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DEVELOPMENTS IN THE FIELD

# Human Rights Due Diligence Within the Arms Industry: Challenges, Practices and Opportunities

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## Abstract

The defence industry plays a critical role in maintaining international peace and security, yet its activities inherently have human rights implications. This article examines the industry's responsibility to respect human rights in conformity with the United Nations Guiding Principles on Business and Human Rights. It explores challenges, practices, and opportunities of human rights due diligence within the arms sector—including the end-use monitoring component. It seeks to inform policymakers, industry, scholars and activists working towards a rights-respecting arms trade regime. The article will explore human rights due diligence's foundations in international human rights law and corporate social responsibility frameworks, as well as emerging shifts and standards in the legal landscape at the national, regional, and international levels. Drawing on the American Bar Association Center for Human Rights evidence-based research, this piece will also explore the industry's response to its due diligence obligations and how these narratives cannot shield the industry from legal, financial and reputational risks.

**Keywords:** arms sector; human rights due diligence; responsible arms transfer; responsibility to respect human rights; UNGPs

## I. Introduction

The United Nations Working Group on Business and Human Rights issued an information note outlining the arms sector's responsibility to respect human rights and undertake human rights due diligence in arms transfers in 2022.[1] Despite the intrinsic risks of causing or contributing to human rights and international humanitarian law (IHL) violations ingrained in the operations of the arms sector, the UN Working Group noted that 'limited attention has been paid to due diligence and the associated liability of arms-exporting companies compared to those applicable to some other business sectors.'[2] The defence

* This piece was prepared by the author and reflects her own views. It has not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association as a whole.

[1] UN Working Group on Business and Human Rights (UN Working Group), Information Note, 'Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights,' (August 2022).

[2] M Kanetake, C Ryngaert, *Due Diligence and Corporate Liability of the Defence Industry: Arms Exports, End Use and Corporate Responsibility*, (Brussels: Flemish Peace Institute, 2023) 8.

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sector maintains that the United Nations Guiding Principles on Business and Human Rights (UNGPs) do not apply to its activities due to the sector's unique standing and how much arms companies are interlinked with arms exporting governments. This article delves into the industry's responsibility to respect human rights in line with the UNGPs. It examines challenges and opportunities for human rights due diligence (HRDD) within the arms sector that incorporates an end-use monitoring component.

## II. The UNGPs and the Arms Sector

The UNGPs set forth expectations that businesses respect international human rights law in their operations, in addition to complying with local laws. The UNGPs also provide an authoritative normative framework that fleshes out the states' duty to protect and corporations' responsibility to respect human rights.[3] They put forward recommendations to states on how to create greater legal and policy coherence between their human rights obligations under international human rights treaties and actions with respect to business.

Indeed, states have the primary responsibility to protect human rights. For example, states that are signatories to the Arms Trade Treaty (ATT) are supposed to investigate the likelihood that arms will be used to commit serious human rights and IHL violations through their existing export control systems and national legal framework before issuing an export license. In cases where risks cannot be mitigated, states are prohibited from issuing an export license, as stipulated by Article 7 (3) of the ATT.[4] Similarly, criterion two (c) of the European Union (EU) Common Position requires the non-authorization of export licenses to risky clients.[5]

Pillar II of the UNGPs acknowledges businesses' independent responsibility to respect human rights. It provides the baseline expectations for all companies, regardless of size, industry, country of operation, domicile, or ownership structure. Under this responsibility, businesses are required to '[a]void causing or contributing to adverse human rights impacts,'[6] and '[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.'[7] Businesses 'should take the necessary steps to cease or prevent their contribution and use [their] leverage to mitigate any remaining impact to the greatest extent possible.'[8] Leverage is considered to exist where businesses can effect change in the wrongful practices of an entity that causes harm. Due to the nature of the relationship between arms companies and recipient countries, one could argue that these businesses have the necessary leverage to influence clients' behaviour on the end use of weaponry throughout the life span of arms sale contracts.

The UNGPs further indicate that corporate responsibility to respect human rights 'exists independently of states' abilities and/or willingness to [fulfil] their own human rights obligations.'[9] The duty to respect entails setting up and implementing HRDD policies and processes, which requires businesses to identify, prevent, and mitigate human rights

[3] OHCHR, 'Frequently Asked Questions About The Guiding Principles on Business and Human Rights,' (2014), 9.

[4] Tara Van Ho, 'How the Arms Trade Treaty CSP9 Risks Repeating Past Mistakes,' *Just Security*, (23 August 2023), https://www.justsecurity.org/87764/how-the-arms-trade-treaty-csp9-risks-repeating-past-mistakes/ (accessed 31 May 2024).

[5] Council of the European Union, Council Common Position 2008/944/CFSP, (8 December 2008).

[6] Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,' A/HRC/17/31 (21 March 2011) at 14.

[7] Ibid.

[8] Ibid, 21.

[9] Ibid, 13.

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adverse impacts and account for how they address them.[10] These are ongoing and separate responsibilities from the licensing process. While the onus is on states to uphold their obligations under international human rights law and IHL in issuing export licenses, the UNGPs recognize a complementary and independent responsibility on businesses, albeit non-binding, to assess the risk of whether arms sales will result in human rights violations or not. As such, the issuance of arms export licenses should not be considered by businesses in lieu of their responsibility to conduct human rights due diligence throughout the life cycle of arms trade contracts.[11]

## III. A Shifting Legal and Policy Landscape

Legislators and policymakers are taking an interest in mandatory rules to ensure corporate responsibility for human rights abuses, imposing applicable due diligence obligations to address business and human rights concerns. Several jurisdictions have adopted mandatory human rights due diligence legislation. Even though there is no established precedent of their use in the case of arms companies, these laws 'are critically important to regulating the export of arms to conflict zones, in part because they determine the liability consequences of due diligence failures.'[12] France's duty of vigilance law requires French companies to exercise due diligence in establishing effective measures to identify risks and prevent severe impacts on human rights and the environment resulting from the company's activities and those of its subcontractors and suppliers.[13] Non-compliance with the law could subject companies to civil liability for individuals harmed.[14] However, due to its nexus with governments, arms companies maintain that 'a governmental licensing check [is] a key safeguard for mitigating the normatively problematic consequences of arms exports.'[15] They argue that the diligence performed under the arms export licensing process is sufficient and could protect them from any potential legal liability.

The Corporate Sustainability Due Diligence Directive (CSDDD) was adopted in July 2024, establishing a mandatory human rights and environmental due diligence standard for large businesses operating in the EU. It requires businesses to conduct human rights and environmental due diligence within their operations and global value chains and enforces this duty through administrative supervision and civil liability.[16] Despite civil society efforts, the adopted text excludes the arms sector on the basis that its operations are subject to arms export control regulations.[17] This is in contrast to the expectations arising from the UNGPs as international soft law standards, that establish corporate responsibilities related to the sale of arms, even in the presence of an export license.

[10] UN Working Group, 'UNGPs 10+ A Roadmap For The Next Decade of Business and Human Rights' (2021) 12.

[11] Muchlinski, note 3.

[12] Kanetake, note 2, 17.

[13] Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

[14] Business and Human Rights Resource Centre, 'France's Duty of Vigilance Law,' https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/ (accessed 31 May 2024).

[15] Machiko Kanetake and Cedric Ryngaert, 'Arms Exporters' Corporate Liability for Due Diligence Failures', *Articles of War* (15 November 2023), https://lieber.westpoint.edu/arms-exporters-corporate-liability-due-diligence-failures/ (accessed 11 October 2024).

[16] European Commission, 'Corporate Sustainability Due Diligence,' https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en (accessed 31 May 2024).

[17] León Castellanos-Jankiewicz and Melanie Schneider, 'Including the Arms Sector in the EU Corporate Due Diligence Directive,' *Verfassungsblog* (19 May 2023), https://verfassungsblog.de/including-the-arms-sector-in-the-eu-corporate-due-diligence-directive/ (accessed 29 July 2024).

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'[T]he international standards ... recognize the broader scope of due diligence in conflict-affected contexts, introducing the concept of enhanced or heightened human rights due diligence.'[18] Simply put, any company 'operating in conflict-affected areas should adopt a broader understanding of the conflict when identifying human rights risks and impacts.'[19]

## IV. The Importance of Human Rights Due Diligence for the Defence Sector

In 2022, the American Bar Association Center for Human Rights published its Defence Industry Human Rights Due Diligence Guidance, aiming to address the industry's lack of due diligence processes.[20] This guidance, informed by the UNGPs, provides practical steps to set up human rights due diligence programs with an end-use monitoring component. It demonstrates to arms companies the potential consequences of not upholding their responsibility to respect human rights and undertaking robust human rights due diligence in their operations. The Guidance focuses on the fact that the industry's reliance on human rights due diligence performed by regulators could be, in some instances, insufficient.

For example, according to a United States Government Accountability Office report, between 2015 and 2021, the United States Department of Defence administered military support worth at least US$54.6 billion to Saudi Arabia and the United Arab Emirates (UAE), primarily for defence equipment and defence services.[21] Arms sales to these two countries continued despite the findings of the UN and civil society organizations that the Saudi-led coalition had carried out airstrikes in Yemen that were indiscriminate and may amount to war crimes.[22] Further, US laws prohibit arms transfers to countries that violate human rights and international humanitarian law. Section 502B of the U.S. Foreign Assistance Act and Section 3 of the U.S. Arms Export Control Act prohibit the provision of weapons to countries engaged in a consistent pattern of gross human rights violations.[23] Despite these obligations under U.S. domestic law, various U.S. administrations have authorized arms transfers to recipients that could be categorized as high-risk, resulting in negative consequences.[24]

The Arms Trade Litigation Monitor has also reported on an increasing number of legal challenges against governments' arms exporting licensing decisions, failing to effectively perform due diligence.[25] For example, the European Center for Constitutional and Human Rights (ECCHR) and the civil society organization Mwatana filed a criminal complaint

[18] European Center for Constitutional and Human Rights (ECCHR), *EU: Arms and Conflict-affected Areas in the Corporate Sustainable Due Diligence Directive* (7 November 2023), 3.

[19] Ibid. See also, UN WGBHR, 'Report on business, human rights and conflict-affected regions: towards heightened action' A/75/212 (2020); UNDP, 'Heightened Human Rights Due Diligence for Business in Conflict-Affected Contexts: A Guide,' (2022).

[20] American Bar Association, *Defense Industry Human Rights Due Diligence Guidance* (Washington DC: American Bar Association, 2022).

[21] United States Government Accountability Office (GAO), *Yemen State and DOD Need Better Information on Civilian Impacts of U.S. Military Support to Saudi Arabia and the United Arab Emirates*, (Washington DC, GAO, June 2022).

[22] See generally HRC, Group of Eminent Experts on Yemen, https://www.ohchr.org/en/hr-bodies/hrc/yemen-gee/index (accessed 31 May 2024).

[23] Center for the Protection of Civilians and American Bar Association Center for Human Rights, *Human Rights, Civilian Harm, and Arms Sales: A Primer on U.S. Law and Policy*, (February 2022), 4, 9, https://civiliansinconflict.org/wp-content/uploads/2022/02/US-Law-and-Arms-Transfers_Final.pdf (accessed 11 October 2023)

[24] A T Thrall and C Dorminey, 'Risky Business: The Role of Arms Sales in U.S. Foreign Policy' *CATO Institute* (13 March 2018), https://www.cato.org/policy-analysis/risky-business-role-arms-sales-us-foreign-policy#u-s-arms-sales-since-9-11-assessing-the-risk-from-arms-sales (accessed 31 May 2024).

[25] The Arms Trade Litigation Monitor https://armstradelitigationmonitor.org/ (accessed 31 May 2024).

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against managers of RWM Italia and senior officials of Italy's National Authority for the Export of Armament (UAMA).[26] The complaint alleges their criminal liability for the export of a part of the weapon that was used in an airstrike that killed an entire family in Yemen. Further, in June 2022, ECCHR, Mwatana, and the French non-governmental organization (NGO) Sherpa filed a criminal complaint in France requesting a criminal investigation into the potential complicity of three French arms manufacturers, namely Dassault Aviation, Thalès, and MBDA France, for their role in supplying and maintaining arms of the Saudi-led Coalition.[27] The investigation is still in the early stages. In the U.S., a group of Yemeni nationals filed a civil lawsuit against Lockheed, General Dynamics, and Raytheon for 'aiding and abetting war crimes and extrajudicial killings' by supplying arms to the Saudi-led coalition's war in Yemen.[28]

These legal challenges, among other factors such as investors' push for human rights impact assessments,[29] have triggered changes in arms companies' operations and governance. The recent action taken by Itochu Corporation, a Japanese trading conglomerate that cancelled an memorandum of understanding (MoU) with Elbit Systems, one of Israel's largest defence contractors, indicates that some industry actors acknowledge they have some type of responsibility to respect human rights.[30] This cancellation came in response to the International Court of Justice (ICJ) order in January 2024 on South Africa's request for provisional measures on the application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip, which indicates that 'plausible genocide' is being committed by Israel.[31]

This is even though the MoU was made at the request of Japan's Defence Ministry.[32] Itochu Corporation has put in place human rights due diligence policies that require the company to 'decline a potential sale where the risk to human rights or company reputation are [sic] unacceptable irrespective of whether that sale would be legally permissible,' with the objective of fulfilling the UNGPs.[33] Its 'Respect and Consideration for Human Rights' policy states that 'if there is a contradiction between internationally recognized human rights and the laws and ordinances of a country or region, we will pursue a method to maximize respect for international human rights principles.'[34] By conducting its own autonomous human rights due diligence, Itochu recognizes that its responsibility is independent of states' ability or willingness to fulfil their human rights obligations, and separate from diligence performed by regulators. By failing to proactively identify and

[26] ECCHR, 'European Responsibility for War Crimes in Yemen,' https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/ (accessed 31 May 2024).

[27] ECCHR, 'War Crimes in Yemen: Complaint Against French Arms Companies,' https://www.ecchr.eu/en/case/yemen-arms-exports-france/ (accessed 22 October 2024).

[28] *Ali v Al-Nahyan* 1:23-CV-00576, (2023).

[29] A A Acosta and J Abramson, 'As War Leads to More Orders, Weapons Makers Should Embrace Human Rights' *Forum on The Arms Trade* (27 April 2023), https://www.forumarmstrade.org/blog/as-war-leads-to-more-orders-weapons-makers-should-embrace-human-rights (accessed 31 May 2024).

[30] Reuters, 'Japan's Itochu to End Cooperation with Israel's Elbit amid Gaza War,' *The Jerusalem Post* (5 February 2024), https://www.jpost.com/international/article-785226 (accessed 31 May 2024).

[31] *South Africa v Israel*: Request for the indication of provisional measures, International Court of Justice (ICJ) (26 January 2024).

[32] Reuters, note 30.

[33] H Alwishewa, 'The Move Towards Human Rights Due Diligence Policies by the Arms Industry,' *Forum on the Arms Trade* (18 January 2024), https://www.forumarmstrade.org/blog/the-move-towards-human-rights-due-diligence-policies-by-the-arms-industry (accessed 31 May 2024).

[34] Itochu Corporation, Respect and Consideration for Human Rights, https://www.itochu.co.jp/en/csr/society/human_rights/index.html (accessed 2 August 2023).

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mitigate risks to human rights and IHL, arms companies risk facing legal, reputational, and financial challenges.

## V. Debunking Myths

Arms companies have cited limitations in accessing information as a hindrance to fulfilling their responsibility to respect human rights and the ability to conduct HRDD.[35] However, arms exporters have access to significant and relevant data. The dynamics of the arms trade frequently involve longterm support contracts, facilitating ongoing engagement between suppliers and buyers for training, maintenance, upgrades, and further transfers. These sustained interactions provide valuable insights into the policies and practices of end-users and end-use. Exporters can proactively include contractual clauses mandating transparency and cooperation from their clients.[36] This allows companies to take 'adequate measures for their prevention, mitigation and, where appropriate, remediation,'[37] as part of fulfilling their responsibility to respect human rights.

Another argument that companies have raised is that due diligence obligations create an 'unlevel playing field,' and that implementing a robust HRDD program without mandatory legislation puts companies at a business disadvantage.[38] For the vast majority of defence companies, governments are their largest clients by a significant margin; this may cause concerns if their internal policies are at odds with government policies that would permit sales. But as noted above, arms companies have a normative responsibility to act consistently with the UNGPs if they cause, contribute to, or are linked to human rights harm or adverse impact through their direct operations or relationships. Additionally, HRDD not only assists companies in mitigating regulatory, financial, legal, and reputational risks but also enables them to cultivate a competitive edge with investors and employees who increasingly prioritize environmental, social, and governance (ESG) standards.[39]

## VI. Conclusion

Defence companies frequently contend that their human rights obligations are fulfilled through due diligence conducted by regulators when approving sales or granting export licenses.[40] However, regulatory approvals do not absolve arms exporters of their duty to uphold human rights. Possessing a valid license does not shield defence companies from civil or criminal liability. The UNGPs clarify the complementary and independent responsibilities between governments and businesses. The current litigation against States, when coupled with evolving guidance relating to the defence sector, such as the ABA Guidance, demonstrates that the reason for interdependent State duties and company responsibilities under Pillars I and II of the UNGPs is because of the insufficiency of State licensing procedures to address severe human rights risks connected to arms sales.

[35] Eian Katz, 'Human Rights Due Diligence: A Defense Industry Business Necessity,' *Just Security* (13 September 2022), https://www.justsecurity.org/83028/human-rights-due-diligence-a-necessity/ (accessed 31 May 2024).

[36] American Bar Association, note 22.

[37] HRC, note 5, 13.

[38] Quaker United Nations Office, 'Responsible Business Conduct - The Case Of The Arms Sector,' Verbatim Read Out (29 November 2022).

[39] Ibid.

[40] United States Securities and Exchange Commission, *Schedule 14a Proxy Statement Pursuant To Section 14(A) Of The Securities Exchange Act Of 1934 (Amendment No.), Lockheed Martin Corporation*, https://www.sec.gov/Archives/edgar/data/936468/000093646822000033/lockheedmartin2022proxy.htm (accessed 31 May 2024).

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