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INTERNATIONAL ARMS TRADE AS A WAR CRIME AND VIOLATION OF BUSINESS'S HUMAN RIGHTS OBLIGATIONS.
THE CASE OF RWM IN YEMEN

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“I go to seek a Great Perhaps.”
— François Rabelais

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ACRONYMS

ATT: Arms Trade Treaty

CSR: Corporate Social Responsibility

GEE: United Nations Group of Eminent Experts on Yemen

GC: Global Compact

GP: Guiding Principles

HRC: Human Rights Committee/Council

ICC: International Criminal Court

ICR: International Committee of the Red Cross

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the former Yugoslavia

IHL: International Humanitarian Law

IMT: International Military Tribunal

OHCHR: Office of the High Commissioner for Human Rights

OTP: Office of the Prosecutor

SG: Secretary General

SR: Special Representative

STL: Special Tribunal for Lebanon

TNCs/MNCs: Transnational/Multinational Corporations

UAMA: Autorità nazionale – Unità per le autorizzazioni dei materiali di armamento

UN: United Nations

UNGA: United Nations General Assembly

INTRODUCTION

The studies around the modern concept of international law have been constantly evolving starting from the last century. Within international law, the branches of humanitarian law and human rights law have been among the most thriving ones, with constant developments and new challenges to face. States and International Organizations contributed to the continuous expansion of the codification of international human rights law, with the aim of protecting individuals and provide them with the means to emancipates themselves and play an active role when dealing with governmental abuses. Alongside the development of human rights law, international criminal law has gained worldwide attention, as the chosen way to act when facing war crimes, genocide, and other abuses.

While this constant trend has been both necessary and admirable, those behind it have been perpetually ignoring some of the most powerful non-state actors, transnational corporations and other business enterprises. The moral responsibility of legal persons has been recognized, but the legal dimension remains in the realm of controversy and speculation. Some scholars state that international criminal liability for corporations is the "the next legal discovery" and it appears that the foundations are being laid in that direction.

International arms trade is among the most sensitive business sectors to exist. Many rightfully argue that arms trade is not *per se* a "bad business", it provides revenues, employment, and facilitates relationships among countries. Using as an example RWM Italia, the firm which is the object of this thesis, its production plant is situated in Domusnovas, Sardinia, which following the bankruptcies and relocations of the 90s and the economic crisis of 2008, has become one of the poorest provinces of Italy. RWM Italia offered a lot of job opportunities. In the aftermaths of the trading scandal, in a tug-of-war between the Italian State, NGOs, and the German mother group Rheinmetall, the latter often used the threats of delocalisation and personnel cuts. After the decision of the Italian State to stop the licences to trade with Saudi Arabia and the United Arab Emirates, RWM Italia proceeded with the cuts.

One might wonder why I decided to begin this thesis telling the story of the workers of Domusnovas. Later on, I will talk about the aggravating factor of greed; when arms traders decide to continue with their operations even though they know how their products are used. Greed might have been behind the decision of both the Italian State and the managers of RWM Italia to continue with their operations. The complete disregard for the future of the workers is proof of the disinterest of the two actors for people's lives. The Italian State did the right thing when it stopped the licences, but workers must be secured as well. The Italian State must use the fund for the reconversion of the war industry provided for by Law 185/90 on the control of the export of armaments materials and provide for plans for the economic and environmental enhancement and requalification of the Sulcis-Inglesiente territory[1].

Content of the thesis

The aim of this thesis is to analyse the recent trends in both corporate international criminal liability and the role of corporations in aiding and abetting war crimes. At the same time, I am trying to map the current debate on business human rights obligations and what the future holds. The thesis is divided into three chapters.

The first chapter analyses the relationship between corporate liability, humanitarian law and arms trade. After the first part on definitions of war crimes, I provided a study on business as a subject of international humanitarian law and criminal law, with a focus on the jurisprudence of the most famous international tribunals. The chapter continues with a recollection of the events leading to the adoption of the ATT and its role in preventing arms trade complicity in war crimes. The chapter ends with a focus on arms trade as a war crime and some figures on the scale of global trade.

The second chapter provides an overview of the debate surrounding business and human rights. Starting from the 90s, with the CSR movement, it

[1] Save the Children, *Solidarietà ai lavoratori della RWM per una soluzione positiva dal governo,* https://www.savethechildren.it/blog-notizie/solidarieta-lavoratori-rwm-per-soluzione-positiva-governo.

analyses the first attempt to codify an instrument to bind business enterprises, from the failed Draft Norms to the more successful Global Compact. Moving onto the more recent developments, the chapter follows the work of the Special Representative for Business and Human Rights John Ruggie. Mr Ruggie produced what is still considered today the most important normative framework for business enterprises, the Protec, Respect, Remedy Framework and its Guiding Principles. Mr Ruggie was very respondent to the issues relating to the operations of business enterprises and in the specific sensitive industries, such as the arms trade operating in conflict affected areas. The chapter ends with an overview of the recent developments, the attempt to draft a legally binding treaty on business and human rights. Following I provided some thoughts on the challenges and developments to expect regarding the Treaty.

The final chapter is the case study on the operations of the Italian firm RWM Italia and its involvement in the Yemen conflict. I first contextualize the conflict, considered by the UN one of the worst humanitarian crisis ever happened. I then present the events of the airstrike against civilians, the legal procedure currently ongoing and the operations of the organizations involved. I then provide a personal analysis using elements of the previous chapters, proving the corporate complicity of RWM Italia and the gross negligence of Italian officials. I conclude the chapter recognizing the inherent difficulties of my thesis and providing an alternative in prosecuting individuals, with some examples.

In the conclusions, I suggest three possible solutions, to the case and the issue of international corporate criminal liability and holding legal persons accountable. An amendment of the Rome Statute, the creation of a Committee or treaty body connected to the treaty on business and human rights, and the institution of a hybrid special tribunal for Yemen.

Methodology

The writing of this thesis was divided into two phases. The first one was only research, to get a general idea of the theme, the debates surrounding it, and the opinions of the experts. The second phase, while continuing with the research included also the actual writing of the thesis.

I mostly used secondary sources, but when necessary I consulted also primary sources. I consulted the text of the PRR Framework, the Guiding Principles, I read the ATT and the minutes of the meeting, some goes for the Draft Treaty on Business and Human Rights. As secondary sources, I consulted mostly articles found in journals covering the various themes of this thesis, criminal law, corporate liability, and human rights. To research the events of the conflict I used articles found on valid news agencies: BBC, Al Jazeera, ANSA. To analyse the case, I used the reports produced by the NGOs involved, precedent case law, Italian law, and the Statutes or texts of the tribunals mentioned.

I also conducted a series of interviews with representatives of the NGOs that failed the criminal complaint to the Public Prosecutor of Rome. I interviewed Francesco Vignarca, director of Rete Disarmo, who explained the working of UAMA and the granting of licences to trade weaponry. Then I talked with Bonyan Jamal, the accountability specialist of the Yemenite NGO Mwatana for Human Rights, she tried to help me understand the context of the Yemen Conflict, the actors involved, and the impact of international arms trade. The last person I talked to was Linde Bryk, the legal advisor of ECCHR, who built the case. We discussed the content of my thesis and shared ideas of possible solutions and developments, both regarding the case study and the general theme of international corporate criminal liability.

State of the art

The literature on every theme touched in this thesis is vast, to say the least. New inputs and insights are constantly produced and therefore the analysis of international law and its branches never really stops. As I told earlier, the interest around corporations and their contributions to the commission of atrocities is always high, but when new scandals or events are exposed there is new momentum. As per the debate around business and human rights, I noticed that it was especially fervent in the years of activity of the Special Representative, but then it started to be scarcer, without ever disappearing. The themes touched are controversial and the range of opinions varies a lot, with many supporting or opposing voices to each theory or statement.

CHAPTER I: ARMS TRADE AS A WAR CRIME

1. International Humanitarian Law

International humanitarian law is a branch of public international law that regulates relations between States, international organizations and other subjects in times of armed conflicts, it is also known as "the law of the war" or "the law of armed conflicts"[2]. IHL is based on the premise that even in times of armed conflict human dignity must be respected and protected, its fundamental aim is to protect those that do not participate to the conflict and to avoid the perpetuations of unnecessary sufferings through the regulation of the methods of warfare[3]. IHL is not concerned about the legality of an armed conflict (*jus ad bellum*), which is covered by the UN Charter, but only regulates armed conflicts whether of an international or a non-international character (*jus in bellum*)[4]. IHL is in force on the whole territory of the conflict, regardless of whether the fighting is taking place there, and lasts continuously for the whole duration of the conflict.

Since the beginning of time war has been regulated by some kind of rules, not written and vague, but still attempting to protect individuals from the worst aspects of armed conflicts. The codification of modern humanitarian law started in the second half of the 19th century, thanks to the work of swiss businessman Henry Dunant, that together with Guillaume-Henri Dufour, Gustave Moynier, Louis Appia and Théodore Maunoir founded what would become the International Committee of the Red Cross in 1876. The Swiss Government, answering the requests of the "founding five", convened a diplomatic conference in 1864 which resulted in the adoption of the very first international humanitarian law instrument, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field[5]. Since then, IHL has constantly continued to evolve and new treaties have

[2] International Committee of the Red Cross, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law* (2006).
[3] International Committee of the Red Cross, *International Humanitarian law: answers to your questions* (2015).
[4] International Committee of the Red Cross, *ABC del diritto internazionale umanitario* (Berne: Federal Department of Foreign Affairs FDFA, 2018).
[5] ICRC, *International Humanitarian law: answers to your questions* (2015).

been adopted, covering more and more aspects of war, the developments of arms technology and changes in the very nature of war. The four Geneva Conventions of 1949 and their Additional Protocols of 1977 are considered the main instruments of humanitarian law, subsequent treaties address specific aspects of war, such as the use of new weapons. All States have ratified the four Geneva Conventions. Moreover, IHL relies on customary law, rules that are not necessarily found in treaties but derive from the constant practice of States, which results in the general conviction that the practice is legally required. Customary law practices regarding IHL have been greatly studied and researched by the ICRC, that collects them in a constantly updated database[6].

Besides the developments through time, IHL maintains a core of essential rules that constitute its very essence. The main difference that IHL makes is between civilians and combatants. Civilians cannot be killed or injured at any time, and those combatants that laid down their arms in surrender or are unable to fight, enjoy the same protection. Only military objects can be targeted, in case of casualties (accidental hits of civilian population or buildings) they must be proportionate and unavoidable, indiscriminate hits are forbidden. Captured combatants and civilians are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions and must be protected from violence and reprisal, they are entitled to exchange news with their families and receive aid and enjoy basic judicial guarantees. The sick and the wounded must be taken care of, regardless of their array. The parties of the armed conflict cannot use all weapons unrestrictedly. Weapons or methods of warfare that are likely to cause superfluous injury or unnecessary suffering or widespread, long-term and severe damage to the environment are forbidden[7]. Moreover, thanks to the Martens Clause

> "Civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[8]"

[6] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: Cambridge University Press, 2009).
[7] ICRC, *Business and International Humanitarian Law* (2006).
[8] Preamble to the 1899 Hague Convention (II) on the laws and customs of war on land.

Exists the general interpretation that if something is not specially covered by IHL it does not mean it is automatically permissible; the conflicting parts must maintain a minimum standard of humanity and respect of the dictates of public conscience.

2. What constitutes a war crime?

Serious violations of international humanitarian law during international and non-international conflicts constitute war crimes[9]. Definitions or lists of war crimes are found in the Statute of the International Military Tribunal established after the Second World War in Nuremberg, the Geneva Conventions and their Additional Protocols, the Statutes and case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Rome Statute of the International Criminal Court, and other international and hybrid tribunals. Due to the seriousness of such breaches, the Geneva Conventions and Additional Protocol I state that all Parties must criminalize certain grave breaches of IHL in their national legislation and all parties must investigate and prosecute such offences regardless of where they take place and by whom they are committed[10]. Article 8 of the Statute of the ICC contains a list of acts that are generally considered serious violations of IHL, constituting, therefore, war crimes under international customary law. That said, many countries include other acts and definitions under serious violations of IHL and criminalize them in their national law. Regarding jurisdiction, war crimes are part of the criminal law of most States, but several international courts and tribunals have jurisdiction to persecute those responsible of these offences, usually in cases when the country is unable or unwilling to proceed with the prosecution[11]. Many national legislations also provide the option of civil liability for war crimes.

Here are some acts that are considered grave breaches of IHL:

- wilful killing of a protected person (e.g. wounded or sick combatant, prisoner of war, civilian)
- torture or inhuman treatment of a protected person

[9] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*
[10] ICRC, *Business and International Humanitarian Law* (2006).
[11] Statute of the International Criminal Court.

- wilfully causing great suffering or serious injury to a protected person
- attacking the civilian population
- unlawful deportation or transfer
- using prohibited weapons or methods of warfare
- making improper use of the red cross or red crescent emblem or other protective signs
- perfidiously wounding or killing individuals belonging to a hostile nation or army
- pillage of public or private property.[12]

Customary IHL states that individuals can be responsible for committing a war crime, but also for attempting to commit a war crime, as well as for assisting in, facilitating, aiding or abetting the commission of a war crime. They can also be responsible for planning or instigating the commission of a war crime[13]. Not every action result in a war crime, there must be a connection between the act and the conflict. The Elements of Crime of the International Criminal Court explains that the actions must have been taken "in the context of and was associated with an armed conflict"[14].

3. Business as subjects of international law

Traditionally, the subjects of international law have only been States. The classical theory of international law and the conventions of legal theory strictly separated the public and private sphere. Such assumptions remained unchallenged until the middle of the twentieth century[15]. Therefore, one of the key arguments used by corporations to avoid international obligations has been that they are not States and therefore are not subjects of international law.

This can easily be proved as untrue. Corporations have been subjects of international law for the past decades in the field of international financial accords, trade regimes, and others. On a treaty-by-treaty basis, States, which are still the

[12] ICRC, *International Humanitarian law: answers to your questions* (2018).
[13] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, 551.
[14] The Prosecutor v. Thomas Lubanga Dyilo (2012).
[15] Wolfgang Kaleck and Miriam Saage-Maaß, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges", *Journal of International Criminal Justice* 8, no. 3 (2010): 699-724.

main subjects of international law, can decide to make business enterprises accountable to international law. The idea of States as the only subjects of international law was born after the Peace of Westphalia in 1648 and lays in the sovereignty theory. Modern corporations have taken advantage of this loophole and escaped international law obligations for a very long time, but times are changing. International law is constantly evolving and the idea that States are the only subjects of international law is nowadays supported only by an ever-shrinking number of purists. It is undeniable that those that were once only seen as subjects of domestic law, such as citizens, corporations, and non-state actors, are increasingly seen as subjects of international law and regulations[16]. Just like Westphalia, the events of the Second World War initiated a new era for international law, making natural persons subjects of international criminal law and recognizing individual responsibility for the atrocities committed in the name of their State, regardless of their status within that State.[17] This could work as a precedent to cover legal persons under this jurisdiction.

Regarding the status of "legal person", corporations have enjoyed it within domestic legislations for many years already. In domestic law, they are subjects of the law and under the power of the State, this needs to be spread even more also at the international level. If business enterprises become subjects of international law, it will be applied to them also in the international legal fora. If one considers financial and trade treaties, this is already a reality, but with international criminal law, the situation becomes more complicated. The issue is not whether they can be identified as actors or not, but rather if they can commit the crimes that customary law prohibits. Moreover, as long as a legally binding treaty on transnational corporations does not exist, business enterprises continue to not have any responsibility at the international level. One could consider the guidelines towards the path of becoming customary law, also considering the interest and commitment

[16] Michael J. Kelly, *Prosecuting Corporations for Genocide* (New York: Oxford University Press, 2016).
[17] Guénaél Mettraux, *International Crimes: Law and Practice – Volume I: Genocide* (New York: Oxford University Press, 2019).

around them, but we are definitively not there yet. Business enterprises still live in legal limbo.

Before the Nuremberg trials, natural persons were not considered subjects of international law. The Nuremberg trials held accountable natural persons for the first time. This set a precedent, now international tribunals prosecute individuals for IHL violations. The reason is set in the beliefs that some crimes are too atrocious and because of their gravity they should be prosecuted at the international level, rather than only the domestic[18]. Business enterprises are made up of natural persons, to prosecute them for violations of international law does not appear that far of a reach. Violations of IHL are considered violations of the values globally shared by all actors, values that must be respected in the same way by all, business enterprises included. Moreover, business enterprises already enjoy many rights and special protections under international law, so it appears stubborn and outdated to not consider them subjects of international law. The UN, a non-state actor, has been considered a subject of international law since 1949, with the Reparation case. The General Assembly asked the International Court of Justice for an advisory opinion on whether the UN could make a claim for damages after the assassination of the Secretary General's mediator in Jerusalem. The Court said yes, the United Nations had international legal personality sufficient to effectuate its core functions. Moreover, the Restatement of Foreign Relations Law implicitly recognized corporations as subjects of international law in 1987. Since then, scholars and institutions have increasingly acknowledged individuals and corporations as falling under international law[19].

International humanitarian law

It is arguable that corporations are not *per se* directly bound by international humanitarian law[20]. Cue the international aspect, as I explained previously, domestic legislations are assigning humanitarian law obligations to business and

[18] Jelena Aparac, "Which International Jurisdiction for Corporate Crimes in Armed Conflicts?," *Harvard International Law Journal* 57 (2016): 40-43.
[19] Michael J. Kelly, "Prosecuting Corporations for Genocide Under International Law." *Harvard Law & Policy Review* 6, no. 2 (2012): 339-367.
[20] Emanuela Chiara Gillard, "The Position with Regard to International Humanitarian Law," *Proceedings of the Annual Meeting (American Society of International Law)* 100 (2006): 130-35.

failure to meet these obligations might result in criminal and civil liability[21]. Therefore, it lays in States' obligation the decision to whether or not impose humanitarian law obligations on business enterprises.

But, as mentioned before, international humanitarian law is a branch of international law that follows a different set of rules and presents many aspects specific to its nature. For this reason, while corporations per se are not bound by IHL, their staff is. The same principle works for non-state actors (i.e. rebel groups) and individuals. How it is explained in the chapter on business obligations, so far their abiding to IHL is characterized by a voluntary nature, but the staff and individuals that are part of the business enterprise operating in armed conflicts are indeed subject to international humanitarian law and there is absolutely nothing voluntary[22]. Therefore, the people are those who make up the corporation and they are legally bound and prosecutable under international criminal law. When they act through the company, they are still bound by IHL and therefore the whole enterprise is bound by those obligations. Here also plays the relationship between those who carried out the crime and the hierarchical structure of the corporation. IHL can be described as military law and presents a strict structure typical of the military, where the offender can be identified relatively easily. Such a strict hierarchy is usually challenging to find in enterprises, power is shared, subsidiaries exist, and everything can happen throughout the supply chain. Therefore, when a crime is committed the whole business enterprise is involved.

The involvement of corporations in international crimes can be divided into supporting actions towards military regimes and dictatorship or direct operations within conflict or war zones. In both cases, corporations can provide the means to either facilitate the regime's abuses[23] or continue fuelling the conflict[24]. Either case, the business enterprise does not directly carry out the crime but is complicit to it. Complicity to war crimes is prosecuted under international criminal law, but the process faces many difficulties. Investigations to acquire information about the

[21] See footnote 9.
[22] Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law.
[23] *Public Prosecutor v. Van Anraat.*
[24] *Public Prosecuto v. Guus Kouwenhoven.*

involvement of corporations are long and costly, and it is extremely complicated to obtain such information. Moreover, corporations still belong to the private sphere, so they are not forced to share their internal documents or records[25] and access to sensitive information is hard to obtain without the support of national legislation. Here comes into play the fundamental importance of human rights due diligence and the role of States into fostering an open and transparent environment when dealing with business enterprises.

4. International Criminal Tribunals

Historically, International Tribunals have had different takes and opinion regarding business enterprises and their stance under international law, their human rights obligations, and how to address them.

The International Military Tribunal

In the aftermath of World War II, the Allied Powers established the first international tribunal, the International Military Tribunal in Nuremberg, Germany. The IMT was set to prosecute and punish the major war criminals of the European Axis[26]. From 1945 to 1946 were held the "Major War Criminals' Trials" that prosecuted the high-level Nazi leader and from 1946 to 1949 were held the "Subsequent Trials" that prosecuted, among others, Nazi industrialists[27]. The "Industrialist Trials" were made up of the three trials of Krupp, Flick, and Farben, the conglomerates of which the defendants were employees or executives. It was the first time in modern history where a judicial body considered the cases of corporations and their agents committing war crimes and other violations of

[25] Wolfgang Kalek and Miriam Saage-Maaß, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges."
[26] The Historian of the U.S. Department of State, "The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)," Office of the Historian, https://history.state.gov/milestones/1945-1952/nuremberg (Accessed on February 5, 2020).
[27] History Editors, "Nuremberg Trials," *History*, January 29, 2010, https://www.history.com/topics/world-war-ii/nuremberg-trials#section_3.

international law[28]. The outcome and opinion of the Nuremberg Trials are extremely clear and well-known:

> "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[29]

Those with a narrow, positivist, judicial understanding of the Nuremberg Trials and their implications for corporate liability always provide this sentence as proof of their statements. But the issue is not as straightforward. As Kelly points out in his book corporate criminal liability was never rejected as legally unsound. After being thoughtfully explored, it was decided not to carry out any further an attack on the German private industry for strictly political reasons. While the first Cold War sentiments were starting to simmer through the Allied Powers, western powers feared, as Chief U.S. Prosecutor Jackson wrote in a diplomatic memo directed to U.S. President Truman in 1946, that the Soviet Union would have used this attack against the private industry for propagandistic reasons, as they did not rely on private enterprises[30]. Moreover, when the Nuremberg Trials started, US foreign policy was influenced by Morgenthau's view of complete industrial disarmament of Germany. But later, in 1945-46 the Truman Doctrine was adopted, and Germany started to be considered as a powerful defence line against the spread of communism and Soviet interests[31].

Moreover, while the Farben and Krupp groups were never condemned themselves, their judgments refer to the action of both the company and the individuals. In the Farben case, the IMT recognized the criminal conduct of the Farben Group and sentenced the individuals for their complicity in the group's actions. Similarly, the Krupp case stated: "that […] illegal acts of spoliation and

[28] Jonathan Kolieb, "Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law," *American University International Law Review* 32, no. 2(2017): 569-604.
[29] Nürnberg Trial, 6 F.R.D. 69, 110 (IMT 1946).
[30] Kolieb, "Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law."
[31] Kelly, *Prosecuting Corporations for Genocide*.

plunder were committed by, and on behalf of, the Krupp firm.". The individuals were considered liable for committing the crimes through the Groups[32].

International Criminal Tribunals

Moving forward with the already existing mechanisms, the International Criminal Court and its Statute are also extremely clear on the matter. The Rome Statute, which established the ICC and codified its rules' jurisdiction, and the core crimes of International Criminal Law and surrounding general principles, with article 25(1) states:

> "The Court shall have jurisdiction over natural persons pursuant to this Statute."[33]

which means that war crimes and other violations of IHL carried out by corporations can be persecuted only through individual criminal responsibility or superior responsibility for corporate actors.

Looking at the *travaux préparatoires* of the Rome Statute, it appears also in this occasion that the decision not to include legal persons under the jurisdiction of the Court was strictly political[34] and doomed by time constraints which prevented the possibility to discuss further possible solutions, as many governments were worried about such a novelty. Moreover, at the time, corporate liability under domestic legislation was still a rare occurrence and it would have resulted in a struggle for the principle of complementarity of the ICC[35]. Nonetheless, international criminal liability was never clearly rejected on a legal basis[36].

The solution to this issue would be an amendment of the Rome Statute to include legal persons under its jurisdiction. An increasing number of States are including civil and criminal liability for corporations under their domestic

[32] Kolieb, "Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law."
[33] Article 25(1) of the Rome Statute.
[34] Maisie Biggs, "International Criminal Law and Corporate Actors - Part 2: The Rome Statute and its Aftermath*," Doing Business Right*, May 21, 2019 https://www.asser.nl/DoingBusinessRight/Blog/post/international-criminal-law-and-corporate-actors-part-2-the-rome-statute-and-its-aftermath-by-maisie-biggs#_ftn1.
[35] David Scheffer, "Corporate Liability under the Rome Statute," *Harvard International Law Journal* 57 (2016): 35-39.
[36] Kelly, *Prosecuting Corporations for Genocide*.

legislations, solving, therefore, the issues of complementarity. The support within domestic legislation pushed forwards the narrative according to which international criminal liability for corporations is the "the next logical step" or "the next legal discovery"[37]. It will be extremely challenging to obtain the amendment of the Rome Statute for this specific issue. Corporations have become a fundamental part of national economies worldwide and a future criminal liability or investigation would have disastrous effects on the economic performance of the corporation and consequently impact the national economy of both the home and host States[38]. Moreover, the ICC is already struggling because of the lack of resources[39], so putting even more on its plate, and even more, something so huge, might have the opposite effect and strain the ICC until its collapse.

The Special Tribunal for Lebanon

Alongside the ICC several "internationalized" tribunals have been established in cooperation with national governments. The jurisdiction of these bodies generally covers specific periods of time corresponding to particularly intense phases of conflict or unrest involving widespread human rights abuses[40]. Some of the most notorious hybrid international criminal tribunals are the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Serious Crimes Panels of the Dili District Court (East Timor), and the Special Tribunal for Lebanon. The latter is particularly relevant for the topic of this thesis.

The Special Tribunal for Lebanon was established after the assassination of former Lebanese Prime Minister Rafiq Hariri and 22 others in a bomb attack. In the beginning, shortly after the attack, the United Nations International Independent Investigation Commission (UNIIIC) was established to "assist the Lebanese

[37] Marie Davoise, "All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute," *OpinioJuris*, July 25, 2019 http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/.
[38] Scheffer, "Corporate Liability under the Rome Statute".
[39] Davoise, "All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute".
[40] International Justice Resource Centre, "Internationalized Criminal Tribunals," *International Justice Resource Centre*, https://ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/.

authorities in their investigation". At the end of 2005 the Lebanese Prime Minister of the time, Fouad Siniora, asked the UN "to establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Hariri"[41]. After almost two years of negotiations between the Lebanese government and the United Nations, on June 10th, 2007, the Special Tribunal for Lebanon came into force[42].

Two Lebanese corporations: New TV S.A.L. (Al Jadeed TV) (a television station) and Akhbar Beirut S.A.L. (a newspaper) were accused of contemptuous acts. The count indicated also two natural persons, Mr Al Amin (Akhbar Beirut S.A.L.'s Editor in Chief and Chairman of the Board of Directors) and Ms Al Khayat (New TV S.A.L. (Al Jadeed TV)'s (then) Deputy News and Political Programmes Manager). Akhbar Beirut S.A.L. and New TV S.A.L., on two different occasions, revealed information about the purported confidential witnesses of the STL's *Ayyash et al.* case. Furthermore, New TV S.A.L. did not take down from its YouTube and Website page offending reports upon request of a court order. STL's jurisdiction over legal persons was questioned by the defence and the Contempt Judge ruled that Rule 60 bis of the STL Rules of Procedure and Evidence (Rules) (the STL provision that criminalizes contempt) applied only to natural persons. Two different Appeals Panels of the STL overturned the ruling and extended the jurisdiction of Rule 60 of the STL over legal persons.

These outcomes of the Appeals Panels set down the precedent for the prosecution of legal persons, namely corporations, before a hybrid international tribunal; for the first time in the history of international criminal law, corporations were accused of and were called to answer for allegedly committing crimes, although those of contempt[43].

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[41] Martin Wählisch, "The Special Tribunal for Lebanon: An Introduction and Research Guide," *Hauser Global Law School Program, New York University School of Law*, September 2012 https://www.nyulawglobal.org/globalex/Special_Tribunal_Lebanon.html.
[42] Global Policy Forum, "Special Tribunal for Lebanon," *Global Policy Forum*, https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-tribunal-for-lebanon.html.
[43] Manuel J. Ventura, "The Prosecution of Corporations Before a Hybrid International Criminal Tribunal: The New TV and Akhbar Beirut Contempt Jurisdiction Decisions of the Special Tribunal for Lebanon," *African Journal of International Criminal Justice* 1, no. 2 (2017): 71-83.

The reasoning behind such decision and interpretation of the Rules of Procedure of STL was the recognition from Judge Baragwanath, in *New TV S.A.L.*, of the recent development in domestic corporate accountability, which was to be followed by an adjustment in international criminal law[44]. Moreover, the Appeals Panels considered the sources indicated in Rule 3 – the provision mandating how STL Rules are to be interpreted[45]. The Panel explained that the jurisdiction of the STL was not extended, because it already covered legal persons and pointed out that the Vienna Convention on the Law of Treaties (1969) only talked about persons, which means both natural and legal are considered. Regarding the human rights standards, the Panel held that there is a trend towards addressing corporate human rights violations and an emerging consensus on human rights obligations for corporations. Criminal prosecution of corporations for human rights violations is getting more and more coverage under both domestic and international legislations. On the general principles of criminal law and procedure was used the IMT as an example, as it declared some German groups and organizations criminal. Regarding the infamous quote I mentioned earlier, the Panels explained that the decision to not prosecute the corporations was due to the desire to punish the individuals directly and not allow them to hide behind the legal personality of the Groups or Germany itself, therefore it had no legal explanations. Regarding the absence of criminal liability for legal persons under the Rome Statute, the Panels claimed that the Statute does not codify international law and it does not apply outside its boundaries. The fact that no post-World War II international criminal tribunal had had ever possessed the authority to try legal persons was not considered a concern of the STL. The Appeals Panels, considering the recent trends and the ever-growing

[44] Biggs, "International Criminal Law and Corporate Actors - Part 2: The Rome Statute and its Aftermath".

[45] Rule 3 – Interpretation of the Rules

A. The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights, (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

B. Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstances then under consideration.

use of corporate liability (civil or criminal) in domestic legislations, concluded stating that international corporate criminal liability was "on the verge of attaining, at the very least, the status of a general principle of law applicable under international law". Finally, considering the Lebanese law, the Appeals Panels held that the Lebanese Criminal Code does recognize corporate criminal liability[46].

Concluding Remarks

Criminal corporate liability within the International Tribunals remains a contentious issue. While it has never been rejected on a legal basis, it has yet to be recognized in international law. There are different factors that come into play, mostly of a political character. While it seems that a codification of corporate liability is not in the near future, it is also impossible to ignore the recent trend towards it. Moreover, as Kelly stated, the absence of international criminal corporate liability does not mean that corporations are exempt from international law obligations, especially they are required to respect human rights and humanitarian law obligations just like the other international actors[47]. The STL created an interesting precedent, even though it concerns only the crime of Contempt. International law must be interpreted according to also *the travaux préparatoires* and so far, there is still no legal basis for a complete rejection of corporate criminal liability. What the future holds is vague, it is important to remain updated on the developments of the case law, recognizing the inherently porous nature of international law and the continuous trend in the direction international obligation for business enterprises (which will be analysed in the next chapter). Corporations are subjects of international law and enjoy a vast array of rights, it is only logical that they are burdened by obligations, just like the others.

5. The Arms Trade Treaty

International arms trade is regulated by the Arms Trade Treaty (ATT). The ATT was adopted by the United Nations General Assembly 2 April 2013 with 154

[46] Ventura, "The Prosecution of Corporations Before a Hybrid International Criminal Tribunal: The New TV and Akhbar Beirut Contempt Jurisdiction Decisions of the Special Tribunal for Lebanon."
[47] Kelly, *Prosecuting Corporations for Genocide*.

votes in favour, 3 votes against, and 23 abstentions[48]. The Treaty opened for signature on 3 June 2013 and entered into force on 24 December 2014 following its ratification, acceptance or approval by 50 states. As of today, the ATT has 105 State Parties and 33 signatories. The States that have yet to join the Treaty are 56, among them some of the major international powers such as the United States, Russia and China[49].

The adoption of the ATT was a ground-breaking event in the history of the UN, international law and arms trade regulation: the ATT is the first treaty ever adopted that regulates the commerce of weapons and sets common standards on the topic, before that the issue was unregulated. The absence of any standards, according to the UNGA, was a major contribution to the development of conflicts, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development[50]. The very

[48] After the official vote, the delegation of Angola (which had abstained) and Cape Verde (which had not voted) informed the secretariat of the negotiating conference that they had intended to vote in favour of the resolution. Accordingly, 156 States voted in favour of the resolution, 3 voted against it, and 22 abstained from voting.
In favour: Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Brunai Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, El Salvador, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Suriname, Sweden, Switzerland, Thailand, former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Zambia
Against: Democratic People's Republic of Korea, Iran (Islamic Republic of), Syrian Arab Republic
Abstaining: Angola, Bahrain, Belarus, Bolivia (Plurinational State of), China, Cuba, Ecuador, Egypt, Fiji, India, Indonesia, Kuwait, Lao People's Democratic Republic, Myanmar, Nicaragua, Oman, Qatar, Russian Federation, Saudi Arabia, Sri Lanka, Sudan, Swaziland, Yemen
[49] Arms Trade Treaty, https://thearmstradetreaty.org/ (Accessed on January 10, 2020)
[50] General Assembly Resolution 61/89, *"Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms,"* A/RES/61/89 (18 December 2006).

principles of the United Nations and its Charter were directly undermined by this absence.

The Secretary-General Report and Member States' Opinion

The adoption of the Treaty was the culmination of a long and difficult process that started in 2006, when the GA pledged to produce, through multilateral engagement, a legally binding instrument establishing common standards for the import, export and transfer of conventional arms. Another initiative deserves to be mentioned, in 1997 a group on Nobel Peace Laureates started a campaign asking the international community to regulate arms trade through international law norms[51]. The first step was to request the Secretary-General to gather the opinions of the Member States on the feasibility, scope and parameters of a foreseeable legally binding instrument bound to regulate import, export and transfer of conventional arms through the development of common international standards. In the same resolution (A/RES/61/89) the GA requested the creation of a governmental experts group with the duty of analysing the work of the Secretary-General and produce a report to be presented at the sixty-third session of the GA.

Between these two major steps, in August 2007, during the sixty-second session of the GA, the Secretary-General presented his report "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms: establishing common international standards for the import, export and transfer of conventional arms". The Secretary-General had sent at the beginning of the year a note verbale to all the MS requesting them their insights on the topic of international arms trade standards, what should be included in the future treaty, and other prominent issues. It was a heavily participated turn-out, 94 States, the Caribbean Community, and the European Union submitted their answers, proving that a future treaty on the regulation of weapons and their trade was an extremely interesting prospect for the international community, both in terms of protection of the principles of the UN Charter and human rights and of the

[51] Gerardo Alberto Arce, "Towards a Legally Binding Arms Trade Treaty," *Peace & Conflict Monitor*, September 01, 2012, http://www.monitor.upeace.org/archive.cfm?id_article=858#_ftn3.

States' very own business and conduct of internal affairs[52]. All countries reacted positively, there was not a single rejection, and all provided interesting inputs and different views, mostly based on their historical background, social and economic situation and whether they were a producer or a consumer.

The Group of Governmental Experts report

The report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a legally binding instrument was presented, as requested, at the sixty-third session of the UNGA. The Report started off with a foreword by the Secretary-General in which he recalled all the steps taken to reach that point in the debate on arms trade treaty. The group was formed by experts of 28 States equally distributed across the regions.

The group drafted its report on the basis of different documents, starting with the 2007 report of the Secretary-General mentioned previously, which allowed them to collect the opinions of over 100 MS. The group also benefitted from two studies of the United Nations Institute for Disarmament Research, one was an Analysis of States' Views on an Arms Trade Treaty and the other on Implications of States' Views on an arms trade treaty. Consultant Rachel Stohl from the UN Secretariat gathered evidence of the existing sub-regional, regional, and international instruments, arrangements and/or documents that aim at regulating the international conventional arms trade or enhancing transparency and a presentation made by the Secretary of the 2006 Group of Governmental Experts on the continuing operation of the United Nations Register of Conventional Arms and its further development, Nazir Kamal[53].

The report went on giving a general overlook at the resolutions, guidelines and decisions taken at the international level and related to the trade and transfer of conventional weapons. Regarding the recent trends in the international arms trade,

[52] General Assembly Resolution 62/278 (Part I), *"Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General,"* A/62/278 (Part I), (17 August 2007).
[53] General Assembly Resolution 63/334, *"Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms"* A/63/334, (26 August 2008).

the experts pointed out, as one can expect, how globalization influenced the international dynamics of weapons trade. The most prominent change was that weapons were manufactured in cooperation; they were assembled using technology transfers and upgrades from external sources. As we have seen previously, the nowadays transnational nature of business is clearly reflected in this issue. The Group pointed out how illicit arms trade most of the times started with lawful transfers that were then re-exported trough illegal brokering. The section ended underlining the importance of arms trade for the economy and employment of many countries and how the reasons for the production and transfer were different and multiple[54].

To recall, the expert group was concerned with analysing the feasibility, scope and parameters of a future treaty on arms trade. Regarding the feasibility, it pointed out that issue was both political and technical and impacted the national security of States. The most important thing was to establish clear and collectively agreed objectives; the treaty has to be applicable, strong against political abuse, and universal. Which means that its feasibility is strongly dependant on the scope and parameters. Quoting the report:

> "To be feasible, a potential arms trade treaty would need clear definitions and be fair, objective, balanced, non-political, non-discriminatory and universal within the framework of the United Nations."

The experts group also stressed the importance of respecting States sovereignty, otherwise, it would be counterproductive for the very existence, scope and applicability of the treaty. States are not ready yet to give up such an important part of their existence, arms trade deals with many sectors, internal and external affairs, economy and employment, national security. Clearly enough the treaty has to be concerned only with international arms trade, internal and national trade and ownership are not to fall under the jurisdiction of the treaty. The section concluded with the reminder that the most important thing is to set collectively agreed and clear criteria for producers and importers.

[54] Ibid.

Regarding the scope, the experts considered all the weapons, activities and transactions that could be included in the treaty. Some raised the questions on whether with the scope it was meant the one just mentioned or the drafting of the international common standards. The scope proposed by the various MS included elements from many different instruments. The group wondered if the seven categories of the United Nations Register of Conventional Arms, small arms and light weapons could be expanded to other categories. It pondered on whether to use broad and long-lasting definitions or to use more specific ones that have to be updated regularly. The same happened on the activities and transactions to be included and how to manage their control while also respecting States' sovereignty and non-interference in their internal affairs. The section on scope concluded with the request of paying special attention to illicit trade and unlawful transfers to non-state actors.

As for the last section, it dealt with the parameters to be used for the basis of the treaty, which space from the UN Charter, international human rights and humanitarian law, States' sovereignty, non-discrimination, controlled multilateral and ad hoc exchanges, and so on[55].

The Open-ended Working Group

In resolution A/RES/63/240 the GA welcomed the Secretary-General report and the work carried out by the experts group. Pleased with how the debate was developing, the GA instituted an open-ended working group with the job of collecting the points of the experts group's report that gained a general consensus as the basis for a treaty on the import, export and transfer of conventional arms and present a draft at the UNGA sixty-forth session[56].

The Open-ended Working Group met for one organizational session in January 2009 and two substantive sessions in March and July 2009. The 2009 sessions were another occasion for Member States to thoroughly analyse and discuss the points that were agreed on through consensus to be included in the

[55] Ibid 2.
[56] General Assembly Resolution 63/240, *"Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms,"* A/RES/63/240, (8 January 2009).

eventual arms trade treaty, which had to be balanced in order to provide benefits for all the parts involved, in line with the principles of the UN Charter and other existing international obligations. The Member States had the chance to express extensively their opinions in an open and transparent discussion. They once again went over the goals and objectives of a feasible treaty, the scope of such treaty, the desirable parameters, and other related issues that could be included into an arms trade treaty. The discussion brought out other matters worthy of discussion: the respective responsibility of exporters and importers, the increasingly worrying issues of unregulated trade and illicit markets and their connection to the growth of instability, international terrorism, and transnational organized crime[57].

The report was adopted and presented at the GA sixty-fourth session in December 2009.

The Preparatory Committees

The GA through Resolution 64/48 endorsed the report of the open-ended working group and decided to convene a United Nations Conference on the Arms Trade Treaty to be convened in 2012 in order to draft a legally binding treaty on the highest standards for international arms trade. The Open-ended working group was then transformed into the preparatory committee for the Conference. The aim of the preparatory committee was to make suggestions to the Conference in order to develop a balanced legally binding document that considered all the opinions gathered thus far through the various reports and meetings. The GA requested the Secretary-General to produce another report collecting all the opinions of the Member States on the possible elements of the treaty and present it at the sixty-sixth session. Civil society organizations were formally invited to participate as observers to the sessions of the preparatory committee[58].

A group of legal experts from the Geneva Academy of International Humanitarian Law and Human Rights and the late Oxford Martin School

[57] Open-ended Working Group, *"Report of the Open-ended Working Group towards an Arms Trade Treaty: establishing common international standards for the import, export and transfer of conventional arms,"* A/AC.277/2009/1, (20 July 2009).
[58] General Assembly Resolution 64/48, "The Arms Trade Treaty," A/RES/64/48 (12 January 2010).

Programme on Human Rights held a blog that followed the drafting of the ATT from the first preparatory committee in 2010 to its adoption in 2013 and gave interesting insights throughout the whole path. After attending the first PrepCom the legal experts showed a mild enthusiasm for its outcome. It settled that a Treaty was going to be drafted and adopted, which very unsure before, but the main issue remained its content, what it will regulate and how wide its reach will be. As they pointed out, the international community tends to work itself up and is charged with good intentions when everything is still to be set, and yet disappointing and limited outcomes are not that uncommon; that explains the suspicions of the group[59].

Before the start of the second PrepCom the Chair of the Preparatory Committee Roberto García Moritán circulated his informal draft paper on the outcome of the first PrepCom, to work as a basis for the second PrepCom. He specified that this text (and the ones that followed) were not the draft treaty text and therefore did not carry any formal status[60]. The draft is a good starting point and at first sight, it seems like a valuable effort, but unfortunately, it presents many potential loopholes. The language is weak, it does entail a binding obligation for States, which, by the way, appear as the sole judges on what is appropriate and that they should just "take into consideration" the content of the draft. The rest of the document is useful but too general and weak, issues are not specified enough. For example, it mentions "other international crimes" (besides genocide and crimes against humanity) without indicating them precisely[61].

During the second PrepCom Ambassador Moritán revised his previous draft and fixed many of the issues I have indicated above. The revised document provided more solid, clear and defined provisions and definitions[62].

[59] Geneva Academy of International Humanitarian Law and Human Rights and Oxford Martin School Programme on Human Rights, *Arms Trade Treaty legal blog,* http://armstradetreaty.blogspot.com/2010/.
[60] Andrew Wood, "How to Reach Consensus on an Arms Trade Treaty," *Arms Control Association,* https://www.armscontrol.org/act/2012-01/reach-consensus-arms-trade-treaty#THREE.
[61] Chair Draft Proposal 1.
[62] Char Draft Proposal 2.

The third PrepCom followed the debate of the second, not much changed, with an overall consensus, but still opposed by a small, but obstinate number of States.

The fourth PrepCom was set to be only procedural in view of the Diplomatic Conference, but the first day was still concerned with debating the substance of the future ATT. The next few days of the PrepCom focused on drafting the rules of procedure for the UN Conference on the Arms Trade Treaty. It was a long and difficult process and the results were, to say the least, surprising. The outcome of the fourth PrepCom was that voting was not allowed for any matter of substance. Rule 33 of the Rules of Procedure for the United Nations Conference on the Arms Trade Treaty states that: "The Conference shall take its decisions, and consider the text of the Treaty, by consensus, in accordance with General Assembly Resolution 64/48.[63]" The prospect for the Diplomatic Conference was that of an extremely hard debate, where an agreement was going to be difficult to reach, especially considering the intense opposition of some States and their intent on grouping up, a "strong and robust treaty" as requested by the GA seemed almost unachievable[64]. It is necessary to underline the fact that it was the United States that pushed negotiating conference to be undertaken on the basis of consensus, otherwise, they would have voted against[65] as they did for the ATT resolutions of 2006 and 2008. Some experts wondered if giving up to the American request was worth it, fearing that it would result in a stall during the negotiations and a diluted treaty[66]. The US positive participation was vital, The United States has been the largest exporter of conventional weapons for the past decade[67], and an arms trade treaty without their support was doomed to be weak and limited. The fact that the US decided to join the discussion and, even more, called for a strong and robust Treaty, made Russia

[63] United Nations Conference on the Arms Trade Treaty, *"Provisional rules of procedure of the Conference,"* A/CONF.217/L.1.
[64] Geneva Academy of International Humanitarian Law and Human Rights and Oxford Martin School Programme on Human Rights, *Arms Trade Treaty legal blog.*
[65] Hillary Rodham Clinton, "U.S. Support for the Arms Trade Treaty," *U.S. Department of State*, October 14, 2009, https://2009-2017.state.gov/secretary/20092013clinton/rm/2009a/10/130573.htm.
[66] Wood, "How to Reach Consensus on an Arms Trade Treaty".
[67] Amnesty International, "Killer facts 2019: The scale of the global arms trade," *Amnesty International*, August 23, 2019, https://www.amnesty.org/en/latest/news/2019/08/killer-facts-2019-the-scale-of-the-global-arms-trade/.

and China, which are among the top 5 of arms exporters worldwide, reconsider their position of abstention; they decided to work alongside the US. The interests of the three were touched directly and so the treaty deserved their attention[68].

The United Nations Conference on the Arms Trade Treaty of 2012

The first United Nations Conference on the Arms Trade Treaty opened on July 2nd, 2012 and lasted for four weeks and ended without a treaty. This disappointing outcome was the reflection of shortcoming, sabotages and, simply put, bad diplomatic and negotiating skills.

The reasons behind this failure are multiple, but in my opinion, the main one was the indescribable waste of precious time. For example, the first day and half of the conference were spent on deciding the status of Palestine, whether to admit it as an observer or a participating State. An issue that should have been considered within the Rules of Procedure. As expected, Israel and the US threatened to leave the Conference if Palestine was admitted as a participating State, which would have been detrimental for the outcome of the Conference, the number one arms exporter leaving on day one. In the end, the original Rules of Procedure were adopted without any amendment. The following days were a charade of delegations taking the floor and repeating their opinion, which was already known thanks to the four PrepComs, which were held for that exact reason. Some delegations that were against the Treaty from the very beginning carried out disruptive actions, tried to provoke other delegations and delayed the negotiations even more with some quibbles.

When the part of the conference that dealt with the (already well known) statements ended and started the actual negotiating part, the spirits were low. The time was running out, the different views were too many and too far apart, new issues were being raised and the very essence of the Treaty was being questioned. A major threat was a proposal carried out by the UK on behalf of the Permanent 5. They suggested putting the criteria in the national implementation section, meaning that the heart of the Treaty would be subject to national discretion and sovereignty;

[68] Wood, "How to Reach Consensus on an Arms Trade Treaty".

a Treaty meant to be establishing the highest possible common international standards. Fortunately, their proposal was rejected.

The major issue, which remained unsolved, covered whether to include within the treaty the transfer to non-state actors. The complexity derives also from a moral standpoint, should transfer to non-state actors be banned? Meaning that non-state actors are only terrorist groups and rebels, but what if we are dealing with liberation groups? Or groups fighting oppression? And what about business? Regarding this particular aspect, there was also the fear that if that was the way of dealing with the provisions then the treaty would only regulate illicit trade, leaving a massive chunk of arms trade out and overall rendering the treaty quite useless. Moreover, regarding what the Treaty should cover, some delegations pointed out the importance of including "gifts and loans" within the definition of transfer and that combat aircraft should include drones. These were among the most controversial issues, after delaying the conference so much, it was decided that they would be discussed at the second conference as there no prospect of an emerging consensus on these themes.

Many States struggled to even mention human rights, ignoring the natural connection between, human rights law, humanitarian law and the arms trade treaty. Many feared that mentioning human rights would allow for interferences in the internal affairs of States, others underlined that this the one in question was not a human rights treaty, so why mention them?

Towards the end of the Conference Ambassador Moritán, probably aware of the failure outcome of the conference, took a proactive approach and wrote a draft without caring to please everyone. Clearly, this resulted in the conference ending without the adoption of the treaty, but at least it was a very good starting point for negotiations and a draft was written. Many delegations were disappointed and expressed their opinion on the outcome of the conference but reiterated that a lot had been achieved and committed themselves to keep working on the drafting of the Treaty[69]. I think Ambassador Moritán did an excellent job, overall,

[69] Geneva Academy of International Humanitarian Law and Human Rights and Oxford Martin School Programme on Human Rights, *Arms Trade Treaty legal blog*.

considering the difficulties, the delays and the great number of different opinions he had to concert together. Probably, if the US had not been so insistent on adoption by consensus, the whole process would have been quicker, but we are dealing with a highly profitable business, so who knows?

The draft of the arms trade treaty, submitted by the President of the Conference Ambassador Moritán, consists of a preamble, a section stating the principles, and 25 articles. The final draft of the first conference regulates the following topics:

- Goals and objectives
- Scope
- Prohibited transfer
- National assessment
- General implementation
- Export
- Import
- Brokering
- Transit and Transhipment
- Report and Record-Keeping
- Enforcement
- Secretariat
- International Cooperation
- International Assistance
- Signature, Ratification, Acceptance, Approval or Accession
- Entry into Force
- Provisional application
- Duration and Withdrawal
- Reservations
- Amendments
- Conference of States Parties
- Dispute Settlement
- Relations with States not party to this Treaty
- Relationship with other instruments
- Authentic Texts and Depositary[70]

The text is a good starting point, but the fiery issues are obviously lacking, and the absence of consensus is palpable. Ambassador Moritán managed to progress with the work while keeping in mind the requests of the States and

[70] United Nations Conference on the Arms Trade Treaty, *"Draft of the Arms Trade Treaty,"* A/CONF.217/CRP.1, (1 August 2012).

appeasing a lot of them. Overall, the language is strong, even though there are a few slips, and the scope is quite wide, even though the more problematic points are missing (for examples ammunitions are not included and are only briefly motioned later under article 6 on Exports). The goals and objectives are concise and clear, but I have to admit that after such a long debate on the content of article 1, they are underwhelming.

The General Assembly, on December 24, 2012, adopted resolution 77/234A. The UNGA expressed its disappointment for the outcome of the first conference and called for a second and final conference to be held in New York, from 18 to 28 March 2013, governed by the Rules of Procedure adopted prior to the first Conference and using the draft submitted at the end of the first Conference as the basis for the future work on the Arms Trade Treaty[71].

The Final United Nations Conference on the Arms Trade Treaty of 2013

The Final UN Conference opened on March 18th, 2013 and the Australian Ambassador Peter Woolcott was appointed by acclamation as the President of the Conference. The Secretary-General then delivered his message, which pointed out many interesting issues and questions to be answered: where are they produced; how have they been licensed; what standards have been applied to assess the legality of proposed transfers? And what to do about it? He concluded underlining that the adoption of this treaty was a moral obligation towards the victims and those risk their lives to build peace[72].

President Woolcot explained that he was going to present three drafts throughout the conference, the first one was addressing the legal wording and correct the inconstancies, the second one to try and include the new suggestions of States and the final one, to be adopted.

The whole conference considered again many of the issues that were faced previously and new ones. Some delegations called for the elimination of the

[71] General Assembly Resolution 67/234*, "The Arms Trade Treaty,"* A/RES/67/234 (4 January 2013).
[72] Geneva Academy of International Humanitarian Law and Human Rights and Oxford Martin School Programme on Human Rights, *Arms Trade Treaty legal blog*.

principles section, or to at least include it within the preamble. Once again, many requested to include a mention of non-state actors and to forbid transfers to them. Some delegation requested to change "overriding risk" to "clear or substantial risk" in article 7, but the US rejected the proposal. Russia, India, and Brazil requested the deletion of the criteria on the adverse impact of corruption on development of art. 4 as it was not relevant for an arms trade treaty.

Towards the end of the Conference emerged a massive issue. Iran, North Korea and Syria indicated their intent on blocking the consensus. They claimed that the most recent draft presented too many loopholes and legal flaws. The Rules of Procedure state that the Treaty could be adopted only with consensus. It seemed another failure for the Treaty was on its way. In the end, the Treaty did not reach a consensus within its own conference, but due to the high number of States in favour of it was adopted by the GA under Agenda item 94 "General and Complete Disarmament". I want to point out that before reaching this solution the Mexican delegation, still within the framework of the conference, had pointed out that there was no specific definition of consensus and therefore such a high majority could be considered as such. Unfortunately, many States strongly rejected this affirmation, but in my opinion, it was a smart attempt[73].

In the end, the Treaty was adopted on 2 April 2013 by 154 votes to three with 23 abstentions. On June 3rd, 2013 was held the signing ceremony and 67 States signed the Treaty on the first day. The Treaty entered into force on 24 December 2014. As of today, the Treaty has 105 State Parties, 33 signatories that are not yet a State Party, and 56 States that have not joined the Treaty yet[74].

The Arms Trade Treaty

The Arms Trade Treaty consists of a preamble, a section on the principles, and 28 articles. The text is a clear improvement from the previous draft, and it addresses many of the problems left out, minding the requests of the States, it is a robust text, not perfect, but no treaty text really is. The Treaty, from the very beginning, was never thought as a disarmament treaty or a non-proliferation treaty

[73] Ibid.
[74] Arms Trade Treaty, https://thearmstradetreaty.org/.

(even though it was developed within the UNGA 1st committee on Disarmament and International Security). Its aim is to regulate international arms trade and prevent illicit arms trade and diversion.

The preamble is long and rich and sets out some of the principles that must be followed when adhering to the Treaty. As expected, the natural basis of the Treaty is the UN Charter, its principles, and in particular art. 26:

> "which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources"[75]

The Preamble then refers to the pillars of the UN, peace and security, development, and human rights, and how they can be affected by an unregulated arms trade, it refers to the victims, the civilians, and the most affected categories (women and children) and the challenges they face when caught in armed conflicts.

The Preamble also works as reassurance for arms producer and recognizes the legitimate political, security, economic and commercial interests of States in pursuing arms trade. It reaffirms the legitimacy of arms ownership for multiple reasons (recreational, cultural, historical, and sporting activities), which must be regulated by national and international laws, without affecting States sovereignty. Nothing in the Treaty should be read as preventing international cooperation, technology transfer and advancement and trade for peaceful reasons.

The Treaty complements other international instruments: the United Nations Disarmament Commission Guidelines for international arms transfers in the context of General Assembly resolution 46/36H of 1991, the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, as well as the 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, and the International Instrument to Enable States

[75] Preamble of the Arms Trade Treaty.

to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons[76].

The following section recognizes the principles that should work as a basis for the working of the Treaty. The right to self-defence, the settlement of international disputes through peaceful means, prohibition of the use of force and crime of aggression, State sovereignty and non-intervention in the internal affairs of other States, respect of international humanitarian law and the four Geneva Conventions of 1949, respect of human rights, the responsibility of State to regulate international arms trade and their right to lawfully trade and own arms, based on the norms and regulations contained in the ATT[77].

The Treaty regulates the seven categories indicated in the 1991 United Nations Register of Conventional Arms (UNROCA), which are the following:

1. Battle tanks;
2. Armoured combat vehicles;
3. Large-calibre artillery systems;
4. Combat aircraft;
5. Attack helicopters;
6. Warships;
7. Missiles and missile launchers; and
8. Small arms and light weapons. This last category is not covered by the UNROCA, but many countries are pushing for their addition as the eight category and are willingly including them in their yearly reports on imports or exports of conventional weapons[78].

The ATT art. 3 regulates one of the most debated and controversial issues, much opposed by the US, the export of ammunition/munitions fired, launched or delivered by the conventional arms just mentioned. The activities considered, which are grouped under the voice "transfers", are export, import, transit, trans-shipment and brokering. There is no mention of the requests of the Palestinian and UK delegations, correspondingly the inclusion of drones under combat aircraft and of loans and gifts under transfers. These issues were now a concern of the Conference of the State Parties.

[76] Ibid.
[77] Principles of the Arms Trade Treaty.
[78] United Nations Register on Conventional Arms, "About," UNROCA, https://www.unroca.org/about (Accessed January 20, 2020).

The transfer of these weapons is specifically forbidden in three cases. If the exports violate the obligations set out by the Security Council within the measures contained in the UN Charter chapter VII; if the transfer violates any obligations deriving from a Treaty the State is part of; if the States at the time of the transfer knows that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party. There is no explicit mention of the crimes forbidden by art. 3 of the Geneva Conventions or of the Crimes covered by the Statue of the International Criminal Court. Also, even though its addition had been requested multiple times, there is no explicit mention of transfers to non-state actors. In a treaty that is set to attain the highest international standards, it is unthinkable of giving a restrictive reading to such absence. The transfers mentioned above must be prohibited to every actor, State or non-State[79].

State Parties are encouraged to keep a record of all the import and exports they carry out and each year they must present to the Secretariat a report of the previous year authorized or actual exports and imports of conventional arms regulated by the ATT. States have the faculty to leave out imports or exports that concern commercially sensitive or national security information. States can decide to exchange the reports and present suggestions and recommendations to the other State Parties.

The rest of the articles cover procedural matters, such as entry requirements, duration, amendments, reservations, etc[80].

After seven years of negotiations, which at times were tortuous and it appeared that the adoption of the Treaty was still unreachable we have in our hands a strong and balanced text, that should not be blindly praised, but also not just straight out rejected. The ATT is a great achievement, the international community

[79] Natalino Rozzitti, "Il trattato internazionale sul commercio delle armi," *Osservatorio di Politica Internazionale* 42, (2013).
[80] Stuart Casey-Maslen, "The Arms Trade Treaty (2013)," *Academy Briefing* 3 (2013).

proved its commitment to international peace and security. After recognizing that the absence of any form of arms trade regulation was baffling and it was directly contributing to conflicts, insecurity, gross human rights violations, the UNGA and MS decided to begin this path. Some mistakes were made, probably the biggest one was agreeing to the US request of adopting the treaty only by consensus, that later on resulted in a weakening of the status of the final treaty. The scope of the Treaty is limited, but the inclusion of small arms and light weapons is a great achievement. The reporting mechanism has proved before to not be extremely effective, so maybe a more intrusive control system could be preferable.

Obviously, the ATT concerns States, and non-state actors, with a restrictive reading, are not even mentioned, but I thought it was important for the aim of this thesis to give a general overview of the ATT, it is the only international legally binding instrument that regulates arms trade. It sets the international standards and it provides a precedent.

6. Arms trade as a war crime

When dealing with business involvement in international crimes it is important to recognize the context and cases, especially when dealing with neutral business activities. In the context of sensitive cases, it is important to tell apart morally questionable cases, when business enterprises have a relationship with "bad actors" and cases where business enterprises provide relevant contributions to the commission of international crimes. The line is drawn when the goods provided are actively used to perpetrate human rights violations. It is fundamental to understand if the transaction results in complicity; especially when dealing with dangerous goods, such as weapons. When trading arms, the factor of *mens rea* acquires further relevance, as the knowledge needed for criminal liability needs lower standards[81]. The International Commission of Jurists produced a thematic report in 2008 to

[81] Kaleck and Saage-Maaß. "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges."

provide a guiding tool in recognizing the criteria to judge if a neutral business (or its personnel) is complicit to an international crime:

a) Makes it possible for the abuse to happen, meaning that without its contribution it would have not taken place
b) Makes the situation significatively worse and exacerbates the abuse
c) Its contribution makes carrying out the abuse more easily

That said, the business enterprise or its employees must actively wish to enable, worsen or facilitate the commission of the international crime; they must know or should know of the risk of their conduct consequences, or they must be willfully blind to that risk. Moreover, the condition of proximity must be met, meaning that the company must be close to the perpetrators or the victims, or must have been in continuous contact through time. The closer they are to the situation, the more likely it is that the company's conduct will be legally regarded as complicit to the war crime[82].

Those who suffer the major impacts of unregulated arms trade and its war crime implications are civilians. It is well documented, as we will see later on, that often arms are used to commit human rights and humanitarian law violations, such as the targeting of hospitals, homes, markets and transport systems, and even civilians. Targeting civilians, as explained earlier, constitutes a war crime, and those who survive are usually pushed into poverty. Many suffer life-long debilitating injuries, their economic life is completely unravelled, and are still constantly under the threat of further violations of their human rights. Not dwelling too much into the topic, unregulated arms trade is affecting also non-conflict affected area. Globally, more than 500 people die every day because of violence committed by firearms[83].

In the last chapter, there will be a further analysis of the relationship between arms trade and war crimes and which role the arms trade industry plays as an abettor

[82] International Commission of Jurists, "Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes*," International Commission of Jurists*, January 1, 2008 https://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/.
[83] Amnesty International, *"Killer facts 2019: The scale of the global arms trade"*.

and aider to war crimes. As already stated, multiple times, arms trade is not automatically a bad business, but without a doubt, it is a sensitive one and the risk to contribute to atrocities is extremely high. To conclude this subchapter, I want to point out the three aspects crucial to the arms trade sector when dealing with human rights obligations: licences, due diligence, and remedy. Many business enterprises, when facing the accusation for the complicity in abuses, explain that they received the licences to trade by the State. It is fundamental to understand, also for later on when reading the chapter on the case study, the licences do not result in an obligation to trade. Business enterprises are allowed to, but they also have the duty to conduct their own investigations and when faced with proofs of human rights abuses, they must stop any trade relationship. Human rights due diligence is a process that is gaining more and more popularity and it should be mandatory. In the meantime, business enterprises have all the means available to conduct the process and can request assistance from governments, international organizations, civil society organizations, national human rights institutions, media or other experts. As per remedial mechanisms, when business enterprises become aware of the fact that their actions are contributing to human rights abuses, they must first of all immediately stop and then provide remedies, in a process where the victims play an active role.[84]

7. The scale of global arms trade

The Stockholm International Peace Research Institute (SIPRI) calculated that transfers of major arms in the five-year period 2014–18 was 7.8 per cent higher than in the period 2009–13, for a total of at least $95 billion spent in 2017[85].

The 5 top exporters were the US, Russia, France, Germany and China, which together accounted for 75 per cent of global exports. The top 5 importers of arms were Saudi Arabia, India, Egypt, Australia and Algeria. Together they

[84] Christian Schliemann and Linde Bryk, "Arms trade and corporate responsibility", *Friedrich-Ebert-Stiftung*, November 2019, https://www.fes.de/en/shaping-a-just-world/global-economy-and-corporate-responsibility/publications-on-global-economy-and-corporate-responsibility?tx_digbib_digbibpublicationlist%5BpageIndex%5D=1&cHash=18c5d407ed7666d0f16b35dd71a64ed8.

[85] Stockholm International Peace Research Institute, "SIPRI YEARBOOK 2019 Armaments, Disarmament and International Security Summary," *SIPRI*, September 23, 2019, https://www.sipri.org/sites/default/files/2019-08/yb19_summary_eng_1.pdf.

accounted for 35 per cent of total arms imports. Down below a graph (Figure 1) depicting the share of global exports of the 10 top exporters and a graph (Figure 2) depicting the share of global imports of the 10 top importers.

The ATT so far is failing its aim. The gross scale of arms trade rather than lowering, or at least remaining the same, has been growing constantly despite the ATT being in force since 2014. The ATT is facing structural weaknesses, it is simply impossible to regulate arms trade when some of the top 5 major exporters of arms globally, US, Russia, and China, are not parties to the Treaty[86]. And as we will explore later, those who ratified the treaty are not complying with it. The transfer of weapons and ammunition to conflict affected areas has not stopped and arms trades with parties renowned for human rights and humanitarian law violations are still taking place.

In Figure 1 and Figure 2 is possible to see the scale of the global arms trade, divided between the top 10 exporters and importers.

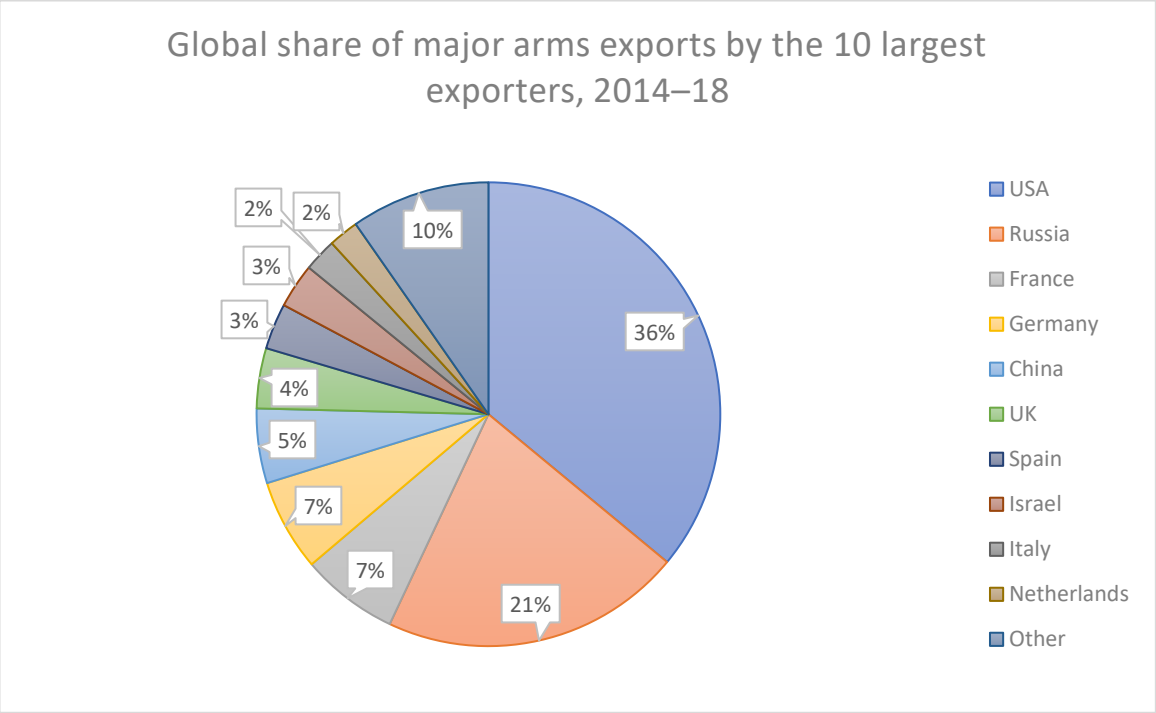

Figure 1- SIPRI Arms Transfers Database, Mar. 2019.

[86] Amnesty International, *"Killer facts 2019: The scale of the global arms trade."*

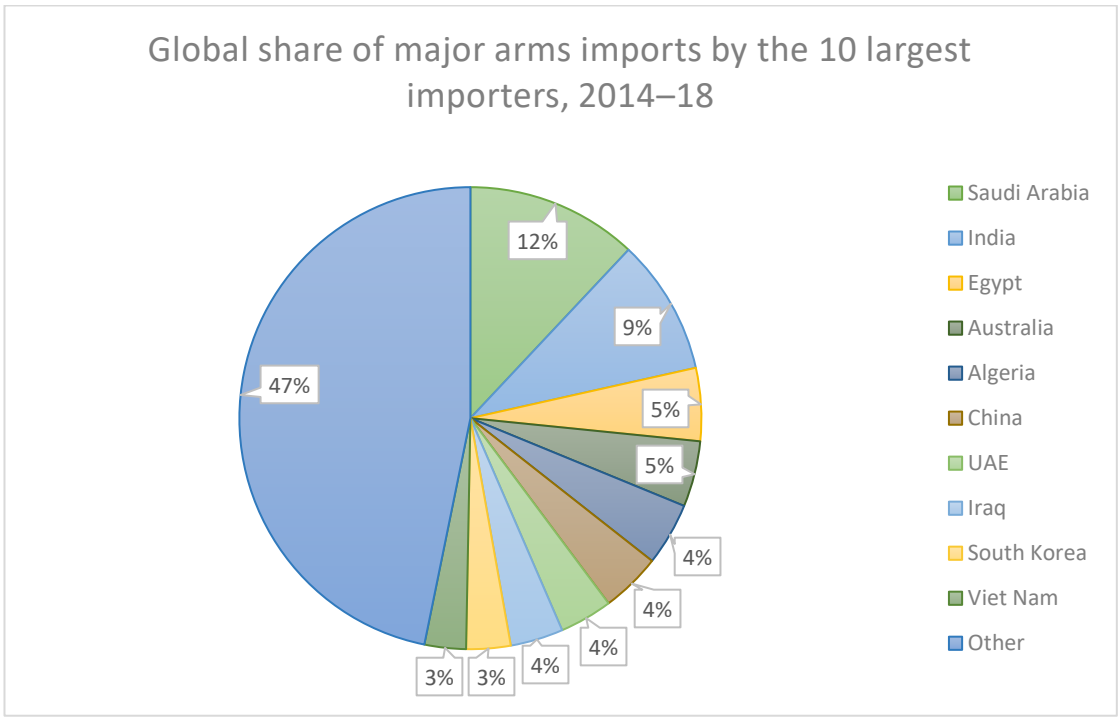

Figure 2- SIPRI Arms Transfers Database, Mar. 2019.

CHAPTER II: BUSINESS HUMAN RIGHTS OBLIGATIONS

1. The United Nations Legal Framework: first steps

The role of Corporations in international law has always been one of interest, starting already in 1700, but in the past few decades, it also gained new momentum, probably due to new attention given to it by humanitarian actors like the International Committee of the Red Cross. The domain of business and human rights in the modern age started to develop around the 1990s and as it always happens with rapidly evolving environments, especially considering the fast-paced globalized era in which we are living, it allowed for the proliferation of gaps and quibbles in which new actors such as corporations move around freely. The issues emerging were multiple and the legal gaps abounding starting from the unfair power imbalance between companies and rights holders, the growing power of companies vis-à-vis States, the increased scope of the rights granted to companies on the international stage without corresponding obligations and the lack of effective regulation in conflict and post-conflict settings[87]. But business enterprises have always possessed and shown the potential in facing the new challenges, contributing to the debate and helping the promotion and implementation of human rights.

Arms trade is considered one of the sensitive business, but it is never specifically addressed in the following initiatives. The initiatives usually consider business operating in conflict affected areas in general. For this reason, I will consider in this in the chapter, while keeping in mind that the business I am researching is arms trade.

The United Nations proved to be sensitive to international development also on this occasion and responded accordingly. In the 1990s the first major scandals of TNCs conduct started to catch the global attention. I am referring to the global campaign against Nike's abusive workplace practices and Shell's role in the violent

[87] General Assembly Resolution 40/48, *"Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights",* A/HRC/40/48 (2 January 2019).

episodes in Ogoniland and Nigeria[88]. Both Corporations responded with the adoption of codes of conduct and inclusion of the principle of responsibility of business. Nike and Shell became the leaders of the Corporate Social Responsibility (CSR) movement and pushed for the adoption of codes of conduct, supply chain audits and other forms of monitoring[89]. In 1999, riding the heat of the recent scandals and developments in the business world two very different initiatives saw their first light, the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' and the UN Global Compact[90].

The UN Global Compact

The UN Global Compact, which has recently celebrated its 20th anniversary, started out as a personal initiative of the at the time UN Secretary-General Kofi Annan[91]. The GC started out as a keynote speech by SG Annan at the annual meeting of the World Economic Forum of Davos. The main topic of the speech, which was drafted by the future SR on business and Human Rights John Ruggie and Georg Kell, was the intrinsic imbalance of globalization. A world only focused on the economic realm at the expense of the social and political was unsustainable. He challenged business to start a sort of cultural revolution without waiting for new laws, to uphold human rights and decent labour and environmental standards voluntarily[92]. The enthusiasm in the aftermaths of the speech was so tangible that Mr Annan felt obliged to create a program, which besides the critics never started out with the aim to regulate, but rather to provide a norms-based learning forum and engagement mechanism[93]. The end result was a ten-point guide based on the existing UN declarations in the areas of human rights, labour, the environment, and

[88] John Ruggie, *Just Business: Multinational Corporations and Human Rights,* (New York: W. W. Norton & Company, 2013).
[89] Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights."
[90] Ibid.
[91] Rorden Wilkinson, "Global Compact – United Nations Initiative," *Encyclopaedia Britannica*, May 14, 2014, https://www.britannica.com/topic/Global-Compact.
[92] United Nations, "Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos," *Meetings Coverage and Press Releases,* February 1, 1999 http://www.un.org/press/en/1999/19990201.sgsm6881.html.
[93] Ruggie "The Social Construction of the UN Guiding Principles on Business and Human Rights."

anti-corruption[94]. The aim of the GC was to avoid the proliferation of the trend started by Nike and Shell of single private corporate codes.

The UN Global Compact is an example of a successful initiative. 20 years later it is still thriving, there are over 12000 signatories from more than 160 countries, covering almost every sector and size[95]. Its strength is mostly due to the open and diverse environment it offers, representatives from business, government, and major international NGOs are welcomed to participate, the dialogue is encouraged and assistance to business enterprises is constantly provided. The UNGC improved from the naming-and-shaming to early proactive measures to avoid risks and difficulties from the start. According to the UN Global Compact Performance Report, organisations that have committed to the UNGC's 10 principles perform significantly better on sustainability measures[96]. The weakness of the Global Compact is in its very nature as a voluntary initiative. The GC never aimed at regulating or binding; it only provides a common platform of suggestions to follow. There is no independent monitoring or enforcement, which means there is no way to make sure business enterprises are actually following the UNGC's ten points. The lack of screening of new participants allows for everyone to be able to access, regardless of their performance. The only obligation is the submission of the annual Communication on Progress. Many fear that the GC works only as a façade for business enterprises, in order to show an improved and ethically conscious image, without achieving real improvements in social and environmental issues[97].

Regarding the role of business enterprises in conflict-affected areas, the UNGC showed a growing commitment to the topic throughout the years. In 2010 the GC put out a Guidance on Responsible Business in Conflict-Affected and High-

[94] Global Compact, "Participation," *Global Compact*, https://www.unglobalcompact.org/participation (Accessed on December 15, 2019).
[95] Ibid.
[96] Julia Mashkin, "Why the UN Global Compact is a CSR commitment that works," Ethical Corporation, May 1, 2019**,** http://www.ethicalcorp.com/why-un-global-compact-csr-commitment-works.
[97] Mark van Dorp, *Multinationals and Conflict. International principles and guidelines for corporate responsibility in conflict- affected areas* (Amsterdam: Stichting Onderzoek Multinationale Ondernemingen (SOMO) – Centre for Research on Multinational Corporations, 2014).

Risk Areas, to come alongside the Principles for Responsible Investment (PRI) Initiative[98]. The Guidance gathers national and international law and provides a place for dialogue in order to collect examples of good practices and build up the highest possible standards[99]. The Guidance is the most complete document produced by the GC on the theme of business in sensitive areas, which strongly affirms that long-term financial performance is in no contradiction with peace and development. Rather, business enterprises have the chance and even the duty to make a positive contribution and to enhance the respect and implementation of human rights, peace and sustainable development. There are also other examples of the GC's effort to contribute and regulate the action business enterprises in conflict-affected areas, such as the 2013 Business for Peace initiative, sector-specific initiatives (like extractive, mineral, and water industries), and forums to address the dilemmas business might face when operating in sensitive areas[100].

The GC might have many weaknesses, but it has worked efficiently for the last 20 years in encouraging business enterprises to take responsibility, recognize their role, their positive and negative contribution, and to create a common set of standards. It might be not binding, but it is for sure a good starting point and example, which might develop into a stronger instrument, with the help of business and governments.

The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

With Resolution 1997/11 the Sub-Commission on the Promotion and Protection of Human Rights requested the Creation of a sessional Working Group on the Working Methods and Activities of Transnational Corporations[101]. The response, through Resolution 1998/8 was the establishment of a sessional working

[98] Global Compact, "Guidance on Responsible Business in Conflict-Affected & High-Risk Areas: A Resource for Companies and Investors," *Global Compact*, 2010, https://www.unglobalcompact.org/library/281.
[99] van Dorp, *Multinationals and Conflict.*
[100] Global Compact, *Global Compact*, https://www.unglobalcompact.org/search?utf8=%E2%9C%93&search%5Btype%5D=all&search%5Bkeywords%5D=conflict.
[101] United Nations Resolution 1997/11, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-ninth Session*, E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997).

group for a period of three years aimed at studying and researching the working methods and activities of transnational corporations[102]. The mandate included various tasks:

> "[…] such as identifying issues, examining information regarding the effects of transnational corporations on human rights, examining investment agreements for their compatibility with human rights agreements, making recommendations regarding the methods of work and activities of transnational corporations in order to ensure the protection of human rights, and considering the scope of the state's obligation to regulate transnational corporations."[103]

In the following three years the Working Group undertook the job of clarifying the scope and width of the norms, enjoying the contribution of experts and civil society organizations, such as NGOs, representatives of corporations and unions, and scholars[104]. The mandate of the Working Group was renewed in 2001 for another three years, it remained mostly identical but for the addition of new activities such as the listing of human rights norms and instruments relevant for the topic. This last point aimed at binding business enterprises directly under international law, holding them accountable to the single global standard of human rights law[105]. The norms were presented to the Human Rights Commission in 2004 for adoption. The response was unenthusiastic, to say the least, pointing out that it was a valuable work, but never requested. The Norms were a heroic predecessor of the UNGPs, but they did not stand a chance. Their aim was to monitor business, ask them to produce reports and pay reparations to the victims, in order to become legally binding they had to be transformed into a Treaty or be incorporated into national legislation. The answer of both Governments and business enterprises was furious opposition[106]. That is how one of the first attempts of drafting norms to

[102] United Nations Resolution 1998/8, *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Mediods and Activities of Transnational Corporations*, E/CN.4/Sub.2/ RES/1998/8.
[103] Ibid.
[104] David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law* 97, no. 4 (2003): 901–22.
[105] Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights".
[106] Ibid.

control the activities of business enterprise with regard to human rights ended, with a metaphorical pat on the back and a silent order to not continue any further.

The Norms are scarce on analysing the issue of transnational corporations in conflict-affected areas. The only explicit reference to conflicts is in section C, art. 4 where the norms state that business "shall not engage in nor benefit from war crimes […][107]", then they only refer to international human rights law and obligations and international humanitarian law in a general sense. The commentary is more explicative and wide in its reach and scope: it explicitly forbids business enterprises and corporations which are involved in military, security, or police products/services to trade them when there is known possibility of human rights and humanitarian law violation and it prohibits them to directly engage in this situations[108].

In April 2004 the at the time Commission on Human Rights, taking note of the previous work carried out by the Sub-Commission on the Promotion and Protection of Human Rights, requested the Office of the High Commissioner for Human Rights to compile a report on the topic and its scope[109]. The "Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights" was presented at the 61st of the Commission in February 2005. At the time the topic of business and human rights was already the catalyst of fervent attention, many stakeholders participated in the drafting of the report, namely States, transnational corporations, employers' associations, employees' associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organizations.

The report recorded that in the previous 15 years over 200 initiatives and standards had been developed. They were divided into six macro-categories:

[107] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.
[108] Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.
[109] Office of the High Commissioner for Human Rights *Resolution, Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/2004/116.

international instruments, nationally based standards, certification schemes, voluntary initiatives, mainstream financial indices, and tools, meetings, and other initiatives[110]. The report then proceeded to provide the tools and criteria to analyse and understand the legal status of the existing initiatives and standards. The report then compared four initiatives that were existing at the time: the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; the OECD Guidelines for Multinational Enterprises; the United Nations Global Compact; and the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (draft Norms) (E/CN.4/Sub.2/2003/12/Rev.2).

The second section is concerned with other outstanding issues which are based on three general assumptions. The first one is that business has to operate in a responsible manner, through the respect of human rights. The second assumption is that business has the duty and the potential to create an environment that fosters the protection and implementation of human rights through investment, employment creation and the stimulation of economic growth; in the past these three issues proved to be the fuel for conflicts and human rights violations so in this specific case business must be monitored and accompanied during the entire path, to provide them with an education and an example. The third assumption is that it exists a gap in understanding the nature and scope of responsibilities of business with regard to human rights, the different initiatives have not developed in the same way and at the same and this could lead in discrepancies in the practices of companies, States and international actors. Based on these three assumptions the report analyses the different issues, which can be summarized as follows: what are the responsibilities of business? What are their boundaries? Which human rights are concerned? How to guarantee human rights? Does the UN need to intervene and create a set of standards? What is the legal nature of these responsibilities? What tools can be used by business?

[110] OHCHR, *"Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights,"* E/CN.4/2005/91 (15 February 2005).

The report was considered a beginning, a well-rounded starting point, providing the chance to further deepening the debate. It proved the growing interest of the international society on the topic and the need to deepen the discussion, as there were still many gaps and uncertainties. The concluding remarks end the report pointing out that multiple issues deserved their own study, and among them, there is the issue of the role of business in conflict-afflicted areas.

2. The "Protect Respect and Remedy" Framework

Following the steps mentioned above, in 2005 the Commission on Human Rights adopted resolution E/CN.4/RES/2005/69. The resolution formally asked the "Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises"[111]. The resolution sets out the mandate of the SR with the following points:

- To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";
- To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

[111] OHCHR, "Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises," *United Nations Human Rights,* https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx.

- To compile a compendium of best practices of States and transnational corporations and other business enterprises[112].

Professor John Ruggie of Harvard Kennedy School was appointed as Special Representative on Business and Human Rights in 2005 for an initial period of two years, not the normal three due to the controversies surrounding the topic, which was first extended to its full term and then until 2011[113]. It was established as a "research" mandate, with a limited budget and some of the mechanisms entrusted to other UN Special Procedures missing, such as the individual complaints or urgent appeals procedure, or the authorization to conduct country visits[114].

Professor Ruggie carried out its role with the utmost dedication and at the end of each mandate presented two ground-breaking documents within the United Nations system, the "Protect, Respect and Remedy Framework" in 2008 and, on the basis of the Framework, the "UN Guiding Principles on Business and Human Rights" in 2011[115]. In between these two, he produced also updating documents, for a total of six official reports presented to the HRC.

The Protect, Respect and Remedy Framework was presented by Prof. Ruggie at the 8th session of the Human Rights Council in June 2008. During the previous two years of its mandate Prof. Ruggie had convened 14 multi-stakeholder consultations on five continents; conducted more than two dozen research projects, some with the assistance of global law firms and other legal experts, non-governmental organizations (NGOs), international institutions, and committed individuals; produced more than 1,000 pages of documents; received some 20 submissions, and reported twice to the Commission on Human Rights and the Human Rights Council. The SR produced two initial reports in which he clarified the legal and policy dimension of the issue. The final report, in which is contained

[112] UN Commission on Human Rights Resolution 2005/69, *Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/RES/2005/69 (20 April 2005).
[113] Ruggie, "The Social Construction of the UN Guiding Principles on Business and Human Rights".
[114] Bijlmakers, "Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework and the Guiding Principles."
[115] Rachel Davis, "The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities*," International Review of the Red Cross* 94, no. 887 (2012): 961-979.

the Framework, is the conclusion of its first mandate, so to provide views and recommendations for the Council[116]. The main issue that the SR identified was the lack of an authoritative focal point. As I mentioned earlier, the debate was quite fervent and the number of initiatives and claims was ever-growing, but it was just turning into a jumble of attempts with no solid background and with a limited reach. Just think about the different CSR initiative, the norms, the GC works that I mentioned in the prior paragraphs. Clearly, such conditions were allowing some actors, both States and companies, to commit gross human rights violations without any consequences, even remaining undetected. After listening to the opinions of the different stakeholders, the SR explained that his approach was going to be a comprehensive one as business can affect all internationally recognize rights and selecting just a few could leave out some rights which can become important in specific stances. Prof. Ruggie then explained that rather than an overlapping of responsibilities between States and business, he was working towards an approach of mutual commitment. States should govern in the public interest and business should carry out their economic activities, but in doing so they must respect the rights of others[117]. The report aims at specifying each responsibility and clearly stating which belong to States and which to companies, as leaving the issue vague could end with dire consequences for people and human rights.

As the report's title suggests the framework is based on three core principles:

> "the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies"[118]

The first point addresses the alleged government gaps in the regulation of business' actions. These gaps have various reasons behind them, the inability of governments to respond to the globalization's challenges, the inability or unwillingness to do so, because of earnings opportunity or fear of losing foreign investments, the

[116] Human Rights Council Resolution 8/5, *"Protect, Respect and Remedy: a Framework for Business and Human Rights,"* A/HRC/8/5 (7 April 2008).
[117] International Labour Organization (2010). *Professor John Ruggie Presents Business and Human Rights Framework.* [video] Available at: https://www.youtube.com/watch?v=55PJw077eQE.
[118] Ibid.

relationship between some governments and business entities. The SR, later on backed by the OHCHR, found out that these challenges are more likely to occur in specific contexts, such as low-income countries, post- or still in conflict areas, countries where the rule of law in almost absent and where high levels of corruptions are detected. The interesting point of this section, in my opinion, is the silent issue it poses: if governments are unable or unwilling to hold business accountable, who should take up this role? It is also important not to forget the needs of the social actors, while there are no excuses for human rights violations, in such a competitive environment the single actors might feel too constricted by strong regulations. It is important to develop a coherent and concerted approach in which all social actors are held accountable, but their individual needs are also protected (quite clearly here I am referring at the needs of small business enterprises, as they might struggle the most with highly restrictive regulations.) What SR Ruggie stressed when presenting the Framework was that the principles must be universally applicable, but the methodology and the tools provided will differ depending on the single context and its circumstances, the size of the company and in some cases the industry sector to which it belongs.

In the second section of the report titled "the State duty to protect" it is thoughtfully explained that States have a duty to assist Corporations and advise them, through the development of related policy domains[119]. One of the sub-sections deals specifically with the situation in conflict zones. As it is known, the grossest human rights violations happen in situations of diffused violence, where the human rights regime is prevented from working efficiently. States have the duty to develop policy innovations to prevent corporate abuse, but at that time, the system was still lagging behind. While there are attempts to create such policy, they result limited, fragmented and unilateral most of the time. Moreover, as perfectly exemplified with the use of the Secretary-General sanctions, the interest was still focused on the punishment rather than the prevention. The fundamental point for States is to assist and advise corporations, conflicts are among the most sensitive and risky situations. It is necessary to provide business with clear information in

[119] Ibid 2.

order to have them recognise the high-risk situation in which they are working and therefore carrying out with their activities in a sensitive and human rights-based way. This duty belongs to both the home and host States, but the host State must also prevent corporate abuse within its jurisdiction, even in the chance of withdrawal of the home State.

Now, the States are the main actors of international law and their duty to protect is undeniable, but for the framework to work efficiently is necessary also the oath of business to respect, which is the topic of the third section of the Report[120]. The role of States and business is obviously very different, and they are placed below different set of rules, but the report states clearly that the corporate responsibility to respect exists independently of States' duties and the responsibilities of the two actors have the same importance. This concept revolves around the due diligence of corporations, which can be explained as the full path that a corporation must take in order to become aware of, prevent and address adverse human rights impacts. This is pivotal for corporations' activities in conflict zones. In fact, business must consider three factors when pursuing their objectives: the country's context and any human rights-related challenges, what set of human rights might be affected by their activities and thirdly whether they might contribute to abuses through their activities.

The last section of the Framework deals with remedial mechanisms. The issues concerned with business and human rights are, as I explained, still underdeveloped, haphazard, and not well executed. All this is reflected in the remedial mechanism. There are a few, but they show gaps and further challenges. They are divided into judicial and non-judicial mechanisms, State and non-state based and the company-level grievances mechanisms. The report indicates as the main issue, once again, the lack of information. Often, individuals do not know what the mechanisms in place are or how to access them. Alongside the lack of information, there are also the limitations of the already existing mechanisms, both intended and unintended. The section ends with the proposal of the creation of a global ombudsman which could flank without substituting the national mechanisms

[120] Ibid 3.

and help to move towards the development of international standards. The decision to include a section on remedies shows a mature insight by Mr Ruggie, as he explained, even the best efforts cannot completely prevent abuses, States, therefore, must investigate, redress, and punish corporate human rights violations that took place within their territories or jurisdiction.

The world of business and human rights can be a fertile field of examples of the mutual influence of international and national laws. Corporations must respect international standards and can be trailed domestically for international crimes. It is self-explanatory the importance of this point for corporate crimes in conflict zones.

3. The UN Guiding Principles on Business and Human Rights (UNGPs)

The mandate of the SR Ruggie ended in 2011, the culmination of this were the UN Guiding Principles on Business and Human Rights, created on the basis of the 2008 Framework. The guidelines were unanimously endorsed by the Human Rights Council in June 2011[121]. The Guidelines, even though have universal application, play a significant role in conflict-affected areas. As the Guidelines point out, gross human rights abuses tend to be an unfortunately common occurrence in areas where the government institutions and legal protection play no effective role. Such situations are often found in conflict-affected areas. Moreover, frequently when the State is not absent it is the first one to be involved and perpetrating human rights abuses[122].

The aim of the Guidelines is to implement the "Protect Respect and Remedy" Framework and to provide guidance for its implementation. This means that the Guidelines do not create new legal obligations, within them can be found all the internationally recognized rights and obligations for all States and business enterprises[123]. The UNGPs work with the existing standards and practice aiming at

[121] OHCHR, "Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises".
[122] Van Dorp, *Multinationals and Conflict.*
[123] Ruggie "The Social Construction of the UN Guiding Principles on Business and Human Rights".

integrating them and finding their holes. The expected outcome was the creation of a coherent set of standards and practice that has been integrated and improved[124]. Their strength depends on the endorsement and support received by States and stakeholders such as civil society and business enterprises, which has already been translated into biding regulations and laws[125].

The UNGPs are structured into 31 points, divided into the three macro-categories of protect, respect and remedy. Each point provides a commentary with the aim of explaining the meaning and implications for law, policy and practice[126]. The Guidelines are a document that is especially sensitive to the issue of business and human rights in conflict zones, providing specific provisions in six principles (principles 7, 12, 17, 18, 21, and 23).

Principle 7 is found under the first pillar Protect and is titled "Supporting business respect for human rights in conflict-affected areas". The principle states that both home and host States, due to heightened risk of human rights violations in conflict areas, must ensure that business operating in those areas are not in any way contributing to the violations. States must, through diverse measures, assist business enterprises in identifying the heightened risks and intervene from an early stage to prevent and mitigate any violation due to their activities; engage with business to assess and address the risks of abuse; States must deny access to public support for business involved in extended abuse and does not cooperate; State must ensure that their policies, legislation, regulations and enforcement measures are working effectively to address these violations[127]. The commentary underlines that the worst violations occur when the conflict is already raging, which means that the human rights regime might not be working as intended. This means that there might be the chance that the host State is unable to protect human rights effectively, so the home State has the duty to intervene and assist business enterprises. The weakness of principle 7 is that it only mentions the inability of the host State, ignoring the

[124] Van Dorp, *Multinationals and Conflict.*
[125] Ruggie "The Social Construction of the UN Guiding Principles on Business and Human Rights".
[126] Ibid.
[127] UN Guiding Principles on Business and Human Rights (UNGPs).

multiple cases where the State is unwilling to regulate corporate activity because the State itself is involved in the human rights abuses[128].

Under the second pillar, Respect, are the most principles we are concerned with. Principle 12 states that the responsibility to respect of business refers to all internationally recognized human rights, comprehensive of the International Bill of Human Rights together with the principles concerning fundamental rights in the eight ILO core conventions[129]. These documents contain the minimum human rights standards that must be upheld by business. Depending on the circumstances the categories of rights might be expanded to include the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Principle 12 then explains that business operating in a violent conflict, defined as such by the ICRC, are subject of international humanitarian law as both rights-holders and duty-bearers[130].

Principle 17 and 18 deal with human rights due diligence. The concept of due diligence is one of the pivotal ones and it covers an entire section of 5 out of 31 principles. Reference to due diligence is made also in Guiding Principles 4 and 15 and within the Commentary to several other Guiding Principles. The decision to include the concept of due diligence proves once again SR Ruggie's strategic wisdom and clever acting. Due diligence is understood by business people, human rights lawyers and States and it provided a fertile ground for building up consensus on his approach. The issue is that there is not one single definition of due diligence and it actually has very different meanings in the business and international law world; the Guidelines use both approaches indiscreetly, without never referencing to or acknowledging their differences or how the two concepts relate to one another. Human rights lawyers interpret due diligence as a standard of conduct required to respect an obligation, meanwhile business use it as a risk management process[131].

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[128] Van Dorp, *Multinationals and Conflict.*
[129] UN Guiding Principles on Business and Human Rights (UNGPs).
[130] ICRC, *Business and International Humanitarian Law* (2006).
[131] Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights," *European Journal of International Law* 28, no.3 (2017): 899–919.

Principle 17 states that business enterprises should carry out human rights due diligence through assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. It then specifies that human rights due diligence will depend on the size of the business and the context in which it is operating. Especially due to this last point the process should be ongoing as the contexts might evolve over time. Clearly, business operating in conflict areas are facing an especially sensitive situation and their human rights due diligence should always be updated and prompt. Their procedure should be public, complete transparency is mandatory in order to prove their commitment to prevent direct or indirect involvement with serious human rights abuses and other crimes. All reputable companies go under such scrutiny and it should cover all risky areas, from corruption to environmental crimes[132]. Principle 18 suggests business enterprises refer to internal and/or independent external human rights expertise during the process of human rights due diligence and to constantly engage with the locals, the potentially affected groups and the relevant stakeholders[133]. Once again, the guidelines are striving for an inclusive and transparent approach.

On the line of principles 17 and 18, principle 21, which is still under the section human rights due diligence, indicates that business enterprises should communicate openly and publicly how they intend to address their possibly negative human rights impacts, especially when operating in sensitive zones (conflict zones). The reporting can be presented in various forms such as in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports[134]. Whatever the form, the communication share three fundamental characteristics: they should be frequent and accessible, provide sufficient information to draw a complete evaluation of the enterprises' actions, and keep the relevant stakeholders and personnel safe and at the same time protect the commercial confidentiality.

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[132] Global witness, "Do No Harm: A Guide for Companies Sourcing From the DRC," *Global Witness*, July 8, 2010 https://www.globalwitness.org/en/archive/do-no-harm-guide-companies-sourcing-drc/.
[133] UN Guiding Principles on Business and Human Rights (UNGPs).
[134] Ibid.

Guiding principle 23 recognizes that different contexts pose different risks and challenges, but regardless business enterprises share the same responsibility in respecting human rights, meaning respecting internationally recognized human rights and provide proof of their course of action in that direction. Clearly, operating in conflict affected areas increases the risk of being complicit in human rights abuses committed by other actors. The Guidelines state that this should be treated as a legal compliance issue, due to the increasing practice of corporate legal liability and the inclusion in the Rome Statute of a provision on corporate criminal responsibility[135]. When operating in conflict zones, business enterprises must be careful of not exacerbating the conflict, to carefully assessing their role and understanding that their human rights impact might result in a termination of their activities[136]. To achieve a comprehensive and adequate picture of the context business enterprises are advised to consult credible, independent experts, including Governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives[137].

For the sake of this thesis, I think it is worth mentioning also Principles 8 and 13, even though they are not specifically concerned with business operation in conflict affected areas. Principle 8 points out that governmental departments, agencies and other State-based institutions that deal with business practices must be aware and implement the State's human rights obligations. It is a State's duty to translate international human rights obligations into policies, laws and processes and transfer this information to departments and agencies that shape business practices.

Principle 13 indicates that it is a business enterprise's responsibility to avoid causing or facilitating human rights abuses through their activities, in the event of abuses occurring business must address them. Business have the duty to prevent any abuses connected to their activities, intended as actions and omissions, or

[135] Ibid.
[136] Van Dorp, *Multinationals and Conflict.*
[137] UN Guiding Principles on Business and Human Rights (UNGPs).

relationships, intended as relationships with business partners, entities in its value chain, and any other non-State or State entity[138].

Special Representative Ruggie produced also the companion report to the Guiding Principles 17/32 titled "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and human rights in conflict-affected regions: challenges and options towards State responses".[139] The report was drafted after three workshops convened by the SR, where a small, but relevant group of States[140], through brainstorming sessions, tried to identify the policy options that home, host and neighbouring States have or could develop to prevent and deter corporate-related human rights abuses in conflict contexts. The aim of the workshops was to foster the debate around the different policy options, not to reach a consensus or reach a common position.

The report focused only on States' behaviour, pointing out their possible course of action and possible challenges when dealing with business enterprises operating in conflict zones, which steps to take, how to act with cooperative business enterprises and which measures take when the enterprises are not willing to respect the standards set out[141]. As the report points out, all the initiatives existing at the time were almost entirely focusing on business operations, without providing States with the necessary tools to intervene proactively in order to deter or at least mitigate human rights abuses. Much like in the Guiding Principles, the State has the duty to teach and constantly assist business, without assuming that a lack of interest is equivalent to the desire to be left alone. The aim has never been "naming and shaming", but "knowing and showing", meaning, give business

[138] Ibid.
[139] OHCHR, "UN Working Group on Business and Human Rights – Project on business in conflict and post-conflict contexts," *United Nations Human Rights*, https://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx.
[140] Belgium, Brazil, Canada, China, Colombia, Guatemala, Nigeria, Norway, Sierra Leone, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America.
[141] Human Rights Council Resolution 17/32, *"Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and human rights in conflict-affected regions: challenges and options towards State responses,"* A/HRC/17/32 (27 May 2011).

enterprises the chance to learn and improve their human rights performance. Which must not be mistaken for weakness, uncooperative enterprises must be warned, and eventual persistence and disinterest must result in additional measures, such as sanctions or civil, administrative or criminal liability.

Assessment of the Framework and the Guiding Principles

When the Framework and the Guiding Principles were presented, they both received a well-deserved enthusiastic reaction. Governments, business enterprises, and civil society organizations showed their complete support for both initiatives and their implementation.

Mr Ruggie proved to be a smart, strategic and prepared Special Representative, that managed to build a consensus among all the stakeholders involved. He managed to do that thanks to various reasons and moves he carried out. John Ruggie enjoyed renowned fame as an expert in the field of business and human rights, he was one of the minds behind the successful outcome of the UN Global Compact, he followed perfectly his mandate and the criteria set by the Code of Conduct for Special Procedures Mandate-Holders of the HRC, all of this guaranteed that his work was surrounded by an aura of moral authority and credibility. Moreover, he always distanced himself from the highly controversial UN Draft Norms and never tried to even suggest starting the negotiations for a legally binding treaty, which at the time was simply inconceivable (cue the cold reaction to the Draft Norms I mentioned earlier).

From the very beginning, the SR pointed out that the aim of at first the Framework and then the Guidelines was to fix the institutional misalignments and knowledge gaps in the business and human rights realm, which gathering in a scattered pile of efforts, not working efficiently together. The world was showing a renewed interest in Corporate Responsibility, but the lack of an adequate regulatory framework proved the impossibility to face these gaps, that in the meantime were worsened by the new challenges posed by globalization and the increasingly transnational activities of business. The aim of the Framework and Guiding principles, therefore, was not that of creating new international obligations for business, but to gather the already existing ones into a single, logically coherent and

comprehensive template. The creation of this template had then the aim of identifying the gaps and shortcomings of the existing regime and work for its improvement and integration.

The relevant stakeholder welcomed the Framework. The HRC, in relation to the Guiding Principles, used for the first time in its history the term "endorse" in relation to a normative text that governments did not negotiate themselves[142]. States, civil society and business enterprises started to consider the Guiding Principles as the point of reference and CSR initiatives to integrate them into their schemes. Such a prevalent acceptance of the Framework and the Guiding Principles is due to the widespread perception of their normative legitimacy, coupled with their democratic legitimacy, which manages to influence business enterprises' behaviour.

The democratic legitimacy of the Framework and the Guiding Principles is almost completely undeniable. Mr Ruggie has always been praised for the democratic stance of his work, which was carried out in an inclusive, transparent and extensive manner throughout the six years of his mandate. The HRC requested him to hold ongoing consultations with all stakeholders and he duly did so. He engaged in almost 50 cross-continental consultations and in the regional consultation of Johannesburg, Bangkok, Bogotá, New Delhi and Buenos Aires. He participated in the expert consultations and the consultations organized by the Office of the High Commissioner for Human Rights. He conducted private field visits to global firms based in developing countries, visits that often were complemented by meetings with local civil society organizations. At the beginning of his mandate was established an on-line consultation process, the page attracted a total number of 3576 visitors from 120 countries and territories. The written submission and all the other relevant documents relating the SR's mandate, including consultation reports, briefing papers and discussion papers, were

[142] John G. Ruggie, "Interview," Interview by Vincent Bernard. *International Review of the Red Cross* 94, no. 887, March 29, 2012.

available and easily accessible on the online portal hosted by the Business and Human Rights Resource Centre[143].

Thousands of pages of contributions, reports, and paper contributed to the creation of the Guiding Principles. All relevant stakeholders had the chance to participate, express their opinion, and contribute. The whole process was inclusive, transparent, and open, creating an undeniably democratic document. It is simply inconceivable to deny the solid ground on which the Guidelines stand, and their inherent normative legitimacy. They might not be legally binding, but with such a strong background, the widespread support they enjoy, the strong hold they have on respectable business behaviour, but also on the whole realm on business enterprise, seems to suggest a gradual transition towards customary law or a bright future for the development of a legally binding treaty. Those against it are a few scattered entities that cannot fight against the democratic surge that the world of business and human rights is experiencing.

Another strong point of the Guiding Principles is the introduction of human rights due diligence. Mr Ruggie managed to introduce a concept known to all the parties involved, where business enterprises had a major role in how to conduct their operations, but with the guidance and under the supervision of States. Human rights due diligence reports are also an instrument for CSOs to eventually hold business enterprises accountable or intervene beforehand.

That said, the Guidelines also proved to have many shortcomings and issues within themselves. The democratic legitimacy I have just finished praising, soon proved to have room for improvement. As it was mentioned, the mandate of the SR was carried out with a limited budget, this lack of funding in the end negatively impacted only the Global South. For example, when the OHCHR convened a conference for all relevant stakeholders in Geneva, individuals from the Global South, including community representatives, victims of human rights abuse and indigenous peoples could not afford to participate due to limitations in their capacity and financial resources. Limitations that could be fixed by neither the

[143]Bijlmakers "Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework and the Guiding Principles."

OHCHR nor the SR as they never received funding to secure the journeys[144]. Insofar as the on-line consultation, many CSOs were sceptical whether their inputs were taken into consideration, as they never made into the final texts. The Country visits, which laudably were carried out on a voluntary basis outside the SR's mandate, seemed to lack any form of strategy and it was never explained why some were chosen over others. In the end, the widespread support that welcomed the Guidelines started to falter and they were accused of simply depicting the status quo, without giving authoritative interpretation on internationally recognized human rights obligations. Moreover, even though Mr Ruggie always stated that all human rights can be affected by business enterprises' behaviour, not enough thought was given to contextual interpretations of human rights and justice, without setting a clear standard of what the Guiding Principles really aimed at protecting. Moreover, the rigid nature of the UNGPs makes it unthinkable to ever amend them regarding this problem, but on the other hand, the general nature of the Guidelines is also one of its strong points, working as an umbrella for all cases of business and human rights. The final issue is one that affects the whole realm of business and human rights, business often show their commitment to the Guiding Principles (or joining the Global Compact) only to wash off their reputation, to appear as sustainable and respectful on paper, but they continue with their abusive operations.

In conclusion, the Guiding Principles have many strong points, but equally many issues. I personally think that Mr Ruggie did an excellent job with what he had on his hands and he managed to build a consensus on a topic that ten years earlier had sparked a huge controversy and the vehement opposition of both business and Governments. Mr Ruggie showed over and over again his dedication to the project, going beyond his mandate multiple times, providing support and clarification, he tried to find solutions to the most thorny issues (like business operating in conflict zones), wrote a clear document, with a well-developed commentary and above all that produced an almost 100 pages long interpretative guide to the Guiding Principles[145]. He took the issues of gaps and loopholes very seriously, demonstrating a serious attitude, without risking falling into the naivety

[144] Ibid.
[145] The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.

that often surrounds debates on human rights. He truly proved to be an expert on business and human rights. The Guiding Principles are the first document of this kind and for this reason alone they represent a massive milestone in the debate of business and human rights. That, connected to the endorsement of the HRC, provides the basis for the future debate and the soon to be legally binding treaty on business and human rights. The underlining and constant weakness of the Guidelines is their soft language and its constant reminder of their voluntary nature. Business enterprise can decide what to do with the Guidelines, implementing a detrimental "pick-an-choose" approach that allows them to decide which principles to follow and which to ignore, providing, as already said, a good public image, while perpetuating human rights abuses. That said, the democratic aspect of the final result is also apparent on the constant coordination and debate among the different UN Agencies, levels, and bodies. I think it is fundamental that the debate did not start and stayed within the HRC because it would have otherwise attracted the suspicions and scepticism of many actors involved. It was a truly concerted achievement.

4. Working Group on the issue of human rights and transnational corporations and other business enterprises

Mr Ruggie's mandate terminated in 2011, but as he always likes to specify, it was not the end of the debate on business and human rights, but the end of the beginning; much more is to be achieved in the future[146].

For this reason, in 2011, after the end of Ruggie's mandate, and to ensure the accountability of both the Framework and the Guiding Principles[147], the Human Rights Council with Resolution 17/4 established the Working Group on the issue of human rights and transnational corporations and other business enterprises[148].

[146] Presentation of Report to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (30 May 2011).
[147] Bijlmakers, "Business and human rights governance and democratic legitimacy: the UN "Protect, Respect and Remedy" Framework and the Guiding Principles."
[148] Human Rights Council Resolution 17/4*, "Human rights and transnational corporations and other business enterprises,"* A/HRC/17/4 (6 July 2011).

The mandate of the Working group truly shows the commitment to the Guiding Principles and the rooted desire to improve them constantly and to achieve even more. As I already said, the UNGPs were never destined and conceived to remain a settled end.

The mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, composed of five independent experts, is to facilitate the dissemination and implementation of the Framework and the Guiding Principles, to collect, exchange, and promote good practices and lessons learned and to make recommendations. The WG must provide support for capacity-building and the insertion of the Guiding Principles into domestic legislation. The mandate of the Working Group includes conducting country visits, when invited, which was lacking in the mandate of Special Representative. Then, the Working Group will work to clarify and make recommendations regarding the remedial process and how to make it more accessible, with a specific focus on conflict areas. It will work in constant cooperation with relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations and, with the actors just mentioned, Governments and other relevant stakeholders, it will promote dialogue and discussions on relevant old and new themes. Among its duties is to guide work of the Forum on Business and Human Right and to report annually to the Human Rights Council and the General Assembly[149]. In 2017, the HRC through Resolution 35/7 extended the mandate of the Working Group for a period of three years and included the implementation of the Guiding Principles in light of the Agenda 2030for Sustainable Development[150].

Within the mandate of the Working Group, in 2018 it was launched a project on business in conflict and post-conflict contexts, with the aim of clarifying "the practical steps that States and business enterprises should take to implement the

[149] OHCHR, "Working Group on the issue of human rights and transnational corporations and other business enterprises," *United Nations Human Rights,* https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[150] Human Rights Council Resolution 35/7, "Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/HRC/35/7 (14 July 2017).

Guiding Principles in conflict and post-conflict contexts."[151] The reason behind the launch of the project was evident, as the SR had already documented in his Special Report, the worst human rights abuses happen in conflict zones, where the human rights regime is not working as it should. The project is trying to answer some key issues to better understand the practical measures that all actors should take to prevent and address business-related human rights abuse. The key issues are the following:

- What are or should be the home and host States' appropriate policies, regulation and adjudication to protect against corporate-related human rights abuses in conflict and post-conflict situations?
- What specific measures should business take in conflict and post-conflict situations and what do "enhanced" human rights due diligence look like in practice? How does/should the process to identify, prevent, mitigate and account for actual and potential impacts in conflict and post-conflict situations differ from "non-conflictual" contexts?
- What does responsible and sustainable investment in post-conflict and reconstruction contexts look like in practical terms? What actions should be taken (and avoided) by actors in the financial sector – both public financial institutions and private investors – to meet their responsibilities under the Guiding Principles, and to use their leverage to support outcomes that do not undermine human rights and sustainable peace?
- What is the role of business in transitional justice? What are the implications of the Guiding Principles in a transitional justice context?[152]

The findings of the Working Group will be presented to the GA in October 2020. As per tradition, the whole process is inclusive, transparent, and democratic. The project piloted with a series of expert consultations and multi-stakeholder discussion at the Forum in 2018. Further contributions are integrated through regional consultations, expert and multi-stakeholder consultations, consultations with governments, research, a questionnaire distributed to all governments, and open call for input. All interested parties can submit their information and materials; in order to produce an evidence-based guidance case studies and examples of good practices are extremely welcomed.

The outcome of all these inputs, consultations, and visits will be presented as recommendations in a report to be presented at the UNGA in October 2020 and

[151] OHCHR, "UN Working Group on Business and Human Rights – Project on business in conflict and post-conflict contexts".
[152] Ibid.

it will be one of the key elements of the 2020 Forum, which will be held in November 2020. The recommendations will be disseminated to the relevant actors in, first and foremost operating in the peacebuilding and conflict prevention area, then to governments, business and the investment community, civil society and international institutions as well. High expectations are surrounding the whole project and its future outcomes.

5. The UN Forum on business and human rights

The UN Forum on business and human rights was established by the Human Rights Council in 2011[153], following the adoption of the Guiding Principles. The Forum, chaired and guided by the Working Group, was created to offer a global platform where all relevant stakeholders could

> "discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices."[154]

Alongside are organized also regional events, such as the Asian, African and Latin America and the Caribbean regional forums, held respectively in 2016, 2014, and 2013, plus the 2019 and 2020 South Asia Forums[155].

The Forum takes place annually in Geneva (Palais des Nations) and on the course of three days more than 2000 participants from government, business, community groups and civil society, law firms, investor organisations, UN bodies, national human rights institutions, trade unions, academia and the media take part in panels debating the current issues surrounding the Guiding Principles and business and human rights challenges in general. So far there have been 8 sessions of the forum, each year the forum revolves around the main theme, all participants can submit their inputs on the topic and then debate during the Forum. In the end,

[153] Human Rights Council Resolution 17/4*, "Human rights and transnational corporations and other business enterprises."*
[154] OHCHR, "About the UN Forum on business and human rights," *United Nations Human Rights*, https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx.
[155] Ibid.

the Working Group prepares a report on the topic of the Forum, what was discussed and presents it to the UN General Assembly[156]. The topic for the next Forum on business and human rights (Fall 2020) has not been decided yet.

The Forum is a learning global platform, it has no duty in decision making, but it can work towards the clarification of existing issues or the discovery of new gaps. Therefore, while its work can be considered as soft and more of a background nature, it is important to recognize its efforts and progress. The Forum works as a place where every stakeholder can intervene, give their inputs, and bring forward new demands, so it appears clearly how important this context is for CSOs. It is a well-known fact that these are the rooms where the real networking takes place, where negotiations techniques are broadcasted at their finest, it would be silly and blind to undermine the importance of the Forum.

6. The Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

In 2014, at the twenty-sixth session of the Human Rights Council was adopted Resolution 26/9 on the "Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights". And so, it was established the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. The reason behind such decision was the acknowledgement of the international efforts carried out that far to regulate the behaviour of TNCs and the role of States. Resolution 26/ recognized the work of the Secretary-General, of his Special Representative John Ruggie, of, first the Human Rights Commission and then the Council towards a clarification of the issues and the achievement that are the Protect, Respect, Remedy Framework and its Guiding Principles[157]. The

[156] Ibid 2.
[157] General Assembly Resolution 26/9, *"Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,"* A/HRC/26/9 (14 July 2014).

resolution was adopted with 20 votes in favour, 14 against, and 13 abstentions[158], a close call, almost splitting in half the Council.

First Session

The IGWG mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. Resolution 26/9 indicated that the first two sessions were to be dedicated to the clarification of the content, scope, nature and form of the future international treaty. In the meantime, the Chairperson-Rapporteur had the task of drafting the treaty, in order to present it and proceed with the substantial negotiations starting from the third session[159].

The first session of the Working Group took place from 6 to 10 July 2015. It was opened by the Deputy High Commissioner for Human Rights, on behalf of the Secretary-General, Flavia Pansieri, who screened a video-message by the High Commissioner for Human Rights Zeid Ra'ad Al Hussein. Prince Zeid, in his message, pointed out the ever-evolving nature of international human rights law and the recent trend towards the recognition of third actors' responsibilities, their accountability and remedial mechanisms[160]. The HCHR continued explaining that the process of drafting a legally binding treaty was complementary to the Guiding Principles and should both be used to foster human rights protection and promotion in the business context.

The following opening statement was held by keynote speaker Victoria Tauli Corpuz, the UN Special Rapporteur on the Rights of Indigenous Peoples. The

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[158] *In favour:* Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam
Against: Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America
Abstaining: Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates.

[159] General Assembly, *"Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights"*.

[160] Zeid Ra'ad Al Hussein, (2015) *"Opening of the 1st Session of Open-ended Intergovernmental Working Group on Transnational Corporations,"* [video] available at: http://webtv.un.org/search/1st-meeting-1st-session-of-open-ended-intergovernmental-working-groupon-transnational-corporations/4339866849001?term=business&languages=&sort=date.

Special Rapporteur underlined the fundamental importance of a legally binding treaty in fixing the gaps and imbalances currently existing in the context of business and human rights, and how necessary is to face and resolve the lack of remedies for victims of corporate abuses, of which indigenous populations have been one of the most affected groups in the past decades. Ms Tauli Corpuz concluded with a very interesting and clever point, explaining that the Guiding Principles should be used as an interim platform to address the relationship between business and human rights, while the treaty is being drafted[161]. After the Opening Session, Ambassador María Fernanda Espinosa Garcés, Permanent Representative of Ecuador, was elected by acclamation as Chair-Rapporteur[162].

During the discussion on the adoption of the program of Work, the European Union requested the addition of the word "all" before "other business enterprises" in order to include also national and domestic enterprise, as they are usually exempt from human rights abuses, but after a long discussion, the proposal was rejected for lack of consensus, as the inclusion of domestic enterprises was outside the mandate set in resolution 26/9. Therefore, from now on when mentioning business enterprises is should be automatically assumed their transnational character[163].

After the adoption of the Program of Work the floor was opened for general statements and many delegations presented their statements, show-casting a wide range of different opinions regarding the treaty process, its existence and the possible outcome. The majority of the delegations, composed by States, IGOs, and NGOs, supported the drafting of the treaty. Their concerns focused on eradicating the inherent power disparities between business and human rights and the idea that everything can be bought, including absolution from human rights abuses. Many requested more effective and just remedial mechanisms, that ensured victims participation and protections. It was once again underlined how the treaty and the

[161] Victoria Tauli-Corpuz, "Opening remarks by the united nations special rapporteur on the rights of indigenous peoples, Ms. Victoria Tauli-Corpuz," *OHCHR*, July 6, 2015, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SR_STATEMENT_IWG.pdf.
[162] Human Rights Council Resolution 31/50, *"Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/31/50 (5 February 2016).
[163] Ibid.

Guiding Principles can be complementary, and how the treaty can fix the gaps of the UNGPs. NGOs wished for the enthusiastic participation of States in what could become a historic moment of reaffirmation of the interdependence and indivisibility of all human rights. The delegations that still expressed their opposition explained that the treaty was simply not necessary, it was a premature attempt and the Guiding Principles were enough.

The discussion was divided into eight panels, each focusing on an issue regarding the content, scope, and form of the future, as the mandate requested. The panels covered the following themes:

- Panel I: renew the commitment to the Guiding Principles on Business and Human Rights
- Panel II: Principles for an international legally binding instrument
- Panel III: concepts and legal nature in international law of TNCs
- Panel IV: Human rights to be covered under the instrument
- Panel V: Obligations of States, including extraterritorial obligation
- Panel VI: Enhancing the responsibility of TNCs
- Panel VII. What standard for corporate legal liability and for what conduct?
- Panel VIII: Building national and international mechanisms for access to remedy, including international judicial cooperation, with respect to human rights violations by TNCs, the OHCHR accountability and remedy project[164]

The debate was fruitful, and many good points were raised, the discussion was brought forward without many antagonisms or stalling attempts (unlike during the drafting process of the ATT). The general idea was that a legally binding treaty was necessary, as all entities yielding power should be somewhat regulated. The main point was the reaffirmation of the legal superiority of human rights, which are the top of the hierarchy. TNCs have gradually gained more influence over States and therefore it is necessary to develop an instrument that controls both, not leaving all the burden to the States. All States, both home and host, maintain the duty of

[164] Ibid 2.

implementing their domestic legislation on the matter and the future Treaty would reinforce what they have while filling the gaps. Specific mention was made on the importance of due diligence and necessity to make it a mandatory process. The debate moved on considering all the aspects of extraterritorial obligations for States. Regarding the obligations for business enterprises and their responsibility, the panel on the topic explained the need to move from the responsibility paradigms, which entail a voluntary basis, to the duty paradigms, where the obligations are binding. For this reason, the second pillar of the Guiding Principles can be used a starting point, but it needs to be further developed, filling its gaps. Moreover, there are already some instruments that are legally binding, such as the ILO Declaration on Fundamental Principles and Rights at Work, its Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29), and other ILO conventions and they request human rights due diligence from business. International law is an ever-evolving discipline and precedents are fundamental for its development, considering this aspect, human rights obligation for business enterprises are already in the picture, moreover, business enterprises are considering their human rights impact and effectively including their promotion through their operations. Achieving legal certainty is fundamental to avoid frivolous litigation and facilitate mutual assistance and cooperation among States. It is necessary to create a victim-centred approach, where those affected can explain how they are affected, by which actions, and which form they want their remedy to take. It is important to tackle barriers to access to justice and provide victims with all the necessary means. It was suggested the approach of complementarity between home and host State, so to grant access to justice in any case. Other suggested the creation of a monitoring body, on the blueprint of the human rights instruments, or the institution of an ad hoc court to deal with business enterprises' crimes.

The Chair-Rapporteur concluded the first session adjourning the debate on the content and scope of the Treaty to the second session. In the meantime, the Chair-Rapporteur held informal consultations with Governments, regional groups, intergovernmental organizations, United Nations mechanisms, civil society and other relevant stakeholders.

Second session

The second session of the Working Group was held from 24 to 28 October 2016. Ambassador María Fernanda Espinosa Garcés, Permanent Representative of Ecuador was re-elected Chair-Rapporteur by acclamation. After the opening Statement and the intervention of the keynote speaker, Professor Jeffrey Sachs, the delegations presented their general Statements. It was underlined the growing imbalance between the rise of influence of corporations and their little legal and social obligations they must respect. Business have the capacity to support and foster the implementation of human rights. The second session was divided into six panels, covering the following themes:

- Panel I: The social, economic and environmental impacts related to TNCs and their legal challenges
- Panel II: Primary obligations of States, including extraterritorial obligations
- Panel III: Obligations and responsibilities of TNCs
- Panel IV: Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument
- Panel V: Strengthening cooperation with regard to prevention, remedy and accountability and access to justice at the national and international levels
- Panel VI: Lessons learned and challenges to access to remedy (selected cases from different sectors and regions)[165]

The second session's panellist and delegations repeated many of the points already expressed during the first session, therefore approaching more and more a consolidated idea of what could be the scope and nature of the future treaty. That said, many new issues and themes were explored during the 2016 session, considering also the recent development of the international stage. Between the first and second session was adopted the 2030 Agenda on Sustainable Development and the new 17 Goals were now influencing almost every aspect of international life, having an especially important impact on business enterprises behaviour and their

[165] Human Rights Council Resolution 34/47, *"Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/34/47 (4 January 2017).

human rights and sustainable development commitments. It was underlined the necessity to clarify the obligations of both States and business enterprises. It was suggested to use the example of the work of the treaty bodies or the creation of an international ombudsman. Regarding the issue of jurisdiction, it was pointed out the international nature of human rights. It was requested to understand if providing civil or criminal liability, as administrative does not provide redress for victims. Moreover, it was suggested to use the Statute of Rome as the blueprint. TNCs are hard to define, but there are many other undefined issues, such as terrorism, that are regulated by international instruments, so it should be a stalling issue. It was presented the OHCHR accountability and remedy project[166].

Third Session

The third session of the Working Group was held from 23 to 27 October 2017. After the opening statements of the High Commissioner for Human Rights, the President of the HRC and Director of the Thematic Engagement, Special Procedures and Right to Development Division, the Permanent Representative of Ecuador, Guillaume Long, was elected by acclamation as Chair-Rapporteur.

After the first two sessions, during which was discussed the scope and form of the treaty, the debate moved onto the elements for the practical contents, structure and aims of the treaty, in order to finally prepare the draft treaty, to be discussed at the next session. Earlier that year was circulated a text titled "Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" which was used as a basis for the debate. Criticisms on this point were not lacking, as many delegations lamented the short time span, they had to revise and analyse the text before the session. The participants discussed during the different dedicated panels the following issues: General framework, Scope of application, General obligations Preventive measures, Legal liability, Access to justice, effective remedy and guarantees of non-

[166] Ibid.

repetition, Jurisdiction, International cooperation, Mechanisms for promotion, implementation and monitoring, General provisions[167].

The debate was not too harsh, there were obviously some disagreements, but it was an incredible improvement thinking back to the general reception that the Draft norms received. The most controversial points remained more or less the same as the previous sessions. The most salient discordances were about the apparent legal superiority of human rights, some delegations pointed out that not all human rights are internationally recognized and that it would be bad for trade and investment agreements. Connected to this point was the controversy regarding the inclusion of the notion of environmental rights and doubts on referring specifically to vulnerable categories (such as indigenous people) as it would result into an unfair and unbalanced treaty. Even though widely welcomed, it was asked the Chair-Rapporteur to clarify the sections on legal liability and jurisdiction, especially extraterritorial jurisdiction. Surprisingly, the request of the creation of an international court did not result in a ruckus, but a lot more work is needed in that direction since it was also suggested to institute an international ombudsman. At the end there was also a specific panel titled "Victims' voices" where was presented a victim-centred approach, trying to create a document where the victims themselves were at the centre of its drafting, exposing first-hand their experiences and necessities.

The Chair-Rapporteur concluded the session and adopted the final report, in which it stated the first Draft Treaty was going to be circulated at least four months before the fourth sessions of the Working Group[168].

Fourth Session

The fourth session of the Working Group was held from 15 to 19 October 2018. As the mandate established in resolution 26/9 provided the discussion moved on to the debate on the draft treaty. After the third session the Permanent Mission

[167] Human Rights Council Resolution 37/67, *"Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/37/67 (24 January 2018).
[168] Ibid.

of Ecuador, on behalf of the Chair-Rapporteur, prepared a zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, as well as a zero draft optional protocol to be annexed to the zero draft legally binding instrument[169]. After the statement from the United Nations Deputy High Commissioner for Human Rights, the Permanent Representative of Ecuador, Luis Gallegos, was elected Chair-Rapporteur by acclamation.

The draft is divided into three macro sections and 15 articles. Article 1 contains the Preamble[170]. The main body consisted of the following articles, after art. 13 were presented the procedural matters:

- Article 3. Scope
- Article 4. Definitions
- Article 5. Jurisdiction
- Article 6. Statute of limitations
- Article 7. Applicable law
- Article 8. Rights of Victims
- Article 9. Prevention
- Article 10. Legal Liability
- Article 11. Mutual Legal Assistance
- Article 12. International Cooperation
- Article 13. Consistency with International Law[171]

The additional protocol presents 20 articles aimed at the creation of a National Implementation Mechanisms to promote compliance with, monitor and implement the future legally binding instrument[172]. The debate moved forward, as usual, first the delegations expressed their general statements, then after the

[169] Human Rights Council, "Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights," *UN Human Rights Council,* https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.
[170] Zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.
[171] Ibid.
[172] Preamble of the Zero Draft.

presentation of the draft, the delegations stated their opinions on each article of the draft text. Much like the whole path so far, the process that brought to the draft text was extremely democratic, transparent, and inclusive. The Chair-Rapporteur relied heavily on what said during the first three sessions of the Working Group and listened carefully to the inputs of thousands of victims, held many bilateral and multilateral meetings and consulted experts of different backgrounds. The first draft is based on four pillars: prevention, victim's rights, international cooperation, and monitoring mechanisms.

The debate was structured into a first reading of the text, and then a debate on the single article or a cluster of articles covering similar items. The salient issues were mostly the same mentioned earlier. It was highly debated, multiple times, whether to expand the scope of the treaty also to domestic business[173], rather than only those with a transnational nature, as human rights violations are committed by all kinds of business enterprises and this absence would result into a legal vacuum. Since it was more than once underlined the importance how the whole treaty is based on States responsibility, that the State has the duty to protect, and so on, it does appear as peculiar choice to only include transnational corporations. The Chair-Rapporteur reassured that subsidiaries were included because TNCs had to be committed to the content of the treaty throughout their supply chains. It was once again requested more clarity in almost every article, but without being too limiting and strict, in order to provide a wide application, without being too vague. It was suggested the creation of a victim's fund so that to tackle one of the possible barriers of access to justice; the proposal was generally welcomed. Moving onto article 7, on due diligence, it was highly requested to specify human rights due diligence. Some delegations expressed their doubts on the topic and on the budgetary implications for both the State and the Company. It was highly suggested to include at least one mention to international humanitarian law, the draft treaty is silent on the specific issue and difficulties of business operating in conflict affected zones.

[173] See footnote 163.

Finally, as usual, it was questioned the impact of the treaty on State's sovereignty, especially regarding the issues of extraterritorial jurisdiction[174].

Overall, the Chair-Rapporteur managed to create a balanced text and satisfied many of the requests, but in my opinion, there was too much of departure from the Guiding Principles, which were supposed to work as a basis, and even if lacking in many points, provided a solid background. For sure, some of their provisions are missing and new legal gaps were created.

Fifth Session

The fifth session of the Working Group was held from14 to 18 October 2019. After the Opening statement by the Deputy Hugh Commissioner for Human Rights, the Permanent Representative of Ecuador, Emilio Rafael Izquierdo Miño, was elected Chair-Rapporteur by acclamation. After the presentation of the revised draft the floor was open for general statements. Delegations welcomed the new text, considering it a great improvement from the zero draft, and appreciated the efforts of the Chair-Rapporteur took to produce a new text based on all the suggestions and opinions received. That said, delegations recognized that there was still room for improvement and further clarification of some aspects and provisions. The new text was divided into a preamble and 22 articles. The article on jurisdiction was replaced with on "adjudicative jurisdiction" and the content of the old art. 15 on final provisions was divided into 9 specific articles[175].

Once again, the doubts were more or less the same as the previous sessions. It was asked more clarity in the language of the articles, especially regarding whether the treaty should cover all business enterprises or only those with a transnational nature. It was questioned the decision to refer to the core human rights treaty, as they have not been adopted by all States and it would result in different standards of application of the future treaty. A similar point was raised on criminal

[174] Human Rights Council Resolution 40/48, *"Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/40/48 (02 January 2019).
[175] Revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.

liability, as not all domestic legal system provided such liability. There was a long debate on the reasons behind the article on Victim's rights, with some opposing it and other vehemently supporting it. Connected to this and the concept of human rights due diligence, some delegations pointed out that the treaty was too strict on States and did not leave any room for them to decide its domestic implementation, which measures to adopt, and how to carry out its supporting activity towards business enterprises. It was generally considered too premature to even discuss articles 13-22 since they referred to the possible creation of a Treaty Body or Committee and the final provisions[176].

The revised draft brought forwards a concrete improvement and showed a serious commitment of the Chair-Rapporteur. The session closed and has been adjusted at, the latest, June 2020. If the trend of the debate keeps moving in this direction and the Chair-Rapporteur continues to consider the inputs of the participants, the newly revised draft will most likely be a strong text basis for serious negotiations[177].

Regarding my concerns on the zero draft, many have been solved. The preamble makes a clear reference to international human rights laws, international humanitarian law, and the Protect, Respect and Remedy Framework and its Guiding Principles. As per the focus of this thesis, the reference to humanitarian law is a good starting point, and, after all, the future treaty aims at regulating the behaviour of business enterprises regarding international human rights in general. I personally think that, due to the specific difficulties and challenges typical of operations within conflict affected zones and the risk of causing or contributing to adverse human rights impact, including violations of humanitarian law, the preferred outcome would be the drafting of an additional protocol on business enterprises in conflict affected zones, taking as an example the additional protocol to the Convention on

[176] Human Rights Council Resolution 43/55, *"Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/43/55 (09 January 2020).
[177] Carlos Lopez, "The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects," *International Institute for Sustainable Development*, October 2, 2019, https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez/.

the Rights of Child on the involvement of children in armed conflict. It is a long shot, and right now a general treaty is still being negotiated, so we are thinking of many years from now; in the meantime, effective human rights due diligence must be urged, States must effectively fulfil their protection obligations and support business enterprises in respecting human rights, with a close interest for sensitive situations, meaning both the specific needs of vulnerable groups and the issues of sensitive contexts.

7. Concluding Remarks

Business human rights obligations do not cover the practice of arms trade specifically. But arms trade is considered among the most sensitive field of business, as the extractive and fashion industries. The whole process just described, with the addition of also the OECD Guidelines on Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Business Conduct, published in 2019 (OECD Guidance), and the ILO Tripartite declaration of principles concerning multinational enterprises and social policy, proves the commitment of the international community to promote, protect, and respect human rights within the business sector.

The instruments described are of voluntary nature, but it is impossible to ignore the widespread impact they have. More and more business enterprises are adhering to them and the general mindset is shifting as well. To be considered a reputable and trustworthy business you must respect the obligations and play an active role in promoting human rights.

Here civil society organizations play a fundamental role. While the recent trend moved from the mere naming-and-shaming to knowing-and-showing, exposing the abuses and the lack of willingness to cooperate of business enterprises leads to global movements of investigations, boycotting, and to easier access to justice for the victims.

To conclude, all these instruments might not be binding so far, but, also thanks to the highly democratic process that led to their drafting, they are slowly

entering the realm of customary law. We are still living in a highly unjust world, where the balance of power regarding TNCs is inequitable, but thanks to the work of NGOs and organizations, people and governments are refraining from turning a blind eye when facing abuses of any kind perpetrated by TNCs.

CHAPTER III: CASE STUDY – RWM ITALIA S.P.A. AND THE YEMEN CONFLICT

1. The Yemen Conflict

When I interviewed Bonyan Jamal, the accountability specialist of the Yemenite NGO Mwatana for Human Rights, the person that followed the RWM complaint case against RWM Italia, the first thing she told me was that the Yemen Conflict is so complicated that not even them, working on the field, understand its developments.

The roots of the conflict date back to the season of the Arab Springs of 2011. At the time, following an uprising, the former authoritarian president, Ali Abdullah Saleh, was forced to hand over power to his deputy, Abdrabbuh Mansour Hadi. President Hadi found himself dealing with the political transition of one of the poorest countries of the Middle East and the result, rather than appeasing the tormented situation of the country, made it worse. President Hadi had to face many challenges, including militant attacks, corruption, food insecurity, and continuing loyalty of many military officers to Saleh. In 2014, taking advantage of the situation, the Shia Muslim Rebel Group, the Houthi, linked to Iran and with a history of actions against Sunni governments, seized control of northern Saada province and neighbouring areas. Due to the unstable situation, many Yemenites, even those belonging to the Sunni group, initially supported the rebels, hoping for a change. The rebels then conquered the capital, Sana'a, asking for lower gas prices and a change of governments. After the negotiations failed, they occupied the presidential palace and forced President Hadi to flee abroad[178].

Usually ignored due to its instability and widespread poverty, Yemen was still considered a strategic position due to its proximity to the oil shipments pass of the Red Sea, and soon began to be considered the battleground of a proxy war among foreign powers. The foreign involvement contributed to the exaltation of the civil war. It soon appeared to have become a bigger fight between Shia and Sunni

[178] BBC, "Yemen conflict explained in 400 words," *BBC*, June 13, 2018, https://www.bbc.com/news/world-middle-east-44466574.

Muslims. Soon after the seize of Sana'a, a coalition of Gulf States led by Saudi Arabia began a campaign of economic isolation and airstrikes against the Houthis, backed by US, UK, and France logistical and intelligence support[179].

President Hadi, after resigning in September 2015 returned to the city of Aden, in Yemen, and the fighting has not stopped since then. In 2016, the UN attempted to mediate peace talks between the Houthi rebels and the legitimate Yemenite government but failed. In the same year, the former president Saleh and the Houthi rebels in a joint statement announced the formation of a political council to control Sana'a and a big section of northern Yemen. Soon after, in 2017, President Saleh broke the alliance and called upon his forces to defeat the Houthi rebels. He failed and was killed within two days[180]. In November 2017 a ballistic missile was launched towards Riyadh and the Saudi government answered tightening the blockade of Yemen. The reason was to stop the smuggling of weapons from Iran to the rebel groups, the accusation that was rejected by the Teheran government. The result of the tightening of the blockade was a substantial increase in the prices of food and fuel, helping to push more people into food insecurity[181].

In 2018, the Arab Coalition tried to unblock the situation and launched a major offensive on the harbour city of Hudaydah, which overlooks the Red Sea. Hudaydah constitutes the principal lifeline for almost two-thirds of Yemen's population; the UN warned that the eventual destruction of the harbour would result in the breaking point of the famine, from which it would have been impossible to recover. In December 2018, after six months of fighting for the city of Hudaydah, the two parts agreed on a ceasefire in the Stockholm Agreement[182]. The Stockholm Agreement requires the redeployment of the forces from Hudaydah, the

[179] Steven A. Cook and Philip H. Gordon, "War in Yemen," *Global Conflict Tracker*, last updated March 20, 2020, https://www.cfr.org/interactive/global-conflict-tracker/conflict/war-yemen.
[180] Ibid.
[181] BBC, "Yemen crisis: Why is there a war?," *BBC*, February 10, 2020, https://www.bbc.com/news/world-middle-east-29319423.
[182] Haydee Dijkstal, "Yemen and the Stockholm Agreement: Background, Context, and the Significance of the Agreement," *American Society of International Law* 23, no. 5 (2019).

establishment of a prisoner exchange mechanism, and fixing the situation of the city of Taiz.

In August 2019, in the southern region of Yemen, fights broke out between the Saudi-backed government forces and an ostensibly allied southern separatist movement supported by the United Arab Emirates, the Southern Transitional Council (STC). The STC forces accused president Hadi of mismanagement and connections with the Islamists, they then seized control over Aden and refused to allow the return of the cabinet until Saudi Arabia intervened and proposed a power-sharing deal in November. Tensions rose again in January 2020 between the Houthis and coalition-led forces with a resurgence of fighting on several front lines, missile strikes and air raids.

Worsening the situation, the two terrorist groups of Al-Qaeda in the Arabian Peninsula (AQAP) and the Islamic State (IS) are fighting their own proxy war against each other, thanks to the current instability of the country. They are

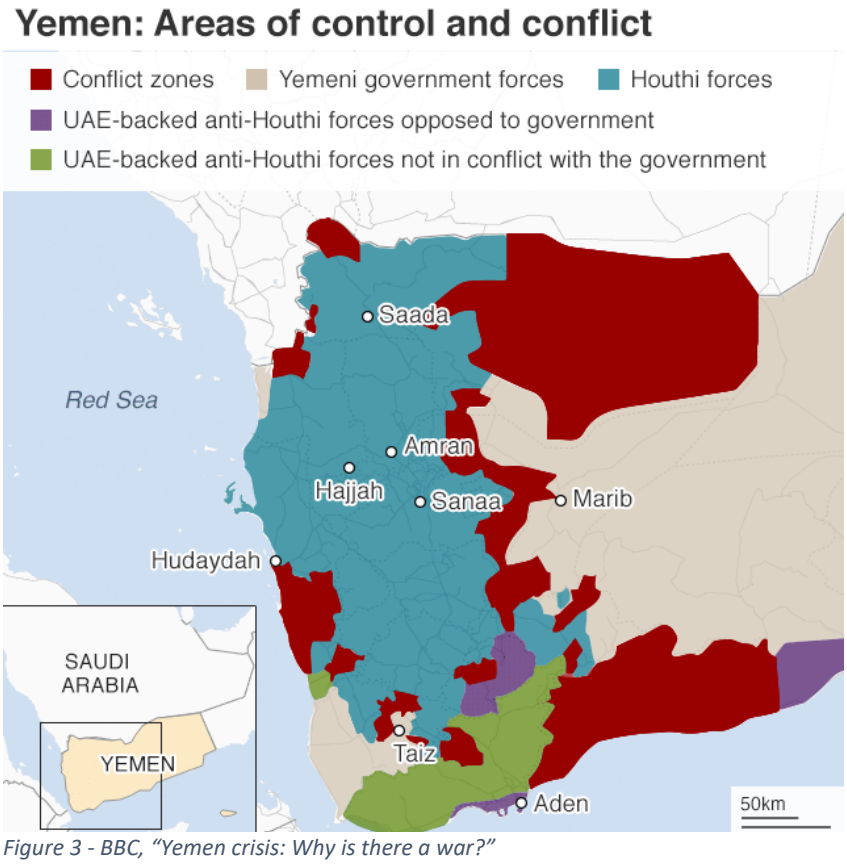

Figure 3 - BBC, "Yemen crisis: Why is there a war?"

currently fighting in the Southern region of Yemen and carrying out deadly attacks, mostly in the city of Aden.

2. The humanitarian cost

Yemen is considered the world's worst ongoing humanitarian crisis. All parties to the conflict have indiscriminately killed and injured thousands of Yemeni civilians. According to the Yemen Data Project, almost 18.500 civilians have been killed or injured since 2015[183]. In total, more than 100.000 reported killings have been registered so far. The majority of the casualties are caused by indiscriminate airstrikes. The data provided by The Armed Conflict Location & Event Data Project show that 67% of the air raids have been carried out by the Saudi coalition, for a total of around 20,500 raids (an average of 12 per day)[184]. This makes the Arab Coalition the most lethal towards civilians. The Coalition has been violating humanitarian law since the beginning of the conflict, targeting civilians, hospitals, school buses, markets, mosques, farms, bridges, factories, and detention centres[185]. The most dangerous zones for civilians are the governorates of Hodeidah, Taiz, and Sadah, more than 75% of the casualties in these governorates have been caused by airstrikes.

In addition to the unlawful airstrikes' casualties, thousands of civilians have died from preventable causes, including malnutrition, disease and poor health. According to the UN, 80% of the population (24 million people) are in need of humanitarian assistance. The UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that more than 20 million people are experiencing food insecurity and 10 million are at risk of famine[186]. Between 2015 and 2018 85.000 children have died of malnutrition and 2 million children are acutely malnourished.

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[183] Iona Craig, Yemen Data Project, https://www.yemendataproject.org/ (Accessed March 05, 2020).
[184] Matthias Sulz, "Yemen Snapshots: 2015-2019*," The Armed Conflict Location & Event Data Project*, 2019, https://acleddata.com/2019/06/18/yemen-snapshots-2015-2019/ / (Accessed March 05, 2020).
[185] Human Rights Watch, *World Report 2020 – Events of 2019*, (New York: Seven Stories Press, 2020).
[186] Dijkstal, "Yemen and the Stockholm Agreement: Background, Context, and the Significance of the Agreement."

In 2016 started a massive cholera outbreak, that still lasts (2.2 million suspected cases), which has killed 3886 people and brought the Yemenite health system to its collapse, with only half of the country medical facilities fully functioning[187]. The number of displaced people gravitates around 3.65 million.

The conflict in Yemen can highly influence and exacerbate regional tensions. As said earlier, it has become the battleground of the Shia-Sunni conflict and it is highly contended between the terrorist groups of AQAP and IS. The humanitarian crisis has long passed its tipping point and recovery for the Yemenite society appears out of the picture, at least for the short-medium term. The conflict has worsened the economic crisis, which though a vicious cycle worsens the humanitarian crisis. Families for a long time have no form of a steady income and have not received their salary in years. Civilians suffer from a lack of basic services, a spiralling economic crisis, abusive local security forces, and broken governance, health, education, and judicial systems[188]. Civilians are exhausted and when possible denounce the violations, claiming that all parties consider themselves above the law and continue with the killings.

3. The impact of the arms trade on the conflict

The continuous flow of weapons towards Yemen has been constantly worsening the humanitarian crisis. Both sides are responsible, the Arab Coalition, as I have written above, carries out unlawful and indiscriminate airstrikes towards civilians, while the Houthis have been reported to shell civilian areas and use imprecise weapons. Since the start of the conflict in 2015, the amount of sales towards the Saudi Coalition has reached more than US$18 billion[189]. Many campaigns have been carried out to stop the flow of weapons towards Yemen and many countries have adhered. But at the same time, some of the major arms exporters, including the US, UK, and France, continue to provide the Arab Coalition with weapons. The ATT forbids the transfer of weapons to

[187] BBC, "Yemen crisis: Why is there a war?".
[188] Human Rights Watch, *World Report 2020.*
[189] Amnesty International, "Arms Control," *Amnesty International*, https://www.amnesty.org/en/what-we-do/arms-control/.

countries/context where those weapons will be used to commit human rights and humanitarian law violations, but it has not been effective. Considering also that for example, the United States is not State Party to the ATT and therefore not bound by it. As I showed in the first chapter, the first major arms exporter is the US and the first major arms importer is Saudi Arabia. It is undeniable that the US is a key supplier for the Arab Coalition, but European countries also provide substantial military support to the Arab Coalition. The UK, Germany, Spain, France and Italy together make up the biggest share of arms delivered from Europe to Saudi Arabia, the UAE and Egypt[190].

What I have just mentioned refers only to the licit trade of arms. Clearly, the illicit transfer of arms and its trade with third actors poses a serious challenge to the respect of human rights and humanitarian law. For example, it has been recorded that European weapons are being used also by the terrorist group of AQAP. But the situation is not that simple and clear cut. End-user agreements are not being respected and many weapons sold to the Saudi coalition are then transferred to other groups without the seller knowledge[191].

In 2015, the UN Security Council through Resolution 2216 imposed a full arms embargo against the Houthi Rebel group and demanded all parties to cooperate and prevent from taking actions that could affect the UN-facilitated political transition. The Resolution called for the Houthis to immediately and unconditionally end violence, withdraw forces from areas they have seized, relinquish all arms, cease activities undermining the authority of the country's legitimate Government, refrain from provocation against neighbouring States, release the Defence Minister, and end the recruitment of children. The Resolution also asked for the cooperation of all Member States to prevent direct or indirect supply, sale or transfers that would benefit Mr Saleh and his collaborators[192].

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[190] Mwatana for Human Rights, "Made in Europe, Bombed in Yemen (Case Report) How the ICC could tackle the responsibility of arms exporters and government officials," Mwatana for Human Rights, December 12, 2019, https://mwatana.org/en/made-in-europe-bombed-in-yemen-case-report/.

[191] Deutsche Welle, (2018), "Yemen and the global arms trade | DW Documentary (Arms documentary)" [video], https://www.youtube.com/watch?v=tkUv2R97I-Y.

[192] Stockholm International Peace Research Institute, "Yemen (NGF)," SIPRI, April 14, 2015, https://www.sipri.org/databases/embargoes/un_arms_embargoes/yemen/yemen.

While the arms embargo against the Houthis is a step in the right direction, it is simply not enough. First of all, Iran has already violated the embargo, the UN Panel on the topic explained that there are no proofs that Iran provided the Houthis with the weapons, but nevertheless Iran did not prevent efficiently the weapons from entering Yemen[193]. Moreover, the arms embargo should cover all of Yemen and should be against all parties of the conflict. As the United Nations Group of Eminent Experts on Yemen (GEE) concluded, all parties might be responsible for war crimes[194]. The report of the GEE confirmed that all the parties, the Saudi Arabia-led coalition and allied forces, Houthi and Yemeni government-aligned forces, have a complete disregard for civilians' life. The Yemen war is considered a civil war, but the interests and well-being of civilians is not a matter of interest for any of the parties. What is happening in Yemen is a bigger scale war on conflicting interests between Middle East countries, with the contribution of western powers. The unlawful airstrikes, through a long stretch, might be considered a war casualty, but the prevention of access to humanitarian aid, the complete disregard for human rights, humanitarian law, including arbitrary detention, enforced disappearances, child recruitment, and UN directives proves those suffering the most are also those not directly involved with the reasons behind the conflict, the civilian population.

4. Case Study – RWM Italia S.p.A.

The event

On the night of 8 October 2016 an airstrike, allegedly carried out by the Arab Coalition led by Saudi Arabia hit a civilian home in the village of Deir Al-Hajari, in the Al Hudaydah governorate, in north-west Yemen. The victims of the airstrike were a civilian family of six, which included the pregnant mother and four

[193] Rick Gladstone, "Iran Violated Yemen Arms Embargo, U.N. Experts Say," *New York Times*, January 12, 2018, https://www.nytimes.com/2018/01/12/world/middleeast/iran-yemen-saudi-arabia-arms-embargo-un.html.
[194] Amnesty International, "Yemen: Scathing UN report underscores need for arms embargo, tougher scrutiny," *Amnesty International*, August 28, 2018, https://www.amnesty.org/en/latest/news/2018/08/yemen-scathing-un-report-underscores-need-for-arms-embargo-tougher-scrutiny/.

children. The incident has been well documented by the field monitor of the NGO Mwatana, who inspected the scene the following day. The airstrike had no identifiable military reason, it targeted civilians, adding the element of nocturnal surprise[195].

The bomb remnants found on the airstrike scene fitted to a bomb belonging to the MK80-family of guided bombs. Among the remnants was also found the suspension lug, necessary to attach the bomb to the plane. The lug presented a serial mark that leads back to the manufacturer, RWM Italia S.p.A., an Italian subsidiary

Figure 4 – Remnants found at the site of the air strike on 8 October 2016 in Deir Al-Ḥajārī, Yemen. Photo: Mwatana

of German Rheinmetall AG. No evidence on the scene points to the fact that the targeted civilians were collateral damage since the bomb found was guided and the closest military target, a military checkpoint, was more than 300 meters away and had never been targeted before and has never been targeted after the events of October 2016[196].

Moreover, as I showed earlier, the Saudi Coalition has been carrying out unlawful and indiscriminate airstrikes for the whole duration of the conflict, purposely hitting civilians.

[195] European Center for Constitutional and Human Rights, "European Responsibility for War Crimes in Yemen – Complicity of Italian Subsidiary of German Arms Manufacturer and of Italian arms Export Authority," *ECCHR*, April 2018, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_Yemen_Italy_Arms_ECCHR_Mwatana_ReteDisarmo_20180418.pdf.
[196] Ibid.

The legal intervention against RWM Italia S.p.A. and UAMA officials

Due to the severity of the case and the continuous involvement of European and Italian firms in the arms transfer towards the Saudi Coalition, on 17 April 2018, a group on NGO[197] filed a criminal complaint against the managers of RWM Italia S.p.A. and senior officials of Italy's National Authority for the Export of Armament (UAMA) to the public prosecutor in Rome.

The *Unità per le autorizzazioni dei materiali di armamento – UAMA* is Italy's National Authority for the Export of Armament, it has been established in 2012 to ensure the application of Italian legislation, integrated with European and international legislation on the matter of armament export. Firms must contact the National Authority in order to obtain the licences to trade weaponry. UAMA must carefully examine, on a case by case basis, all requests and only after checking their compliance with Italian, European and international normative can grant them the permit. The type of licences varies according to the type of trade, the other actors involved and the end-users[198]. The director of UAMA is Minister Alberto Cutillo[199].

RWM Italia S.p.A. is the Italian subsidiary of the German group Rheinmetall Defence. The company incorporated the activities and production lines of the Defence branch of the historic company S.E.I. Società Esplosivi Industriali S.p.A., founded in 1933[200]. RWM Italia's principal activities are the development and manufacturing of countermining systems, medium to large calibre ammunition and warheads[201]. RWM Italia is headquartered in Ghedi (BS) in northern Italy and

[197] ECCHR, Mwatana, and Rete Italiana per Il Disarmo in cooperation with Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L.), "Una coalizione internazionale di Organizzazioni Non Governative sporge denuncia penale contro RWM Italia S.p.a, filiale italiana del produttore di armamenti tedesco Rheinmetall AG, e contro l'Autorità Nazionale per le autorizzazioni all'esportazione di armamenti (UAMA)", ECCHR, April 18, 2018, https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/ITA_final_CS_Yemen_apr2018.pdf.
[198] Ministero Affari Esteri e Cooperazione Internazionale, "Autorità nazionale - UAMA (Unità per le autorizzazioni dei materiali di armamento)," *Esteri*, https://www.esteri.it/mae/it/ministero/struttura/uama.
[199] Ministero Affari Esteri e Cooperazione Internazionale, "Struttura," *Esteri*, https://www.esteri.it/mae/it/ministero/struttura/uama/struttura.html.
[200] Federazione Aziende Italiane per l'Aerospazio, la Difesa e la Sicurezza, "Aziende Federate: RWM ITALIA S.p.A.," *AIAD*, http://www.aiad.it/it/scheda_azienda.wp;jsessionid=E15C4830F14DC91A9AB96280ACBFA647?contentId=SCH15554.
[201] Rheinmetall Defence, "RWM Italia S.p.A.," *Rheinmetall Defence*, https://www.rheinmetall-defence.com/en/rheinmetall_defence/company/divisions_and_subsidiaries/rwm_italia/index.php.

has a production plant in Sardinia at Domusnovas (SU). The president is Klaus Werner Krämer and the managing director is Fabio Sgarzi.

I interviewed Francesco Vignarca, director of Rete Italiana per il Disarmo, and he explained that UAMA granted RWM Italia the licence to trade with Saudi Arabia long before the start of the Yemen conflict. The licence allows RMW Italia to trade with Saudi Arabia, it does not oblige the firm to do so, and it is a responsibility of also the firm to decide whether to continue or not with the trade. Italian law and the ATT (of which Italy is State Party) state that in the case of a development in the context of the end-user the control over the license must be updated and only afterwards the licence can eventually be granted again. This did not happen. Even after the involvement of Saudi Arabia in the Yemen conflict, Italy did not check its licences. RWM Italia continued to trade in weaponry with Saudi Arabia. Soon enough organizations started to report of the human rights and humanitarian law violations perpetrated by the Saudi led coalition. RWM Italia continued to trade with Saudi Arabia. After the involvement of civil society, long campaigns at the national, European, and international level, and the media interest raised towards the case I am presenting, in 2018 the Italian government revoked the licences of RWM Italia to trade with Riyadh[202].

The complaint filed by the three NGOs (ECCHR, Mwatana, Rete Disarmo) requests the Italian prosecutor to investigate the alleged criminal liability of the managers and officials of RWM Italia and UAMA for the export of the deadly weapons used in the strike of Deir Al-Hajari, to Saudi Arabia or another member State of the Arab Coalition[203]. The alleged criminal liability of the managers and officials is their complicity through gross negligence in murder and personal injury under articles 589, 590, together with 61 n. 3 of the Italian Criminal Code. They could also be liable for intentional complicity in murder and injury under articles 110, 575, and 582 of the Italian Criminal Code. The complaint also requests the

[202] ANSA, "Nel 2018 nessuna bomba da Italia a Riad," *ANSA*, April 11, 2019 http://www.ansa.it/sardegna/notizie/2019/04/11/nel-2018-nessuna-bomba-da-italia-a-riad_6e9091bd-fbb1-4db8-ba39-2cb4262ef086.html.
[203] ECCHR, "European Responsibility for War Crimes in Yemen – Complicity of Italian Subsidiary of German Arms Manufacturer and of Italian arms Export Authority".

investigation into the alleged abuse of power by UAMA officials under article 323 (2) of the Italian Criminal Code[204].

In October 2019 the Italian public prosecutor of Rome decided to request a dismissal of the case. The group of NGOs appealed this decision. On April 14, 2020, is supposed to take place the audit in which the judge will rule whether the prosecutor of Rome must continue with the investigation or if the case will be completely closed and dismissed[205].

Further developments

On December 11th, 2019 a group of NGOs[206] submitted to the Office of the Prosecutor (OTP) of the International Criminal Court a communication on the situation in Yemen and the role of European companies as well as governments[207]. The communication is a 300 pages document reporting on 26 different airstrikes that led to the violation of humanitarian law, targeting residential buildings, schools, hospitals, a museum and world heritage sites, which constitute war crimes according to the Rome Statute. The communication focuses on different European companies[208], including Rheinmetall AG and its Italian subsidiary RWM Italia. It has been proved by many reliable sources that European countries are actively contributing to the perpetuation of the aerial warfare that has been taking place in Yemen since the beginning of the conflict.

[204] Ibid.
[205] At the time of writing (spring 2020) Italy is facing a complete lockdown due to the Coronavirus health emergency, so the audit might be postponed.
[206] European Center for Constitutional and Human Rights (ECCHR) along with its partner organisations Mwatana for Human Rights from Yemen, the International Secretariat of Amnesty International, the Campaign Against Arms Trade (CAAT) based in the United Kingdom, Centre d'Estudis per la Pau J.M. Delàs (Centre Delàs) from Spain and Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L.) from Italy.
[207] Mwatana for Human Rights, "Made in Europe, Bombed in Yemen (Case Report)
How the ICC could tackle the responsibility of arms exporters and government officials".
[208] Airbus Defence and Space S.A.(Spain), Airbus Defence and Space GmbH (Germany), BAE Systems Plc. (UK), Dassault Aviation S.A. (France), Leonardo S.p.A. (Italy), MBDA UK Ldt. (UK), MBDA France S.A.S. (France), Raytheon Systems Ltd. (UK), and Thales France.

5. Legal analysis

The sale of arms by Italy to the Arab Coalition and possession of arms by the latter do not constitute a breach of international law, of the Geneva Conventions, or the ICC Statute. The use of those arms by Saudi Arabia, on the other hand, constituted a breach of all the instruments just mentioned. RWM Italia provided Saudi Arabia with the means to commit war crimes.

Italian law

Italian law is a different story. Italian law n.185/1990, which regulates arms trade, states in article 1(5):

> The export and transit of armaments materials, as well as the transfer of the relative production licences, are prohibited when they are in conflict with the Constitution, with Italy's international commitments and […] as well as when adequate guarantees on the final destination of the materials are lacking[209].

And in article 1(6):

> The export and transit of military equipment shall also be prohibited: a) to countries in a state of armed conflict, in contrast with the principles of Article 51 of the Charter of the United Nations, […] b) to countries whose policy is in conflict with the principles of Article 11 of the Constitution; c) towards countries in respect of which the total or partial embargo of war supplies has been declared by the United Nations; d) towards countries whose governments are responsible for ascertained violations of international conventions on human rights; […][210].

The trade permitted by UAMA and carried out by RWM Italia violates Italian law, but under the very same does not constitute a war crime. Italy has yet to incorporate the Rome Statute into its national legislation. That is why in the case brought forward to the public prosecutor in Rome the alleged liability is complicity through gross negligence in murder and personal injury, intentional complicity in murder and injury, and alleged abuse of power[211].

[209] Translation of Legge 9 luglio 1990 n.185 "Nuove norme sul controllo dell'esportazione, importazione e transito dei materiali di armamento (1) (2) (3)".
[210] Ibid.
[211] See footnote 204.

Regarding corporate liability, under Italian domestic law, it is admitted administrative vicarious liability for corporate entities for crimes committed by their employees for a restricted number of cases[212]. No mentions of violations of international humanitarian law or human rights.

International obligations

Beside domestic law, other international obligations were violated in this case. Italian national law is stricter than international law, as it forbids trade with countries participating in an armed conflict. The Arms Trade Treaty, of which Italy is among the first State Parties, in article 6(3) forbids any transfer

> "if it [the State] has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."[213]

As explained earlier, the licences to trade arms with Saudi Arabia were emitted before the conflict and the subsequent creation of the Saudi led Coalition. At the time, UAMA officials were not violating the ATT. Afterwards, due to the change in the context of the importer country they should have done another inquiry and based on the findings decide whether to continue or not granting the licences. It is virtually impossible that Italy was not aware of the war crimes perpetrated by the Saudi coalition, its diplomatic offices must have made the Italian MFA aware of the situation. Italy has many partnerships in the Middle East and to protect its interests it was for sure informed of the situation.

The annual reports to the ATT, show that Italy has been consistently selling weapons to members of the Coalition up to 2018 (the 2019 annual report has yet to be submitted).

As per the business and human rights obligations, the situation is more complicated. As I explained in the previous chapters they tend to be of a voluntary

[212] Decreto legislativo 8 giugno 2001, n. 231 "Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300".
[213] Art. 6(3) of the Arms Trade Treaty.

nature. For example, neither RWM Italia nor Rheinmetall are part of the Global Compact. The Rheinmetall group decide to go with their own Corporate Social Responsibility initiative. In their Corporate Responsibility Report of 2017, they indeed recognized the sensitivity of their field of work and proceeded to explain how they avoid having relationships with potentially dangerous partners. Clearly, they must have repeatedly missed the human rights and humanitarian law violations systematically perpetrated by the Arab Coalition. It appears to be an example of those corporations that use their social commitment as a public façade and then continue their illicit operations.

These preconditions do not suggest that an eventual adherence of Rheinmetall or RWM Italia to the UN Guiding Principle would have had a better impact. Nonetheless, the UNGPs are able to capture every aspect and fallacy of this case. The Italian State did not fulfil its obligation to protect, UAMA allowed the trade to members of the Arab Coalition, even though there were reports of their abuses. Similarly, RWM did not follow the obligation of the second paradigm, the obligation of business enterprises to respect human rights. A human rights due diligence process, in this case, might have influenced the situation for the better. As explained earlier, the grant of licences to trade does not result in an obligation, RWM Italia could have and should have stopped any commercial relationship with Saudi Arabia. As for the third pillar, to provide a remedy, from the beginning it was considered the hardest to achieve in general, and this case is confirming this idea. Access to remedial mechanisms does not seem to be granted. RWM Italia and UAMA refuse to acknowledge their responsibilities and the justice system is failing so far. Everything now depends on the decision of the OTP of the ICC.

The only binding instrument would be the Treaty on business and human rights, but it still being discussed, and its draft is usually updated before every meeting. What would be the best instrument to deal with RWM Italia as a business enterprise guilty of having contributed to a humanitarian law violation is not yet in place.

Corporate complicity

RWM Italia violated national law. But the point here is that it violated international law, humanitarian law and human rights obligations. The nature of corporate involvement in the execution of war crimes is usually indirect. The company participates indirectly providing support for the direct prosecutor of the crime. The best tools to use under international law to trial corporations are the concepts of complicity or aiding and abetting the crimes.

The International Tribunals slightly vary on their threshold for complicity. According to the ICTY, ICTR and SCSL aiding and abetting are considered as modes of criminal participation. To determine whether the behaviour of an arms-producing corporation contributed to the execution of the crime or provided the means for the commission of the crime is necessary to assess the conduct (*actus reus*) and the mental element (*mens rea*)[214].

Regarding the *actus reus*, the International Tribunals stated that aiding and abetting has to result in acts directed to assist, encourage or lend moral support to the perpetuation of a crime. The aid must have a substantial effect on the commission of the crimes, it must influence the situation so much that without the aiding and abetting the crime would have not been perpetuated[215].

Thanks to the hard evidence collected on the scene of the crime, it is plausible to assume that RWM heavily contributed to the commission of the crime, providing the means of carrying it out. The remnants of the bombs produced by RWM Italia were found on the scene and if the RWM Italia had stopped selling those weapons to Saudi Arabia the specific airstrike of October 2016 might have been harder to execute.

As for the *mens rea*, the aider and abettor must know that they are aiding or abetting the commission of the crime. It is not necessary that they know what the exact crime will be, they just need to know that their contribution will most likely result into the commission of a war crime (in this specific case). A knowledge

[214] Schliemann and Bryk, "Arms trade and corporate responsibility".
[215] Ibid.

standard is sufficient to provide the *mens rea*. The fact that there is knowledge of the consequences, according to the ad hoc Tribunals, results in *mens rea*. The fact that the topic is widely covered by media suffices to knowledge.

It is undoubted that RWM Italia knew that its weapons were used to commit war crimes. Even though it has widely been pointed out that especially western media did not cover the Yemen Conflict adequately, the Saudi involvement in the conflict was a known fact. NGOs and human rights organizations have raised awareness since the very beginning of the conflict and have been trying to contact all the actors involved, including business enterprises, to make them aware of their contribution to the humanitarian and human rights violations. As I explained earlier, RWM Italia is a subsidiary of the German Rheinmetall. Two other subsidiaries of the German group are located in the capital of the Kingdom of Saudi Arabia, Riyadh, Rheinmetall Arabia Simulation and Training LLC and Rheinmetall International Defence and Security LLC. For the sake of knowledge, Rheinmetall has subsidiaries also in Qatar and the United Arab Emirates, which are both parts of the Arab Coalition. When carrying out risk assessments procedures or due diligence, members of every level of the supply chain must have been informed of the peculiar situation of Saudi Arabia and its involvement in the conflict. Moreover, subsidiaries must produce annual reports, where they explain the situation of their host country, therefore it plausible that the Riyadh subsidiary has sent an update to the mother company on the general tensions of the Middle East and in particular the Yemen Conflict. Also, as of lately, NGOs and organizations have started to participate in the shareholders meeting of companies and raising questions. Mr Vignarca told me that together with Rete Disarmo they bought some shares out of Rheinmetall and participated to the shareholders meeting and face to face with the CEO presented the situation of the Yemen Conflict, the involvement of RWM Italia in the airstrike and asked Rheinmetall their stance on the matter. The managers refused to answer, but they first-hand heard of the situation.

On the other hand, the ICC Statute presents a stricter interpretation of the knowledge standards required for *mens res*. Art. 25 states that a (natural) person to be held criminally accountable must have perpetrated the act “for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its

commission or its attempted commission, including providing the means for its commission"[216]. Art. 25 has yet to be interpreted regarding the commission of a war crime[217]. Therefore, a strict interpretation of art. 25 would mean that the complicit actor possesses the direct intent to facilitate the commission of a crime. According to the ad hoc tribunals, the complicit actor just needs to know that their action will most likely result into crime but does not necessarily want it to happen, it might just be thinking about making profits. This interpretation would result in the exemption from liability of actors that heavily contribute to the commission of crimes and would ignore the factual reality of human rights and humanitarian law violations. The Rome Statute should incorporate the jurisprudence of the ad hoc tribunals, in order to actually carry forward its mission.

A similar argument must be at the basis of a future amendment of the Rome Statute, in order to include legal persons into its jurisdiction. Doing so would result into the ICC being in sync with the reality of human rights and humanitarian law violations and would allow the prosecution of all the actors involved, without allowing them to hide behind impunity and strict interpretations of international law.

6. Prosecuting individuals

Traditionally international criminal law focused on the prosecution of individuals. Therefore, this case could be read also in this light. But rather than just focusing on corporations or just focusing on the natural persons, I think that a combined liability is the best outcome. Prosecuting the corporation as the structure making the crime possible and the employees involved, so that they cannot hide behind the legal personality of their mother company and are held accountable for their actions.

[216] Statue of the ICC.
[217] In the case *The Prosecutor v. Jean-Pierre Bemba Gombo*, when interpreting art. 25, the lower knowledge standards of the ad hoc tribunal were rejected, but the case referred to an offence against the administration of justice.

The Van Anraat and Kouwenhoven cases

Regarding the prosecution of the arms exporter, international criminal law provides already two precedents.

Frans Van Anraat is a Dutch businessman; he was charged by the District Court of The Hague in The Netherlands with complicity in war crimes and genocide for providing the Saddam Hussein's regime with chemical supplies used in attacks against the Kurdish population 1988 and against the Iranian town of Sardasht in 1987 and 1988[218]. In the end, in 2005 he was found guilty of complicity in war crimes and acquitted of the charge of complicity to genocide due to the lack of evidence of his knowledge of the genocidal intent of the Regime[219]. In 2007, the Appeals Court increased the sentence to 17 years holding that he was motivated by greed and repeatedly sold chemicals knowing they were being turned into mustard gas[220]. Due to the length of the process, his sentence was shortened of 6 months in 2006.

Guus Kouwenhoven is a Dutch businessman; in 2017 he was sentenced by the Court of Appeals in Den Bosh, The Netherlands for complicity in war crimes perpetrated in Liberia and Guinea and arms trafficking[221]. At the time of the Second Civil War in Liberia (1999-2003) he was the Director of Operations of the Oriental Timber Company (OTC) and of the Royal Timber Company (RTC) in Liberia. He was especially close with the Liberian President Charles Taylor and facilitated the import of arms, infringing resolutions of the UN Security Council. Those weapons were then used by Taylor to terrorize the civilian population. He was first arrested in 2005, but the final sentence was reached in 2018. He was condemned to 19 years of imprisonment for aiding and abetting war crimes and arms trafficking. In the meantime, he had fled to South Africa and his extradition keeps on getting postponed for medical reasons.

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[218] Trial international, "Frans Van Anraat," *Trial International*, May 2, 2016, https://trialinternational.org/latest-post/frans-van-anraat/.
[219] International Crimes Database, "Public Prosecutor v. Frans Cornelis Adrianus van Anraat", *ICD*, http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/.
[220] Trial International, "Frans Van Anraat".
[221] International Crimes Database, "The Public Prosecutor v. Guus Kouwenhoven," *ICD*, http://www.internationalcrimesdatabase.org/Case/2239 (Accessed on March 8, 2020).

What does it mean for the RWM Italia case?

The two cases slightly differ from the one analysed in this thesis, but they still provide interesting insights and examples. In the Kouwenhoven case, the Court did not find that Mr Kouwenhoven was part of a common plan to commit war crimes or that the weapons he provided would have been used to commit such crimes. But considering his involvement and active participation he "must have been aware" that "in the ordinary course of events" those weapons and ammunition *would* be used[222]. Moreover, it was proved his close relationship with Taylor. The court stated that Mr Kouwenhoven might not have had any intent to participate in the commission of war crime, but by providing the means he "knowingly exposed himself to the substantial chance that the weapons and ammunition he provided would be used by others to commit war crimes and/or crimes against humanity"[223]. On the other hand, in the Van Anraat case, the Court found that he "…consciously and solely acting in pursuit of gain, has made an essential contribution to the chemical warfare programme of Iraq during the nineteen-eighties. His contribution has enabled, or at least facilitated, a great number of attacks with mustard gas on defenceless civilians. These attacks represent very serious war crimes...". While aware of the situation he continued with his business only caring about his profits.

Rheinmetall and RWM Italia managers could be judged using elements of both cases. As I explained earlier, they were aware of the war crimes perpetrated by the Saudi led coalition and continued to allow trade. The reasons behind their choices can be multiple and different, greed, active participation, support of the Saudi Coalition. Only the Prosecutor and investigations can find out. The fact that they did not intend to participate, and their only role was of aiders and abetters does not diminish the gravity of their actions and they should all be persecuted accordingly. UAMA officials, on the other hand, participated through gross negligence. Their failure in updating the status of the licences allowed for a

[222] Dieneke De Vos, "Corporate accountability: Dutch court convicts former "Timber baron" of war crimes in Liberia," EUI personal websites, April 24, 2017, https://me.eui.eu/dieneke-de-vos/blog/corporate-accountability-dutch-court-convicts-former-timber-baron-of-war-crimes-in-liberia/.
[223] Ibid.

loophole in which RWM Italia continued to trade with Saudi Arabia. If they did their job correctly, they could have avoided the airstrike.

CONCLUSION

The aim of this thesis was to understand the relation between the international arms trade and its facilitation in the occurrence of war crimes and what are business human rights obligations and the stance of the arms trade industry on them.

The first chapter analysed the discipline of international humanitarian law and the current trends regarding the position of business within it. In particular, I analysed the role of international arms trade and its complicity in the commission of atrocities. I analysed the possible contributions of the ATT and how it is fundamentally failing in his objectives due to the lack of an implementation mechanism and the disregard of its obligations of States. I finished the first chapter with an overview of the current figures of the international arms trade, the picture the figures presented confirms what Harold Hongju Koh defined as "a world drowning in guns"[224].

The second chapter presented an overview of the debate surrounding business and human rights. Starting from the 90s with the first scandals of Nike and Shell and subsequent Corporate Social Responsibility movement. The failed attempt of the binding draft norms and the more successful Global Compact, that turns 20 this year. I then presented the work of the Special Representative for business and human rights John Ruggie. Regardless of the challenging topic, Mr Ruggie worked efficiently and in a highly democratic process produced the Protect, Respect, Remedy Framework. To help the implementation of the Framework he proceeded to create the Guiding Principles to the Framework, in order to provide a guide for all the actors involved: States, business and victims. Mr Ruggie has been particularly conscious of the importance of sensitive business and business operating in conflict affected areas thoroughly assisted States and business in navigating such a delicate realm. I concluded the chapter analysing the recent

[224] Harold Hongju Koh, "A World Drowning in Guns," *Fordham Law Review* 71, (2003): 2333-2361.

attempts in drafting a legally binding treaty on business and human rights and the future challenges to expect.

In the final chapter, I presented the case of the implication of the Italian firm RWM Italia in the Yemen Conflict and tried to apply the different theories presented in the first two chapters. I first provided a section on the Yemen Conflict in order to contextualize the case and the understand the role of the actors involved, then I presented the events, the airstrike and the following legal procedure within the Italian system and the recent developments within the ICC. I conclude providing a personal legal analysis. Saudi Arabia and the Arab coalition are guilty of committing war crimes. NGOs, human rights organizations and the UN Eminent Experts Groups have investigated and provided proofs of their deliberate targeting of civilians. Targeting civilian objects constituted a war crime under customary international humanitarian law, the ad hoc Tribunals, the ICC Statute and many national legislations. I went on developing the concept of corporate complicity and showed how RWM Italia and its mother company Rheinmetall are complicit in aiding and abetting the crimes. As I demonstrated the company was perfectly aware of the operations carried out by the Saudi led Coalition and decided to not interrupt the trade relationship. The Italian State is complicit through gross negligence, as it did not update the licences to trade with Saudi Arabia after the involvement of the latter in the conflict. I decide to conclude the chapter bringing also the examples of the Van Anraat and Kouwenhoven cases, where two arms exporters were trialled and charged for complicity in war crimes thanks to their facilitating action through the export of weapons. I thought it was important to consider the possible limitations that would result in attempting to charge only corporate entities, both because of the controversy around the issue and also because it would allow war criminals to hide behind the legal personality of their company of origin.

To conclude, I will now present the three possible solutions I considered to prosecute Corporate entities in general and in the specific case of the involvement of RWM Italia in Yemen. But before any legal action takes place, as it plausible it will take some time, I think the desirable course of action is to impose a total arms embargo on Yemen. The UNSC must act rapidly and try to mitigate the crisis. So far there is only a partial embargo towards the Houthi rebels, and while I understand

that the major military actions are carried out by the Coalition, preventing weapons from even entering into Yemen would have a drastic effect on the development of the civil war. Moreover, it would presumably stop the weapons from falling into the wrong hands, especially those of the terrorist groups of AQAP and IS which are aggravating the conflict through their own proxy war.

The first solution would be amending the Rome Statute, in particular amending art. 25 so that to include legal persons in the jurisdiction of the ICC. As explained multiple time through the analysis of the *travaux préparatoires* of the different Tribunals and of the ICC Statute as well, the rejection of corporate criminal liability was never carried forward because considered legally unsound. Since the institution of the IMT, the first step into the codification of modern international criminal law, the rejection of the inclusion of legal persons into the jurisdiction of the Tribunals was based on multiple reasons. First and foremost, political reasons, as we have seen with the IMT and the first warning of a future cold war, or the desire to not allow the war criminals to hide behind their State or company. As for the drafting of the ICC, it was considered but then rejected because of the lack of time to debate on such a controversial issue. Therefore, it would appear only right to review the Rome Statute and consider its shortcomings. Moreover, in the last few years, in domestic legislation the practice of holding corporations criminally accountable has been spreading and considering the porous nature of international law it would appear to be a natural step in the future. But this is not the place to be naïve, if this amendment was to happen, it would not be in the near future. Too many interests are stakes and the issue remains highly controversial, moreover not every State presents criminal liability for corporations within its jurisdiction so the opposition might be fierce.

The second solution depends on the future developments of the binding treaty on business and human rights. To monitor and implement its application I would suggest the institution of a Committee or Treaty Body. The other human rights instruments present such mechanisms and due to the importance that the treaty could have it should be included in the core human rights instruments. While finishing the draft of the Treaty and creating the mechanism will be extremely important to create a strong text that does not allow the creation of legal loopholes

where corporations can operate without any regard for human rights. This is why I support the stance of some States to include also domestic business and not only those with a transnational nature.

The final solution would be the creation of a hybrid special tribunal for Yemen with the mandate of investigating and judging those involved in the atrocities committed during the conflict. I would suggest using as an example the Special Tribunal for Lebanon since it had jurisdiction over corporations. As seen in the first chapter, in the example case of the STL both the company and its employee were sentenced. The creation of a special tribunal for Yemen with such jurisdiction would represent a milestone for international law. That said, it would be extremely challenging, also because States are already resistant in investigating about Yemen. The liable situation of the EEG provides an example. As long as there is no collective desire to allow access to justice for the Yemenite population, the idea of the creation of a special tribunal remains impossible.

In conclusion, the international arms trade is among the most sensitive business sectors and its role in facilitating violations of international humanitarian law is undeniable. So far, everything is on a voluntary basis, business enterprises must put forward a process of human rights due diligence and realise when they are working within a sensitive field or in a sensitive context, such conflict zones. The international community is showing ever-increasing attention to the behaviour of business enterprises but is necessary to act more strictly. States must act rapidly and efficiently and adopt the treaty on business and human rights. While some might say that the arms industry per se is not guilty of anything and it provides jobs and economic revenues, it is important to recognize its role as aider and abettor to the commission of war crimes. The arms industry must stop to ignore the context where the end-users are operating only to focus on their profits. They had the chance to do so on a voluntary basis, but they missed this opportunity. In the meantime, while the biding treaty is being drafted and other possible binding mechanisms are put into place, there are all the preconditions to at least prosecute the individuals. Through their actions within the company, they facilitated the commission of war crimes.

BIBLIOGRAPHY

Books, articles, journals

- Aparac, Jelena. “Which International Jurisdiction for Corporate Crimes in Armed Conflicts?,” *Harvard International Law Journal* 57 (2016): 40-43
- Arce, Gerardo Alberto. “Towards a Legally Binding Arms Trade Treaty.” *Peace & Conflict Monitor*, September 01, 2012. http://www.monitor.upeace.org/archive.cfm?id_article=858#_ftn3
- Bijlmakers, Stephanie. “Business and human rights governance and democratic legitimacy: the UN “Protect, Respect and Remedy” Framework and the Guiding Principles.” *Innovation: The European Journal of Social Science Research* 26, no. 3 (2013): 288-301
- Bismuth, Regis. “Mapping a Responsibility of Corporations for Violations of International Humanitarian Law Sailing between International and Domestic Legal Orders.” *Denver Journal of International Law and Policy* 38, no. 2 (2010): 203-226.
- Bonnitcha, Jonathan and Robert McCorquodale. “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights.” *European Journal of International Law* 28, no.3 (2017): 899–919.
- Bush, Jonathan A. "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said." *Columbia Law Review* 109, no. 5 (2009): 1094-262.
- Carbonnier, Gilles. “Corporate responsibility and humanitarian action. What relations between the business and humanitarian worlds?,” *International Review of the Red Cross* 83, no. 844 (2010): 974-968.
- Casey-Maslen, Stuart and Sarah Parker. “The Draft Arms Trade Treaty (2013).” *Academy Briefing* 2 (2012)
- Casey-Maslen, Stuart and Tobias Vestner. “The Arms Trade Treaty (2013).” *Academy Briefing* 3 (2013)
- Davis, Rachel. “The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities.*”* *International Review of the Red Cross* 94, no. 887 (2012): 961-979
- Dijkstal, Haydee. “Yemen and the Stockholm Agreement: Background, Context, and the Significance of the Agreement.” *American Society of International Law* 23, no. 5 (2019)
- Ferencz Benjamin B. and Federica D’Alessandra. “An International Jurisdiction For Corporate Atrocities: Observations of a former Nuremberg War Crimes Prosecutor,” *Harvard International Law Journal* 57 (2016): 15-19
- Gillard, Emanuela-Chiara. "The Position with Regard to International Humanitarian Law." *Proceedings of the Annual Meeting (American Society of International Law)* 100 (2006): 130-35.
- Hathaway, Oona A., Paul K. Strauch, Beatrice A. Walton, Zoe A. Y. Weinberg. “What is a War Crime?,”Yale Journal of International Law 44, no. 1(2019): 53-113.
- Henckaerts, Jean-Marie and Louise Doswald-Beck. *Customary International Humanitarian Law Volume I: Rules.* Cambridge: Cambridge University Press, 2009
- Human Rights Watch, *World Report 2020 – Events of 2019*, (New York: Seven Stories Press, 2020)

- International Committee of the Red Cross, *ABC del diritto internazionale umanitario* (Berne: Federal Department of Foreign Affairs FDFA, 2018)
- International Committee of the Red Cross, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law* (2006)
- International Committee of the Red Cross, *International Humanitarian law: answers to your questions* (2015)
- Kaleck, Wolfgang and Miriam Saage-Maaß. "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and its Challenges." *Journal of International Criminal Justice* 8, no. 3 (2010): 699–724
- Kelly, Michael J. "Prosecuting Corporations for Genocide Under International Law." *Harvard Law & Policy Review* 6, no. 2 (2012): 339-367.
- Kelly, Michael J. *Prosecuting Corporations for Genocide.* New York: Oxford University Press, 2016.
- Koh, Harold Hongju. "A World Drowning in Guns." *Fordham Law Review* 71, (2003): 2333-2361.
- Kolieb, Jonathan. "Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law". *American University International Law Review* 32, no. 2(2017): 569-604.
- Maclean, Ken. *International Humanitarian Law and Corporate Accountability in a Conflict Zone.* 2018
- Mettraux, Guénaél. *International Crimes: Law and Practice – Volume I: Genocide.* New York: Oxford University Press, 2019.
- Murphy, M. and Jordi Vives." Perceptions of Justice and the Human Rights Protect, Respect, and Remedy Framework." *Journal of Business Ethics* 116, (2013):781–797.
- Rozzitti, Natalino. "Il trattato internazionale sul commercio delle armi," *Osservatorio di Politica Internazionale* 42, (2013)
- Ruggie, John G. "The Social Construction of the UN Guiding Principles on Business and Human Rights." *Corporate Responsibility Initiative Working Paper No. 67, 2017.* Cambridge, MA: John F. Kennedy School of Government, Harvard University.
- Ruggie, John, G. "Interview," Interview by Vincent Bernard. *International Review of the Red Cross* 94, no. 887, March 29, 2012
- Ruggie, John, G. *Just Business: Multinational Corporations and Human Rights.* (New York: W. W. Norton & Company, 2013)
- Scheffer, David. "Corporate Liability under the Rome Statute," *Harvard International Law Journal* 57 (2016): 35-39
- van Dorp, Mark. *Multinationals and Conflict: International principles and guidelines for corporate responsibility in conflict- affected areas.* (Amsterdam: Stichting Onderzoek Multinationale Ondernemingen (SOMO) – Centre for Research on Multinational Corporations, 2014)
- Ventura, Manuel J. "The Prosecution of Corporations Before a Hybrid International Criminal Tribunal: The New TV and Akhbar Beirut Contempt Jurisdiction Decisions of the Special Tribunal for Lebanon." *African Journal of International Criminal Justice* 1, no. 2 (2017): 71-83.
- Wählisch, Martin. "The Special Tribunal for Lebanon: An Introduction and Research Guide." *Hauser Global Law School Program, New York University School of Law,* September 2012. https://www.nyulawglobal.org/globalex/Special_Tribunal_Lebanon.html

- Weissbrodt, David, and Muria Kruger. "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights." *American Journal of International Law* 97, no. 4 (2003): 901–22.

Documents, reports, and resolutions

- General Assembly Resolution 26/9, *"Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,"* A/HRC/26/9 (14 July 2014)
- General Assembly Resolution 40/48, *"Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights",* A/HRC/40/48 (2 January 2019)
- General Assembly Resolution 61/89, *"Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms,"* A/RES/61/89 (18 December 2006)
- General Assembly Resolution 62/278 (Part I)*, "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms – Report of the Secretary-General,"* A/62/278 (Part I), (17 August 2007)
- General Assembly Resolution 63/334*, "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms"* A/63/334, (26 August 2008)
- General Assembly Resolution 64/48, *"The Arms Trade Treaty,"* A/RES/64/48 (12 January 2010)
- Human Rights Council Resolution 17/31, *"Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,"* A/HRC/17/31 (21 March 2011)
- Human Rights Council Resolution 17/32, *"Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and human rights in conflict-affected regions: challenges and options towards State responses,"* A/HRC/17/32 (27 May 2011)
- Human Rights Council Resolution 17/4*, "Human rights and transnational corporations and other business enterprises,"* A/HRC/17/4 (6 July 2011)
- Human Rights Council Resolution 31/50, *"Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/31/50 (5 February 2016)
- Human Rights Council Resolution 34/47, *"Report on the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/34/47 (4 January 2017)
- Human Rights Council Resolution 35/7, "Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises," A/HRC/35/7 (14 July 2017)
- Human Rights Council Resolution 37/67, *"Report on the third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/37/67 (24 January 2018)

- Human Rights Council Resolution 40/48, *"Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/40/48 (02 January 2019)
- Human Rights Council Resolution 43/55, *"Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument,"* A/HRC/43/55 (09 January 2020)
- Human Rights Council Resolution 8/5, *"Protect, Respect and Remedy: a Framework for Business and Human Rights,"* A/HRC/8/5 (7 April 2008)
- OHCHR, *"Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights,"* E/CN.4/2005/91 (15 February 2005)
- OHCHR, *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/2004/116
- Open-ended Working Group, *"Report of the Open-ended Working Group towards an Arms Trade Treaty: establishing common international standards for the import, export and transfer of conventional arms,"* A/AC.277/2009/1, (20 July 2009)
- UN Commission on Human Rights Resolution 2005/69, *Human Rights and Transnational Corporations and Other Business Enterprises*, E/CN.4/RES/2005/69 (20 April 2005)
- United Nations Conference on the Arms Trade Treaty, *"Draft of the Arms Trade Treaty,"* A/CONF.217/CRP.1, (1 August 2012)
- United Nations Conference on the Arms Trade Treaty, *"Provisional rules of procedure of the Conference,"* A/CONF.217/L.1
- United Nations Resolution 1997/11, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on Its Forty-ninth Session, E/CN.4/1998/2, E/CN.4/Sub.2/1997/50 (1997).
- United Nations Resolution 1998/8, *The Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Mediods and Activities of Transnational Corporations*, E/CN.4/Sub.2/ RES/1998/8.

Legal sources and case law

- Chair Draft Proposal 1
- Char Draft Proposal 2
- Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights
- Decreto legislativo 8 giugno 2001, n. 231 "Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300"
- Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework
- Legge 9 luglio 1990 n.185 "Nuove norme sul controllo dell'esportazione, importazione e transito dei materiali di armamento (1) (2) (3)"
- Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

- *Public Prosecutor v. Guus Kouwenhoven*
- *Public Prosecutor v. Van Anraat*
- Revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises
- Statute of the International Criminal Court
- The Arms Trade Treaty
- The Corporate Responsibility to Respect Human Rights: An Interpretive Guide
- The Hague Convention (II) on the laws and customs of war on land
- *The Prosecutor v. Jean-Pierre Bemba Gombo*
- Zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

Web sources and Websites

- Al Hussein, Zeid Ra'ad. (2015). *"Opening of the 1st Session of Open-ended Intergovernmental Working Group on Transnational Corporations,"* [video] available at: http://webtv.un.org/search/1st-meeting-1st-session-of-open-ended-intergovernmental-working-groupon-transnational-corporations/4339866849001?term=business&languages=&sort=date
- Amnesty International, "Arms Control," *Amnesty International*, https://www.amnesty.org/en/what-we-do/arms-control/
- Amnesty International, "Yemen: Scathing UN report underscores need for arms embargo, tougher scrutiny," *Amnesty International*, August 28, 2018, https://www.amnesty.org/en/latest/news/2018/08/yemen-scathing-un-report-underscores-need-for-arms-embargo-tougher-scrutiny/
- Amnesty International. "Killer facts 2019: The scale of the global arms trade." *Amnesty International*, August 23, 2019. https://www.amnesty.org/en/latest/news/2019/08/killer-facts-2019-the-scale-of-the-global-arms-trade/
- ANSA, "Nel 2018 nessuna bomba da Italia a Riad," *ANSA*, April 11, 2019 http://www.ansa.it/sardegna/notizie/2019/04/11/nel-2018-nessuna-bomba-da-italia-a-riad_6e9091bd-fbb1-4db8-ba39-2cb4262ef086.html
- Arms Control Association, *Arms Control Association*, https://www.armscontrol.org/
- Arms Trade Treaty, https://thearmstradetreaty.org/ (Accessed on January 10, 2020)
- BBC, "Yemen conflict explained in 400 words," *BBC*, June 13, 2018, https://www.bbc.com/news/world-middle-east-44466574
- BBC, "Yemen crisis: Why is there a war?," *BBC*, February 10, 2020, https://www.bbc.com/news/world-middle-east-29319423
- Biggs, Maisie. "International Criminal Law and Corporate Actors - Part 2: The Rome Statute and its Aftermath," *Doing Business Right*, May 21, 2019. https://www.asser.nl/DoingBusinessRight/Blog/post/international-criminal-law-and-corporate-actors-part-2-the-rome-statute-and-its-aftermath-by-maisie-biggs#_ftn1
- Clinton Rodham, Hillary. "U.S. Support for the Arms Trade Treaty." *U.S. Department of State*, October 14, 2009. https://2009-2017.state.gov/secretary/20092013clinton/rm/2009a/10/130573.htm
- Cook, Steven A. and Philip H. Gordon. "War in Yemen." *Global Conflict Tracker*, last updated March 20, 2020. https://www.cfr.org/interactive/global-conflict-tracker/conflict/war-yemen

- Craig, Iona. Yemen Data Project. https://www.yemendataproject.org/ (Accessed March 05, 2020)
- Davoise, Marie. "All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute." *OpinioJuris*, July 25, 2019. http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/
- De Vos, Dieneke. "Corporate accountability: Dutch court convicts former "Timber baron" of war crimes in Liberia." EUI personal websites, April 24, 2017. https://me.eui.eu/dieneke-de-vos/blog/corporate-accountability-dutch-court-convicts-former-timber-baron-of-war-crimes-in-liberia/
- Deutsche Welle, (2018), "Yemen and the global arms trade | DW Documentary (Arms documentary)" [video], https://www.youtube.com/watch?v=tkUv2R97I-Y
- ECCHR, Mwatana, and Rete Italiana per Il Disarmo in cooperation with Osservatorio Permanente sulle Armi Leggere e le Politiche di Sicurezza e Difesa (O.P.A.L.), "Una coalizione internazionale di Organizzazioni Non Governative sporge denuncia penale contro RWM Italia S.p.a, filiale italiana del produttore di armamenti tedesco Rheinmetall AG, e contro l'Autorità Nazionale per le autorizzazioni all'esportazione di armamenti (UAMA)", ECCHR, April 18, 2018, https://www.ecchr.eu/fileadmin/Pressemitteilungen_englisch/ITA_final_CS_Yemen_apr2018.pdf
- European Center for Constitutional and Human Rights, "European Responsibility for War Crimes in Yemen – Complicity of Italian Subsidiary of German Arms Manufacturer and of Italian arms Export Authority," *ECCHR*, April 2018, https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_Yemen_Italy_Arms_ECCHR_Mwatana_ReteDisarmo_20180418.pdf
- Federazione Aziende Italiane per l'Aerospazio, la Difesa e la Sicurezza, "Aziende Federate: RWM ITALIA S.p.A.," *AIAD*, http://www.aiad.it/it/scheda_azienda.wp;jsessionid=E15C4830F14DC91A9AB96280ACBFA647?contentId=SCH15554
- Geneva Academy of International Humanitarian Law and Human Rights and Oxford Martin School Programme on Human Rights, *Arms Trade Treaty legal blog,* http://armstradetreaty.blogspot.com/2010/
- Gladstone, Rick. "Iran Violated Yemen Arms Embargo, U.N. Experts Say." *New York Times*, January 12, 2018. https://www.nytimes.com/2018/01/12/world/middleeast/iran-yemen-saudi-arabia-arms-embargo-un.html
- Global Compact, "Guidance on Responsible Business in Conflict-Affected & High-Risk Areas: A Resource for Companies and Investors," *Global Compact*, 2010, https://www.unglobalcompact.org/library/281
- Global Compact, "Participation," *Global Compact*, https://www.unglobalcompact.org/participation (Accessed on December 15, 2019)
- Global Compact, *Global Compact*, https://www.unglobalcompact.org/search?utf8=%E2%9C%93&search%5Btype%5D=all&search%5Bkeywords%5D=conflict
- Global Policy Forum, "Special Tribunal for Lebanon," *Global Policy Forum*, https://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/special-tribunal-for-lebanon.html
- Global witness, "Do No Harm: A Guide for Companies Sourcing From the DRC," *Global Witness*, July 8, 2010 https://www.globalwitness.org/en/archive/do-no-harm-guide-companies-sourcing-drc/

- History Editors. "Nuremberg Trials." *History,* January 29, 2010, https://www.history.com/topics/world-war-ii/nuremberg-trials#section_3
- Human Rights Council, "Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights," *UN Human Rights Council,* https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx
- International Commission of Jurists, "Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes*," International Commission of Jurists*, January 1, 2008**,** https://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes/
- International Crimes Database, "Public Prosecutor v. Frans Cornelis Adrianus van Anraat", *ICD,* http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/
- International Crimes Database, "The Public Prosecutor v. Guus Kouwenhoven," *ICD,* http://www.internationalcrimesdatabase.org/Case/2239 (Accessed on March 8, 2020)
- International Justice Resource Centre. "Internationalized Criminal Tribunals." *International Justice Resource Centre*. https://ijrcenter.org/international-criminal-law/internationalized-criminal-tribunals/
- International Labour Organization (2010). "*Professor John Ruggie Presents Business and Human Rights Framework*." [video] Available at: https://www.youtube.com/watch?v=55PJw077eQE.
- Lopez, Carlos. "The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects." *International Institute for Sustainable Development,* October 2, 2019. https://www.iisd.org/itn/2019/10/02/the-revised-draft-of-a-treaty-on-business-and-human-rights-ground-breaking-improvements-and-brighter-prospects-carlos-lopez/
- Mashkin, Julia. "Why the UN Global Compact is a CSR commitment that works." Ethical Corporation, May 1, 2019. http://www.ethicalcorp.com/why-un-global-compact-csr-commitment-works
- Ministero Affari Esteri e Cooperazione Internazionale, "Autorità nazionale - UAMA (Unità per le autorizzazioni dei materiali di armamento)," *Esteri,* https://www.esteri.it/mae/it/ministero/struttura/uama
- Ministero Affari Esteri e Cooperazione Internazionale, "Struttura," *Esteri,* https://www.esteri.it/mae/it/ministero/struttura/uama/struttura.html.
- Mwatana for Human Rights, "Made in Europe, Bombed in Yemen (Case Report) How the ICC could tackle the responsibility of arms exporters and government officials," Mwatana for Human Rights, December 12, 2019, https://mwatana.org/en/made-in-europe-bombed-in-yemen-case-report/
- OHCHR, "About the UN Forum on business and human rights," *United Nations Human Rights,* https://www.ohchr.org/EN/Issues/Business/Forum/Pages/ForumonBusinessandHumanRights.aspx
- OHCHR, "Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises," *United Nations Human Rights,* https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx
- OHCHR, "UN Working Group on Business and Human Rights – Project on business in conflict and post-conflict contexts," *United Nations Human Rights,* https://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx

- OHCHR, "Working Group on the issue of human rights and transnational corporations and other business enterprises," *United Nations Human Rights,* https://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx
- Presentation of Report to United Nations Human Rights Council, Professor John G. Ruggie, Special Representative of the Secretary-General for Business and Human Rights, Geneva (30 May 2011)
- Rheinmetall Defence, "RWM Italia S.p.A.," *Rheinmetall Defence*, https://www.rheinmetall-defence.com/en/rheinmetall_defence/company/divisions_and_subsidiaries/rwm_italia/index.php
- Save the Children, *Solidarietà ai lavoratori della RWM per una soluzione positiva dal governo,* https://www.savethechildren.it/blog-notizie/solidarieta-lavoratori-rwm-per-soluzione-positiva-governo
- Schliemann, Christian and Linde Bryk, "Arms trade and corporate responsibility", *Friedrich-Ebert-Stiftung,* November 2019, https://www.fes.de/en/shaping-a-just-world/global-economy-and-corporate-responsibility/publications-on-global-economy-and-corporate-responsibility?tx_digbib_digbibpublicationlist%5BpageIndex%5D=1&cHash=18c5d407ed7666d0f16b35dd71a64ed8
- Stockholm International Peace Research Institute, "SIPRI YEARBOOK 2019 Armaments, Disarmament and International Security Summary," *SIPRI*, September 23, 2019, https://www.sipri.org/sites/default/files/2019-08/yb19_summary_eng_1.pdf
- Stockholm International Peace Research Institute, "Yemen (NGF)," SIPRI, April 14, 2015, https://www.sipri.org/databases/embargoes/un_arms_embargoes/yemen/yemen
- Sulz, Matthias. "Yemen Snapshots: 2015-2019." *The Armed Conflict Location & Event Data Project*, 2019. https://acleddata.com/2019/06/18/yemen-snapshots-2015-2019/ / (Accessed March 05, 2020)
- Tauli-Corpuz, Victoria. "Opening remarks by the united nations special rapporteur on the rights of indigenous peoples, Ms. Victoria Tauli-Corpuz," *OHCHR,* July 6, 2015, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/SR_STATEMENT_IWG.pdf
- The Historian of the U.S. Department of State. "The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)." *Office of the Historian*. https://history.state.gov/milestones/1945-1952/nuremberg.
- Trial international, "Frans Van Anraat," *Trial International,* May 2, 2016, https://trialinternational.org/latest-post/frans-van-anraat/
- UN Guiding Principles on Business and Human Rights (UNGPs)
- United Nations Register on Conventional Arms, "About," UNROCA, https://www.unroca.org/about
- United Nations, "Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos," *Meetings Coverage and Press Releases,* February 1, 1999 http://www.un.org/press/en/1999/19990201.sgsm6881.html
- Wilkinson, Rorden. "Global Compact – United Nations Initiative." *Encyclopaedia Britannica,* May 14, 2014. https://www.britannica.com/topic/Global-Compact
- Wood, Andrew. "How to Reach Consensus on an Arms Trade Treaty." *Arms Control Association***.** https://www.armscontrol.org/act/2012-01/reach-consensus-arms-trade-treaty#THREE

- Woolcott Peter. “The Arms Trade Treaty.” Audio-visual Library of International Law, April 2, 2013. https://legal.un.org/avl/ha/att/att.html

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