

NON-STATE ACTORS AND HUMAN RIGHTS: THE CASE OF ARMS MANUFACTURERS

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Introduction

The human rights discourse has been a factor in the business world for years, but especially so since 2003, when the United Nations (UN) approved the “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights”. A special milestone was reached in 2005, when the Commission on Human Rights requested the UN to appoint a Special Representative for these issues. The resolution was adopted with a vote of 49 countries in favour, out of 53 with the opposition of the USA.¹ Thus in August 2005, somewhat ironically, the American John Ruggie was appointed for that position. Why was it necessary to open an explicit scope for reflection and action on human rights in the business world?

This question might have many answers. For example, we have the case of the pesticide industry explosion in India in 1984 that was categorised by the UN as creating “colossal consequences”² for the people and the environment, leaving thousands dead or wounded. Another situation could be the high number of children working in private enterprises that according to UNICEF data is rising to more than 150 million.³ But in this paper, we will focus especially on the need for arms manufacturers to comply with human rights regulations, the consequences of non-compliance and ways in which the issue can be solved. Specifically we will consider that irresponsible arms trade, proliferation and use undermine the socioeconomic development of people and create an environment in which human right offenders may act freely, particularly because the rules that govern companies wishing to export arms do not always encourage companies to seek own governmental authorization to initiate negotiations or sign contracts with foreign customers.

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¹ UNCHR report to ECOSOC, E/CN.4/2005/L.10/Add.17, 22 April, 2005, 75.

² *Services and the Environment*, United Nations Conference on Trade and Development, UNCTAD/SDD/SER/6, 6 March, 1996, 143.

³ *The State of the World's Children*, UNICEF, 2011, 10.

I. Human Rights and Corporations

In situations like the ones described above, it is not enough that enterprises voluntarily take responsibility and strike their own balance between their economic gains and their social and environmental responsibilities. Companies must respect human rights, and doing so should be a requirement of basic law, not voluntary and optional.

Indeed, in 1999 the former UN Secretary General, Kofi Annan, invited corporations to join a Global Compact⁴ to promote good practices in the fields of human rights, labour, environment and the fight against corruption. But it was not enough, particularly in a globalized world where a large number of countries have enormous legal loopholes that hamstring citizens in their defence against inhumane activities by local and transnational corporations. It therefore became necessary to go beyond the Global Compact and Corporate Social Responsibility and create something as basic as the aforementioned UN Norms.

In this sense, Ruggie recommends promoting a new international regulatory framework focused on three principles: the State's duty to protect human rights, the obligation of the business community to respect those rights, and the promotion of mechanisms to overcome violations⁵. "Protect, respect, remedy" is the new motto for states and businesses of any size and complexity, especially multinationals, as, like individuals, corporations can be held responsible for their actions – and some of those corporations have enormous power. More power means more responsibility.

Therefore it is urgent for businesses to start taking the following steps: they should integrate the assumption of respect for human rights with their core values, identify which areas of the business affect basic rights, design practices on how to respect these rights, and adopt indicators for assessment through internal and external audits.

In line with the above, the debate is currently ongoing on how corporations can be held responsible for violating human rights. One option, as De Brabandere mentions, is to establish "direct 'Civil' Responsibility for Corporations under International Law". But, after reviewing the Rome Statute, the author concludes that "there is no general acceptance of corporate criminal responsibility in international law".⁶ However, the question is still open if we consider the case of a private military company performing State duties, resulting in human rights abuses. Could the President of such a company be

⁴ United Nations Global Compact, online: www.unglobalcompact.org.

⁵ *Protect, Respect and Remedy: a Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008.

⁶ E. de Brabandere, *State-Centrism and Human Rights Obligations Challenging 'Stateless' Approaches towards Direct Corporate Responsibility*, International Law Association, 2009, 10.

held accountable for those crimes? Or would be the government be responsible, having given the orders?

Another point of view is the one presented by McCorquodale,⁷ who holds that the effects of globalisation increased the number of actors involved in the international legal regime, transnational corporations now being among those actors. He further claims, which idea he shares with Marks,⁸ that non-state actors should have a more active role in the creation and codification of new international legal parameters. This notion will be further discussed in this paper.

II. Arms Manufacturers and Human Rights

Irresponsible arms transfers, illicit manufacturing and use of weapons jeopardise the three generations of human rights. Firstly, such practices clearly undermine the right to life, secondly the manufacturing may well involve some kind of labour exploitation, and thirdly armed violence threatens the right to development.

This last idea is supported by the fact that now, eleven years after the adoption of the Millennium Development Goals, which outlined eight priorities in order to achieve optimal quality of life by 2015, a large number of countries still have not achieved decent indicators due to the high rate of armed violence that they suffer.⁹ Therefore, several countries have been seeking concrete initiatives on an international level that not only recognise the lack of public development policies, but that also identify and delineate strategies to combat factors that inhibit development, such as armed violence caused by the great availability of weapons.

It is worth mentioning that before arms fall into the hands of organised crime, they pass through various processes of acquisition and transfer. The first acquisition typically respects the legal and lawful rules of the country where the transaction takes place. After this, these weapons come to the path of trafficking in order to be purchased by criminal end users. This is why the UN General Assembly recognised the need to negotiate an international Arms Trade Treaty (ATT) in order to establish legally binding measures for arms transfers, bearing in mind that “development and human rights are the foundations for collective security”.¹⁰

Thus two challenges, above all, are to be put forward for discussion: will arms manufacturers be indirectly subjected to the obligation to respect human rights? If so, would they also have the right to take part in discussions aimed at

⁷ R. McCorquodale, *An inclusive International Legal System*, *Leiden Journal of International Law*, 17, 2004, 477.

⁸ S. Marks, *State-Centrism, International Law, and the anxieties of influence*, *Leiden Journal of International Law*, 19, 2006, 339.

⁹ *Global Burden of Armed Violence*, Geneva Declaration Secretariat, Switzerland, 2008, 89.

¹⁰ *The Arms Trade Treaty*, UNGA Resolution, A/Res/64/48, 2 December, 2009, 9.

designing those rights that are to be respected? To deal with these questions, we should first analyse the history of the negotiations that led to the ATT.

III. Arms Manufacturers and their Participation in UN Arms Trade Mechanisms

Despite the huge and irreversible damage that irresponsible arms transfers have caused in the world for many years, this issue was not explored during the first years of the UN. It would not be until 1988¹¹ when the topic appeared on the agenda of the First Committee of the General Assembly on Disarmament and International Security, which considered the illicit trade of conventional weapons.

In 1991, after the issue having been on the agenda for some years, the UN approved the creation of a Register of Conventional Arms.¹² This Register covers all governmental transfers within nations, but unfortunately, it only contains data that governments are willing to provide. It thus has a limited scope: in the case of Mexico, for example, only exports and imports of arms by the Ministry of Defence were recorded, while there was also a large number of Mexican private companies exporting and importing weapons and related material.¹³ The Register proving insufficient, the discussion focused on including private corporations' transfers in the scope of the future ATT.

For this reason, when the UN Secretariat organised its first regional meetings, they tried to involve the private sector in the ATT discussions. Unfortunately, only two out of those ten meetings were attended by industry representatives. The British manufacturer Rolls Royce attended one, and the Ukrainian corporation Motor Sich attended the other. It is interesting to analyse why these two were the only ones to participate and what reasons they may have had to be part of those meetings.

Rolls Royce were represented by their Strategic Exports Control Department.¹⁴ This corporation, according to their official information, is in charge of developing new equipment for different types of fighters.¹⁵ A number of those arms have been involved in human rights violations,¹⁶ mainly in the Middle East.

¹¹ Although the UN did not consider this topic until 1988, in 1925 the League of Nations held a "Conference for the Control of the International Trade in Arms, Munitions and Implements of War", Document No. C.C.I.A.4(2), League of Nations Database of the Northwestern University, online: <http://www.library.northwestern.edu/govinfo/collections/league> retrieved on 27 February, 2011.

¹² *Register of Conventional Arms*, UNGA Resolution, A/Res/46/36, 9 December, 1991.

¹³ This was established by comparing the data available on arms exports at the UN Register of Conventional Arms (http://unhq-appspub-01.un.org/UNODA/UN_REGISTER.nsf) with the information available at the United Nations Commodity Trade Statistics Database (<http://comtrade.un.org/db/>).

¹⁴ An important remark to make is that Mr Andrew Wood, the Director of this Department, was formerly the Head of Export Control Policy at the UK Ministry of Defence.

¹⁵ *GE Rolls-Royce fighter engine team prepares to test fifth engine in 2010*, Rolls-Royce, 14 September 2010, online: <http://www.rolls-royce.com/defence/> retrieved on 4 March 2011.

¹⁶ *Foreign Arms Supplies To Israel/Gaza Fuelling Conflict*, Amnesty International, MDE 15/012/2009, 23 February 2009, Annex 2.

For Motor Sich, it was their Export Control Department attending the UN meetings. Motor Sich builds military aircraft engines, and some reports specifically suggest that their equipment is used to commit human rights violations in Sub-Saharan Africa.¹⁷ In view of this information, it is important to include more and more diverse arms manufacturers.

IV. Regional Mechanisms to Prevent Arms-related Human Rights Violations

In this section, we will analyse different regional agreements that address the problem of illicit trade of firearms and its relation to the likely use of those weapons by the recipient country in violations of human rights. As will be seen, there are still no uniform criteria to assess beforehand whether or not the purpose of the traded arms constitutes a violation of human rights or “people’s rights”. Likewise, not all mechanisms cover the same range; some include only conventional arms, while others go further and cover ammunition and related material as well. Moreover, not all countries in a given region are part of these agreements.

Of the twenty regional instruments designed to combat the illegal trade in small arms and light weapons, only six include the option of preventing arms transfers when there is a possibility that the arms will be used in human rights violations in the recipient country. When it comes to arms manufacturers, only a single instruments makes reference to the “commercial and industrial interests”, which is in the first one described in the following paragraph.

The European Union Code of Conduct on Arms Exports establishes that after assessing the “*recipient country’s attitude toward (...) human rights (...) Member States will not issue an export licence if there is a clear risk that the proposed export might be used for internal repression*”.¹⁸ Taking the human rights scope a little further, the OSCE Principles Governing Conventional Arms Transfers not only take into consideration the respect shown fundamental freedoms in the recipient country, but also ask participating States to “*avoid transfers which would be likely to be used for the violation or suppression of human rights and fundamental freedoms*”.¹⁹

In line with the above, the Central American Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Material, besides covering more than the trade of firearms, refers to specific human rights. For example, it mentions that transfers shall not be carried out from or to States that: Commit and/or sponsor human rights violations, restrict political participation and lack democratic governments.²⁰ This can be understood in light of the political turmoil that happened in this region during the 1980s.

¹⁷ P. Holtom, *Ukrainian Arms Supplies to Sub-Saharan Africa*, Background Paper, SIPRI, February 2011, 5.

¹⁸ Criterion Two, *European Union Code of Conduct on Arms Exports* (1998).

¹⁹ Article 4, *OSCE Principles Governing Conventional Arms Transfers* (1993).

²⁰ Article 1, *Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material* (2005).

V. Possible UN Mechanisms to Prevent Arms-related Human Rights Violations

Among the considerations that countries have asked for the ATT to take into account, several are based on the expected use of arms being transferred internationally by governments or private corporations. The main consideration to have gained support from states, and the one that is most likely to be included in the treaty, is the issue of whether the arms will be used to violate human rights.²¹ But how will these situations be defined and identified? And how can corporations be notified or included?

Governments have proposed a number of different mechanisms to counteract arms-related human rights violations, but have hitherto left private corporations out of the equation. Such mechanisms can, for instance, take the shape of a standing committee. Another option, probably the most suitable solution, would be to take advantage of the work of the Human Rights Council (HRC), and create a list of countries subject to arms import restrictions due to human rights violations. Although, once again, the only corporations eligible to participate in such an initiative and have a say would be corporations that are accredited to work with the HRC: as may be seen by looking at a recent list of civil society organisations that enjoy consultative status with the UN, it is unlikely that arms companies will get that status.²²

Conclusions

Next year, the UN will sign one of the most important treaties on international security of the last twenty years: the Arms Trade Treaty. For this treaty to be comprehensive and inclusive, it needs to address a number of serious challenges related to arms transfers, such as the likeliness of these arms being used to commit serious violations of human rights. To be able to do this, as described above, it is vital that the UN secures the participation of non-State actors both in the negotiations for and the future implementation of the ATT. In the beginning of the second decade of the 21st century, the range of actors involved with the protection of human rights must be broader; for the sake of a sound ATT, those actors will also need to include arms manufacturers.

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²¹ S. Parker, *Analysis of States' Views on an Arms Trade Treaty*, United Nations Institute for Disarmament Research, 2007.

²² *List of non-governmental organizations in consultative status with the Economic and Social Council*, E/2008/INF/518, September 2008.