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Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development

Impact of arms transfers on human rights

Report of the Office of the United Nations High Commissioner for Human Rights*

Summary

In the present report, the Office of the United Nations High Commissioner for Human Rights (OHCHR) examines gaps with respect to the role of States and the private sector to prevent, address and mitigate the negative human rights impacts of arms transfers, including unregulated illicit arms transfers and diversion. Building on the intersessional workshop mandated by resolution 53/15, gaps are grouped into five categories, namely the lack of: good governance of the arms sector; safeguards against the authorization of prohibited transfers; due diligence by the private sector; effective prevention of negative human rights impacts resulting from arms transfers; and access to justice. In its conclusions and recommendations, OHCHR concludes that arms transfers are not a human rights-free zone and recommends future steps that should be taken.

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I. Introduction

1. In its resolution 53/15, the Human Rights Council requested that the Office of the United Nations High Commissioner for Human Rights (OHCHR) prepare a report on gaps and future steps on the role of States and the private sector in preventing, addressing and mitigating the negative human rights impact of arms transfers, including the diversion of arms and unregulated or illicit arms transfers, to be presented to the Council at its fifty-eighth session. As mandated by the Council, the report is informed by the intersessional workshop that was held online from 7 to 9 October 2024.¹ To prepare the report, OHCHR has also sought input from States,² United Nations entities³ and other relevant stakeholders.⁴ In addition, a broad range of sources were consulted, including international instruments, the practice of States, United Nations human rights mechanisms, reports by civil society organizations and academic studies.

2. The world is facing the highest number of violent conflicts since the Second World War, global military expenditures in 2023 increased for the ninth consecutive year⁵ and, in some regions, the volume of arms transfers has significantly increased.⁶ The Charter of the United Nations seeks the promotion of international peace and security with the least diversion for armament of the world's human and economic resources, and the General Assembly has affirmed that build-ups of national stockpiles can have regional destabilizing effects on international peace and security.⁷ Some research has suggested that arms imports increase the probability of the outbreak of armed conflict; once conflict begins, it becomes a driver for the arms trade.⁸ Arms transfers to parties to armed conflicts also contribute to prolonging conflicts and increase the probability of more violent conflicts.⁹ In practice, in recent times, States and private actors have continued transferring arms to end users,

¹ See <https://www.ohchr.org/en/events/events/2024/intersessional-workshop-hold-stocktaking-discussions-role-states-and-private>.

² Submissions were received from Algeria, Argentina, Ecuador, Iraq, Ireland, Lebanon, Mexico, Saudi Arabia, Serbia, the State of Palestine and the League of Arab States.

³ Submissions were received from the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

⁴ Submissions were received from Action on Armed Violence; the American University of Paris Working Group on Human Rights; the Arms Accountability Working Group; the Asser Institute and Global Rights Compliance; the Association for the Reintegration of Crimea; the Centre for Advanced Studies in Human Rights, Rajiv Gandhi National University of Law; Centre for Law and Policy, Ziauddin University; Centro de Estudios Legales y Sociales, Asociación Civil (CELS); Changemakers; Citizen Outreach Coalition and iCure Health International; EgyptWide; the European Center for Constitutional and Human Rights; Geneva Water Hub; the Global Initiative against Transnational Organized Crime; the International Human Rights Council; the International Human Rights Program at the University of Toronto Faculty of Law and the Global Human Rights Clinic at the University of Chicago Law School; Maat for Peace, Development and Human Rights Association; the *Indian Journal for Projects, Infrastructure and Energy Laws*; PAX; and the Women's International League for Peace and Freedom.

⁵ Nan Tian and others, "Trends in world military expenditure, 2023" (Stockholm, Stockholm International Peace Research Institute, 2024).

⁶ See Pieter D. Wezeman and others, "Trends in international arms transfers, 2023" (Stockholm, Stockholm International Peace Research Institute, 2024).

⁷ Charter of the United Nations, Article 26; and General Assembly resolution 46/36 L.

⁸ Nan Tian, "The inter-relation between arms trade, military expenditure and armed conflict", in *Research Handbook on the Arms Trade*, Andrew T.H. Tan, ed. (Cheltenham, United Kingdom of Great Britain and Northern Ireland, Edward Elgar, 2020), p. 72.

⁹ International Committee of the Red Cross (ICRC), "Arms transfers to parties to armed conflict: what the law says", 3 June 2024.

including the military in Myanmar,¹⁰ Israel,¹¹ and the parties to the conflicts in the Sudan,¹² South Sudan¹³ and Yemen,¹⁴ despite the risks that they contribute to serious violations of international humanitarian and human rights law. Arms transfers can also contribute to internal repression and other human rights violations and abuses outside conflict situations. In the Pact for the Future, the General Assembly expressed concern over the devastating impact of armed conflict on civilians and, referring *inter alia* to international human rights law, encouraged States to take measures necessary to exercise control over arms transfers.¹⁵

3. In the present report, OHCHR examines the role of States and the private sector under international norms and standards, to prevent, address and mitigate the negative human rights impact of arms transfers. It then examines gaps between that role and the actual practice of States and the private sector, identifying five gaps related to: preventing corruption and conflicts of interest; refraining from prohibited arms transfers; respecting human rights by the private sector; preventing prohibited arms transfers; and ensuring access to justice. In its conclusions and recommendations, OHCHR recommends future steps that should be taken with respect to the role of States and the private sector to prevent, address and mitigate the negative human rights impact of arms transfers.

II. Role of States and the private sector to prevent, address and mitigate the negative human rights impacts of arms transfers

A. States

4. Various bodies of international law govern the role that States must play to prevent, address and mitigate the negative human rights impacts of arms transfers.

5. The Arms Trade Treaty (arts. 6 and 7) prohibits authorizing exports of conventional arms, ammunition and parts and components in situations in which the export would contribute to, or in which there is an overriding risk that it could contribute to, certain violations, including serious violations of international human rights and humanitarian law.¹⁶ The four Geneva Conventions of 12 August 1949 (common article 1) impose an obligation to prohibit arms transfers in situations in which there is an expectation that the arms would be used in the commission of a violation of international humanitarian law.¹⁷ Such prohibitions apply independently of whether a violation is actually committed. In addition, the Convention on the Prevention and Punishment of the Crime of Genocide also contains a

¹⁰ See the conference room paper of the Special Rapporteur on the situation of human rights in Myanmar on arms transfers by States Members of the United Nations to the Myanmar military, available at https://www.ohchr.org/sites/default/files/2022-03/A_HRC_49_CRP.1.docx; and the conference room paper by the same Special Rapporteur on the billion dollar death trade: the international arms networks that enable human rights violations in Myanmar, available at https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session53/A_HRC_53_CRP2.docx.

¹¹ Zain Hussain, “How top arms exporters have responded to the war in Gaza”, Stockholm International Peace Research Institute, 3 October 2024; and PAX, “The companies arming Israel and their financiers” (2024).

¹² S/2024/65, paras. 41–49.

¹³ Amnesty International, “South Sudan: evidence of violations and illicit concealment of arms must spur UN to renew arms embargo”, 30 April 2020; and Conflict Armament Research, *Weapon Supplies into South Sudan’s Civil War: Regional Re-Transfers and International Intermediaries* (London, 2018).

¹⁴ See the conference room paper of the Group of Eminent International and Regional Experts on Yemen containing an accountability update, para. 57 et seq., available at https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session48/Documents/A_HRC_48_CRP.4_En.docx.

¹⁵ General Assembly resolution 79/1.

¹⁶ Within the European Union, see Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

¹⁷ ICRC, *Commentary on the Third Geneva Convention: Convention III relative to the Treatment of Prisoners of War* (Cambridge, United Kingdom, Cambridge University Press, 2021), para. 195.

duty to prevent genocide, including prohibiting arms transfers, when there is a serious risk that genocide will be committed.¹⁸

6. International law also contains a number of complicity norms: in other words, responsibility as accessory to the commission of a violation by a third State or non-State actor. Both the International Covenant on Civil and Political Rights and the Genocide Convention contain special prohibitions on complicity.¹⁹ Under customary international law, States will be responsible if they aid or assist in the commission of a violation of international law.²⁰ In addition, all States are prohibited from rendering aid or assistance to maintain an unlawful situation created by a serious breach of peremptory norms, such as acts of aggression, violations of the principle of self-determination, racial discrimination and apartheid.²¹ The maintenance of an unlawful situation extends beyond the commission of the serious breach itself to the maintenance of the situation created by that breach.²²

7. Additional prohibitions relate to specific types of conventional arms, such as restrictions on and prohibitions of the transfer of cluster munitions, anti-personnel landmines, booby-traps and small arms and light weapons.²³ However, other prohibitions depend heavily on the modalities of transfer, such as arms transferred to non-State actors in third States without the consent of the territorial State,²⁴ or in situations in which the transfer of firearms would otherwise constitute “illicit trafficking”.²⁵ Lastly, there are prohibitions determined by the destination or recipient,²⁶ as will frequently be the case with arms embargoes mandated by the Security Council.²⁷

8. States must take a variety of legal, institutional and practical measures to effectively govern arms transfers and activities related to them. States are under a general obligation to comply with international human rights law in the governance of their arms transfers,²⁸ and should ensure the rule of law, particularly by avoiding the arbitrary exercise of executive

¹⁸ International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 425 et seq.

¹⁹ Human Rights Committee, general comment No. 36 (2018), para. 63; Genocide Convention, art. 3; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, paras. 416 and 418 et seq.

²⁰ Articles on responsibility of States for internationally wrongful acts, art. 16.

²¹ Ibid., art. 41 (2); and International Law Commission, draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), conclusion 19 (2) and annex.

²² See paragraph (11) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts. See also International Court of Justice, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, 19 July 2024, para. 279.

²³ See, for example, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; the Convention on Cluster Munitions; the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996); and the Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials.

²⁴ See, for example, International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14.

²⁵ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol). See also Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture, Repair and Assembly (Kinshasa Convention); ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials; and Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials.

²⁶ For example, the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, art. 3 (2).

²⁷ Such embargoes are often imposed as a response to, and to prevent, human rights violations and abuses. See, for example, Security Council resolutions 2653 (2022), 1970 (2011) and 2127 (2013).

²⁸ See [A/HRC/51/15](#) and [A/HRC/56/42](#).

power and by ensuring internal and external scrutiny of public decision-making and access to justice.²⁹ In that respect, treaties impose specific obligations on the governance of arms transfers, such as the establishment of national control systems, national control lists, licensing procedures, record-keeping, regulation and control measures of export, transit and trans-shipment of arms, brokering activities and measures to prevent the diversion of arms.³⁰ Importantly, States must, in each case, exercise due diligence in arms transfer decision-making. That obligation is included either as a stand-alone obligation to conduct export assessments³¹ or it follows necessarily from the effective implementation of the prohibitions in question.³² In addition, international human rights law imposes a general obligation on States to ensure the rights of individuals within their jurisdiction. As noted by the Human Rights Committee, that entails that States have a duty to protect individuals from harm caused by third parties, including other States and businesses,³³ and to adopt legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, are consistent with the right to life.³⁴

9. The responsibility of States for violations of international law resulting from arms transfers entails an obligation to cease and guarantee the non-repetition of the wrongful act, as well as to provide reparation for injury through restitution, compensation, satisfaction or combinations thereof.³⁵ International human rights law imposes an obligation to provide effective remedies to victims,³⁶ and in the case of gross violations of human rights and serious violations of international humanitarian law, the right entails access to a judicial remedy.³⁷ In addition, various bodies of international law impose an obligation to investigate, prosecute and punish conduct, in particular certain human rights violations and conduct amounting to crimes under international law.³⁸

B. Private sector

10. The responsibilities of the private sector are expressed in the Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011.³⁹ They establish standards of expected conduct for business entities in relation to human rights. They are applicable to businesses irrespective of conduct by the State and irrespective of the sector in which the business activity takes place. The foundational principle for business enterprises contained in the Guiding Principles on Business and Human Rights is to respect human rights.⁴⁰ That means that they should avoid infringing on the human rights of others and

²⁹ A/HRC/57/27, paras. 8–26.

³⁰ See, for example, the Arms Trade Treaty; the Firearms Protocol; the Kinshasa Convention; the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials; and Council Common Position 2008/944/CFSP.

³¹ See, for example, Arms Trade Treaty, art. 7; and Council Common Position 2008/944/CFSP, arts. 2 and 5.

³² ICRC, *Commentary on the Third Geneva Convention*, para. 195.

³³ See also the Guiding Principles on Business and Human Rights, principle 1.

³⁴ Human Rights Committee, general comment No. 31 (2004), para. 8; and general comment No. 36 (2018), paras. 21 and 22.

³⁵ Articles on responsibility of States for internationally wrongful acts, art. 28 et seq.

³⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

³⁷ *Ibid.*, para. 12.

³⁸ See, for example, Human Rights Committee, general comment No. 31 (2004), para. 15; and general comment No. 36 (2018), para. 27; and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I – Rules* (Cambridge, United Kingdom, Cambridge University Press, 2005), rule 158.

³⁹ Similar standards are contained, for example, in the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises on Responsible Business Conduct.

⁴⁰ Principle 11.

should address adverse human rights impacts with which they are involved.⁴¹ The content of the duty to respect human rights must be interpreted in accordance with international law⁴² and is applicable also in situations of armed conflict.⁴³ As noted in the commentaries to the Guiding Principles on Business and Human Rights, in situations of armed conflict, due to the complementary application of international human rights law and international humanitarian law, enterprises should respect the norms and standards of both bodies of law.⁴⁴ To facilitate their respect for human rights and humanitarian law, businesses should adopt a human rights policy that includes a due diligence process. It also entails undertaking due diligence assessments in order to identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.⁴⁵ Companies must implement a due diligence process assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.⁴⁶ As arms transfers, particularly to parties to armed conflicts, can entail complicity in gross human rights abuses committed by other actors, enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of provisions in domestic law on corporate criminal responsibility.⁴⁷ In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.⁴⁸

III. Gaps in the role of States and the private sector

A. Introduction

11. In the present section, OHCHR addresses gaps between the role of States under international law and the private sector under the Guiding Principles on Business and Human Rights, and their role in practice. The gaps identified below exclude those areas that have already been subject to Human Rights Council reporting mandates⁴⁹ and are informed by discussions held during the intersessional workshop. The gaps highlighted in the present section are not exhaustive,⁵⁰ but attempt to give an overview of some of the most salient concerns related to preventing, addressing and mitigating negative human rights impacts of arms transfers.

B. Gaps in combating corruption and conflicts of interest

12. In the course of the intersessional workshop, participants noted that several of the challenges related to the arms industry were influenced by corruption and conflicts of interest and high degrees of influence exercised by the private sector over public decision-making.

⁴¹ Ibid.

⁴² Principle 12.

⁴³ See, for example, International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, paras. 216 and 217; Human Rights Committee, general comment No. 31 (2004), para. 11; general comment No. 35 (2014), para. 64; general comment No. 36 (2018), para. 64; and general comment No. 37 (2020), para. 97; Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013), paras. 20 and 21; E/C.12/CAF/CO/1, para. 9; and E/C.12/ISR/CO/4, paras. 8 and 9.

⁴⁴ Commentary to principle 12.

⁴⁵ Principle 18.

⁴⁶ Principle 17.

⁴⁷ Commentary to principle 23.

⁴⁸ Ibid.

⁴⁹ See A/HRC/35/8, A/HRC/44/29, A/HRC/51/15 and A/HRC/56/42.

⁵⁰ As, for example, noted by the Women's International League for Peace and Freedom, it has been suggested that another gap has been the lack of focus on the effects of arms transfers on the environment.

13. While necessarily difficult to quantify, corruption related to the arms trade has been estimated to be significant.⁵¹ Corruption appears to affect all types of arms transfers irrespective of the region they are transferred to.⁵² Several of the largest arms manufacturers globally have reportedly engaged in corruption,⁵³ including through systematic bribery of foreign officials.⁵⁴ In addition to corruption, other concerns appear to be prevalent. Those include risks of disproportionate influence exerted by the arms industry over public decision makers, including parliament and the executive through various forms of lobbying, the funding of political parties and other interest groups, and revolving-door practices.⁵⁵

14. As noted in a previous OHCHR report on the topic, a real risk of corruption in the arms trade can result from the general lack of transparency in the defence sector;⁵⁶ as well as an unduly close relationship between the private sector and political establishments; the transnational and complicated lines of order, delivery and supply of arms; the technical specificity of weapons technologies; the pressure to procure arms swiftly due to situations of conflict; the significant monetary value of some contracts; and the highly competitive nature of the business.⁵⁷

15. The effects of corruption appear to be significant. It has been said to constitute a driver of the arms trade,⁵⁸ it can result in the purchase of unnecessarily expensive military equipment by the recipient, to the detriment of the recipient State's capacity to deliver on economic, social and cultural rights, and it can jeopardize the recipient State's defence capabilities or its capacity to protect its own population.⁵⁹ Corruption is also an important factor in facilitating diversion, particularly of small arms and light weapons, during the active use or storage, transfer and disposal of arms.⁶⁰

C. Gaps in safeguards against prohibited arms transfers

16. The International Committee of the Red Cross has recently expressed deep concern about the "gap that seems to exist between the commitments expressed by States to respect and ensure respect for international humanitarian law, and the faithful implementation of instruments such as the [Arms Trade Treaty], and the arms transfer practices of too many of them".⁶¹ Risk assessments are essential to avoid arms' being transferred in circumstances in which they would be prohibited under international law. During the intersessional workshop, several participants highlighted concerns related to the practice of risk assessments conducted by States.⁶²

⁵¹ Andrew Feinstein, Paul Holden and Barnaby Pace, "Corruption and the arms trade: sins of commission", in *SIPRI Yearbook 2011: Armaments, Disarmament and International Security* (Stockholm, Stockholm International Peace Research Institute, 2011), p. 13.

⁵² Sam Perlo-Freeman, "Corruption in the arms trade", in *Research Handbook on the Arms Trade*, p. 100.

⁵³ For an overview, see <https://sites.tufts.edu/corruptarmsdeals>.

⁵⁴ See, for example, <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>.

⁵⁵ See, for example, A/HRC/53/49, para. 51; Sam Perlo-Freeman, *From Revolving Door to Open-Plan Office: The Ever-Closer Union between the UK Government and the Arms Industry* (Somerville, Massachusetts, World Peace Foundation, 2024); Bram Vranken, "Securing profits: how the arms lobby is hijacking Europe's defence policy" (Vredesactie, 2017); and William D. Hartung and Dillon Fischer, "March of the four-stars: the role of retired generals and admirals in the arms industry" (Quincy Institute for Responsible Statecraft, 2023).

⁵⁶ A/HRC/56/42.

⁵⁷ Feinstein, Holden and Pace, "Corruption and the arms trade", p. 17 et seq.

⁵⁸ Andrew T.H. Tan, "Key drivers of the arms trade", in *Research Handbook on the Arms Trade*, pp. 32 and 33.

⁵⁹ On the latter, see, for example, <https://sites.tufts.edu/corruptarmsdeals/nigerias-armsgate-scandal>.

⁶⁰ Transparency International Defence & Security, "Dangerously diluted: corruption's role in fueling arms diversion" (2024).

⁶¹ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Building a Culture of Compliance for IHL to Protect Humanity in Today's and Future Conflicts* (Geneva, 2024), p. 82.

⁶² See also the submission by Action on Armed Violence.

17. The content of the applicable domestic framework regulating risk assessments is likely to influence export assessment practice. Most States appear to have adopted domestic export assessment criteria that prohibit certain arms transfers, but there are considerable variations among them. In one study, it was noted that, despite a set of common rules outlined in international law and guidance on how to carry out licencing decisions, the legal value of the applicable international law and implementation guidance were far from clear in every jurisdiction.⁶³ That is the case also among top global exporters. Thus, domestic law in China lists compliance with international law as one among many factors to be taken into account in the assessment.⁶⁴ In the United States of America, statutory provisions have been adopted to exclude foreign military units from military assistance in situations in which there is credible evidence that the unit has committed a gross violation of human rights,⁶⁵ and different export assessment criteria have been adopted as non-enforceable policy commitments by successive Governments, with the most recent one adding risks of violations of international human rights and humanitarian law as a clear criterion.⁶⁶ A review of public State reports on the implementation of the Arms Trade Treaty has suggested that most States did not take legislative action to adjust their domestic requirements to the criteria in articles 6 and 7 of the Treaty, as States considered that their domestic laws already satisfied the requirements.⁶⁷ Among European Union member States, there reportedly appeared to be a perception that the incorporation of the European Union Common Position was sufficient.⁶⁸

18. Participants at the intersessional workshop and others expressed particular concern about the following three practices. The first practice consists of exempting certain transfers from risk assessments.⁶⁹ An example includes the exemption from licensing requirements, and thus also from risk assessment, of arms exports from Canada to the United States,⁷⁰ which is estimated to amount to nearly half of the total volume of Canadian exports.⁷¹ The second practice concerns measures that reduce export controls with respect to arms produced jointly by several States.⁷² Thus, a concern highlighted with respect to the Franco-German-Spanish treaty on export controls has been that it applies a principle of least restrictive export standards, limiting the ability of States contributing to the production of the weapon from challenging the export of the final product.⁷³ A third practice concerns the use of open export

⁶³ Christian Schliemann and Linde Bryk, “Arms trade and corporate responsibility: liability, litigation and legislative reform” (Berlin, Friedrich-Ebert-Stiftung, 2019), p. 11.

⁶⁴ Export Control Law, adopted on 17 October 2020, art. 13. See also Action on Armed Violence, “Case studies: China before and after ATT accession – assessing the effectiveness of the Arms Trade Treaty, part 11”, 15 February 2023.

⁶⁵ See 22 United States Code sect. 2378d; 10 United States Code sect. 362; 22 United States Code sect. 2378–1; and 22 United States Code sect. 2304.

⁶⁶ Memorandum on United States Conventional Arms Transfer Policy, NSM-18, adopted on 23 February 2023. See also National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services, NSM-20, adopted on 8 February 2024.

⁶⁷ Tobias Vestner, “Prohibitions and export assessment: tracking implementation of the Arms Trade Treaty” (Geneva, Geneva Centre for Security Policy, 2019), p. 7.

⁶⁸ Ibid.

⁶⁹ ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, p. 82.

⁷⁰ 1956 Defence Production Sharing Agreement, available at <https://www.ccc.ca/wp-content/uploads/2021/07/defence-production-sharing-agreement-en.pdf>; Export Control List SOR-89-202, available at <https://laws-lois.justice.gc.ca/eng/regulations/sor-89-202/FullText.html>; and General Export Permit No. 47 – Export of Arms Trade Treaty Items to the United States: SOR-2019-230, available at <https://gazette.gc.ca/rp-pr/p2/2019/2019-06-26/html/sor-dors230-eng.html>. See also <https://www.international.gc.ca/transparency-transparence/controls-controles/military-goods-2023-marchandises-militaires.aspx?lang=eng#a4>; and the submission by the International Human Rights Program and the Global Human Rights Clinic.

⁷¹ See A/HRC/56/42.

⁷² ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, p. 82.

⁷³ See Franco-German-Spanish Agreement on Export Controls, available at https://www.bafa.de/SharedDocs/Downloads/DE/Aussenwirtschaft/afk_merkblatt_deutsch-franzoesische_industrielle_zusammenarbeit.html (in German); and https://www.bmwk.de/Redaktion/DE/Downloads/A/ausfuhrkontrollen-im-ruestungsbereich.pdf?__blob=publicationFile&v=1 (in German). See also the submission by PAX; and European Parliament resolution of 17 September 2020 on arms export: implementation of Common Position 2008/944/CFSP (2020/2003(INI)), para. 33.

licences that are valid for many years without a requirement for periodic review,⁷⁴ which in some States constitutes a significant proportion of export licences.⁷⁵ As noted in a case before the courts in the Kingdom of the Netherlands, that could result in a situation in which the licence remains valid even when a change of circumstances would mean that exports under the licence would be unlawful under international law.⁷⁶

19. Information on actual risk assessment practice is generally kept confidential, often unduly, by States.⁷⁷ That renders a comprehensive evaluation of such practice across States extremely difficult. With respect to many States, the lack of available information does not permit independent assessment as to whether any risk assessment has been carried out prior to export and, if so, how it was done. For those States that carry out risk assessments and where information is available, there are several general concerns.

20. First, decision-making on arms transfers appears to be heavily influenced by foreign policy and defence considerations.⁷⁸ It has been argued, for example, that political pressure among allied States could lead to a practice of less rigorous export assessments among those States.⁷⁹ Such considerations could lead to differential treatment in the procedure, rendering it more difficult to suspend transfers to certain allied States. Concerns have for example been raised with respect to the politization of the process for declaring Israeli units ineligible for United States military assistance.⁸⁰ There is also a concern that political priorities in certain cases are integrated into legal assessments to trump risks of violations. Thus, in a recent case in the Kingdom of the Netherlands concerning the export of F-35 parts and components to Israel, the Government relied on “integrated foreign policy or security considerations”, including the interest of maintaining a good relationship with allied States, to outweigh the risks of violations of international humanitarian law associated with the export.⁸¹

21. Second, States operate with different risk thresholds,⁸² but rarely clarify the exact meaning and measurement of those thresholds,⁸³ which could raise concerns with respect to the interpretation and application of those thresholds in executive practice. Thus, in some cases, exporting States have suggested that violations must be “established” or that they must be able to reach a “determinative conclusion” on violations.⁸⁴ However, as noted by one court, the executive is not required to establish violations to determine the existence of a sufficient degree of risk that the equipment exported may be used in the commission of serious violations of international humanitarian law.⁸⁵

22. Third, while there is considerable guidance with respect to the information that should be taken into account in risk assessments,⁸⁶ concerns have been raised with respect to the lack

⁷⁴ See, for example, Court of Appeal of The Hague, Case No. 200.336.130/01, *Oxfam Novib Foundation et al. v. the Kingdom of the Netherlands*, Judgment, 12 February 2024, para. 5.22 et seq.

⁷⁵ See [A/HRC/56/42](#).

⁷⁶ *Oxfam Novib Foundation et al. v. the Kingdom of the Netherlands*, paras. 3.5 and 3.15.

⁷⁷ See [A/HRC/56/42](#).

⁷⁸ See, for example, <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>, p. 4. See also the submission by Maat for Peace, Development and Human Rights Association.

⁷⁹ Submission by PAX.

⁸⁰ Charles O. Blaha, “Israel and the Leahy Law”, Just Security, 10 June 2024. The disclosure of the policy is subject to a lawsuit before the District Court for the District of Columbia; see *DAWN v. U.S. Department of State*, case No. 1:24-cv-02521.

⁸¹ See *Oxfam Novib Foundation et al. v. the Kingdom of the Netherlands*. See also the submission by PAX.

⁸² Thus, while the United States policy currently applies a threshold of “more probable than not”, European States operate with a threshold of “clear risk”.

⁸³ Vestner, “Prohibitions and export assessment”, p. 13.

⁸⁴ See <https://www.gov.uk/government/publications/summary-of-the-international-humanitarian-law-ihl-process-decision-and-the-factors-taken-into-account/summary-of-the-ihl-process-decision-and-the-factors-taken-into-account>; *Oxfam Novib Foundation et al. v. the Kingdom of the Netherlands*; and the submission by EgyptWide.

⁸⁵ *Oxfam Novib Foundation et al. v. the Kingdom of the Netherlands*.

⁸⁶ See, for example, <https://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>; and https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP4_WGETI_Draft_Report_EN1/ATT_CSP4_WGETI_Draft_Report_EN.pdf (annexes B and E).

of consideration of information related to the international human rights and humanitarian law record of the recipient. Courts in Belgium and the United Kingdom found that the authorities had failed to evaluate the past conduct of the recipient in the assessment of future risks.⁸⁷ Similarly, in a report published in 2021, the Norwegian Supreme Audit Institution concluded that, while the executive maintained that each licence request had been thoroughly and individually examined, there were many instances where there was no evidence that assessments had taken place,⁸⁸ noting that the executive had not taken into account information to assess the human rights and humanitarian law risks associated with transfers of weapons to a party to the armed conflict in Yemen.⁸⁹

23. Fourth, concerns have also been raised as to how information is interpreted and weighed. Thus, after the High Court in the United Kingdom ordered the suspension of export licences to Saudi Arabia due to the risk of violations of international humanitarian law in Yemen, the executive decided not to suspend other export licences to the same recipient, interpreting the risks as related to an isolated incident.⁹⁰ Moreover, in its first legal assessment on transfers to Israel in December 2023, which has since been reversed,⁹¹ the United Kingdom controversially attached weight to the recipient State's subjective opinion on the content of international humanitarian law as an argument in favour of its commitment to such law, noting that "Israel's position is that it is acting in accordance with what it believes to be the relevant obligations in relation to humanitarian assistance and that therefore, although this is an area of concern, it may not be indicative of any intentional disregard for IHL".⁹²

24. Fifth, concerns have been raised with respect to the lack of consideration of the risk of diversion and the risk that the end user would retransfer arms contrary to international law. Thus, no such regular controls appear to be exercised by States applying exemptions from licensing requirements.⁹³ Even with respect to those States that have strict licensing procedures, concerns have been raised that insufficient measures have been taken to prevent likely retransfers that would be contrary to international law.⁹⁴ With respect to transfers to parties to the armed conflict in Yemen, the Norwegian Supreme Audit Institution found that neither licences nor end-user certificates included any measures to mitigate the risk of diversion to Yemen, despite significant risks of diversion associated with the transfers.⁹⁵

D. Gaps in respect for human rights by the private sector

25. The private sector forms an integral part of the arms industry and plays a key role at all levels in many arms transfers. Such a role is characterized by specific features.

26. The first is the relationship between the State and the private sector in the arms industry. Particularly with respect to the procurement of large weapons systems, States are

⁸⁷ See, for example, <http://www.raadvst-consetat.be/arr.php?nr=244803> (in French); and <https://armstradelitigationmonitor.org/document/judgement-of-the-court-of-appeal>.

⁸⁸ See <https://www.riksrevisjonen.no/globalassets/rapporter/no-2020-2021/myndighetenes-arbeid-med-eksportkontroll-av-strategiske-varer.pdf> (in Norwegian).

⁸⁹ Ibid.; and the submission by Changemaker.

⁹⁰ See <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339>; and the submission by the Asser Institute and Global Rights Compliance.

⁹¹ See <https://www.gov.uk/government/publications/summary-of-the-international-humanitarian-law-ihl-process-decision-and-the-factors-taken-into-account/summary-of-the-ihl-process-decision-and-the-factors-taken-into-account>.

⁹² This has been challenged before the domestic courts; see https://www.glanlaw.org/_files/ugd/26e1a5_14f16c2640e24bc99211ee41243e9c45.pdf.

⁹³ Submission by the International Human Rights Program and the Global Human Rights Clinic.

⁹⁴ These concerns are reportedly the object of a case presented before courts in the Kingdom of the Netherlands with respect to compliance with the order of 24 February 2024 to suspend the transfer of parts and components to Israel; see <https://paxforpeace.nl/news/appeal-against-the-export-of-dutch-fighter-plane-parts-to-israel>.

⁹⁵ See <https://www.riksrevisjonen.no/globalassets/rapporter/no-2020-2021/myndighetenes-arbeid-med-eksportkontroll-av-strategiske-varer.pdf>, p. 17.

often the only clients,⁹⁶ and arms exports often form part of the defence or foreign policy of the State.⁹⁷ Examining the conduct of private entities will thus require analysis of concurrent responsibilities of States. Moreover, States are often shareholders in companies in the arms industry, either directly or through holding companies, which in some cases could entail their responsibility to require human rights due diligence or the attribution of conduct by the company to the State.⁹⁸ It is of concern that such companies have reportedly transferred arms in contexts in which there is a risk that weapons would be used in violation of international human rights or humanitarian law without evidence that due diligence measures were implemented.⁹⁹ In a few instances, States have reportedly used private companies to export or import arms in situations that would likely constitute violations of international law.¹⁰⁰

27. The second feature is the multitude of private actors involved in arms transfers and the complexity of the structures of some companies. They include arms manufacturers, export and import companies, freight forwarders, logistics and transportation providers, brokers, banking and other financial service providers and insurance companies. Arms manufacturers are diverse, ranging from multinational manufacturers of large weapons systems to smaller manufacturers of parts and components, or firearms intended for the civilian market. It has been noted that the number of actors and intermediaries involved in transfers heightens risks, such as of diversion, particularly with respect to the transfer of small arms and light weapons.¹⁰¹ The way that many arms companies are structured presents further challenges. For example, several manufacturers duplicate part of their operations, including manufacturing and post-sale services through so-called strategic offshoring,¹⁰² to jurisdictions with more relaxed regulatory frameworks.¹⁰³ That has reportedly led to export of licensed arms from the third State that would have been prohibited in the home State.¹⁰⁴ Many companies also enter into agreements on licensed production in third States, including through offset agreements.¹⁰⁵ That may entail that the original manufacturer and the home State effectively lose control over the use and re-export of those products.¹⁰⁶

28. The human rights impacts resulting from the conduct of the private sector are significant. The Special Rapporteur on the situation of human rights in Myanmar has, for example, reported on how arms transferred from private actors in China, India, the Russian Federation, Singapore and Thailand have been used by the military in Myanmar since the coup to commit human rights violations.¹⁰⁷ Another recent study has described how parties to the armed conflict in the Sudan have received arms manufactured by Chinese, Emirati, Russian, Serbian and Turkish companies, including through businesses reportedly acting as proxies to the parties to the conflict.¹⁰⁸ Negative human rights impacts are not restricted to diverted transfers or illicit trafficking; they can also flow from authorized transfers, as evidenced by the licensed supply of arms by several manufacturers used in the course of

⁹⁶ Liliana Lizarazo-Rodriguez and Markus Falhbusch, *Due Diligence and Corporate Accountability in the Arms Value Chain* (Antwerp, International Peace Information Service, 2024), p. 36.

⁹⁷ Ibid.; and <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>.

⁹⁸ Guiding Principles on Business and Human Rights, commentary to principle 4; and A/HRC/32/45.

⁹⁹ See, for example, Amnesty International, *Outsourcing Responsibility: Human Rights Policies in the Defence Sector* (2019), pp. 36 and 37.

¹⁰⁰ See the conference room paper by the Special Rapporteur on the situation of human rights in Myanmar on the billion dollar death trade; and Amnesty International, “New weapons fuelling the Sudan conflict” (2024), pp. 31 and 32.

¹⁰¹ See, for example, Lizarazo-Rodriguez and Falhbusch, *Due Diligence and Corporate Accountability*, pp. 37 and 38.

¹⁰² Submission by the Asser Institute and Global Rights Compliance; and Lizarazo-Rodriguez and Falhbusch, *Due Diligence and Corporate Accountability*, p. 35.

¹⁰³ Submission by the Asser Institute and Global Rights Compliance.

¹⁰⁴ Ibid.

¹⁰⁵ Lizarazo-Rodriguez and Falhbusch, *Due Diligence and Corporate Accountability*, p. 37. See also the submission by EgyptWide.

¹⁰⁶ Submission by the Asser Institute and Global Rights Compliance. See also <https://forensic-architecture.org/investigation/the-killing-of-hind-rajab>.

¹⁰⁷ See the conference room paper by the Special Rapporteur on the situation of human rights in Myanmar on the billion dollar death trade.

¹⁰⁸ Amnesty International, “New weapons fuelling the Sudan conflict”.

hostilities by Israel in Gaza¹⁰⁹ and to the parties to the conflict in Yemen.¹¹⁰ Furthermore, concerns have been expressed in relation to export outside situations of armed conflict, including the transfer of firearms to law enforcement agencies that subsequently contributed to violations of international human rights law.¹¹¹ Post-transfer services can entail a long-term commitment to the repair and upkeep of transferred arms¹¹² and have allegedly been provided contrary to international law, including arms embargoes mandated by the Security Council.¹¹³

29. A review of 10 of the largest global arms manufacturers from top exporting States suggests that some have issued human rights policies or statements.¹¹⁴ That could suggest an increased awareness of the human rights impacts of their operations. However, overall, the policies and practices of implementing due diligence among such companies reportedly remains unclear.¹¹⁵ In a review of six major arms manufacturers, it was found that, while human rights were frequently mentioned in policies, such norms did not always appear in the context of corporate decision-making in connection with selling and exporting items, and no mention was found with respect to international humanitarian law.¹¹⁶ A review of the 15 largest manufacturers of small arms worldwide found that only 1 had adopted a policy including human rights, but with respect to exports: “To the extent we export products outside the United States, the Company respects the sovereignty of other governments and believes that it is the primary responsibility of local governments to safeguard and protect the basic human rights of their citizens.” Other small arms manufacturers have rejected attempts to adopt policies adhering to the Guiding Principles on Business and Human Rights.¹¹⁷

30. As noted by the Working Group on business and human rights, the transfer of arms to parties to armed conflicts requires enhanced due diligence on the part of companies.¹¹⁸ That is applicable during the pre-transfer, transfer and post-transfer phases, the latter for example can entail longer term commitments to providing training, maintenance and repair services.¹¹⁹ However, available information suggests that several manufacturers from top exporting States rely on export assessments carried out by States rather than carry out their own international human rights and humanitarian law risk assessments.¹²⁰ Thus, in response to questions by several special procedure mandate holders on due diligence assessments carried out with respect to arms transferred to Israel,¹²¹ one company referred to applicable domestic law as the decisive benchmark.¹²² The importance of independent corporate due diligence assessments are vividly expressed by the Panel of Experts on Yemen, in a case concerning the export of firearms from a Brazilian manufacturer diverted to parties to the armed conflict in Yemen. It noted that a due diligence assessment would have identified aspects of an arms purchase that were suspicious in relation to the targeted arms embargo on Yemen and could have stopped the shipment.¹²³

¹⁰⁹ PAX, “The companies arming Israel and their financiers”.

¹¹⁰ See <https://yemen.armstradewatch.eu/air.html>.

¹¹¹ Submission by EgyptWide.

¹¹² Azarova and Trevisan, *Post-Sale Services*, p. 41.

¹¹³ See <https://euarms.com/landing/6pN1mlZeh9cOP3y7jj6H2o>; and <https://euarms.com/landing/1jH13JoU3zZciVExaEFzJ>.

¹¹⁴ Hiruni Alwishewa, “Human rights due diligence for arms companies: lessons from supply chain regulations”, *European Journal of Risk Regulation*, 15 November 2024, p. 5.

¹¹⁵ *Ibid.*, p. 8.

¹¹⁶ Machiko Kanetake and Cedric Ryngaert, “Due diligence and corporate liability of the defence industry: arms exports, end use and corporate responsibility” (Brussels, Flemish Peace Institute, 2023), pp. 32 and 33.

¹¹⁷ Submission by the Asser Institute and Global Rights Compliance. See also [A/HRC/53/42](#).

¹¹⁸ See <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>.

¹¹⁹ Lizarazo-Rodriguez and Falhbusch, *Due Diligence and Corporate Accountability*, pp. 39 and 40; and Azarova and Trevisan, *Post-Sale Services*, p. 5.

¹²⁰ See, for example, Schliemann and Bryk, “Arms trade and corporate responsibility”, pp. 21 and 22; Amnesty International, *Outsourcing Responsibility*, p. 31; and <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>, p. 5.

¹²¹ See communication OTH 84/2014, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=29085>.

¹²² See <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=38545>.

¹²³ [S/2018/193](#), annex 41, para. 2.

31. Several participants during the intersessional workshop also noted the critical role of banks and other financial service providers, insurance companies and investors.¹²⁴ Studies of several major banks suggest that most have adopted policies on human rights, and several have adopted specific policies with respect to the defence sector,¹²⁵ with exclusion guidelines covering certain arms or arms agreements.¹²⁶ It has been noted that several factors could hamper the effectiveness of such policies. For example, policies that restrict the financing of certain arms deals but that do not exclude general purpose corporate loans to the same recipient risk being ineffective.¹²⁷ OHCHR has previously reported on certain good practices taken by investors with respect to investment in arms manufacturers.¹²⁸ However, a concerning practice is that some European environmental, social and governance investors have reportedly moved to include parts of the arms sector as such investments.¹²⁹ A notable good practice is the Norwegian Government Pension Fund, which provides criteria for the exclusion of companies, *inter alia*, on the basis of risks of violations of international human rights or humanitarian law, and establishes a Council of Ethics to assess such exclusions a *proprio motu* or at the request of the Norwegian Central Bank.¹³⁰

E. Gaps in the duty to prevent prohibited arms transfers

32. Protection from the negative human rights impacts resulting from arms transfers is achieved partly by setting up national control systems to exercise export controls and other law enforcement measures, including through international cooperation. In practice, several concerns have been raised with respect to the effectiveness of such implementation measures. In the present section, three concerns will be highlighted.

33. The first concern is the continued lack of effective legal regulation of corporate actors in the arms industry.¹³¹ While some States have adopted due diligence requirements for companies, such as domestic laws in France and Norway, such initiatives remain exceptional. In that regard, a notable concern is the exclusion from the scope of the recently adopted European Union Corporate Sustainability Due Diligence Directive of the distribution, transport and storage of products subject to export controls under the dual-use regulation or to the export controls relating to weapons, munitions or war materials.¹³² Moreover, while regulated in international and regional instruments, post-sale services granted by private companies fall within the scope of some export control systems, but not within the scope of others,¹³³ and concerns have been raised that the monitoring and enforcement of existing regulation in some jurisdictions has been inadequate.¹³⁴

34. A second concern is the lack of sufficient control by States of transit and trans-shipment of arms through their territory, even though this is important to prevent the illicit trafficking of arms or other facilitation of the transfer of arms contrary to international law. A review of certain European States suggests significant divergencies in domestic regulation, highlighting control exemptions for the transit or trans-shipment to allied States.¹³⁵ Using information gained through the use of more permissive provisions on access to environmental information, two criminal complaints have been filed in Belgium requesting

¹²⁴ See also <https://www.ohchr.org/en/press-releases/2024/06/states-and-companies-must-end-arms-transfers-israel-immediately-or-risk>.

¹²⁵ PAX, *High-Risk Arms Trade and the Financial Sector* (Utrecht, 2022), pp. 76 and 77; and Hiruni Alwishewa, “Addressing the human rights risks of financing the arms industry: insights from banks’ corporate policies”, *Business and Human Rights Journal* (2024).

¹²⁶ PAX, *High-Risk Arms Trade*, p. 51 et seq.

¹²⁷ *Ibid.*, p. 77.

¹²⁸ A/HRC/53/42.

¹²⁹ Submission by the Asser Institute and Global Rights Compliance.

¹³⁰ See https://lovdata.no/dokument/INS/forskrift/2014-12-18-1793/KAPITTEL_2#KAPITTEL_2 (sects. 3–6 and 10) (in Norwegian).

¹³¹ Schliemann and Bryk, “Arms trade and corporate responsibility”, pp. 24–27.

¹³² Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024.

¹³³ Lizarazo-Rodriguez and Falhbusch, *Due Diligence and Corporate Accountability*, p. 39.

¹³⁴ Azarova and Trevisan, *Post-Sale Services*, p. 31.

¹³⁵ Diederik Cops and Sophie Timmermans, “Controlling the transit of controlled military items in Europe”, *WorldECR* (2023).

the investigation of companies for the unlawful transit of arms to Israel and Saudi Arabia, respectively, without a transit licence.¹³⁶ Those and other cases have raised concern about the enforcement of transit controls even in jurisdictions in which such transit is strictly regulated.¹³⁷

35. The third concern relates to the lack of investigation, prosecution and punishment of offences committed through arms exports. A notable exception has been the case against Heckler and Koch concerning the falsification of end-user certificates for firearms exports to law enforcement agencies in Mexico. The transferred firearms were used in the killing and disappearance of 43 students in 2014.¹³⁸ However, it has been noted that, since that case concerned prosecution for violations of export control laws, victims were reportedly excluded from the proceedings and unable to claim compensation.¹³⁹ Prosecution for crimes under international law appears less common, with two cases in the Kingdom of the Netherlands being notable exceptions. Those cases concerned charges for supplying chemicals for the production of mustard gas to a former Government of Iraq during Saddam Hussein's presidency and for supplying arms to Liberia during the regime of Charles Taylor.¹⁴⁰ There appear to be very few cases against corporations themselves. Questions have been raised regarding the prospects for corporate criminal accountability for exports that did not contravene domestic export controls, but which were nonetheless contrary to international law and used in the perpetration of crimes under such law.¹⁴¹

F. Gaps in access to justice

36. Several participants at the intersessional workshop highlighted the crucial role of access to justice in relation to decisions on arms transfers, expressing deep concern over the significant shortcomings in the practice of States. As also noted in the course of the workshop, accountability efforts are predominantly initiated by civil society and facilitated by the work of journalists and researchers.

37. As detailed in a previous report, a significant entry-level barrier for litigants relates to the lack of access to information on arms transfer licences and on actual exports.¹⁴² A recent example is illustrative. Five individuals from Gaza brought a case before the Berlin Administrative Court in Germany: the claimants first filed a request for provisional measures to halt the export of certain so-called war weapons to Israel. The request was rejected, as the weapons in question, unknown to the claimants, had already been exported. In the absence of public information on other licences, the claimants then filed a request for provisional measures in relation to a broader range of war weapon licences to Israel, which was rejected as the Court noted there were no new licence applications pending. Consequently, the claimants requested to be informed of new export licences, which was again rejected as the Court could not grant information in the abstract, noting that it touched a core area of executive responsibility and could endanger secrecy and security interests.¹⁴³

38. A second obstacle is one of standing. Some jurisdictions, such as the Kingdom of the Netherlands and the United Kingdom, do not require victim status to challenge export licences, which allows for cases to be filed by civil society organizations.¹⁴⁴ In other jurisdictions, only the victim has standing. Most generally, that entails a risk that courts will be unable to control the State's compliance with obligations to refrain from transfers unless

¹³⁶ See <https://armstradelitigationmonitor.org/associated-cases/belgium-and-arms-transit>.

¹³⁷ See, for example, https://ipisresearch.be/wp-content/uploads/2024/03/20240305_Vredesactie-IPIS-Belgische-wapenexport-naar-Israel.pdf (in Dutch); and <https://www.belganewsagency.eu/ngos-sue-israeli-shipping-company-zim-for-trafficking-arms>.

¹³⁸ See https://sherloc.unodc.org/cld/en/case-law-doc/criminalgroupcrimetype/deu/2021/bgh_urteil_vom_30.03.2021_3_str_47419.html.

¹³⁹ Schliemann and Bryk, "Arms trade and corporate responsibility", p. 17.

¹⁴⁰ *Ibid.*, pp. 15 and 16.

¹⁴¹ See, for example, <https://www.ejiltalk.org/complicity-in-war-crimes-through-legal-arms-supplies>; and Kanetake and Ryngaert, "Due diligence and corporate liability", p. 26 et seq.

¹⁴² See A/HRC/56/42.

¹⁴³ Submission by the European Center for Constitutional and Human Rights.

¹⁴⁴ Submission by the Asser Institute and Global Rights Compliance.

the transferred weapons are used in violation of international law. As noted, several of the prohibitions do not depend on the subsequent use of the weapons; transfers are prohibited if there is a sufficient degree of risk prior to the transfer. It also creates significant practical difficulties, as the victims will often be located in a third State, often in a situation of vulnerability, and creates a practical challenge faced by lawyers representing victims trapped in contexts in which hostilities are ongoing.¹⁴⁵ Moreover, the assessment of victim status will frequently entail several additional requirements that present difficulties in cases challenging arms transfer decisions. Thus, in some jurisdictions, that would entail proving personal injury and causality between the arms export authorization and the harm, which has led to the dismissal of several cases.¹⁴⁶

39. A third obstacle relates to limitations on the powers of the courts to review decisions. In some jurisdictions, courts appear entirely precluded from reviewing executive decisions related to arms transfers.¹⁴⁷ For instance, in France, licensing decisions have been considered “acts of the Government”, undetachable from foreign policy decisions of the State, and therefore outside the jurisdiction of courts.¹⁴⁸ While there have been legislative proposals to amend this doctrine, they have thus far not been adopted.¹⁴⁹ Several other jurisdictions operate with more limited political question doctrines,¹⁵⁰ such as barring courts from examining the merits of arms exports.¹⁵¹ A related concern is the deferential standard of review adopted in situations in which claims are examined on the merits. In that regard, courts in the Kingdom of the Netherlands have shown an openness to exercising closer scrutiny over licensing decisions,¹⁵² while other domestic courts have imposed exacting standards for overruling executive decisions, confined to situations in which the decision was “irrational”,¹⁵³ “arbitrary” or “capricious”,¹⁵⁴ or “blatantly arbitrary”.¹⁵⁵

40. While civil claims against corporate entities could be pursued through courts, such as under general tort law, in practice, claimants would face similar hurdles, including a lack of information with the additional challenge of complex corporate structures spanning several jurisdictions.¹⁵⁶ Taken together, those challenges raise significant concerns about a sidelining of the role of the judiciary in controlling arms transfer decisions in many States.¹⁵⁷

IV. Conclusions and recommendations on future steps

41. **Arms transfers are not a human rights-free zone. They can entail severe human rights and humanitarian consequences, facilitate serious violations and abuse of human rights, and entail responsibility for crimes under international law. The gaps highlighted in the present report, many of which in practice are interrelated, reveal that more should be done to close compliance gaps to effectively prevent, address and**

¹⁴⁵ Submission by the European Center for Constitutional and Human Rights.

¹⁴⁶ See, for example, <https://www.lawfaremedia.org/article/why-courts-don-t-enforce-arms-transfer-restrictions-under-u.s.-law>.

¹⁴⁷ Schliemann and Bryk, “Arms trade and corporate responsibility”, p. 11.

¹⁴⁸ See https://www.dalloz.fr/documentation/Document?id=CE_LIEUVIDE_2023-01-27_436098; and https://www.dalloz.fr/documentation/Document?id=TA_PARIS_2024-04-13_2408368# (both in French).

¹⁴⁹ Submission by the Asser Institute and Global Rights Compliance.

¹⁵⁰ See, for example, <https://www.lawfaremedia.org/article/why-courts-don-t-enforce-arms-transfer-restrictions-under-u.s.-law>.

¹⁵¹ See <https://www.judiciary.uk/wp-content/uploads/2019/06/CAAT-v-Secretary-of-State-and-Others-Open-12-June-2019.pdf>; and ATT Expert Group, *Domestic Accountability for International Arms Transfers: Law, Policy and Practice* (London, Saferworld, 2021), pp. 17 and 38.

¹⁵² See *Oxfam Novib Foundation et al. v. the Kingdom of the Netherlands*.

¹⁵³ See <https://www.ejiltalk.org/arms-exports-and-access-to-justice-enforcing-international-law-through-domestic-courts>.

¹⁵⁴ See <https://www.lawfaremedia.org/article/why-courts-don-t-enforce-arms-transfer-restrictions-under-u.s.-law>.

¹⁵⁵ See <https://www.ejiltalk.org/german-arms-exports-to-israel-the-frankfurt-administrative-court-takes-a-hands-off-approach-to-international-law>.

¹⁵⁶ Kanetake and Ryngaert, “Due diligence and corporate liability”, pp. 24–26.

¹⁵⁷ ATT Expert Group, *Domestic Accountability*, p. 47.

mitigate the negative human rights impact of arms transfers. The human rights impact of arms transfers should therefore be the object of continued attention.

42. In that regard, further research would help to understand better the gaps in the role of States and the private sector to prevent, address and mitigate the negative human rights impact of arms transfers, particularly in relation to identifying practical measures and good practices on the following topics:

- (a) Measures taken by States to refrain from prohibited arms transfers, such as through legislation and administrative practice, including risk assessments;
 - (b) Measures taken by the private sector to respect human rights, including through the adoption of relevant policies and effective due diligence processes;
 - (c) Measures taken by States to prevent unlawful arms transfers by third parties, including the regulation of the arms sector, exercise of control over transit and trans-shipment of arms, and the investigation, prosecution and punishment of conduct related to arms exports prohibited by international law;
 - (d) Measures to ensure access to justice, effective remedies and judicial oversight over arms exports, which are central to ensure prevention and accountability.
-