

# Defense Industry Human Rights Due Diligence Guidance

JULY 2022



# ■ ABOUT

## American Bar Association Center for Human Rights

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# ■ ACKNOWLEDGEMENTS

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Front Cover: Aerial bombardments on Sana'a, Yemen.  
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# ■ EXECUTIVE SUMMARY

While vital to the maintenance of peace and security, the international trade in defense articles and services can also result in adverse human rights impacts. Defense exporters therefore must contend with a number of different risks related to the misuse of their products, including:

- Reputational, Financial, and Governance Risks
  - Exporters may incur reputational harm through negative media coverage, public protests, and acts of civil disobedience owing to their human rights impacts
  - Private and institutional investors are increasingly eschewing publicly traded companies that are complicit in all manner of human rights violations
  - Activist shareholders are increasingly demanding socially responsible conduct from companies
- Regulatory and Policy Risks
  - A growing number of states have imposed generally applicable due diligence obligations to address business and human rights concerns
  - States have directed unprecedented scrutiny toward the end use of defense articles and services, resulting in many banned transactions
  - Concerned citizens have brought court actions challenging the legitimacy of export licenses that would allow the delivery of defense articles and services to known human rights violators
- Legal Risks
  - A failure to disclose material information regarding human rights risks can result in civil liability
  - Complicity in war crimes, crimes against humanity, or genocide may lead to exposure to civil or criminal liability in domestic or international fora

In this risk environment, it is in the interest of defense exporters to develop and implement a comprehensive human rights due diligence policy. Such a policy would have the following elements:

- Risk Assessment
  - Exporters should evaluate the human rights risks of a transaction in consideration of:
    - Risks related to the industry or sector, the geographic region, and the product or service (*contextual risks*);
    - Risks pertaining to the client's known policies, practices, and track record in receiving defense articles and services (*client risks*); and
    - The risk that a valid export license may be deemed illegitimate owing to the failings of the regulatory authority (*regulatory authority reliability risk*)
  - If risks cannot be adequately prevented or mitigated, the exporter should not engage in the transaction
  - Where risks are high, additional scrutiny should be applied

- Prevention and Mitigation Measures
  - Exporters can include key contractual terms to prevent and mitigate risk, including terms related to legal compliance and cooperation in end-use monitoring, tying business incentives to responsible usage, and termination clauses
  - Exporters can provide training on safe handling and usage, relevant laws and regulations, and risk identification and treatment
  - A red-flag system can alert exporters to risks of misuse, triggering either a rebuttable presumption that it is impossible to adequately prevent or mitigate risk or the application of heightened scrutiny
  - Industry actors can collaborate by standardizing their due diligence practices and sharing information
- End-Use Monitoring
  - Exporters can require that their clients submit periodic and incident reports concerning their usage of the defense articles and services
  - Where possible, exporters may engage in periodic audits and site inspections
  - Exporters can track developments by collecting open-source information and consistently engaging with the client and other stakeholders
- Investigation and Remediation
  - Upon reasonable suspicion of potential misuse, an exporter should investigate whether it substantially contributed to the adverse impact
  - If the exporter determines that there is a reasonable likelihood that misuse has occurred, it should activate contractual contingencies, including the cancellation of future deliveries and the termination of business relations
  - If the exporter determines that there is a reasonable likelihood that it substantially contributed to an adverse impact caused by misuse, it should reform its policies and consider appropriate forms of remediation to victims
  - Upon notification, discovery, or reasonable suspicion of potential misuse, the exporter should immediately report the incident to the authorities and cooperate fully in the investigation



# ■ INTRODUCTION

The international trade in defense articles and services contributes to global peace and security by ensuring the ability of states to provide for their own and for the collective defense. Without adequate risk management, however, it can also enable malign actors to commit or facilitate serious violations of international human rights and humanitarian law. Although an extensive framework of treaties, laws, and regulations governs the defense market at the international, regional, and domestic levels, it has several key limitations.

The signature response of the international community is the Arms Trade Treaty (ATT), which enjoins states from transferring conventional weapons in violation of their international law obligations and imposes upon them a duty to assess, prevent, and mitigate the risk of seriously unlawful use of their exports.<sup>1</sup> Implementation of the ATT has been mixed at best, with arms transfers to serial human rights abusers only accelerating since its entry into force in 2014.<sup>2</sup> Notable holdouts to the treaty include Russia and the United States, the world's two leading arms exporters. The UN Security Council, for its

part, has proven largely ineffective in taking action to rein in trafficking or in enforcing its own sanctions and embargoes, in no small part due to the obstructionism of its veto-wielding members.<sup>3</sup>

Many countries have established their own arms control regulations. These, too, have been found deficient in many cases. By supplying the Saudi-led coalition in Yemen, for example, the United Kingdom and the United States may have violated national and regional laws.<sup>4</sup> Moreover, the multitude of parallel and overlapping transfer regimes complicates compliance for multinational corporations. Nor are these regimes fully consistent in their terms—for example, there are different approaches as to whether sales restrictions apply at the point of the exporter's actual knowledge (“knows”) or constructive knowledge (“should know”) of a likelihood of misconduct.<sup>5</sup> And, in some cases, opportunistic exporters may exploit variations in these standards in order to “shop” for more lenient jurisdictions.

Given these several pitfalls, it follows that the laws and regulations purporting to control

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1 The Arms Trade Treaty, arts. 6–7, April 2, 2013, 3013 U.N.T.S. 269 (entered into force on Dec. 24, 2014) [hereinafter ATT].

2 Rachel Stohl, *2020 ATT Annual Reports: Examining Trends and Enduring Challenges*, STIMSON CENTER (OCT. 2020), AVAILABLE AT <https://www.stimson.org/wp-content/uploads/2021/10/ATT-AR-2021-WEB1.pdf>; Amnesty Int'l, *Killer Facts 2019: The Scale of the Global Arms Trade* (Aug. 23, 2019), available at <https://www.amnesty.org/en/latest/news/2019/08/killer-facts-2019-the-scale-of-the-global-arms-trade/>.

3 Anthony Ayers and Brittany Benowitz, *The Legal Framework Regulating Proxy Warfare*, A.B.A. CENTER FOR HUMAN RIGHTS 2 (2019), AVAILABLE AT [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-proxy-warfare-report-2019.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf).

4 *Id.* at 48–50.

5 *Id.* at 21; Tobias Vestner, *Prohibitions and Export Assessment: Tracking Implementation of the Arms Treaty*, GENEVA CENTRE FOR SECURITY POL'Y 2 (2019), AVAILABLE AT <https://dam.gcsp.ch/files/2y10A4BVLfexJ3OtniNY5FaeeXFCmWP1KB2FAArQjx4E11gP6jkUHS>.

the flow of arms have been shown to be poorly enforced in practice.<sup>6</sup> Amid an accumulation of reports of arms exports authorized by regulators in spite of clear risks of misuse or diversion,<sup>7</sup> the adequacy of the extant legal regime has been directly and repeatedly called into question. Media attention, reports of international experts, and public outcry have in turn prompted increasing administrative, legislative, and judicial scrutiny of weapons sales. In this fraught and dynamic context, it has therefore become vitally important for exporters<sup>8</sup> to conduct a thorough due diligence process to ensure that any proposed transactions will not contribute to adverse human rights outcomes. In a 2019 review of 22 leading arms companies, however, Amnesty International found that “each of the companies surveyed is failing to take adequate steps to meet its responsibility to respect human rights.”<sup>9</sup>

This Guidance is intended to assist exporters endeavoring to improve in this area. Part I reviews the risks to which arms exporters may be exposed owing to the human rights impacts of their products and services and which therefore should motivate the adoption of a rigorous due diligence process. These risks—which ultimately stem from correspondent obligations incumbent upon businesses under international human rights law—demonstrate that a valid license is not an adequate shield against all the potential adverse business consequences of insufficient attention to human rights outcomes. Part II therefore offers practical instruction on devising and implementing a comprehensive due diligence regime.

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6 See Brittany Benowitz & Alicia Ceccanese, *How States Supporting Armed Proxies Can Reduce Civilian Casualties and Protracted Hostilities*, JUST SECURITY (MAY 20, 2020) <https://www.justsecurity.org/70222/how-states-supporting-armed-proxies-can-reduce-civilian-casualties-and-protracted-hostilities/>; Ayers and Benowitz, *The Legal Framework Regulating Proxy Warfare* at 9.

7 See, e.g. Michael LaForgia and Walt Bogdanovich, *Why Bombs Made in America Have Been Killing Civilians in Yemen*, N.Y. TIMES (MAY 16, 2020), AVAILABLE AT <https://www.nytimes.com/2020/05/16/us/arms-deals-raytheon-yemen.html>; Dan Sabbagh, *BAE Systems Accused of Being Party to Alleged War Crimes*, THE GUARDIAN (DEC. 11, 2019), AVAILABLE AT <https://www.theguardian.com/uk-news/2019/dec/11/bae-systems-accused-of-being-party-to-alleged-war-crimes>; Hannah Beech, *Worldly, Charming, and Quietly Equipping a Brutal Military*, N.Y. TIMES (DEC. 24, 2021), AVAILABLE AT <https://www.nytimes.com/2021/12/24/world/asia/myanmar-coup-military-tatmadaw-kyaw-thaung.html>.

8 “Exporters” here refers to companies that provide defense articles and services on the global market.

9 Amnesty International, *Outsourcing Responsibility: Human Rights Policies in the Defence Sector* 30 (Sept. 9, 2019), available at <https://www.amnesty.org/en/documents/act30/0893/2019/en/>.

# I. EMERGING BUSINESS RISKS AND LEGAL RESPONSIBILITIES

In 2011, the UN Human Rights Council unanimously endorsed a set of Guiding Principles on Business and Human Rights (UNGPs), setting forth a responsibility for businesses to “avoid causing or contributing to adverse human rights impacts” and to “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations.”<sup>10</sup> The UNGPs further establish as a global standard of expected conduct that enterprises conduct ongoing human rights due diligence as appropriate in consideration of their size, potential human rights impact, and operational context.<sup>11</sup> The publication of the UNGPs was a watershed moment signifying ascendant international attention to the human rights impacts of global commerce.

The defense industry is among the most impacted by this sea change in rights discourse. Indeed, in a November 2021 commentary, the UN stated that companies selling products “for military purposes to conflict-affected areas are expected to engage in heightened due diligence.”<sup>12</sup> While governments make the decision to grant export licenses, defense companies acting pursuant to valid licenses are not immune from legal responsibility and must

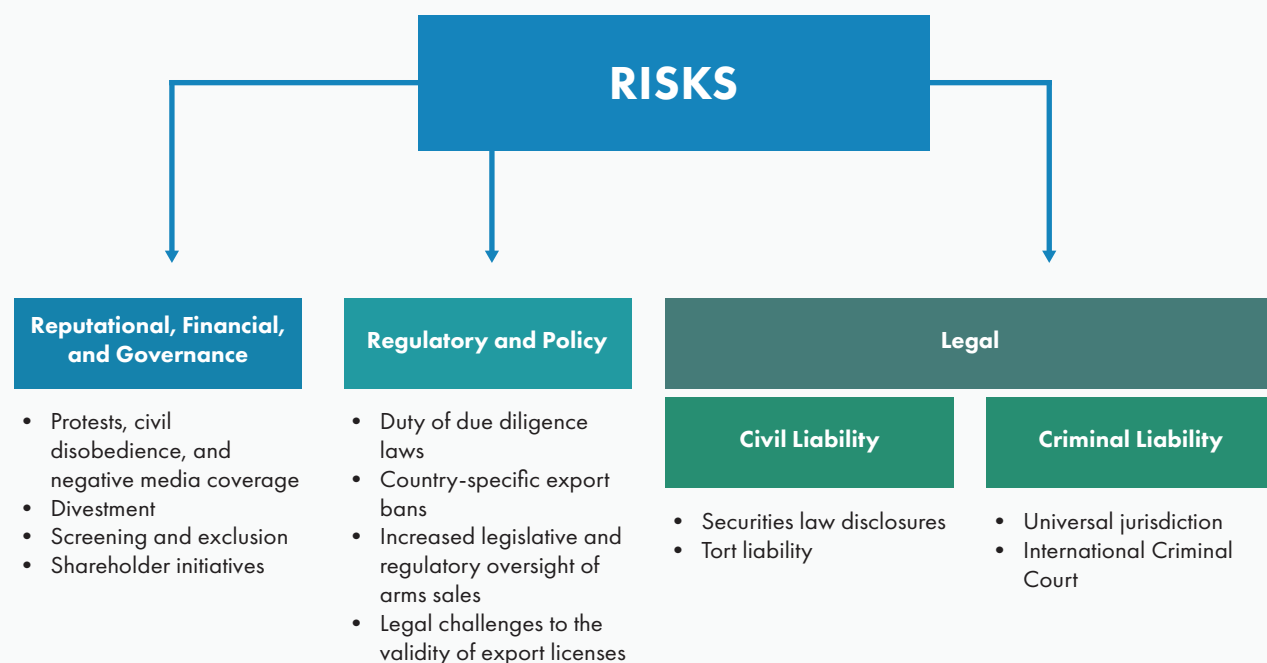
contend with substantial business risks. Among these are reputational, financial, and governance risks; regulatory and policy risks; and legal risks, including exposure to both civil and criminal liability. With recent trends only auguring toward the continued escalation of these risks, a due diligence program should therefore be viewed as a business necessity for participants in the global trade in arms. The nature of these risks also illustrates that compliance with national regulations may not be enough to fully protect defense companies and that it is therefore incumbent upon industry to perform its own complementary diligence.

10 U.N. Office of the Comm’r for Human Rights, *Guiding Principles on Business and Human Rights*, U.N. (2011) ART. 13, AVAILABLE AT [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

11 *Id.* at art. 17.

12 U.N. Office of the Comm’r for Human Rights, *OHCHR Response to Request from Danwatch for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights*, U.N. 2 (Nov. 16, 2021), AVAILABLE AT <https://www.ohchr.org/sites/default/files/2021-11/tech-2021-response-export-military-software.pdf>.





**Figure 1: Defense Industry Human Rights Risk Matrix**

#### a. Reputational, Financial, and Governance Risks

Defense companies are incurring increasing reputational costs for irresponsible exports, as illustrated by prominent acts of protest against them. Demonstrators have massed at weapons manufacturing facilities<sup>13</sup> and at major arms fairs,<sup>14</sup> while workers have engaged in acts of civil disobedience and protest.<sup>15</sup> In addition to the immediate disruption caused by these actions, they have brought negative media coverage and critical public attention to the human rights impacts of the arms industry.

Investors have taken notice, and with the rise of the ethical investing movement, arms exporters' access to financing may soon become endangered. Environmental, social, and governance (ESG) funds have grown in value exponentially in the past several years,<sup>16</sup> with Bloomberg forecasting that ESG assets may surpass "\$50 trillion by 2025, one-third of the projected total assets under management globally."<sup>17</sup> At the same time, ESG-compliant companies have outperformed the market.<sup>18</sup> This trend directly impacts the defense industry. Divestment from controversial weapons, such as cluster bombs, anti-personnel mines, and nuclear warheads, is already widespread,

13 The Associated Press, *Protestors Block Entrances to Raytheon Plant*, DEFENSE NEWS (AUG. 12, 2021), AVAILABLE AT <https://www.defensenews.com/industry/2021/08/12/protesters-block-entrances-to-raytheon-plant/>.

14 Dan Sabbagh, *Human Rights Groups Protest as World Arms Fair Returns to London*, THE GUARDIAN (SEPT. 9, 2019), AVAILABLE AT <https://www.theguardian.com/world/2019/sep/09/human-rights-groups-protest-as-world-arms-fair-returns-to-london>.

15 Paresh Dave, *Google Bars Use of Its Artificial Intelligence Tech in Weapons*, REUTERS (JUNE 7, 2020), AVAILABLE AT <https://www.reuters.com/article/us-alphabet-ai/google-bars-uses-of-its-artificial-intelligence-tech-in-weapons-idUSKCN1J32M7>; Reuters Staff, *Italy Unions Refuse to Load Saudi Ship in Protest over Yemen War*, REUTERS (MAY 20, 2019), AVAILABLE AT <https://www.reuters.com/article/us-yemen-security-italy-arms/italy-unions-refuse-to-load-saudi-ship-in-protest-over-yemen-war-idUSKCN1SQ17W>.

16 Ross Kerber and Simon Jessop, *Analysis: How 2021 Became the Year of ESG Investing*, REUTERS (DEC. 23, 2021), AVAILABLE AT <https://www.reuters.com/markets/us/how-2021-became-year-esg-investing-2021-12-23/#:~:text=A%20record%20%24649%20billion%20poured,10%25%20of%20worldwide%20fund%20assets>.

17 *ESG May Surpass \$41 Trillion Assets in 2022, But Not Without Challenges, Finds Bloomberg Intelligence*, BLOOMBERG (JAN. 24, 2022), <https://www.bloomberg.com/company/press/esg-may-surpass-41-trillion-assets-in-2022-but-not-without-challenges-finds-bloomberg-intelligence/>.

18 Kerber and Jessop, *Analysis: How 2021 Became the Year of ESG Investing*.

with 59% of funds tracked in a recent survey claiming to exclude companies tied to these weapons.<sup>19</sup> Nuclear weapons have likewise seen a precipitous decline in investment.<sup>20</sup>

Many banks have developed general policies around defense sector investment screening and exclusion—one study found this to be true of all but one of the 15 largest European banks.<sup>21</sup> Some investor funds and associations, such as Norway’s sovereign wealth fund and the Dutch insurance industry association, have adopted their own due diligence protocol to mitigate the human rights risks associated with investment in the arms industry.<sup>22</sup> In order to better enable individual and institutional ESG investors to account for defense articles and services in their decision-making, Weapons Free Fund is a platform that lists the defense holdings of mutual funds.<sup>23</sup> Human rights due diligence offers a mechanisms by which industry players can distinguish themselves to ethical investors and avoid the negative financial consequences of this general aversion to arms.

Investor pressure can be internal, too. As the “triple bottom line<sup>24</sup>” becomes a more broadly accepted outcome metric, corporate boards

encounter increasing demand among investors for socially responsible conduct.<sup>25</sup> This year, for example, shareholders of General Dynamics and Lockheed Martin proposed that the companies issue, respectively, a report on their human rights due diligence practices and a human rights impact assessment.<sup>26</sup> In a telling vote on a related matter, 57% of independent Alphabet shareholders favored undertaking a similar assessment of planned business expansions into countries with poor human rights records.<sup>27</sup> While all of these measures failed to pass, they exemplify a growing trend of investor activism in promoting corporate accountability that defense exporters can expect to continue in the years to come in parallel with divestment. Characterization of these issues as foreign relations and national security matters and appeals to regulatory compliance may not adequately address the risk.

## b. Regulatory and Policy Risks

As exemplified by the UNGPs, lawmakers at the national and international levels have taken a growing interest in the human rights implications of global commerce. While the UNGPs are not binding, since 2014 the UN Human Rights Council

19 Brooke Sutherland, *Defense Stocks Search for their Place in the ESG Universe*, BLOOMBERG (MAR. 25, 2022), AVAILABLE AT <https://www.bloomberg.com/opinion/articles/2022-03-25/industrial-strength-defense-stocks-search-for-their-place-in-the-esg-universe-l16s9bcq>.

20 International Campaign to Abolish Nuclear Weapons, \$63 Billion Drop in Investment: New Report Shows Impact of Nuclear Weapons Ban Treaty on Nuclear Weapons Business (Nov. 2021), available at [https://www.icanw.org/63\\_billion\\_usd\\_drop\\_in\\_nuclear\\_weapons\\_investments](https://www.icanw.org/63_billion_usd_drop_in_nuclear_weapons_investments).

21 Cor Oudes, Frank Slijper, and Michel Uiterwaal, *High-Risk Arms Trade and the Financial Sector*, PAX 77 (JULY 2022), AVAILABLE AT [HTTPS://PAXVOORDE.NL/MEDIA/DOWNLOAD/PAX\\_REPORT\\_HIGHRISK\\_ARMS\\_TRADE.PDF](https://paxvoorde.nl/media/download/pax_report_highrisk_arms_trade.pdf)

22 Irene Dotterud-Flaa et al., *Norwegian Government Pension Fund Introduces Ethical Investment Criterion for Weapons Companies and War Crimes: A Game Changer*, Urgewald (Oct. 6, 2021), available at <https://www.urgewald.org/en/medien/norwegian-government-pension-fund-introduces-ethical-investment-criterion-weapons-companies>; RBC Insurances, Inc. et. al, *Agreement on International Responsible Investment in the Insurance Sector—ESG Investment Framework for the Theme: Controversial Weapons and the Trade in Weapons with High-Risk Countries* (2020), available at <https://www.imvoconvenanten.nl/en/~/-/media/AD1A78F66E524DF0A1232F6AE88CCBA3.ashx>.

23 WEAPON FREE FUNDS, AVAILABLE AT <https://weaponfreefunds.org/> (last visited Jun. 7, 2022).

24 The triple bottom line measures profits along with social and environmental impacts.

25 See, e.g., Investor Alliance for Human Rights, *The Investor Case for Mandatory Human Rights Due Diligence*, available at <https://investorsforhumanrights.org/sites/default/files/attachments/202004/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL.pdf>.

26 Lockheed Martin Corp., *Proxy Statement & Notice of Annual Meeting of Stockholders*, Proposal 5, 76-9 (Apr. 21, 2022), available at <https://www.sec.gov/Archives/edgar/data/0000936468/000093646822000033/lockheedmartin2022proxy.htm>; General Dynamics Corp., *Notice of Annual Meeting of Shareholders and Proxy Statement*, Proposal 5, 87-90 (Mar. 24, 2022), available at [https://www.sec.gov/Archives/edgar/data/0000040533/000130817922000109/lgd2022\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/0000040533/000130817922000109/lgd2022_def14a.htm).

27 Access Now, *Google’s Plans in Saudi Arabia: Company Ignores Independent Shareholder Vote to Respect Human Rights* (June 9, 2022), available at <https://www.accessnow.org/google-cloud-saudi-arabia-shareholder-vote/>.

has spearheaded negotiations to formalize them as an international treaty.<sup>28</sup> In May 2022, the G7 nations pledged to “engage constructively” in this process.<sup>29</sup> National and regional legislatures have likewise begun to codify the terms of the UNGPs. Most significantly, in February 2022 the European Commission adopted a proposal to enact a “due diligence duty to address negative human rights impacts” among companies of a certain size.<sup>30</sup> The EU directive builds on similar laws already in effect in several Member States.<sup>31</sup> In the US, lawmakers and regulators have to an extent mandated corporate due diligence and transparency regarding certain products (such as conflict minerals) and practices (such as slavery and human trafficking), and have weighed more comprehensive measures.<sup>32</sup>

Within the broader context of business and human rights, conventional arms control is emerging as a particular focus of policymakers. A 2021 EU parliament resolution, for example, called on Member States to ban the export of weapons to Saudi Arabia and the UAE and warned that defense contractors transacting with these countries are non-compliant with the legally binding Council Common Position on arms exports.<sup>33</sup> To date, EU states including Austria, Belgium, Denmark, Finland, Germany,

Greece, Italy, the Netherlands, and Sweden have at various points placed restrictions on Saudi arms exports.<sup>34</sup>

In the United States, \$8.1 billion in “emergency” arms to Saudi Arabia and the UAE announced in 2019 was met with stiff congressional opposition. In a rare move, both the House and Senate voted to block the sale, though they were stymied by a presidential veto.<sup>35</sup> Nonetheless, persistent legislative and public pressure ultimately did lead President Biden in 2021 to announce the suspension of “all American support for offensive operations in the war in Yemen, including relevant arms sales.”<sup>36</sup> In response to congressional requests, the Office of the Inspector General (OIG) at the Department of State also investigated the propriety of the Department’s emergency certification for the Saudi and Emirati weapons sales, which allowed for the executive to circumvent congressional review. While OIG found no legal impropriety, it faulted the Department for failing to “fully assess risks and implement mitigation measures to reduce civilian casualties” and for routinely approving arms sales to Saudi Arabia and the UAE at levels below the congressional reporting threshold.<sup>37</sup> In the past two years, Congress has considered a slew of legislative reforms

28 Business & Human Rights Resource Centre, *Binding Treaty: A Brief Overview*, available at <https://www.business-humanrights.org/en/big-issues/binding-treaty/#:~:text=In%20June%202014%2C%20the%20UN,corporations%20and%20other%20business%20enterprises>.

29 G7 Employment Ministerial Meeting, *Just Transition: Make it Work—Towards Decent and High Quality Work in a Green Economy* (May 24, 2022), available at [https://www.bmas.de/SharedDocs/Downloads/DE/Pressemitteilungen/2022/g7-employment-ministerial-meetingm-communique.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Pressemitteilungen/2022/g7-employment-ministerial-meetingm-communique.pdf?__blob=publicationFile&v=2).

30 Press Release, European Commission, *Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Supply Chains* (Feb. 23, 2022), available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1145](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145).

31 *National & Regional Movements for Mandatory Human Rights & Environmental Due Diligence in Europe*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE (APR. 22, 2022), AVAILABLE AT <https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/>.

32 Gibson Dunn, *Part Two—Mandatory Corporate Human Rights Due Diligence: What Now and What Next? An International Perspective* (Mar. 10, 2021), available at <https://www.gibsondunn.com/part-two-mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international-perspective/>.

33 *European Parliament resolution of 11 February 2021 on the humanitarian and political situation in Yemen*, 2021/2539(RSP), paras. 12-13.

34 Monica Pinna, *Are European Arms Fueling Wars and Conflicts Worldwide?* EURONEWS (JULY 23, 2021), AVAILABLE AT <https://www.euronews.com/my-europe/2021/07/23/are-european-arms-fuelling-wars-and-conflicts-worldwide>.

35 Alexandra Stark, *Congress Failed to Block the Sale of Missiles to Saudi Arabia. Why?* WASH. POST (DEC. 23, 2016), AVAILABLE AT <https://www.washingtonpost.com/politics/2021/12/23/congress-failed-block-sale-missiles-saudi-sarabia-why/>.

36 *Id.*

37 Office of Inspector General, *Review of the Department of State’s Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab Emirates*, U.S. DEP’T OF STATE (AUG. 2020), AVAILABLE AT [https://www.stateoig.gov/system/files/isp-i-20-19\\_rdwweb\\_508.pdf](https://www.stateoig.gov/system/files/isp-i-20-19_rdwweb_508.pdf).

that would increase oversight of and place new limits on arms sales.<sup>38</sup> In June 2022, Congress again introduced legislation to end US military involvement in Yemen, including the provision of military equipment.<sup>39</sup>

Even if granted an export license, arms companies transacting with known rights violators may still face business risks in the form of legal challenges to the validity of the license. Recent actions of this sort have been brought in Belgium, Canada, France, Italy, the Netherlands, South Africa, Spain, the UK, and the US.<sup>40</sup> Some of these have successfully halted arms sales. In Belgium, courts have annulled or suspended several Saudi arms export licenses.<sup>41</sup> Likewise, a court decision in the UK temporarily ceased sales to members of the Saudi-led coalition;<sup>42</sup> the decision to renew arms sales to Saudi Arabia in 2020 is now under judicial review.<sup>43</sup> In the US, a lawsuit contesting the authorization of arms sales to the UAE also remains pending.<sup>44</sup>

## c. Legal Risks

### i. Civil Liability

In many legal regimes, defense exporters may have an obligation under applicable securities laws to disclose to investors any information concerning disputes about the legality of arms sales where such disputes could result in the suspension of a license that could materially impact projected earnings. Most major world stock exchanges reference human rights in their ESG disclosure guidance.<sup>45</sup> Exporters may also have an obligation to disclose to relevant authorities information in their possession about the use of their exports that may not be readily available to regulators and may have a bearing on the legitimacy of relevant licenses. A failure to make these disclosures could result in civil penalties or lawsuits.

Weapons manufacturers also face the possibility, however remote, of civil liability for international crimes under domestic statutes, such as the Alien Tort Statute (ATS).<sup>46</sup> Although the extraterritorial reach of the ATS has been sharply limited by the US Supreme Court, senators have recently put forward a proposal to change that.<sup>47</sup> Even without the ATS, there may be other routes to domestic accountability

38 Values in Arms Export Act of 2022, S. 3558, 117th Cong. (2021-2022); Stop Arming Human Rights Abusers, H.R. 5880, 116th Cong. (2019-2020); National Security Powers Act of 2021, S. 2391 117th Cong. (2021-2022).

39 Press Release, Congressional Progressive Caucus, *Members of Congress Introduce Bipartisan War Powers Resolution to End U.S. Involvement in Saudi War in Yemen* (June 1, 2022), available at <https://progressives.house.gov/press-releases?ID=287750BA-778B-4C04-8DBE-BC6AF439EDB1>.

40 See Valentina Azarova, Roy Isbister, and Carlo Mazzoleni, *Domestic Accountability For International Arms Transfers: Law, Policy and Practice*, SAFERWORLD 10-44 (AUG. 2021), AVAILABLE AT <https://www.saferworld.org.uk/resources/publications/1366-domestic-accountability-for-international-arms-transfers-law-policy-and-practice>.

41 *Id.* at 19-23.

42 Campaign Against Arms Trade, *CAAT's Legal Challenge* (Apr. 22, 2021), available at <https://caat.org.uk/homepage/stop-arming-saudi-arabia/caats-legal-challenge/>.

43 Mwatana for Human Rights, *On the Ground Investigation in Yemen Shows Patterns of Attack in Violation of International Law, Mwatana for Human Rights Said in a Witness Statement to the UK Court, Published Today* (May 26, 2022), available at <https://mwatana.org/en/uk-case/#>.

44 *Statement on NYCFPA v. U.S. Department of State Lawsuit and U.S. Government Approval of Sale of Arms to UAE*, N.Y. CENTER FOR FOREIGN POL'Y AFFAIRS (APR. 14, 2021), AVAILABLE AT <https://nycfpa.org/04/14/statement-on-nycfpa-vs-u-s-department-of-state-lawsuit-and-u-s-government-approval-of-sale-of-arms-to-uae/>.

45 Anthony Miller et al., *Stock Exchange Guidance on Human Rights Disclosure*, SUSTAINABLE STOCK EXCHANGES (2020), AVAILABLE AT <https://sseinitiative.org/wp-content/uploads/2021/06/Policy-brief-Stock-exchange-guidance-on-human-rights-disclosure.pdf>.

46 Elizabeth Beavers, *War Crimes, Inc.: The ATS Case against the US Weapons Industry for Aiding and Abetting Atrocities in Yemen*, 31 Fla. J. Intl. L. 179 (2021).

47 Business & Human Rights Resource Centre, *USA: Senators Introduce Bill to Clarify Extraterritorial Application of Alien Tort Statute to Ensure Companies are Held Accountable for Human Rights Abuses Abroad* (May 9, 2022), available at <https://www.business-humanrights.org/en/latest-news/usa-senators-introduce-bill-to-clarify-extraterritorial-application-of-alien-tort-statute-to-ensure-companies-are-held-accountable-for-human-rights-abuses/>.



in the US. For instance, Mexico has brought an action against American arms manufacturers that has garnered support from a number of state attorneys general and district attorneys.<sup>48</sup>

## ii. Criminal Liability

Lastly, companies face the possibility of criminal sanctions at both the domestic and international levels. Domestically, liability may result from violating the terms of an export license or, in states that have adopted universal jurisdiction or some form of extraterritorial jurisdiction, for complicity in war crimes, crimes against humanity, and genocide. In Germany, prosecutors have brought two successful cases against manufacturers who sold small arms to known human rights abusers in Mexico and Colombia, resulting in financial penalties and the conviction of several of their directors and officers.<sup>49</sup> Similarly, an Italian exporter is currently facing a criminal investigation for its role in an airstrike in Yemen.<sup>50</sup> In a related context, in May 2022 a French appeals court upheld charges against a cement manufacturer and its directors for complicity in crimes against humanity in Syria,<sup>51</sup> potentially opening the door to further criminal prosecutions of multinational corporations under theories of vicarious liability. Indeed, a criminal complaint filed just weeks

afterwards accuses French arms companies of complicity in war crimes and crimes against humanity in Yemen.<sup>52</sup> In the United States, State Department lawyers have worried about the criminal exposure of bureaucrats who approved arms sales to Saudi Arabia.<sup>53</sup>

International courts, for their part, have a long history of holding the suppliers of weapons to account for war crimes, beginning with the *Zyklon B* case, in which two industry executives were convicted by a British military tribunal for exporting the poisonous gas.<sup>54</sup> Ad hoc regional tribunals have held defendants guilty of aiding and abetting crimes if they were generally aware of the probability that crimes would be committed—a fairly low standard.<sup>55</sup> In recent years, human rights organizations have issued calls for criminal accountability at the International Criminal Court (ICC) for arms companies who have delivered weaponry to conflict actors under circumstances indicating a high likelihood of misuse.<sup>56</sup> In one specific case, Amnesty International and other human rights organizations have found a “reasonable basis” for the ICC to prosecute the decision-making staff of a Spanish aerospace firm for aiding and abetting war crimes in Yemen.<sup>57</sup> The Court has yet to take up these matters.

48 Chris Villani, *Gunmakers Must Face Mexico Trafficking Suit, States Say*, LAW360 (FEB. 3, 2022), AVAILABLE AT <https://www.law360.com/articles/1461842/gunmakers-must-face-mexico-trafficking-suit-states-say>.

49 Deutsche Welle, *Court: Heckler & Koch Must Pay For Illegal Arms Sales To Mexico* (Mar. 30, 2021), available at <https://www.dw.com/en/court-heckler-koch-must-pay-for-illegal-arms-sales-to-mexico/a-57047654>; Deutsche Welle, *Sig Sauer: German Gun Maker Execs Strike Court Deal Over Illegal Sales* (Apr. 3, 2019), available at <https://www.dw.com/en/sig-sauer-german-gun-maker-execs-strike-court-deal-over-illegal-sales/a-48189995>.

50 *Human Rights Groups Challenge Italy's Decision to Dismiss Criminal Investigation of Arms Company Executives and Export Authorities*, MWATANA FOR HUMAN RIGHTS (MAR. 15, 2022), AVAILABLE AT <https://mwatana.org/en/war-crimes/>.

51 France 24, *French Court Upholds Syria "Complicity in Crimes against Humanity" Charge against Lafarge*, FRANCE 24 (MAY 18, 2022), AVAILABLE AT <https://www.france24.com/en/live-news/20220518-paris-court-upholds-charges-of-complicity-in-crimes-against-humanity-linked-to-lafarge-s-cement-plant-in-syria>.

52 European Center for Constitutional Rights, *Aiding and Abetting War Crimes in Yemen* (June 2, 2022), available at <https://www.ecchr.eu/en/press-release/aiding-and-abetting-war-crimes-in-yemen/>.

53 Ryan Goodman, *U.S. Arms Sales to Saudis Spell Legal Trouble for State Department Officials*, JUST SECURITY (MAR. 15, 2017), AVAILABLE AT <https://www.justsecurity.org/38836/arms-sale-saudis-spell-legal-trouble-state-depart-officials/>.

54 Judgment, *Trial of Bruno Tesch and Two Others*, British Military Court, 1–8 March 1946, Law Reports of Trials of War Criminals (1947) Vol I, 93–103.

55 Christian Schliemann and Linde Bryk, *Arms Trade and Corporate Responsibility: Liability, Litigation, and Legislative Reform*, FRIEDRICH EBERT STIFTUNG 14 (NOV. 2019), AVAILABLE AT <https://library.fes.de/pdf-files/iez/15850.pdf>.

56 *ICC Must Investigate Arms Company Executives Linked to Yemen War Crimes Allegations*, AMNESTY INT'L (DEC. 12, 2019), AVAILABLE AT <https://www.amnesty.org/en/latest/news/2019/12/icc-investigate-arms-companies-yemen-war-crimes-allegations/>.

57 Christian Schliemann-Radbruch, Jordi Calvo Rufanges, and Alberto Estevez Suarez, *Spanish Arms Exports and Alleged War Crimes in Yemen*, AMNESTY INT'L, EUR. CENTER FOR CONST. AND HUMAN RIGHTS, AND CENTRE DELAS (MAY 2022), AVAILABLE AT <https://www.centredelas.org/publicacions/armasespanolasycrimenesdeguaenyemen/?lang=en>.



## ■ II. ARMS INDUSTRY DUE DILIGENCE GUIDANCE

As the legal, regulatory, policy, fiscal, and social environment surrounding business and human rights generally and arms sales specifically continues to evolve, the need for exporters to undertake thorough due diligence intensifies commensurately. Building on the “know your customer” policies already commonly practiced by defense companies with respect to money laundering, corruption, and economic sanctions, a comprehensive human rights due diligence program can encourage clients to comply with applicable rules and standards, reduce reputational and business risks to the exporter, and shield it and its officers from potential liability.

With these benefits in mind, the remainder of this section offers guidance to assist defense exporters in preventing the misuse of their products and services.<sup>58</sup> Borrowing from the language of the ATT, “misuse” is defined here as a use of defense articles or services to commit or facilitate a serious violation of international human rights or

humanitarian law.<sup>59</sup> Whether a violation is “serious” depends on its nature, magnitude, and impacts, and on the status of the victims.<sup>60</sup> “Seriousness” is a “low threshold and a broad concept.”<sup>61</sup> Serious violations of international human rights law include, but are not limited to, attacks or threats of attacks against civilians or civilian objects; disproportionate, unnecessary, or indiscriminate uses of force; torture or cruel, inhuman, or degrading treatment or punishment; arbitrary arrest or enforced disappearance; forced displacement; and consistent violation of fundamental rights, including the rights to freedom of expression, association, and assembly.<sup>62</sup>

This Guidance draws on several sources. Chief among these are the general principles on business’ responsibility to respect human rights enshrined in the UNGPs and reflected and further elaborated in the OECD Guidelines for Multinational Enterprises<sup>63</sup> and the OECD Due Diligence Guidance for Responsible Business Conduct.<sup>64</sup> This Guidance represents

58 It should be noted that although this Guidance is primarily concerned with the end uses of defense articles and services, human rights concerns pertaining to the supply chain should not be overlooked.

59 ATT art. 7(b).

60 Geneva Academy of International Humanitarian Law and Human Rights, *What Amounts to a “Serious Violation of International Human Rights Law?”* 6 (Aug. 2014), available at [https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law\\_Academy%20Briefing%20No%206.pdf](https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf).

61 *Id.*

62 Geneva Academy of International Humanitarian Law and Human Rights, *What Amounts to a “Serious Violation of International Human Rights Law?”*.

63 Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011), available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

64 Organisation for Economic Co-operation and Development, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), available at <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf#:~:text=The%20objective%20of%20the%20OECD%20Due%20Diligence%20Guidance,of%20its%20due%20diligence%20recommendations%20and%20associated%20provisions> [hereinafter “OECD Guidance”].

an attempt to translate these generic principles into instructions specific to exporters of defense articles and services. In order to accomplish this adaptation, the risk assessment frameworks detailed in the UNIDIR Arms-Related Risk Analysis Toolkit<sup>65</sup> and the Cato Institute's Arms Sales Risk Index<sup>66</sup> were essential resources. The Guidance also took inspiration from the obligations that the ATT imposes upon states, and which mirror due diligence imperatives.<sup>67</sup>

Rather than offering specific policy language, this Guidance provides practical instruction on the implementation of a comprehensive due diligence regime. Consistent with OECD standards, it models a risk-based approach to due diligence<sup>68</sup> encompassing four unique stages: risk assessment, prevention and mitigation,

end-use monitoring, and investigation and remediation. This action plan should be incorporated by exporters into a policy that is approved at the most senior level, incorporated throughout its business operations, and overseen by a dedicated compliance unit.<sup>69</sup>

It should be noted that not all of these steps will be feasible for all sales. In particular, private companies may have less insight into and influence upon the structure of government-to-government sales, also known as foreign military sales (FMS). In those cases, they should strive to adopt whatever due diligence practices are reasonably practicable. By contrast, private companies have greater visibility and license with regard to direct commercial sales (DCS), which comprise the vast majority of American defense exports.<sup>70</sup>

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65 Simon Yazgi and Erica Mumford, *The Arms-Related Risk Analysis Toolkit*, U.S. INST.FOR DISARMAMENT RESEARCH (2021), AVAILABLE AT <https://unidir.org/sites/default/files/2021-12/Arms-Related%20Risk%20Analysis%20Toolkit.pdf>.

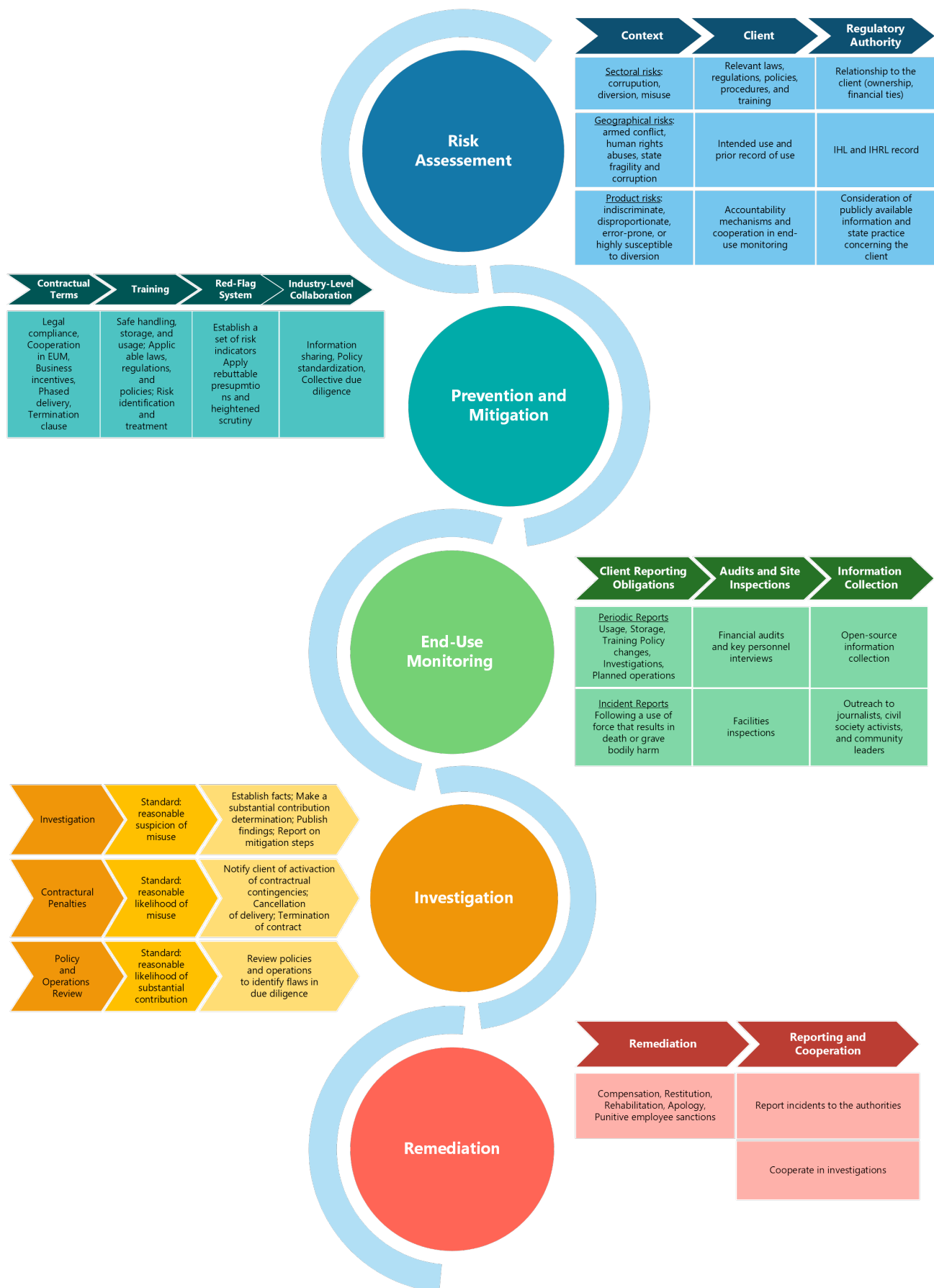
66 A. Trevor Thrall and Jordan Cohen, *2021 Arms Sales Risk Index*, CATO INST. (JAN. 18, 2022), AVAILABLE AT <https://www.cato.org/study/2021-arms-sales-risk-index>.

67 ATT arts. 7, 11-12.

68 OECD *Guidelines for Multinational Enterprises* at 20; OECD *Due Diligence Guidance for Responsible Business Conduct* at 17.

69 UNGP art. 16; OECD *Guidelines* at 23.

70 U.S. Department of State, *Fiscal Year 2021 U.S. Arms Transfers and Defense Trade* (Dec. 22, 2021), available at <https://www.state.gov/fiscal-year-2021-u-s-arms-transfers-and-defense-trade/>.



**Figure 2: Human Rights Due Diligence Process Model**

## a. Stage 1: Risk Assessment

When considering a new business opportunity, the first step in the due diligence process is a risk assessment.<sup>71</sup> This involves three separate subprocesses: a contextual risk assessment, a client risk assessment, and a regulatory authority reliability assessment. Exporters should produce a written record of each phase.

### i. Contextual Risk Assessment

The goal of a contextual risk assessment, or “scoping,” is to broadly identify human rights threats and hazards across business operations and relationships in order to enable risk-informed policymaking and decision-making.<sup>72</sup> It should therefore evaluate sectoral, geographic, and product risks attending the exporter’s business.<sup>73</sup>

- Sectoral risks: Three overriding risks pervade the arms industry: corruption, diversion, and misuse. Weapons sales may fuel corruption by supplying the means of repression, enriching cronies and nourishing patronage networks, and wasting public monies. Without scrupulous tracking weapons may also end up in the hands of unintended users. And, most relevantly for the purposes of this Guidance, weapons may be used to commit or facilitate serious violations of international human rights and humanitarian law. The following indices may be useful indicators for these types of risks:
  - Transparency International’s Corruption Perceptions Index;
  - World Bank’s World Governance Indicators;
  - Fund for Peace’s Fragile States Index;

- Freedom House’s Freedom in the World index;
  - Political Terror Scale;
  - Institute for Economics and Peace’s Global Terrorism Index;
  - Economist Intelligence Unit’s Democracy Index;
  - Vision of Humanity’s Global Peace Index;
  - Uppsala Conflict Data Program’s Conflict Encyclopedia; and
  - Cato Institute’s Armed Sales Risk Index
- Geographic risks: The risks of the arms trade are not evenly spread across all countries and regions and can in fact vary substantially within geographic areas. Areas experiencing armed conflict, corruption, state fragility, human rights violations, societal militarization, and a significant presence of organized armed groups are generally at higher risk for the diversion and misuse of arms.
  - Product risks: Certain defense articles are inherently risky. Some, including many of those banned under international conventions,<sup>74</sup> may by nature be indiscriminate or prone to cause unnecessary suffering.<sup>75</sup> Others may be lawful if deployed properly, but carry a high risk of error among incautious or poorly-trained users, such as explosive weapons with wide-area effects. Lastly, some defense articles, such as small arms and light weapons, are more susceptible to diversion or illicit trafficking.

These risks should be assessed in comparison to relevant laws and regulations. The assessment should also account for relevant gender considerations, including the impacts on gender-based violence, access to healthcare, household bargaining power, and the burden of care within

<sup>71</sup> UNGP art. 18-19.

<sup>72</sup> OECD Guidance at 25.

<sup>73</sup> *Id.*

<sup>74</sup> See, e.g., Convention on the Prohibition of Biological Weapons (1972) Convention on Certain Conventional Weapons (1983); Convention on the Prohibition of Chemical Weapons (1993); Convention on the Prohibition of Anti-Personnel Mines (1997); Convention on Cluster Munitions (2008); Treaty on the Prohibition of Nuclear Weapons (2017).

<sup>75</sup> International Committee of the Red Cross, *Customary IHL Database*, Rules 70-71, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul).

households.<sup>76</sup> The most significant risks should be prioritized in the client assessment to come.<sup>77</sup>

Contextual risk assessment should be conducted according to the most up-to-date available information, culled from credible sources such as UN reports, NGO publications, and reliable media sources. Where information gaps exist, the exporter should engage in stakeholder and expert consultations. The findings should be reviewed on a regular basis and updated to reflect factual changes or changes in the exporter's business operations or relationships. Contextual analysis is a necessary first step in the risk assessment process because it provides background inputs that allow the exporter to situate client assessments in the appropriate context. However, it need not necessarily be repeated for each client assessment; the results of scoping with a view toward one potential client may be equally applicable toward another similarly-situated potential client.

## ii. Client Risk Assessment

While a contextual risk assessment provides an overview of the risk climate, individualized determinations are required to assess the specific risks inherent to each new business opportunity. The aim of this undertaking should be to apprehend the potential client's capacity and intent to utilize the articles and services in compliance with all applicable laws and regulations. It should be conducted prior to forming a new business relationship and revisited prior to each new transaction. In particular, exporters should carefully scrutinize:

- The laws and regulations governing the import, transfer, storage, and usage of defense articles and services in the potential client's jurisdiction, such as:
  - Ratification of or accession to the ATT;
  - National implementation of the ATT, including reporting and development of a national control system;
  - National transfer control legislation, including import licensing, regulation of state-owned weapons, and criminal sanctions for the illicit trafficking, re-transfer, or unauthorized use of weapons; and State capacity to enforce all relevant laws and regulations;
- The potential client's policies around the usage of defense articles and services, including rules of engagement;
- Training that the potential client provides users on the safe and legally compliant usage of defense articles;
- The potential client's intended use of and purpose for the defense articles and services;
- The potential client's prior record of lawful use of defense articles and services, including, if applicable, the specific articles and services under consideration;
- The processes by which the potential client has investigated and held to account individuals responsible for past misuse of defense articles and services, along with resultant policy reforms and the potential client's responsiveness to inquiries made by international bodies;
- Any known relationships between the potential client and criminal organizations or armed groups; and
- The potential client's record of cooperation in end-user and end-use monitoring.

To investigate these issues, exporters should:<sup>78</sup>

- Review publicly available documents pertaining to the potential client's policies, objectives, operations, transactions, finances, objectives, governance structures, other business relationships, political activities, and prior usage of defense articles and services;

<sup>76</sup> Women's International League for Peace & Freedom, *Submission to the UN Working Group on Business and Human Rights' Project on Business, Human Rights, and Conflict-Affected Contexts* 20 (2021), available at <https://www.wilpf.org/wp-content/uploads/2021/01/WILPF-submission-UNWGP-project-on-BHR-and-conflict.pdf>.

<sup>77</sup> UNGP art. 24.

<sup>78</sup> OECD Guidance at 66-67.



- Request additional disclosures from the potential client in order to ascertain non-public information;
- Review the potential client's own human rights impact assessments, legal reviews, and compliance management systems;
- Interview key potential client personnel, including high-ranking officials and staff overseeing the usage of the defense articles and services;
- Review expert analysis and public reporting on the potential client's adherence to international human rights law and the standards of responsible business conduct;
- Engage in stakeholder consultations among communities impacted by the potential client's operations; and
- Collaborate with industry associations and other exporters with preexisting or nascent relationships with the potential client in order to share information.

The outcome of this assessment will enable the exporter to identify risks and then determine whether it is possible to prevent or mitigate them. If it is not, the exporter should cease consideration of the new business opportunity. Clients that are not disqualified but which nonetheless pose a high risk should be categorized as such. For this purpose, risk should be assessed according to the severity and likelihood of potential adverse impacts.<sup>79</sup> Severity may be evaluated in consideration of the scale, scope, and irremediable character of the impact.<sup>80</sup> High-risk clients should be subjected to additional scrutiny and prioritized in the allocation of due diligence resources.<sup>81</sup> In addition, exporters should notify the authorizing state when the high-risk label has been applied.

### iii. Regulatory Authority Reliability Assessment

A valid export license does not excuse the exporter from its due diligence obligation. In fact, there are conditions under which an exporter should be skeptical that such a license was granted by the authorizing state in a manner

consistent with applicable law. These include:

- The authorizing state has not ratified or acceded to the ATT;
- The authorizing state has an ownership interest in the exporter;
- The authorizing state does not have a record of respecting international human rights or humanitarian law;
- The authorizing state has a record of sales to states committing violations of international human rights or humanitarian law;
- The exporter has contributed financially to elected officials in a position to influence the approval of the license;
- The authorizing state or the exporter is aware that the subject defense articles or services are being used in a manner inconsistent with the applicable license;
- The authorizing state issued the license despite credible public reports that the potential client has committed violations of international human rights or humanitarian law;
- The license or similar licenses are the subject of a pending legal challenge, audit, or inquiry;
- Other states have denied or revoked licenses for similar products or services; or
- Other states have denied or revoked licenses for the sale of defense articles or services to the same client or a closely related entity.

Where these circumstances are found, the exporter should exercise additional caution and should not rely on a valid export license as a shield from liability or an absolution of responsibility. Faulty regulatory processes reinforce the need for defense companies to undertake their own due diligence rather than considering their government's process as a sufficient protection against risk.

<sup>79</sup> OECD Guidance at 42.

<sup>80</sup> *Id.*

<sup>81</sup> UNGP art. 24; OECD Guidance at 66.

## **b. Stage 2: Prevention and Mitigation Measures**

In addition to a comprehensive risk assessment, exporters can promote responsible end use by engaging in common-sense prevention and mitigation measures. These include thoughtfully structured and phrased contractual provisions, personnel training, red-flag systems, and industry-level collaboration. The exporter should make a determination on the record as to its ability to adequately prevent or mitigate risks through these and other strategies.

### **i. Build Prevention and Mitigation into Business Contracts**

Upon initiating a new business relationship, arms exporters can incorporate prevention and mitigation into their client contracts through the inclusion of key terms:<sup>82</sup>

- Requiring adherence to all applicable domestic laws and regulations;
- Requiring the client's agreement to use the defense articles and services in compliance with international human rights and humanitarian law;
- Requiring the client's acknowledgment of the exporter's due diligence policies and its consent to transparency, reporting, and cooperation in end-use monitoring, which may include providing access to documents and witnesses, submitting periodic and incident reports, and responding to requests for information;
- Requiring the client to undergo training provided by the exporter on its due diligence policies;
- Linking business incentives, such as commitments to long-term contracts and future orders, upgrades, or maintenance, to responsible usage of the defense articles and services;
- Structuring the delivery of defense articles and services in phases rather than as a single shipment, so as to allow for monitoring before full execution;
- Designating violative uses of the defense

articles and services as grounds for contractual termination or rescission; and

- Establishing as necessary other prevention and mitigation measures relevant to the geographic region or the specific defense articles or services.

### **ii. Training**

Some risks may be averted or lessened through proper training of those receiving the defense articles or services,<sup>83</sup> whether provided by exporter personnel or by external consultants. This may include practical training on the safe handling, storage, and usage of defense articles. It may also include training on policies, laws and regulations pertaining to the defense articles or services, including international human rights and humanitarian law. Client employees should further receive training on risk identification and treatment and on the process for notifying the exporter of potential violations through incident reports. Finally, clients may benefit from technical guidance regarding organizational management and oversight systems.

### **iii. Establish a Red-Flag System**

Exporters can anticipate and be alerted to risks by establishing a series of "red flags" that trigger intensified scrutiny.<sup>84</sup> A red flag may be tripped during the risk assessment process or during the course of a business relationship. Attached to each red flag should be an appropriate responsive protocol.

Red flags pertaining to a particular client or potential client may include:

- Known prior misuse of defense articles or services;
- Known prior diversion of defense articles;
- Known involvement in an ongoing armed conflict;
- Known involvement in a past armed conflict with a reasonable likelihood of recurrence based on observable

<sup>82</sup> OECD Guidance at 60, 75, 78.

<sup>83</sup> *Id.* at 75.

<sup>84</sup> *Id.*

indicators, such as:

- The refusal of some armed groups to join a peace agreement;
- The presence of non-conformist factions within armed groups that have joined a peace agreement;
- Continuing violence;
- A failure to disarm, demobilize, and reintegrate combatants;
- A failure to address the root causes of conflict; or
- Changes in areas of control that may lead to a change in the status quo;
- Known ties to an organized armed group or criminal enterprise;
- Subjection to multilateral sanctions or to an arms embargo;
- Credible allegations of violations of multilateral sanctions or an arms embargo;
- Credible allegations of serious violations of human rights or international humanitarian law by the client or potential client or its agents;
- Credible allegations of misuse of defense articles or services similar to those provided by the exporter in an area of operations in which the client or potential client is active;
- Threatening, vilifying, or dehumanizing statements made by the client or its agents toward a disfavored group that may be suggestive of an intent to misuse defense articles or services;
- High or rapidly increasing levels of armed violence in the client or potential client's region, whether political, criminal, or state-sponsored;
- A high degree of societal militarization, as assessed based on observable indicators such as the number of security personnel per capita, the number of organized armed groups, defense spending (as measured by the SIPRI Military Expenditure Database) relative to GDP, and the proliferation of small arms and light weapons;
- Poor levels of cohesion or ineffective command and control among the armed forces;
- Uncertain or contested ownership or control of weapons stockpiles;
- Risky arms storage or management

practices;

- Previous arms suppliers terminated relations or raised due diligence concerns;
- Vagueness on the part of the client or potential client as to the purpose of the defense articles or services;
- Disinterest in, interference with, or hindrance of training services offered by the exporter on the safe usage of defense articles;
- Subsequent discovery of relevant information that the client knowingly withheld from the exporter; or
- For state clients or potential state clients, poor performance on any of the following indices:
  - Transparency International's Corruption Perceptions Index;
  - World Bank's World Governance Indicators;
  - Fund for Peace's Fragile States Index;
  - Freedom House's Freedom in the World Index;
  - Political Terror Scale;
  - Institute for Economics and Peace's Global Terrorism Index;
  - Economist Intelligence Unit's Democracy Index;
  - Vision of Humanity's Global Peace Index;
  - Uppsala Conflict Data Program's Conflict Encyclopedia; or
  - Cato Institute's Armed Sales Risk Index.

Upon the identification of a red flag, the exporter should take appropriate responsive action, beginning by notifying the appropriate regulatory authority. In the most severe cases, a red flag should create a rebuttable presumption that it is impossible to adequately prevent or mitigate risk and that the exporter should therefore cease consideration of engaging in a new business relationship or terminate an existing one. In less severe cases, a red flag should be cause for the application of heightened scrutiny and for direct engagement with the client or potential client in order to better understand the context and implications of the condition of concern.

#### iv. Industry-Level Collaboration

Arms exporters can benefit from the collective experience of their industry peers by sharing information and developing common policies on responsible business conduct.<sup>85</sup> This may avert a race to the bottom, in which the most responsible industry actors incur short-term business costs for taking due diligence seriously. A more uniform policy regime also facilitates compliance among clients. Standardized contractual structures and oversight regimes can therefore strengthen human rights performance.

Industry actors may also collectivize due diligence responsibilities in order to economize and take advantage of a broader pool of knowledge. Any such joint initiative, however, must be collaborative, consultative, and credible. Moreover, participation in a collective effort does not absolve an exporter from responsibility for impacts resulting from or directly linked to its business operations.

#### c. Stage 3: End-Use Monitoring

Once defense articles or services have been delivered to the client, the diligence exercise shifts to monitoring their use to ensure that they are not involved in the commission of serious violations of international human rights or humanitarian law. Along with vigilant attention to the red-flag system, arms exporters can effectively monitor the use of their defense articles and services through client reporting obligations, audits and site inspections, open-source information collection, and stakeholder engagement. While some regulatory authorities engage in their own end-use monitoring, they tend to focus on diversion, rather than misuse.<sup>86</sup> In addition, exporters may have access to information that is unavailable to regulators owing to their close and continuing ties with their clientele.

#### i. Client Reporting Obligations

The client itself is the best source of information on its usage of defense articles and services. As in the context of anti-corruption, establishing affirmative reporting obligations can therefore grant the exporter considerable insight. Reports may be of two varieties: periodic reports and incident reports.

In periodic reports submitted on a quarterly basis, the client should be asked to provide information on, *inter alia*, the use of the defense articles and services during the period, the storage of the defense articles, training provided on the use of the defense articles, policy changes or changes to any information previously disclosed, the status and outcome of investigations into potential diversion or misuse of the defense articles or services, and planned or completed military, intelligence, or law enforcement operations that may involve the defense articles or services.

Additionally, high-risk clients should submit to the exporter an incident report following each use of force involving the subject defense articles or services that results in death or grave bodily harm. All clients should submit an incident report following suspected misuse of the defense articles or services. This report should identify the individuals involved in the use of force along with witnesses, victims, and the individual who prepared the report. It should also state whether the use of force was deemed appropriate by the relevant commander, and, if not, report on the status of the investigation.

#### ii. Audits and Site Inspections

Exporters should engage in active monitoring by conducting periodic audits and site inspections. Audits should include reviews of operational and financial documents and interviews with key client personnel. Exporters should also inspect facilities housing defense articles to ensure

<sup>85</sup> OECD Guidance at 19.

<sup>86</sup> Center for Civilian in Conflict, Security Assistance Monitor, and Stimson, *Demystifying End-Use Monitoring in U.S. Arms Exports* (2021), available at <https://civiliansinconflict.org/wp-content/uploads/2021/09/EUM-Brief.pdf>; American Bar Association Center for Human Rights, *White Paper on Means to Enhance End-Use Monitoring of Exports of Defense Articles and Services* 6 (March 2022), available at [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/chr-eum-white-paper-032022.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-eum-white-paper-032022.pdf).

safe storage and proper maintenance, ideally with little or no advance notice to the client. A written report should be produced following each audit or site inspection.

### iii. Open-Source Information Collection and Stakeholder Engagement

Exporters may keep abreast of relevant developments in the destination country, including political and security dynamics, by closely following news reports and analysis. Trends indicative of instability should be cause for increased focus. Relatedly, exporters may collate information on country conditions disseminated by local civil society organizations, national human rights institutions, and international non-governmental organizations and engage with these actors. Exporters may also choose to rely on external consultants to collect this information.

Where uses of force potentially involving the client or its agents are publicly reported, the exporter should seek to ascertain whether defense articles or services that it provided were used. This may require outreach to journalists, civil society activists, or local community leaders, though the exporter should be cognizant of security considerations and have protection protocols in place. The exporter should form relationships with these stakeholders in advance of an incident and engage in regular exchanges with them.

Moreover, through-life contact points with the client for additional transfers, upgrades, or maintenance present openings for review and discussion of human rights issues. Exporters should make use of these opportunities to raise any due diligence issues with the client and, if needed, withhold goods and services until compliance is restored. This exchange is especially vital because through sustainment exporters may be presented with information unavailable to regulators.

## d. Stage 4: Investigation and Remediation

Upon notification, discovery, or reasonable suspicion of potential misuse, the exporter should immediately take steps to investigate the circumstances and remediate the harm.<sup>87</sup> “Reasonable suspicion of potential misuse” means that an inference of misuse could logically be drawn from a specific set of known facts, even if it is not the most likely inference.<sup>88</sup>

### i. Internal Investigation of Potential Misuse

An investigation should be opened as soon as the exporter actually develops or reasonably should have developed a reasonable suspicion of potential misuse. The goal of the investigation should be twofold. First, the exporter should seek to establish the facts of the incident and the severity of the impact. Second, the exporter must determine whether it substantially contributed to the adverse impact. “Substantial contribution” means non-trivial causation, facilitation, or incentivization of misuse, considering factors such as the nature of the defense articles or services, the foreseeability of their misuse, and the risk prevention and mitigation measures undertaken.<sup>89</sup>

The investigation may be facilitated by an incident report received from the client, but the exporter should seek to corroborate the information provided. In doing so, it may rely on methods such as forensic analysis, witness interviews, and open-source information collection.

Regardless of its findings, the exporter should memorialize the outcome of its investigation in writing and make it public via contextually appropriate media. Before doing so, however, the exporter should consult local laws that could govern the publication of potentially sensitive information and ensure that witnesses will not be put at risk. The exporter should also communicate the mitigation steps it has implemented and publicly report on their effectiveness at regular intervals.

<sup>87</sup> UNGP art. 22; OECD Guidelines at 34.

<sup>88</sup> See *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

<sup>89</sup> OECD Guidance at 70.



## **ii. Contractual Penalties**

If the exporter determines that there is a reasonable likelihood that misuse has occurred, it should immediately notify the client of its intent to activate contractual contingencies, including the cancellation of future deliveries of defense articles and services and the termination of contractual relations. “Reasonable likelihood” means that there is some evidentiary support backing allegations of a specific form of misuse perpetrated by an identifiable group or individual, making it more than merely plausible even if the evidence is significantly less than a preponderance.<sup>90</sup> If the client is able to present exculpatory evidence within a reasonable time period, these penalties may be revoked.

## **iii. Policy and Operations Review and Remediation**

If the exporter determines that there is a reasonable likelihood that it substantially contributed to an adverse impact caused by misuse, it should take appropriate remedial action. While this begins with the contractual penalties described above, it should also encompass a broader review of the exporter’s policies and operations to identify shortcomings in its due diligence procedures and new areas of risk in light of the findings. It should reform its policies and practices accordingly so as to minimize the risk of recurrence.

Depending on the nature and extent of the adverse impact, the exporter may need to offer further forms of remedy to the victims, such as compensation, restitution, rehabilitation, punitive employee sanctions, or a formal apology. The remedy should be designed in consideration of domestic and international standards (including cultural practices), precedent cases, and stakeholder preferences.

## **iv. Cooperation in External Investigations and Fact-Finding**

Upon notification, discovery, or reasonable suspicion of potential misuse, the exporter should immediately report the incident to the appropriate security, regulatory, and judicial authorities. If a police, military, administrative, or judicial inquiry is opened, the exporter should fully cooperate, including by sharing relevant documents and information and by making key staff available for interviews. To the extent practicable, the exporter should also use its leverage to compel the client to participate in these processes.

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<sup>90</sup> Australian Government, *What Does “Reasonable Likelihood” Mean?* (Mar. 21, 2022), available at <https://guides.dss.gov.au/national-redress-guide/3/2/1#:~:text=For%20the%20purposes%20of%20the,is%20more%20than%20merely%20plausible>.



## ■ CONCLUSION

International arms transfers serve a valuable purpose in guaranteeing global peace and security, but can also be put to nefarious uses. In addition to the direct harm to civilian life and welfare, adverse impacts stemming from the misuse of defense articles and services can redound to the exporting company in the form of reputational and financial costs, regulatory risk, and civil or criminal liability. To protect themselves, defense companies should stand up a rigorous due diligence program that features a comprehensive risk assessment, preventive and mitigatory measures, end-use monitoring, and procedures for the investigation and remediation of harm. This Guidance has drawn from numerous authoritative sources in order to model the design for such a program.



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