

REPORT

# Due diligence and corporate liability of the defence industry

## Arms exports, end use and corporate responsibility

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REPORT

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## Colophon

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# List of abbreviations

<b>ABA</b>	Americans for Democracy and Human Rights in Bahrain
<b>ATT</b>	ATT
<b>CSDD</b>	Directive on Corporate Sustainability Due Diligence
<b>CSR</b>	corporate social responsibility
<b>ESG</b>	environmental, social, and governance
<b>EU</b>	European Union
<b>ICC</b>	International Criminal Court
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICPs</b>	internal compliance programmes
<b>ICRC</b>	International Committee of the Red Cross
<b>NCPs</b>	National Contact Points
<b>NGOs</b>	non-governmental organisations
<b>OECD</b>	Organisation for Economic Co-operation and Development

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**OHCHR** UN High Commissioner for Human Rights

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**RBC** responsible business conduct

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**SIPRI** Stockholm International Peace Research Institute

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**UN** United Nations

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**UNGPs** UN Guiding Principles on Business and Human Rights

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# Introduction

## Background

Due diligence is a frequently used concept that describes measures aimed at preventing and mitigating adverse impacts and risks. As part of international initiatives to integrate environmental, social, and governance (ESG) considerations into responsible business conduct (RBC), the concept of due diligence has garnered extensive attention. Particularly notable is the importance afforded to due diligence developed by the UN Guiding Principles on Business and Human Rights (UNGPs) (2011),<sup>1</sup> which have been described as an ‘authoritative’ global framework.<sup>2</sup> The UNGPs expect business enterprises to exercise human rights due diligence to identify, prevent, mitigate, and account for the way they take account of and deal with adverse human rights impacts. Likewise, the 2011 edition of the OECD Guidelines for Multinational Enterprises repeatedly referred to due diligence in facilitating businesses’ engagement with their environmental, human rights, labour, and other societal impacts.<sup>3</sup>

Due diligence should be highly relevant to the defence industry: there are many reasons to assume its relevance to arms-exporting companies. The Stockholm International Peace Research Institute (SIPRI) estimates the combined arms sales of the world’s top 100 arms-producing and military services companies to have been \$531 billion in 2020, of which 21 per cent (or \$109 billion) was derived from the arms sales of 26 European companies.<sup>4</sup> Such an overall market size is accompanied by a general recognition of the adverse impacts that exported arms may have in either intended countries or ultimate destinations. Both the Council Common Position 2008/944/CFSP, a set of obligatory criteria applicable to EU member states’ arms trade, and the Arms Trade Treaty (ATT), an international treaty on the regulation of conventional arms trade, recognise linkages between the transfer of arms, on the one hand, and serious violations of international humanitarian law and international human rights law, on the other.<sup>5</sup> Such linkages were extensively discussed in connection with the arms trade with Saudi Arabia, to which the weapons were sold for use in armed conflicts in Yemen.<sup>6</sup> While the Common Position and the ATT regulate governmental licensing decisions (as opposed to corporate conduct), what matters for the

purposes of this report is the fact that these instruments acknowledge specific adverse impacts arising from military exports.

Despite the recognition of adverse impacts, relatively limited attention has been paid to due diligence and the associated liability of arms-exporting companies compared to those applicable to some other business sectors. As of February 2023, the OECD had not yet adopted due diligence guidance specific to the defence sector. To fill the gap, the American Bar Association (ABA) published the Defence Industry Human Rights Due Diligence Guidance (2022),<sup>7</sup> although its understanding of risks encompasses both those to the industry and those to potential victims of human rights violations.<sup>8</sup> The reasons for the scarcity of sector-specific information are multi-faceted, but one of the explanations is the unique role of state authorities over the defence sector and its exports. Traditionally, state authorities have played a predominant role in the defence industry's ownership and operation, given the sector's influence on national and regional security interests.<sup>9</sup> In addition, regardless of the level of privatisation in the defence industry, governments continue to retain the authority to allocate export licenses for military items. Defence companies often invoke governmental export controls as a basis for their fulfilment of risk mitigation and prevention.<sup>10</sup> Yet it is evident that companies play a distinct role in export decisions. As governments cannot realistically verify all the descriptions and statements submitted by exporters, licensing decisions are partly built on a range of information sources provided by arms-exporting companies, which have unique insights into their relationships with end-users and end-use, prior to licensing decisions being made and also after they have been made. Also, as Schliemann and Bryk have pointed out, risks may change over time even if companies are formally permitted to export.<sup>11</sup> It is therefore crucial to promote the discussion of due diligence and liability with defence companies as a way of preventing and mitigating the adverse impacts of military exports.

Against this background, this report analyses the due diligence and related liability of businesses which export military items and technologies. For the sake of this report, 'military items and technologies' are broadly understood as including weapons of mass destruction and conventional weapons, related equipment, components, software, and technical assistance as well as dual-use items that can serve military purposes.

Our focus is directed at those companies which *export* military items and technologies and also associated technical support. In this sense, this report does not focus on legal questions arising from the *development* of weapons per se. Yet it would be good to remember that exporters are part of the 'full value chain of actors' linked to the life cycle of weapons systems, components, and ancillary equipment.<sup>12</sup> While the focus of the present report is on one segment of the cycle, the export of military items is by no means distinct from development and other steps within the cycle. This is partly due to the nature of due diligence; other stages are relevant if it is reasonable for exporters to identify and mitigate certain risks arising from the stages of weapons development. Such risks include, for instance, the post-use effects of weapons by design (e.g., a high dud rate in cluster munitions). Also, should due diligence be applicable – for example, not only to the transfer of a fighter jet itself but also to the export of its components and the provision of technical assistance – the various stages of the fighter jet's life cycle could trigger multiple exporters' due diligence.

## Research questions & methodology

On this basis, this report will be guided by the following three research questions:

- 1 What does the concept of due diligence entail? How does it relate to other concepts and practices such as ‘corporate social responsibility’ and ‘internal compliance programmes’?
- 2 To what extent can companies be held liable for violations of obligations under international law, such as international human rights law and international humanitarian law, regarding exported weapons and their components?
- 3 What are the opportunities for the defence industry to exercise due diligence and the challenges the industry faces in exercising it?

The three chapters of this report follow the order of these questions. We start with providing three conceptual variations of due diligence and explain how the concept is given meaning at the international and domestic levels (chapter 1). We then analyse the connection between an exporter’s due diligence ‘failures’, on the one hand, and the exporter’s civil and criminal liability, on the other hand (chapter 2). On this basis, we examine more concrete implications of due diligence for the defence industry, show some pathways for the industry, and provide recommendations for international law-making (chapter 3).

Our analysis is based mainly on desk-based documentary research. As documentary analysis has its limitations, an expert seminar was organised in December 2022 by the Flemish Peace Institute and the authors of the report. The aim of the expert seminar was to seek practice-oriented insights from different stakeholders regarding the implications of due diligence in the practices of the defence industry. During the seminar, 11 professionals from Europe-based defence companies, human rights NGOs, and EU governmental regulators shared their responses to a draft version of the report and a set of questions sent prior to the seminar.

With regard to analytical perspectives, we have responded the first and second questions primarily through a legal doctrinal lens and provide a description of the law as it currently stands. In order to respond to the third question, we attempted to situate some of the applicable legal frameworks in the specific practices and characteristics of the defence industry. With regard to the legal domains to be analysed, our analysis is primarily based on international and EU legal frameworks. The report’s theme is at the intersection of several sub-fields of international law, including: business and human rights, arms trade controls, dual-use export controls, international humanitarian law, and international criminal law. Given the importance of domestic law in the analysis of liability, however, we provide some analysis of the ways in which due diligence failures inform the determination of both civil and criminal liability in the law of selected jurisdictions.

# 1

## The concept of due diligence

### 1.1. Three conceptual variations of ‘due diligence’

The term ‘due diligence’ proliferates in a variety of legal and social spheres. In addressing due diligence and corporate liability in the defence industry, it is thus necessary to make distinctions between the following three usages of the term: risk analysis for businesses, processes of risk identification and mitigation, and standard of conduct. While there are other conceptual variations of ‘due diligence’, awareness of some of the key conceptual differences serves as a starting point.

First, in business practices, including those in the defence industry, due diligence is regularly referred to as a mechanism with which to analyse financial, technical, legal, reputational, and other risks associated with business transactions.<sup>13</sup> Consider, for instance, the assessment of financial statements prior to the acquisition of another business or the analysis of technical specifications prior to the sale or purchase of components. Such due diligence may include the identification of adverse social impacts of transactions. Yet due diligence in this first sense is intended primarily to investigate multi-faceted risks to *companies themselves* in connection with pending business activities. For example, the possibility that the buyer of armed drones would use them in a densely populated area can be flagged – in the course of a due diligence analysis – as part of the seller’s ‘legal compliance’ and reputational risks.

Second, in business and human rights, due diligence has developed into a concept that encompasses comprehensive processes of identifying actual and potential ‘adverse impacts’ and taking steps to mitigate them. According to Ruggie, the UNGPs’ main author, due diligence is understood to be:

*a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.<sup>14</sup>*

According to Principle 17 of the UNGPs, the process of human rights due diligence should include ‘assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking resources, and communicating how impacts are addressed’.<sup>15</sup>

Such a broad conceptualisation of due diligence, characteristic of the UNGPs, has also been featured in other subject-matter domains of ESG, such as the protection of the environment. According to the OECD Guidelines for Multinational Enterprises, such enterprises should carry out due diligence to ‘identify, prevent, and mitigate actual and potential adverse impacts’ and to ‘account for how these impacts are addressed’.<sup>16</sup> The OECD Guidelines apply due diligence to address a wide range of ‘adverse impacts’, including those on human rights, the environment, employment and industrial relations, bribery and corruption, and consumer interests.<sup>17</sup> On this basis, the OECD Due Diligence Guidance (2018) envisages a cycle of the following six measures to implement due diligence:

- 1 to embed RBC into the enterprise’s policies and management systems;
- 2 to identify actual or potential adverse impacts;
- 3 to cease, prevent, or mitigate such impacts;
- 4 to track implementation and results;
- 5 to communicate how impacts are addressed; and
- 6 to provide for or cooperate in remediation when appropriate.<sup>18</sup>

As illustrated by the OECD Guidance’ six steps, due diligence is envisaged as a comprehensive process to address adverse impacts.

Third and finally, in the law of torts, due diligence can be used as a ‘standard of conduct’ required for businesses to discharge an obligation. Here, due diligence is conceptualised not as specific steps to be followed but as an expected conduct in a given situation, depending on, for instance, the reasonable foreseeability of harms. Due diligence as a standard of conduct has its conceptual origin in the Roman law maxim of a *diligens paterfamilias* (a prudent head of a household) as a standard by which to assess a person’s liability for accidental harm caused to others.<sup>19</sup> At least in some jurisdictions, the Roman doctrine of *diligens paterfamilias* has developed into a standard of expected conduct in determining whether a person has been negligent in tortious law.<sup>20</sup> Also, due diligence, or rather the lack of it, is a central component in criminal liability for negligently causing harm.<sup>21</sup> In this sense, ‘due diligence failure’ is a prerequisite of liability based upon ‘negligence’ in tort or criminal law.<sup>22</sup> Depending on applicable domestic laws, an arms-exporting company’s failure to act with due diligence may give rise to corporate liability for negligence, as is discussed in chapter 2 of this report.

These three conceptual variations of due diligence differ in terms of whose risks are primarily at stake, what steps companies should take, and what may be the consequences of failing to conduct, or act with, due diligence. Of these concepts, the *second and third versions* of due diligence are relevant in this report. The *second usage* (i.e., processes of risk identification and mitigation) is especially pertinent, not only because it is a commonly used terminology in ESG, but also because it affects the third variation of due diligence (i.e., standard of conduct). As nicely put by Ruggie and Sherman, the aim of the UNGPs was to change our understanding of ‘reasonable’ conduct for businesses with regard to their role in preventing and addressing human rights impacts.<sup>23</sup> Implementing due diligence processes according to the UNGPs and the OECD Due Diligence Guidance may thus help to shape the standard of expected conduct for businesses as a basis for their liability.

## 1.2. Relationship with other concepts

Before elaborating on the legal status of due diligence, it is useful to explain its conceptual nexus to other frequently used terms, such as ‘corporate social responsibility’ (CSR) and ‘internal compliance programmes’ (ICPs). ICPs can be defined as ‘ongoing, effective, appropriate and proportionate policies and procedures adopted by exporters to facilitate compliance’.<sup>24</sup> Human rights and environmental due diligence can be one of the elements of compliance, depending on the applicable legal frameworks. ICPs serve as intermediaries/channels through which export control authorities check and facilitate exporters’ level of compliance with applicable legal frameworks. National authorities may provide guidelines for ICPs and use them as a focal point for discussions with the industry.

CSR has been given diverse interpretations since the 1950s.<sup>25</sup> According to the definition of the European Commission in 2011, CSR denotes ‘a process to integrate social, environmental, ethical, human rights and consumer concerns into ... business operations and core strategy’.<sup>26</sup> In this sense, CSR is akin to RBC. In fact, some EU documents use CSR as a concept interchangeably with RBC. Both CSR and RBC can be understood as being an underlying motivation for due diligence in the fields of human rights, environment, and other ESG domains. In the context of the defence industry, CSR offers an explanation for why the conduct of arms-exporting companies – and not that of state authorities – should be subject to separate scrutiny because of their impact on both society and environment.

Despite such a connection, due diligence should not be equated to CSR. This is because CSR aims at ‘maximising the creation of shared value’ among business owners, shareholders, other stakeholders, and society at large.<sup>27</sup> In contrast, the UNGPs expect business enterprises to respect human rights, notably through due diligence, regardless of whether such due diligence maximises the shared value. In this sense, the UNGPs’ due diligence and CSR differ in what ought to be protected as a matter of priority.

## 1.3. Legal status of due diligence: international, EU, and national law

### 1.3.1 International law

In understanding the legal status of corporate due diligence, it is necessary to consider its presence under international, EU and national law. These legal domains interact with each other in giving meaning to the concept of due diligence.

At the international level, due diligence is used as a standard of care with which to assess states' implementation and compliance with obligations of conduct.<sup>28</sup> International lawyers consider the obligation of (diligent) conduct to be an obligation to 'make every effort', which can be distinguished from an obligation to obtain a certain result.<sup>29</sup> For example, an exporting state may not be held responsible solely because it failed to prevent an arms importer's indiscriminate attacks, but the exporting state may still be held responsible for failing to act diligently when awarding export licenses to weapons that are used for such attacks. With regard to its specific content, however, due diligence is 'not a free-standing obligation' under international law.<sup>30</sup> This means that it does not serve as an independent basis for generating international rights and obligations:<sup>31</sup> the content of due diligence depends on specific domains, such as international humanitarian law, human rights law, and environmental law.<sup>a</sup>

As indicated by the description above, due diligence obligations under international law pertain primarily to those of states inasmuch as international law traditionally regulates the conduct of states. Take, for example, international human rights law. As the UN Human Rights Committee observed in connection with Article 6 (right to life) of the International Covenant on Civil and Political Rights (ICCPR), states parties must 'exercise *due diligence* to protect the lives of individuals against deprivations' that are 'caused by persons or entities whose conduct is not attributable to the State'.<sup>32</sup> Such a due diligence obligation arises from the states' duty to take positive measures to protect the right to life.<sup>33</sup> According to the UN Human Rights Committee, due diligence has to be exercised against 'reasonably foreseeable threats and life-threatening situations that can result in loss of life'.<sup>34</sup> Actual loss of life is not necessarily required in order to hold states responsible for failing to discharge their due diligence obligations.<sup>35</sup>

That being said, states' due diligence did pave the way for the development of international standards regarding *corporations'* due diligence in ESG, which is separate from that of states. Such standard-setting takes place primarily through formally non-binding international instruments (often called 'soft' law), such as the UNGPs and the OECD Due Diligence Guidance.<sup>36</sup> According to the UNGPs, 'all business enterprises' have the 'responsibility to respect human rights' as a 'global standard of expected conduct'

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a More precisely, in the terminology of international law, the content of due diligence depends on the 'primary' rules of international law (which create obligations for legal persons) as opposed to commonly applicable 'secondary' rules (which provide for the conditions and consequences of a wrongful act): Ollino, *Due Diligence Obligations in International Law* (n 30) 57

regardless of where they operate.<sup>37</sup> In fulfilling such responsibility, business enterprises are ‘required to exercise human rights due diligence’.<sup>38</sup> The formulation of due diligence under the UNGPs is broad enough to be applicable to a corporate decision to export its products and services.

On top of respect for human rights, the UNGPs observe that enterprises should respect the standards of international humanitarian law in situations of armed conflict.<sup>39</sup> International humanitarian law is a body of law applicable to armed conflicts in which both states and non-state actors can be parties to the conflicts. The UNGPs’ brief remark is particularly significant to the defence industry, whose products and services are often tied up with situations of armed conflict. While international human rights law continues to apply to situations of armed conflict, the legality of conduct under human rights law (e.g., arbitrary deprivation of life) will be determined by reference to international humanitarian law when there is a normative conflict between these two bodies of law.<sup>40</sup>

The question is whether, and to what extent, arms exporters are formally bound by international humanitarian law. Its applicability is a complex issue.<sup>41</sup> For the purposes of this report, there are at least two basic questions: whether international humanitarian law is applicable to companies and their employees (personal scope); and whether particular conduct is linked to an armed conflict (nexus requirement). With regard to the personal scope, as the International Committee of the Red Cross (ICRC) summarised, humanitarian law must be respected ‘not only by all parties to the conflict, but by all individuals acting in relation to a conflict’.<sup>42</sup> As arms-exporting companies are not normally party to an armed conflict, it seems plausible that they are not formally bound by international humanitarian law.<sup>43</sup> International humanitarian law may apply, in contrast, to an exporting company’s individual employees performing activities related to an armed conflict.<sup>44</sup>

At the same time, the ICRC has observed, in another document, that *business enterprises* – arguably including arms-exporting companies – must respect international humanitarian law if they carry out activities that are ‘closely linked’ to an armed conflict.<sup>45</sup> Furthermore, it can be argued that, if – as is discussed in chapter 2 below – corporations can incur liability in some domestic jurisdictions in connection with war crimes (serious violations of international humanitarian law), they must be bound by the underlying rules of international humanitarian law. On top of the contested issue of personal scope, there remains uncertainty about the extent to which a corporation’s or an employee’s decision to export military items to a conflict zone is linked to the armed conflict (nexus requirement) and could therefore give rise to the application of international humanitarian law.<sup>a</sup>

Notwithstanding the general applicability, what matters for the purposes of this report is that arms-exporting companies are obliged to uphold international humanitarian law

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a According to Sassòli, whether a sufficient nexus exists for international humanitarian law to apply depends on some indicative factors, including ‘geographical proximity to the hostilities, the author’s affiliation to a party, the (perceived or real) affiliation of the target or victim to a party and the conformity of the act with the aims of a party’: Sassòli, *International Humanitarian Law* (n 41) 202, para 8.64.

to the extent that it is ‘integrated into national law and made applicable to companies’.<sup>46</sup> This is partly illustrated by the EU’s Dual-Use Regulation 2021/821, which is discussed in section 1.3.2 below.

While the UNGPs expect corporations to respect human rights and international humanitarian law, a thorny question pertains to the levels of risks (of authorised or unauthorised end-users acting in violation of these bodies of law) that exporters should identify and mitigate. According to Ruggie and Sherman, the UNGPs envisage due diligence to deal with three levels of impacts: (i) where a business ‘causes or may cause’ an adverse impact; (ii) where a business ‘contributes or may contribute to’ the adverse impact; (iii) where a business has not contributed to the adverse impact but such an impact is still ‘directly linked to its operations, products or services by its business relationship with another entity’.<sup>47</sup>

A wide range of situations can fall under these three scenarios. An exporter may contribute to adverse impacts if they provide technical assistance to end-users by conducting tests and providing training. In addition, the third scenario – involving adverse impacts ‘directly linked’ to an entity’s ‘business relationship with another entity’ – covers not only the impact caused by direct sales of weapons to governments or non-state armed groups; the scenario may also cover the exportation of parts, components, machines, and software that can be used to produce weapons, or the involvement of corporations in the extraction or processing of raw materials used to produce weapons. The third scenario also appears to cover arms exporters’ due diligence regarding brokers or civilian front companies for the military.<sup>48</sup> As is discussed in section 2.1.2 below, the distinction between these levels of connection with adverse impacts becomes relevant to the applicability of liability regimes.

### 1.3.2 EU law

Whereas the UNGPs and OECD Guidelines for Multinational Enterprises are formally non-binding instruments, these and other related instruments have been incorporated into, or serve as a basis for, EU legislation.<sup>49</sup> The European Commission’s February 2022 proposal for a Directive on Corporate Sustainability Due Diligence (CSDD) is an illustration of this.<sup>50</sup> The proposed CSDD Directive aims to set a ‘horizontal framework’ that obliges businesses to respect human rights and the environment in their own operations and in their value chains.<sup>51</sup> The Directive aligns itself with both the UNGPs and other relevant international guidelines such as the OECD Guidelines for Multinational Enterprises.<sup>52</sup> The due diligence process outlined covers the six steps envisaged by the OECD Due Diligence Guidance.<sup>53</sup> The proposed CSDD Directive is applicable not only to EU companies, but also to third-country companies which have specific operations in the EU.

Since the proposed Directive intends to be applicable to all companies that meet a set of thresholds,<sup>a</sup> it would in principle also apply to companies in the defence sector. Furthermore, it targets business activities related to the ‘value chain’ of a product. These business activities involve the production or provision of goods and services, including ‘up to the end life of the product’, which includes distribution, transport, and storage.<sup>54</sup> As of February 2023, however, the applicability of the CSDD Directive to a company’s export decisions remains contested. According to the Council’s position adopted in November 2022, its approach is to exclude ‘distribution, transport, storage and disposal of the product’ insofar as these steps are ‘subject to the export control’ for dual-use items and weapons and war material, and such exclusion applies ‘after the export of the product is authorised’.<sup>55</sup> This means that the Council intends to limit exporters’ due diligence to what is uniquely required under export controls.

On a more substantive front, the proposed Directive applies to measures taken with regard to ‘adverse human rights impacts’. This refers to impacts on persons protected<sup>56</sup> against the violation of the rights or prohibitions identified in the Annex to the CSDD Directive.<sup>57</sup> The Annex encompasses the right to life and security in accordance with Article 3 of the Universal Declaration of Human Rights (1948),<sup>58</sup> the prohibition of torture, cruel, inhuman or degrading treatment in accordance with Article 5 of the Universal Declaration,<sup>59</sup> the right to liberty and security in accordance with Article 9 of the Universal Declaration,<sup>60</sup> the prohibition on causing any measurable environmental degradation which harms the health, safety, the normal use of property or land, or the normal conduct of economic activity of a person or affects ecological integrity, such as deforestation, as well as other factors.<sup>61</sup> The Annex also refers to various conventions on human rights. The rights listed in the Annex would be applicable in situations where military items and technologies may be used in a way that compromises such rights.

Apart from the proposed CSDD Directive, due diligence has been used in various pieces of EU legislation, although the meaning attributed to it is by no means uniform. Among the EU instruments referring to due diligence, particularly relevant to the defence industry is the EU’s Dual-Use Regulation (EU) 2021/821 regarding the export control of dual-use items.<sup>62</sup> Under the EU’s regulation, dual-use items refers to those items which serve both civilian and military purposes.

Under Recital 7 of Regulation 2021/821, ‘due diligence’ is mentioned as part of an ‘Internal Compliance Programme’. According to Recital 7:

*the assessment of risks related to transactions concerned by this Regulation is to be carried out through transaction-screening measures, also known as the due diligence principle, as a part of an Internal Compliance Programme (ICP). In that regard, in particular size and*

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a Article 2 of the Proposal states that companies covered include: those with more than 500 employees and a turnover of €150 million in the past financial year; companies that did not meet these thresholds but had more than 250 employees on average and a net worldwide turnover of €40 million in the last financial year, and if 50% of the net turnover was generated in the sectors identified. This also applies to companies formed in accordance with the legislation of a third country.

*organisational structure of exporters have to be taken into account when developing and implementing ICPs.*<sup>63</sup> [Emphasis added]

According to Regulation 2021/821, an ICP to facilitate compliance includes ‘due diligence measures assessing risks related to the export of the items to end-users and end-uses’.<sup>64</sup> In this context, ‘due diligence’ appears to signify a type of risk analysis rather than a comprehensive set of processes to prevent and mitigate risks.

Despite the apparently narrow definition of due diligence, the EU’s Dual-Use Regulation 2021/821 is significant in that it effectively obliges dual-use exporters – and not only governmental authorities – to undertake such a risk analysis within the frameworks of international human rights and international humanitarian law. This is provided for in Article 5(2) of Regulation 2021/821 regarding the export of ‘cyber surveillance items’, which was one of the most controversial provisions during the legislative processes.<sup>65</sup> According to Article 5(2):

*Where an exporter is aware, according to its due diligence findings, that cyber-surveillance items which the exporter proposes to export, not listed in Annex I, are intended, in their entirety or in part, for any of the uses referred to in paragraph 1 of this Article [i.e., for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law], the exporter shall notify the competent authority.* [Emphasis added].

According to this provision, an exporter’s awareness of the intended uses of dual-use items for the serious violations of human rights and international humanitarian law gives rise to an obligation to notify to a relevant EU Member State authority. Albeit limited to export controls over ‘cyber surveillance items’, Regulation 2021/821 on dual-use export controls recognised the adverse impacts arising from the export of dual-use items in the context of regulating the conduct of exporters. To be clear, due diligence itself is nothing new to the EU’s dual-use export controls in that the previous versions of the EU’s dual-use regulation had already given rise to debates regarding the type and degree of due diligence for exporters. A novel feature of Article 5(2) of Regulation 2021/821 is, however, its explicit reference to human rights and international humanitarian law, which serve as the yardsticks for conducting risk assessment.

### 1.3.3 National law

While the focus of our report is directed at international and EU law, it must be noted that due diligence in the domains of ESG has increasingly been integrated into national laws on due diligence. Notable in this regard is the French Corporate Duty of Diligence Law.<sup>66</sup> Other pieces of legislation on due diligence include the Italian Due Diligence Laws,<sup>67</sup> the Dutch Child Labour Due Diligence Law,<sup>68</sup> and the German Supply Chain Due Diligence Act.<sup>69</sup> Not all are designed to be applicable to export decisions that may bring adverse impacts abroad. For example, the German Supply Chain Due Diligence Act focuses on preventing and responding to human rights and environmental violations in a company’s ‘upstream’

suppliers, as opposed to its ‘downstream’ business partners and relationships.<sup>70</sup> In similar vein, the Dutch Child Labour Due Diligence Law requires only those companies offering goods or services to Dutch end-consumers to carry out due diligence in relation to their suppliers,<sup>71</sup> although the proposed Dutch CSR Act, tabled in March 2021, does not make a distinction between upstream and downstream due diligence (applying in general to corporations who know or reasonably should have known that their activity or the activity of their business partners could have adverse consequences for human rights or the environment outside the Netherlands).<sup>72</sup>

Applicable national laws are critically important to regulating the export of arms to conflict zones, in part because they determine the liability consequences of due diligence failures – as is examined in section 2.2 of this report. These and other national laws do not exist independently, however. Their content can be based upon international and regional standards on corporate due diligence and, simultaneously, such national practices contribute to the development of international and regional standards.<sup>73</sup>

## 1.4. Adverse impacts of the export of military items and technologies

In situating the concept of due diligence in the context of arms exports, one of the most intricate aspects pertains to determining what constitutes ‘adverse impacts’. Conventional weapons and other weapons are, almost by definition, meant to cause destruction, injuries, and/or death. Yet such damage may not, in itself, amount to ‘adverse impacts’ that should be identified and mitigated according to international, EU, and national legal frameworks. Furthermore, according to the OECD Due Diligence Guidance, due diligence measures ‘should be commensurate to the severity and likelihood of the adverse impact’.<sup>74</sup> This means that there are varying degrees of adverse impacts, which alter due diligence and possibly the consequences of due diligence failures.

As the ATT explicitly acknowledged, the first broad categories of adverse impacts are serious violations of international humanitarian law and international crimes. Article 7(1)(b)(i) of the ATT obliges states to assess the potential for arms to be used to commit or facilitate ‘a serious violation of international humanitarian law’. Also, Article 6(3) of the ATT acknowledged the links between arms trade and ‘genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such’ and ‘other war crimes as defined by international agreements’ to which a state is a party.<sup>75</sup> Grave breaches cover a category of particularly serious violations of the Geneva Conventions committed in international armed conflicts (e.g., wilful killing of civilians in occupied territory).<sup>a</sup> Such ‘other war

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a From a procedural point of view, grave breaches cover violations for which states must enact penal legislation, search for suspects, and prosecute or extradite them, whereas war crimes are those violations that are criminalised in international law. In their material scope, however, these two categories overlap and war crimes cover a wider range of the violations of humanitarian law: Marko Divac Öberg, ‘The Absorption of Grave Breaches into War Crimes Law’ (2009) 91 *International Review of the Red Cross* 163. Note that the substantive limitation of Art. 6(3) of the ATT to grave breaches is open to criticism.

'crimes' include serious violations of common Article 3 of the 1949 Geneva Conventions that are applicable to non-international armed conflicts.<sup>76</sup> Whereas the ATT regulates states' decisions, the *types of adverse impact* can be used to assess businesses' decisions to export conventional weapons and related material.

Another broad category of the adverse impacts pertains to human rights violations. In the resolution entitled 'Impact of Arms Transfers on Human Rights', the UN Human Rights Council acknowledged that 'millions of people around the world are affected by serious human rights violations committed or facilitated by the irresponsible use of arms'.<sup>77</sup> Arms can be used to commit violations of a wide range of human rights, including the right to life, the right to liberty and security, and the right to be free from torture and other cruel, inhuman, or degrading treatment or punishment.<sup>78</sup> The availability of arms may also facilitate gender-based violence, including sexual violence,<sup>79</sup> as articulated in Article 7(4) of the ATT.<sup>80</sup> The right to freedom of expression, the right of peaceful assembly, and the right to freedom of association may also be undermined by the use of arms or the threat of their use.<sup>81</sup> On top of these civil and political rights, economic, social, and cultural rights can be 'significantly undermined by the use of arms', due to the damage or destruction of civilian infrastructure that deprives civilians of access to basic necessities and services such as food, health, education, and shelter.<sup>82</sup>

Among a wide range of human rights violations, Article 7(1) of the ATT, Criterion Two of the EU's Common Position, and Article 5 of the EU's Dual-Use Regulation 2021/821 all employ the concept of 'serious' violations of human rights in the context of controlling the risks of arms and dual-use exports. For example, Article 7(1)(b)(ii) of the ATT obliges states to assess the potential for arms to be used to commit or facilitate 'a serious violation of international human rights law'. The ATT does not define further what constitutes 'serious' human rights violations. According to the study of Siatitsa, whether or not human rights violations are regarded as 'serious' depends on the 'combination of various aggravating elements', such as the 'irreparable impact on victims, together with the value protected by the human rights rule and the degree of vulnerability of a situation presents for the victims'.<sup>83</sup> While determining what constitutes 'serious' violations requires case-specific information, exported military items and technologies can indeed be used in violations of human rights that have an irreparable impact on victims (e.g., infringement of the right to life, the right to be free from torture).

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Under customary international humanitarian law, arms transfers that could be linked to *all* war crimes may be prohibited; this includes war crimes that do not qualify as 'grave breaches'. After all, under Common Article 1 of the Geneva Conventions and Rule 144 of the ICRC's Customary International Humanitarian Law Study (2005), all states have an obligation to respect and ensure respect for international humanitarian law, meaning that they must act to prevent all violations of the law

## 1.5. Interim conclusion

Overall, what is the concept of due diligence, then? In the field of ESG, owing to the influence of the UNGPs, it is understood as the processes of risk identification and mitigation. The UNGPs' understanding of due diligence as a comprehensive process of risk prevention and mitigation has been used by the OECD, not only in the context of business and human rights, but also in other dimensions of ESG. Such UNGP-based understanding of due diligence is, however, *not* the same as due diligence as a standard of conduct for liability (this is discussed further in the next section of this report). Also, due diligence as used in Article 5(2) of the EU's dual-use regulation seems to adopt a narrow definition of due diligence as a process of risk analysis.

To what extent is due diligence, as understood as the processes of risk identification and mitigation, legally relevant to arms-exporting companies? This depends entirely on the applicable legal frameworks. At the international level, corporations' due diligence has been developed through soft law instruments that pertain to international human rights and international humanitarian law. That being said, international standards, such as the UNGPs, can affect the way corporate liability is assessed. That is why the processes of risk identification and mitigation, even if they are not yet part of formally binding norms, cannot be reduced to mere recommendations.

In taking steps to identify and mitigate risks, one of the most challenging aspects is to interpret what constitutes 'adverse impacts'. Across relevant international and EU instruments, there is broad recognition that the adverse impacts of arms exports include serious violations of international humanitarian law and international human rights law. Accordingly, arms-exporting companies need to familiarize themselves with both bodies of law. Any assessment of whether arms exports caused adverse impacts will ultimately be context-specific. It is arguable, however, that, to address the risk of diversion, due diligence requires not just that any possible impacts caused by intended end-users be ascertained, but also those caused by the actual end-users to which arms may be re-exported by intermediaries. This matter is fleshed out in the following chapter.

# 2

# Legal frameworks for corporate liability

In chapter 1, we introduced due diligence as a concept of risk prevention and mitigation regarding the adverse impacts of arms exports, including adverse impacts on international human rights and international humanitarian law. In this chapter, we consider the consequences of due diligence failures in the light of legal responsibility or liability under both domestic and international law. After introducing various avenues for responding to due diligence failures, we unpack the way in which arms companies could possibly be held liable for such failures under civil and criminal law.

## 2.1. Legal avenues for responding to due diligence failures

### 2.1.1 Due diligence failures and international scrutiny

As we noted at the beginning of this report, our analysis is primarily based upon international and EU law. Traditionally, international law has had limited relevance to the regulation of corporate conduct in that that body of law is understood as a body of rules which is centred on states. As the power of corporations, including their ability to wreak global havoc, has grown, calls have been made to impose direct international obligations on corporations, especially regarding human rights.<sup>84</sup> While these calls have not yet been heeded, especially since the adoption of the UNGPs international consensus has grown that, short of direct obligations, business enterprises have at least a *responsibility* to respect human rights.<sup>85</sup> As indicated in chapter 1 of this report, this is a global standard of expected conduct pursuant to which ‘they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved’,<sup>86</sup> in particular by carrying out *due diligence*.<sup>87</sup>

Corporate responsibility is not a legal obligation in a strict sense. As the UNGPs articulated,

*the responsibility of business enterprises to respect human rights is distinct from issues of legal liability, which remain defined largely by national law provisions in relevant jurisdictions.*<sup>88</sup>

The fact that business enterprises, including arms exporters, cannot normally be held responsible at the international level for violations of international human rights law does not mean that they escape international scrutiny. Dedicated civil-society actors and ethical investors closely monitor global corporate conduct. Relevant actors also include the OECD National Contact Points (NCPs), which provide a quasi-judicial international mediation and conciliation platform for resolving issues that arise from the alleged non-observance of the OECD Guidelines on Multinational Enterprises in specific instances.<sup>89</sup> Whereas NCPs do not offer a formal accountability process, their final statements may suggest important ways of improving responsible business conduct. The defence industry is subject to the scrutiny of these mechanisms.<sup>a</sup>

Some NCPs have heard cases concerning corporate diligence and arms exports. Most instructive in this regard is the complaint filed by the NGO ‘Americans for Democracy and Human Rights in Bahrain’ (ADHRB) with the French NCP against French company Alsetex in 2015. ADHRB alleged that Alsetex had violated the OECD Guidelines by selling tear gas to the government of Bahrain, which subsequently used this gas to crack down on protestors, with lethal consequences. In 2016, the French NCP, after interviewing representatives of both parties, issued a final statement in the case. On the one hand, it pointed out that the French government had authorised the export of the relevant products and that ‘[b]y complying with the government’s decisions, which the NCP has no mandate to evaluate, the enterprise was, *ipso facto*, in compliance with the requirements of responsible business conduct vis-à-vis human rights’. On the other hand, however, the NCP recommended that the enterprise formalize its risk-based due diligence measures, draft a human rights policy for responsible business conduct, ‘take into account both the OECD Guidelines and AHRDB’s comments in order to enhance the content of the policy, and then to disseminate it’.<sup>90</sup>

The French decision hinted quite hesitantly at the existence of ‘autonomous’ due diligence obligations for arms exporters. In other words, regardless of the existence of export licences, such companies may have to conduct their own due diligence. The French decision may be contrasted with that of the English NCP, which appeared to rule out autonomous due diligence obligations altogether in a decision in 2016. The case concerned the supply of munitions by a UK company to Saudi Arabia; Saudi Arabia allegedly used these munitions in an internal security operation which violated human rights. The NCP decided that it is appropriate for the company simply to ‘rely on the UK government export

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a Note that some NCPs have a mandate to hear complaints not only brought against corporations, but also against governmental entities active in the field of defence. The Danish NCP, for instance, found in 2018 that the Danish Ministry of Defence failed to carry out due diligence in relation to the contracting and construction process of an inspection vessel which was built at a Polish shipyard where allegedly forced North Korean labour was used. The NCP recommended, *inter alia*, that the Ministry ‘revise its risk management systems in order to implement and meet the requirements of due diligence concerning its suppliers’, that it ‘ensure that the Ministry’s CSR policy is in accordance with the OECD Guidelines for Multinational Enterprises, particularly with regards to human and labor rights’, and that it ‘should define CSR requirements for suppliers and continuously ensure compliance with these requirements’. See Danish NCP, Danish Ministry of Defence, concerning the Lauge Koch vessel, Final statement of 6 September 2018, <http://mneguidelines.oecd.org/database/instances/dk0017.htm>.

licensing procedure, which includes a human rights risk assessment'.<sup>91</sup> Nonetheless, it bears emphasising that this decision could have been different if the complainants had substantiated their complaint more adequately; after all, the lack of substantiation in relation to the specific incident alleged was the main reason for the NCP's rejection of the complaint.<sup>92</sup>

For some NCPs, the fact that the corporations' arms exports are intertwined with the practices of states, given the requirement of government arms export authorization, is a principled reason not to offer mediation in the first place. For instance, in 2016 the US NCP refused to offer mediation in a case concerning an alleged due diligence failure by US corporations Boeing and Lockheed Martin in selling arms to Saudi Arabia, which used them for military operations in Yemen. The US NCP held that the complaint 'concerns the conduct of particular States [US and Saudi Arabia], and would entail an examination of state conduct, which would not serve to advance the OECD Guidelines'.<sup>93</sup> Nevertheless, the US NCP recalled that 'companies in every sector [including the defence sector] should carry out human rights due diligence and avoid causing or contributing to adverse human rights impacts' and 'should consider incorporating the Guidelines into their existing public human rights commitments' – which appears to point to the existence of an autonomous due diligence obligation for arms companies.<sup>94</sup>

In future, it is likely that NCPs will provide additional guidance on the scope of arms companies' due diligence obligations, also in relation to government decisions on export licensing. For instance, as of February 2023, a complaint is pending before the Australian NCP against Saab Australia. The complaint, which was considered admissible in 2022, concerns an item of military equipment made by Saab Sweden (Saab Australia's parent company) and discovered on the traditional country of the Aboriginal plaintiffs in Australia. The plaintiffs allege that the company committed due diligence failures that led to adverse impacts on personal safety and Aboriginal heritage.<sup>95</sup>

### 2.1.2 Due diligence failures and liability under domestic law

In a legal sense, the abovementioned OECD NCPs do not have the mandate to hold companies liable in law. In order to determine the liability consequences of corporate due diligence failures, one has to look mainly to *domestic law*. Nevertheless, international and regional initiatives are currently underway to compel states to establish a domestic system of legal liability for human rights and other abuses. For instance, the third draft of a legally binding international (treaty) instrument on business and human rights (2021) – which is admittedly unlikely to become law – provides:

*States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.*<sup>96</sup>

Along similar lines, the EU's proposed Corporate Sustainability Due Diligence (CSDD) Directive obliges all EU Member States to ensure that companies are liable for damages if they failed to comply with their due diligence obligations and if as a result of this failure an adverse impact occurred and led to damage.<sup>97</sup>

Much effort has in the meantime gone into clarifying the *exact relationship between due diligence and liability* under domestic law. According to the UNGP commentary, 'conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them'.<sup>98</sup> Similarly, in a 2016 Guidance, the Office of the UN High Commissioner for Human Rights (OHCHR) embraced the following as a policy objective:

*[t]he principles for assessing corporate liability under domestic [public and private] law regimes [should be] properly aligned with the responsibility of companies to exercise human rights due diligence across their operations.*<sup>99</sup>

This need not mean, however, that due diligence failures necessarily lead to liability. The 2016 OHCHR Guidance, for instance, appears to limit liability to human rights impacts that 'a business enterprise may cause or contribute to as a result of its policies, practices or operations',<sup>100</sup> in this way possibly excluding adverse impacts directly linked to a company's business relationship with another entity. For the defence industry, this may mean that an exporter may possibly be held liable for selling items to a repressive government which uses them to commit human rights violations; but it could also mean that the exporter may not be held liable for selling such items to an intermediary company which resells them to such a government, possibly after integrating them into another product.

The literature has nevertheless questioned whether this distinction between an enterprise causing or contributing to adverse human rights impacts, on the one hand, and a business relationship of the enterprise causing such impacts, on the other, 'is necessary and even desirable in domestic liability regimes'.<sup>101</sup> Indeed, why should liability be excluded if a company uses an intermediary, being aware that this intermediary supplies the product to the rights violator? Thus, it is suggested that corporations, including those in the arms industry, should identify, mitigate, and remedy the potential adverse human rights impacts of their activities *and* the activities of their contractual partners. When implementing this due diligence, they should not be allowed to hide behind formal, box-ticking due diligence exercises to avoid liability. Indeed, as the UNGP commentary clarifies:

*business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.*<sup>102</sup>

Accordingly, corporations, including those in the arms industry, should not be allowed to hide behind formal, box-ticking due diligence exercises to avoid liability; they should instead thoroughly identify, mitigate, and remedy the potential adverse human rights

impacts of their activities, possibly even including the activities of their contractual partners.

As due diligence is an obligation of best efforts rather than result,<sup>103</sup> a corporation's liability will not be engaged if the corporation did what it could, even if harm ultimately ensues. Yet this also means that a corporation's liability may be engaged *without* actual harm ensuing, provided that it did not meet the due diligence standard. Accordingly, regulators and courts could hold corporations liable (under administrative or civil law) for not having their internal processes in order. They could enjoin them to take the necessary measures to improve them, possibly under supervision. To hold a corporation liable *in tort* and under the *criminal law*, however, liability will depend on actual harm. Below, we discuss civil and criminal liability in turn.

## 2.2. Civil liability

States can adopt specific legislation that links civil liability to due diligence failures. For instance, the French Duty of Vigilance Law (2017) provides that a corporation's failure to comply with its human rights and environmental due diligence (vigilance) obligations engages its liability and obliges it to repair the harm which properly discharging its obligations would have prevented.<sup>104</sup> The first cases have been brought against corporations under this Vigilance Law. For instance, a number of associations and French territorial entities have sought a court injunction against Total, alleging failures in the company's plan of vigilance (regarding climate change).<sup>105</sup>

Other states which have adopted relevant legislation have not directly linked due diligence failures to civil liability, although such failures may lead to administrative injunctions or fines. For instance, the German Supply Chain Act (2021), which entered into force in 2023, provides that non-compliance with extensive reporting obligations under the Act may lead to administrative fines, as may poor risk analysis or failure to take appropriate preventive or remedial measures. The Act excludes civil liability, however.<sup>106</sup> The UK Modern Slavery Act (2015) does not provide for civil liability nor does it provide for administrative fines if a corporation fails to verify that its supply chain is slavery-free – although the UK Secretary of State can bring proceedings for specific performance.<sup>107</sup> An amendment to this Act has been proposed, however; this would provide that:

*[a] person who is responsible for a slavery and human trafficking statement commits an offence if information in the statement is false or incomplete in a material particular, and the person either knows it is or is reckless as to whether it is.<sup>108</sup>*

Regardless of the adoption of specific legislation linking due diligence to liability, companies could be held liable under general tort doctrines for harm ensuing from due diligence failures (at least if such liability is not excluded by law). In particular, the duty of care, as it is applied in, for instance, English and Dutch tort law,<sup>109</sup> lends itself well to litigating alleged corporate due diligence failures. Corporations could be held liable in negligence for breaching a duty of care if it becomes apparent that they failed to exercise

due diligence responsibly in accordance with the UNGPs, sectoral guidance, or any other normative expectations.<sup>110</sup>

For a corporation to be held liable in this manner, at least under the principles of English tort law, the harm must be reasonably foreseeable as a result of its conduct, the relationship between the victim and the corporation must be ‘sufficiently close’ (‘proximate’), and it must be generally fair, just and reasonable to impose liability.<sup>111</sup> Inevitably, these criteria are rather abstract: their operationalisation will depend on the specific facts of a case. It is clear, however, that they set a relatively high bar. One could imagine that a defence company may be held liable in tort for civilian harm caused by aircraft, missiles, and technical support provided by the company to a government which is widely known to pay scant regard to international humanitarian law. It is less likely, however, that a defence company’s liability will be involved under English tort law in relation to providing a technological item that is integrated into a military system which the military goes on to use in ways that cause civilian harm in violation of international humanitarian law. Such harm, which is one step removed, may not be reasonably foreseeable, the company may be causally too remote from the victim, and it may simply not be fair, just and reasonable to impose liability.

A number of tort cases have been brought against corporations for overseas human rights harm. Yet not many have been successful to date.<sup>112</sup> This trend is attributable to a number of practical and legal barriers.<sup>113</sup> We can highlight three key legal obstacles that may have particular relevance to defence industry liability: the burden of proof, causal uncertainty, and opaque corporate structures. We also explore ways in which these obstacles could be overcome.

### 2.2.1 Burden of proof

The first obstacle relates to the burden of proof. Under principles of tort law, the claimant will have to prove the wrong, the damage, and the causal relationship between breach and damage. It may be challenging, however, for claimants to establish a breach of due diligence because they may not have access to company documents which shed light on internal processes and risk determinations. This challenge applies especially to the defence industry, which, dealing with highly sensitive matters of military security as it does, tends to be cloaked in secrecy. To remedy this evidentiary problem, the burden of proof could be reversed – meaning that it would be incumbent on the corporation to prove that it complied with the relevant due diligence obligations. Efforts at introducing such a reversed burden of proof in the context of human rights due diligence in corporations have to date not been successful, though.<sup>114</sup>

### 2.2.2 Causal uncertainty

Second, in complex negligence-based human rights cases, sizeable causal uncertainty may arise either in cases where multiple potential causes of the harm can be identified or where there is uncertainty as to the exact contribution of the corporation to the

eventual harm.<sup>115</sup> Take, for instance, the case of multiple defence companies providing arms to a regime, which then uses some of them to target civilians while using others to target military objects. Because it may be unclear which arms have been used for which purposes, the question arises if, and to what extent, any of these defence companies could be held liable in tort. In some jurisdictions, such uncertainty may lead to a rejection of liability. In contrast, others may well establish liability on the basis of the doctrine of joint and several liability – pursuant to which multiple defendants may each be held fully liable for the harm in case it is not clear who caused it, as long as it is clear that all of them materially increased the risk of harm.<sup>116</sup> Alternatively, they may be held partially liable, namely, liable to a proportion in case of causal uncertainty existing between the wrong and the original damage.<sup>117</sup>

### 2.2.3 Opaque corporate structures

A third obstacle concerns the opacity of corporate structures. Global corporations tend to consist of a parent (or holding) company and a multitude of subsidiaries. The defence industry is no different.<sup>118</sup> As subsidiaries are separately incorporated, they are independent legal persons whose conduct, pursuant to the principle of limited liability, does not engage the liability of the parent company.<sup>119</sup> Thus, a German defence corporation will not normally be liable for the due diligence failures of its Italian subsidiary. Victims, however, may be interested in suing the parent instead of, or at least alongside, the subsidiary, because the parent may have a better solvency ratio than the subsidiary or is headquartered in a state whose courts are more accessible or better-functioning.

In recent tort cases with a human rights dimension, Dutch and English courts have held that, at least in some circumstances, a parent company could indeed have a duty of care towards claimants whose rights were violated by a foreign subsidiary.<sup>120</sup> Such a duty of care may exist where the parent controls the subsidiary or supervises (or is supposed to supervise) its operations.<sup>121</sup> This case law implies that a German defence corporation may possibly be held tortiously liable in German courts in relation to its Italian subsidiary's due diligence failures. It may also allow courts to hold defence corporations liable for breaches committed by front or shell organisations which have been artificially created to hide arms transfers from the public eye and to evade regulation.<sup>122</sup> It may even allow courts to hold lead defence corporations liable for breaches committed by their contractors, provided that the lead corporation exercises a degree of control, supervision, or decisive influence over the contractor – as, for instance, attested to by the lead corporation's market position vis-à-vis the contractor.<sup>123</sup> Which domestic liability regime eventually applies in these transnational cases is governed by the rules of private international law.

## 2.3. Criminal liability

International crimes can be committed with weapons which have been provided by the defence industry. This raises the question whether the defence industry could be held criminally liable for complicity in international crimes. Complicity is a well-known form

of secondary liability which denotes a person's participation in a crime committed by another perpetrator. It exists in both international and domestic law. In our scenario, an autocratic or militaristic regime routinely engaged in international crimes would be the principal perpetrator, whereas a defence corporation providing arms to the regime could potentially qualify as an accomplice.

The international community's interest in dealing with corporate contributions to international crimes is not new. As early as 1947, a number of German industrialists were prosecuted in Nuremberg for their cooperation in international crimes committed by the Nazi regime: 23 executives of the IG Farben conglomerate which supplied chemicals to the Nazis and Bruno Tesch, who supplied the Zyklon-B gas which was used in the extermination camps.<sup>124</sup>

Currently, lawyers' interest in the defence industry's complicity in international crimes tends to focus on accomplice liability before the International Criminal Court (ICC). This focus is understandable inasmuch as the ICC is the most visible supranational institution enforcing international criminal law.<sup>a</sup> However, the ICC does not have jurisdiction over corporations, only over natural persons;<sup>125</sup> this means that it cannot indict arms corporations, although it can indict the officers of such corporations, such as a CEO.

The ICC has not yet outlined the exact parameters for accomplice liability in the context of corporate criminality.<sup>126</sup> Yet the provisions of the ICC Rome Statute on complicity may, at least in some circumstances, apply to the defence industry's dealings with regimes committing international crimes.<sup>b</sup> In essence, arms traders' accomplice liability could be involved if they make a tangible causal contribution to the crime and are aware of the criminal purposes of the group, notably in the light of the information available in the public domain.<sup>127</sup> Proof that a particular weapon was used in a particular incident is not required.<sup>128</sup> Thus, as Bryk and Saage-Maass have argued, in the context of direct arms exports to members of the Saudi-led Coalition bombing Yemen, an arms dealer could be held liable under the ICC Rome Statute insofar as it can be established that (at least some of) the weapons were used to commit international crimes, and bearing mind the 'abundance of information on the Coalition's warfare practices and war crimes committed in Yemen, as well as the arms exporters' understanding of the legal framework under which they act', coupled with the 'heightened vigilance' that can be demanded of arms companies, given 'the nature and use of weapons of war'.<sup>129</sup>

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a Obviously, the ICC is by no means the only international criminal tribunal. Note also that the ICC, per Article 5 of its Statute, has jurisdiction over only four core crimes: war crimes, crimes against humanity, genocide, aggression

b The relevant provisions in the ICC Statute are Article 25(3)(c) and (d): 'In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ... (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.'

Ultimately, only the ICC itself will be able to provide clarity on the scope of the complicity provisions in its Statute. For this purpose, in December 2019, a number of non-governmental organisations filed a communication with the ICC calling on the Prosecutor to investigate the accomplice liability of, among others, a number of major Western arms exporters selling arms to the Coalition conducting airstrikes in Yemen.<sup>130</sup> As of February 2023, the ICC Office of the Prosecutor had not yet taken action in response to this communication.

Alternatively, arms traders' complicity liability could be established by domestic courts. Choosing the domestic avenue has the additional advantage that defence corporations rather than their officers can be targeted, as many domestic jurisdictions are familiar with the concept of corporate criminal liability. Prosecutors have to date brought only a few prosecutions against corporations, arguably due to legal, practical, and political constraints. These constraints include, for example, unclear legal standards, the challenges of gathering evidence outside the forum's territory, and the risk of diplomatic fallout with foreign nations in the case of prosecutions being brought against their arms suppliers.<sup>131</sup> Two currently pending cases stand out, however. In the first, French prosecutors initiated proceedings against French cement company Lafarge for complicity in crimes against humanity committed by rebel groups in Syria.<sup>a</sup> In September 2021, the French Supreme Court allowed the case to proceed, holding that for a corporation's international criminal liability to be engaged:

*it suffices if the accomplice has knowledge that the principal perpetrators are committing or will commit a crime against humanity, and that, by their aid or assistance, they facilitate its preparation or commission.*<sup>132</sup>

In the second, Swedish prosecutors are currently conducting investigations in respect of Swedish company Lundin, alleging that the company enabled atrocities to be committed when it conducted operations in the energy sector in Sudan.<sup>133</sup> No criminal cases have yet been reported against defence companies, though.<sup>134</sup>

However, in two other cases, Dutch courts have held individual arms traders liable for complicity in war crimes. In *van Anraat*, the Dutch courts held a trader liable for selling chemicals to Saddam Hussein's regime, the regime having used these chemicals to produce mustard gas, which was then used against the Kurds in Iraq.<sup>135</sup> In *Kouwenhoven*, the owner of two logging companies was held liable for selling arms to Liberian President Charles Taylor, who used them to commit war crimes in Sierra Leone.<sup>136</sup> What these cases have in common is that they apply the complicity standard of *dolus eventualis* under Dutch criminal law. Pursuant to this standard, a person's liability is activated if they know that a particular consequence may occur in the ordinary course of events, but they nevertheless

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a Between 2011 and 2014, Lafarge continued to do business in Syria while the country was being ravaged by civil war. It was alleged that it purchased materials from terrorist groups and bought safe passage for its employees and goods from these groups. At the time of writing, the case was still ongoing. In 2019, a French appeals court dismissed the charges based on crimes against humanity and only allowed charges based on financing terrorism to proceed, but this judgment was overturned by the French Supreme Court in 2021. For an overview of the case, see <https://www.business-humanrights.org/en/latest-news/lafarge-lawsuit-re-complicity-in-crimes-against-humanity-in-syria>

accept that risk. Such a standard is particularly well suited to corporate accountability, because whereas corporations rarely intend to facilitate international crimes, they do tend to be wilfully blind to the adverse consequences of the support they provide to unsavoury regimes. It bears noting that a *dolus eventualis* standard of recklessness is higher than the standard of negligence which is used in tort law: the former requires a person's deliberate engagement in risky behaviour, whereas for the latter it suffices that the person failed to do what was expected.

What, then, is the role of due diligence in the law of complicity? The UNGPs have considered due diligence to be relevant to complicity. The UNGPs observe, in relation to due diligence, that 'questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties'.<sup>137</sup> However, there is little clarity on which due diligence failures precisely would engage a corporation's accomplice liability, as the case law on this point is still scant. Nevertheless, the literature has suggested that the key mental element of complicity – namely, whether the corporation knew or should have known that it was assisting international criminality – could be informed by the investigative duties that are inherent in due diligence obligations.<sup>138</sup> Such investigative duties may follow from sectoral due diligence guidance or expectations because they also apply to the defence industry.<sup>139</sup>

Applying due diligence standards, it is likely that accomplice liability may well be involved in direct arms exports, but this may not be the case for arms exports via an intermediary which transships them to the state using the weapons. In such a scenario, proximity between the exporting and the use may be lacking, because the arms exporter is one step removed from the actual use (and causality may thus objectively be lacking);<sup>140</sup> and in such a case the arms exporter may (subjectively) not have known that such items would be assembled into rights-violating drones, for instance. In such a case, an EU-based corporation whose microchips and camera lenses were found in Iranian drones sold to Russia, which went on to use them in ways that violate international humanitarian law in Ukraine, will probably not be held liable.<sup>141</sup>

Finally, it bears emphasizing that, in principle, arms exporters may be held liable under international criminal law even if their exports were legal under national law (because the companies obtained an export licence).<sup>142</sup> After all, international criminal law operates on an autonomous legal plane. And in cases where the exports are allegedly unlawful under both national and international law, prosecutors have the choice whether to charge the exporter with violating national or international law, or both regimes. In such cases, however, it may be normatively preferable to charge the exporter primarily with violating international criminal law, given the expressive effects and moral condemnation associated with international criminal liability. In *Kouwenhoven*, for instance, the suspected arms trader was primarily charged with (and convicted of) complicity in war crimes and only secondarily for violations of Dutch sanctions regulations regarding exports.<sup>143</sup>

## 2.4. Interim conclusion

In this chapter, we have examined the circumstances under which due diligence failures of arms exporters that (can) result in civilian harm lead to legal liability under (domestic) civil law and (international) criminal law.

With regard to civil liability, we can conclude that arms exporters can, in some circumstances, be held civilly liable (in tort) in the case of due diligence failures which ultimately lead to civilian harm. Such civil liability can be based on specific due diligence laws, but can also be based on general tort law, that is, the duty of care. For a defence company to be held liable, however, a sufficiently close connection should exist between the company and the victim, so that the risk of harm is reasonably foreseeable. This connection may be very difficult to prove. There are also additional legal hurdles, such as the evidentiary issues which plaintiffs are likely to face, the fact that civilian harm may result from multiple causes, and the opacity of corporate structures. Such hurdles may, however, be overcome.

As for criminal liability, it can be concluded that arms traders' accomplice liability could be involved if they sell arms to regimes that engage in international crimes if the traders were aware or could not have been unaware of these crimes, provided that the degree of assistance provided by the trader significantly enhances the risk that these crimes will (continue to) be committed.<sup>144</sup> The ICC or domestic prosecutors, possibly egged on by NGOs, could take up relevant cases and give principled guidance on the precise way in which complicity standards apply to the arms industry. Yet practical and political considerations, such as discharging a burden of proof, causal uncertainty, and political hesitancy to prosecute powerful corporations, may stand in the way of such prosecutions.

Insofar as due diligence failures could lead to arms exporters being held civilly or criminally liable, the question remains: what measures and processes should these companies implement, in part to prevent liability? The answer is that there is no exhaustive checklist, in that the expected conduct varies depending on the legal frameworks pertaining to and the circumstances of a specific military export. With this in mind, in the next chapter we identify some of the challenges which arms exporters face in exercising due diligence and consider how such challenges can be overcome.

# 3



## Exercising due diligence: challenges and possibilities

As observed in chapter 2, the failure of corporations to exercise due diligence according to the UNGPs and other international standards could lead to civil liability for negligence or could inform an assessment of the mental element of complicity in criminal law. Apart from the implications for liability, it should be remembered that the UNGPs situate due diligence as a key element for business enterprises to fulfil their ‘responsibility’ to respect human rights. The OECD Guidelines for Multinational Enterprises conceive of risk-based due diligence of businesses in connection with a wider range of adverse impacts.

In this chapter, we first draw some examples from the existing due diligence policies in the defence industry. On this basis, we highlight some of the challenges facing arms/exporting companies in exercising due diligence and providing some pathways for resolving such challenges. In doing so, we gathered insights from the defence industry, human rights NGOs, and EU member state regulators through the expert seminar held in December 2022 (which we referred to in the introduction of this report).

### 3.1. Existing due diligence policies

We have read a limited number of the publicly available English-language group-wide policy documents of several major companies in the defence industry – Airbus, BAE Systems, Heckler & Koch Group, Lockheed Martin, Raytheon Technologies, and Rheinmetall Group – in order to gain a glimpse of their policies on due diligence applicable to their exports.

Regarding the publicly available policies on due diligence, we observe that some of the defence companies do not explicitly integrate the perspectives of human rights and humanitarian law into *their policies on exports or sales in general*. This is also one of the observations made by Schliemann and Bryk (2019), who assessed the publicly available reports of four arms-manufacturing companies.<sup>145</sup> Schliemann and Bryk found no ‘clear

policy commitment to respect human rights' by a company on 'the use of its products by its customers'.<sup>146</sup> While we found human rights frequently being mentioned, such norms do not always appear in the context of corporate decision-making in connection with *selling and exporting* items.

Let us elaborate on this general impression through citing specific examples.

- The Code of Conduct of the Rheinmetall Group (June 2022) refers to human rights and non-discrimination in employment contexts and environmental protection in general terms.<sup>147</sup> But in the same document, human rights and environmental protection are not specifically mentioned in the section on 'business partners and third parties'.<sup>148</sup> In fact, the Code of Conduct does not explicitly refer to international humanitarian law or international crimes. Whereas the Code of Conduct refers to 'UN and OECD conventions/guidelines' as examples of 'recognized compliance standards',<sup>149</sup> it is not clear whether such standards include the UNGPs, OECD Guidelines for Multinational Enterprises, or the OECD Due Diligence Guidance.
- In similar vein, the Code of Ethics and Business Conduct of the Heckler & Koch Group (October 2019) mentions human rights and environmental protection in the context of employment<sup>150</sup> without specifically referring to these norms in connection to exports.
- Airbus's human rights policy explicitly refers to the UNGPs and OECD Guidelines for Multinational Enterprises<sup>151</sup> and makes reference to its commitment to 'undertaking ongoing risk-based human rights due diligence on such activities to identify, address and remedy adverse impacts'.<sup>152</sup> However, the policy itself does not refer to human rights in connection with exports.

In some documents, we found references to human rights in connection to companies' policies on the sale and use of products. For instance:

- BAE Systems' Human Rights Statement (2022) refers to human rights more specifically with regard to its exported items. Under the heading of '[h]uman rights and our products', the Statement refers to the fact that the defence industry is 'subject to strict regulatory controls' and that the company maintains 'stringent internal controls that govern what we sell and to whom we sell'.<sup>153</sup>
- Lockheed Martin's Human Rights Report (2021) has a section on 'product sale and use', where the company was said to 'consider many risk factors throughout the life-cycle of a product including the sale and use phases'.<sup>154</sup>
- Raytheon Technologies' Human Rights Policy (2022) also has some description on '[h]uman rights impact of our product sales'.<sup>155</sup> The Policy acknowledges that there are 'potential risks associated with [products and services sales'] misuse' and recognises 'a responsibility to identify and mitigate these risks where feasible'.<sup>156</sup> According to the Policy, there is a 'due diligence program focused on identifying and mitigating human rights risks associated with potential product sales'. According to the 'program's standards', 'potential sales involving certain types of products

in countries identified as presenting a higher risk of human rights violations from product misuse' are subjected to screening.<sup>157</sup>

We are aware that the documents we have consulted are limited in the number of companies (six corporations), language (English), geographical scope (group-based international policies as opposed to a country-based documents), and accessibility (published policies as opposed to internal documents). The group-based policies for transnational corporations, for example, do not address specific requirements that may be imposed at the EU or national level. At the same time, in the light of the relevance of ESG due diligence to the defence industry, we anticipated more frequent explicit references to human rights and UNGPs in the context of sales and exports. Furthermore, what is also striking is the absence of references to international humanitarian law, despite its relevance to the defence industry.

## 3.2. Challenges and solutions for arms exporters

How should arms-exporting companies exercise due diligence, then?

Armed with the inputs we have received during the expert seminar, we examine here some key challenges that the defence industry encounters in exercising due diligence. It must be remembered that 'challenges' can differ significantly depending one's perspective. In this chapter, we limit ourselves to engaging with some of the challenges often raised by the defence industry. This means that we do not examine the struggles faced by those adversely affected by the exported military items, the obstacles faced by human rights NGOs intent on holding arms exporters accountable, or the difficulties that government regulators may face.

In what follows, we focus on these five challenges faced by the defence industry:

- 1 the (non-)availability of due diligence guidance;
- 2 the role of governmental licensing;
- 3 the assessment of adverse impacts;
- 4 the export of dual-use items; and
- 5 the sources of information to which the industry has access.

### 3.2.1 Availability of due diligence guidance

First, the lack or limited availability of industry-specific guidance has been pointed out as one of the overarching challenges facing arms exporters in exercising due diligence in ESG. During the expert seminar, a representative of a European defence company pointed out that they were in the process of developing human rights due diligence processes, but that very little information is publicly available on the due diligence practices of (other) defence companies. The representative indicated that it was therefore difficult to know

what best practices are or ought to be. Another industry representative mentioned that they were developing a responsible sales policy and that it is unclear whether the policy would be made available publicly.

The industry's concerns may have some cogency. As noted at the beginning of the report, as of February 2023, the OECD had not adopted due diligence guidance specific to the defence sector. Yet apart from applicable national law and standards, the UNGPs, the OECD Guidelines, and OECD Guidance do propose steps that are expected of business enterprises; and the defence industry is no exception. Based on these instruments, Schliemann and Bryk's study offers a series of recommendations for exporting companies and government authorities.<sup>158</sup> In addition, the ABA's Defence Industry Human Rights Due Diligence Guidance sets out a series of factors to help exporters to identify risks, processes for preventing and mitigating risks, steps to investigate the potential misuse of exported items, and remedial actions.<sup>159</sup> While the OECD does not have sector-specific guidance for the defence industry, Schliemann and Bryk's study and the ABA Due Diligence Guidance may assist arms exporters' processes of identifying and mitigating the adverse impacts arising from military exports.

Furthermore, government regulators have an important role to play in providing appropriate guidance to the defence industry. During the expert seminar, the representatives of the export control authorities in some EU member states indicated that ICPs serve as a point of dialogue between regulators and companies to prevent future infringements. Depending on the jurisdiction, the screening of ICPs can consist of examining whether a company has knowledge of the relevant export control obligations, the technical aspects of their goods and their potential use, the customer, and the end-use. ICP-based dialogues can lead to the inclusion of additional human rights clauses and the creation of additional mechanisms to mitigate risks. In addition, during the expert seminar, an industry representative indicated that it would be useful if governments were to publish their reasons for refusing licences. The practices of making such reasons available vary between EU member states, but the industry can take such reasons into account in applying for licences, and also in their due diligence procedures.

### 3.2.2 Connection to government review

Second, a common discussion point in the defence industry is its connection to government licensing review. Having read some publicly available policies on due diligence (section 3.1), we observe that emphasis is often placed on the role of government licensing review and approval. For instance, whereas Lockheed Martin's Human Rights Report (2022) refers extensively to human rights due diligence,<sup>160</sup> the report's description of the 'product sale and use' placed emphasis on the fact that the company's international military sales are regulated by US governmental review and approval. The Report notes that the government review already includes a consideration of whether 'any arms transfer contributes to the risk of human rights abuses'.<sup>161</sup>

In this regard, it is worth reiterating that a state's licensing decision is not a replacement for corporate due diligence. Arms-exporting companies have original insights into end-users and end-use, and both government review and corporate due diligence have a unique role to play in identifying and mitigating the adverse impacts of military exports. In order to make the most of their respective expertise, regulators and companies can take part in developing and revising the content of ICPs as an important way for governments to ensure compliance and for businesses to clarify the concrete steps they have to follow.

In addition, end-use declarations can be based upon false or misleading information which may not be detected by authorities' assessments. Illustrative of this is a series of court decisions in Germany against arms exports by Heckler & Koch to Mexico.<sup>162</sup> In April 2010, criminal charges were filed against both Heckler & Koch and the managers of the arms company for illegal exports of 4,200 G36 assault rifles to Mexico City between 2006 and 2009, in addition to forwarding weapons to provinces of conflict. The Stuttgart Regional Court concluded that export licences were obtained by deliberately using false end-use declarations, and the regional court's verdict was confirmed by the German Federal Court of Justice in March 2021.<sup>163</sup> As is highlighted by this case, in order for adverse impacts to be identified and mitigated, it is necessary that both government review and corporate due diligence be functional and subject to independent scrutiny.

### 3.2.3 Assessment of adverse impacts

Third, as we have acknowledged several times in this report, one of the core challenges pertains to the assessment of adverse impacts. As discussed in section 1.3 of this report, military exports can give rise to a variety of adverse impacts. These can include serious violations of international human rights law, but these do not exhaust the types of adverse impact that exporters are expected to consider and mitigate. In particular, international humanitarian law is highly relevant to the defence industry, whose products and services may be used in situations of armed conflict. Despite the critical relevance of international humanitarian law, the publicly available policies of defence companies do not indicate whether and to what extent the necessary respect for international humanitarian law has been built up within the industry.

It is true that international humanitarian law has often been overlooked in the scholarship on and the practices of business and human rights.<sup>164</sup> Nevertheless, the defence industry is a sector that is most immediately tied up with situations of armed conflict. It may thus be advisable for arms exporters to revise their internal due diligence policies, disseminate knowledge of international humanitarian law within the company, and publish their approach to detecting and mitigating adverse impacts beyond the parameters of human rights protection.<sup>165</sup> Furthermore, as observed by a representative of an EU member state during the expert seminar, governments can and should play a proactive role in supporting companies in integrating international humanitarian law into their due diligence policies.

### **3.2.4 Risks associated with 'dual-use' items**

Fourth, one of the persistent challenges facing arms-exporting companies is identifying and mitigating adverse impacts associated with dual-use items that can be used for both civil and military purposes. As noted in section 1.3.1, the UNGPs expect an exporter to exercise due diligence in connection with possible adverse impacts 'directly linked' to the exporter's business relationship with another entity. This can cover the export of components of weapons systems, such components also possibly being dual-use. The assessment of humanitarian and human rights risks is much more complicated with regard to the export of dual-use items. The UNGPs do not appear to provide whether and to what extent risks should be foreseeable. As discussed in chapter 2, however, whether or not the risk of harm was reasonably foreseeable is relevant in determining the civil liability of exporters.

During the expert seminar, a representative from an NGO emphasised that the UNGPs are applicable not only to the defence industry per se, but to all corporations that may export items or technology that could be used in ways that violate international human rights and humanitarian law. Similarly, a representative from an industry association pointed to the need to increase awareness of export controls among non-defence companies. The industry representative took the view that the EU and/or member states should propose training related to export controls obligations for certain categories of companies (SMEs and in particular IT/innovation start-ups) who are not generally involved in defence-related research but who wish to participate in EU-funded defence research programs.

To prevent the diversion of dual-use items, a representative from an EU member state's export control authority observed that it would routinely check whether an order is placed by a neighbouring country of a country under sanctions (e.g., an order by Kazakhstan that could be diverted to Russia) and it would share such information with the relevant customs authorities to enable continuous monitoring. Given that technological developments proceed faster than regulators' ability to add certain items to the list of controlled items, a member state representative highlighted a need for cooperation and information exchange with the industry regarding emerging dual-use items, their technical capabilities, any risks arising from the export of such items to conflict zones, and possible routes for diversion.

### **3.2.5 Sources of information for due diligence**

Finally, defence and related companies may have difficulty in gathering information with which to assess the possible adverse impacts of weapons sale. In this respect, companies find it difficult to gauge the extent to which they should gather information regarding, for instance, destinations and end-users.

Whereas exporters should be proactive and willing to seek information, a wide range of factors affect the amount and quality of information. Three factors are mentioned here. The first consideration is an enterprise's institutional culture and mindset. Given that ESG due diligence is perceived as being relatively new to the defence industry, a company-

wide change in patterns of thinking and behaviour may be necessary in order to detect and analyse the adverse impacts of transactions. The second factor that affects information-gathering is the size of business enterprises. Small companies do not have the same resources as large companies to accumulate knowledge about legal compliance, assess potential abuses of products and services, and have access to information provided by the government. The third consideration is the manner in which government authorities communicate when refusing licences. As noted above, if substantive reasons for refusal are given and made publicly accessible, the industry would be able to take them into account when applying for licences and identifying risks in the future.

While there are many factors that affect the level of information-gathering, it is clear that there is a wide range of publicly available resources that could serve as a basis for informing and developing the risk-assessment processes of arms companies. For example, the ATT Secretariat's Working Group on Effective Treaty Implementation has published a list of 'public documents' that states parties can consider when conducting risk assessment in connection with arms exports.<sup>166</sup> Whereas the ATT is meant to assist states with their risk assessment, the list could also be used by companies to conduct their own assessment about end-users and the end-use of their products and services. The list provides a wide array of publicly available sources, including the findings of research institutes, UN agencies, NGOs, (local) media reports, and judgments by the ICC and ad hoc tribunals.<sup>167</sup> Importantly, the listed sources also assist related stakeholders – including NGOs and those directly or indirectly affected by exported items – with reassessing whether the risk assessments of arms exporters were appropriately conducted.

Whereas companies do not have access to the diplomatic information that governments have, they may have unique insights into the technical capabilities of products and services; and they may also have unique access to their clients and their operations. In this sense, risk identification and mitigation should be carried out as a shared endeavour of governments and exporters, who can complement their respective strengths and weaknesses in identifying and mitigating the risks associated with the export of military items and technologies. In this respect, the risk of corporate liability should go a long way towards incentivising exporters and governments to proactively share risk-related information, even if that means jeopardising a licence. It is recalled in this respect that in the Heckler & Koch case discussed above,<sup>168</sup> the court held corporate officers liable for refraining from sharing relevant information (and the government failing to verify it) and fraudulently obtaining a licence.

### 3.3. Need for international law-making

In this report, we have analysed the applicable (international) legal frameworks in order to understand due diligence in the context of military exports. As revealed in this report, a wide range of binding norms, soft law instruments, and jurisprudence are in place at the international and domestic levels, that shape the meaning of due diligence and the consequences of due diligence failures. At the same time, our analysis and the challenges faced by the industry provide us with the impetus for further law-making concerning

the exercise of due diligence when setting out the specific conditions and procedures for companies that export military items and technologies.

From an international perspective, the role of the UN (e.g., Working Group on Business and Human Rights) and the OECD is significant in setting out the interpretation of existing norms, suggesting additional standards, and sharing best practices. On the basis of our analysis, we recommend that the UN and the OECD:

- create sector-specific guidance for arms exporters to implement the UNGPs and the OECD Due Diligence Guidance. Such guidance should indicate that arms exporters have their own due diligence obligations (i.e., separate from the licensing government's obligations). This guidance should also pay particular attention to identifying and mitigating adverse impacts 'directly linked' to an exporter's 'business relationship'. The guidance may also cover companies which do not belong to the defence industry but which nevertheless export items and technology whose use may cause adverse impacts;
- devise indicators for determining specific circumstances under which international humanitarian law is and should be applicable to arms-exporting companies and their employees; and
- provide policy options to strengthen judicial and non-judicial avenues, both national and international, where those who are affected by military exports, their representatives, or relevant non-governmental organizations would be able to raise their complaints and seek remedies.

### 3.4. Conclusion

In this report, we have explored the meaning of the concept of due diligence, and its relation to other concepts and practices such as CSR and ICPs. We have pointed out that corporate due diligence in the defence industry is not without obligation. In fact, a corporation's failure to properly carry out due diligence could lead to legal liability. We have subsequently addressed the challenges which the defence industry specifically faces in exercising due diligence regarding arms trade, and we have suggested a way ahead.

As we noted at the beginning of this report, due diligence is a frequently used concept in business and legal communities. Given that the term customarily appears in business practices in assessing multi-faceted risks associated with pending transactions, it is worth stating once again that due diligence as discussed in our report should be approached differently, especially according to whose risks are ultimately at stake. Due diligence as discussed here is intended to deal with some of the normatively problematic consequences of military exports beyond the paradigm of a risk analysis for businesses. The concept requires that the defence industry, governmental authorities, and external observers engage with the effect of military exports on those individuals and entities in either intended or unintended destinations, where military items and technologies

end up being mobilised as part of military or law-enforcement operations, and where violations of international human rights and humanitarian law could occur.

Under international law, due diligence may not give rise to general obligations. This means that the content of due diligence would have to be understood through the lens of specific principles and rules under, for instance, international humanitarian law, international human rights law, and international environmental law. Among the many conceptual issues surrounding due diligence in ESG, one of the key difficulties pertains to identifying ‘adverse impacts’. In the context of corporate decisions to export military items and technologies, the assessment of such impacts is not the same as measuring the destructive or technological capacity of weapons per se. Nor is the exporters’ assessment of adverse impacts the same as the determination of whether a specific military action amounted to a war crime. Identifying adverse impacts involves, in addition to the technical assessment of items concerned, the analysis of the past and present situations in the country of destination and the past and present conduct of end-users in using military items and technologies. While it is no doubt difficult to draw a line between permissible and impermissible military exports, to engage in such a task is precisely one of the responsibilities of businesses envisaged in the UNGPs and the OECD due diligence instruments.

The defence industry should be aware that failure to conduct adequate due diligence and to identify potential adverse impacts of their exports may lead to a finding of legal liability. Arms exporters and their officers could be held liable in tort for failing to properly discharge their duty of care vis-à-vis victims of violations of international humanitarian or human rights law. They could be held criminally liable for complicity in international crimes. Both in tort and in criminal law, due diligence informs the interpretation of relevant legal norms. Accordingly, if only to avert legal liability and its possibly drastic consequences (injunctions, compensation, fines, imprisonment), arms exporters are well advised to develop adequate due diligence procedures with respect to their clients.

Finally, we must note that the content of due diligence continues to be altered by the wealth of knowledge accumulated through past practices, failures, and responses to those failures. As Ruggie and Sherman have pointed out, what is considered to be ‘reasonable’ business conduct is subject to change.<sup>169</sup> Such changes are facilitated not only through the development of international, EU, and national standards and practices on due diligence in the fields of ESG. The expectation of reasonable business conduct has also continued to be altered by technological progress, which allows not only the development of military items and technologies, but also the mechanisms with which to track the movement and use of exported military items, gather and build up information regarding the risks of destination countries, and assemble information regarding end-users. Accumulating knowledge – which affects the meaning of due diligence and the consequences of due diligence failures – is therefore a continuous effort. Such a shared endeavour involves not only governments and the defence industry, but also international organisations, NGOs, journalists, researchers, and the wider public, whose insights can alter the expected conduct for business enterprises.

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- 37 United Nations UNGPs (n 1) 13 (commentary to Principle 11).
- 38 'The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' UN Doc. A/73/163 (16 July 2018) para 2. According to Principle 15 of the UNGPs, business enterprises discharge their responsibility to respect human rights, notably by 'a human rights due diligence process', which is 'to identify, prevent, mitigate and account for how they address their impacts on human rights': United Nations UNGPs (n 1) 16 (Principle 15(b)).
- 39 United Nations UNGPs (n 1) 14 (commentary to Principle 12). There other guidelines that expect companies to respect humanitarian law independently of being a party to an armed conflict. For the analysis of international documents that refer to businesses' respect for international humanitarian law, see Jonathan Kolieb, 'Don't Forget the Geneva Conventions: Achieving Responsible Business Conduct in Conflict-affected Areas through Adherence to International Humanitarian Law' (2020) 26 *Australian Journal of Human Rights* 142. For indicators of corporate best practice in international humanitarian law, see Australian Red Cross and RMIT University, 'Doing Responsible Business in Armed Conflicts: Risks, Rights and Responsibilities' (2020). <https://www.redcross.org.au/globalassets/cms-assets/documents/ihl--no-ihl/doing-responsible-business-in-armed-conflict-final-publication-web.pdf>.
- 40 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports 226 (Advisory Opinion of 8 July 1996) para 25. If there is no clear normative conflict, however, these two bodies of law complement each other.
- 41 For a general overview of the applicability of international humanitarian law, see, e.g., Marco Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing, 2019) 168–203. For the analysis of the nexus requirement, see Katharine Fortin, 'The Application of Human Rights Law to Everyday Civilian Life Under Rebel Control' (2016) 63 *Netherlands International Law Review* 161, 172–179.
- 42 ICRC, 'The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' (August 2009) 37. It must be noted that the Montreux Document concerns private military and security companies (PMSCs) and focuses on those that provide 'services'. Thus, the Document itself does not apply to all arms suppliers. Yet the Document is relevant because it refers to some of the general tenets of humanitarian law; and companies that provide maintenance or repair services relating to the weapons systems they sell fall within the ambit of the Document.
- 43 Ibid., 36 ('As companies, PMSCs per se are not bound to respect international humanitarian law').
- 44 ICRC (n 42) 37, 39 ('All individuals have to respect international humanitarian law in any activity related to an armed conflict').
- 45 ICRC, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises Under International Humanitarian Law' (2006), at 14, [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0882.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf)
- 46 ICRC (n 42) 36.
- 47 United Nations UNGPs (n 1) 21–22 (commentary to Principle 19); Ruggie and Sherman, 'A Reply' (n 23) 927.
- 48 For example, the Special Advisory Council for Myanmar analysed various scenarios regarding businesses supplying Myanmar's weapons production: The Special Advisory Council for Myanmar, 'Fatal Business: Supplying the Myanmar Military's Weapons Production' (16 January 2023) 7–8, <https://specialadvisorycouncil.org/fatal-business/report/>
- 49 For example, the EU's Conflict Minerals Regulation, which imposes supply chain due diligence on EU importers of conflict-sensitive minerals, refers extensively to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for European Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1; OECD, 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (3rd ed., OECD Publishing, 2016), <http://dx.doi.org/10.1787/9789264252479-en>.
- 50 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final (CSDD proposal).
- 51 Ibid., 3.
- 52 Ibid., paras 12, 44.
- 53 Ibid., para 16. See OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (2018) and accompanying texts for the six steps under the OECD Due Diligence Guidance.
- 54 European Commission CSDD Proposal of February 2022 (n 50) para 18.
- 55 Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 – General Approach' ST 15024 2022 REV1 (30 November

- 2022) 73.
- 56 The proposed CSDD Directive uses the term 'protected persons' (whose legal interests are protected by the rights and prohibitions contained in the Annex), but 'protected persons' are not those defined under international humanitarian law (namely, those persons protected by the Geneva Conventions and Additional Protocols).
- 57 European Commission CSDD Proposal of February 2022 (n 50) Article 3(c).
- 58 European Commission, Annex to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM (2022) 71 final, Part 1 (1)(2).
- 59 Ibid., Part 1(1)(3).
- 60 Ibid., Part 1(1)(4).
- 61 Ibid., Part 1(1)(4).
- 62 Regulation (EU) 2021/821 (n 24). For a concise overview of the key points of the 2021 Regulation, see, e.g., Mark Bromley and Kolja Brockmann, 'Implementing the 2021 Recast of the EU Dual-Use Regulation: Challenges and Opportunities' Non-Proliferation and Disarmament Papers, No. 77 (September 2021).
- 63 Ibid., Recital 7. Recital 21 of the Regulation also refers to due diligence as part of an ICP assessment of risks related to the export of the items to end-users and end-uses: *ibid.*, Recital 21.
- 64 Ibid., Article 2(21).
- 65 For the background, see Machiko Kanetake, 'The EU's Dual-Use Export Control and Human Rights Risks: The Case of Cyber Surveillance Technology' (2019) *Europe and the World: A Law Review*; Machiko Kanetake, 'Converging Dual-Use Export Control with Human Rights Norms: The EU's Responses to Digital Surveillance Exports' in E. Fahey (ed.), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart/Bloomsbury, 2020) 65.
- 66 Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>
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- 71 Wet zorgplicht kinderarbeid, Art. 41.
- 72 Wetsvoorstel maatschappelijk verantwoord ondernemen, Article 1.2, <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?id=2021Z04465&dossier=35761#wetgevingsproces>
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- 74 OECD Due Diligence Guidance (n 17) 17 (original emphasis omitted).
- 75 ATT (2013) (n 5) Art. 6(3).
- 76 Stuart Casey-Maslen *et al.*, *The Arms Trade Treaty: A Commentary* (Oxford University Press, 2016) 184–185, 233–234.
- 77 UN Human Rights Council, 'Impact of Arms Transfers on Human Rights' UN Doc. A/HRC/RES/32/12 (15 July 2016) pre. para 8.
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- 79 UN Human Rights Council, 'Impact of Arms Transfers on Human Rights' (n 77) para 2; Human Rights Council 'Impact of Arms Transfers on the Enjoyment of Human Rights – Report of the Office of the United Nations High Commissioner for Human Rights' (n 78) paras 12, 26.
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- 81 UN Human Rights Council 'Impact of Arms Transfers' (n 78) para 9.
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- 86 UNGPs (n 1), Principle 11.
- 87 Ibid., Principle 17.
- 88 Ibid., Principle 12, commentary.

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- 93 US National Contact Point for the OECD Guidelines for Multinational Enterprises, Final Statement, Specific Instance between European Centre for Democracy and Human Rights, Defenders for Medical Impartiality, and Arabian Rights Watch Association, and The Boeing Company and Lockheed Martin Corporation, 18 November 2016, <https://2009-2017.state.gov/e/eb/oecd/usncp/specificinstance/finalstatements/264328.htm>.
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- 97 See section 1.3.2 for the description of the EU's proposed CSDD Directive.
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- 99 Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19 (2016), policy objectives 3 and 14.
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- 103 See (n 29) and accompanying text.
- 104 Article L.225-102-5 of the French Commercial Code.
- 105 See Tribunal judiciaire de Nanterre, *Notre Affaire à Tous et autres c/SE Total*, 11 février 2021, N° RG 20/00915 – N° Portalis DB3R-W-B7E-VQFM, allowing the case to proceed.
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- 107 UK Modern Slavery Act 2015 c. 30.
- 108 Modern Slavery (Amendment) Bill [HL], 2021, Article 54ZA.
- 109 Article 6:162 Dutch Civil Code; J. Plunkett, *The Duty of Care in Negligence* (Hart 2018).
- 110 Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 *Business and Human Rights Journal* 179.
- 111 *Caparo Industries plc v Dickman* [1990] UKHL 2.
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- 116 *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22 (holding different employers of a claimant jointly and severally liable

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- 119 See, on the corporate veil doctrine, also Kai Ambos, 'International Economic Criminal Law: The Foundations of Companies' Criminal Responsibility under International Law', (2018) 29 *Criminal Law Forum* 499, 544–545.
- 120 *Lungowe v Vedanta Resources plc* [2019] UKSC 20; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3; Court of Appeal of The Hague, judgment of 29 January 2021 (*Milieudefensie v Shell*), ECLI:NL:GHDHA:2021:1825.
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- 122 Amnesty International, 'From London to Juba: A UK-registered company's role in one of the largest arms deals in South Sudan' (Report 2017); Oxfam, *Brokers without Borders* (Report 2010).
- 123 Bueno and Bright (n 101) 815–816 (citing the Supreme Court of Canada's judgment in *Nevsun Resources Ltd v Araya*, 220 SCC 5 (CanLII, 2020), which held a lead (parent) company liable for acts committed by a foreign subcontractor).
- 124 For an extensive discussion of all relevant corporate cases at Nuremberg: Joanna Kyriakakis, 'Industry at Nuremberg: Justice in the post-World War II Era' (Chapter 2), in Corporations, Accountability and International Criminal Law (Edward Elgar 2021), 46–103.
- 125 Article 25 ICC Statute.
- 126 Relevant case-law exists on accomplice liability in general, however. See, for a discussion: Kai Ambos, 'Article 25: Individual Criminal Responsibility', in Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed. (Beck 2022), 1189–1246.
- 127 Linde Bryk and Miriam Saage-Maaß, 'Individual Criminal Liability for Arms Exports under the ICC Statute: A Case Study of Arms Exports from Europe to Saudi-Led Coalition Members Used in the War in Yemen' (2019) 17 *Journal of International Criminal Justice* 1117 at 1117–1137 (basing their argument on Article 25(3)(c) ICC Statute); Tomas Hamilton, 'Arms Transfer Complicity under the Rome Statute' in N.H.B. Jørgensen (ed.), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, 2020) 148, 148–186 (basing his argument on Article 25(3)(d), ICC Statute).
- 128 For example, Hamilton (n 127) 182; Bryk and Saage-Maaß, 'Individual Criminal Liability' (n 127) 1136. This argument is based on judgment pursuant to Article 74 of the Statute, Bemba Gombo et al. (ICC-01/05-01/13), ICC Trial Chamber VII, 19 October 2016, paras 88 and 89.
- 129 Bryk and Saage-Maaß, 'Individual Criminal Liability' (n 127) 1137. Note, however, that these authors are plaintiffs regarding the Yemen situation before the ICC (see next footnote).
- 130 ECCHR, 'Made in Europe, bombed in Yemen: ICC Must Investigate European Responsibility in Alleged War Crimes in Yemen', <https://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen/>
- 131 See, on the relevant challenges (and how to overcome them): International Corporate Accountability Roundtable and Amnesty International, 'The Corporate Crimes Principles' report (October 2016).
- 132 Cour de cassation [Cass.] [supreme court for judicial matters] crim., 7 Sept. 2021, Bull. crim., No. 19 (Fr.). (para. 67: 'Il suffit qu'il ait connaissance de ce que les auteurs principaux commettent ou vont commettre un tel crime contre l'humanité et que par son aide ou assistance, il en facilite la préparation ou la consommation').
- 133 The Swedish District Court (2020) and the Court of Appeal (2021) allowed the prosecutor to continue the investigation against the company. The company appealed before the Supreme Court. For an overview of the case, see <https://www.business-humanrights.org/en/latest-news/lundin-petroleum-lawsuit-re-complicity-war-crimes-sudan/>.
- 134 In Germany, employees of defence company Heckler & Koch have been convicted for fraudulently obtaining an export licence for Mexico, using deliberately false end-user agreements. Landgericht (District Court) of Stuttgart, judgment (13 Ks 143 Js 38100/10), 21 February 2019. The prosecution and conviction were not based on international criminal law, however.
- 135 Supreme Court of The Netherlands, *Public Prosecutor v. Van Anraat*, Case No. 07/10742, Judgment, 30 June 2009.
- 136 Judgment of the Court of Appeal at 's-Hertogenbosch, *The Public Prosecutor v. Guus Kouwenhoven*, 21 April 2017.
- 137 UNGPs (n 1), Principle 17, commentary.
- 138 Daniëlla Dam-de Jong, 'Ignorantia Facti Excusat? The Viability of Due Diligence as a Model to Establish International Criminal Accountability for Corporate Actors Purchasing Natural Resources from Conflict Zones' in L. Enneking et al. (eds.), *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge, 2019) 126. Unlike what the title of this contribution suggests, it does not focus on 'mistake of fact' in international criminal law, but rather on the mental element of complicity.
- 139 Bryk and Saage-Maaß, 'Individual Criminal Liability' (n 127) 1133.
- 140 Tomas Hamilton, 'Corporate accountability and Iranian drones in the Ukraine war: Could sanctions lead to prosecutions for international crimes?', *EJIL:Talk!* (23 November 2022).
- 141 Ibid.
- 142 Kai Ambos, 'Corporate Complicity in International Crimes through Arms Supplies despite National Authorisations?', (2021)

- 21 *International Criminal Law Review* 181, 201 ('[T]he respective company cannot be absolved of criminal liability invoking a national authorisation if it knowingly – perhaps even with greater knowledge than the licensing authority – provides weapons to a zone of (armed) conflict, where they are used to commit international crimes. Such a company assists in the commission of these crimes.); Kai Ambos, 'Beihilfe zu Kriegsverbrechen durch (legale) Waffenlieferungen?', StV 2020, 788.
- 143 Judgment of the Court of Appeal at 's-Hertogenbosch, *The Public Prosecutor v. Guus Kouwenhoven*, 21 April 2017.
- 144 Göran Sluiter and Sean Shun Ming Yau, 'Aiding and Abetting and Causation in the Commission of International Crimes: The Cases of Dutch Businessmen van Anraat and Kouwenhoven' in N.H.B. Jørgensen (ed.), *The International Criminal Responsibility of War's Funders and Profiteers* (Cambridge University Press, 2020) 304. These authors provide the following four-pronged test for risk-based causation in cases of mass atrocities 'a) whether or not the assistance provided was capable of making a difference to the crimes committed by the principal; b) whether or not the assistance provided could also be used only or essentially for lawful purposes and how likely this was in light of the evidence; c) whether or not the assistance was provided directly to the principal; and d) how important the acts of assistance provided by the accused were in comparison to the assistance provided by others' (*ibid.*, 327).
- 145 Dassault (France), MBDA (Netherlands), Rheinmetall (Germany), and Heckler & Koch (Germany).
- 146 Christian Schliemann and Linde Bryk, 'Arms Trade and Corporate Responsibility' (n 11) 20.
- 147 The Rheinmetall Group, 'Corporate Compliance: Code of Conduct of the Rheinmetall Group' (June 2022), <https://www.rheinmetall.com/en/company/compliance/compliance-overview>, chapters 1.1 (human rights and non-discrimination) and 1.2 (protection of the environment).
- 148 *Ibid.*, chapter 1.6 (involvement with business partners and third parties).
- 149 *Ibid.*, at 8 (chapter 1.6).
- 150 The Heckler & Koch Group, 'Code of Ethics and Business Conduct' (October 2019) 28.
- 151 Airbus, 'Human Rights: Our Commitment to Respecting Human Rights', <https://www.airbus.com/en/sustainability/corporate-citizenship/human-rights>.
- 152 Airbus, 'Human Rights Policy Statement by Guillaume Faury' (2022), <https://www.airbus.com/sites/g/files/jlccta136/files/2022-04/Human%20Rights%20Policy%20Statement%20by%20Guillaume%20Faury.pdf>.
- 153 BAE Systems, 'Human Rights Statement 2022' (2022) 5.
- 154 Lockheed Martin, '2021 Human Rights Report' (2021), [https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/sustainability/Lockheed\\_Martin\\_Human\\_Rights\\_Report\\_2020.pdf](https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/sustainability/Lockheed_Martin_Human_Rights_Report_2020.pdf) 12 (section 3.5 Product Sale and Use).
- 155 Raytheon Technologies, 'Human Rights Policy' (April 2022), <https://investors.rtx.com/static-files/ea19fb9b-cb9c-4232-b8ae-500bgdb23675>.
- 156 *Ibid.*, at 3.
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- 158 Christian Schliemann and Linde Bryk, 'Arms Trade and Corporate Responsibility' (n 11) 28–29.
- 159 The American Bar Association (n 7) 11–21.
- 160 Lockheed Martin, '2022 Human Rights Report', [https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/sustainability/Lockheed\\_Martin\\_Human\\_Rights\\_Report\\_2022.pdf](https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/sustainability/Lockheed_Martin_Human_Rights_Report_2022.pdf)
- 161 *Ibid.*, 13.
- 162 See ECCHR, 'Brutal Police Operation in Mexico: German Arms Manufacturer Heckler & Koch Responsible', [https://www.ecchr.eu/en/case/brutal-police-operation-in-mexico-responsibility-of-german-arms-manufacturer-heckler-koch/#case\\_case](https://www.ecchr.eu/en/case/brutal-police-operation-in-mexico-responsibility-of-german-arms-manufacturer-heckler-koch/#case_case); Ambos, 'Corporate Complicity in International Crimes' (n 96) 187–191.
- 163 ECCHR, 'Explosive Verdict in Germany: German Arms Export Controls Have Deadly Gaps' (30 March 2021), <https://www.ecchr.eu/en/press-release/explosive-verdict-in-germany-german-arms-export-controls-have-deadly-gaps/>.
- 164 Kolieb, 'Don't Forget the Geneva Conventions' (n 39).
- 165 *Ibid.*, 155.
- 166 Working Group on Effective Treaty Implementation, 'List of possible reference documents to be considered by States Parties in conducting risk assessment under Article 7', Annex B of 'Draft Report to the Fifth Conference of States Parties (CSP5)' ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1 2019, para. 26.
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