STUDY

DEMOCRACY AND HUMAN RIGHTS

ARMS TRADE AND CORPORATE RESPONSIBILITY

Liability, Litigation and Legislative Reform

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The defence industry is not living up to its responsibilities under the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Legal analysis shows that arms exports can be challenged in court and that industry representatives and government officials may be criminally liable if arms exports are authorized and then exported to buyers who use the arms in violation of international human rights and humanitarian law.

This study makes recommendations to the defence sector on human rights due diligence, and to states on effective arms export controls that recognize business' human rights responsibilities and enable civil society to act as watchdog over government decision-making and corporate exports, including through legal redress.

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INTRODUCTION

> »We do not [take] account [of] the customer's use of our products. […] We cannot assume responsibility for the utilization of our military equipment.«
>
> Reply by Armin Papperger, CEO Rheinmetall AG, during shareholder meeting 2018 to questions asked by a representative of a Yemeni civil society organization

Arms produced in the European Union (EU) account for a substantial part of the global arms trade. Although these arms are covered by export regulations, they may be used in violations of international humanitarian law, war crimes and individual cases of murder and enforced disappearance. The armed conflict in Yemen is a flagrant example of the latter, as European countries continue to grant licenses for arms exports by European arms manufacturers to members of the Saudi-led coalition, which has reportedly violated international human rights and humanitarian law.

This study therefore asks how such arms exports can be challenged and whether arms manufacturers and exporters, as well as government officials licensing these exports, can be held to account when exported weapons are used to commit or facilitate violations of international human rights and humanitarian law. More precisely, from a prevention perspective, it needs to be asked how such arms exports can be stopped before they happen, while from a remediation perspective, questions of liability need to be answered. We will first address the legal framework applicable to the international trade in arms and military equipment. The fact that arms exports may subsequently be used to commit war crimes, murder and enforced disappearances proves that the regulatory framework is deficient and also that even the positive parts of the existing rules are more honoured in the breach than in the observance (Section 1).

Following the discussion of the legal framework, we shall analyze past and ongoing litigation using administrative law to challenge arms export licenses to find out whether they serve as a means of preventing arms exports. We will demonstrate that some promising decisions by administrative courts have enabled judicial review of export authorizations and point out why other attempts have failed (Section 2.1). In addition, industry representatives and government officials may be criminally liable if – and where – exports were granted and carried out in blatant disregard of the fact that ongoing violations of international human rights and humanitarian law are being committed with the arms exported. An analysis of existing jurisprudence from international and national courts shows that in certain cases criminal responsibility was established. Other cases, however, show shortcomings in criminal law and the administration of justice, among other things, resulting in a lack of scrutiny of the powerful defence industry in such procedures (Section 2.2).

Referring back to the opening quotation, this study further examines the responsibilities of arms manufacturers under the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and the OECD Due Diligence Guidance for Responsible Business Conduct (OECD Guidance). The defence industry too often hides behind government authorizations to avoid responsibility. This is, however, at odds with above standards, according to which business enterprises should respect human rights, should avoid infringing on the human rights of others and should address adverse human rights impacts in situations in which they are involved. We will show that currently the industry is failing to live up to its responsibilities under this business and human rights framework. At the same time, governments are lagging behind in their obligation to review whether their legislation effectively addresses the heightened risk this sector poses. This could be improved by including provisions for human rights due diligence by arms manufacturers in either mandatory human rights due diligence laws or into national or international arms export regulations (Section 3). Finally, we will present our conclusions on individual and corporate liability for arms exports and provide recommendations for an effective arms export control regime that recognizes the human rights responsibilities of business and enables civil society to carry out its role as a watchdog over government decision-making and corporate exports, including by seeking legal redress (Section 4).

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WHAT ARE THE PROBLEMS WITH THE INTERNATIONAL ARMS TRADE?

Arms produced in European countries, including Germany, are an important part of the global arms trade and are being used in violent conflicts all around the world and in the alleged commission of international crimes.

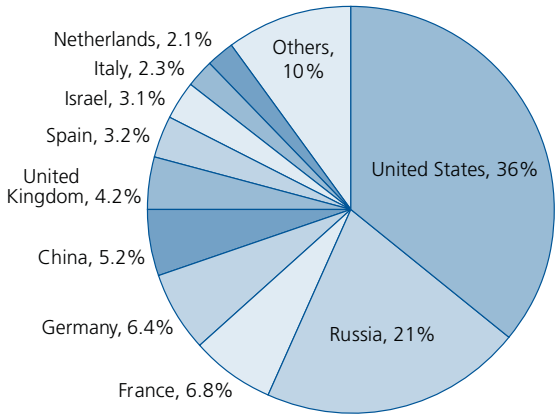
1.1 STATISTICS ON THE GLOBAL ARMS TRADE AND GERMANY'S CONTRIBUTION

Obtaining reliable data on the global arms trade is notoriously difficult, as the trade shrouds itself in obscurity.[1] Information is provided by a number of sources, including national government reports, reports by multilateral governmental institutions, such as the United Nations Register of Conventional Arms (UNROCA) or the EU Annual Report on Arms Exports and by independent research institutions, such as the Stockholm International Peace Research Institute (SIPRI).[2]

Despite its limitations, the data provided by SIPRI is still widely considered the best available.[3] The five largest exporters in 2014–2018 were the United States, Russia, France, Germany and China, as was the case for the period 2009–2013, accounting for approximately 75 per cent of all arms exports.[4] It is to be noted that four other European States – the United Kingdom (sixth), Spain (seventh), Italy (ninth) and the Netherlands (tenth) – are also in the top ten.

According to SIPRI, the combined exports of the top five West European arms-exporting states – France, Germany, the United Kingdom, Spain and Italy – accounted for 23 per cent of the global total over the past five years.[5]

Figure 1
Global share of major arms exports by the ten largest exporters 2014-2018



Source: SIPRI Arms Transfers Database, Mar. 2019.

Looking specifically at Germany, exports between 2014 and 2018 amount to 6.4 per cent of the world's total.[6] More than half of the exports are ships, followed by armoured vehicles (roughly 14 per cent) and aircraft-related products (about 11 per cent) of overall exports.[7] The export of small arms and light weapons (SALW) has also been on the rise in the past three years, with licenses worth roughly €48 million granted in 2017. Of those licenses, 31 per cent were for exports to so-called third states, meaning those that are not in the EU, NATO or NATO equivalent states.[8] As of 2018 there seems to have been a change in the distribution of exported SALW among different countries. According to the German government's official report on arms exports for 2018, export licences were granted for small arms with a total value of €38.91 million. In 2018, however, only €0.4 million's worth were destined for third countries.[9] Whether

1 Sam Perlo Freeman (2019), »How big is the international arms trade?«, research paper, World Peace Foundation, 19 July; https://sites.tufts.edu/wpf/files/2018/08/How-big-is-the-International-Arms-Trade-20180725-f.pdf

2 Ibid. The reports produced by these institutions vary according to the products included in the reporting, the type of activity reported (licenses, actual contracts or physical deliveries) and the sources and methodologies used.

3 Analyzing the official critique, Gemeinsame Konferenz Kirche und Entwicklung (GKKE), Rüstungsexportbericht 2010, GKKE-Fachgruppe Rüstungsexporte, pp. 34 et seq.; On the methodology used by SIPRI: https://sipri.org/databases/armstransfers/background

4 SIPRI, Trends in International Arms Transfers 2018, SIPRI Fact Sheet, March 2019, p. 2; https://www.sipri.org/sites/default/files/2019-03/fs_1903_at_2018.pdf

5 Ibid, p. 5. French arms exports to the Middle East rose by 261 per cent, while German, Italian and British exports grew by 125, 75 and 30 per cent, respectively compared with 2009–2013.

6 SIPRI, Trends in International Arms Transfers, p. 2.

7 SIPRI, Arms Transfers Database, Exporter TIV table for Germany 2014–2018; http://armstrade.sipri.org/armstrade/page/values.php

8 GKKE, Rüstungsexportbericht 2018, p. 57.

9 Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2018, p. 21.

this trend is maintained or can be considered an outlier, remains to be seen.

1.2 WHICH EXPORTS ARE ALLOWED UNDER (INTER)NATIONAL ARMS EXPORT CONTROL LAWS?

The export of arms and military equipment from Europe is regulated by a number of legal norms on the international, European and national levels, which will be dealt with below to provide the necessary background against which the legality of ongoing arms exports can be assessed.

The Arms Trade Treaty

Since its entry into force on 24 December 2014, the Arms Trade Treaty represents the first international legally binding instrument regulating the transfer of conventional arms.[10] The Treaty makes States Parties responsible for implementing these obligations under domestic law.[11] It expressly incorporates respect for human rights and international humanitarian law as a precondition for international trade in arms. This is reflected in Article 6(3), which prohibits any transfer of conventional arms when the State Party has knowledge, at the time of authorization, that the arms would be used in, among other things, the commission of grave breaches of the Geneva Convention of 1949, attacks civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.[12] If an export is not ruled out by Article 6's absolute prohibition, Article 7 of the Arms Trade Treaty stipulates that the exporting State must still assess »in an objective and non-discriminatory way« the »potential« that the arms:

a) would contribute to or undermine peace and security;
b) could be used to:
   (i) commit or facilitate a serious violation of international humanitarian law;
   (ii) commit or facilitate a serious violation of international human rights law.

If, after conducting this assessment and considering the available mitigating measures the State Party determines that there is an overriding risk of such negative consequences, the State Party shall also not authorize the export.[13] Article 7(4) of the Arms Trade Treaty further requires that the exporting State Party assess the risk of the exported goods being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women or children.

It is important to underscore that (risk) assessments required by the Arms Trade Treaty assess just that, namely the *risk* that the arms in question will be used in any of the ways prohibited by the Treaty.[14] It is not necessary to establish that a particular transferred item has been used in a specific act in order to prevent future transfers of the same item. If the risk alone is high enough, the transfer must be denied. However, overriding risk is not defined in the Arms Trade Treaty, which creates the need for a subjective assessment by States and therefore a high degree of discretion when carrying out risk assessments. This has led to export decisions among European countries that contradict each other in cases where the end-user is the same and the type of weaponry comparable. This state of affairs calls into question the effectiveness of the Arms Trade Treaty and the adequacy of its provisions.

The EU Common Position on Governing Control of Exports of Military Equipment

At the level of the European Union, Council Common Position 2008/944/CFSP of 8 December 2008 defines common rules governing control of exports of military technology and equipment (EU Common Position) and sets minimum standards, which should be complied with for the restriction and management of transfers of military technology and equipment.[15] The EU Common Position is binding for the Member States, which shall ensure that their national policies conform with it and requires Member States to assess arms export license applications against eight criteria.[16] Criterion 2 deals with respect for human rights in the country of final destination, as well as respect by that country of international humanitarian law. It provides that »having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

a) deny an export license if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

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10 The Arms Trade Treaty was adopted by the United Nations General Assembly on 2 April 2013.

11 Article 14 Arms Trade Treaty.

12 Article 6.3 Arms Trade Treaty; https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf

13 Article 7.3 of the Arms Trade Treaty. The term »overriding risk« in Article 7.3 Arms Trade Treaty is problematic as it is undefined and is not a concept used in international law. On the interpretation of Article 7, including the undefined »overriding risk« see P. Sands, A. Clapham and B. Ghrálaigh, The Lawfulness of the Authorization by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen, Legal Opinion, paras. 5.32–5.49.

14 It has to be noted that Article 6(3) Arms Trade Treaty does not contain an explicit risk element as incorporated in Article 7(3). The wording in Article 6(3) Arms Trade Treaty, which provides for an absolute prohibition, is »has knowledge« that it »would be used«. The Arms Trade Treaty does not provide any further guidance on how this »knowledge« requirement should be interpreted. However, based on jurisprudence from the International Court of Justice, a standard of »normally have been aware« could be used. See also Legal Opinion by Matrix Chambers on the Lawfulness of the Authorization by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen, 11 December 2015; https://www.amnesty.org.uk/files/webfm/Documents/issues/legal_opinion_on_saudi_arms_exports_16_december_2015_correction.pdf

15 EU Common Position, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0944. On 16 September 2019 the Council of the European Union adopted a decision amending the EU Common Position. In relation to criterion 2 no major changes were inserted, apart from a reference to the Member States' obligations under the Arms Trade Treaty.

16 Article 15 EU Treaty until the changes made by the Treaty of Lisbon.

b) exercise special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe; and
c) deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.«

The EU Common Position is complemented by the so-called User's Guide, a set of recommendations intended to guide the interpretation and implementation of the EU Common Position.[17] On criterion 2, the User's Guide suggests that Member States should ask the following questions to assess the risk of serious violations of international humanitarian law:

– Have violations been committed by any actor for which the State is responsible (including the armed forces)?
– Has the recipient country failed to take action to prevent and suppress violations committed by its nationals or to investigate violations allegedly committed by its nationals?
– Where the answer to these questions is negative, strong indications speak against the granting of a license.

Importantly, criterion 5 adds that consideration of defence and security interests »cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability«. Despite a higher level of concreteness, the User's Guide remains a recommendation and until today the EU Common Position, taken together with the User's Guide, has not been effective in guaranteeing consistent licensing decisions among Member States of the European Union.

Germany's arms export control laws

Germany's arms export control is based on the German War Weapons Control Act, *Kriegswaffenkontrollgesetz* (KrWaffKontrG) and the *Außenwirtschaftsgesetz* (Foreign Trade Law), which need to be read in conjunction with the Political Principles of the Government of the Federal Republic of Germany for the Export of War Weapons and Other Military Equipment.

According to §6(3) KrWaffKontrG a license shall not be granted when there is the risk that the arms will be used for activities endangering international peace or when there is reason to believe that the license would infringe Germany's existing public international law obligations. In its submission to the Arms Trade Treaty Baseline Assessment Project, Germany outlined that the preservation of human rights is of particular importance for every export decision, irrespective of the envisaged recipient country. Military equipment exports are therefore not approved where there is »sufficient suspicion« of misuse of the military equipment for internal repression or other ongoing and systematic violations of human rights.[18] Germany thus incorporates the Arms Trade Treaty and the EU Common Position through its reliance in §6(3) KrWaffKontrG on respect for public international law. The eight criteria of the EU Common Position are, however, only explicitly referenced in the non-binding political principles. In June 2019, the German government adopted an updated version of these political principles. Although still non-binding, they clearly state as a general principle that the human rights situation in the recipient country is given special weight in export decisions.[19] Further, in March 2015, Germany adopted its »Small Arms Principles« governing the export of small arms and light weapons, corresponding ammunition and production equipment to third countries. However, similar to the political principles, these are not formally binding.

1.3 SOMETHING TO ACCOUNT FOR? THE INDUSTRY'S DISREGARD FOR INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

One of the current conflicts in which the effects of European/German produced and exported arms are most apparent is the ongoing war in Yemen. Since the launch of »Operation Decisive Storm« on 26 March 2015 several countries, under the leadership of Saudi Arabia, have been waging war in Yemen to restore the exiled President Hadi to power (Saudi-led coalition). For four and a half years, airstrikes, a de facto naval and aerial blockade and attacks on civilians and civilian infrastructure in Yemen have led to a humanitarian crisis on an unprecedented scale. Reports by the UN and NGOs indicate that certain coalition airstrikes potentially constitute violations of international humanitarian law.[20] For instance, the 2016 UN Panel of Experts report on Yemen contains incidents including attacks against camps for internally displaced persons and refugees, civilian gatherings and civilian objects – medical facilities, schools, mosques, markets and other essential civilian infrastructure.[21] The latest 2018 UN

17 Council of the European Union, COARM 172 CFSP/PESC 393, User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, as endorsed by the Council on 20 July 2015.

18 The Impact of Germany's Arms Transfers on Women, Germany's Extraterritorial Obligations under CEDAW, Joint Shadow Report to CEDAW Committee, 66th Session by WILPF and ECCHR, p. 4.

19 Politische Grundsätze der Bundesregierung für den Export von Kriegswaffen und sonstigen Rüstungsgütern, 26.06.2019; https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2019/20190626-bundesregierung-beschliesst-politische-grundsaetze-fuer-ruestungsexporte.html

20 UN Security Council of Experts on Yemen, Final report of the Panel Experts on Yemen pursuant Security Council Resolution 2140 (2016), UN DOC S/2016/73 at 35, 152–166; Human Rights Watch, »Hiding behind the Coalition«; https://www.hrw.org/report/2018/08/24/hiding-behind-coalition/failure-credibly-investigate-and-provide-redress-unlawful (accessed on 24 June 2019).

21 UN Security Council of Experts on Yemen, Final report of the Panel Experts on Yemen pursuant Security Council Resolution 2140 (2016), UN DOC S/2016/73 at 35, 152–166.

Panel of Expert report on Yemen similarly concludes, »[t]here have been widespread violations of international humanitarian law (…) The coalition airstrikes (…) continued to disproportionally affect civilians and civilian infrastructure.«[22] It is reported that as of June 2018, coalition airstrikes have been responsible for at least 4,300 deaths.[23]

Nevertheless, countries in the Middle East, which form part of the Saudi-led coalition fighting the war in Yemen, are among the top recipients of global arms exports, led by Saudi Arabia, with a share of 12 per cent of all imports, Egypt, with a share of 5.1 per cent and the United Arab Emirates (UAE), with a share of 3.7 per cent.[24] Also, exports from Germany had a strong focus on states in the Middle East, with Egypt, Saudi Arabia and the UAE among the top eight importers of German weapons in 2017[25] and Saudi Arabia again in fourth place in 2018.[26] Over the course of the past four and a half years, exports of weapons of high relevance to the actual warfare in Yemen were thus licensed and subsequently carried out to those states. The war materiel includes the Eurofighter Typhoon, an important component of the Saudi-led coalition's air force that carries out the airstrikes, as well as war vessels, refuelling planes, missiles and bombs. [27] Investigative journalists have documented clear evidence of the use of such materiel in the war in Yemen, such as the French produced Mirage fighter jets and CAESAR howitzers,[28] and German-made components for the Tornado fighter jet.[29]

Many of these products are the result of joint European projects. For example, the manufacture of the Eurofighter Typhoon fighter jet relies on government cooperation between four European partner nations (Germany, Spain, Italy and the United Kingdom). On the industry side, one company from each country, BAE Systems Plc. (United Kingdom) (33 per cent), Airbus Defence and Space GmbH (Germany) (33 per cent), Airbus Defence and Space S.A. (Spain) (13 per cent) and Leonardo S.p.A. (Italy) (21 per cent)[30] contributes parts to the end-product, each relying on a high number of sub-contracted companies.

Because of the increasing quantity of publicly available information on war crimes committed in the Yemen conflict, some European governments have officially suspended all exports to Saudi Arabia, while others continue to grant export licenses, ignoring overwhelming evidence of violations of international humanitarian law. In January 2018, the CDU/CSU and SPD, in their Coalition agreement to form a new German government, agreed to try to call a halt to approvals of arms exports to any country directly participating in the war in Yemen.[31] However, the Federal government did not fully implement this approach.[32] Only on 19 November 2018, in the aftermath of the murder of journalist Jamal Khashoggi, did the German government publicly renounce granting any further licenses for exports to Saudi Arabia and committed itself to using its leverage to influence already existing license holders not to deliver products to Saudi Arabia.[33] The German government has extended this position three times since then, most recently on 17 September 2019 for a period of another six months.[34] It highlighted, however, that deliveries based on collective licenses related to joint European production programmes are allowed until 31 December 2019, even if the final destination is Saudi Arabia or the UAE. The government is only required to carry out consultations with its European partners to avoid the use of joint products in the war in Yemen and the industry is obliged to contractually ensure that its business partners do not export the final products to Saudi Arabia or the UAE.[35]

Also in relation to trade in small arms and light weapons, practice differs from what is preached. Despite increasing assurances by the German government that the export of such weapons to third states should be more restrictive[36] licenses have been granted for exports to countries where, for instance, the employment of child soldiers is well documented,[37] as criticized by international institutions such as

22 Final report of the Panel of Experts on Yemen, Final report of the Panel of Experts on Yemen, UN Doc. S/2019/83, p. 4.

23 UN Human Rights Council, »Situation of Human Rights in Yemen, including Violations and Abuses since September 2014«, Report of the United Nations High Commissioner for Human Rights (17 August 2018) at 3 (annex IV).

24 SIPRI, Trends in International Arms Transfers, p. 6.

25 Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2017, pp. 73–74.

26 Bericht der Bundesregierung über ihre Exportpolitik für konventionelle Rüstungsgüter im Jahre 2018, p. 72.

27 Marius Bales and Max M. Mutschler (2019), Einsatz deutscher Rüstungstechnik im Jemen – Für ein umfassendes Waffenembargo gegen die Kriegskoalition, BICC Policy Brief 2/2019, 25 February 2019; https://www.bicc.de/uploads/tx_bicctools/BICC_Policy_Brief_2_2019_d.pdf

28 The war in Yemen: France's hidden role in a vast humanitarian tragedy, authors: Disclose, published 15 April 2019; www.mediapart.fr

29 Recherchebündnis deckt deutsche Rüstungsexporte im Jemen auf, Der Stern, 26 February, 2019, https://www.stern.de/politik/deutschland/-germanarms--recherchebuendnis-deckt-deutsche-ruestungsexporte-im-jemen-auf-8597032.html

30 https://www.eurofighter.com/about-us

31 Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land, Koalitionsvertrag zwischen CDU, CSU und SPD 19. Legislaturperiode, see p. 149; https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1

32 https://www.ohne-ruestung-leben.de/nachrichten/article/deutscher-ruestungsexport-zahlen-erstes-halbjahr-2018-trendwende-in-sicht-252.html; http://www.aufschrei-waffenhandel.de/daten-fakten/informationen/#c10507

33 Answer of the Federal government to the parliamentary question put by Sevim Dagdelen MP et al. and DIE LINKE, Bundestagsdrucksache 19/7800, 8 February 2019.

34 »German government extends arms export moratorium for Saudi Arabia«, Reuters 18.09.2019; https://in.reuters.com/article/germany-arms-saudi-ban/german-government-extends-arms-export-moratorium-for-saudi-arabia-idINKBN1W31OX (official text not yet available).

35 Federal government of Germany, Verständigung der Bundesregierung zu Ruhensanordnungen und Gemeinschaftsprogrammen, press release 99, 28 March 2019.

36 Grundsätze der Bundesregierung für die Ausfuhrgenehmigungspolitik bei der Lieferung von kleinen und leichten Waffen, dazugehöriger Munition und entsprechender Herstellungsausrüstung, May 2015. https://www.bmwi.de/Redaktion/DE/Downloads/G/grundsaetze-der-bundesregierung-fuer-die-ausfuhrgenehmigungspolitik-bei-der-lieferung-von-kleinen-und-leichten-waffen.pdf?__blob=publicationFile&v=3

37 C. Steinmetz (2017), Deutsche Rüstungsexporte und Kindersoldaten – Kleinwaffen in Kinderhänden, February 2017.

the Committee for the Rights of the Child,[38] or where gender-based violence is widespread.[39] Probably as a result of such outside pressure, the Coalition Agreement foresees that licenses for the export of small arms to third countries are in principle no longer granted as of 2018.[40] This wording has also been included in the recently updated Political Principles of the German government. Yet, in both cases, »in principle« does not mean that no small arms and light weapons at all are exported. Quite the contrary, exceptions are inherent in the formulation. The Coalition Agreement, however, only represents the good intentions of the two governing parties and also the Political Principles are not binding legislation, thus resulting in demands by German civil society and parliamentarians to adopt new comprehensive arms export control legislation instead. [41]

The German industry, however, has already found another way to continue selling these products to third states, even if exports from Germany are ruled out. Small arms producers Heckler & Koch and Sig Sauer have extended their production sites to other countries, from which small arms are exported to third countries for which they would not get a license in Germany.[42] The use of arms produced by both companies has been documented in various places and in relation to egregious crimes such as murder and enforced disappearances.[43] This diversification of company structures in the small arms and light weapons sector is mirrored by other defence companies engaged in the production of major conventional arms. For example, by German Rheinmetall AG, most worryingly in relation to the ongoing conflict in Yemen.

38 Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Germany, 25 February 2014, UN-Doc. CRC/C/DEU/CO/3-4, para. 77; Committee on the Rights of the Child, UN-Doc. CRC/C/OPA/DEU/CO/1, 1 February 2008, concluding observations: Germany, paras. 22-23.

39 ECCHR & WILPF Submission to CEDAW

40 The coalition agreement concluded by the ruling parties the CDU and the SPD provides for the following statement on the export of SALW: in addition to the political guidelines for small arms exports of May 2015 no small arms shall, in principle, be exported to third countries (translation by the authors), Koalitionsvertrag, Kapitel XII, 3, For a more restrictiver export policy.

41 Antrag die Linke und Bündnis 90/ die Grünen, Genehmigungspflicht für die technische Unterstützung von Rüstungsproduktion im Ausland einführen, BT-Drs. 19/2697; Antrag der Fraktion Bündnis 90/die Grünen, Ein Rüstungsexportkontrollgesetz endlich vorlegen, Deutscher Bundestag, Drucksache 19/1849. The draft bill has been rejected by now, see protocol of debate and vote in the German parliament, Plenary Protocol 19/62. Current situation:https://www.bmwi.de/Redaktion/DE/Dossier/ruestungsexportkontrolle.html. In January 2016 the Ministry for Economic Affairs announced that it would to set up a commission of experts for a new and single harmonized law on arms export control. This has been watered down to a consultation process about the future of arms export control that has not led to any tangible results on the reduction and harmonization of the existing rules.

42 Carlos A. Pérez-Ricart and Lotta Ramhorst, Deutsche Waffen made in USA – Die strategische Produktionsverlagerung von Klein- und Leichtwaffen in die USA, Informationsstelle Militarisierung e.V. Ausdruck Dezember 6/2018; Jürgen Grässlin, Daniel Harrich, Danuta Harrich-Zandberg, Netzwerk des Todes, 2015, p]. 48–55.

43 For Heckler & Koch see, for example: Carlos A. Pérez Ricart, »Deutsche Waffen in Mexiko: Der Fall des Exports von Heckler & Koch G36 Gewehren nach Mexiko«, México vá Berlín, No. 002 January 2014.

Rheinmetall AG holds 51 per cent of the shares of the South African company Rheinmetall Denel Munitions (RDM).[44] In its South African production sites various types of bombs, ammunition and missiles are manufactured, including bombs in the MK-80 Series. One of the main customers of RDM is the UAE. Rheinmetall also produces bombs in the same series through its subsidiary in Italy, RWM Italia S.p.A., which exports these bombs to members of the Saudi-led coalition. Their use in the war in Yemen has been confirmed.[45]

1.4 INTERIM CONCLUSION: THE REGULATORY LANDSCAPE AND ITS (LIMITED) IMPACT ON THE PROHIBITION OF PROBLEMATIC ARMS EXPORTS

Authorization practice by EU Member States over recent years, especially in relation to arms exports to members of the Saudi-led coalition involved in the conflict in Yemen, shows worrying differences among national licensing practices. For the time being, the regulatory landscape both at the international and the national level have not led government authorities to systematically and coherently rule out authorizations of arms exports where there is a risk of their subsequent use for violations of international human rights or humanitarian law. Similarly, the arms industry seems to have failed to consider human rights and humanitarian law standards when doing business. This indicates both a lack of sufficiently concrete regulatory guidance, as well as a troubling divergence from even the positive elements of the standards set by the EU Common Position and the Arms Trade Treaty. This assessment does not change when analyzing exports against the German regulatory control framework. Both direct individual exports and exports based on joint projects, raise serious doubts about their compliance with arms export control regulations, which prohibit export where there is knowledge or a clear risk that the weapons will be used in the commission of war crimes or violations of international humanitarian law. Thus, despite the regulatory commitments to respect international human rights and humanitarian law, economic and geopolitical considerations seem to prevail when licensing decisions are taken. Therefore, it can be asked whether past and ongoing litigation activities have managed to secure the promised respect for international human rights and humanitarian law and preventively stopped exports or established liability where exports have already been carried out.

44 Rheinmetall Group, Geschäftsbericht 2017, Konzernanhang – Anteilsbesitz, p. 202.

45 Otfried Nassauer, Hemmungslos in alle Welt, Die Munitionsexporte der Rheinmetall AG, Berliner Informationszentrum für Transatlantische Sicherheit, October 2016, p. 15.

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LITIGATING ARMS EXPORTS

Litigation can serve to enforce existing rules for arms exports. It can challenge both government licensing practices that are allegedly in violation of domestic or international rules established to guide licensing decisions, and the actual production and export of defence materiel by manufacturing companies. To challenge licensing decisions, proceedings brought before administrative courts allow for a review of the licensing decision that may lead to a suspension or revocation of granted licenses (Section 2.1). On the other hand, where exports have already taken place, criminal proceedings may serve to assess the criminal liability of those involved in the authorization or export of weapons subsequently used to commit or facilitate violations of international human rights and humanitarian law (Section 2.2). Both litigation approaches ultimately serve to implement existing rules and hinder further violations of human rights and international humanitarian law by the end-user.

2.1 CHALLENGING EXPORT LICENSES IN ADMINISTRATIVE COURTS

Various administrative proceedings against licenses have taken place throughout Europe in recent years. Despite all the differences between, notably, the common law and continental legal systems, to challenge export authorizations an administrative court must have jurisdiction and the person or organization who brings the case must have legal standing. Furthermore, access to information concerning licenses and documents related to decision-making is important for the success of these cases as it makes it possible to determine whether the required risk assessments were made in compliance with the applicable arms export control laws. Based on concluded and ongoing litigation before administrative courts, we will demonstrate the conditions under which courts have enabled judicial review of export authorizations and suspended extant licenses, and why other cases were unsuccessful. Due to the limited number of existing cases, these lessons are necessarily preliminary.

2.1.1 Jurisdiction

For a complaint to be considered, the administrative court must have jurisdiction. In an ongoing French proceeding filed by NGO Aser in May 2018 the French government argues that the court has no jurisdiction over the case. According to the government the decision to provide a license is an *acte de government* and as such part and parcel of France's foreign policy. This means, according to the government, that the administrative court is not competent to hear decisions that are not severable from the conduct of France's international relations.[46] The plaintiff argued, however, that a right to recourse is warranted based on, among other things, the European Convention on Human Rights.[47] This case shows how governments exploit the discretion seemingly granted for arms export decisions to avoid judicial scrutiny. While the Tribunal Administratif de Paris agreed with the argument of the NGO and considered the licensing decision as not inherently linked to French foreign policy, thereby accepting its jurisdiction,[48] the Court of Appeal (Cour Administrative d'Appel de Paris) concurred with the defendant and considered the licensing decision an *acte de government* that is not detachable from French foreign policy and thereby exempt from judicial scrutiny.[49]

2.1.2 Legal Standing

Besides jurisdiction, legal standing is also needed to challenge a decision to grant a license. This is a procedural law question that governs who can object to the decision to grant the license. In Europe, there are different regimes that allow access to courts. In certain countries, non-governmental organizations are also accepted as claimants, while in others only those directly affected by the export and use of weapons are admitted.

The United Kingdom ranks among the countries in the first category. The Campaign Against Arms Trade (CAAT), as a NGO, had legal standing before the UK administrative court to challenge the decision of the UK government to grant licenses.[50] The same goes for Belgium, where the NGOs Coordination Nationale d'Action pour La Paix et la Démocratie

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46 Mémoire en Défense by the Secretary General of Defence and National Security, 23 November 2018, at 2.

47 Mémoire en Replique dated 25 January 2018, at 10.

48 Tribunal Administratif de Paris, Case N° 1807203/6-2, Decision of 8 July 2019, para. 3.

49 Cour Administrative d'Appel de Paris, Case N°. 19PA02929, Ordonnance du 26 septembre 2019.

50 Judgement of the High Court of Justice, Administrative Court, Case No: CO/1306/2016, dated 10 July 2017.

and Ligue des Droits de l'Homme had legal standing to challenge the arms export licenses granted by the Walloon government.[51]

In the Netherlands, however, the administrative court found the NGOs Pax, Stop Wapenhandel and PILP-NJCM inadmissible as they were not directly affected by the license, a requirement under Dutch customs legislation.[52] Also in Spain, the associations that filed an administrative complaint requesting the annulment of the decision by the Spanish Secretary of State for Commerce to authorize the export of arms to Morocco because of the conflict in Western Sahara, were not found to be »interested parties« under the applicable Spanish law.[53] According to the court the mere fact that the plaintiffs have among their purposes the defence of human rights does not automatically confer on them an interest within the meaning of Article 31 Law 30/1992 for the purpose of intervening and granting them a hearing to formulate allegations.[54] Also in Germany direct affectedness is required to address administrative courts to challenge a licensing decision. On the other hand, petitioners in Germany may rely on their fundamental rights to argue that they are directly affected. In the case of *Faisal bin Ali Jaber and others v the Federal Republic of Germany,* the German Higher Administrative Court found that Yemeni plaintiffs affected by drone strikes carried out through the use of a military airbase in Germany had legal standing due to the German State's failure to protect their right to life.[55]

The question of legal standing is thus of great importance. Arguing for the direct affectedness of those confronted by the use of the weapons is one, albeit very demanding, option to instigate judicial review of a licensing decision. Naturally, where domestic laws allow NGOs to challenge administrative decisions, judicial review is much easier to obtain.

2.1.3 Access to Information as a Prerequisite for Effectively Reviewing Licensing Decisions

Having the appropriate information to sustain an administrative challenge has a strong impact on a petitioner's chance of successfully engaging the courts against export licenses. In Europe, the aforementioned lack of transparency and access to documents in relation to export authorizations severely limits the possibilities of bringing a complaint against a license.

In Spain a request by Spanish NGO Justicia de Pau to obtain copies of licenses for arms exports and copies of the mandatory and binding reports in relation to the licenses issued by the Interministerial Regulatory Board for Foreign Trade in Defence and Dual-Use Equipment was dismissed by the court.[56] The court found that the licenses and the reports were legally protected as »secret« in accordance with the Law on Official Secrets.[57] Following this approach it is difficult to know what and when licenses have been granted. Cases may fail because of this lack of information. In France, in currently pending proceedings, the plaintiffs argued exactly that. They asked for declassification and presentation of, among other things, the licenses granted for arms exports to Saudi-led coalition members, as well as the deliberations and advice of the inter-ministerial commission for the study of exports of war materiel relating to those licenses.[58] According to the plaintiff, without this access there is no possibility for civil society to challenge export decisions that may not be in accordance with the Arms Trade Treaty and the EU Common Position, potentially resulting in the use of exported arms to commit violations of international human rights law and IHL.[59] In the Netherlands lack of information has already led to lost proceedings. The Court of Appeal decided that the license that was being challenged by the NGOs had expired and as a result the procedure was no longer of use,[60] a fact the NGOs could not have foreseen due to a lack of information in the first place.

But some courts have opted for a compromise respecting both the government's interest in secrecy as well as petitioners' legitimate expectations of judicial review. In proceedings in Belgium the applicants filed a request of access to the administrative file, as they had access only to registration numbers and date of adoption of the license. The court maintained the confidentiality of the documents, but requested that the government provide the applicants with accurate information on the nature of the goods covered by the licenses.[61] Following the judgment the NGO, La Ligue de droits humains again requested access to copies of the authorizations of arms exports to Saudi Arabia. This request was even-

51 Conseil D'État, Section Du Contentieux Administratif N° 242.029 of 29 June 2018.

52 Ibid, at. 4 and https://pilpnjcm.nl/en/dossiers/arms-trade-and-human-rights/

53 The associations had recognized in their statutes the purpose of ensuring respect for human rights and the promotion of peace. Some developed specific activities in relation to Western Sahara, which they alleged is territory that Morocco occupies illegally thanks to military and police intervention, for which weapons are essential. See Judgment Sala de lo Contencioso-Administrativo Madrid, nr 03440/2010 of 13 March 2013.

54 Ibid, at 9.

55 Yemeni plaintiffs assisted by the European Center for Constitutional and Human Rights and NGO Reprieve filed a complaint against the Federal Republic of Germany to prohibit the use of the Ramstein air base by the United States for armed drone operations. They argued that they had legal standing as they were directly affected, living in an area in Yemen hit by drone strikes. In March 2019, the Higher Administrative Court found that the German State has a positive constitutional obligation to protect the fundamental right to life also in cases of foreign threats to the right to life, if there is a sufficiently close relationship to the German State. See https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_press_release_19_March_2019_EN.pdf and https://www.ecchr.eu/fileadmin/Juristische_Dokumente/OVG_Muenster_oral_declaration_of_judgment_19_March_2019_EN.pdf. The written judgment will be published later in 2019.

56 Tribunal Superior de Justicia Madrid, 00369/2010 of 31 March 2010.

57 *Ibid*, at 4.

58 Requête Sommaire dated 7 May 2018, at 11.

59 *Ibid*, at 12.

60 Gerechtshof Amsterdam, 24 January 2017, ECLI:NL:GHAMS:2017:165, at. 5.1-5.4.

61 Conseil D'État, Section Du Contentieux Administratif, n° 242023 of 29 June 2018, pp. 14 and 21.

tually granted, subject to the concealment of information relating to business secrecy or that may affect the international relations of the region.[62] The problem of secrecy was also solved in recently concluded proceedings in the United Kingdom. Due to the nature and classified status of some of the evidence the Secretary of State relied on, closed proceedings were warranted by the court in addition to open proceedings. As a consequence, neither the applicants themselves nor their barristers were allowed to be present at the former or see the material discussed, only their special advocates. Nevertheless, proceedings were possible and led to a successful review of the licensing decision.[63]

2.1.4 Reviewing the Licensing Decision

Once the procedural hurdles of jurisdiction and legal standing are overcome the main question is whether a government body's decision to authorize the license complies with domestic law, the EU Common Position and the Arms Trade Treaty. Here, differences tend to be between the respective jurisdictions. However, even where a high degree of discretion is granted to the authorities, manifest failures of rational decision-making may lead to the suspension or revocation of the decision in all jurisdictions.

Rationality and completeness of risk assessment

In Belgium, NGOs have filed administrative complaints requesting suspension of the execution and annulment of several licensing decisions of October 2017 by the Minister-President of the Walloon region for the export of weapons to Saudi Arabia. Eventually, a total of six licenses were suspended and eight were annulled by the court as it found that the government did not properly assess the criteria of the EU Common Position as incorporated in Belgian legislation.[64] The court found that, in compliance with criterion 4, common to both the EU CP and the applicable Walloon legislation, a proper assessment had been made examining the risk that peace, security and regional stability may be threatened. But the government failed to assess the remaining criteria; in particular, it remained silent on criterion 6, concerning the buyer's attitude towards the international community, terrorism and respect for public international law. It is under this heading that the competent authority would have had to examine past practice with regard to the recipient country when it comes to its respect for, among other things, international humanitarian law. The court held that, given the lack of such an assessment, the decision clearly violated existing regulations and the licenses needed to be suspended and annulled, respectively.[65]

In a proceeding in the United Kingdom, initiated by the NGO CAAT, a comparable decision by the Secretary of State to authorize exports to Saudi Arabia was scrutinized. The plaintiff relied on criterion 2c of the UK Consolidated Criteria, essentially similar to criterion 2 of the EU Common Position, on respect for international human rights and humanitarian law. The plaintiff argued that the licenses for exports to Saudi Arabia needed to be suspended in light of the numerous reports by the UN and NGOs that documented violations of international humanitarian law committed by the Saudi-led coalition in Yemen. The Court of Appeal first determined that it needed to analyze whether the government had erred in applying the law. In the particular case, which went deeply into the responsibility and expertise of the executive branch, this meant that the standard of review is not an appeal against the government decision on the merits. Instead, its analysis is restricted to the sole question of whether the government decision was irrational.[66] According to existing jurisprudence the Court thus had to verify whether the decision-maker had taken reasonable steps to acquaint himself with the relevant information in order to make the risk assessment required by criterion 2c.[67] The Court of Appeal concluded that to do so the government had to answer the question of whether there was a historical pattern of international humanitarian law breaches committed by the coalition, and Saudi Arabia in particular.[68] Based on the documentation provided by the government, however, this was not the case. On the contrary, the government even claimed that assessing the legality of Saudi Arabia's conduct in relation to international humanitarian law would have been inappropriate. This position was rejected by the Court of Appeal, which highlighted the inadequacy of this approach in view of the explicit requirements established by the EU Common Position and ultimately suspended extant licenses.[69]

Interplay between domestic and international law

Several ongoing and past proceedings have attempted to establish judicial review of licensing decisions, taking into account not only the directly applicable domestic law but also the EU Common Position or the Arms Trade Treaty. In a proceeding in France the applicant has asked the court to order the Prime Minister to suspend export licenses for exports to Saudi-led coalition members.[70] The plaintiff argues that by granting licenses, and not revoking them, France is acting in violation of Art. 6(3) and Art. 7(7)[71] Arms Trade Treaty.[72] The

62 Commission D'Accès Aux Documents Administratifs, Séance du 15 July 2019, Avis n°304.

63 See Section 4, Rationality and Completeness of Risk Assessments.

64 See judgments Conseil D'État, Section Du Contentieux Administratif N° 242.029 of 29 June 2018, Conseil D'État, Section Du Contentieux Administratif, n° 242023 of 29 June 2018, Conseil D'État, Section Du Contentieux Administratif, n° 242025 of 29 June 2018, and Conseil D'État, Section Du Contentieux Administratif, n°. 242.030 of 29 June 2018; Conseil d'État, Section du Contentieux Administrativ, XVe Chambre, n°. 244.804 of 14 June 2019, which is one of the five judgments issued that day on the matter.

65 Ibid.

66 Court of Appeal, Civil Division, The Queen on the application of Campaign against Arms Trade and The Secretary of State for International Trade, Case No; T3/2017/2079, Judgment of 20 June 2019, para. 54.

67 Ibid, Para. 56–58.

68 Ibid, Para. 138.

69 Ibid, Paras. 138–142. The Appeals Court overturned a prior judgment by the High Court in the same matter: High Court of Justice, Queen's Bench Division, [2017] EWHC 1726 (Admin).

70 Requête Sommaire dated 7 May 2018, at 8.

71 Article 7(7) Arms Trade Treaty stipulates: »If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.«

72 Requête Sommaire dated 7 May 2018, at 9.

government, on the other hand, argues that Articles 6 and 7 Arms Trade Treaty have no direct effect on individuals.[73] In addition, according to the government these provisions do not impose an obligation on France to suspend an authorization to export arms in the event of violations of international humanitarian law.[74] The French administrative court sided with the government and ruled out the possibility of relying directly on the EU Common Position or the Arms Trade Treaty. In its view, these rules apply only between states and not directly in French domestic law. Based on this assessment, among other reasons, the administrative challenge was rejected.[75]

In a case in the Netherlands the plaintiffs argued that the decision by the government of the Netherlands to grant a license for arms exports to the Egyptian navy was unsubstantiated and ill-reasoned as the requisite assessment under Articles 6 and 7 Arms Trade Treaty and Articles 2(2)(3)(4) and (8) of the EU Common Position had not been carried out properly.[76] But because the plaintiffs were found to be inadmissible the Dutch Court did not answer the question.

These cases show that both the Arms Trade Treaty and the EU Common Position may present arguments indispensable to petitioners in such cases. Both in the United Kingdom and in Belgium the plaintiffs relied directly on the provisions of the EU Common Position and the Arms Trade Treaty, which are incorporated into national law. In the CAAT case the Court of Appeal also dealt with the question of the role played by the User's Guide to the EU Common Position in the government's risk assessment. The Court first rejected the CAAT's presumption that the government should be forced either to follow the guidance or to provide cogent reasons why not. It highlighted that the introduction to the User's Guide makes it clear that its purpose is to »share best practice in the interpretation of the criteria rather than to constitute a set of instructions«.[77] In addition, even the User's Guide itself does not require that each and every question mentioned in it be posed.[78]

2.1.5 Interim Conclusion

These cases show that administrative challenges are possible and can be used preventively to suspend problematic licenses. Nevertheless, the possibility of using administrative courts to challenge licenses depends on a number of factors not present in all jurisdictions. First of all, where export authorizations are considered to be exclusively part of foreign policy decisions and thereby exempted from judicial oversight, no independent monitoring is possible. Second, countries that allow legal entities, such as NGOs, to initiate judicial review open up the possibility for civil society scrutiny of export decisions by relying on independent courts. A narrow interpretation of legal standing, allowing only directly affected persons to initiate proceedings, complicates the matter and goes against the realities of those subject to armed violence in recipient countries. Third, transparency is an issue in almost all proceedings. Where information on licensing decisions and physical deliveries is not readily available or not even obtainable through freedom of information requests, the possibility to use administrative courts is severely limited. Fourth, where licensing decisions are irrational, in legal terms (for example, not taking into account relevant facts or omitting essential parts of the risk assessment), licenses may be suspended or annulled. Fifth and very importantly, despite a set of common rules and guidance on how to carry out licensing decisions, the legal value of the Arms Trade Treaty, the EU Common Position or its User's Guide are far from clear in every jurisdiction. Where plaintiffs cannot rely on the EU Common Position or the Arms Trade Treaty, they are left with the national legislation, which may severely hamper the possibility for judicial review, for example, in countries with a strict interpretation of legal standing in their domestic legislation.

2.2 ESTABLISHING THE ACCOUNTABILITY OF ARMS MANUFACTURERS AND LICENSING AUTHORITIES IN CRIMINAL COURTS

Where licenses have already been granted the question remains whether government bodies and officials taking the licensing decision, as well as arms manufacturers are subject to criminal liability if the exported arms are subsequently used to commit violations of international humanitarian law or acts of internal repression. Criminal liability can be established in domestic, but also in international courts. In international courts, criminal conduct is assessed against international criminal law. Domestic courts may rely on both international and national criminal law. In the following sections, we will deal with the application of international criminal law to arms exports in domestic and international courts. Since its beginnings international criminal law has faced the question of how to assess the criminal liability of those providing the means, including arms, to commit international crimes. Several institutions, including the International Military Tribunal (IMT) in Nuremberg, the subsequent war trials, ad hoc international tribunals, the International Criminal Court (ICC) and domestic courts have had to deal with this question. We shall, in addition, also examine the application of national criminal law in domestic courts. By doing so, this section will demonstrate the conditions under which arms exporters and government officials have been held criminally liable for providing arms used to commit or facilitate violations of international human rights and humanitarian law by third parties.

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73 Mémoire en Défense by the Secretary General of Defence and National Security dated 23 November 2018, at 6 and 7.

74 Ibid, at 7.

75 Tribunal Administratif de Paris, Case N° 1807203/6-2, Decision of 8 July 2019, paras. 7-8. The appeal filed by the plaintiffs was also rejected, without however touching again upon this question. Cour Administrative d'Appel de Paris, Case N°. 19PA02929, Ordonnance du 26 septembre 2019.

76 https://pilpnjcm.nl/en/dossiers/arms-trade-and-human-rights/ and Appeal by NJCM, Pax and Stop Wapenhandel 6 July 2016, at 2.

77 Ibid, para. 151.

78 Ibid, para. 152.

2.2.1 International Criminal Law at the International Military Tribunal and the Subsequent Nuremberg Trials

The Nuremberg trials are widely regarded to have established individual criminal liability under international criminal law.[79] The Nuremberg trials were also instructive in formulating our understanding of the individual criminal responsibility of those acting in a corporate capacity. From the outset, it must be noted that the Charter of the International Military Tribunal (IMT) for Nuremberg did not foresee the liability of corporations, only the liability of individuals or of individuals as members of organizations.[80] But because of the key role German industry played in the run-up to and during the Second World War the Allies also wished to try industrial leaders before the Tribunal.

At the trials of the International Military Tribunal, which commenced on 20 November 1945, the only industrialist indicted was Gustav Krupp, representing Krupp A.G., Germany's principal arms manufacturer. According to the IMT Indictment, among other things, Krupp used his position for the preparation of the war effort, participating in military and economic planning and in Nazi preparations for wars of aggression. He also authorized, directed and participated in war crimes and crimes against humanity.[81] However, by the time the trial commenced Gustav Krupp was too ill to stand trial. Instead, Alfried Krupp, his son and owner of the company since 1943, was tried by the Unites States Military Tribunal in Nuremberg, one of the subsequent Nuremberg trials.

According to the prosecutor in that case, the defendant had supported and approved the aims of the Third Reich programme and had put Krupp's resources at their service. Through, among other activities, arms production, Krupp provided assistance indispensable to the preparation of the waging of Germany's aggressive wars.[82] At this time, however, the political appetite for prosecutions of economic actors had already abated due to tensions between the United States and the USSR.[83] Especially in relation to the question of whether arms manufacturers could be held criminally liable, economic aspects seemed to have played their part. If producing arms for Nazi Germany was qualified as criminal behavior, this might also have an impact on the US arms industry that had been and was supplying the US army. An exchange between the Head of the US War Crimes Division of the US War Department and IG Farben prosecutor DuBois highlights this: [83]

> »I personally do not want to discourage you, but a lot of people in this Department are scared stiff of pinning a war plot on these men. There's no law by which we can force industrialists to make war equipment for us right now. A few American manufactures were Farben stooges. And those who weren't can say, »Hell if participating in a rearmament program is criminal, we want no part of it.«[84]

The Tribunal ultimately found that it was not justified to infer responsibility on the defendants for decisions taken at the time when Alfried Krupp's father Gustav had been secretly pursuing the manufacturing of war materiel between 1919 and 1930, as only three of the defendants were connected with the firm at the time and were not in important positions. The Tribunal also found that the prosecution had not proved that the accused had in fact taken part in or conspired with the German government in the planning and waging of wars or had knowledge of these particular plans.[85] But it is important to note that the Tribunal did not generally reject the possibility of liability for providing arms, as it stated that it did »not hold that industrialists as such could not under any circumstances be found guilty upon such charges«.

In the IG Farben case this approach was concretized. In relation to its employees the Tribunal pointed out that the participation standard used at the IMT referred to powerful public officials and high ranking military officers.[86] Therefore, to include the »simple« industrialists the participation standard would have had to be lowered. According to the judges: »individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations were in aid of the war effort in the same way that other productive enterprises aid in the waging of war«.[87] Nevertheless in the *Zyklon B* case tried before the British Military Tribunal, two of the three defendants were found guilty of the war crime that they, in violation of the laws and usages of war, supplied poison gas to the SS between 1941 and 1945, which was used for the extermination of allied nationals interned in concentration camps, well knowing that this

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79 K. C. Priemel and A. Stiller (2013), »Wo Nürnberg liegt. Zur historischen Verortung der Nürnberger Militärtribunale«, in: K. C. Priemel and A. Stiller (eds), *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung.*HIS Verlag GmbH), at 9–64.

80 Charter of the International Military Tribunal, Article 6; https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf

81 Krupp was indicted for crimes against peace, war crimes, crimes against humanity and of a common plan of conspiracy. IMT Indictment, Nuremberg Trials (Vol I), at 75.

82 Law Review of the Trials of War Criminals, Volume X, The IG Farben and Krupp Trials, at 72.

83 The United States saw a strong Germany as a potential buffer between it and the USSR, which diminished the interest in an international trial against German industrialists, G. Baars (2013), »Capitalism's Victor's Justice? The Hidden Stories behind the Prosecution of Industrialists Post-WWII«, in: K.J. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials.* Oxford: Oxford University Press, 163–193, at 174.

84 J.E. DuBois, Jr. (1952), *The Devil's Chemists: 24 conspirators of the international Farben Cartel Who Manufacture Wars.* Boston, The Beacon Press, at 21 and 22.

85 Law Review of the Trials of War Criminals, Volume X, The IG Farben and Krupp Trials, at 84.

86 Law Review of the Trials of War Criminals, Volume X, The IG Farben and Krupp Trials, at 39.

87 Law Review of the Trials of War Criminals, Volume X, The IG Farben and Krupp Trials, at 34, 39.

gas was to be so used.[88] According to the prosecutor »by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder«.

The case law from the IMT and the Nuremberg subsequent trials introduces the notion of arms production and trade as a legitimate business activity as arms manufacturers' business activities »were in aid of the war effort in the same way that other productive enterprises aid in the waging of war«.[89] It separates the military perpetrators and political leadership from those acting in their corporate capacity. Therefore from then on it became necessary to distinguish between legitimate business activities and illegal provision of arms and the subsequent question of when a legitimate business activity turns into criminal behavior.[90] In that respect it seems that if the producers knew that their weaponry would be used in unlawful acts, criminal liability could potentially be established: »We do not hold that industrialists as such could not under any circumstances be found guilty upon such charges«.[91] However, regardless of the fact that standards of international criminal law have to determine when the line is crossed, Nuremberg and subsequent military trials indicate the extent to which such an assessment is influenced by political considerations.[92] The next part of this chapter will discuss how the later ad hoc tribunals built on this jurisprudence confirmed and widened the possibilities to hold individuals to account for actions committed in their corporate capacity.

2.2.2 International Criminal Law after Nuremberg – Complicity under International Criminal Law before the Ad Hoc Tribunals

Building upon the IMT and the subsequent Nuremberg trials, the International Criminal Tribunal for Rwanda (ICTR) the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for the former Yugoslavia (ICTY) (ad hoc tribunals) used »aiding and abetting« as a mode of criminal participation and refined answers to the question of whether individuals could be held criminally liable for the provision of arms and weapons to conflict parties.

To determine whether the actions of an arms manufacturer or a government official aid the commission of a crime, or provide the means for the commission of a crime, the conduct (*actus reus*) and the mental element (*mens rea*) of the arms manufacturer need to be assessed, assuming that the underlying crime, for example a war crime, has been committed.

As to the *actus reus,* the ad hoc tribunals determined that aiding and abetting consists of acts directed to assist, encourage or lend moral support to the perpetration of a crime. There does not need to be a causal link, a *conditio sine qua non* relationship, between the assistance and the commission of the crime.[93] However, the assistance must make a difference to the acts of the perpetrator, it must have a »substantial effect« on the commission of the crime.[94]

The Trial Chamber of the ICTR confirmed in *Kamuhanda* that the distribution of weapons to militia by members of the interim government would constitute an act falling under the conduct element of aiding and abetting.[95] The Appeals Chamber stated that even if the weapons that were distributed had not been used at all, their mere distribution could amount to psychological assistance, as an act of encouragement that contributed substantially to the massacre, thus amounting to abetting, if not aiding.[96] In *Taylor*, the SCSL ruled that providing »arms and ammunition, military personnel, operational support, moral support and ongoing guidance« constituted aiding and abetting.[97] In *Taylor*, the prosecution could prove the delivery of certain arms in defiance of a UN and ECOWAS embargo, within a certain timeframe, and show that the rebel forces in Sierra Leone could not have committed the crimes with only the supplies that were already available locally.[98] However, there was not evidence in all instances that a specific weapon provided on a specific date had been used in a specific incident. Nevertheless, this did not prevent the Pre-Trial Chamber from finding in certain instances that the material provided by Taylor was used in the commission of crimes.[99]

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88 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.

89 Law Review of the Trials of War Criminals, Volume X, The IG Farben and Krupp Trials, at 106.

90 More extensively on this aspect: L. Bryk and M. Saage-Maasz (2019), »Individual Criminal Liability under the ICC Statute for Arms Exports – A Case Study of Arms Exports from Europe to Saudi-led coalition Members Used in the War in Yemen«, 17 *Journal of International Criminal Justice (JICJ)* (2019), forthcoming.

91 The IG Farben Judgment, at 1100 and Law Review of the Trials of War Criminals, Volume X The IG Farben and Krupp Trials, at 106 and 107.

92 For more information see: F. Jeßberger (2010), »On the Origins of Individual Criminal Responsibility under International Law for Business Activity. IG Farben on trial«, 8 *Journal of International Criminal Justice* (*JICJ*) (2010), 783–802; Baars (2013), »Capitalism's Victor's Justice? The Hidden Stories Behind the Prosecution of Industrialists Post-WWII«, in: K.J. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials.* Oxford: Oxford University Press, 163–193.

93 Ibid.

94 In *Furundžija* the Trial Chamber of the ICTY, concluded that the »substantial effect« standard reflects customary international law, Judgment, *Prosecutor v Furundžija,* (IT-95-17/1), Trial Chamber, 10 December 1998, § 234. Judgment *Prosecutor v Simić*, Case No. IT-95-9-A, ICTY, 28 November 2006, para 85, *Blaškić*, Appeals Judgment, para 45 and 46.

95 Judgment, *Prosecutor v Kamuhanda,* (ICTR-99-54-TCII), Trial Chamber II, 22 January 2004. The conviction was overturned on appeal, as there was no evidence that the weapons were used. Judgment, *Prosecutor v Kamuhanda,* (ICTR-99-54A), Appeals Chamber, 19 September 2005, §§ 67, 68.

96 *Ibid*, § 384.

97 Judgment, *Prosecutor v Charles Ghankay Taylor,* (SCSL-03-01-T), Trial Chamber II, 18 May 2012, at 6907-6915. The quote comes from C.C. Jalloh and S. Meisenberg (2015), *The Law Reports of the Special Court for Sierra Leone*: Vol III: *Prosecutor v Charles Ghankay Taylor* (the *Taylor* Case). Martinus Nijhoff Publishers, at 1857.

98 Judgment, *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01-A), Appeals Chamber, §§ 313–315.

99 Judgment, *Prosecutor v Charles Ghankay Taylor,* (SCSL-03-01-T), Trial Chamber II, 18 May 2012, § 5628. See also, §§ 5549, 5551, 5558 – 5560, 5591, 5593, 5564, 5565, 5743, 5745, 5842.

As to *mens rea* the ICTR and ICTY require that the aider and abettor have knowledge that their act would assist the perpetrator in the commission of the actual crime.[100] They do not need to know the precise crime that was intended or committed, but must be aware of the essential elements of the crime.[101] If the aider and abettor is aware of crimes that will probably be committed, and one of these is committed, they shall be deemed to have intended to facilitate the commission of that crime.[102] Therefore, a knowledge standard suffices to determine *mens rea*.[103] Whether the accessory intends to assist might be deduced from the knowledge that the assistance in fact contributes to a specific crime. This assessment is conducted on the basis of all relevant circumstances, including direct and indirect or circumstantial evidence.[104] In that respect, establishing knowledge of the end use of the arms can be less difficult if there is intense publicity by the UN, NGOs or popular media concerning war crimes and other atrocities committed.[105]

In *Taylor,* in relation to the supply of arms and whether Taylor knew that his acts would assist in the commission of the crime, both the Trial Chamber and the Appeals Chamber found that the *mens rea* standard was met, taking into account that Taylor knew of the RUF's operational strategy and of their intent to commit crimes and was aware of the essential elements of the crimes in light of specific and concrete information.[106] Taylor was promoting peace at the peace negotiations while at the same time providing arms and ammunition to the RUF. In addition, when the peace accord was signed and the RUF was supposed to disarm he encouraged the RUF not to do so and continued to supply arms.[107] Further, the Trial Chamber found there was significant evidence of public knowledge of the crimes committed by the RUF and of Taylor's knowledge in particular, which included his testimony. Also, Taylor received daily security briefings, participated in ECOWAS meetings and was aware of the international community's reaction to the situation in Sierra Leone, including UN and public reports by the media and NGOs.[108] As a consequence, Taylor was convicted of aiding and abetting the commission of several war crimes by, among other things, providing arms and ammunition, which, together with additional forms of criminal responsibility, resulted in a sentence of 50 years imprisonment. [109]

However, the standards developed by the ad hoc tribunals have been called into question by the establishment of the International Criminal Court. The Rome Statute of the International Criminal Court states under Art. 25(3)(c) that a person can be held criminally liable only if that person »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«.

The wording »for the purpose of facilitating« of Art. 25(3)(c) of the Rome Statute has been keenly debated because it differs from the wording in the statutes of the ad hoc tribunals. Only in *Bemba* did the ICC deal with Article 25(3)(c), rejecting the lower *mens rea* standard of the ad hoc tribunals.[110] However, it is unclear what level of precedence the ICC would accord to this judgment in its interpretation of Article 25(3)(c) in relation to offences such as war crimes, as the judgment in the *Bemba* case was not about the commission of international crimes, but about an offence against the administration of justice.[111] A strict interpretation of Article 25(3)(c) on the part of the ICC required that an aider and abettor possess a direct intent to facilitate the principal crime. This interpretation results in an exemption from liability of persons who provide assistance in the knowledge that it is virtually certain that they are thereby aiding in the commission of a crime, but do not desire its commission and act with some other objective in mind, for example making a profit.[112] Such a strict interpretation of Article 25(3)(c) goes against the real

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100 Judgment, *Prosecutor v Tadić*, (IT-94-1-A), Appeals Chamber, 15 July 1999, § 229, Judgment, *Prosecutor v Kunarac*, (T-96-23-T&IT-96-23/1-T), Trial Chamber, 22 February 2001, § 392, ICTY, *Blagojević and Jokić*, Appeals Chamber decision from 9 May 2007, para. 127; ICTY, *Simic*, Appeals Chamber decision from 28 November 2006, para. 86; ICTY, *Blaškić*, Appeals Chamber decision from 29 July 2004, paras. 45-46; ICTY *Vasiljević*, Appeals Chamber decision from 25 February 2004, para. 102. Judgment *Brima et al,*. Appeals Chamber, para. 242, quoting Judgment, *Brima et al.* Trial Chamber, para. 776. E. van Sliedregt (2012), *Individual Criminal Responsibility in International Law.* Oxford, Oxford University Press, at 121.

101 E. van Sliedregt (2012), *Individual Criminal Responsibility in International Law,* at 121, and Judgment, *Prosecutor v Tadić*, Appeals Chamber, 15 July 1999, § 229, Judgment, *Prosecutor v Kunarac*, Trial Chamber, 22 February 2001, § 392, ICTY, *Blagojević and Jokić*, Appeals Chamber 9 May 2007, para. 127; *Simic*, Appeals Chamber 28 November 2006, para. 86; ICTY, *Blaškić*, Appeals Chamber 29 July 2004, paras. 45–46; ICTY *Vasiljević*, Appeals Chamber 25 February 2004, para. 102.

102 E. van Sliedregt (2012), *Individual Criminal Responsibility in International Law*, at 121.

103 In the Perišić case the ICTY Appeals Chamber elevated this standard by demanding the need for »specific direction«, which meant that the accessory needed to have specifically aimed to contribute to the war crimes and not merely aimed at, for example, supporting the war in general. However, in Taylor the SCSL took a different turn and did not require a specific direction. ICTY, Perišić, Appeals Chamber decision 28 February 2013, paras. 25 ff; In Šainović et al the ICTY Appeals Chamber criticized the Perišić decision for requiring specific direction, see Prosecutor v Šainović et al, Appeals Chamber decision from 23 January 2014, paras. 1617–1625, 1650.

104 *Ibid.* Judgment*, Prosecutor v Popović et al,* (IT-05-88-T), Trial Chamber, 10 June 2010, § 1500; *Public Prosecutor v Van Anraat,* District Court of The Hague, 23 December 2005, § 11.16; W. Schabas (2016), *The International Criminal Court, A Commentary on the Rome Statute,* 2nd edn. Oxford: Oxford University Press, at 579.

105 *Public Prosecutor v Kouwenhoven*, Court of Appeal 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760, § L.2.4. William A. Schabas (2001), »Enforcing International Humanitarian Law: Catching the Accomplices«, 83 *International Review of the Red Cross*, 2001, no. 842; https://www.icrc.org/en/doc/assets/files/other/439-460_schabas.pdf, at 439, 450-451.

106 Judgment, *Prosecutor v Charles Ghankay Taylor* (SCSL-03-01-A), Appeals Chamber, at 445.

107 *Ibid,* at 537.

108 Ibid, at 538.

109 Ibid, Disposition.

110 *Prosecutor v Bemba Gombo et al* 44, § 97.

111 *Ibid*, § 98.

112 E. van Sliedregt and A. Popova (2014), »Interpreting ›for the purpose of facilitating‹ in Article 25(3)(c)?«, Jamesgstewart Blog, 22 December; http://jamesgstewart.com/author/elies-and-alex/ (accessed on 29 April 2019) .

circumstances in which atrocities are committed. Individuals acting out in their corporate capacity might, first and foremost, have the intention to close the deal and make a profit, but at the same time they take it for granted that providing the arms enables the perpetrator to commit crimes.[113] Therefore, a broader interpretation would afford appropriate weight to existing practice and the customary international law standard as reflected in the jurisprudence of the ad hoc tribunals. [114]

In sum, the case law of the ad hoc tribunals indicates that the threshold for complicity for aiding and abetting for those involved in arms trading was lowered compared with the Nuremberg case law. Aiding and abetting may consist of acts directed to assist, encourage or lend moral support to the perpetration of the crime, and which have a »substantial effect on the commission of the crime. But it is not necessary to prove that a particular weapon was subsequently used in a specific crime. As regards the subjective element the ad hoc tribunals were satisfied with a knowledge standard. This approach is preferable to the wording of the Rome Statute, whose interpretation should therefore take into account the jurisprudence of the ad hoc tribunals in order to keep in sync with the reality of arms trading.

2.2.3 Liability for Complicity in War Crimes in Domestic Jurisdictions

Business people have also been found complicit in the commission of war crimes through illicit arms trading in domestic courts. In the Netherlands, a Dutch Court of Appeals found that Frans Van Anraat, who between 1980 and 1988, at the time of the Iran–Iraq war sold large quantities of raw materials that can be used in the production of mustard gas to the Iraqi government was aiding and abetting the commission of war crimes.[115] His supply of chemicals to Iraq comprised 38 per cent of the entire supply to Iraq in this period and as such »the defendant played an important part by supplying Thiodiglycol to the Iraqi regime for the production of mustard gas«.[116] Further, between 1984 and 1988 he was the sole supplier of the chemical.[117] The mustard gas was subsequently used by Saddam Hussein in attacks against Kurdish civilians and the Iranian military, injuring thousands of people.

Van Anraat was sentenced by the Dutch Court in December 2005 to 15 years in prison for aiding and abetting war crimes.[118] The court found that the mental element required for the offence of aiding and abetting war crimes, the standard of *dolus eventualis,*[119] sufficed instead of a higher standard of positive knowledge.[120] In addition, for the question of whether Van Anraat's supply provided the opportunity and/or means to carry out the crimes committed, it is sufficient when the assistance offered by the accessory has indeed promoted the offence or has made it easier to commit that offence.[121] After Van Anraat appealed the decision, the Dutch Court of Appeals affirmed the decision of the court of first instance.[122] It found that Van Anraat knew that the chemicals he supplied would be used for the production of poison or mustard gas in Iraq.[123] Moreover, the Court of Appeal indicated that »[p]eople or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that – if they do not exercise increased vigilance – they can become involved in most serious criminal offences«.[124] In June 2009 the Dutch Supreme Court affirmed the Court of Appeals' decision.[125]

In a second case, Dutch businessman Guus Kouwenhoven was prosecuted and convicted for complicity in war crimes by, among other things, providing weapons to the President of Liberia, Charles Taylor, during the civil war in Sierra Leone.[126] Kouwenhoven exercised effective control over two timber companies involved in logging in Liberia and in which Charles Taylor had commercial and financial interests.[127] Through these companies Kouwenhoven was involved in the smuggling into Liberia of weapons, in violation of UN imposed arms embargoes, that were distributed among the troops of Charles Taylor's army.[128] Furthermore, Kouwenhoven stored and distributed weapons using one of the companies as a base, and made (armed) employees available to Taylor's troops for the purpose of an armed conflict in northern Liberia.

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113 Brief of D. J. Scheffer, Director of the Center for International Human Rights, as amicus curiae in support of the issuance of a writ of certiorari, in relation to *Presbyterian Church of Sudan et al v Talisman Energy, Inc,* No. 09-1262, Supreme Court of the United States, 19 May 2010; www.justsecurity.org/wp-content/uploads/2016/09/Amicus-brief-David-Scheffer-aiding-and-abetting-Rome-Statute.pdf, (accessed on 29 April 2019), at 17.

114 *Ibid*, at 5-15, and Judgment, *Prosecutor v Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, § 229.

115 *Public Prosecutor v Van Anraat,* The Hague Court of Appeal, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676, at 13. (hereafter the »Van Anraat 2007 Judgment«), § 11.10 and 11.12. The verdict was upheld by the Dutch Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BG4822.

116 *Ibid*, § 12.5, confirmed by Dutch Supreme Court, 30 June 2009, ECLI:NL:HR:2009:BG4822, § 6.3.

117 Ibid.

118 *Public Prosecutor v Van Anraat*, LJN: AX6406, decision 23 December 2005. Van Anraat was acquitted of the charges in relation to genocide.

119 *Dolus eventualis*, conditional intent, is a lower threshold than direct intent. In *Public Prosecutor v Kouwenhoven*, Court of Appeal 's-Hertogenbosch, 21 April 2017, ECLI:NL:GHSHE:2017:1760, at L.2.3 (hereafter *Kouwenhoven* Appeal Judgment), conditional intent in light of aiding and abetting was described as follows: the aider knowingly exposed himself to the probably chance that there would be a particular consequence. To determine whether he exposed himself to this chance, it is required that he be aware of the significant probability that the consequence will occur, and that he consciously accepted that probability at the time of the actions.

120 See H.G. van der Wilt (2008), Genocide v War Crimes in the Van Anraat Appeal, in: *Journal of International Criminal Justice* 6, 557–567.

121 *Van Anraat* Judgment 2007, § 12.4.

122 *Ibid*. The Court of Appeals increased the sentence from 15 to 17 years on account of the severity of the crime.

123 *Ibid*, § 11.12.

124 *Van Anraat* Appeal Judgment, *supra* note 20, §16.

125 *Van Anraat* 2009 Judgment.

126 *Kouwenhoven* Appeal Judgment and Supreme Court, 18 December 2018, ECLI:NL:PHR:2018:1394.

127 *Kouwenhoven* Appeal Judgment, § H.2.1.

128 *Ibid*, § H.5.

The Court of Appeals found that, as an accomplice, Kouwenhoven was co-responsible for the proven war crimes and crimes against humanity committed against civilians during that armed conflict. The Court of Appeals ruled that Kouwenhoven deliberately provided an essential contribution to the violations because, through the supply of weapons and ammunition, he enabled the regime to continue their armed attacks on defenceless civilians, inflicting death and destruction for a number of years.[129] Furthermore, as to his *mens rea* the Court of Appeals took into account the large amount of media reporting as of the start of the conflict in which the atrocities committed were discussed.[130] Kouwenhoven was therefore sentenced to 19 years of imprisonment for illegal trafficking of arms and complicity in war crimes. In both Van Anraat and Kouwenhoven the indictments did not include charges against the legal entities used by them.[131]

The use of the *dolus eventualis* standard by the Dutch court in these two cases, and the requirement that it suffices that the assistance promoted the offence, or essentially contributed to the commission of the crime, enables the prosecution of businesspeople who *illegally* provide arms to warring parties. This leaves the question of how domestic courts would deal with cases in which *authorized* arms trading contributes to the commission of international crimes, which is not an academic question, given the ongoing proceedings in France. On 29 June 2016, a Palestinian family assisted by NGO ACAT filed a complaint with the prosecutor's office against French company Exxelia Technologies for complicity in war crimes and manslaughter.[132] The case concerns an Israeli strike during Israel's offensive Protective Rim in the Gaza Strip in July 2014 in which a missile hit the roof of a house killing four and seriously injuring two children. Among the remnants of the missile found at the house was a component, a Hall effect sensory sensor, produced by Exxelia and licensed by the French government. The complaint argues that the attack may constitute a war crime because a military target was absent and it resulted in civilian deaths and material damage. As Exxelia sold the sensor to an Israeli defence company, it is alleged that Exxelia would be criminally liable for involuntary manslaughter and complicit in war crimes. The chances of success of this case largely depend on the willingness of the prosecutor and the investigative judge in France to move this case forward.

2.2.4 Criminal Liability in Domestic Courts for Violation of Arms Export Control Laws and (Negligent) Manslaughter by Arms Manufacturers and Government Officials

Domestic criminal law cases against arms manufacturers for international exports and the subsequent use of exported arms for violations of international human rights and humanitarian law are rare. In Germany, two cases recently made the headlines, involving the criminal liability of employees of Heckler & Koch and Sig Sauer, two German small arms manufacturers. In the Heckler & Koch case, five employees of the German company stood trial before the Landgericht Stuttgart for the alleged violation of Germany's arms export control laws through exports of assault rifles to Mexico. The German authorities had excluded the possibility to export to four federal states in Mexico, which was confirmed by the Mexican State in the end-use certificate. However, the Mexican authorities subsequently and with the knowledge and factual assistance of H&K agents forwarded the arms also to those four states.[133] The Sig Sauer case, dealt with by the Landgericht in Kiel, involved the export of small arms to the United States and their subsequent re-export to Colombia, despite assurances in the end-use certificate that the weapons were destined for the US market.

In the Stuttgart proceedings, the NGO European Center for Constitutional and Human Rights (ECCHR) requested access to the case files on behalf of Aldo Gutiérrez Solano, whose interests were represented by his parents, in preparation of a potential accessory prosecution. Solano is one of the Ayotzinapa students, who, following an attack by the Mexican security forces on college students in 2014, remains in a coma. Some of the military and police personnel involved in this attack carried and used weapons that were part of the illegal export at stake in the trial in Stuttgart. The court, however, rejected the request to access the case files because the arms export control laws are not designed to serve individuals, but rather to protect peace and friendly relations among nations. Moreover, the judges in Stuttgart refused to examine whether the delivery of weapons aided the commission of the crime of attempted manslaughter in Mexico as they considered this to go beyond the actions dealt with in the criminal proceedings in Germany. The latter position is surprising because, shortly beforehand, an arms dealer on the »dark net« was sentenced by another criminal court in Germany not only for violations of arms control laws, but also for negligent homicide.[134] This may point to the differences applied in cases of the so-called legal arms trade where at the outset licenses were granted, even if based on fraudulent information, and the clearly illegal arms trade operating without licenses from the beginning.

In another currently ongoing proceeding, an Italian prosecutor has to assess the criminal liability of corporate and government officials for arms exports to Saudi Arabia. In April 2018 Yemen-based NGO Mwatana for Human Rights, Italy-based Rete Disarmo and ECCHR filed a criminal complaint with the public prosecutor in Rome. The complaint requested an investigation into the criminal liability of RWM Italia S.p.A.'s managers and officials of UAMA, the authority that

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129 *Ibid*, § Q.

130 *Ibid*, § L.2.4.

131 Article 51(1) of the Dutch Criminal Code provides for corporate criminal liability.

132 https://www.acatfrance.fr/communique-de-presse/plainte-pour-complicite-de-crimes-de-guerre-a-gaza-contre-lentreprise-francaise-exxelia-technologies. The family is represented by Ancile Avocats.

133 A detailed description is provided by Jürgen Grässlin, Daniel Harrich and Danuta Harrich-Zandberg, Netzwerk des Todes, 2015, pp. 137–146.

134 Landgericht München, Az: 12 KLs 111 Js 239798/16, judgment of 19.01.2018.

authorizes Italian arms exports, in relation to the export of arms to members of the Saudi-led coalition.[135] The main focus of the complaint is an air strike – allegedly carried out by the Saudi-led coalition – that struck a civilian home in the village of Deir Al-Hajari in Yemen on 8 October 2016, killing a family of six, including a pregnant mother and her four children. Bomb remnants were found at the scene of the strike, indicating the use of a guided bomb of the MK80series. In addition, a suspension lug, needed to attach a bomb to a plane, manufactured by RWM Italia S.p.A., an Italian subsidiary of German Rheinmetall AG, was found among the remnants. The complaint requested the Italian prosecutor to investigate the criminal liability of the government officials for an alleged abuse of power, and both the government officials and managers in Italy for their complicity through gross negligence in murder and personal injury.[136] After more than a year and a half of investigations, the Italian public prosecutor's office decided to request a dismissal of the case in October 2019. The three organizations submitting the initial complaint have appealed this decision. A hearing before a judge in Rome is expected beginning of 2020. If the Italian judge instructs the prosecutor to further investigate, and if eventually criminal proceedings are initiated, relatives of the deceased might be admitted as civil parties in the proceeding for compensation.

The Heckler & Koch case was decided in February 2019.[137] Three of the accused were cleared of all charges, while two other employees received a conditional sentence. As part of the sentencing, a fine of 3.7 million euros was imposed on the company Heckler & Koch itself. The verdict has not yet been implemented because both the public prosecutor and the defence lawyers have appealed the decision. In the Sig Sauer trial, all three accused were conditionally sentenced. In addition, similar to Heckler & Koch, the company Sig Sauer was fined, both in Germany and the United States, for the amount of the real value of the arms and not only the profit made.[138]

In sum, the proceeding in Stuttgart did not take into account the specific concerns of an individual directly affected by arms exports in the recipient country because the arms export control laws do not create a direct affectedness for individuals. Because even access to the file was denied, no information could be used for a possible civil claim against Heckler & Koch or in ongoing proceedings against police and government officials in Mexico. In both cases, for the first time the companies, too, have been subjected to a sanction. Moreover, the judgment in Stuttgart also invalidated the entire system of end-use certificates (EUC). The submission of end-use certificates is a common requirement in European countries before licenses are granted. They clarify who is going to use the exported arms, thereby allowing the State authorities to make a proper risk assessment tailored to the individual end-user. Often, they also aim to guarantee that the exported arms actually stay with the entity indicated in the end-use certificate after the export has taken place. Other than in the Sig Sauer proceeding, in which the end-use certificates were not questioned at all, the judge in Stuttgart concluded that the certificates are not part of the license, because it is impossible for the company and its employees to guarantee their implementation. The entire control regime, heavily relying on end-use certificates as a guarantor for the end-use of the exported goods, is thereby called into question.

2.2.5 Interim Conclusion

During the 70 years since Nuremberg the notion of individual criminal responsibility for international crimes has developed, especially in relation to actions by individuals committed in their corporate capacity or actions by corporations. During the Nuremberg trials the notion of arms trading as a legitimate business activity was introduced. The door to liability was opened if the producers knew that their weaponry would be used in unlawful acts. The ad hoc tribunals further developed this case law and established the criminal liability of those aiding and abetting international crimes by providing arms. In parallel with and subsequent to the ad hoc tribunals, Dutch courts recognized the criminal liability for complicity in war crimes of those involved in illicit arms trading, using a *mens rea* threshold that enabled the prosecution of these perpetrators. Furthermore, because the option of corporate criminal liability was not included in the founding documents of international courts and tribunals corporate liability under international criminal law was not developed by these institutions.

While domestic courts may accept corporate criminal liability, no cases involving arms exporters have been decided so far. Moreover, in domestic criminal proceedings in Germany, notably the Heckler & Koch case, the proceedings focused solely on criminal liability for violations of export control laws. The charge of criminal liability in the form of aiding and abetting the crimes committed with the illegally exported weapons was not part of the proceedings, even where the risk of their use was recognized during the licensing procedure. Due to the limited scope of the proceedings, the affected persons were effectively excluded and as such were unable to claim compensation. This could be different in Italy and France, where proceedings are still ongoing at the time of writing. In these cases, those directly affected by the arms exports might be able to be admitted as civil parties in the proceedings against the arms exporters and government officials.

Overall, it can be concluded that in order to enable prosecutions of individuals acting in their corporate capacity or corporations for their complicity in the commission of international crimes, the *mens rea* standard of *dolus eventualis* or of recklessness needs to be applied. Higher standards will represent unreasonable obstacles to holding these actors to account as their first and foremost intention would be to obtain a profit rather than sharing the same intent as the per-

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135 See for more information: https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/

136 Because Italy has not transposed the wording of the Rome Statute into its Penal Code, an investigation into complicity in war crimes could not be demanded.

137 Landgericht Stuttgart, judgment of 21.02.2019, Az: 13 KLs 143 Js 38100/10.

138 Landgericht Kiel, judgment of 03.04.2019, Az: 3 KLs 3/18.

petrator of the principal crime, taking it for granted that the provision of the arms enables the perpetration of the crimes. Therefore, in particular in relation to prosecutions before the ICC a broader interpretation of Article 25(3)(c) is warranted in line with the customary international law standard used by the ad hoc tribunals. Otherwise relevant actions committed in a corporate capacity will not be covered.

The cases show that the defence industry regularly hides behind government authorizations, negating their own responsibility to carry out a risk assessment and take into account relevant information on the end-user before engaging in exports. Criminal courts are, however, not bound by the administrative decisions carried out by the licensing authorities. Instead, an independent analysis of corporate officers' criminal conduct is warranted and the international and national standards on businesses' human rights responsibilities may help to concretize what is expected of companies in that regard.

3

THE UNDERDEVELOPED BUSINESS AND HUMAN RIGHTS ANGLE

In the previous sections, we have discussed the regulatory landscape, its limited impact on certain problematic arms exports and the difficulties faced when challenging arms export licenses or establishing the accountability of arms manufacturers and licensing authorities in the courts. First, the regulatory landscape is itself incomplete and does not achieve its intended purpose, namely to rule out arms exports that are subsequently used to commit or facilitate violations of international human rights and humanitarian law. Secondly, judicial proceedings hinge on a number of procedural and substantive hurdles that render judicial review limited and complicated, despite some positive examples. Third, business responsibility is not properly dealt with because of the assumed primacy of prior government authorizations. This absence of a separate assessment of businesses' role is surprising given how the business and human rights debate has evolved over recent years.

Currently, 21 National Action Plans are in place worldwide in which governments committed themselves to implementing the UN Guiding Principles on Business and Human Rights that provide for state and business responsibilities on business and human rights. This section will take a closer look at this development and argue that the business and human rights framework also applies to arms manufacturers and exporters.

In 2011 the United Nations Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights (UNGPs).[139] The UNGPs are based on three pillars that are all important for the present study. Pillar I deals with the State duty to protect human rights, pillar II contains principles regulating the corporate responsibility to respect human rights and pillar III provides principles related to access to remedy for corporate human rights abuses. This framework, therefore, not only requires the acceptance of corporate responsibilities (3.1) but also provides insights on what is expected from states regarding regulation of business activities (3.2) and access to remedy for corporate human rights abuses in the arms sector (3.3).

3.1 BUSINESS AND HUMAN RIGHTS PILLAR II – BUSINESS RESPONSIBILITY IN THE DEFENCE SECTOR

In recent years, there has been an increasing tendency to subject (transnational) companies to human rights responsibilities, as a complement to States' obligations, to ensure respect for human rights in their business relationships. As regards business responsibilities under pillar II, the UNGPs recommend that enterprises respect all internationally recognized human rights, which require them to »avoid causing or contributing to adverse human rights impacts […] and address such impacts when they occur« and to »seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships«.[140] In terms of the implementation of this general requirement the UNGPs recommend the adoption of »(a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute«.[141]

A similar expectation can be drawn from the OECD Guidelines on Multinational Enterprises[142] and from the OECD Due Diligence Guidance for Responsible Business Conduct, published in 2019 (OECD Guidance),[143] a comparable set of recommendations addressed by governments to multinational enterprises operating in or from adhering countries. As is made explicit by the OECD Guidelines' chapter four on human rights, it draws on the United Nations Framework for

139 Guiding Principles on Business and Human Rights: Implementing the United Nations' »Protect, Respect and Remedy Framework«, Final Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/17/31. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

140 UNHRC (2011), »Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises«, UN Doc A/HRC/17/31, principle 13.

141 Ibid, principle 15.

142 OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing; http://mneguidelines.oecd.org/guidelines/

143 OECD (2019), OECD Due Diligence Guidance for Responsible Business Conduct OECD Publishing; https://www.oecd.org/daf/inv/mne/due-diligence-guidance-for-responsible-business-conduct.htm

Business and Human Rights and is in line with the UNGPs for its implementation.[144] The Guidelines and the OECD Guidance can thus be read together with the UNGPs to establish a common standard for what is expected from businesses in terms of respect for human rights.

One core element of the business responsibility to respect human rights is the concept of due diligence. As explained by the UN Working Group on Business and Human Rights, human rights due diligence shall include the following features: (a) that it be undertaken first and foremost to prevent adverse human rights impacts; (b) that it be commensurate with the severity and likelihood of the adverse impact (the higher the likelihood and severity of an adverse impact, the more extensive the due diligence should be) and be tailored to specific risks and how they affect different groups and adjusting actions accordingly; and (c) that it be ongoing, in recognition of the fact that the risks to human rights may change over time as operations and operating contexts evolve.[145]

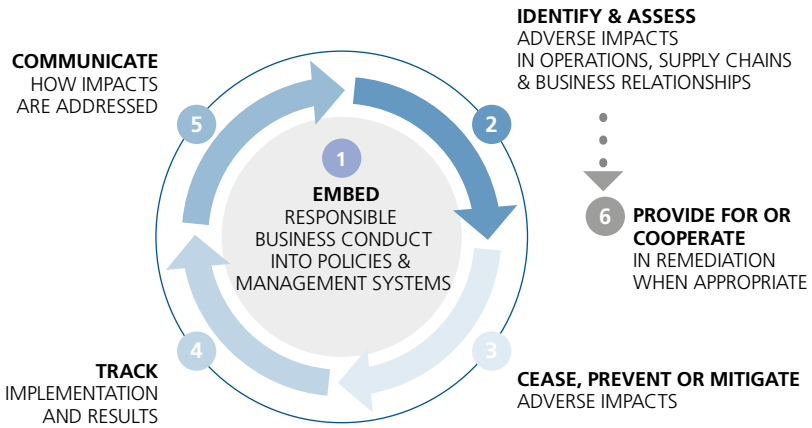
With regard to the content and methods of human rights due diligence the OECD Guidelines state that »the process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed«.[146]

On this basis, the OECD recently published the OECD Guidance on Human Rights Due Diligence, summarizing what is expected from enterprises (see Figure 2).

On this general level there are already six elements to proper human rights due diligence that are also applicable in the arms manufacturing sector. Taking a look, however, at four arms manufacturing companies, Dassault (France), MBDA (Netherlands), Rheinmetall and Heckler & Koch (both Germany), we find the following, based on their public reporting. None of the four companies has a clear policy commitment to respect human rights that explicitly includes the use of its products by its customers. Respect for human rights is generically claimed and elaborated upon for the internal company sphere only. Moreover, in none of the publications is respect for international humanitarian law mentioned at all as a relevant issue for which risk assessment should be carried out. Therefore, although the companies have already established due diligence mechanisms (risk identification, taking measures, tracking results, complaints procedures) these are not put into practice in relation to respect for the human rights of third parties and international humanitarian law.[147]

The results of this selection have been confirmed by further studies on the arms industry. In particular, a recently published study by Amnesty International, scrutinizing 22 companies from the arms sector, reaches similar conclusions.[148] Summarizing the findings, the authors conclude »it is clear that each of the companies surveyed is failing to take adequate steps to meet its responsibility to respect human rights«.[149] Some companies have no policy commitment at all; others have policies but do not outline how the company then actually identifies and addresses or mitigates risks; and most worryingly, none of the companies have examined the

Figure 2
Due Diligence Process & Supporting Measures



Source: OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct

144 OECD Guidelines for Multinational Enterprises, Chapter IV Human Rights, Commentary.

145 UN Working Group on Business Human Rights, Report to General Assembly, 26 July 2018, para. 13.

146 OECD Guidelines for Multinational Enterprises, p. 34 (Commentary on Human Rights), para. 5.

147 The following documents were analyzed before reaching the above conclusion: Rheinmetall, Jahresabschlussbericht 2017; for Dassault, Ethical Charter and Annual Financial Report 2018; for Rheinmetall, Geschäftsbericht 2017, Code of Conduct der Rheinmetall Group; for MBDA, Code of Ethics, Business Ethics Policy, Corporate and Social Responsibility Report 2017; for Heckler and Koch, Ethische Geschäftsgrundlagen Heckler & Koch Konzern, Konzernabschluss zum 31. Dezember 2018 and Konzernlagebericht.

148 Amnesty International, Outsourcing Responsibility – Human Rights Policies in the Defence Sector, 2019; the companies are listed on p. 20.

149 Ibid, at 30.

question of human rights responsibilities in concrete situations, such as the Yemen conflict.[150] Hence, defence companies do not deal with the gravest human rights risk associated with their business, namely the misuse of their products and services by their customers and third parties. This situation is all the more worrying because, although limited, there does exist some guidance on what due diligence means for the arms sector.

3.1.1 Concretizing Business Responsibility in the Arms Sector

Three particular aspects of business responsibility are particularly important in relation to the global arms trade: the role of licenses, due diligence and remediation.

We can start by pointing out the aspects highlighted in the UNGPs, the OECD Guidelines and their respective commentaries that reflect the particular characteristics of the global arms industry, as well as specific instances dealt with by National Contact Points (NCP) established by OECD adhering governments. NCPs oversee implementation of the OECD Guidelines and provide for non-judicial grievance mechanisms, so-called »specific instances« that allow for complaints against companies that have, allegedly, failed to comply with the OECD Guidelines. Such complaints can be brought by individuals or organizations before the NCP located where the corporation operates or is based. The NCP subsequently facilitates a non-adversarial procedure, mediation, at which the issue is discussed. Ultimately, the NCP is required to issue a final statement on conclusion of the process, which is non-binding. This final statement may either refer to the agreement reached by the parties or in case no agreement was reached provide an assessment of company conduct and issue recommendations for improvement.

Licenses are not an exemption from business responsibilities

As has become apparent from the domestic and international court cases on the responsibility of arms manufacturers and exporters, most often companies reject their responsibility on the basis of existing State authorization through export licenses. For example, when UK arms manufacturer BAE was asked, at its annual shareholders meeting, about its human rights due diligence, its CEO answered along the lines that BAE had to abide by its contractual arrangements, that it was up to the UK government to decide on matters relating to human rights and that BAE did not stray into this area. Furthermore, he had not heard of the UNGPs.[151] This lack of understanding by the industry of the need for human rights due diligence has been crucial in all the instances before NCPs that have dealt with the global trade in arms or dual-use goods.

One case before the US NCP dealt with the export of arms to Saudi Arabia by Boeing and Lockheed Martin. It was alleged that the companies failed to take appropriate steps to ensure that their products did not cause or contribute to human rights abuses, and that the companies' products directly contributed to adverse human rights impacts in Yemen through their use by the government of Saudi Arabia. The submitters also claimed that the companies did not have a relevant human rights policy and did not carry out appropriate human rights due diligence in the sale of their products. [152] However, the US NCP concluded that an examination of the case would necessarily include an evaluation of State conduct, namely the US decision to grant an export license and decisions about the use of the arms by Saudi Arabia. The NCP therefore held that it is not designed to assess State practice and therefore did not accept the complaint for mediation.[153] Shortly we will address why this approach is problematic.

In a similar constellation before the UK NCP the defence company claimed, in response to the allegation that no proper due diligence was carried out before exporting to Saudi Arabia, that its supply complied with UK export licensing requirements and that it believes these requirements provide the appropriate safeguards.[154] The UK NCP also rejected the case. It started, however, from the premise that there is indeed a responsibility even for arms exporting companies to carry out due diligence. In this particular case the NCP considered that the company's approach of relying on the UK government export licensing procedure, which includes a human rights risk assessment, is appropriate.[155] It also noted that

> it does not serve the purpose and effectiveness of the *OECD Guidelines* to examine a supply for which a human rights assessment was made by the UK government as part of export licensing controls. (…) The NCP considers that it brings the *OECD Guidelines* into disrepute if they are seen to be used by the UK government to require a business to account for a human rights assessment made by the UK government. It also potentially undermines confidence in the export licensing regime, which is a serious matter because of the potential consequences if businesses lose confidence in it.[156]

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150 Ibid, at 29.

151 These answers were given at BAE's annual shareholders meeting in 2019. See also https://www.independent.co.uk/news/uk/home-news/bae-arms-supplier-yemen-shareholders-saudi-coalition-uk-a8967791.html

152 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, p. 9.

153 Ibid, p. 4.

154 Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from an NGO against a UK company, October 2016, p. 3; https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-an-ngo-against-a-uk-company

155 Ibid, p.7.

156 Initial Assessment by the UK National Contact Point, Complaint from an NGO against a UK company, October 2016, paras 29 ff; https://www.gov.uk/government/publications/uk-ncp-initial-assessment-complaint-from-an-ngo-against-a-uk-company

In both instances before the NCPs, the issue of the license and an underlying human rights risk assessment by the government is central. However, the NCP decisions are not in line with the OECD Guidelines, the OECD Guidance or the UNGPs. First of all, the OECD Guidance provides that the due diligence recommendations of the OECD Guidelines are not intended to shift responsibilities from governments to enterprises, or from enterprises causing or contributing to adverse impacts to the enterprises that are directly linked to adverse impacts through their business relationships. Instead, the recommendations suggest that each enterprise address its own responsibility with regard to adverse impacts.[157] Second, respect for human rights is the global standard of expected conduct for enterprises. This standard applies independently of States' abilities and/or willingness to fulfil their human rights obligations and does not diminish those obligations.[158] A State's failure either to enforce relevant domestic laws or implement international human rights obligations, or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises should respect human rights. Such expectations thus exist over and above compliance with national laws and regulations protecting human rights.[159] Furthermore, the commentary to principle 12 of the UNGPs and the commentary to the OECD Guidelines provide that, in situations of armed conflict, enterprises should respect the standards of international humanitarian law.[160] This was further elaborated on by the International Committee of the Red Cross (ICRC), which is authoritative on international humanitarian law. According to the ICRC, business enterprises are bound by international humanitarian law,[161] as such »an understanding of international humanitarian law and an interest in the conduct of potential purchasers are essential to the risk management of manufacturers and suppliers of weapons«.[162]

Therefore, on the basis of these general principles a separate analysis of a company's respect for human rights is warranted even where they have obtained government authorizations because the State's obligation and business responsibility exist in parallel. Otherwise, there would be no room at all for human rights responsibilities of arms exporters or, for that matter, for many other export goods, such as hazardous substances, pesticides or dual-use goods, because licenses are always required in these cases.[163] In addition, such an approach would be contrary to the purpose and effective application of the OECD Guidelines and Guidance as arms exporters would become generally exempted from their scope of application. This is not foreseen as an exception anywhere. Moreover, the severity of the human rights risks at stake has to be taken into account. Obliging a company to carry out human rights due diligence becomes even more imperative, given the irreversible consequences should a State fail to do a risk assessment properly prior to granting the license.

Furthermore, licenses do not *oblige* companies to export but only provide them with the opportunity to do so. Given the differences in licensing regimes, the possibility of open licenses that run for years and also individual licenses in respect of which there may be a long period between the granting of the licenses and the physical exports of the covered goods, the risk assessment may actually change over the course of time and lead to different results from the one reached by the initial assessment carried out by the State months or years previously. Also from that perspective a separate responsibility of arms companies to carry out due diligence is absolutely warranted and would foster the effective application of the Guidelines.

Due diligence

From the outset, it should be emphasised that the measures an enterprise takes in pursuit of due diligence should be »commensurate to the *severity* and *likelihood* of the adverse impact. When the likelihood and severity of an adverse impact is high, then due diligence should be more extensive«.[164] Given the sector-specific risks characteristic of the arms trade, in which the likelihood and severity of adverse impacts is high, extensive human rights due diligence is required.

In the case of Alsetex, which had exported tear gas to Bahrain which was allegedly used by the Bahraini government to commit human rights violations in 2011, 2015 and 2016, the French NCP spelled out concrete recommendations on the due diligence process.[165] In line with OECD Guidelines it recommended a policy declaration on human rights to be approved at the most senior level of the company, which had to be published and communicated internally and externally to all personnel, business partners and other relevant parties.[166] It also recommended that the enterprise formalize its due diligence measures more robustly, based on the regulatory framework of export controls and additional measures, particularly in relation to the traceability of exports:

> The NCP recommends that Alsetex systematically considers the possibility of requesting a non-re-export certificate and of assessing the extent to which the customer has understood the recommended use parameters for its products. Should the customer repeatedly fail to fulfil its commitments to Alsetex, the enterprise

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157 OECD Guidance, p. 17.

158 OECD Guidelines for Multinational Enterprises, p. 31 (Human Rights).

159 Ibid, p. 32 (Human Rights).

160 OECD Guidelines, p. 32.

161 *Ibid*, 2006, p. 14.

162 *Ibid*, 2006, p. 25.

163 See, for example, Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from an NGO against a UK company, October 2016, para 24.

164 OECD Guidance, p. 17.

165 Final Statement from the French National Contact point for the OECD Guidelines for Multinational Enterprises, Etienne Lacroix – Alsetex in Bahrain – Specific Instance, 4 July 2016; https://mneguidelines.oecd.org/database/instances/fr0021.htm

166 Final Statement from the French National Contact point for the OECD Guidelines for Multinational Enterprises, Etienne Lacroix – Alsetex in Bahrain – Specific Instance, 4 July 2016; https://mneguidelines.oecd.org/database/instances/fr0021.htm, p. 5. See OECD Guidelines commentary, p. 33.

should undertake to suspend or even terminate its business relationship with that customer.[167]

A further instance, concerning surveillance technology, yielded additional insights into human rights due diligence to be carried out by exporting companies. In February 2013, the UK NCP received a request for review from NGOs Privacy International and ECCHR, alleging that Gamma International UK Ltd had breached the general policies and human rights provisions of the OECD Guidelines by supplying surveillance equipment to police and security services in Bahrain. The UK NCP found that Gamma International UK Ltd's actions were inconsistent with provisions of the OECD Guidelines, including the responsibility to carry out due diligence.[168] On the issue of corporate due diligence, the UK NCP recommended that Gamma International UK Ltd take the following actions to make its conduct more consistent with the Guidelines:

- take note of evidence from international bodies and UK government advice in its future due diligence;
- participate in industry best practice schemes and discussions;
- reconsider its communications strategy to offer the most consistent and transparent engagement appropriate for its sector.

In particular, the recommendation concerning the evidence or sources of information that need to be taken into account by arms/dual-use exporters is pertinent to the due diligence process. As set out by the OECD Guidance, in order to identify and assess actual and potential negative impacts associated with the enterprise's product, an exporter should gather information to try to understand any high-level risks of adverse impacts related to the sector, geographic risk factors (for example, governance and rule-of-law, conflict, pervasive human rights adverse impacts) or enterprise-specific risk factors (for example, known instances of misconduct). Information sources might include reports from governments, international organizations, civil society organizations, national human rights institutions, media or other experts.[169] The Amnesty study on arms exporters also emphasised that »companies should review reports and seek independent assessments from inter-governmental organizations, international and local NGOs, independent military experts, community groups and trusted local contacts. … They should include assessments of those at heightened risk of vulnerability or marginalization in the context of conflict situation (e.g. civilian populations in conflict areas…).«[170] This is fully in line with what is required of States when engaging in human rights risk assessment before authorizing arms exports. Of particular relevance here are the EU Common Position and its User's Guide, which specify that, besides EU internal documentation and case-by-case analyses, additional information might be consulted. This may include Member State diplomatic missions and other governmental institutions; documentation from the UN, the ICRC and other international and regional bodies; reports from international NGOs, reports from local human rights NGOs and other reliable local sources and generally information from civil society.[171] Companies should thus continuously consult these sources to assess if the inherent risks of their products may materialize in human rights violations before they engage in the export of their goods.[172]

The UK NCP in the Gamma case, finally, also concluded that, even when a State is the customer, the obligation to encourage a business partner to comply with the Guidelines is not met if the business partner knows they will not be named and can rely on Gamma not to state publically the human rights policy it applies in selecting them.[173]

Remedy mechanisms

When an enterprise identifies that it has caused or contributed to actual adverse impacts, the UNGPs, OECD Guidelines and OECD Guidance recommend that the enterprise addresses such impacts by providing for or cooperating in their remediation.[174] Remediation can require cooperation with judicial or State-based non-judicial mechanisms, or operational-level grievance mechanisms for those potentially impacted by enterprises' activities.

In several of the above cases, the NCP also made pronouncements on the appropriate remediation companies have to put in place once human rights violations have materialized. One such consequence was mentioned above, namely that an arms manufacturer that has a business relationship with a customer who repeatedly fails to fulfil its human rights commitments[175] or has a publicly known bad human rights record, should undertake to at least suspend that business relationship. Beyond that, the UK NCP in the Gamma case recommended that if Gamma learns about allegations of misuse or realizes that its product has in fact been misused it has a responsibility to cooperate with any enquiries into this misuse and adverse impacts and with official remediation processes involving victims.[176] In relation to those affected by a product's inherent dangers the French NCP in the Alsetex case recommended that the company include in its contracts a

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167 *Ibid*, p. 5.

168 Chapter II: General Policies, paragraphs 2, 10 and 13, and Chapter IV: Human Rights, paragraphs 1,4, 5 and 6.

169 OECD Guidance, p. 25.

170 Amnesty International, Outsourcing Responsibility – Human Rights Policies in the Defence Sector, 2019, the companies are listed on p. 32.

171 User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 20 July 2015, pp. 40–41.

172 OECD Guidance p. 25.

173 UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Privacy International and Gamma International UK Ltd, Final statement after examination of complaint, para. 67.

174 OECD Guidelines, p. 34, OECD Guidance, p. 34.

175 See: Final Statement from the French National Contact point for the OECD Guidelines for Multinational Enterprises, Etienne Lacroix – Alsetex in Bahrain – Specific Instance, 4 July 2016; https://mneguidelines.oecd.org/database/instances/fr0021.htm

176 UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Privacy International and Gamma International UK Ltd, Final statement after examination of complaint, para. 66, 73.

clause stating that in case of re-exports that are not authorized by the French government, the customer must compensate the enterprise, which would use the compensation to fund actions to protect human rights.[177]

Interim conclusion

Based on analyses by NCPs in specific instances involving international arms trading and our analysis of the expectations arising from the UNGPs and the OECD Guidelines, companies need to implement a number of measures in order to comply with their human rights responsibilities. First, a human rights policy should be formally adopted and due diligence measures need to be established based on the regulatory framework of export controls. For their risk assessment, companies should take note of evidence from international bodies, government advice and those sources that governments, too, need to consult on the basis of the EU Common Position. They should also adopt measures to ensure the traceability of their products and request a non-re-export certificate and assessment of the extent to which the customer has understood the recommended use parameters. Within its business relationships a company is supposed to encourage business partners to respect human rights. In this regard, confidentiality clauses in the underlying contracts need to be adjusted so that contracting parties are not able to shield themselves behind them when adverse effects occur. Furthermore, a clause should be included in these contracts, which foresees compensation by the customer in case of adverse human rights impacts. This compensation would be used to fund actions to protect human rights. Where a customer repeatedly fails to fulfil its commitments, a company should suspend or even terminate its business relationship. When it comes to remediation, companies are expected to cooperate with any enquiries into the misuse and adverse impacts of their products and with official remediation processes resorted to by victims.

3.2 BUSINESS AND HUMAN RIGHTS: STATE OBLIGATIONS IN THE ARMS SECTOR UNDER PILLAR I

The general principle underlying pillar I, namely, that States have a duty to protect against human rights abuses by non-state actors within their territory and jurisdiction, is a reflection of the existing binding human rights treaties for States applied to the context of business activities.[178] Based on principles 1–10 under pillar I, States have the obligation to protect against human rights abuses within their territory and/or jurisdiction by business enterprises, and should clearly set out the expectation that enterprises respect human rights throughout their operations (principles 1 and 2). Under principle 8, States are also required to continuously ensure policy coherence between their human rights obligations and the laws and policies they put in place that shape business practices.[179]

In the context of the global arms trade, States Parties should duly identify any conflicts that may exist between their arms export control policies, their role in supporting commercial negotiations for arms companies and their international human rights obligations. As a result, legislative and administrative changes may be warranted. Given the specific risks of gross human rights abuses posed by irresponsible arms transfers by the arms industry, including fuelling conflict and constantly producing threats to the right to life and physical integrity of a large number of people, the State's duty to ensure that business enterprises exporting arms are not involved in such abuses becomes even more imperative. According to the UNGPs, States »should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them.«[180]

Hitherto, general human rights due diligence of the business sector has not been made mandatory in many States. In fact, only in France was a Corporate Duty of Vigilance Law adopted in 2017 that provides for mandatory human rights due diligence. The law has, however, been poorly implemented by the French defence sector, as an analysis by Amnesty France highlights.[181] In Germany, the German NAP, *Nationaler Aktionsplan für Wirtschaft und Menschenrechte*, will be evaluated in 2020 to determine whether enough corporations voluntarily carry out their human rights due diligence and have integrated it in their operational processes. If not, the NAP provides the possibility for further measures to strengthen human rights protection in the business context, one of which is the adoption of a law for mandatory human rights due diligence.[182] Where no mandatory human rights due diligence exists, the NAPs remain the focal point for business responsibilities as they establish a clear expectation that business should respect human rights. However, neither Germany, France, Italy nor Spain have provisions on arms exports or provisions specifically aimed at the defence sector in their NAP. In the UK NAP, in the part on the State's duty to protect (pillar I), reference is made to the export of »strategic« goods and technology where the government exercises control through the export licensing system. According to the UK NAP, all export licence applications are assessed against the

177 See: Final Statement from the French National Contact point for the OECD Guidelines for Multinational Enterprises, Etienne Lacroix – Alsetex in Bahrain – Specific Instance, 4 July 2016; https://mneguidelines.oecd.org/database/instances/fr0021.htm

178 Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations, John Ruggie, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, UN Doc. A/HRC/4/35, 10 February 2007, para. 10 et seq.

179 Commentary to principle 3.

180 Commentary to principle 7.

181 Amnesty International France et al, The Law on Duty of Vigilance of Parent and Outsourcing Companies – Year 1: Companies Must Do Better, https://amnestyfr.cdn.prismic.io/amnestyfr%2F8fcbc315-bebf-434f-9352-aacc9a0d943f_190614_web_version_anglaise.pdf, February 2019, at 26–29.

182 A mandatory human rights due diligence law is called for in Germany by the Campaign Initiative Lieferkettengesetz, see https://lieferkettengesetz.de/

Consolidated EU and National Arms Export Licensing Criteria. These assessments take account of possible human rights impacts; for example, a licence would not be granted if the government finds there is a clear risk that the proposed export might be used for internal repression or to commit International humanitarian law and human rights violations.[183] In the Belgian NAP an agreed action point in relation to pillar I is included that sees to the import, export and transit of arms, munitions, military and law enforcement equipment and dual-use goods. Regarding corporate actors and arms exports, the Belgium NAP provides that, where needed, additional requirements can be imposed on the receiving corporations, such as signing an end-user certificate in which they state that they will not use the goods to violate human rights and humanitarian law, and that they will not further transfer the goods to other entities or countries where these risks might occur.[184]

The fact that the topic of arms export control is included in the UK and Belgium NAPs under pillar I is a good step forward as it acknowledges the heightened risks involved in this sector. As the past and ongoing licensing practices show, however, the existing regulations are too vague to achieve an effective export control regime that avoids the use of exported weapons for violations of international human rights and humanitarian law. Second, risk assessments are not always correctly made, as demonstrated by the CAAT case, in which the Court of Appeals found that the decision-making process underlying the granting of the licenses was flawed and by the case in Belgium, in which the court eventually cancelled the licenses.[185] In addition, the fact that the State makes an assessment does not exempt corporations from making their own and does not reduce their responsibilities under the UN-GPs and OECD Guidelines. To date, NAPs, or for that matter subsequent binding rules at the domestic level, either lack an explicit recognition that corporations, too, must deal with the heightened risks posed by the international arms trade as part of their responsibility to respect human rights or are too vague to achieve the intended goals.

Taking Germany as an example, several monitoring bodies have criticized these and further shortcomings in its arms export control laws and implementation practice. For instance, in the most recent hearing of the Committee against Torture on Germany's implementation practice, the Co-Rapporteur raised the issue of arms exports to Saudi Arabia and asked what legislation was in place to govern this issue in line with Germany's human rights policy.[186] Similarly, the Committee on the Elimination of Discrimination against Women recommended that Germany harmonise its legislation regulating arms export control and that, before arms export licenses are granted, comprehensive and transparent assessments should be conducted on the impact of SALW on women.[187] Also, the Committee on the Rights of the Child has twice recommended that Germany ensure the greatest transparency regarding the transfer of arms and explicitly prohibit in law the sale of arms where there is a risk that the final destination is a country where children are, or could be, recruited or used in hostilities.[188] In addition to these explicit recommendations by human rights monitoring bodies, the proposals put forward by the parliamentarian opposition and civil society bodies in Germany to remedy inconsistencies and loopholes in arms export regulations may also be mandated by international human rights law. Beyond the issues raised above, the main proposals are as follows: legally binding incorporation of German political principles and the EU Common Position into the risk assessment foreseen by the German arms export control law; regulation of business activities of foreign subsidiaries; heightened transparency in reporting about export licenses, in particular by providing regular, timely and detailed information on the exact product for which a license was obtained, as well as the specific end-use of the product; prohibition of export credit guarantees for arms export and a legally binding prohibition of exports of SALW to third countries.[189]

Finally, it is important to underline that States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies (principle 4), as is often the case with companies in the arms industry. Indeed, some of the top arms companies in the world are partly state-owned, major suppliers to their government and often receive substantial support from their government in the conclusion of contracts. Where a business enterprise is controlled by the State or where its acts can be otherwise attributed to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations.[190] The same applies to export credit agencies that play a prominent role in securing finance for arms exporters. For instance, German company Lürssen received an export credit guarantee for the export of patrol boats to Saudi Arabia, but the use of these boats

183 Good Business, Implementing the UN Guiding Principles on Business and Human Rights, Updated May 2016; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522868/Good_Business_Implementing_the_UN_Guiding_Principles_on_Business_and_Human_Rights_print_version.PDF , p. 8.

184 Belgian National Action Plan on Business and Human Rights; https://www.duurzameontwikkeling.be/sites/default/files/content/be_nap_bhr_brochure_en.pdf. For a more elaborate version: https://www.sdgs.be/sites/default/files/publication/attachments/nationaal_actieplan_ondernemingen_en_mensenrechten_2017.compressed.pdf, p 75.

185 See Section 2.A.4.a of this publication.

186 Summary of the hearing can be found at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24537&LangID=E

187 Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Germany, UN Doc. CEDAW/C/DEU/CO/7-8, 3 March 2017, para. 27–28.

188 Committee on the Rights of the Child, Concluding Observations on the combined third and fourth periodic reports of Germany, UN Doc. CRC/C/DEU/CO/3-4, 25 February 2014, para. 77.

189 Antrag der Fraktion Bündnis 90/die Grünen, Ein Rüstungsexportkontrollgesetz endlich vorlegen, Deutscher Bundestag, Drucksache 19/1849. The draft bill has since been rejected; see protocol of the debate and vote in the German parliament, Plenary Protocal 19/62.

190 Commentary to principle 4.

by Saudi Arabia remains unclear; it may not be confined to border control purposes initially agreed in the end-use certificate, but also extend to support the de facto naval blockade in Yemen.[191] The UNGPs, however, warn that where these credit agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk of supporting such harm.[192] »Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.«[193] Arms exports pose a serious risk to human rights and export credit agencies are therefore required to carry out human rights due diligence to identify potential risks and prevent them.

In sum the current regulatory regime for the arms trade does not conform to the State's obligation to protect against human rights abuses by arms manufacturing and exporting companies by failing to impose adequate legislation on arms export controls and effectively implementing it. In addition, no change is yet visible, for example, in the German arms export control framework with regard to how it lives up to the elevated duties it has in terms of financial safeguards granted by the State, as equally required by the UNGPs. Moreover, current legislation does not sufficiently establish an expectation that arms manufacturers need to respect the human rights of third persons. Given the inherent risks of violations of international human rights and humanitarian law, what is needed are mandatory due diligence laws that include the arms sector, or the inclusion of mandatory human rights due diligence into the arms export laws for arms manufacturers and brokering companies. Otherwise, companies will continue to rely on State authorizations as a means to fulfil human rights due diligence, as is current practice; arms manufacturers seem to believe they are absolved from carrying out human rights due diligence and therefore neither assess whether their activities cause or contribute to adverse impacts on human rights nor address such impacts when they occur.

3.3 BUSINESS AND HUMAN RIGHTS PILLAR III – ACCESS TO REMEDY

As already mentioned, pillar III of the UNGPs, the OECD Guidelines and OECD Guidance attempt to ensure that, if human rights violations have been committed, those affected may seek redress by using a remedy mechanism. In what follows we are most concerned with State-based remedy mechanisms, as only States can provide for judicial remedies, as discussed in the present study. As a general principle, States must take appropriate steps to ensure that those affected have access to effective remedy, including by judicial means.[194] For such State-based judicial mechanisms States should take appropriate measures to ensure their effectiveness, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.[195] This includes overcoming situations in which claimants face a denial of justice (i) in a host State (in the present context this would be where the arms were used) and (ii) cannot access home State courts, regardless of the merits of the claim or where the way in which legal responsibility is attributed among members of a corporate group facilitates the avoidance of appropriate accountability.[196] Further causes identified as hindrance to the use of judicial mechanisms to obtain effective remedy are in particular the frequent imbalances between the parties to business-related human rights claims, such as with regard to financial resources or access to information and expertise.[197]

Against this background, the prior description of past and ongoing litigation against government licenses or for criminal liability of government officials and arms exporters, highlights that States arguably lag behind a comprehensive implementation of their duty to provide adequate access to remedy for victims of human rights violations in which the global arms trade plays a substantial role.

First, when it comes to administrative proceedings aimed at preventing potentially harmful arms exports, the lack of legal standing of NGOs in some countries seriously hampers the possibility of judicial review and should be changed. Similarly, relying on the confidentiality of relevant information due to its inherently political nature linked to foreign relations, should not go as far as to impede entirely the possibility of judicial review. Compromise solutions, such as the one established in a Belgian court case,[198] are the minimum standard to allow scrutiny of export decisions in line with a government's human rights obligations. Finally, looking at how risk assessments are carried out highlights the need for clear and binding provisions in the respective domestic law on which plaintiffs can rely to argue that a particular government decision was not well-founded.

Secondly, returning to the question of criminal liability, past and ongoing proceedings demonstrate the existing difficulties. The inbuilt bias resulting in a more lenient approach to granting export licenses needs to be addressed, as evidenced by some of the court cases mentioned in prior sections. Moreover, as a matter of law, arms exporters and government officials who grant and act on licenses while knowing-

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191 Antwort auf die Kleine Anfrage der Abgeordneten Jan van Aken, Wolfgang Gehrcke et al und der Fraktion die Linke, BT-Drucksache 18/8145.

192 United Nations Guiding Principles on Business and Human Rights, Commentary to GP 4, p. 7.

193 Ibid.

194 UNGPs, principle 25.

195 UNGPs, principle 26.

196 UNGPs, commentary to principle 26.

197 Ibid.

198 The court maintained the confidentiality of the documents, but requested that the government provide the applicants with accurate information on the nature of the goods covered by the licenses, Conseil D'État, Section Du Contentieux Administratif, n° 242023 of 29 June 2018, pp. 14 and 21.

ly accepting the risk that they may be used in the commission of war crimes or murder and enforced disappearances clearly fall within the scope of criminal liability for complicity in such crimes. In addition, where only the violation of export control laws is at stake, individuals should have the possibility to intervene in proceedings as a directly affected person. Furthermore, difficulties in obtaining evidence from conflict areas and lack of access to company documents should be countered by specialized prosecutors, for example from war crimes units, who are able to obtain such evidence. Lastly, the level of the *mens rea* standard for company officials in order to determine their criminal responsibility can pose a hurdle for accountability if a »purpose« standard is required instead of a »knowledge« standard. Based on existing expectations towards companies under international business and human right standards, in particular their responsibility to carry out risk assessments, liability may already be engaged in cases in which companies should have known that their products are being used for the commission of crimes. This should thus be the case where companies wilfully turn a blind eye to public information reporting on violations of international humanitarian law or internal repression in the recipient country.

4

CONCLUSION AND RECOMMENDATIONS

As this study shows, contrary to the words of Armin Papperger quoted in the Introduction, arms manufacturing and exporting companies will have to »assume responsibility for the utilization« of their military equipment and take »account [of] the customer's use « of their products when they can foresee that their products might have an adverse impact on human rights or might be used in the commission of violations of international humanitarian law and international crimes. In our overview of existing bodies of law and non-binding principles regulating the international trade in arms, it became clear that not enough attention is paid to considerations of international human rights and humanitarian law. We also showed that it is important to also consider the arms trade from an (international) criminal law perspective and through the lens of business responsibilities. Criminal court cases and OECD NCP instances indicate a tendency towards heightened standards when it comes to holding arms traders and government official accountable for the export of arms and their subsequent use. Much needs to be done, however, to achieve an effective regulatory arms export control regime that is subject to adequate judicial review by administrative courts and allows for the possibility to establish criminal liability in cases in which exported arms were subsequently used to commit or facilitate violations of international human rights or humanitarian law. These efforts can build on existing court cases, carry through pending cases or bring new cases that allow the judiciary to remind governments and corporate actors alike what their responsibility are under existing legislation. The comparative perspective taken in this study makes it possible, despite all the differences in the respective jurisdictions, to identify common problems in national arms export control practices and situations in which judicial oversight may be effective in implementing existing legislation.

In addition, building on the UNGPs and the OECD Guidelines makes it possible to shape more concretely what is expected from companies in the arms sector. Future specific instances may further clarify the scope and elements of due diligence obligations in the arms sector and the relationship between business risk assessments and government authorizations. Such specific instances, despite their soft-law character, therefore contribute to making arms export control more effective.

Law reform is needed in all the jurisdictions examined in this study. Changes are required to improve and harmonize risk assessment methods that effectively rule out exports that might subsequently be used to facilitate or commit violations of international human rights and humanitarian law. Similarly, incorporating mandatory corporate human rights due diligence – including for the arms sector – in national legislation on the basis of existing international standards and the risks imminent in the international arms trade is warranted. Similarly, domestic arms control laws should incorporate corporate human rights due diligence. Finally, national rules on administrative and criminal procedures may be improved to better reflect the reality of the international arms trade, allowing for the judicial review of administrative decisions and the participation of those affected by the use of the exported arms.

On this basis, we offer the following recommendations:

4.1 RECOMMENDATIONS TO ARMS MANUFACTURING AND EXPORTING COMPANIES

- Adopt a human rights policy and communicate it internally and externally to all personnel, business partners and other relevant parties.
- Formalize due diligence measures more robustly based on the regulatory framework of export controls.
- Participate in industry best practice schemes and discussions.
- For risk assessments, take note of evidence from international bodies and government advice and rely on the sources that governments also need to consult on the basis of the EU Common Position, as further detailed in the User's Guide.
- Take additional measures to ensure human rights violations are prevented or mitigated:
  - adopt measures to ensure traceability of products;
  - request a non-re-export certificate and assessment of the extent to which the customer has understood the recommended use parameters for its products; and
- encourage business partners to respect human rights. Confidentiality clauses in the underlying contracts need to be adjusted in order to ensure that contracting

parties are not able to shield themselves behind them when adverse impacts occur.
- Remediation:
  - undertake to suspend or even terminate a business relationship should a customer repeatedly fail to fulfil its commitments;
  - cooperate with any enquiries into misuse and adverse impacts and cooperate with official remedy processes used by victims of the misuse; and
  - introduce clauses in contracts with customers that demand compensation in case of misuse by the customer, which would be used to fund actions to protect human rights.

4.2 RECOMMENDATIONS TO STATES:

- Given the inherent risks of violations of international human rights and humanitarian law, adopt mandatory due diligence laws that include the arms sector, or include mandatory human rights due diligence in the arms export laws for arms manufacturers and brokering companies.
- Adequately regulate the business activities of foreign subsidiaries of arms manufacturing and exporting companies.
- Increase transparency in reporting about export licenses in particular by providing regular, timely and detailed information on the exact product for which a license was received, the date of actual export, and the specific end-use of the product.
- Take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies, for example, by prohibiting export credit guarantees for arms export.
- Adopt a legally binding prohibition of exports of SALW to third countries.
- Adopt OECD Due Diligence Guidance for the Arms Sector recognizing the high-risk sector it operates in, and providing for a human rights policy and human rights due diligence by corporations, clarifying their relationship to government authorizations.
- Recommendations to improve judicial review of licensing decisions in administrative courts:
  - establish legal standing for NGOs that can demonstrate involvement in topics such as the arms control sector, human rights or peace;
  - adopt measures to avoid the exclusion of relevant information from the possibility of judicial review due to its confidentiality linked to foreign relations and its political nature; and
  - adopt clear and binding provisions in the relevant domestic laws on risk assessments, on which plaintiffs can rely to argue the illegality of government decisions.

- Recommendations to improve access to remedy in criminal cases:
  - allow criminal courts to undertake separate assessments of administrative licensing decisions in order to determine the criminal liability of corporate actors;
  - establish procedural possibilities for those individuals affected by the use of exported weapons to intervene in criminal proceedings against arms exporters;
  - difficulties in obtaining evidence from conflict areas and lack of access to company documents should be countered by specialized prosecutors who are able to obtain such evidence.

ANNEX: Overview of existing and past cases

Case	Jurisdiction	Legal standing	
Country: France **Parties:** Action Sécurité Éthique Républicaine (ASER) v. Premier ministre de France **Court:** Cour Administrative d'Appel de Paris, **Date and previous instances:** Case N°. 19PA02929, Ordonnance of 26 September 2019; First instance: Tribunal Administratif de Paris, *Case N° 1807203/6-2* (8 July 2019)	– Lower court accepted its jurisdiction – Court of Appeal denied jurisdiction as the licensing decision is inherently linked to foreign policy		
Country: United Kingdom **Parties:** Campaign against Arms Trade (CAAT) v. Secretary for International Trade **Court:** Court of Appeal, civil division **Date and previous instances:** Decided on 20 June 2019; First instance, High Court of Justice, Queen's Bench Division (10 July 2017)		– Court affirmed legal standing of the NGO	
Country: Belgium **Parties:** Ligue des droits de l'Homme et Coordination nationale d'action pour la paix et la démocratie v. Région wallone **Court:** Conseil d'État, section du contentieux administratif; *Case N° 242.029* **Date and previous instances:** decided on 29 June 2018; previous decisions on 24 November 2017, 06 March 208, 14 June 2019		– Court affirmed legal standing of the NGO	
Country: The Netherlands **Parties:** NJCM, PAX and Stop Wapenhandel v. Staat der Nederlanden **Court:** Court of Appeal of Amsterdam *Case N° ECLI:NL:GHAMS:2017:165* **Date and previous instances:** decided on 24 January 2017; District Court of Noord Holland (26 August 2016) Case 2: decided on 17 October 2017; previously District Court of Noord Holland (20 April 2017)		– Legal standing was denied as the NGO was not directly affected by the license	
Country: Spain **Parties:** Case 1: Asociacion de Familiares de Presos y Detenidos Saharauis et al. v. Ministerio de Industria, Comercio y Turismo; Case 2: Justicia de Pau v. la Subsecretaría de Estado de Industria, Turismo y Comercio, **Court:** Case 1: Sala de lo Contencioso-Administrativo Madrid; *Case N° 03440/2010* *Case 2: Tribunal Superior de Justicia Madrid,* *Case N° 00369/2010* **Date and previous instances:** Case 1: decided on 13 March 2013 Case 2: decided on 31 March 2010	–	– Legal standing was denied as the associations filing the complaint were not found to be »interested parties« under the applicable Spanish law – The court denied the notion of defending human rights as an adequate interest within the meaning of Spanish law	
Country: Germany **Parties:** Faisal bin Ali Jaber and others v. the Federal Republic of Germany **Court:** German Higher Administrative Court for the State of North Rhine-Westphalia *Case N° 4 A 1361/15* **Date and previous instances:** decided on 19 March 2019; previously VG Köln (27 May 2015)		– Plaintiff has to be directly affected to have legal standing – Plaintiff can rely on his fundamental rights to argue his affectedness	

	Access to information	Review of licensing decisions
	– Request by plaintiffs for declassification and communication of licenses and deliberations of government bodies responsible for granting the licenses was denied.	– Plaintiffs: by granting licenses the government acted in violation of Art. 6 and 7 Arms Trade Treaty – Court agreed with the government's argument: the EU CP and the Arms Trade Treaty only apply between states
	– Court warranted a closed proceeding in addition to an open one. In the closed proceeding only special advocates were allowed to take part.	– Plaintiff challenged licensing decisions on the basis of the UK Consolidated Criteria, which incorporate the EU CP into national law – Court: sole question is whether the government erred in applying the law, whether the decision was irrational. The government had erred as it did not answer the question of whether there was a historical pattern of IHL breaches committed by the Saudi-led coalition – Court made clear that the User's guide to the EU CP does not impose any obligation on governments
	– Court granted access for applicants to the selected information from the administrative file to obtain information about the nature of goods covered by the license	– The court suspended six licenses and annulled eight licenses for the export of weapons to Saudi Arabia – Court: The government failed to assess criteria 6 in accordance with the EU CP before granting the licenses
	– Lack of information resulted in a lost proceeding, as the challenged license had already expired	– Plaintiff relied on Art. 6 and 7 Arms Trade Treaty and Art. 2 of the EU CP. – Because the plaintiffs were found inadmissible the court did not look at the merits
	– Request to obtain copies of licenses by an NGO was dismissed by the court as licenses and corresponding reports are protected as »secret«	

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ARMS TRADE AND CORPORATE RESPONSIBILITY

Liability, Litigation and Legislative Reform

Arms produced in the European Union account for a substantial part of the global arms trade. Although these arms are covered by export regulations, they may be used to commit war crimes, individual murders and enforced disappearances, as well as in violations of international humanitarian law.

This study shows that arms manufacturing and exporting companies must take responsibility for how their military equipment is used when they can foresee that their products may infringe human rights or figure in breaches of international humanitarian law and international crimes.

Defence companies' lack of human rights due diligence concerning how their products are deployed is alarming, especially because these companies operate within the UNGP framework. Building on the UNGPs and the OECD Guidelines it's possible to bring home to these companies exactly what is expected of them.

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