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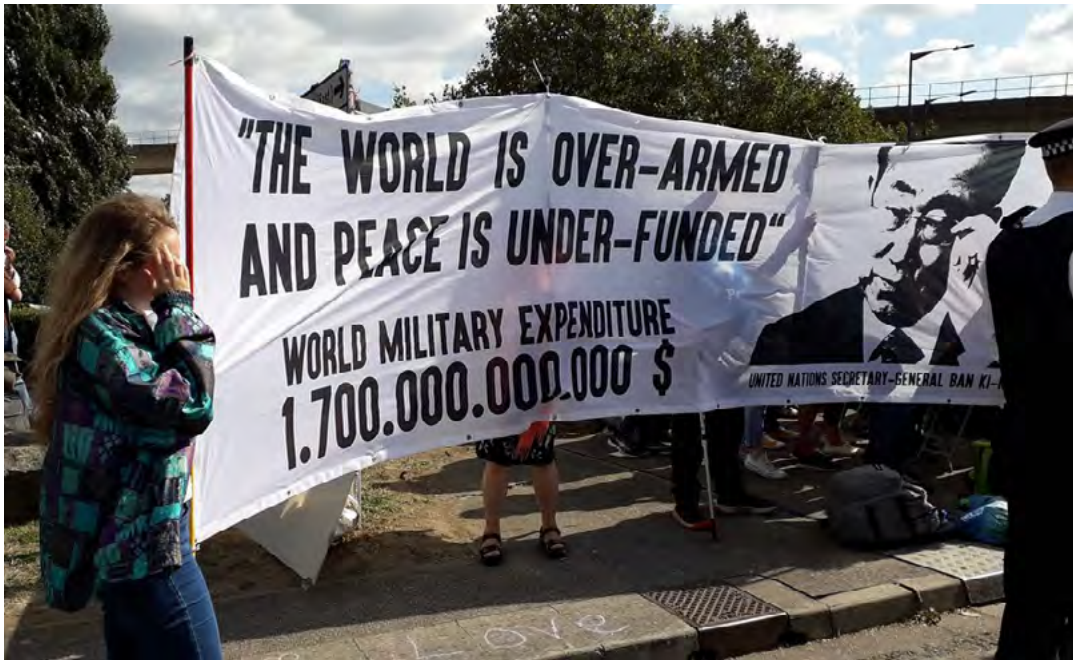
REGULATING THE ARMS INDUSTRY: CRAFTING HUMAN RIGHTS DUE DILIGENCE LEGISLATION FOR ARMS COMPANIES



The international legal systems deployed to restrain the arms industry in the face of violations of human rights and humanitarian law are demonstrably weak. In certain areas, collective action has attempted to address this. Union workers in Italy refused to load generators onto boats laden with arms and bound for Saudi Arabia; diverse coalitions of demonstrators protested arms fairs in the UK; and Google employees refused to continue the corporation's work on developing AI technology that could be used by the military. Though these actions may point towards an ability to mobilise against the arms industry, they also show that relying exclusively on the existing legal order is insufficient

Regulatory systems for arms exports have been designed to contain glaring loopholes. The most prominent treaty on the issue, the Arms Trade Treaty, merely asks states to refuse or suspend export licences when there is an 'overriding risk' that they could contribute to serious violations of international human rights or humanitarian law. What amounts to an 'overriding risk' is not explicitly defined, and this definitional void grants states the leeway to continue granting export licences.

Additionally, following the privatisation of arms manufacturers across Europe, the arms industry continues to operate both with the freedom of private industry and with cossetted protections conferred by its close relationships with the state. In this sense, arms manufacturers have few obligations to conduct checks on the likelihood of violations and can largely defer to the state's diligence system, however flawed. The extraordinary amount of money states bring in from their arms trade and its bearing on geopolitical positioning acts to corrupt, or at the very least dampen, their attempts to control arms exports.

In recognising the potentially corruptive force of the arms industry in the face of governmental decision-making, state regulation (while remaining in place and tweaked to close the existing loopholes) can potentially be supported by the development of a mandatory human rights due diligence (HRDD) regulatory system, moving away from the voluntary fig leaves of 'Corporate Social Responsibility' approaches that naively expect corporations to comprehensively scrutinise their own behaviour.

LEGITIMISING THE ILLEGITIMATE?

Of course, the creation of mandatory HRDD obligations for the arms industry entails its own dilemma. The sale of weaponry – by its nature – involves the promotion of violence, the continuation and expansion of militarised foreign policy, and the proliferation of warfare as a commodity. Though HRDD obligations provide one avenue for preventing sales of arms for more obvious violations of human rights and/or humanitarian law, the process may confer legitimacy on the arms industry, and perhaps conflict, as a whole, by presenting a system perceived as capable of eliminating the harshest features of war. This concern must be appreciated and confronted by those intent on limiting the arms trade and military aggression.

This article puts forward an HRDD model in the context of the European arms sales market as a way to increase the regulation of the arms industry in exporting states. It does not advance a strategy for its abolition. Whilst this may be the ultimate goal, the recommendation for the establishment of mandatory HRDD processes is designed to prevent abuses in the short to medium term, recognising that efforts should be made to safeguard against death and destruction in the interim. If the recommended approach is adopted, consistent collective societal efforts will still be necessary to end militaristic foreign policy. Ultimately, war – even when waged within the strictures of international law – is barbaric.

HRDD IN INTERNATIONAL LAW

The UN Guiding Principles on Business & Human Rights (UNGPs), though legally non-binding, serve as an authoritative source clarifying the legal obligations of both states and businesses in relation to human rights law. The UNGPs' author, Professor John Ruggie, held that the principles found in the UNGPs were not merely arbitrary rules that he crafted, but were a collection of obligations and responsibilities identified across a variety of sources and customary international law. The UNGPs flesh out a number of HRDD responsibilities for states, recommending the establishment of human rights due diligence processes so that businesses are required to identify, prevent, mitigate and account for their impacts on human rights, with further features articulated within the subsequent principles. Other organisations such as the Organisation for Economic Co-operation and Development (OECD) have also directed their attention to crafting similar HRDD standards. Nevertheless, international law considers the state as the primary subject that holds binding legal responsibility. Though this state-centric approach is in tension with contemporary reality, where corporations have been able to accumulate a level of power and political control that rivals and at times surpasses that of states, corporations' obligations are ultimately derived from those that states choose to impose. As such, states must deliberately extend binding obligations to private businesses and craft the legal framework to govern the arms industry.

This provides an entry point for parliamentary and extra-parliamentary activism aimed at lobbying for and establishing such legislation. When engaging in this effort, we can recognise, however, that a regulatory due diligence framework will not exist within a vacuum. Within Europe, a number of countries have enacted HRDD legislation, and others such as the Republic of Ireland are actively looking towards developing their own frameworks. The 'Devoir de Vigilance' (Duty of Vigilance) law, enacted in France in 2017, has provided one of the most prominent systems to date, requiring large limited liability companies to establish and publish vigilance plans to identify impacts on human rights as well as environmental issues resulting from their activities, as well as those of their subsidiaries, subcontractors and supply networks. Similar legislation has been enacted in other countries, touching

on particular human rights issues, including the Child Labour Due Diligence laws in the Netherlands and the Modern Slavery Act in the UK. This is by no means an exhaustive list but provides an indication of some of the ways in which mandatory HRDD obligations have been implemented. Ultimately, these regulations can be used as a basis for HRDD regulations specific to the arms industry, with their language and requirements serving as inspiration. They can thus help to confer legitimacy on efforts to develop HRDD policies for the arms industry.

CREATING HRDD REGULATIONS FOR THE ARMS INDUSTRY

Based on an analysis of the arms industry's practices, existing regulations regarding the arms trade and the tool kit of due diligence policies within Europe, this section provides a series of recommendations for HRDD measures that may be used as a basis for the development of regulations tailored to the arms industry.

SPECIALIST UNITS

Dedicated HRDD compliance units, with competent and specialised employees, should be relied upon for conducting HRDD activities. The same practice has been applied in the banking industry with respect to anti-money laundering due diligence work. Assigning HRDD responsibilities to a specialist HRDD unit will make internal conflicts of interest less likely, particularly where the unit is only accountable to and solely reports to senior management or a responsible decision-making committee.

The UNGPs require companies to have policies and processes in place to meet their human rights responsibilities. For arms companies, these human rights centred policies must be widely disseminated throughout the company structure and relayed to their supply chain. As part of this commitment, the compliance unit should be provided with the necessary authority within the company in order, for instance, to have safe and direct channels between itself and the company agents and employees on the ground. The same specialised unit should also facilitate any grievance channels, which may provide the company with pertinent information on the use of its products in the field. The importance of the work and necessary level of engagement with the unit should be thoroughly communicated through internal and external channels to all stakeholders by top-ranking decision-makers who foster and promote the company culture.

HUMAN RIGHTS IMPACT ASSESSMENTS

Whilst these assessments should take place before any transactions, the checks should continue throughout the life cycle of the business relationship, particularly where additional information has come to light regarding violations from the purchasing state. The relationship between parties in arms transactions is not limited to immediate transactions and may extend to ongoing crucial maintenance efforts and logistical and training support work on the ground. Thus, where the company has a physical presence on the ground in the performance of these additional services (even where they are not in the country where violations have occurred), it should establish measures to ensure that human rights concerns related to the end user's activities are adequately considered, such as the use of a compliance checklist and periodic visits by the company or an independent auditor to examine the end user's practices.

EARLY DUE DILIGENCE (PREVENTATIVE MEASURES)

The process of identifying possible violations should commence before the transaction occurs and should adopt a risk-based approach where the likelihood of violations is assessed. This mandates HRDD reviews but recognises that definite knowledge of a future abuse will rarely be present. The 'Know Your Customer' (KYC) model is used within anti-money laundering, corruption and bribery due diligence. Companies must collect sufficient information about the customer before the transaction occurs.

Where the purchasing party is a government, before entering into agreement, a company should, at a minimum, consider the following indicators:

- Does the customer operate in a conflict-affected zone?
- Do the resolutions, comments, statements and findings of the UN Security Council, UN human rights machinery and EU or Council of Europe bodies indicate that the conflict-related situations, systemic human rights issues and past or current behaviour are in contradiction with the potential end user's obligations under international humanitarian law (IHL) and international human rights law (IHRL)?
- Does the country risk information provided by the foreign affairs ministry of the country in which the company is based indicate the potential for the products to be used in violation of the recipient country's IHRL and IHL obligations? For example, companies based in the UK should review the travel advice provided by the Foreign and Commonwealth Office to identify the general risk levels and salient human rights and humanitarian issues within the countries concerned.
- Do recent reports by credible NGOs in the field such as the Red Cross, Amnesty International, Human Rights Watch or other international or local reputable civil society groups contain information on the possibility of past or current behaviour which is in contradiction with the IHL and IHRL obligations of the potential end user?
- Do adverse media checks through reliable open sources return credible information on conflict-related and/or human rights violations or past/ current behaviour which is in violation of the IHL and IHRL obligations of the potential end user?

Additionally, beyond regular due diligence checks, employees and/or agents who are on the ground or involved in maintenance, logistical and training support work after the initial sale of products should duly inform the relevant units of pertinent information when they become aware of a development that may indicate the possible violation of IHL and IHRL.

In instances where information is identified from high-profile reputable sources, such as UN fact-finding or other mechanisms, it is possible to create a 'presumption' that there is an 'overriding' or 'clear' risk that the products will be used to facilitate violations of IHL and/or IHRL. This information can subsequently be rebutted by governments but would prohibit the continued sale by private companies in the interim.

INTEGRATING FINDINGS INTO THE DECISION-MAKING PROCESS

Where the HRDD review process results in the finding that there is a risk of potential violations should the transaction proceed, companies should promptly prevent the harm. This may ultimately mean cancelling the immediate transaction and ceasing the business relationship until the concerns are adequately addressed. Therefore, businesses should be ready to act independently in a responsive manner to address any kind of direct or indirect human rights or humanitarian law violations which may result from a transaction. These decisions should be recorded in writing and stored. Ultimately, the decisions should also be reported to senior management within the company to ensure that they remain aware of these decisions.

RECORD-KEEPING

Throughout the verification and decision-making process, robust records should be kept of the information used to guide companies' ultimate determination as well as the relevant persons involved in making these decisions. This will provide invaluable assistance for accountability measures, particularly as a considerable challenge in holding individuals criminally responsible for the transfer of arms is the inability to show that they had the requisite knowledge that they would be facilitating a human rights, humanitarian, or criminal law violation by a third party. Given the recommendation that senior management be involved in the decision-making relating to human rights obligations, mandated record-keeping is a way to ensure that they do not shirk the recognition of complicity. As a result, symbolic legal victories in which courts and tribunals hold senior management criminally responsible can be secured.

FINES

Businesses that fail to comply with necessary mandatory HRDD measures should face penalties to better ensure compliance. Legislation within the UK that provides for due diligence obligations allows for a range of penalties and may provide a useful basis for penalties concerning the arms trade. Such penalties should include fines and statements censuring the offending business. Considerable fines have been issued by the Financial Conduct Authority for such failures, including the fine of £102,163,200 to Standard Chartered Bank in April 2019. Furthermore, legislation should be enacted to allow for the suspension and removal of authorisation for the business to operate and the temporary or permanent prohibition of staff holding an office or position involving decision-making responsibility concerning the management of the transaction.

REGULAR REPORTS

Currently, regulations such as the UK's Modern Slavery Act require companies to issue annual HRDD reports to show what steps they are taking to identify, assess and mitigate possible negative impacts on human rights. In the context where the reporting requirements demand detailed information and transparency on their processes, this can provide an entry point for genuine scrutiny from civil society, academia and politicians amongst others. Moreover, the regular release of these reports can fuse these activities to the news cycle, providing a recurring spotlight on the activities of the arms industry and increasing the potential for public scrutiny and pressure.

DIFFICULTIES IN CONDUCTING DUE DILIGENCE ASSESSMENTS

One potential critique of the HRDD process for arms companies is that they are less capable than states of making the proper determinations, as states will have additional information at their disposal to inform their decisions. However, the UNGPs advise that both states and private industry should hold obligations for ensuring they are compliant with human rights standards. To counter this, one can contend that the risk-based approach provides the best model for corporate practices as it accepts that corporations will rarely be in possession of the entirety of facts, but rather, operate on the basis that there is a given risk of a certain impact occurring. Indeed, as other industries hold due diligence obligations, such as the banking sector, it is reasonable to contend that the arms trade will be in a position to make similar determinations in regard to their transactions and in some instances will be better placed to make these decisions (such as in cases where they have maintenance and training relationships with end users, which may give them additional insights into their customers' practices). Further, the volume of money that the arms industry garners would certainly mean that sums are able to be invested in HRDD measures.

CONCLUSION

Fundamentally, HRDD legislation must be recognised as part of a collective and multi-sectoral response designed to restrain the arms trade, shifting discourse to the appreciation that the arms trade carries human rights obligations that should not be merely delegated to the state.

The drive to create specific HRDD legislation stems from the recognition that voluntary corporate social responsibility approaches are insufficient, particularly where the secrecy of the arms trade means that there is little opportunity to mobilise and lobby for better practice – and that public boycotts are irrelevant for many of the actors in the arms industry. For instance, the public can arguably refrain from buying palm-oil products in an effort to apply pressure; however, not many people will be in a position to discontinue their purchase of a fighter jet to apply the same pressure to the arms industry. Even assuming that consumer boycott driven public pressure is capable of bringing about a sustained improvement in corporate social responsibility practices, this model is not suited to the arms trade. Arms companies have also demonstrated an unwillingness to engage in discussions on adequately improving their human rights compliance, showing that we cannot expect movement emanating from the arms trade without concerted pressure. Robust government regulation is therefore one of the primary ways to bring about an improvement in standards and enforce accountability among private actors. Existing HRDD and adjacent due diligence measures demonstrate one route forward. In this connection, civil society efforts are needed to push politicians to act, building coalitions across community groups, political parties and trade unions as well as honing awareness of the issues promoted.

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