially devastating impacts on human dignity, states undoubtedly have an even stricter obligation to control operators in this economic sector. This is all the more relevant when these products are destined for CAHRAS,[221] where there is an aggravated risk of violating IHRL and IHL. Although in IHL there is not a unique due diligence standard applicable to each obligation of conduct, states' duties of due diligence to require specific standards of conduct depend on the scope of established substantial obligations (Longobardo, Marco, 2019, p. 80).

The primary duty of the state is to regulate corporate behaviour of companies active in arms value chains, which is essential to guarantee the respect of IHRL and IHL. It entails the regulation of the duties of companies to comply with international standards, and their responsibility and liability when they are involved in irregular activities that affect their value chains. Although carrying out impact assessments to obtain export licences is mandatory, and in the case of Flanders implies real due diligence obligations, companies need to go beyond the licencing stage and beyond compliance with national export control laws.[222] States should require companies in the arms value chain to implement ongoing due diligence processes that assess upstream and downstream sustainability practices in their value chains, apart from and in addition to state export controls.

The UNGPs, Pillar I reminds states that they have a duty to regulate responsible corporate conduct. This duty materialises by adopting binding norms to require companies to respect human rights and to ensure that other laws and policies also enable them to respect human rights. An obligation that derives from the state duty to regulate corporate conduct, is the state duty of care that entails the implementation of

219 UN GA A/HRC/35/8 of 3.5.2017, paragraph 17. See also (Nave, 2019).

220 See, the proposed new German Arms Export Control Act that is currently under discussion (*Rüstungsexportkontrollgesetz*). CSOs expressed their views: https://www.bmwk.de/Navigation/DE/Service/Stellungnahmen/rekg/stellungnahmen-rekg.html.

221 UN GA A/HRC/35/8 of 3.5.2017

222 Cf. Working Group on the issue of human rights and transnational corporations and other business enterprises (2022). *Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights – Information Note by the UN Working Group on Business and Human Rights*, p.6. See also (Amnesty International, 2019, p. 31; Schliemann & Bryk, 2019, p. 22).

the rules enacted. Particularly, on the basis of several documents cited above, the following concrete actions are expected from states:

- Conducting detailed and informed human rights impact assessments (HRIA) prior to granting licences for arms transfers, and refusing or suspending them when new risks that arms could be used to violate human rights become known.[223] A comprehensive HRIA[224] has the following minimum parameters:
  - It is a case-by-case exercise that must cover risks to vulnerable communities, particularly women and children.[225]
  - It adopts a forward-looking approach with inquiries into the human rights record of the recipient state and the future human rights risks, grounded in a solid and informed consultation.[226] It should also consider the cyclical patterns of heightened risks of disturbance and circumstances that can deteriorate the human rights situation.[227]
  - It must identify the durability of the arms to be transferred, and their potential or actual use.
- Incorporating the relevant international guidelines, such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).
- Preventing the illicit manufacturing or trafficking of firearms and other SALW, in accordance with the UN Firearms Protocol and the UN Programme of Action. This also includes the diversion of arms and unregulated or illicit arms transfers.[228] The concrete due diligence duties of states emerging from the international law framework presented in section 2 consist of:
  - Adopting criminal offences for illicit manufacturing or trafficking of firearms, including conduct that supports or directs these activities.
  - Ensuring that licencing or authorisation procedures are secure and cover measures to detect, prevent and eliminate the theft, loss, or diversion of firearms, and the illicit manufacturing and trafficking of them, including the activities of brokers.
  - Requiring a marking system of arms and their components in the production phase to ensure traceability.
  - Identifying the impact of unregulated or illicit arms transfers and diversion, particularly on vulnerable communities, and on women and children.
  - Prosecuting and ensuring access to remedy when human rights abuses are committed by state and non-state actors.
  - Coordinating and cooperating with states involved so the arms transfers occur in conformity to the law; they should also exchange information to verify end-user destinations.
  - Supporting and cooperating with companies involved in the arms value chain to prevent and detect illicit activities and provide technical assistance to improve control mechanisms.
  - Regulating corporate conduct in line with the UNGPs when companies operate in their jurisdiction.

In arms value chains, there are two aspects that require an enhanced duty to regulate corporate accountability

223 E/C.12/GBR/CO/6, para. 12 (c), cited by UN GA A/HRC/35/8 of 3.5.2017

224 UN GA A/HRC/35/8 of 3.5.2017

225 UNCCEDAW General Recommendation 30/2013, CRC/C/SWE/CO/5, para. 54, CRC/C/OPAC/NLD/CO/1, para. 24, CRC/C/OPAC/BRA/CO/1, para. 34, CRC/C/OPAC/TKM/CO/1, para. 24, CRC/C/DEU/CO/3-4, para. 77, cited by UN GA A/HRC/35/8 of 3.5.2017.

226 For this purpose, states must consult UN rights bodies and mechanisms, regional human rights bodies and the secretariat of the ATT, national diplomatic missions, human rights institutions, relevant military information of the recipient state, and reports of non-governmental organizations (NGOs), research institutes and think tanks with expertise in the topic. See UN GA A/HRC/35/8 of 3.5.2017.

227 UN GA A/HRC/35/8 of 3.5.2017.

228 UNGA A/HRC/44/29 of 19.6.2020 UN General Comment 36 CCPR/C/GC/36 par 22 on the duty of state to regulate corporations cited by UNGA A/HRC/44/29 of 19.6.2020, paragraphs 26-8. Committee on the Elimination of Discrimination against Women, general recommendation No. 35, para. 24 (b), cited by UNGA A/HRC/44/29 of 19.6.2020, paragraph 30. UNGA A/HRC/44/29 of 19.6.2020, paragraphs 31-40.

mechanisms. Firstly, many companies active in the sector are owned or controlled by states or receive substantial support and services from state agencies. Secondly, the products of arms value chains are at a higher risk of leading to gross human rights abuses, while many companies involved are active in or have business relations with states or companies operating in CAHRAS. Moreover, the OECD Guidelines (2023) explicitly refer to new areas of relevance for arms transfers, particularly for dual-use goods. These areas should be integrated into the due diligence procedures that companies active in the sector should implement: First, the development, financing, sale, licencing, trade and use of technology, including data collection and processing. Second, the analysis of risks related to acts of corruption and lobbying activities.

8.2. Pillar II: Corporate responsibility

Corporate responsibility to respect international standards on IHRL and IHL among others is complementary but independent from a state's duty to protect and fulfil IHRL and IHL obligations. It goes beyond states' "abilities and/or willingness" to fulfil them (UNGPs, commentary to Principle 11). The OECD Due Diligence Guidance (2018, p. 17.), however, indicates that the "independent" character of corporate responsibility goes hand in hand with the affirmation not to "shift responsibilities from governments to enterprises". This means that companies should not be held responsible in place of the state, i.e. for the failures of the state or for the inability of victims to hold states accountable. Companies must discharge their own responsibility as they are accountable for their own conduct. Conversely, states should not be relieved of their responsibility through a focus on the corporate conduct.

Companies conducting any economic activities at the national or transnational level, independently of their capital ownership (including state-owned), size, sector, location, and structures are responsible, within their sphere of influence, for the respect of human rights, even if states fail to regulate their activities within their jurisdiction (GC 24 2017).[229] The legal duty of care to fulfil these obligations arises when state due diligence obligations under international law are concretised through the establishment of norms that hold companies in their jurisdiction accountable for respecting IHRL and IHL. Although not all countries, or a treaty, have established corporate due diligence as a legal duty, the corporate responsibility to respect human rights is a global standard of conduct that applies to all companies while the scope of requirements depends on circumstances and the severity of possible impacts (UNGPs, Principle 14).

Concretely, due diligence duties materialise corporate responsibility to respect international standards. When states regulate the corporate governance of the value chains in their jurisdiction, they should include an identification of benefits and risks, and the distribution thereof, to define the degree of responsibility of the actors involved. Further, corporate responsibility goes beyond compliance with national laws because the corporate standard of conduct is given by the international legal framework, even when the domestic context prevents companies to implement this standard of responsibility (UNGP, Principle 11).[230]

The UNGPs recall two concrete duties that should guide the way companies conduct the analysis of their risks:

- A passive duty to avoid causing or contributing to adverse human rights impacts through their own activities (UNGPs, Principle 11). This involves the duty to avoid being complicit of abuses caused by their partners or benefiting from an abuse committed by other entities (UNGPs, commentary to Principle 17), particularly in CAHRAS, where the risks of being complicit in gross human rights abuses committed by other actors increases (UNGPs, commentary to Principle 23).

- An active duty to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services in their value chain, even if their partners have not contributed to those impacts (UNGPs, Principle 13).

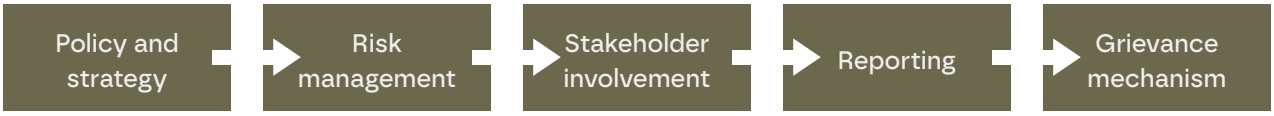
In the arms value chain, leading companies do not discharge their responsibility to respect human rights and IHL by only complying with the requirements connected to export licences. In other words, the risk assessment conducted by the state granting a licence does not discharge companies of their duty to address actual or potential adverse impacts they may cause as a result of their activities or products. This includes the

229 CESCR, E/C.12/GC/24 of 23.6.2017.

230 See also: OECD (2011), *OECD Guidelines for Multinational Enterprises*. OECD Publishing, p. 32.

misuse, diversion, unauthorised or illegal use of arms. These duties can be complied with by implementing corporate due diligence procedures that align with international standards and with national or regional organisations binding norms.

Due diligence is a complex and permanent process that has been defined mainly by the OECD Guidance and the UNGPs. The following chart shows which steps should be taken in the arms value chain to ensure compliance with the duty to respect IHRL and IHL.



▲ **Corporate Due Diligence process** (Chart based on the UNGPs (2011) and the OECD Due Diligence Guidance (2018)).

8.2.1. Company policies

The *Seven Indicators of Corporate Best Practice in International Humanitarian Law* (Kurnadi & Kolieb, 2021) illustrate the points of attention for states when regulating the actions that companies need to take in order to implement due diligences procedures. Although this study did not cover the entire value chain and all potential impacts, its indicators are applicable to all tiers of the arms value chain and both actual and potential impacts, while including any type of conventional arms or dual-use goods.

The first requirement for a solid due diligence process is to establish publicly available policy commitments related to corporate sustainable conduct aligned with international standards. That way, stakeholders are informed about the knowledge and willingness of the company to align and ensure compliance with the applicable legal framework. (Kurnadi & Kolieb, 2021) recommends companies to:

- Adopt (a) a public statement of a human rights (and other relevant areas) commitment that includes respect for IHL; (b) policies on safety and conduct of personnel regarding relevant norms of behaviour; (c) policies and processes to provide access to effective remedy when risks materialise.
- Disclose locations where they and their supply chains operate, particularly in CAHRAS.
- Commit to initiatives or instruments aimed at improving corporate conduct with respect to human rights.

In addition to their policy commitments, companies need to undertake concrete steps to implement them. This is, companies are also expected to train their personnel to comply with international standards, and to exercise leverage to minimise risks for themselves and for others. This entails a solid staff orientation and training on human rights, humanitarian law, environmental protection and conflict-related risks of harms that could be committed by their company, or by partners in their value chain. (Kurnadi & Kolieb, 2021)

8.2.2. Permanent risk assessment of salient and severe risks in the value chain

Several international standards and policy documents highlight that companies need to identify, prevent and mitigate the most serious risks of adversely affecting IHRL, IHL or the environment (when applicable). The risk assessments should be based on "the objective, non-discriminatory, verifiable and systematic collection of accurate and reliable information" for each specific case.[231] This operational assessment can be partially nourished by the risk assessment conducted to obtain an export licence for the transfer of arms. However, the risk assessment should cover activities in the entire value chain, from the sourcing of raw materials until the post-delivery phase of transfers, including the role of investors and funders of operations.

In principle, implementing due diligence is not the only action required to absolve the company from liability for causing or contributing to human rights abuses (UNGPs, Principle 19). One duty of means is to conduct risk assessments, but the substantial duty of respecting human rights should be the main purpose of these procedures. When conducting the risk assessment, companies should pay special attention to adverse impacts that may be caused to vulnerable

231 UN GA A/HRC/35/8 of 3.5.2017, paragraph 49.

communities. Particularly when arms value chains conduct activities in CAHRAS several risks arise: end-users can violate IHL; their chains can be involved actively or passively in armed conflict; their business partners may not have the capacity and knowledge to identify breaches of IHRL and IHL, and may not be aware of the special attention that vulnerable groups, such as women and children, possibly require.

The impact assessment that companies should routinely conduct to identify and address risks encompasses non-compliance with international standards. For instance, the risk assessment should also cover whether national legal systems effectively address security and human rights issues, and the potential for the company to be "indirectly or directly complicit in human rights abuses, in the illegal use of force and/or in gross human rights violations" (UNGP: Principle 25). It should also cover operational risks falling under the following three headings: risks that the company may directly cause; risks that the company may have contributed to (e.g. when they are caused by its subsidiaries or direct business partners); or risks that the company has not created or contributed to but where it can exercise its leverage to prevent, mitigate or address them in its value chains (OECD Guidance 2018).

8.2.3. Stakeholder engagement and reporting

Stakeholder consultation is inherent to due diligence processes, but, although it was mentioned tangentially in the preamble to the ATT, until now it has not been part of arms export licencing processes. This gap has been evaluated from two opposing perspectives. On the one hand, CSOs expect to get participation channels in matters that are of general interest. On the other hand, states deem it not convenient to open channels of stakeholder involvement and transparency in the licencing processes given their geopolitical interests.

The latter argument is countered by several UN documents reiterating the importance of facilitating access to information and participation to CSOs. That way, companies leading arms value chains will be better informed about the risks of their operations in terms of IHL and IHRL and will be able to report in a more comprehensive manner, including on adverse impacts they could not have identified without stakeholder input. A broader involvement of stakeholders can also contribute to increase transparency and can support state and company action to prevent diversion of arms to illegal markets. The UN also acknowledges that CSOs are relevant to build understanding on the most salient and inherent human rights impacts of arms value chain activities, as they have developed methodologies to monitor, gather, analyse, and release relevant information.[232]

From a perspective of corporate accountability, stakeholder consultation is crucial to hold companies responsible and answerable for a number of reasons. First, the identification of salient risks in their value chains needs to be grounded in *internal and/or independent external human rights expertise,* but also in consultation with affected groups and stakeholders (UNGPs, Principle 18). Second, stakeholders are fundamental agents in raising awareness about state and corporate duties in line with international law, and about practices that may have an inherent risk of having detrimental human rights impacts.[233] Third, stakeholder involvement is crucial in advocating for remedies for affected communities, particularly when they are not able to name or claim their grievances (Felstiner et al., 1980). Fourth, stakeholders are agents of transformation by promoting and managing multi-stakeholder initiatives, such as the Voluntary Principles on Security and Human Rights, that gather parties interested in enforcing international standards in any value chain with a transnational reach.

Many countries, such as those in the EU, require certain types of companies in the arms value chain to release sustainability reports as part of their due diligence. Such reporting concretises the duty of companies to communicate to shareholders and stakeholders how they address their risks and to render this information transparent, public and accountable, thus making it actionable (World Bank Group, 2017, p. 248). So far, the EU is the only regional organisation where reporting requirements concern large and listed small and medium size companies in the arms value chain.[234] The EU CSRD is "sector agnostic"

232 UN GA A/HRC/35/8 of 3.5.2017, para 45.

233 UN GA A/HRC/35/8 of 3.5.2017, para 45.

234 See the analysis of the environmental reporting of 15 major arms companies conducted by conflict and environmental observatory (CEOBS), ((Dec 2021) Environmental CSR reporting by the arms industry https://ceobs.org/environmental-csr-reporting-by-the-arms-industry/ and (Parkinson, 2020).

and aligns with the UNGPs, the OECD Guidelines, and OECD Guidance, as well as with OECD sectoral guidelines, the Global Compact, the International Labour Organization's (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the SDGs, ISO 26000 standard, and the UN Principles for Responsible Investment (CSRD, para. 31 and 45). Further, the EU established the duty to conduct a double materiality analysis, this is, companies are required to report on their own risks, and on the risks for the community, regarding impacts that contribute to global warming, or affect ecosystems, human rights and governance, when such impacts result from their own operations and from their value chains. This means that companies active in the EU already have binding duties to conduct due diligence, which enables them to report on their impacts to their shareholders but also to other stakeholders. This in turn allows for stakeholder engagement that is based on information on how a company addresses risks.

8.3. Pillar III: Access to justice

The third pillar of the UNGPs, access to justice, ensures that due diligence processes are not a dead letter. To allow access to justice, it is necessary that companies leading arms value chains create complaint or grievance mechanisms about the impacts that they, their subsidiaries or their business partners, cause or may cause to the communities where they operate or where their products are used or misused. The UNGPs refer to *"grievance mechanisms"* as channels that affected persons or stakeholders can use to claim redress or other remedies. Such channels have the triple purpose of being the official platform for stakeholders and affected persons to raise concerns, to provide feedback on the due diligence process and to claim remedies when they have been affected (FIDO/IFDD, Toolbox for Business and Organisations, tool 9). The UNGPs affirm that grievance mechanisms should be accessible to all although their nature may vary according to the sector and size of companies and value chains concerned. This also means that they should not entail rigid legal formalities and should allow for preventive measures correcting and avoiding adverse impacts before a harm occurs.

Grievance mechanisms respond to the logic of tackling endangering behaviours without having to wait for real harm to occur to activate them (see UNGP, principle 29). If affected persons are not able to reach a solution through grievance mechanisms, triggering them should not prevent them to claim remedies by using state-based remedy mechanisms. Part of the rationale behind grievance mechanisms is also that they generate outcomes that can feed investigations conducted by the state. From a substantive viewpoint, companies active in arms value chains should be aware of the Van Boven Bassiuni Principles[235] which, so far, are the most comprehensive guidelines defining the remedies that can be provided to victims of gross violations of IHRL and IHL.

When grievance mechanisms are insufficient to prevent or mitigate harm, states need to have judicial or non-judicial mechanisms in place to guarantee the protection of human dignity of affected persons. Effective access to remedy is an important complement to businesses' due diligence responsibilities, because affected persons should be able to trigger them to avoid or to claim redress or reparation.

Chapter 8 of this report offers a non-exhaustive summary of the way states have fulfilled the duty to guarantee access to justice. It illustrates that complaint channels generally do not connect with the obligation of companies to implement due diligence mechanisms, which means that there is still a long way to go in the arms sector. Finally, it also important to reiterate that arms value chain due diligence, although it is a risk-based management tool, should allow for the participation of stakeholders to decrease the likelihood of serious IHRL and IHL violations, and to increase awareness among its operators of their responsibilities.

235 UNGA on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law, Res.60/147:UN Doc.A/RES/60/147 (21/06/2006).

Conclusion

This study sought to answer two interrelated questions. First, to what extent are the companies active in the arms value chains required to incorporate into their risk assessments, the adverse and salient human rights impacts that their activities or the misuse of their products may cause or contribute to, and second, to what extent should the duty of conducting such risk assessments to obtain export licences entail the obligation to implement due diligence procedures.

Scholars and policymakers have extensively discussed the desirability and necessity of regulating the conduct of companies operating in conventional arms value chains. Arguments pro and contra refer to their intimate relationship with the sovereign powers of states, such as national security, strategic relations with other states, protection of territory, etc. It is clear that this sector, like other sectors, is increasingly called upon to behave responsibly with respect to international standards such as IHRL, IHL and environmental law, while this does not appear to be incompatible with the sovereign powers of states. Furthermore, various areas of international law establish concrete due diligence obligations of states, which take the form of obligations to regulate the arms value chain in order to control diversion and smuggling of arms, and include impact assessments that take into account the potential adverse human rights and humanitarian law impacts of arms transfers, particularly when they are destined for CAHRAS.

Although international regulation of the arms value chains refers primarily to state obligations, it is clear that these obligations are fulfilled when states in turn regulate the activities of the companies that operate in the value chains concerned. Preventing and remedying the misuse of transferred arms, and serious breaches of IHRL and IHL, indeed are a shared responsibility of both states and companies active in arms value chains. This means among others that not only producers and exporters should be aware of their responsibilities, but also other actors intervening in the chain, such as investors, consultants, marketing advisors, transporters, etcetera.

The idea of shared responsibility can constitute an essential contribution to the debate of due diligence and corporate accountability in the arms value chain. This study has shown that to some extent this understanding is already emerging in arms transfer control mechanisms. For instance, companies are required to provide information and to assist national control authorities with their export risk assessment. In addition, some governments, e.g. in Flanders, already consider due diligence as a requirement for obtaining an export licence. The next step would be to require due diligence for all the activities of a corporate group or a value chain, and not only for licencing purposes.

The notion of shared responsibility in the framework of due diligence and corporate accountability implies that companies do not merely play a subordinate role but act on an equal footing with states, implementing their own due diligence processes. From that perspective, corporate responsibility can be described as independent from states' duties, notwithstanding the fact that, legally speaking, companies' obligations are derived from the obligations of states. More specifically, companies' duties derive from the due diligence duties of states such as their duty to regulate, implement and enforce arms control frameworks. Companies' due diligence measures also need to build upon these arms control frameworks as the legal and practical context of their activities. This is not a one-way process, as the respective duties and their implementation should complement each other. Given that states and companies operate on an equal footing, their respective duties and corresponding measures might even overlap.

Three aspects further increase the level of the responsibility of states to regulate the arms value chain. Firstly, many arms are destined for or used by state agents. Secondly, arms are frequently destined for CAHRAS, which entails a heightened duty of care. Thirdly, many companies controlling arms value chains are state-owned. These characteristics imply that the obligation of states to regulate operations of companies in the arms sector to prevent diversion or smuggling, and to analyse risks in terms of human dignity, applies more strongly than in other economic sectors.

Ideally, states and companies should arrive at an understanding where they work together towards the goal of preventing the misuse of arms, leaving aside rigid and formal circumscriptions of respective

responsibilities. Existing gaps in the arms value chain and control framework need to be closed by both states and companies, while also involving other relevant stakeholders.

Finally, responsible corporate behaviour also implies engagement with stakeholders and representatives of civil society. Leading private, public or state-owned companies in arms value chains need to find channels of engagement with stakeholders, and to create mechanisms for redress or remediation, in order for them to benefit from the feedback of civil society organisations when conducting impact assessments of their transnational activities, and to provide opportune response to affected persons' claims.

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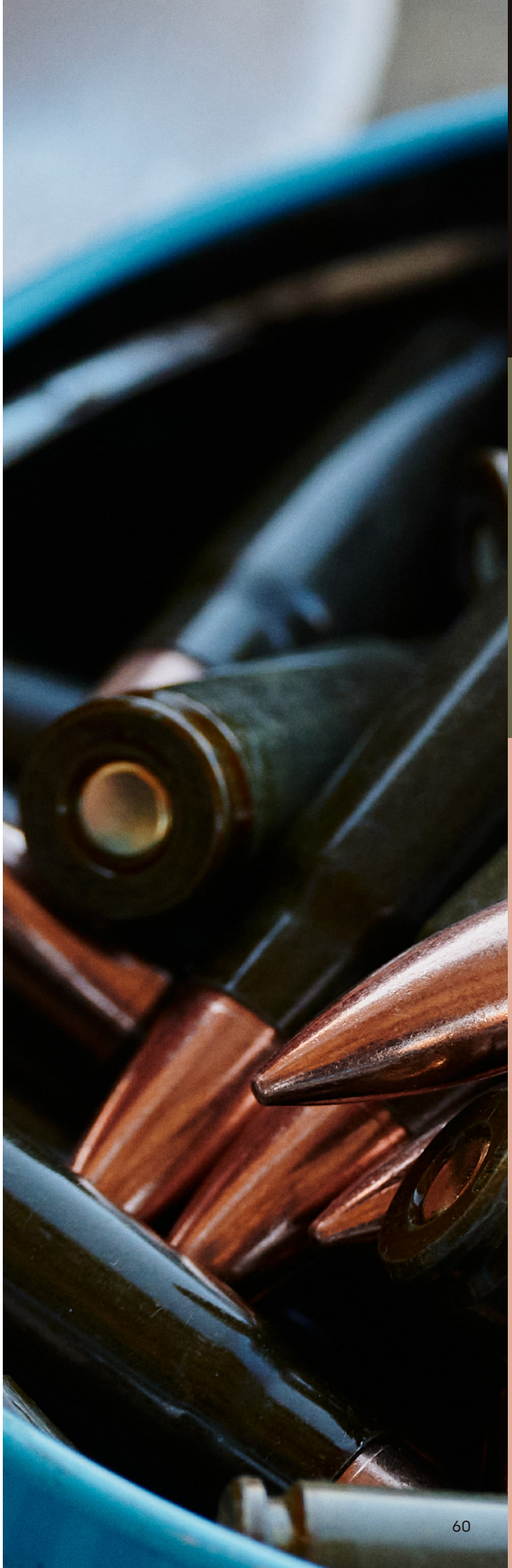

Annexes

I. Cases in the United States of America

Court cases	**Soto v. Bushmaster Firearms International, LLC/ Remington Outdoor**[236] **(2014 - United States)**
Claim	2012 Sandy Hook Elementary School shooting: a wrongful-death lawsuit against Remington, the manufacturer of the Bushmaster AR-15-style rifle used in the massacre
Companies	Bushmaster Firearms International, LLC and Remington Outdoor
Court	Connecticut superior court The US Supreme Court in 2019 rejected appeal lodged by Remington
Legal grounds	Wrongful marketing under the Connecticut Unfair Trade Practices Act.
Outcome	2022, Settlement of $73 million against Remington Ironshore and James River, Remington's insurers.

Court cases	**Victims of a mass shooting at a California synagogue**[237] **(2019 - United States)**
Claim	Bursting into a Southern California synagogue on the last day of Passover with a semiautomatic rifle. Negligence in marketing the gun
Companies	Smith & Wesson
Court	San Diego County Superior Court
Legal grounds	The state's public nuisance laws
Outcome	Ruling: Victims can sue the company

Court cases	**Victims of a shooting at Santa Fe, Texas, high school**[238] **(2018 - United States)**
Claim	Texas elementary school shooting that killed 19 children and two teachers. The accused "negligently" and "illegally" sold and delivered the ammunition to the then-underaged gunman.
Companies	Luckygunner.com, online seller of ammunition and Red Stag Fulfilment LLC, which ships it
Court	Texas Supreme Court
Legal grounds	unclear
Outcome	Settlement Breaches of the law make it illegal to sell ammunition to minors. online ammunition retailer Lucky Gunner must verify purchasers' ages

Court cases	**Complaint against Air Shunt Instruments Inc., a California aircraft components company**[239] **(2008 - United States)**
Claim	Air Shunt made a false statement regarding a gyroscope used on military helicopters. The gyroscope is on the US Munitions List (USML), which cannot be exported without licence.
Companies	Air Shunt Instruments Inc.
Court	Federal judge in the Central District of California
Legal grounds	Arms Export Control Act.
Outcome	Criminal fine of $250,000 due to false statements related to an export of military technology. The company's Vice President for International Sales, has been indicted for illegal exports of military items to United Arab Emirates and Thailand.

236 https://edition.cnn.com/2019/04/25/politics/mass-shootings-gun-manufacturers-sandy-hook/index.html; https://edition.cnn.com/2019/11/12/business/remington-sandy-hook-supreme-court/index.html.

237 https://www.npr.org/2021/09/30/1042056596/california-synagogue-shooting-life-sentence-san-diego; https://www.washingtonpost.com/nation/2021/07/11/poway-synagogue-shooting-lawsuit/.

238 https://people.com/crime/santa-fe-shooting-victims-settle-lawsuit-company-sold-ammo-suspect/.

239 #08-623: California Firm Sentenced While Search for Its Fugitive Vice President Continues in Arms Export Case (2008-07-17) (justice.gov).

Court cases	**Complaint against Tennessee Technology Co.**[240] **(2008 - United States)**
Claim	Sending in 2005 and 2006 of "defense articles" to a citizen of the China in violation of the Arms Export Control Act.
Companies	Atmospheric Glow Technologies Inc. (AGT), Plasma technology co.
Court	U.S. District Court for the Eastern District of Tennessee at Knoxville
Legal grounds	Arms Export Control Act.
Outcome	Plead guilty to ten counts of a federal indictment charging AGT with unlawfully exporting "defense articles" to a citizen of China

Court cases	**Case 12-1487-cr against the broker Viktor Bout**[241] **(1995 - United States)**
Claim	Trafficking of weapons to several African warlords, dictators in the Middle-East and the Colombian FARC. The Belgian prosecutor issued an arrest warrant against him in 2002 for money laundering, but a Brussels court dismissed the case against him on limitation grounds
Companies	Person
Court	United States Court of Appeals for the Second Circuit
Legal grounds	US Code: 1. conspiracy to kill US nationals and US officials and employees. 2. conspiracy to acquire and use anti-aircraft missiles and to provide material support and resources to a foreign terrorist organisation.
Outcome	The US Drug Enforcement Administration (DEA) order the capture of Bout, captured in Thailand and extradited to the US (2010). A jury found him guilty on all charges and sentenced to 25 years prison (2012)

Court cases	**EU Mexicanos, Vs. Smith & Wesson Brands, Inc., et al.**[242] **(2021 - United States)**
Claim	Civil Action No. 1:21-CV-11269-FDS: charges of undermining gun laws by designing, marketing and distributing military-style assault weapons that armed drug cartels, fuelling murders and kidnappings.
Companies	SMITH & WESSON BRANDS, INC., et al
Court	Boston/Massachusetts federal district court
Legal grounds	2005 Protection of Lawful Commerce in Arms Act
Outcome	Dismissed; Appeal filed on 14 March 2023 before the U.S. Court of Appeals for the First Circuit, based in Boston, Massachusetts[243]

Court cases	**EU MEXICANOS, vs. Diamondback Shooting Sports, Inc., an Arizona corporation; SNG Tactical, LLC, an Arizona llc and others. CIV 22-472-TUC-CKJ**[244] **(2022 - United States)**
Claim	Illicit weapons trafficking. After dismissal, EUM opposed to the Motion to Dismiss.
Companies	Sprague's Sports Inc; SnG Tactical, LLC; Diamondback Shooting Sports, Inc; Lone Prairie, LLC, D/B/A Hub Target Sports; and Ammo A-Z, LLC
Court	Federal court in Arizona. And United States District Judge
Legal grounds	U.S. anti-racketeering law, RICO
Outcome	EUM may file a sur-reply to the Motion to Dismiss on or before July 14, 2023

240 https://www.justice.gov/archive/opa/pr/2008/August/08-nsd-736.html.

241 https://www.internationalcrimesdatabase.org/Case/2240/Bout/; https://caselaw.findlaw.com/us-2nd-circuit/1645293.html.

242 https://www.asil.org/insights/volume/26/issue/1; https://www.armscontrol.org/act/2021-09/news/lawsuit-targets-arms-flows-mexico); https://www.reuters.com/world/americas/us-gunmakers-ask-judge-toss-mexicos-10-billion-lawsuit-2022-04-12/; https://www.justsecurity.org/80041/mexico-v-smith-wesson-high-stakes-gun-suit-may-turn-on-choice-of-law-analysis/; https://www.justsecurity.org/79542/mexico-v-smith-wesson-u-s-court-duel-over-extraterritorial-legal-issues-looms-with-motion-to-dismiss/; https://storage.courtlistener.com/recap/gov.uscourts.mad.236945/gov.uscourts.mad.236945.163.0.pdf.

243 https://www.gob.mx/sre/prensa/mexico-appeals-the-ruling-of-the-federal-court-in-boston-dismissing-its-lawsuit-against-arms-trafficking?idiom=en.

244 https://casetext.com/case/estados-unidos-mexicanos-v-diamondback-shooting-sports-inc.

Court cases	**Civil action under Torture Victim Protection Act against Raytheon, Lockheed Martin, and General Dynamics by Yemeni nationals[245] (2023 - United States)**
Claim	Civil Action: Accusing the defending companies of aiding and abetting war crimes and extrajudicial killings" by supplying arms to the Saudi-led coalition's war in Yemen
Companies	Raytheon, Lockheed Martin, and General Dynamics
Court	District Court of Washington DC
Legal grounds	Torture Victim Protection Act
Outcome	Pending

II. Cases filed in Europe

Court cases	**Charges against RWM Italia S.p.A. and Italian Arms Export Authority.[246] Complaint filed in April 2018 by Mwatana for Human Rights (Yemen), Rete Pace e Disarmo (Italy) and the ECCHR (Berlin). (2018 - Italy)**
Claim	Criminal complaint: complicity of Italian subsidiary of German Arms Manufacturer and of Italian Arms Export Authority in "war crimes" in Yemen. Product exported "to members of the Saudi-led military coalition"
Companies	RWM Italia
Court	Judge for Preliminary Investigations in Rome
Legal grounds	Articles 110, 575, and 582 of the Italian Criminal Code
Outcome	In 2021 the ordered the criminal investigation to be continued, but the public prosecutor is unwilling to proceed. The appeal argues that there is sufficient evidence to move directly to trial. In 2023 the Judge dismissed it for lack of evidence that the company profited from the abuse of power

Court cases	**Exxelia Technologies (ACAT complaint of Christians for the Abolition of Torture) and, Cabinet Ancile-avocats, supporting the members of the Shuheibar family in Gaza City[247] (2016 - France)**
Claim	Criminal complaint for complicity in a war crime, or at a minimum manslaughter, component/sensor of a missile exported to Israel (export licenced by the French authorities
Companies	Exxelia technologies
Court	Juge d'instruction de Paris
Legal grounds	Order for a criminal enquiry (instruction) for complicity in a war crime
Outcome	The criminal complaint is ongoing[248]

Court cases	**Thalès Groupe, Dassault Aviation and MBDA France, filed by Mwatana for Human Rights, the (ECCHR) and Sherpa (Support of Amnesty International France)[249] (2022 - France)**
Claim	Criminal complaint: Complicity in alleged war crimes and crimes against humanity in Yemen, potentially enabled by their arms exports to Saudi Arabia (SA) and the United Arab Emirates (UAE)"
Companies	Dassault Aviation, Thales, and MBDA France
Court	Paris Trbunal
Legal grounds	Complicity in war crimes and crimes against humanity
Outcome	Pending. Connected to the case at the ICC

245 https://www.middleeasteye.net/news/yemenis-sue-top-us-defence-contractors-aiding-war-crimes.

246 https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/.

247 https://www.acatfrance.fr/communique-de-presse/plainte-pour-complicite-de-crimes-de-guerre-a-gaza-contre-lentreprise-francaise-exxelia-technologies; https://www.acatfrance.fr/public/qr_plainte_gaza_acat.pdf; https://www.mezan.org/en/post/42836; https://www.france24.com/fr/20160629-gaza-crime-guerre-exxelia-homicide-involontaire-acat-israel-justice; https://www.liberation.fr/planete/2016/06/29/crimes-de-guerre-une-famille-palestinienne-va-porter-plainte-contre-une-entreprise-francaise_1462796/; Amnesty International (2019), Outsourcing Responsibility: Human Rights Policies in the Defence Sector, ACT 30/0893/2019, p. 49; Assemblée Nationale/Commission des Affaires Etrangères (2020), Rapport d'information sur le contrôle des exportations d'armement (https://www.assemblee-nationale.fr/dyn/opendata/RINFANR5L15B3581.html).

248 https://lphr.org.uk/wp-content/uploads/2023/08/Al-Mezan_LPHR-Statement-03-August-2023.pdf; https://english.almayadeen.net/news/politics/french-arms-maker-at-heart-of-investigation-into-war-crimes

249 https://www.ecchr.eu/en/press-release/aiding-and-abetting-war-crimes-in-yemen/; https://www.asso-sherpa.org/aiding-and-abetting-war-crimes-in-yemen-criminal-complaint-submitted-against-french-arms-companies.

Court cases	**The Ligue des droits de l'Homme (LDH) and the Coordination nationale d'action pour la paix et la démocratie (CNAPD) against the Walloon Region**[250] **(2009 - Belgium)**
Claim	Suspension of licences for exporting arms to Libya
Companies	Herstal
Court	Council of State
Legal grounds	The arms export licence was issued while the Walloon government was in a period of "current affairs"
Outcome	Suspended licences

Court cases	**FN Herstal, John Cockerill and Mecar complaint :Coordination nationale d'action pour la paix et la démocratie (CNAPD) Ligue des Droits Humains (LDH), supported by AI Belgium (AIBF)**[251] **(2019 - Belgium)**
Claim	Criminal complaint for arms exports to Saudi Arabia under licences that they are not valid when the country of destination is involved in an international or internal conflict
Companies	FN Herstal and CMI Defence (now John Cockerill), and a third unnamed company
Court	Examining magistrate in Liège and Council of State
Legal grounds	/
Outcome	Pending

Court cases	**Complaint against employees of Heckler & Koch, Landgericht Stuttgart, Az: 13 KLs 143 Js 38100/10**[252] **(2019 - Germany)**
Claim	Criminal action because of the violation of Germany's arms export control laws through exports of assault rifles to Mexico.
Companies	Heckler & Koch
Court	Landgericht Stuttgart
Legal grounds	The export permit of 4200 assault rifles as obtained by intentionally inaccurate end-user certificates.
Outcome	Three accused were cleared of all charges. Two employees received a conditional sentence. Fine of 3.7 million euros to Heckler & Koch. Appeal pending.

Court cases	**Sig Sauer against employees of Sig Sauer, Landgericht Kiel, 3/4/2019, Az: 3 KLs 3/18**[253] **(2021 - Germany)**
Claim	Criminal complaint for exports of small arms to the US and then to Colombia, despite the end-use certificate was issued to be destined for the US market
Companies	Employees of Sig Sauer
Court	Landgericht in Kiel confirmed by BGH on 1/7/2021
Legal grounds	/
Outcome	The accused were conditionally sentenced. Sig Sauer was fined in Germany and the US for the real value of the arms and not only the profit.

250 https://www.rtbf.be/article/fn-herstal-le-conseil-d-etat-suspend-la-licence-d-exportation-d-armes-vers-la-libye-5060773; http://www.raadvst-consetat.be/arr.php?nr=197522&l=fr. This is the first of a series of decisions by the Belgian Council of State suspending or annulling licences, the latest one being: Ligue des Droits Humains, Coordination nationale d'action pour la paix et la démocratie (CNAPD) and Forum voor Vredesactie (Vredesactie) against the Walloon Region, Arrêt n° 249.991 du 5 mars 2021 (http://www.raadvst-consetat.be/arr.php?nr=249991).

251 https://www.amnesty.be/infos/actualites/article/exportation-armes-wallonnes-justice-appelee-secours-droits; https://www.amnesty.be/infos/actualites/article/commerce-armes-wallonnes-nouvelle-action-justice-visera-herstal.

252 https://www.ecchr.eu/en/case/brutal-police-operation-in-mexico-responsibility-of-german-arms-manufacturer-heckler-koch/#case_case; https://landgericht-stuttgart.justiz-bw.de/pb/,Lde_DE/Startseite/Aktuelles/Urteil+im+Verfahren+gegen+Mitarbeiter+von+Heckler+_+Koch?QUERYSTRING=heckler; mostly confirmed by the BGH: https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021069.html?nn=10690868; http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=118351&pos=0&anz=1; http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=124717&pos=0&anz=1; http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=126579&pos=0&anz=1; http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=129995&pos=0&anz=1.

253 https://openjur.de/u/2203626.html; https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021121.html; http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=122197&pos=0&anz=1.

III. Cases before international bodies

Court cases	**The Prosecutor v. Charles Ghankay Taylor**[254] **(2013 - UN ad hoc court)**
Claim	Sealed Indictment of Taylor on 17 counts of war crimes, crimes against humanity, and other serious violations of international law. The UNSC Resolution 1688, allowed the SCSL to transfer Taylor's case to The Hague.
Companies	/
Court	Trial Chamber of the Special Court for Sierra Leone (SCSL)
Legal grounds	IHL
Outcome	Guilty on all 11 counts for aiding and abetting the commission of war crimes and crimes against humanity and for planning attacks where these crimes were committed.

Court cases	**Complaint lodged at the by the (ECCHR), AI, the Campaign Against Arms Trade, Centre Delàs for Peace Studies, Mwatana for Human Rights, and Rete Italiana Pace e Disarmo**[255] **(2019 - ICC)**
Claim	Whether these companies and governments and officials, by authorizing and exporting (dual use products) arms to members of the military coalition led by Saudi Arabia and the United Arab Emirates (UAE), have contributed to serious violations of IHL in Yemen that may amount to war crimes
Companies	Airbus Defence and Space S.A. (Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc. (UK), Dassault Aviation S.A. (France), Leonardo S.p.A. (Italy), MBDA UK Ldt. (UK), MBDA France S.A.S. (France), Raytheon Systems Ltd. (UK), Rheinmetall AG (Germany) and subsidiary RWM Italia S.p.A. (Italy), and Thales France
Court	Office of the Prosecutor of the International Criminal Court (ICC)
Legal grounds	Rome Statute, Article 25(3)(c) By authorizing and exporting arms to Coalition members, they may have contributed to violations of IHL in Yemen
Outcome	Pending

IV. Cases lodged in Europe and Israel regarding dual use goods

Court cases	**Amesys criminal complaint by FIDH and the Ligue française des droits de l'Homme**[256] **(2011 - France)**
Claim	Criminal complaint: Amesys assisted the Libya with the development of a communication surveillance network. They used to intercept private Internet communications and to identify opponents of Gaddafi - who were detained and tortured. Serious human rights violations either directly [committed] or tolerated by a power whose structure allows for all forms of breach.
Companies	Amesys (French subsidiary of the Bull group)
Court	Tribunal of the Paris Appeals Court
Legal grounds	French Code of Criminal Procedure and French Criminal Code. UN Convention against Torture, and the principle of extraterritorial jurisdiction.
Outcome	The indictment of two employees were cancelled. the indictment of AMESYS and its executives was confirmed and dismissed all the other procedural nullities invoked. It ordered the continuation of the investigation

254 https://www.hrw.org/news/2012/04/11/prosecutor-v-charles-ghankay-taylor-chronology-case-special-court-sierra-leone.

255 https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf; https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/; https://www.ecchr.eu/fileadmin/Q_As/QA_ICC_arms_Yemen_ECCHR_CAAT_Mwatana_Amnesty_Delas_Rete.pdf; https://rethinkingslic.org/blog/criminal-law/93-an-arms-trade-case-at-the-international-criminal-court-would-the-article-25-3-c-purpose-requirement-really-matter.

256 https://www.fidh.org/IMG/pdf/report_amesys_case_eng.pdf ; https://www.fidh.org/en/region/north-africa-middle-east/libya/16959-the-amesys-case-the-victims-anxious-to-see-tangible-progress; https://www.fidh.org/en/impacts/Surveillance-torture-Libya-Paris-Court-Appeal-indictment-AMESYS.

Court cases	**Nexa Technologies (formerly Amesys) in France;[257] The complaints, filed by the International Federation for Human Rights, or FIDH, and the French League for Human Rights. (2021 - France)**
Claim	New complaint for selling cybersurveillance material to the Egyptian government: the sales to Libya and Egypt over the last decade led to the crushing of opposition, torture of dissidents, and other human rights abuses.
Companies	Nexa Technology
Court	Paris Judicial Court: Crimes Against Humanity and War Crimes unit of the court
Legal grounds	IHL
Outcome	Four executives of Amesys, and of Nexa technologies were indicted for "complicity in acts of torture" for selling spy technology to the Libyan regime. Three Nexa executives face the same charges for surveillance sales to Egypt.[258]

Court cases	**Qosmos complaint by FIDH and the Ligue française des droits de l'Homme[259] (2012 - France)**
Claim	Criminal complaint against Qosmos, for providing the Bashar El-Assad government with surveillance equipment, used to monitor and target dissidents later arrested and tortured.
Companies	Qosmos (Software company)
Court	Paris Criminal Court
Legal grounds	IHL
Outcome	2020: Dismissed, lack of evidence to establish a causal link between the defective surveillance equipment and the acts of torture and crimes against humanity perpetrated by the Syrian regime.

Court cases	**FinFisher GmbH, FinFisher Labs GmbH and Elaman GmbH complaint by The Society for Civil Rights (GFF), Reporters Without Borders (RSF Germany) the blog netzpolitik.org and the ECCHR[260] (2019 - Germany)**
Claim	Criminal complaints against CEOs allegedly exporting the spyware FinSpy to Turkey without an export licence
Companies	FinFisher GmbH, FinFisher Labs GmbH and Elaman GmbH
Court	Munich Public Prosecutor's Office
Legal grounds	Violation of licencing procedure
Outcome	Pending. FinFisher filed for bankruptcy in March 2022. In 2023, the Prosecutor's Office brought charges against four former managers of the corporate group. They intentionally violated licencing requirements for dual-use goods by selling surveillance software to non-EU countries and having made themselves liable to criminal prosecution.

Court cases	**Complaints against Israel's Cognyte for agreement after a Myanmar spyware tender before coup[261] (2017 - Israel)**
Claim	Criminal complaint against the deal. Cognyte and unnamed defence and foreign ministry officials responsible of the tender contributing to crimes against humanity committed in Myanmar
Companies	Cognyte Software Ltd
Court	Israel's Supreme Court
Legal grounds	Israeli law: companies exporting defence-related products must have licences for export and marketing.
Outcome	Pending.

257 Assemblée Nationale/Commission des Affaires Etrangères (2020), Rapport d'information sur le contrôle des exportations d'armement (https://www.assemblee-nationale.fr/dyn/opendata/RINFANR5L15B3581.html) ; Irene Pietropaoli (2020), Business, Human Rights and Transitional Justice, Routledge, p. 74.

258 https://www.technologyreview.com/2021/06/22/1026777/france-spyware-amesys-nexa-crimes-against-humanity-libya-egypt/.

259 https://www.fidh.org/en/region/europe-central-asia/france/15116-france-opening-of-a-judicial-investigation-targeting-qosmos-for-complicity; https://www.business-humanrights.org/en/latest-news/qosmos-investigation-re-syria/; Irene Pietropaoli (2020), Business, Human Rights and Transitional Justice, Routledge, p. 74.

260 https://www.ecchr.eu/en/press-release/german-prosecutor-opens-criminal-investiation-into-finfisher-for-selling-spyware-to-turkey-without-license/; FinFisher filed for bankruptcy in March 2022 (Public Prosecutor's investigations still ongoing) (https://www.ecchr.eu/en/case/surveillance-software-germany-turkey-finfisher/).

261 https://www.aljazeera.com/news/2023/1/15/israels-cognyte-won-myanmar-spyware-tender-before-coup.

Court cases	**Pouladian-Kari v R [2013] EWCA Crim 158 (bailii.org)**[262] **(2013 - United Kingdom)**
Claim	Attempt to export prohibited or restricted goods, namely, electrical switchgear, contrary to s 68(2) of the Customs and Excise Management Act 1979. (12th December 2011)
Companies	GTC Associates Limited ("GTC")
Court	England and Wales Court of Appeal (criminal division) on appeal from the Central Criminal Court Mr. Recorder Lewis QC
Legal grounds	S.68 of the Customs and Excise Management Act 1979
Outcome	The conviction must be quashed for procedural reasons (related to a jury).

Court cases	**Public Prosecutor v. Frans Cornelis Adrianus van Anraat**[263] **(2007 - The Netherlands)**
Claim	Between 1985 and 1988, the accused supplied the chemical raw material thiodiglycol to Iraq's government and a firm affiliated with the Iraqi Ministry of Oil.
Companies	Chemical Frans
Court	Court of Appeal of The Hague, The Netherlands
Legal grounds	IHL
Outcome	Acquitted of the charge of complicity to genocide (his intent could not be proved). Convicted of complicity in war crimes: Sentenced to 15 years' imprisonment.

Court cases	**Oxfam Novib, Vredesbeweging, PAX Nederland and The Rights Forum against The Netherlands in the interest of the citizens of Gaza (Palestine)**[264] **(2023 - The Netherlands)**
Claim	Shipment from the Netherlands of Parts for F-35 Fighter Aircraft to Israel
Companies	Commander Logistics Center Woensdrecht.[265] (F-35 Lightning II program on the production and maintenance of the United States (US) manufactured F-35 fighter aircraft
Court	The Appeals Court of the Hague[266]
Legal grounds	Strategic Goods Decree, ATT, Geneva Conventions, EU Common Position 2008/944/CFSP
Outcome	The Netherlands must take adequate measures within a week to stop the further shipment of F35 parts to Israel. The Government of the Netherlands will go in Cassation.[267] The court declared its judgment provisionally enforceable (because it is a summary proceedings).

262 https://www.casemine.com/judgement/uk/5a8ff6fc60d03e7f57ea5438.

263 I.Pietropaoli (2020), Business, Human Rights and Transitional Justice, Routledge, p. 80/81; https://www.internationalcrimesdatabase.org/Case/168/Van-Anraat/#:~:text=The%20Court%20of%20Appeal%20of%20The%20Hague%20upheld,increased%20Van%20Anraat%E2%80%99s%20sentence%20to%2017%20years%E2%80%99%20imprisonment.

264 Se M. Zwanenburg and J. Voetelink (2024) *Appeals Judgment in Case concerning the Shipment from the Netherlands of Parts for F-35 Fighter Aircraft to Israel* EJIL talk! https://www.ejiltalk.org/appeals-judgment-in-case-concerning-the-shipment-from-the-netherlands-of-parts-for-f-35-fighter-aircraft-to-israel/

265 See *European spare parts center F-35 officially opened*, at https://brabantisbright.nl/european-spare-parts-center-f-35-officially-opened/

266 This judgment (ECLI:NL:GHDHA:2024:191, Gerechtshof Den Haag, 200.336.130/01 (rechtspraak.nl)) decided an appeal against the judgment of 15 December 2023 of the district court of the Hague (C/09/657026 KG ZA 23-991 Kort geding) ECLI:NL:RBDHA:2023:19744, Rechtbank Den Haag, C/09/657026 KG ZA 23-991 (rechtspraak.nl)

267 See, *State lodges appeal in cassation against judgment on distribution of F-35 parts to Israel* News item 12-02-2024 at https://www.government.nl/latest/news/2024/02/12/state-lodges-appeal-in-cassation-against-judgment-on-distribution-of-f-35-parts-to-israel

V. Cases before OECD National Contact Points

Court cases	**Boeing Company and Lockheed Martin Co. the European Centre for Democracy and Human Rights, Defenders for Medical Impartiality, and the Arabian Rights Watch Association**[268] **(2016 - United States)**
Claim	The companies' products (Conventional arms (their parts, components, ammunition)) have contributed to human rights violations in Yemen through their use by the government of Saudi Arabia in 2015 and 2016.
Companies	Boeing Company and Lockheed Martin Corporation
Court	US OECD National Contact Point
Legal grounds	OECD Guidelines
Outcome	Rejected. The US NCP decided to mediate, because the instance would have entailed an examination of state conduct, which would not serve to advance the Guidelines

Court cases	**NGO complaint against a UK company**[269] **(2016 - United Kingdom)**
Claim	Complaint about human rights impacts in Saudi Arabia
Companies	anonymous
Court	UK OECD National Contact Point
Legal grounds	OECD Guidelines
Outcome	Rejected.

Court cases	**Alsetex, Etienne Lacroix**[270] **(2016 - France)**
Claim	Export of tear gas to Bahrain that was allegedly used by the government to commit human rights violations.
Companies	Alsetex
Court	French OEDC National Contact Point
Legal grounds	OECD Guidelines
Outcome	Recommendations on the due diligence process

Court cases	**Privacy International et al. Vs. Gamma International**[271] **(2013 - United Kingdom)**
Claim	Breaches of the general policies and human rights provisions of the OECD Guidelines by supplying surveillance equipment to police and security services in Bahrain.
Companies	Gamma International UK Ltd
Court	UK National Contact Point
Legal grounds	OECD Guidelines. Complicit of aiding and abetting the Bahrain which violated human rights, and arbitrarily arrested and tortured people.
Outcome	Gamma International UK Ltd's actions were inconsistent with provisions of the OECD Guidelines, including the responsibility to carry out due diligence

268 https://www.oecdwatch.org/complaint/ecdhr-et-al-vs-boeing-lockheed-martin/.

269 https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-an-ngo-against-a-uk-company.

270 https://mneguidelines.oecd.org/database/instances/fr0021.htm; Christian Schliemann, Linde Bryk, Arms Trade and Corporate Responsibility: Liability, Litigation and Legislative Reform, Friedrich-Ebert-Stiftung Study, November 2019, p. 22.

271 https://www.oecdwatch.org/complaint/privacy-international-et-al-vs-gamma-international/; https://www.gov.uk/government/publications/privacy-international-complaint-to-uk-ncp-about-gamma-international-uk-ltd.

VI. Public interest litigation

Court cases	**TA Paris, 8.8 2019, n° 1807203/6-2 lodged by "Action sécurité éthique républicaines".[272] (2018 - France)**
Claim	Suspension of export licences for war materiel and related materials to countries involved in the war in Yemen: Error of law and a manifest error of assessment (Art. L. 2335-4 of Defence Code: export licences are maintained in breach of France's int. commitments; Disregard of Art. L. 243-2 of the French Code of Relations between the Public and the Administration: obligation to repeal a regulatory act that is unlawful or devoid of purpose. Violation of Article 6,7 of the ATT. Article 2 of the UN Charter.
Companies	Government
Court	Administrative Court of Paris
Legal grounds	Article L. 2335-4 of the Defence Code; Article L. 243-2 of the French Code of Relations between the Public and the Administration: Violation of Article 6,7 of the ATT. Article 2 of the UN Charter.
Outcome	Rejected. No jurisdiction as the licencing decision is inherently linked to foreign policy.

Court cases	**Campaign Against Arms Trade vs UK government[273] (2019 - United Kingdom)**
Claim	The decision to continue to licence military equipment for export to the Gulf states was unlawful. It was a clear risk the arms might be used in a serious violation of IHL.
Companies	Producers of yphoon and Tornado fighter jets, and precision-guided bombs.
Court	Court of Appeal of London
Legal grounds	UK export policy: military equipment licences should not be granted if there is a "clear risk" that weapons might be used in a "serious violation of IHL"
Outcome	Licences should be reviewed but would not be immediately suspended. The decision did not assess the licence grant, but the rationality of the process to decide.

Court cases	**NJCM, PAX and Stop Wapenhandel v. Staat der Nederlanden. Case N° ECLI:NL: GHAMS: 2017:165[274] (2017 - The Netherlands)**
Claim	Public interest of all those who are or may become victims of arms trade in violation of law. I.e. residents of Egypt and the region, and past, present and future victims of the use of military force by the Egyptian armed forces
Companies	Export of military goods/technology to Egypt that have been and are still to be granted by the Minister
Court	Court of Appeal of Amsterdam
Legal grounds	Section 3:305a of the Dutch Civil Code, general interest (compliance with international law (IHRL and IHL) by the state. Art. 6- 7 ATT and Art. 2 (EU CP)
Outcome	Legal standing was denied as the NGO was not directly affected by the licence

Court cases	**Asociación de Familiares de Presos y Detenidos Saharauis et al. v. Ministerio de Industria, Comercio y Turismo (Schliemann & Bryk, 2019)[275] (2010 - Spain)**
Claim	Whether the Spanish judicial authorities had jurisdiction to indict Moroccan military and police officials for the crime of genocide committed in Western Sahara.
Companies	Hachem and ors
Court	Contentious- Administrative Chamber of Madrid; Case 03440/2010
Legal grounds	/
Outcome	Legal standing was denied as the claimants were not found to be "interested parties" under the Spanish law.

272 https://www.doctrine.fr/d/TA/Paris/2019/UC1F9A5EAC140E2843583.

273 https://www.bbc.com/news/uk-48704596.

274 https://pilpnjcm.nl/wp-content/uploads/2021/11/7727-PAX-c.s.-Staat-der-Nederlanden_DEFINITIEF_EN_PILP-NJCM.pdf; Schliemann, C., & Bryk, L. (2019). Arms Trade and Corporate Responsibility: Liability, Litigation and Legislative Reform: Democracy and Human Rights. Friedrich-Ebert-Stiftung, Global Policy and Development.

275 Schliemann, C., & Bryk, L. (2019). Arms Trade and Corporate Responsibility: Liability, Litigation and Legislative Reform: Democracy and Human Rights. Friedrich-Ebert-Stiftung, Global Policy and Development.

Court cases	**NGO Justicia de Pau vs. Interministerial Regulatory Board for Foreign Trade in Defence and Dual-Use Equipment.**[276] **(2013 - Spain)**
Claim	Request of copies of licences for arms exports and copies of the mandatory and binding reports in relation to the licences issued by the Interministerial Regulatory Board for Foreign Trade.
Companies	/
Court	Superior Court of Justice of Madrid, Case 00369/2010
Legal grounds	Law on Official Secrets.
Outcome	Denied: The licences and the reports were legally protected as »secret« in accordance with the Law on Official Secrets.

276 Schliemann, C., & Bryk, L. (2019). Arms Trade and Corporate Responsibility: Liability, Litigation and Legislative Reform: Democracy and Human Rights. Friedrich-Ebert-Stiftung, Global Policy and Development.

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