

[draft for discussion purposes – please do not quote without permission]

To Whom Does a Defense Industry Firm Owe a Duty When There is an Opportunity to Pay a Bribe

Philip M. Nichols*

Abstract

The defense industry has a long history with bribery. Bribes paid by defense businesses had a central role in the Congressional Hearings that preceded enactment of the United States' Foreign Corrupt Practices Act. Scarcely a year has gone by since then without revelations of bribes paid by a defense business somewhere in the world, and studies by Transparency International and the Organisation for Economic Cooperation and Development each suggest that bribery continues to plague the defense industry. The defense industry often counters that it works in a complex, multicultural environment in which personal payments to government officials are often expected. They also point to competition from weapons manufacturers that freely pay bribes. Bribery in the defense industry raises special concerns. For one thing, bribery tends to go hand in hand with diminished quality, which raises concerns about the safety of military personnel and others directly involved. For another, bribery tends to create an environment in which rules and regulations are ignored, which raises concerns about weapons flowing in contravention of rules intended to protect civilians and international order. The claims made by defense businesses and the concerns raised by bribery in the defense industry present a question: to whom does a defense business owe a duty when presented with an opportunity to pay a bribe? This paper concludes that because the market failures that allow bribery to flourish are the same market failures required for the defense industry to operate, and because defense industry firms benefit by operating in that imperfect market, they owe a duty to persons who would be harmed by the effects of bribery.

The defense industry has a long and troubled history with bribery. The disclosure of bribes paid by Lockheed Martin played a highly visible role in the congressional investigations and debates that culminated in the passage of the

* Class of 1940 Reunion Term Associate Professor of Legal Studies and Business Ethics, The Wharton School of the University of Pennsylvania.

Foreign Corrupt Practices Act in the United States. Decades later, the disclosure of bribes paid by BAE Systems played a highly visible role in undermining the credibility of the Serious Fraud Office's claims that it would rigorously enforce the United Kingdom's new Bribery Act. In between, and since, scarcely a year has passed without revelations of bribery in connection to a defense industry firm. Research into the defense industry suggests that unique factors that significantly shape that industry render it prone to corruption. This paper suggests that those same factors create a special responsibility on the part of defense industry firms to avoid paying bribes. These firms benefit from society's indulgence in allowing them to operate in a flawed market. Because those firms benefit from that indulgence, they owe society the benefit of their actions rather than harming society through self-serving behaviors.

I. FACTORS THAT PUT THE DEFENSE INDUSTRY AT RISK OF CORRUPTION

The non-governmental organization Transparency International has conducted what may be the most comprehensive analysis of bribery within the defense industry.¹ Transparency International offers five categories of factors that may contribute to the tendency of any given defense industry firm to engage in corruption: political factors, finance, personnel, operations, and procurement. Within each category Transparency International explores several particular factors that may influence tendencies toward corruption. Transparency International's research provides an excellent framework for a discussion of the issue.

Politics. Within the defense industry, politics can play a more prominent role than in many other industries. In non-democratic countries, members of the military often have influence or even control the government. Even in democracies, defense policy and policymakers sometimes have disproportionate influence. General and President Dwight Eisenhower, a career officer who devoted most of his life to military service, warned that "a close relationship

¹ An interactive summary of Transparency International's research can be found at <http://www.ti-defence.org/corruption/typologies#tabs0291>.

between government, military, and industry would lead to an unnecessary expansion of military forces, superfluous defense spending, and a breakdown of checks and balances within the public policymaking process. He feared that the influence of such an establishment would allow special interests to profit under the guise of national security.”²

Military leaders sometimes leverage their power to enrich themselves. In many countries, the military is deeply involved in commercial activities, particularly in extractive industries or in exploitation of natural resources. These industries bear their own unique risks of corruption. Combining the political power that these militaries have with commercial power also contributes to higher levels of corruption. More insidiously, militaries are often tasked with local intelligence gathering and often have access to vast amounts of personal information, which also creates opportunities for abuse and for corruption.

The budgets through which the defense industry’s clients pay the defense industry is also different than that of most other industries. As a matter of national security, these budgets are often opaque and subject to little review. In many polities, even the process through which these budgets are devised is not subject to public review. Transparency and public scrutiny are considered by many as critical tools in controlling corruption, but these tools cannot always be used when dealing with the defense industry.

The defense industry also occupies a unique regulatory position. Weapons, and who has them, can pose an existential threat to a polity. The same is true of health, and education, and the products of other industries, but in the case of the defense industry the threat can be immediate. Polities therefore impose many regulations and restrictions on the defense industry, including importation restrictions, exportation restrictions, restrictions on research and development, and on working with other firms or polities, and more. Regulations, particularly cumbersome regulations, create temptations to circumvent through bribery.

² Jerry Brito & Tate Watkins, *Loving the Cyber Bomb? The Dangers of Threat Inflation in Cybersecurity Policy*, 3 HARV. NAT’L SEC. J. 39, 62 (2012).

Finance. The financing of defense purchases is closely related to some of the political factors described above. Secret budgets and the conflation of the military with commercial activities fuel corruption. Transparency International also points out that even when budgets are public, the financing package for any given transaction rarely is available or scrutinized by the public, which also creates opportunities for corruption.

Personnel. As in any industry, personnel and culture contribute to the amount of bribery that occurs. Nepotism thrives in some militaries, which means that the clients of the military industry may have acquired the power to make purchasing decisions through relationships and connections rather than through ability or integrity – such persons may be more likely to demand bribes. In some militaries, officers are expected to find alternative sources of pay for themselves and their troops, which again could lead to bribe demands.

Transparency International's investigation of the defense industry did not seem to indicate that the personnel at defense industry firms are more inclined to corruption than those in other industries. Firm culture, on the other hand, may cause some people who otherwise would not do so to pay bribes.

Operations. Transparency International points out that many of the largest purchasers of defense industry products are not only undemocratic but are also endemically corrupt. Defense firms are likely to face bribe demands in these countries.

With respect to operations, Transparency International also points out that business firms in the defense industry often work with clients whose own operations are questionable. Many international peace forces are poorly disciplined and engage in activities that are harmful to local populations. Defense industries also increasingly work with or themselves provide private military forces, which operate with very few checks and little accountability.

Procurement. Procurement constitutes an area rife with pitfalls. As is the case with the financing of a transaction, the technical requirements and specifications are often not publicly released or scrutinized, which removes a useful check on bribery and other forms of corruption. The technical complexity

of some transactions also makes oversight by untrained government supervisors difficult. The secrecy of procurement, again combined with the technical complexity of some products, lends itself to single source procurement, which removes the check of open competition. It also makes benchmarking transactions difficult, which means that government supervisors do not have industry standards against which to measure the commercial reasonableness of a purchase.

Transparency International found that defense industry firms use many third parties in the sale of their products, and that governments often use middlepersons as well. Defense industry firms have less control over third parties, and the potential for abuse by third parties is well known in other industries.

Procurement is often tied to issues that have little to do with the quality of the good or service offered by a firm, or that in other ways might contribute to corruption. Procurement is often tied to offsets. Offsets as offsets are not corrupt and can often contribute to the overall value generated by a transaction. Offsets, however, usually are effectuated outside of public scrutiny and create an avenue through which corrupt exchanges can occur. Bribes can also take the form of offsets.

II. THE HARM GENERATED BY BRIBERY

There are at least two types of harms that could be caused by corruption in the defense industry. One is harms caused by general failures in the market process. The other is harms caused by failures in the regulatory process.

Long ago, some people thought that corruption only moved rents from one party to another and had no net effect on economies. People also suggested that bribery was useful in overcoming regulatory barriers and facilitating entry into various economies.³

Persons who study corruption now have a much deeper understand of the phenomenon, and have much finer tools and techniques for studying it. Johannes

³ See, David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593 (2000) (noting and criticizing old ways of thinking).

Lambsdorff and others have shown that the notion that corruption merely transfers rent is erroneous, because corruption both effects the size of the rent and because it distorts allocations in unproductive ways.⁴ Daniel Kaufmann and Shang-Jin Wei, in turn, demonstrated that bribery does not reduce barriers to entry but in fact increases the time and money a firm spends interacting with government.⁵ The literature on corruption is replete with examples of specific harms that it inflicts on societies and on people.⁶

With respect to understanding the potential harms associated with corruption in the defense industry, it is important to understand how corruption affects decision making by a government purchaser. In a market that is not corrupt, a buyer makes a decision based on the price and the quality of a good or service. A “rational” producer therefore uses its resources to bring the quality of a good or service as close as possible to that desired by the purchaser and to bring its price as close as possible to the price that the purchaser will pay.⁷ In an endemically corrupt system, the purchaser makes a decision based on the quality of the bribe. A high quality bribe is one that a purchaser wants and can use. A “rational” producer uses its resources to craft high quality bribes.⁸ In a market that is functioning properly, a producer that uses its resources to craft a bribe rather than to improve quality and lower prices will not be able to compete with a producer that uses its resources to produce low-cost, high-quality products. But in an endemically corrupt system the reverse occurs. A producer who devotes resources to the quality of goods or services cannot compete with a producer who uses all of its resources to craft high quality bribes. The world outside of defense

⁴ Johann Graf Lambsdorff, *Corruption and Rent-Seeking*, 113 PUB. CHOICE 97, 120 (2002).

⁵ Daniel Kaufmann & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?* (National Bureau of Economic Research Working Paper No. 7093, 1999).

⁶ See Philip M. Nichols, *The Business Case for Complying With Bribery Laws*, 49 AM. BUS. L.J. 325 (2012) (summarizing research).

⁷ Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT’L L. & POL. 627, 627 (1983).

⁸ *Id.*; Shouyoung Shi & Ted Temzelides, *A Model of Bureaucracy and Corruption*, 45 INT’L ECON. REV. 873, 874 (2004).

offers many examples of the results of corrupt procurement processes, in the forms of unwanted infrastructure that has no function, shopping centers and housing projects that collapse, substandard education and health facilities, and much more.

Unfortunately, the defense industry also offers examples of low-quality products associated with highly-connected persons. Multiple deficiencies with the heavily-lobbied-for M4 infantry rifle, for example, are argued to have contributed to the deaths and injuries of many soldiers in an infamous battle in Wanat, Afghanistan.⁹ A Florida firm with close connections to Florida's then-senior Senator reportedly provided defective grenades to the military.¹⁰ Possibly thousands of other examples exist.¹¹

The second type of harms inflicted by corruption in the defense industry is those that could be ascribed to regulatory failures. The defense industry faces numerous regulations around the world, defying an easy, comprehensive typology. This paper will discuss types of regulation not for the purpose of creating a typology but instead to attempt to more finely parse possible harms.

Some regulations are designed to keep technologies developed by one polity out of the hands of threatening polities. South Korea, for example, has numerous regulations that attempt to prevent North Korea from obtaining technology that could be used against the south.¹² These types of regulations are violated. Brian Patrick Regan, for example, a civilian contracted to the National Reconnaissance Office, solicited thirteen million dollars in bribes from the governments of China, Iran, Iraq, and Libya in exchange for technical details

⁹ Jimmy Wu, *Small Arms Failures Contribute to Wanat Debacle*, DEFENSETECH (Oct. 12, 2009), <http://defensetech.org/2009/10/12/small-arms-failures-contributed-to-wanat-debacle/>.

¹⁰ *Company Provided Faulty Grenades to Army*, ASQ (Feb. 7, 2011), <http://asq.org/qualitynews/qnt/execute/displaySetup?newsID=10559>.

¹¹ See Barry Kellman, *De-Coupling the Military/Industrial Complex – The Liability of Weapons Makers for Injuries to Servicemen*, 35 CLEV. ST. L. REV. 351 (1987).

¹² Jaewon Lee, *South Korea's Export Control System* (SIPRI Background Paper Nov. 2013), available at <http://books.sipri.org/files/misc/SIPRIBP1311.pdf>.

about missile delivery systems used by the United States.¹³ Israel has long sold US military technology to China which in turn has sold that technology to Iran, which is antagonistic to the United States.¹⁴ Neither South Korea nor the United States has faced existential crisis because of these breaches, but the possible harms are apparent.

Some regulations are intended to keep dangerous weapons out of the hands of polities or organizations that embrace mayhem in general. Most members of the North American Treaty Alliance, for example, have enacted laws that prohibit the transfer of technology and of weapons or military-oriented materials to organizations deemed as terrorist.¹⁵ China has enacted legislation intended to prevent the acquisition of China's nuclear technology and hardware by terrorist organizations.¹⁶ The United States, Russia, and other large nations are negotiating sets of regulations intended to prevent weapons from reaching the Islamic State.¹⁷

These rules too are abrogated. The Islamic State, for example, acquires many of its weapons through capture or theft, but strong evidence suggests that it acquires many of its most sophisticated weapons through convoluted sales arrangements that may be facilitated by corrupt officials.¹⁸ Similarly, Boko

¹³ Sarah Frances Cable, Note, *An Unanswered Question in Kennedy v. Louisiana: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?*, 70 LA. L. REV. 995, 996 (2010).

¹⁴ Michael R. Gordon, *Israel Sells Arms to China, U.S. Says*, N.Y. TIMES, Oct. 13, 1993; Bryant Jordan, *Report: Israel Passes U.S. Military Technology to China*, MILITARY.COM (Dec. 24, 2013), <http://defensetech.org/2013/12/24/report-israel-passes-u-s-military-technology-to-china/>.

¹⁵ See Michael D. Beck & Seema Gahlout, *Introduction to Nonproliferation Export Controls*, in TO SUPPLY OR DENY: COMPARING NONPROLIFERATION EXPORT CONTROLS IN FIVE KEY COUNTRIES 1, 2 (Michael D. Beck, Seema Gahlout & Scott A. Jones eds., 2003).

¹⁶ *China Controls Seek to Prevent Terrorism* (Feb. 17, 2007), <http://newsok.com/china-controls-seek-to-prevent-terrorism/article/3014775>.

¹⁷ Thomas Graham, *ISIS' Worst Nightmare: The U.S. and Russia Teaming Up on Terrorism*, THE NAT'L INTEREST, Feb. 10, 2015.

¹⁸ Christopher Harress, *ISIS Weapons Growing In Number, Sophistication: A Soviet, Balkan And American Mix, But The Group Can't Use All Of Them*, INT'L

Haram acquires some weapons through theft or capture and others through convoluted sales arrangements, but some reports suggest that it also acquires weapons directly from bribed officers in the Nigerian military.¹⁹ The harms inflicted on innocent persons by these and other organizations do not bear repeating. Information from the United Nations High Commission on Refugees suggests that increasing numbers of people flee such violence every year, and that globally more than forty-five million people may currently be displaced in the face of this type of violence.²⁰

Two distinct groups of people, therefore, may be harmed by abrogation of the rules. One group consists of persons resident in a polity threatened by another polity. The other group consists of innocent people anywhere who might be harmed by groups or polities that embrace mayhem. While this paper does provide real examples of harms caused by abrogation of these rules, this paper is careful not to directly state that any particular firm in the defense industry pays bribes in order to avoid regulation.

The case that bribes could be paid for such a purpose, however, is easily made. The military industry has a troubled history with the payment of bribes for the purpose of obtaining contracts from or making sales to governments. The payment of bribes to a government official for purposes of self-enrichment by definition involves a violation of rules. Numerous studies have found that the payment – or even merely the observation of the payment – of bribes by members of a firm erodes the “ethical climate” within that firm.²¹ Persons within such firms tend to be more opportunistic and to violate other rules.²² It is a very small and

BUS. TIMES (Aug. 15, 2014), <http://www.ibtimes.com/isis-weapons-growing-number-sophistication-soviet-balkan-american-mix-group-cant-use-all-1659176>.

¹⁹ Clement Ejioko, *Boko Haram's Source of Weapons Revealed*, NAIJ (June 2014), <http://www.naij.com/66368.html>.

²⁰ UNITED NATIONS HIGH COMMISSION ON REFUGEES, MID-YEAR TRENDS 2014. at 21 (2014).

²¹ See Nichols, *supra* note 6, at 342 (discussing studies).

²² Willa Bruce, *Ethical People Are Productive People*, 17 PUB. PRODUCTIVITY & MGMT. REV. 241, 248 (1994); William A. Weeks et al., *The Role of Mere Exposure Effect on Ethical Tolerance: A Two-Study Approach*, 58 J. BUS. ETHICS 281, 282 (2005).

possibly inevitable step from paying a bribe for the purpose of selling a product to paying a bribe for the purpose of *being allowed* to sell a product.

III. DEFENSES BY THE DEFENSE INDUSTRY

The defense industry does not, of course, speak with a single voice. Defenses of structures and conduct that lead to corruption, however, tend to coalesce around three tropes. Perhaps the most frequent defense turns the distorted market observation on its head. Defense industries point out that the market is indeed distorted, and argue that they could not survive in this market without engaging in questionable behavior. These firms often argue that they have a responsibility to the people who depend on them for salaries, to contribute to the overall wealth of the nations in which they are located, or most often that they have a responsibility to enhance the wealth of investors.

Defense industry firms also suggest that they provide a net benefit to society by providing society with the means of defending itself. They point out the many dangers in the world today, the security provided by military devices, and the high costs of developing those devices. Sales made through corrupt means, or sales that violate rules in other ways, subsidize the production of military devices that provide this safety.

It is interesting to note that both this cluster of defenses and the cluster mentioned previously are teleological in nature. These defenses do not take account of rights. As is true of any teleological argument, these defenses rely on empirical claims regarding the conditions of the world and the consequences of discrete actions. A thorough evaluation of these claims would require a level of investigation that would probably violate rules regarding national security and secrecy, and that quite possibly would make individual firms uncomfortable. The argument seems to be offered, therefore, more as a claim than as an actual fact.

A third set of defenses clusters around the notion that “someone else, probably worse, would have done the same thing.” There are many actors in the defense industry, who follow rules in differing degrees. Some firms follow few rules at all. Military industry firms more oriented toward obeying the rules

sometimes suggest that for many reasons it is “better” that firms like themselves make the sale than less rule oriented firms. In addition to accruing the benefits of making these sales, rule-oriented firms suggest that the world would be a more dangerous place if firms with disregard for rules were allowed to flourish.

This is a subtle but interesting argument. In some ways the argument can be compared to the economic doctrine of second best: that if a market distortion cannot be removed then it might be most productive to introduce another market distortion.²³ This argument, as is the case with the preceding arguments, also relies on empirical claims easily made but difficult to verify. The argument also raises troubling questions about self-regulation, and about entrusting firms to break the rules only to an extent that in some way increases – or minimally decreases – overall well-being.

IV. TO WHOM DOES THE DEFENSE INDUSTRY OWE DUTIES

A preliminary question is whether defense industry firms, as firms, are moral agents capable of having duties. Numerous business ethicists suggest that business firms are in fact moral agents, to whom moral responsibility and blame can be assigned. Tom Donaldson, for example, notes that business firms are “capable of controlling the structure of [their] policies and rules” and thus bear moral responsibility for the decisions made through them.²⁴ Eric Posner & Adrian Vermeule suggest two broad arguments for thinking of business firms as moral agents: one set of arguments deemphasizes strict individualism and allows for the assignment of blame to collections of individuals; the other simply treats business firms as individual actors for moral purposes, much the same way that blame is assigned to business firms (and many other entities, such as nations, or unions, or

²³ See Alan O. Sykes, *The Doctrine of Commercial Impracticability in a Second-Best World*, 19 *J. Legal Stud.* 43, 44-45 (1990) (describing theory).

²⁴ THOMAS DONALDSON, *CORPORATIONS AND MORALITY* 30 (1982); see also PATRICIA H. WERHAE, *PERSONS, RIGHTS, AND CORPORATIONS* 59 (1985) (stating that because business firms structure the rules and processes for the “secondary actions” taken by their agents those firms “are and should be held morally responsible for actions within their control when . . . they could have acted otherwise”).

sports teams) in everyday language.²⁵ This paper recognizes that not everyone agrees that business firms are moral actors to whom duties may be assigned.²⁶ This paper, however, is not the forum for resolving that debate and proceeds as if business firms or the collection of persons making decisions for and acting on behalf of business firms can be assigned duties.

Many large defense industry firms are publicly traded. Publicly traded firms do have responsibilities to shareholders. But that, of course, cannot be the sum total of the parties to whom these firms owe duties. The discipline of business ethics is replete with arguments that a firm's duties do not end with the observation that a publicly traded firm has responsibilities to shareholders. At a minimum, for example, firms are obligated to obey law, at least to the extent that the laws are meant to be followed.²⁷ Firms also clearly have a duty not to harm, and outside of the rarified debates of legal scholars most people believe that firms clearly have a duty to rescue.²⁸ This paper argues that military industry firms do in fact have a special duty to the three groups of persons likely to be harmed through bribery in the defense industry: users of the products and services of that industry, persons defended by the use of those products and services, and victims of groups that embrace and inflict mayhem.

Defense industry firms operate in an inherently flawed market. It is precisely the flaws to the market that create conditions that contribute to bribery within the industry. It is very important to recognize, however, that defense

²⁵ Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 703-04 (2003).

²⁶ See, e.g., Amy Sepinwall, *Citizens United and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 605 (2012) (arguing that regardless of whether business firms are moral agents, they “are not expected to participate in the central institutions of citizenship”).

²⁷ Thomas A. Uebler, *Shareholder Police Power: Shareholder's Ability to Hold Directors Accountable for Intentional Violations of Law*, 33 DEL. J. CORP. L. 199, 211 (2008).

²⁸ See MARTIN SANDBU, *JUST BUSINESS: ARGUMENTS IN BUSINESS ETHICS* (2012) (providing deep analysis of the debate and attitudes outside of law); Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1204 (2002) (summarizing legal arguments).

industry firms benefit rather than are harmed by these market flaws. Indeed, these flaws are allowed to exist so that defense industry firms *can* exist and operate.

The market is a social construct that serves several purposes. Those purposes, however, are socially-oriented and intended to enhance overall well-being. A well-functioning market disciplines or creatively destroys firms that produce unwanted goods or services, that shift rents rather than creating value, that act in ways inimical to society. To the extent that the market does not do so, society regulates activities either through its governance/legal functions or through coordinated social efforts. Market regulation and social regulation, however, are difficult when firms cannot compete, when transactions cannot be disclosed, or when firms of necessity must form close relationships with governments.

Society willingly allows defense industry firms to operate outside the discipline of markets and of regulation. The defense industry is not as lucrative as some business sectors, but has nonetheless managed to accrue substantial income and other benefits from its operations.²⁹ In turn, society asks that defense industry firms produce functioning goods and services that actually contribute to the defense of that society. Whether through operation of a specific social contract, or through a more general principle of reciprocity, defense industry firms therefore owe a duty to society to perform in that way.

The people against whom defense industry products are used by groups that embrace mayhem are also owed a duty, although arguably in a different way than those owed to society in general. The defense industry might argue that defense industry firms themselves do not directly harm those people, nor do they even make the decision to inflict harm on those people, Their duty, however, may

²⁹ See pwc, *Aerospace and Defense: 2013 Year in Review and 2014 Forecast* (2014), available at http://www.pwc.com/en_US/us/industrial-products/assets/pwc-aerospace-defense-2013-year-in-review-and-2014-forecast.pdf; Richard Clough, *U.S. Defense Industry's Profits Soaring Along With Global Tensions: Lockheed, Northrop, Raytheon and General Dynamics are Reaping Record Rewards for Shareholders*, Bloomberg News (Sept. 25, 2014), <http://www.pressherald.com/2014/09/25/u-s-defense-industrys-profits-soaring-along-with-global-tensions/>.

lie in theories of complicity. With respect to legal theories, international law assigns culpability to firms that work with bad international actors if three conditions are met:

(1) there is a strong and interdependent business relationship between the [firm] and the host government (i.e., the [firm] hires the security forces or contracts for their services); (2) the MNC is aware of the human rights violations; and (3) the [firm] . . . continues to perform under contractual arrangements, particularly in furtherance of a collaborative project or endeavor.³⁰

Relying on this doctrine, Human Rights Watch has encouraged litigation against defense industry firms that provide devices to malevolent polities, stating that such a firm “facilitates or participates in government human rights violations. Facilitation includes the company’s provision of material or financial support for states’ security forces which then commit human rights violations that benefit the company.”³¹

As a moral concept, theories of complicity tend to examine the degree of proximity between the actively wrong actor and the putatively complicit actor.³² Complexity theory teaches that most actions have many effects: a butterfly flapping its wings in New York affects the weather in Tokyo.³³ The butterfly, however, is hardly either spatially or temporally proximate to the effects in Tokyo, and as a moral matter would bear little culpability in any harms caused by inclement weather. A difficult question, and one that does not have an algorithmic answer, is the degree of proximity at which moral responsibility ceases to exist.

The degree of proximity between defense firms that pay bribes to escape regulation and the infliction of damage by groups that embrace mayhem would

³⁰ Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon : An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 103 (2002).

³¹ Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999), available at <http://www.hrw.org/reports/1999/enron/>

³² Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 57 (2010).

³³ Steven M. Manson, *Simplifying Complexity: A Review of Complexity Theory*, 32 GEOFORUM 405, 407 (2001).

seem to be close enough to warrant blame. These are not really groups that engage in deliberation or choice; by definition they use military devices to inflict harm. The Clarion Project, a non-aligned organization that promotes dialogue, describes Jama'atu Ahlis Sunna Lidda'awati wal-Jihad – better known as Boko Haram – as “follow[ing] a doctrine of unrestrained warfare, making no distinction between non-combatants and combatants; civilians and soldier; females or males,” and notes that its leader has proclaimed that when its followers meet people of other ideologies ““there is no[t] any talk except hitting of the neck.””³⁴ To provide weapons to Boko Haram, or to Ansaru, or Epanastatikos Agonas, or Kach Chai, or Kahane Chai, or Lashkar-e-Jhangvi, or Lashkar-e-Taiba, or any of dozens of similar groups, is to *know* that those devices are intended to be used to hurt people. Moreover, the very fact that a bribe would be paid to avoid regulations that prohibit the provision of goods or services to those organizations suggests a strong relationship between the provider of military devices and the group. Both legal and moral responsibility would be assigned to any firm that did so.

CONCLUSION

Defense industry firms operate in an environment in which secrecy is often as much an objective of the parties as is providing or obtaining the most appropriate good or service at the most appropriate price. Not only does this constitute an imperfect market, it also creates conditions that lead to the payment of bribes. Bribery does in fact occur more often in the defense industry than in many other business sectors.

Bribery and other corruption have observable effects. Bribery tends to degrade the quality of goods and services, to degrade the quality of management and decisionmaking, and to be used to avoid regulation. With respect to the defense industry these effects are likely to cause harm to at least three distinct

³⁴ Ryan Mauro, *Boko Haram 7* (Clarion Group Fact Sheet 2014), *available at* http://www.clarionproject.org/sites/default/files/ClarionProject_FactSheet%20-%20BOKO%20HARAM.pdf.

groups of people: people who use military devices, people intended to be protected by the goods and services produced by defense industry firms, and the victims of groups that embrace mayhem.

Defense industry firms have a duty not to directly or complicitly harm people within these groups by paying bribes. The market failures that encourage corruption are known and tolerated by society, because those failures are considered necessary for the operation of firms that contribute to safety and security. Defense industry firms are substantially rewarded for their legitimate activities. In exchange for being allowed to benefit from operating without the discipline of markets, society may impose special duties on defense industry firms. That includes a duty not to pay bribes.