



## “Responsible Business Conduct - the case of the arms sector”

VERBATIM READ OUT | Tuesday 29th November 2022 – 1:30-3pm CET | Zoom

This conversation - co-organized by the American Bar Association Center for Human Rights, the University of Washington School of Law, PAX, Amnesty International and the Quaker United Nations Office in Geneva - has emerged from respective long standing work on issues related to responsible business conduct & conflict, and in particular looking at the case of the arms sector.

Indeed, despite the often inherently dangerous nature of its business and products, the arms sector and companies throughout the arms transfer life cycle, has not been the subject of the same level of scrutiny as other industry, on their human rights responsibilities under the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) and related frameworks. And, while the Arms Trade Treaty (ATT), as an international treaty that regulates the international trade in conventional arms, focuses on the role of States in addressing the human rights impacts of arms transfers, questions remain about the way in which businesses in the arms industry put in practice their own responsibilities and ensure that they have engaged in processes to prevent, mitigate and address the adverse impacts of their business models and trade.

Our speakers today will be kick starting the conversation - I’ve prepared a few questions for them to give us a sense or flavor of the developments and opportunities in their respective fields of practice to showcase different points of view and open a candid discussion on the topic.

- What type of effective practices do businesses already use to prevent or mitigate human rights impacts of transferred arms? And how should these effective practices be further shared and used?
- How does debate around legislation in the EU Corporate Sustainability Due Diligence and national legislation impact the environment for arms producers in terms of binding and voluntary regulation?
- What human rights due diligence policies and processes should entities involved in and with the arms sector (the trade thereof and whole value chain) implement to ensure that their business does not contribute to human rights abuses in countries affected by conflict or suffering political upheaval?

### Speakers:

- Anita Ramasastry, currently Henry M. Jackson Professor of Law, University of Washington School of Law - and has previously had many hats, including leading on work on conflict and the arms industry at the UN Working Group on Business and Human Rights
- Rachel Stohl, is Vice President of Research Programs at the Stimson Center and Director of the Conventional Defense Program.
- Lana Baydas, Program Director, the American Bar Association Center for Human Rights.
- Cor Oudes, Programme lead Humanitarian Disarmament, Business Conflict and Human Rights, PAX
- Patrick Wilcken - Researcher/advisor on Military, Security and Policing Issues, International Secretariat Amnesty International

Moderated by Florence Foster, Representative - Peace & Disarmament at the Quaker United Nations Office in Geneva.

# Roundtable - conversation with speakers

## Anita

In your time as a member of the Working Group on Business and Human Rights - a Human Rights Council mechanism that has a mandate to promote, disseminate and implement the Guiding Principles on Business and Human Rights - you decided to deep dive into the notion of responsible business conduct in the arms sector.

Could you tell us a little more about why it brought you to look at the corporate side of the arms trade, the landscape you found when you did that research that led to the [information note](#) on 'Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights'?

This information note explains the applicability of the UN Guiding Principles on Business and Human Rights (UNGPs). The rationale for the information note was as follows:

- First, there is a governance gap, States are not fully implementing their duty to protect people from human rights abuses in relation to the arms trade. There are gaps, for example in export licensing and the adequacy of state-based human rights due diligence
- Second, there was a need to clarify that Pillar II of the UNGPs is an independent pillar and that corporate respect for human rights exists independently from the State Duty under Pillar I. Businesses in many regulated sectors (e.g. pharmaceuticals, food) have implemented the UNGPs. The same applies to the arms sector.
- Companies that are part of the arms sector have often said that the issue of human rights is the duty of States and that once a license is granted, they have no independent responsibility to consider the human rights impacts of their sales/exports and end use of arms.

The WG Information note explains the applicability of Pillar II and provides high-level guidance focusing on how business involved in the arms sector have a responsibility to respect human rights and to conduct human rights due diligence pursuant to the UNGPs

The regulatory landscape is changing and that with existing mandatory human rights due diligence rules, arms companies may already have a legal obligation to conduct human rights due diligence. One example of this is the French Law of Vigilance. Other laws such as the draft European Corporate Sustainability Due Diligence Directive. Some governments and companies seem to acknowledge the dual roles of governments and companies in alignment with the UN Guiding Principles

## Lana

At the American Bar Association, you went down a similar path of reflection with a different outcome - while the Working Group produced a normative note - the ABA went more granular setting out the practicalities of what due diligence processes could look like for the arms sector. What was the history and rationale for the development of the '[Defense Industry Human Rights Due Diligence Guidance](#)'?

The American Bar Association Center for Human Rights, through its Proxy Warfare Project, has undertaken several advocacy and research initiatives with the objective of restraining arms exports to countries with poor human rights records and increasing adherence to international, regional, and domestic legal frameworks.

Through this work, we examined legal and regulatory frameworks relevant to the arms trade, and we found them sufficient. International treaties expressly place on states the responsibility to prohibit weapons exports where there is a clear risk of being used in violation of international human rights law and international humanitarian law. The domestic legal frameworks place similar requirements around human rights and humanitarian law violations in undertaking arms sales and transfers. However, the fulfillment of these obligations has been mixed at best. Available oversight mechanisms at the national level are often underutilized.

According to the US Government Accountability Office's recent report, from fiscal years 2015 through 2021, the US Department of Defense administered military support worth at least \$54.6 billion to Saudi Arabia and UAE, primarily for defense articles and defense services. The arms sales to these two countries continue despite the findings of the UN and civil society organizations that coalition airstrikes have been indiscriminate and may amount to war crimes. The GAO report further noted that DoD should enhance its due diligence to prohibit arms sales.

One of the challenges for continuing arms sales to countries with poor human rights records we found, and as identified by the UN Working group on Business and Human Rights, is a lack of human rights due diligence conducted by arms companies. The Center's guidance came with the objective of addressing this loophole and countering arguments advanced by arms companies. These companies often argue that due diligence is performed by regulators in approving sales or in granting export

licenses. Also, they push back against due diligence, using the argument of lack of access to information. As explained in the UN Guiding Principles, companies' responsibility to respect "exists independently of States' abilities and/or willingness to fulfill their own human rights."

Our guidance showed that arms companies could have access to not publicly known information through-life support contracts, for example. The Guidance further demonstrated that advancing these arguments wouldn't shield arms companies from reputational, financial, regulatory, and legal risks.

### **Regulatory and Policy Risk**

Legislators and policymakers are taking an increasingly active interest in the arms trade and in corporate social responsibility, more generally, imposing applicable due diligence obligations to address business and human rights concerns. The recent discussions on the National Defense Amendments Act demonstrated that the US Congress is taking arms control more seriously than ever, elevating the responsibility to conduct end-use monitoring.

### **Financial and Reputational Risk**

Defense companies have incurred reputational damage as media coverage and protests have shed light on the human costs of transferring arms to states with poor human rights records. At the same time, the socially responsible investing movement has grown, with [Bloomberg](#) expecting ESG funds to control one-third of all assets under management globally by 2025.

### **Legal Risk**

Litigants have succeeded in pursuing paths to civil liability against US weapons manufacturers. The current armed conflicts involve weapons transfers with some potential to establish company accomplice liability. In Europe, prosecutors have brought criminal charges against defense companies who violated the terms of their [export licenses](#) or are alleged to be complicit in [war crimes](#) and [crimes against humanity](#) abroad.

The Guidance outlines practical steps for setting up a HRDD program. It has four components: risk assessment, prevention and mitigation, end-use monitoring, and investigation and remediation. The end-use monitoring ensures that the defense articles and services are not involved in the commission of serious violations of international human rights and humanitarian law. The Guidance's rationale is to close the loophole and address arguments that it was impossible to have any due diligence in this sector by spelling out practical steps for companies that have a legal and ethical obligation to put in place meaningful mechanisms to respect human rights.

#### **Patrick**

Taking a few steps back in time, Amnesty International and others, has been reaching out to industry actors, trying to get a sense of what already exists both in terms of their understanding of their own responsibilities and in turn, what is in place in terms of processes akin to due diligence - what did you find [see [2019 Report](#) 'Outsourcing Responsibility'], and has anything changed?

In 2018 we reached out to leading companies in the defense industry – companies like Raytheon, Lockheed Martin, Airbus and BAE Systems - and asked them what human rights due diligence they had in place particularly in relation to exports of products and services to high-risk destinations such as Saudi Arabia.

The answers we got were predictable and disappointing – showing a lack of understanding of the global business and human rights framework.

Most companies argued that their only responsibility was to comply with export law, implying that governments performed human rights due diligence on their behalf through the licensing system.

- BAE Systems: "Our activities in Saudi Arabia are subject to UK government approval and oversight."
- Raytheon: "Raytheon's sale of precision-guided munitions to Saudi Arabia have been and remain in compliance with U.S. law."

Their human rights policies for the most part did not mention "products and services" but stuck to issues like ensuring that there was no forced labour in their supply chains and non-discrimination in the workplace.

### **New positions**

Since that report was published, there have been a few interesting shifts in language in defence companies' human rights policies; some companies, have begun accepting that there are risks associated with misuse of products and services, e.g.:

- Raytheon: "We recognize that certain Raytheon Technologies products and services sales carry potential risks associated with their misuse, and that we have a responsibility to identify and mitigate these risks where feasible." However, they go on to say: "Central to this responsibility is our strong commitment to compliance with all U.S. and applicable non-U.S. laws."

- General Dynamics: “Many of our products and services include, or otherwise support, lethal capabilities. This imposes a terrific responsibility on us.” however, they also go on to say “To meet this call, we rigorously comply with applicable laws and regulations relating to the export and end use of our products and services.”
- One company, Northrop Grumman, does accept full responsibility: The company has procedures in place to engage in due diligence, to assess and potentially to mitigate risks – including to human rights – before undertaking certain business opportunities, even if they are or would be approved. Where the risks of agreeing to such a business opportunity are unacceptable, Northrop Grumman will decline the opportunity regardless of whether it is legally permissible.

### ***Worrying language***

However, some worrying language has crept in, placing strict limits on their human rights responsibilities, that fall well short of the letter and spirit of the UNGPs:

- BAE: “We are committed to respecting and upholding human rights wherever we operate, in respect of activities under the full, direct control of the Company.” – large caveat which excludes responsibilities for most salient risks – ie the use of weapons by third parties.
- Airbus: “Our commitment to embed and advance respect for human rights covers activities under our full, direct control in our divisions, affiliates and supply chain.”

### **Rachel**

You have been running the Industry Working Group on the Arms Trade Treaty in Washington, D.C. since 2010. This group includes the largest U.S. arms manufacturers/exporters and industry associations, as well as U.S. subsidiaries of foreign arms companies. These meetings over time have changed, but very much continue to provide an opportunity for industry to formulate positions on various aspects of ATT - what are the key elements guiding the group’s framework and discussions? And what can you tell us about motivations for supporting ATT implementation?

Since 2010, I have run the Industry Working Group on the ATT in Washington, D.C. This group includes the largest U.S. arms manufacturers/exporters and industry associations, as well as U.S. subsidiaries of foreign arms companies. Though the group originally included some small arms industry associations and manufactures, after a few years, they departed due to their opposition to the ATT. However, I have often included them in key meetings including, for example, with ATT Presidents when they visited Washington.

Initially, I organized the group through my capacity as Consultant to the ATT process to address confusion and misunderstanding about the practicalities of the arms trade among treaty negotiators. Diplomats did not have the necessary experience with the day-to-day operations of the arms trade to ensure that their positions reflected the reality of how the arms trade operates in practice.

Industry played a key role in the ATT negotiations, working to ensure there were not unintended consequences that would undermine the legitimate trade in conventional weapons or create additional costs or burdens. In some cases this was very practical – explaining to government representatives the shipping process for arms, the required paperwork for international transfers, explaining the server requirements for record keeping, or the changes necessary to keep a database system functioning from 9 to 10 or 20 years.

The group’s activities have evolved as the treaty was adopted and now implemented. Based on the premise that the ATT can help stem the flow of illicit arms that contribute to global conflict, the group’s discussion now focuses on developments in ATT processes and the role of industry in those processes. The meetings provide the only opportunity to engage across industry and with experts on the ATT, as well as with the U.S. government, which cannot organize these meetings themselves due to regulatory constraints.

These meetings provide an opportunity for industry to formulate positions on various aspects of ATT implementation, provide input and opinions to U.S. government representatives, ask for clarification on the ATT process or implementation, and receive updates on the ATT process and the ATT situation domestically. Some industry representatives have been motivated to do more on the ATT and have attended ATT process meetings, including Conferences of States Parties.

Among the key elements guiding the group’s framework and discussions are:

Industry recognizes and underscores that it is the responsibility of national governments to implement the ATT – an understanding that is fundamental in outlining industry’s role in the ATT process. Governments are responsible for developing national laws, regulations, processes and procedures to fulfill their ATT obligations.

Governments share these processes with industry to ensure compliance with national laws, regulations, policies, and procedures: industry complies with these measures in order to comply with national regulations, not the ATT directly. Industry actors are not parties to the treaty, nor are they responsible for ATT implementation.

## Cor

Now broadening the scope a little, from the arms sector and manufacturers, to looking at other private actors involved in the making and transferring of weapons through the value chain. Helps us take a look upstream - at investors - and their responsibilities downstream when it comes to the arms sector. What is happening today, and what could be done better?

Financial sector and arms producers (arms trade); what is happening today:

- A study by PAX from the Netherlands, [published](#) in July this year examined how the largest European banks deal with the risk of financing a company involved in high risk arms sales. Those are arms sales to conflict zones or authoritarian regimes. Countries involved in the war in Yemen are a prime example of both. The study included banks like German Deutsche Bank, French BNP Paribas, Swiss bank UBS and NatWest which is based in the UK amongst other banks. The 15 banks hold a total of 87,7 billion euros in investments in arms companies with known arms sales to high risk countries.
- The study also found that quite a few banks (8 out of 15) had decent to good policies on lending to arms companies. These banks will refuse certain types of financing if the arms company is planning to sell to a high risk country, and they got quite specific about the risks involved. The policies of these banks try to mitigate the risk that the bank finances an arms deal that supplies weapons to a conflict zone or known violator of human rights or IHL.
- There is a significant gap here though. These banks will not finance specific arms deals, but will provide other types of lending to arms producers, such as general corporate loans or underwriting. Hence these upstream actors profit from the way an arms company behaves, including its arms sales to high risk countries. The arms producer would still be able to attract financing from these banks, as long as the financing wasn't directly tied to a specific arms deal. And indeed, the study found that many of these banks still have significant financing deals with the arms industry.
- The study also found that 7 of the 15 banks we analyzed did not pay enough attention to high risk arms trade in their policies. This means that in their public policy they do not explain how they want to prevent financing arms companies that sell weapons to conflict zones or dictators.

What could be done better?

- The banks that have good policies, but only for specific trade financing, should expand the scope of their human rights due diligence policies to all financing.
- And the banks that lack decent policies overall, 7 of the 15 banks we analyzed, should quickly improve their policy and their human rights due diligence to include the risks involved in arms trade.
- By doing so, these banks would create pressure on the arms companies to be more restrictive in terms of who they sell their products to. As the *information note* by the [UN Working Group](#) rightly observed, the financial sector plays an important upstream role, and should do much more to fulfill the responsibilities this creates. Thank you.

## Anita

Rachel just mentioned the arms sector, and its own engagement with the ATT framework - how do the ATT and guiding principles relate, complement and offer opportunities for the industry?

It would be fair to say that they complement and overlap one another. In both cases for instance, States under ATT and in their responsibilities under the Guiding Principles should be setting out expectations, guidelines and rules for corporate human rights due diligence in the sector. As part of their State duty to protect under Pillar I of the UN Guiding Principles and in furtherance of their responsibilities and commitments under the ATT, they can set forth clear expectations for the private sector as to its own human rights responsibilities. The Guiding Principles are clear however that regardless of a States activities vis a vis the ATT and with the UN Guiding Principles, there are parallel responsibilities of companies to conduct their own human rights due diligence.

Important opportunities coming up is the Arms Trade Treaty (ATT), Conference of State Parties (CSP9). The current year long cycle is presided by the Republic of Korea who has chosen 'The Role of Industry in Responsible International Transfers of Conventional Arms' as their thematic area of focus - see here for key dates: [CSP9 Preparatory Process \(thearmstradetreaty.org\)](#).

### Lana

Moving from the broader frameworks and sectors, to taking a look at the US, where a lot of your own engagement takes place - what does it look like when it comes to human rights due diligence - and how to bridge the gap between theory and practice?

Effective enforcement of existing laws remains a challenge. The ABA has noted, in [its policy 113 C](#) of 2019, its concern with the apparent failure of the State Department to adhere to relevant human rights provisions and requirements consistent with the Arms Export Control Act and the Foreign Assistance Act. However, we see promising opportunities. Legislators and policymakers are taking an increasingly active interest in limiting arms transfers to certain countries and considering reforms that would increase congressional oversight and place new limits on arms sales.

The gap is in getting the documentation to those who can act on it and educating those with authority on how the law requires them to act on it. To bridge the gap, it is necessary to engage with all stakeholders. The Center staff have engaged with USG, congressional staff, and arms companies. Based on these conversations, the Center, in collaboration with CIVIC, publishes the Primer on US laws and policies. This primer presents an important tool for civil society to engage with legislators and their staff to effectively utilize available oversight mechanisms. It further develops the Defense Industry Human Rights Due Diligence.

The key to addressing the gap between theory and practice is to have mandatory due diligence in arms exporting jurisdictions, as noted in the UN WG BHR information note. Arms companies that understand the risks and are willing to invest in setting up HRDD have voiced concerns that they will be at a business disadvantage to those companies not willing to embark on HRDD. For the vast majority of defense contractors, the U.S. government is their largest client by a significant margin, so they won't want to get into a position where their policies and choices are at odds with the U.S. government. A holistic approach is needed to bridge the gap. Regulatory authorities effectively implement existing laws and activate oversight mechanisms and enact a mandatory HRDD for arms companies. Without a mandatory HRDD that is in compliance with international standards, the conversation on defense industry HRDD will be short-lived.

Report - [https://civiliansinconflict.org/wp-content/uploads/2022/02/US-Law-and-Arms-Transfers\\_Final.pdf](https://civiliansinconflict.org/wp-content/uploads/2022/02/US-Law-and-Arms-Transfers_Final.pdf)

### Patrick

Leaving the US context for now, to look at the other side of the Atlantic zooming back onto the EU level. Much talk has been developing around what the [EU Corporate Sustainability Due Diligence](#) should include. The current proposal excludes the "distribution, transport, storage and disposal of the product being subject to the export control [...] relating to weapons, munition or war materials after the export of the product is authorized". What are the challenges and potential problems down the road in explicitly excluding arms sales from the directive - both for the companies, states, and the impact on people?

The original Commission draft included the entire value chain, and did not have to be carved out for the defense industry, so this Council proposal is a major regression.

On the face of it, with its explicit reference to the authorisation of exports, it seems to be **accepting the industry's argument** that the state exercises HR due diligence on behalf of the company when it comes to the export of defense and dual use products and services.

This is particularly problematic in Europe, where there is **a multiplicity of views** on what constitutes a human rights risk.

Returning to the **Yemen conflict**, as evidence of serial violations of IHL – mainly air strikes on civilians and civilian objects – emerged, EU member states adopted every conceivable position on arms exports, from embargoes, to restrictions on certain weapon types to full-throttled exports – more liberal export decisions have been and are being challenged in the courts. Many European defense companies operate across the EU bloc and therefore have been subject to a series of different - sometimes controversial - interpretations of the EU Common Position.

This points to the weakness and contradictory nature of defense companies' arguments in relation to the exercise of their human rights responsibilities; it means that multinational companies can never take a **consistent position** on the very serious human rights risks their business faces and that **policy coherence** is impossible. It also clearly diverges from the principle of a company's free-standing human rights responsibilities under the UN Guiding Principles on Business and Human Rights.

In the context of the **Ukraine war**, we may be seeing a general weakening of support for controls on the defense industry and disarmament initiatives in general.



**Cor**

How is the EU legislation a step in the right direction when speaking of the full value chain - and your specific focus on the financial sector?

On legislation that would make human rights due diligence mandatory:

- There are currently different proposals of the EU corporate sustainability due diligence directive in play, and for a few key points it's currently still unclear what the final version is going to look like.
- The financial sector does seem to fall in the scope of the law. However, the Commission proposal does not list the financial sector as high impact. This would mean the law does not designate the financial sector as a priority area of action. The EP committee on legal affairs does want the financial sector named as high impact, thus giving it more priority. That would be justified, given the wide exposure of the financial sector to many risks, including as we've seen the risk of becoming involved in high risk arms trade.
- A second point of discussion around the law has to do with ongoing due diligence. The Commission proposal said that specifically for financial products, HRDD would only be mandatory before inception of the contract. The EP committee on legal affairs wants to make that every 12 months. That would be an important improvement, especially when we see that arms suppliers should also be evaluated on their human rights risks much more regularly.
- And lastly, the Commission in its proposal stated that 'loans and investments should not be terminated if this could reasonably be expected to cause substantial prejudice to the entity to whom that service is being provided.' In other words: if you feel divesting from an arms company will have any effect, the law would say you can't do it. The legal affairs committee wants that out. This article specifically could be used by arms companies to shield themselves from divestment, emphasizing their role in Europe's self-defense. It's important that this article doesn't end up in the final version, as it would hamper discussion on improvements in human rights due diligence the arms sector needs to make.

*UPDATE 9/12/2022: The EU Council proposal for the law excludes both the arms industry and the financial sector.*

**Rachel**

Considering your lengthy engagement with industry - how do we reach these actors, engage constructively with them, and best bridge the divide in language and outcome?

Industry does have a recognized role in supporting ATT implementation and can be a resource for better understanding the practicalities of the treaty's provisions as well as for advocating for ATT universalization.

Even though governments are responsible for implementing the ATT, there were, and continue to be, several motivations for industry involvement in seeing the ATT successfully negotiated and implemented.

First, when implemented effectively, the ATT helps level the playing field by requiring other countries to adopt standards similar to those that U.S. companies must follow.

Second, the ATT contributes to greater convergence of arms transfer laws and regulations around the world. The ATT establishes clear elements of a national control system and criteria for States to consider when making arms transfer decisions.

Third, as the international arms trade continues to become increasingly globalized, industry relies on a diverse set of actors across the supply chain. Many of the most active members in that supply chain are ATT members, and thus it is important that States play by the same rules and operate by the same basic principles to ensure that items are not delayed due to differences in understandings of ATT obligations within the global supply chain.

In short, industry has several core motivations for supporting ATT implementation:

- Convergence can make it easier for industry to achieve concurrent compliance with the various national systems that may apply to a given transaction.
- The ATT can help clarify the obligations and responsibilities of industry around the world.
- The ATT levels the playing field.
- Adherence to the ATT reduces reputational risk.

Industry is an implementer of national practice, which often reflects international obligations. Accordingly, industry needs to be kept up to date if these processes change and can provide information and data upon request to support States' implementation of ATT obligations.

For example, record keeping by exporting and importing companies can assist States in collecting and reporting data on actual and authorized exports and imports. States must develop national processes for compiling and submitting their reports and inform industry of the requirements to comply with regulatory and legal requirements at the national level. Industry has vast

experience, therefore, with record keeping and can provide advice and counsel on ways in which information can be stored, collated, and accessed.

The defense industry's involvement in the ATT process is essential to avoid potential consequences stemming from subjecting transactions to multiple, inconsistent export control regimes. If industry engages in the ATT it could avoid unintended consequences for the legitimate arms trade.

Global commerce benefits from equal treatment and clearly understood rules of the game, and the defense industry is no exception. Industry involvement in the ATT process will ensure that such a framework reflects practical realities for the global trade in conventional arms and is well positioned for effective implementation.

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**We hope we've been able to give you a sense of the diversity and depth of both the discussion and actors involved in addressing responsible business conduct in the arms sector - from those working on arms control, human rights, corporate responsibility, to those working on advocacy, litigation, advising states and industry and there are more out there doing great work too.**

**We will not be sharing the Q&A discussion, but we thought it important to close with the emphasis the Chair of the [UN Working Group on Business and Human Rights](#) - Fernanda Hopenhaym Cabrera, put on the Working Group's ongoing commitment to follow through on the work they have done on conflict, and within that work, their focus on the defense and arms industry.**