BUSINESS ENTERPRISES ACTIVITIES IN ARMS INDUSTRY SECTOR: INTERNATIONAL LAW OVERVIEW

(Kegiatan Perusahaan di Sektor Industri Senjata: Tinjauan Hukum Internasional)

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Abstract

In the current era of Revolution Industry 4.0, the advance of technology is indeed influenced the rapid development of arms industry. This supported by the arms companies' contribution in supplying weapons to the warring parties. Nevertheless, such indirect participation in armed conflicts is marred by serious violations of human rights and the law of armed conflicts respectively. By virtue of this reasoning, this article is present to evaluate whether these arms companies are bound by international law. The author observed there are certain provisions under International Humanitarian Law and International Human Rights Law that can be applied for mitigating, as well as preventing these companies for not conducting any activities with similar nature in the near future.

Keywords: arms industry, business enterprises, international law, weapons.

Introduction

As a result of current advancement of technology, it influences the rapid development of defence industry sector. This can be proven from the report of the Stockholm International Peace Research Institute (SIPRI) in 2017 that found the top 100 arms companies have contributed $398.2 billion of arms sales.1

As reported by SIPRI in 2019, these arms sales are mostly originated from arms companies located or registered in the United States, Russian Federation, France, Germany, and China. SIPRI also concludes that the arms trade from these countries represents 75 per cent of all arms exports globally.\(^2\)

### Table 1. Top 10 arms exporting countries\(^3\)

<table>
<thead>
<tr>
<th>No.</th>
<th>Country</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>United States</td>
<td>36</td>
</tr>
<tr>
<td>2</td>
<td>Russian Federation</td>
<td>21</td>
</tr>
<tr>
<td>3</td>
<td>France</td>
<td>6,8</td>
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<tr>
<td>4</td>
<td>Germany</td>
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</tr>
<tr>
<td>5</td>
<td>China</td>
<td>5,2</td>
</tr>
<tr>
<td>6</td>
<td>United Kingdom</td>
<td>4,2</td>
</tr>
<tr>
<td>7</td>
<td>Spain</td>
<td>3,2</td>
</tr>
<tr>
<td>8</td>
<td>Israel</td>
<td>3,1</td>
</tr>
<tr>
<td>9</td>
<td>Italy</td>
<td>2,3</td>
</tr>
<tr>
<td>10</td>
<td>Netherlands</td>
<td>2,1</td>
</tr>
</tbody>
</table>

**Notes:**
This Table shows comparison of the percentage of arms export in 10 major countries.

These countries exporting arms across the globe, particularly to Saudi Arabia, India, Egypt, Australia, Algeria, China, United Arab Emirates, Iraq, South Korea and Vietnam that is being acknowledged as the largest beneficiaries of arms products in 2018.

### Table 2. Top 10 arms importing countries\(^4\)

<table>
<thead>
<tr>
<th>No.</th>
<th>Country</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Saudi Arabia</td>
<td>12</td>
</tr>
<tr>
<td>2</td>
<td>India</td>
<td>9,5</td>
</tr>
<tr>
<td>3</td>
<td>Egypt</td>
<td>5,1</td>
</tr>
<tr>
<td>4</td>
<td>Australia</td>
<td>4,6</td>
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<tr>
<td>5</td>
<td>Algeria</td>
<td>4,4</td>
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<tr>
<td>6</td>
<td>China</td>
<td>4,2</td>
</tr>
<tr>
<td>7</td>
<td>United Arab Emirates</td>
<td>3,7</td>
</tr>
<tr>
<td>8</td>
<td>Iraq</td>
<td>3,7</td>
</tr>
<tr>
<td>9</td>
<td>South Korea</td>
<td>3,1</td>
</tr>
<tr>
<td>10</td>
<td>Vietnam</td>
<td>2,9</td>
</tr>
</tbody>
</table>

**Notes:**
This Table shows comparison of the percentage of arms import in 10 major countries.

The existence of such arms trade was nonetheless occurred as a result of arms corporations’ contribution in supplying large volumes of military equipment. In the Yemen conflict, Boeing, Lockheed Martin, BAE Systems and Raytheon are consistently supplying, servicing and arming the coalition forces of Saudi Arabia and United Arab Emirates (UAE). Likewise, the Rosoboronexport of Russia has supplied military equipment to the Syrian troops.\(^5\)

Notwithstanding to such massive incomes that these countries, these companies rather, may gained from their activities for boosting the economic


\(^3\) Ibid.

\(^4\) Ibid, p.6.

development in their respective countries, the presence of their manufactured devices in time of armed conflict however has bring negative effects for the protection of civilian population vis-à-vis the enjoyment of human rights itself.

Correspondingly, Patrick Wilcken, Researcher specialized on Arms Control from Amnesty International (AI), opined, “the role of arms companies in deadly conflicts marred by serious human rights violations has been the elephant in the room for long”.

For example, in 2016, a Raytheon or Lockheed Martin’s Paveway system has exploded in hospital of Médecins Sans Frontières (MSF) located in Abs district of Yemen, resulted eleven people killed including MSF staff member, and nineteen injured. Meanwhile in early 2017, the United Nations (UN) Panel of Experts on Yemen has found the British-American manufactured Paveways bomb being used in nine strikes, causing 84 civilian deaths and 77 injuries.

Another investigation conducted by AI revealed that Raytheon’s Paveway bomb exploded in residential area named Faj Attan in Sana’a, Yemen and killed a family of six children. Whilst in August 2017, Raytheon/ Lockheed Martin’s Paveway destroyed a motel in Arhab, Yemen and killed 33 civilians.

Similar instance also existed in 2018 during the battle in Eastern Aleppo, Syria, where Robert Fisk has identified Hughes/Raytheon’s manufactured anti-armour missiles (TOWs system) were located among the ruins.

Unfortunately, despite these massive tragedies that indirectly involving arms

companies participation, AI revealed that these arms companies are denying responsibilities by claiming the liability for human rights assessments goes to their home States through the arms licensing process.\textsuperscript{12}

In light of this horrific precedence on one side and the existed regulations relating to State’s obligations in controlling international arms trade, as encapsulated in the Arms Trade Treaty, on the other side, this paper is present to fulfil these gaps by examining whether such atrocities could be mitigated and further prevented by other frameworks of international law, particularly International Humanitarian Law (IHL) and International Human Rights Law (IHRL), that can control the activities of arms companies in distributing weaponry to the warring parties.

Lastly, the author also wishes that this paper would not be an artificial discourse, but could be implemented for a betterment of business enterprises activities in arms industry sector that capable to adopt the universal values humanity as enshrined under IHRL and IHL.

**How does international law control business enterprises activities in arms industry?**

In current dimension of international relations, State is no longer considered as the only subject of international law. Other non-state actors, such as international organization, non-governmental organizations, and individual in a limited sense, have been accepted as such.\textsuperscript{13}

In this case, according to international law classical approach, transnational corporations (TNCs) are treated neither as a subject nor quasi subject of international law.\textsuperscript{14} As a result of the transformation within the international community, TNCs and multinational corporations (MNCs) that at first being considered as a legal entity (rechtspersons) that possessing legal personality as equal

\begin{flushleft}
\textsuperscript{12} AI, Arms Companies, supra note 6.
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as natural person under national law, have nowadays been recognized as new subjects of international law.\textsuperscript{16}

The acknowledgement towards the status of TNCs/MNCs as a new subject of international law was seen in the opinion of Christopher H. Weeramantry, former judge of the International Court of Justice (ICJ), which stated:

"We must attune the international law of the future to the concept that a large variety of new actors have appeared on the international scene, with rights and responsibilities which international law will recognize as inhering in them. The great corporations are a very important group of these new international actors whom the law of the future will recognize as accountable to the international legal system."\textsuperscript{17}

In that regard, the international personality of TNCs exists when international relations involving such corporations were governed by international law.\textsuperscript{18}

Furthermore, Rudi M. Rizki also reaffirmed the rationalization of TNCs as a subject of international law from liberalism, realism and policy oriented approach theories.\textsuperscript{19}

\textbf{First, the liberalism theory:} The point of view of the liberalism theory comes from the existence of free market system and representative system in democracy. These systems require international law to grant TNCs with responsibility. Corporations responsibility appears because TNCs are private legal institution that utilizing democracy method in their decision making process.\textsuperscript{20}

\textbf{Second, realism paradigm:} The followers of realism have a tendency that in treating TNCs, it must adapt with the political design and national interests of a particular country. Limiting the scope of international law in regulating TNCs’ activities would be far more effective.\textsuperscript{21}

\textbf{Third, policy oriented approach:} TNCs are place as part of diverse entities, such as, states, international organizations, political parties, pressure groups to work


\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid.
together, aiming to achieve common goals. The activities of each of these entities were organized by designing an arena for decision-making, identification of relevant entities, procedure available and perspective to formulate a community prescription, verifying and later applying it through various decisions level. With this way, the will of the international community is being clarified and implemented by respecting common values and purposes that has been determined beforehand.\textsuperscript{22}

According to Emeka Duruigbo, TNCs can be placed under international law regime. In his perspective State is placed as the utmost importance subject of international law, but nevertheless such statement is not exclusionary in nature. Since there are degrees of legal personality then a subject of international law does not necessarily has to possess all attributes or same character of a State to fit into the definition of subject. In sum, all subjects of international law do not have to be on the same degree at the international plane.\textsuperscript{23}

In light of current acceptance of business enterprises as a new actor in international relations, international law rather, the author perceived that business holders, including those that focusing their business in arms industry, could not escape from its international obligations as stipulated under international law. As enunciated infra, this paper has identified certain provisions under IHRL and IHL that could restrict the activities of business enterprises in arms industry, in conformity to international standard.

\textit{Business enterprises activities under IHRL}

In 1990-es, the narration on business and human rights has became at the forefront of the international agenda. This situation was nonetheless influenced by the phenomenon of trade liberalization, deregulation, and privatization in domestic

\textsuperscript{22} Ibid.

level around the world that affecting the operation of the marketplace.24

On its development, the relationship between business and human rights are manifested in numerous non-binding instruments, *inter alia*, ILO Tripartite Declaration, ISO 26000, OECD Guidelines for Multinational Enterprises, and UN Global Compact. They dictate that corporations must also fall under the standard of international law, particularly IHRL.25

In that regard, the idea of burdening corporations to be responsible for human rights fundamentally changes the outlook and thinking of human rights *per se*.26 It is under such new paradigm on human rights, Margaret Junk concludes that there are four criteria that can justify the imposition of human rights responsibility for corporations, including to TNCs/MNCs.27

Firstly, it is related to the degree of human rights violation, whether sporadic, random or isolated, as well as planned, systematic or contiguous. Secondly, it is related to the nature of such human rights violations. Thirdly, it concerned with the typology of rights that being violated, and lastly, the proximity between corporations and the existed violations.28

Meanwhile Andrés Felipe López Latorre argued that business holders bear international human rights obligations. In his opinion, they are legal persons according to international law and have particular rights and obligations. Moreover, he also asserts that "IHRL allocates obligations to non-state actors even though their enforcement depends on state and municipal law. In addition, all human rights impose correlative obligations on all social actors regardless of their nature as states or non-state actors, although such obligations depend on the role and circumstances of that particular actor".29

28 Ibid.
29 Andrés Felipe López Latorre, "In Defence of Direct Obligations for Business Under International
The evolution of norm on human rights responsibility for TNCs reached its peak in July 2011, when the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGP). The UNGP grants three conceptual pillars between business and human rights. The first pillar imposes that states are obliged to prevent, investigate and punish private actors, as the perpetrator of human rights abuses. The second pillar dictates that corporations possessed a duty to respect human rights, whilst the third pillar orders the government to provide access of remedy to the victims of human rights abuses. In order for these pillars to be implemented, the UNGP has equipped itself with various foundational and operational principles.

In line with the purpose of this paper, the author would like to deeply discuss on the second pillar concerning business enterprises’ duty to respect human rights. This duty has been interpreted in two ways, i.e. a duty to avoid the infringement of others’ human rights; and a duty to prevent adverse human rights impacts directly linked to operations, products or services by their business partnerships, even if they have not contributed such impacts.

Nevertheless, the substance of companies’ policy and procedure will solely rely upon the existed characteristic of its operation, size, culture and managerial system. The notion ‘respect of human rights’ in practical level can be implemented horizontally by reaching out between diverse functions of business, and vertically from the corporations’ policy into its operation. These methods can optimize business holders’ contribution to implement the UNGP. In other words, ‘respect of human rights’ should be embedded as part of ‘company culture’.

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The second pillar of UNGP also reflects the no harm principle, where companies are mandated to take concrete steps on human rights due diligence for preventing or mitigating its impacts towards human rights.\(^{35}\) This is consistent with Principle 15 of the UNGP, which rules:

“In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Process to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

As regard to companies’ duty to undertake human rights due diligence measure, Principle 17 of the UNGP asserts that:

“In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of business enterprise, the risk of severe human rights impacts and the nature and context of its operations;

(c) Should be on-going, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”

In national level, the imposition of human rights due diligence for major companies was seen in France. In 2017, the French National Parliament has enacted the Vigilance Law.\(^{36}\) Under this law, the companies incorporated or registered in France must conducted their obligation of vigilance (devoir de vigilance). The duty of vigilance has threefold: the writing, the disclosure and the effective “vigilance plan” implementation (plan de vigilance). Moreover, that duty must also cover not

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\(^{36}\) France. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.
only risks and serious harms derived from parent and subcontracting companies activities, but also companies activities controlled directly or indirectly, and the subcontractors and suppliers activities "with which the company maintains an established commercial relationship".\(^{37}\)

The tendency of applying corporates’ duty to respect human rights is nowadays affect the defence companies. Practice in numerous administration showed that the later has been exposed to legal liability and other challenges by failing to identify, preventing or addressing their human rights impacts and giving respect for human rights as a compliance issue.

In *ECCHR et al. v. RWM Italia S.P.A. and Italian Export Officials*, several human rights organizations based in Germany, Italy and Yemen brought a criminal complaint against RWM Italia S.P.A. managers and Italian National Authority for the Export of Armaments (UAMA) senior officials. This case focuses on October 2016 Deir al-Hajari air strike launching RWM-manufactured MK 80 series bomb that killing six civilians. The claimants request the prosecutor to investigate the criminal liability of those managers and officials under the Italian Criminal Code, IHL and IHRL.\(^{38}\)

In other case, European Centre for Democracy and Human Rights (ECDHR), Defenders for Medical Impartiality (DMI), and Arabian Rights Watch Association (ARWA) lodged a complaint against Boeing and Lockheed Martin before the United States National Contact Point (NCP) for the OECD Guidelines. They contended that these companies’ supplies of arms to be used by Saudi Arabia in Yemen were in breach of the OECD Guidelines for Multinational Enterprises, which provides a human rights standard similar to the UNGP. In this case they failed to carry out human rights due diligence concerning the sale of their products, and failed to take appropriate steps to ensure the products did not cause or contribute human rights violations in Yemen. In conclusion, the US


NCP rejected this case as it was beyond the scope of the OECD Guidelines. In the US NCP’s view, these companies’ conduct was inextricably intertwined with the practices of specific states, including Saudi Arabia and US.39

Another precedence concerning the relations between the arms companies and human rights occurred in Belgium. In June 2019, the Belgian Council of State annulled five licenses for military export to Saudi Arabia issued by the Minister-President of the Walloon Region. The rationale behind this annulment is because the Walloon Region had failed to verify the buyer country’s behaviour towards the world community particularly its attitude towards terrorism, the nature of its alliances and respect for international law.40

Despite these practices, the awareness of arms companies to comply with its obligation to respect human rights is still considered low. This is at least evinced in AI’s research towards 22 major arms companies across the globe.41 Of those companies, only eight are corresponded AI’s request on human rights due diligence policies and process. Those companies are: “Airbus, BAE Systems, Leonardo, Lockheed Martin, Raytheon, Rolls-Royce, Saab and Thales. While the rest did not respond that call”.42

Towards the eight responded arms companies, AI found that they have begun using standards of conduct addressing references to human rights, inter alia, Northrop Grumman and Rolls-Royce with their “Human Rights Policy”,43 Raytheon and BAE Systems with their “Code of

42 These companies are Arquus, Avibras, Boeing, Dassault Aviation, Elbit Systems, Embraer, Heckler and Koch, General Dynamics, Herstal Group, Norinco, Northrop Grumman, Remington Outdoor, Rosoboronexport and Zastava.
Conduct" of Thales, and Lockheed Martin has an instrument called "Code of Ethics and Business Conduct".

Although these internal companies documents reference their adherence to IHRL instruments, such as, the Universal Declaration of Human Rights, UN Global Compact, ILO Conventions, UNGPs, as well as the OECD Guidelines for Multinational Enterprises, however AI has identified that such referral is generally fleeting and failed to focus the human rights impact of its products and services.

By virtue of this dilemma, it is plausible for the existed international legal frameworks to bridge the gap between the arms companies and human rights. Thus, they can no longer denying their international obligations to respect human rights from their products to be used by the third parties.

The importance of arms companies to ensure respect their products will not be used against human rights is equivalent to the analogy from the practice of numerous European pharmaceutical companies. Ever since the European Commission regulated the control of export of the drugs (sodium thiopental and pentobarbital) that can be used for capital punishment in 2011, healthcare companies have stopped the use of their products in executions of death penalty in the US. In a similar vein, the arms companies are therefore compelled to ensure that the third parties will not misuse their products, hence demonstrating their compliance with their obligation to respect human rights respectively.

Business enterprises activities under IHL

As one of the branch of international law, the author asserts that IHL is a

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47 AI, "Outsourcing Responsibility", supra note 5, pp.21-22.
48 European Commission, *Commission Implementing Regulation (EU) No. 1352/2011 of 20 December 2011, amending Council Regulation (EC) No. 1236/2005 concerning the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, O.J. L. 338/31, Annex III (4).*
relevant tool in assessing arms companies’ compliance under international law. This assertion is build with the awareness that IHL, as the *lex specialis* rules of IHRL, is present as a tool to maintain means and methods of warfare, as well as to protect civilian population in time of armed conflict.

Historically, the involvement of corporation in time of armed conflict is not a new trend. Dated back to the XVII and XVIII centuries, the Vereenigde Oost-Indie Compagnie (VOC) and British East India Company (EIC) are a solid evidence of the military and politic privatization, where VOC and EIC, as corporations, are not only conducting their trade activities, but also exercising other political activities on behalf of the Dutch government and British empire in their respective colonial territories.\(^{51}\)

Moreover, corporations also played an important role during World War I and II, especially in supplying war equipment and weapons to the warring parties. Cases, such as, *Flick*,\(^{52}\)*Krupp*\(^{53}\) and *Farber*\(^{54}\) that are involved in arms trade, procurement of poison gas, as well as the utilization of forced labour during Nazi era are a tangible proof that company provides direct contribution to the continuation of armed conflict.

Since IHL is so fundamental to the respect of human person and “elementary considerations of humanity”,\(^{55}\) this is also reflected in the stipulation on the means and methods of warfare itself. Normatively, the right of conflicting parties to choose means or methods of warfare is not unlimited.\(^{56}\)

The limitation on the means and methods of warfare can basically divided into three categories.

\(^{50}\)Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 134, para.106.


\(^{52}\)United States v. Friedrich Flick, et al. (The Flick Case), Nurnberg Military Tribunals under Control Council Law No. 10, vol. VI (1952).


\(^{55}\)Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep. 226, para.79 [Nuclear Weapons].

\(^{56}\)Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3, art.35(1) [AP-I].
First, the deployment of weapons, projectiles or material and methods of warfare causing superfluous injury or unnecessary suffering is strictly prohibited.\textsuperscript{57} Jean-Marie Henckaerts and Louise Doswald-Beck enumerated certain weaponry that could caused superfluous injury and unnecessary suffering such as:

"... lances or spears with a barbed head; serrated-edged bayonets; expanding bullets; explosive bullets; poison and poisoned weapons, including projectiles smeared with substances that inflame wounds; biological and chemical weapons; weapons that primarily injure by fragments not detectable by X-Ray, including projectiles filled with broken glass; certain booby-traps; anti-personnel landmines; torpedoes without self-destruction mechanisms; incendiary weapons; blinding laser weapons; and nuclear weapons".\textsuperscript{58}

Second, IHL prohibits the use of weapons that are indiscriminate on its nature.\textsuperscript{59} Chemical, biological and nuclear weapons; anti-personnel landmines; mines; poison; explosives discharged from balloons; V-1 and V-2 rockets; cluster bombs; booby-traps; Scud missiles; Katyusha rockets; incendiary weapons; and environmental modification techniques as equipment that can caused an indiscriminate attack to civilian and civilian objects are several notable examples this typology of weaponry.\textsuperscript{60}

Third, IHL also prohibits the employment of means or methods of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.\textsuperscript{61} Previously, the use of means or methods of warfare that causing damage to the natural environment was seen when the US military sprayed 18-20 million gallons of herbicides or known as the "Agent Orange" during the set of Vietnam War.\textsuperscript{62} Another occasion also appeared when the Iraqi forces spilled large quantity of oil into the Persian Gulf and set more than 600 Kuwaiti oilfields ablaze during the 1991 Gulf War.\textsuperscript{63}

\textsuperscript{57} Ibid, art.35(2).
\textsuperscript{59} AP-I, supra note 57, art.51(4).
\textsuperscript{60} CIHL Rules, supra note 59, pp.249-250.
\textsuperscript{61} AP-I, supra note 57, art.35(3); see also Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Techniques (ENMOD Convention), Dec. 10, 1976, 1108 UNTS 151, art.I(1).
\textsuperscript{63} Adam Roberts, "Environmental Issues in International Armed Conflict: The Experience of the
Pursuant to the 1996 ICJ’s Advisory Opinion in the *Nuclear Weapons*, such prohibitions have been regarded as the cardinal principles of IHL, as cited *infra*:

“*The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use [...] In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives.*”

Although these prohibitions on the means and methods of warfare are designed specifically to the dispute parties, however the extension of such prohibitions can be applied to the States as well as arms manufacturers. As regard to States, the UN General Assembly has consistently stated that the suffering of civilians and combatants would be reduced if all States could agree on restricting or prohibiting weapons causing unnecessary suffering.65

The ability of States in determining of to whether the deployment of weaponry is prohibited or restricted under IHL is solely stipulated under Article 36 of the 1977 First Additional Protocol to the 1949 Geneva Conventions (AP-I), which dictates:

“In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”66

In the light of on-going development in civilian and military technology, States are required to provide the mechanism for

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64 *Nuclear Weapons*, supra note 56, para.78.
66 AP-I, *supra* note 57, art.36.
“weapon review” or “legal review” during the study, development, acquisition or adoption of a new weapon manufactured by arms companies. 67

According to the research conducted by SIPRI in 2017, there are nine countries that have prepared themselves with such weapon review mechanism. They are Belgium, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the United Kingdom and the US. 68 The review mechanism in these countries is essentially different to one another due to the lack of clarity as to how States should formalize the weapon review process under Article 36 of the AP-I. 69

In that regard, the notion of weapon review is indeed limited itself to the “study, development, acquisition or adoption” of a weapon or means or method of warfare, hence precluding the “export or transfer” of weaponry. However, it does not undermine the duties from the arms manufacturing country and the purchasing country to comply with this weapon review duty, especially noting to the fact that the countries that manufacture arms have devoted themselves to this industry a considerable investment in terms of employment and finance, and they are also mainly responsible for multiplying the weapons at an ever increasing rate throughout the world. 70

From this legal construction, it shows that, as far as arms control concerned, IHL is heavily regulating States’ related activities. However, as emphasized by the International Committee of the Red Cross (ICRC), IHL, including the said provisions, binds all actors whose activities are closely linked to an armed conflict. 71 The arms companies’ contribution in supplying arms to the conflicting parties is a clear example of such causal link to an armed conflict. As such, arms companies must also respect

applicable rules of IHL. They are obliged to ensure that their weapons not be used by the belligerent to violate these provisions. Should they fail to do so, they will expose themselves to the risk of legal liability for supporting the commission of war crimes.\(^{72}\)

**Conclusion**

Conclusively, it takes a great deal of bravery to stand up to our enemies, but a great deal more to stand up to your friends. Business enterprises in defence industry are undeniably become the best friends not only for States, but also for the conflicting parties itself. Having that in mind, maintaining the relationship between these actors through legal approach is imperative.

Even though there is no moral justification that could be gained from arms companies to develop and distribute weapons to the conflicting parties that can be used to cause harms to others, particularly to the civilian population. However, there are at least certain international legal frameworks that could mitigate the negative impact of such devices. Business enterprises are essentially bound by its obligations under IHRL and IHL to incorporate a humanitarian value into their works for developing and distributing arms to the warring parties. By incorporating such sense of humanity, they also indirectly applying the Martens clause\(^ {73}\) into their daily activities. Hence, solidifying its position as a new actor in international arena.

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