

**THE LEGALITY OF CONVENTIONAL ARMS
TRANSFERS DURING ARMED CONFLICTS:
ASSESSING STATE RESPONSIBILITY FOR
FACILITATING MILITARY ACTIONS OF OTHER
STATES**

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I. INTRODUCTION

The Russian military attack in, and against, Ukraine has given rise to several critical reflections on the international law applicable to the use of force and international humanitarian law (IHL).¹ The armed conflict there has become a laboratory to distinguish and analyze the applicable rules related both to *jus ad bellum* and *jus in bello*.² It is not the purpose of this Contribution to discuss the actions of the Russian Federation and Ukraine within the framework of the applicable law, which has already been carried out in various works and reports produced in recent months.³ The interest here is rather to analyze the legality of the actions of third states, which in one way or another, have offered and provided military assistance to Ukraine through the delivery of conventional arms in order to make Russian troops withdraw from the occupied territory.⁴

In the context of a growing flow of arms trade,⁵ the question I consider here is whether the transfer of conventional armaments—small, light, or heavy weaponry—constitutes a lawful act under contemporary international law, or whether we are facing situations that are contrary to the positive rules in force. This question is relevant because it allows us to rethink the

1. See Jelena Pejic, *What You Need to Know: Expert Q&A on IHL Compliance in Russia's War in Ukraine*, JUST SEC. (Apr. 7, 2023), <https://www.justsecurity.org/85880/expert-qa-on-ihl-compliance-in-russias-war-in-ukraine/>.

2. See generally *Jus Ad Bellum and Jus In Bello*, INT'L COMM. RED CROSS (Oct. 29, 2010), <https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello> (discussing the definition of *jus in bello* and how it governs warfare).

3. In particular, note the report prepared by the expert group appointed, on the basis of the Moscow Mechanism, by the Organization for Security and Cooperation in Europe. Wolfgang Benedek et al., *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes Against Humanity Committed in Ukraine Since 24 February 2022*, OSCE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS. [ODIHR] (Apr. 13, 2022), <https://www.osce.org/files/f/documents/f/a/5/15868.pdf>. An analysis of the main contributions of the report can be read in Adil Ahmad Haque, *The OSCE Report on War Crimes in Ukraine: Key Takeaways*, JUST SEC. (Apr. 15, 2022), <https://www.justsecurity.org/81143/the-osce-report-on-war-crimes-in-ukraine-key-takeaways/>.

4. See Press Release, Security Council, Security Council Speakers Argue Over Western Countries Supplying Arms That Support Ukraine's Right to Self-Defense Against Russian Federation's Aggression, U.N. Press Release SC/15388 (Aug. 17, 2023).

5. ANDREW T. H. TAN, *THE GLOBAL ARMS TRADE: A HANDBOOK* 3 (1st ed. 2010); Lerna K. Yanik, *Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations*, 28 HUM. RTS. Q. 357, 388 (2006). In this Article, following much of the doctrine on the subject, we use the expressions "trade," "transfer," "supply," or "provision" interchangeably to refer to the dynamics of arms transfers—for commercial or non-commercial purposes—across international borders. The concept of "transfer" in fact is broader than "trade" because it involves military aid, supply of arms for peace-keeping forces, and transfers in the framework of production joint ventures. Dealing with mines, the Amended Protocol II to the 1980 Convention on Certain Conventional Weapons (article 2.15) and the 1997 Ottawa Convention (article 2.4) consider that the notion of "transfer" includes, in addition to the physical movement of weapons into or from national territory, the transfer of title to and control over them. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996, 2048 U.N.T.S. 93; see also Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211.

intervention in hostilities by third states that, by compromising their neutrality, choose to collaborate openly with one of the parties in the confrontation. At the same time, it contributes to a broader thinking about the legal and extra-legal limits that can be imposed on arms transfers when they are likely to affect international peace and security or jeopardize respect for human rights.

II. TRANSFERRING CONVENTIONAL WEAPONS: THE PROBLEMS WITHIN

After the Russian invasion of Crimea in 2014, the United States has provided increased assistance to the Ukrainian government; initially, the amount was estimated at more than three billion dollars, but the Biden administration decided soon afterwards to approve an expanded budget of \$1.7 billion in addition to what was originally foreseen.⁶ At the beginning, this aid was earmarked for the shipment of non-lethal material and defense training, but as the conflict escalated, it was channeled towards the specific shipment of weapons, generally defensive but also of an offensive nature (such as tanks, combat aircraft, and, more recently, cluster munitions).⁷

Most countries within the European Union (EU) have decided to transfer weapons to the Ukrainian territory, including heavy weapons (such as T-72 tanks) or light weapons (such as machine guns); only in some cases this so-called assistance has been limited to equipment whose use does not produce lethal consequences.⁸ For the most part, the weapons delivered are of defensive potential (such as anti-tank or anti-aircraft weapons), although in some cases, certain countries provided military equipment clearly intended for offensive use.⁹ Prior to the Russian attack on February 24, 2022, Germany's refusal to send the Ukrainian military offensive weapons, while maintaining a restrictive position, had generated some debate.¹⁰ Indeed, this

6. PETER DANSSAERT & BRIAN WOOD, IPIS, *RUSSIA'S INVASION OF UKRAINE AND ARMS TRANSFER IN THE FRAMEWORK OF INTERNATIONAL LAW* 10 (Apr. 11, 2022), https://ipisresearch.be/wp-content/uploads/2022/04/20220413_Russias-Invasion-of-Ukraine-and-arms-transfers-in-the-framework-of-international-law_IPIS-insight.pdf.

7. On the controversial decision by the Biden administration to approve the transfer of stockpiled US cluster munitions to Ukraine, its legal problems, and humanitarian concerns, see Patricia Lewis & Rashmin Sagoo, *Supplying Ukraine with Cluster Bombs Sends the Wrong Message to the World*, CHATHAM HOUSE (July 11, 2023), <https://www.chathamhouse.org/2023/07/supplying-ukraine-cluster-bombs-sends-wrong-message-world>.

8. See Jacek Tarocinski & Andrzej Wilk, *Arms Deliveries to Ukraine: Crossing the Red Lines*, OŚRODEK STUDIÓW WSCHODNICH (June 9, 2023), <https://www.osw.waw.pl/en/publikacje/osw-commentary/2023-06-09/arms-deliveries-to-ukraine-crossing-red-lines>.

9. Denys Davydenko et al., *How Western Offensive Weapons Can Help Ukraine Defeat Russia*, EUR. COUNCIL ON FOREIGN RELS. [ECFR] (Mar. 30, 2022), <https://ecfr.eu/article/how-western-offensive-weapons-can-help-ukraine-defeat-russia/>; see also Sophia Zademack & Luke James, *Western Weapons in Ukraine*, OPINIOJURIS (Aug. 2, 2022), <http://opiniojuris.org/2022/02/08/western-weapons-in-ukraine/>.

10. On January 21, 2022, for example, Germany had refused permission to Estonia to transfer German-origin D-30 Howitzer 152 mm artillery pieces.

gesture has been criticized as contrary to the unity of Western support in the face of the tragedy in Ukraine.¹¹

As far as EU actions are concerned, the Council approved an unprecedented resolution on February 28, 2022,¹² through which military assistance to the Ukrainian Armed Forces would be financed for a total of €450 million, a figure which was doubled by Decision 2022/471/CFSP on March 23 of the same year.¹³ On May 16, the EU gave the green light to funding of €1.5 billion for the shipment of war material designed to produce lethal effects to Ukraine.¹⁴ This is the first time that the EU has jointly and financially supported the supply of armaments to a third country.¹⁵ All these measures were taken in the context of the European Peace Facility (EPF), created in 2021 for the financing, by the member states, of various EU actions within the framework of common foreign and security policy aimed at maintaining “peace, preventing conflicts and strengthening international security.”¹⁶

Although weapons of military use, such as those described, are not in themselves prohibited and can be used to confront situations of aggression or oppression,¹⁷ in this case the quantity of arms transferred and the context through which the receiving state is going through poses a specific problem that deserves particular attention.¹⁸ In fact, we know that these are weapons destined for a country suffering an armed conflict, but it should also be noted that, when these measures were approved, sufficient conditions of control, supervision, or monitoring were not established.¹⁹ This raises a number of doubts regarding the possible risks that the transfer of these weapons may present on the ground, especially regarding human rights violations.²⁰ Such delivery of weapons becomes especially worrisome considering the high

11. Zademack & James, *supra* note 9.

12. Council Decision 2022/338/CFSP, 2022 O.J. (L 60) 1 (EU).

13. Council Decision 2022/471/CFSP, 2022 O.J. (L 96) 43 (EU).

14. *See generally European Commission Disburses First Tranche of the New €1 Billion Macro-Financial Assistance for Ukraine*, EUR. COMM’N (Aug. 1, 2022), https://ec.europa.eu/commission/press-corner/detail/en/IP_22_4783 (discussing how the EU will be using the money towards Ukraine).

15. Sebastian Clapp, *Russia’s War on Ukraine: Bilateral Delivery of Weapons and Military Aid to Ukraine*, THINK TANK: EUR. PARLIAMENT (May 20, 2022), [https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2022\)729431](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)729431).

16. Council Decision 2021/509/CFSP, 2021 O.J. (L 102) 14 (EU), Establishing a European Peace Facility, and Repealing Decision 2015/528/CFSP 2015, O.J. (L 84) 39 (EU).

17. Barry Kellman, *Controlling the Arms Trade: One Important Stride for Humankind*, 37(3) FORDHAM INT’L L.J. 687, 690–91 (2014). An exception to this legality is, of course, the transfer of cluster munitions, which is *a priori* forbidden in the Convention on Cluster Munitions, May 30, 2008, 2688 U.N.T.S. 39, 48 I.L.M. 357. However, it should be reminded that, unlike most European states (including many NATO members), the US, Russia, and Ukraine have not yet signed up to the convention.

18. Kellman, *supra* note 17, at 691.

19. *Id.* at 729.

20. *See* Antonia Hinds, *The Arms Trade and Human Rights*, 1 INT’L J. HUM. RTS. 26 (1997).

rates of transnational crime in Ukraine and the lack of regional stability that has been noted with respect to Eastern Europe as a whole.²¹

Moreover, in the Russian-Ukrainian conflict, the report prepared by the group of experts appointed by the OSCE has identified a series of violations of international law related to the disproportionate or indiscriminate use of conventional weapons.²² Thus, for example, the study documented worrisome cases of the use of cluster munitions, missile launchers, white phosphorus, and incendiary weapons, among others.²³ While the use of such weaponry by the Russian military is amply demonstrated, in many cases it is recorded that there have been allegations that many of these weapons were also used by Ukraine.²⁴ This, of course, is not a minor fact if what is being considered is the shipment of armaments to this country.²⁵

III. THE LEGAL FRAMEWORK APPLICABLE TO CONVENTIONAL ARMS TRADE

It could be argued that the right to militarily assist Ukraine in the face of an armed attack, insofar as this state is exercising its inherent right of self-defense, is covered by the notion of collective self-defense explicitly recognized in article 51 of the Charter of the United Nations (UN Charter).²⁶ However, it is well known that not every action can be admitted in terms of a lawful response to an unjustified armed attack, insofar as requirements of necessity, immediacy, and proportionality are customarily imposed.²⁷ In the case of the Russian-Ukrainian armed conflict, it seems clear that the delivery of armaments to Ukraine has been seen as an appropriate, necessary, and reasonable measure to lead to the restoration of a lawful state of affairs.²⁸ Moreover, the deployment of such a defense has been deemed the only possible way forward in the current state of affairs, given that the possible intervention of the Security Council in the matter (referred to in article 51) seems impossible in practical terms—the Russian Federation is one of the

21. Tomas Hamilton, *Articulating Arms Control Law in the EU's Lethal Military Assistance to Ukraine*, JUST SEC. (Mar. 30, 2022), <https://www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine/>.

22. Benedek et al., *supra* note 3, at 41–42.

23. *Id.*

24. *Id.*

25. Kellman, *supra* note 17, at 727–30.

26. U.N. Charter art. 51.

27. On the practical challenges of self-defense, see D. W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958). On the requirements for its exercise, see CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 105–08 (2000). Paradoxically, the Russian Federation rhetorically claimed the right of self-defense to launch its attack against Ukraine. On the lack of legal basis of this Russian claim, see Michael N. Schmitt, *Russia's "Special Military Operation" and the (Claimed) Right of Self-Defense*, LIEBER INST. W. POINT: ARTICLES OF WAR (Feb. 28, 2022), <https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense/> (discussing the lack of a legal basis of this Russian claim).

28. DANSSAERT & WOOD, *supra* note 6, at 9–10.

permanent members with the right of veto in relation to the measures that may be adopted in the matter, according to articles 23.1 and 27.3 of the UN Charter.²⁹

In more specific terms, all shipments of conventional arms must comply with a series of standards and requirements enshrined in international law to ensure that they do not pose a threat to international peace and security.³⁰ This is the case of the Arms Trade Treaty (ATT), an agreement whereby the negotiating states agreed on the highest possible international standards to harmonize trade transactions involving conventional arms, and thus, to prevent and eradicate illicit trade.³¹

The text of the ATT article 6 makes explicit a prohibition imposed on the state that intends to export armaments in any of the categories provided for: it states that no transfer may be authorized if it would violate (1) “its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes,” (2) or of other relevant international obligations under existing agreements on transfer and illicit trafficking, (3) or even if there is:

knowledge at the time of [the] 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.³²

29. U.N. Charter arts. 23, ¶ 1, 27, ¶ 3, 51.

30. “Conventional weapons” include all those classical weapons that do not fall under the classification of weapons of mass destruction, as defined in Commission for Conventional Armaments. Commission for Conventional Armaments: Resolutions Adopted by the Commission at Its 13th Meeting, 12 August 1948, and a Second Progress Report of the Commission, U.N. Doc. S/C.3/32/Rev.1, at 2 (Aug. 18, 1948), <https://digitallibrary.un.org/record/755665?ln=en>; see STUART CASEY-MASLEN & TOBIAS VESTNER, A GUIDE TO INTERNATIONAL DISARMAMENT LAW 28 (1st ed. 2019).

31. Arms Trade Treaty art. 2, *open for signature* Apr. 2, 2013, 3013 U.N.T.S. 52373. The Treaty was adopted by General Assembly Resolution 67/234B and entered into force on December 24, 2014. G.A. Res. 67/234 (Apr. 2, 2013). It currently has 113 States Parties and 28 signatories. *Id.* Article 2 (1) of the ATT identifies eight categories of conventional weapons: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft and unmanned combat aerial vehicles (UCAV), attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. Arms Trade Treaty, *supra*, art. 2. On the importance of the negotiation of the treaty as a turning point in the subject, see L. SIMONET, LE TRAITÉ SUR LE COMMERCE DES ARMES: GENÈSE, ANALYSE, ENJEUX, PERSPECTIVES DU PREMIER INSTRUMENT JURIDIQUE CONSACRÉ À LA RÉGLEMENTATION DES TRANSFERTS INTERNATIONAUX D’ARMES CONVENTIONNELLES (2015) [L. SIMONET, THE ARMS TRADE TREATY: ORIGIN, ANALYSIS, CHALLENGES AND PERSPECTIVES OF THE FIRST LEGAL INSTRUMENT ON THE REGULATION OF THE INTERNATIONAL TRANSFER OF CONVENTIONAL WEAPONS (2015)] (author’s translation).

32. Arms Trade Treaty, *supra* note 31, art. 6, ¶ 3. On the scope of this prohibition, see STUART CASEY-MASLEN ET AL., THE ARMS TRADE TREATY: A COMMENTARY 177–243 (2016) (explaining the scope of this prohibition). See also A. Biad, *La Référence aux Droits de L’homme, au Droit International Humanitaire et aux Crimes Internationaux dans le Traité sur le Commerce des Armes*, in DROITS DE L’HOMME ET DROIT INTERNATIONAL HUMANITAIRE: QUELLES CONSEQUENCES SUR LES TRANSFERTS D’ARMEMENTS CONVENTIONNELS DE GUERRE? (TRIGEAUD, L. DIR.) 187 (2022) [A. Biad, *The Reference*

This standard established in article 6 is based on the “knowledge” of the possible use of arms for purposes contrary to international law.³³ This is an objective element based on the information reasonably available to a state about the prevailing circumstances.³⁴

Furthermore, and beyond this explicit prohibition, ATT article 7 imposes, prior to the provision of any type of conventional weapons, the duty to examine:

[I]n an objective and non-discriminatory manner, taking into account relevant factors . . . the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to:
 - (i) commit or facilitate a serious violation of international humanitarian law;
 - (ii) commit or facilitate a serious violation of international human rights law;
 - (iii) commit or facilitate an act constituting an offense under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
 - (iv) commit or facilitate an act constituting an offense under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.³⁵

The language, as will be explained in the discussion of liability rules, refers to the need of considering, prior to approving an arms transfer, the possible use of arms for the purpose of “commit[ting] or facilitat[ing]” an unlawful act.³⁶ In its second paragraph, the article proposes the adoption of risk mitigation measures to promote confidence in such transactions.³⁷ Finally, in paragraph three it is made clear that no export can be authorized “[i]f, after conducting this assessment and considering available mitigati[on] measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences [foreseen] in paragraph 1.”³⁸

In our case study, most of the countries that intend to provide arms to Ukraine are parties to the ATT,³⁹ and therefore, must respect the obligations

to Human Rights, International Humanitarian Law and International Crimes in the Arms Trade Treaty, in HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: WHAT CONSEQUENCES FOR THE TRANSFER OF CONVENTIONAL ARMS? 187 (2022)] (author’s translation).

33. Arms Trade Treaty, *supra* note 31, art. 6.

34. Zademack & James, *supra* note 9.

35. Arms Trade Treaty, *supra* note 31, art. 7.

36. *Id.*

37. *Id.*

38. *Id.*

39. In fact, all NATO members are ATT State Parties, except for the United States and Turkey. Compare *Arms Trade Treaty*, U.N. TREATY COLLECTION 4, 6, <https://treaties.un.org/doc/Publication/>

derived from its articles. Despite its imprecise vocabulary,⁴⁰ in essence, it is a duty to take into consideration all foreseeable effects that may be generated by the transfer of armaments.⁴¹ With a clear teleological indication, states are required to give a preliminary warning of the consequences of approving such a supply.⁴² The underlying reason is clear: any benefit that the state may derive from the operation—be it economic, political, military, or otherwise—cannot override or outweigh the disadvantages that may arise in terms of peace, security, and respect for human rights when the context allows it to be foreseen.⁴³ These are the same principles that had already been made explicit by other subsidiary bodies of the United Nations, such as the Human Rights Council.⁴⁴

In short, there are a number of explicit provisions that oblige states to take conventional arms transfers seriously, requiring the establishment of strict controls and supervisory measures to ensure that their delivery of weapons would not aggravate the conflict or contribute to the commission of new violations of international law during the armed conflict. However, it seems clear that the ATT only provides a generic framework without indicating concrete ways of implementation.⁴⁵ Moreover, its articles do not institutionally determine clear functions of supervision and control over the observance of its articles by States Parties.⁴⁶

Regarding European countries, it is worth adding the existence of a 2008 Resolution creating the Council's Common Position on the criteria for the evaluation of all arms exports (2008/944/CFSP).⁴⁷ The content of this document is undoubtedly similar to the standards that would later be

MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf (last visited Sept. 5, 2023) (displaying information revealing that the United States and Turkey are not state parties), with *NATO Member Countries*, NATO, https://www.nato.int/cps/en/natohq/topics_52044.htm (last updated June 8, 2023, 4:07 PM). Both countries, however, have signed it, meaning they cannot take actions that would frustrate the purpose and object of the treaty; this obligation is clear from article 18 of the Vienna Convention. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679. Ukraine, for its part, also signed the agreement on September 23, 2014, although it also has not yet ratified it. *See id.*

40. Mikko Huttunen, *The Arms Trade Treaty: An Interpretive Study 67–71* (2014) (Master's Thesis, University of Lapland Faculty of Law), <https://lada.ulapland.fi/bitstream/handle/10024/59986/Huttunen.Mikko.pdf>.

41. On the content of article 7 of the ATT, see CASEY-MASLEN ET AL., *supra* note 32, at 244–85.

42. Arms Trade Treaty, *supra* note 31, art. 7.

43. *See* CASEY-MASLEN ET AL., *supra* note 32, at 318.

44. Human Rights Council Res. 24/35, U.N. Doc. A/HRC/RES/24/35, at 2 (Oct. 8, 2013). In its third resolution paragraph, the Council “[u]rges all States to refrain from transferring arms to those involved in armed conflicts when said States assess, in accordance with their applicable national procedures and international obligations and standards, that such arms are sufficiently likely to be used to commit or facilitate serious violations or abuses of international human rights law or international humanitarian law.” *Id.*

45. JOHN KIERULF, *DISARMAMENT UNDER INTERNATIONAL LAW* 211 (2017).

46. *See* William Thomas Worster, *The Arms Trade Treaty Regime in International Institutional Law*, 36 U. PA. J. INT'L L. 995, 1045 (2015).

47. Council Decision 2008/944/CFSP, 2008 O.J. (L 335) 99 (EU) (Dec. 8, 2008).

established by the ATT and which have already been discussed.⁴⁸ Thus, when defining the common rules governing the control of exports of military technology and equipment, it is made clear that states must take a series of clear precautions when they are destined for a country whose internal situation is marked by armed conflict.⁴⁹ Criterion 3, for example, states that “[m]ember States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.”⁵⁰ Under this standard, if it could be proved that the delivery of conventional weapons to the Ukrainian government will “prolong” hostilities with the Russian Federation, then such a supply should be prohibited.⁵¹ Of course, the language is vague and it is difficult to prove such a prolongation. It has even been argued that, although it is not clear from the wording of the criterion itself, this is a provision whose original intention, when negotiated, was to prevent the transfer of arms from contributing to fomenting a civil war (or promoting clashes between official forces and rebel groups) or to fuel an international armed conflict.⁵² This, of course, in no way affects the applicability of its content, since the letter of the text makes it clear that the preliminary analysis regarding the destination of each export must take into account any situation of armed violence.⁵³

In any case, the above-mentioned guideline undoubtedly complements Criterion 2, which states that an export license should be denied “if there is a clear risk that the exported weapons might be used for internal repression” and that care and vigilance should be exercised when they are destined for a territory in which the international community has established the existence of “serious violations of human rights.”⁵⁴

Equally relevant is Criterion 7, which includes the need to take into consideration the risk of technology or military equipment being either *diverted* within the purchasing country or *re-exported* under undesirable conditions.⁵⁵ This standard was intended to ensure that states would have reliable control over the destination of their own weapons, thus preventing the dangers of possible triangulation into undesirable hands.⁵⁶

48. On the challenges of this EU regulation, see HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: WHAT CONSEQUENCES FOR THE TRANSFER OF CONVENTIONAL ARMS?, *supra* note 32, at 219.

49. Council Decision 2008/944/CFSP, *supra* note 47.

50. *Id.*

51. *Id.*

52. Hamilton, *supra* note 21.

53. See Council Common Position 2008/944/CFSP, 2008 O.J. (L 335) 99 (EC).

54. In general, it is understood that this criterion refers to the need to prevent transfers of war material to countries with systematic records of human rights violations, something that—taking into account Ukraine’s adherence to international arms trade regimes—would not seem to apply here. See Hamilton, *supra* note 21 (citing Council Common Position 2008/944/CFSP, *supra* note 53).

55. Council Common Position 2008/944/CFSP, *supra* note 53.

56. On the importance of anti-diversion measures and the way they are regulated in the text of the

Reading these criteria together in light of the ATT provisions, it can be seen that both the ATT and the Common Position of the Council of the European Union seek to lay the foundations of a uniform control system, providing the greatest possible security during the international transfer of conventional war material, on the basis of the implementation of risk examinations related to what may happen with each specific supply.⁵⁷ This responds to the standard of due diligence, according to which states are bound to prevent, investigate, punish, and compensate, and have the obligation not to encourage others to act in violation of existing legal provisions.⁵⁸ At the same time, in order to comply with relevant standards, before authorizing any transfer of weapons abroad, states shall take all reasonable steps to make an appropriate risk assessment.⁵⁹ This has been endorsed in 2019 by the U.K. court of appeals in a case involving arms exports to Saudi Arabia; the judges concluded there that the government had to study whether the importing country had a historical pattern of breaches related to human rights law and IHL; not having made any attempt to assess the existence of past violations or to evaluate the risk of future violations (in this case Saudi Arabia was leading a coalition that was directing military operations against the Houthis in Yemen), the court ordered the government to stop issuing new licenses for arms sales to that country.⁶⁰

Following this reasoning, it could be asked whether existing regulations would prevent the supply of conventional arms to Ukraine. Preliminarily, it seems that the legal assessment would be less problematic if the delivery of arms were made to the Russian Federation. Indeed, since there is a consistent and widespread opinion that the Russian government resorted to an offensive use of force in violation of article 2.4 of the UN Charter, any delivery of weapons to Putin's administration would be prohibited under the above-mentioned legal norms; this has been stated, for example, in relation to the rejection of the initial decision of China to contribute with weapons to the Russian armed forces.⁶¹

ATT, see Kellman, *supra* note 17, at 716–26.

57. See Council Common Position 944/2008/CFSP, *supra* note 53.

58. On the problems arising with the identification of a general principle of due diligence in international law, see Neil McDonald, *The Role of Due Diligence in International Law*, 68 INT'L & COMP. L.Q. 1041, 1054 (2019).

59. Council Common Position 944/2008/CFSP, *supra* note 53.

60. *The Queen on the Application of Campaign Against Arms Trade v. The Secretary of State for International Trade* (2019), EWCA Civ. 1020, ¶138–42 (appeal taken from 2017 EWHC 1726) (U.K.).

61. On China's violation of the ATT, if it were to transfer arms to the Russian Federation, see Tomas Hamilton, *China Would Violate the Arms Trade Treaty if It Sends Weapons to Russia for Use in Ukraine: Part I*, OPINIOJURIS (June 4, 2022), <http://opiniojuris.org/2022/04/06/china-would-violate-the-arms-trade-treaty-if-it-sends-weapons-to-russia-for-use-in-ukraine-part-i/>, and Tomas Hamilton, *China Would Violate the Arms Trade Treaty if It Sends Weapons to Russia for Use in Ukraine: Part II*, OPINIOJURIS (July 4, 2022), <http://opiniojuris.org/2022/04/07/china-would-violate-the-arms-trade-treaty-if-it-sends-weapons-to-russia-for-use-in-ukraine-part-ii/>.

Regarding the lawfulness of the transfer of arms to Ukraine, however, the picture seems much more obscure. The justification here was related (at least initially) to the fact that Ukrainian authorities were entitled to exercise a defensive use of force to respond to a foreign invasion and were, therefore, in need of means of combat to support such legal action.⁶² In this sense, any collaboration with the regime of President Volodymyr Zelensky has been described as an indispensable aid for the collective reestablishment of the European order.⁶³ In summary, when it comes to discerning whether a transfer of arms would undermine international peace and security, the predominant discourse explains that the arms sent to Ukraine are useful to consolidate the main purpose of the United Nations (article 1.1 of the UN Charter), allowing the country to conduct an appropriate self-defense against an armed attack carried out in clear opposition to the principle included in article 2.4.⁶⁴

Nevertheless, the situation on the ground is challenging, and no definite answer can be given in advance. To assess the legality of such supplies, it becomes necessary to examine in detail the quantity, timing, and details of the weapons delivered in order to determine their possible impact, and therefore, to conclude whether the standards seem to have been respected.⁶⁵ For example, if there are no doubts that the weapons offered are mainly used for defensive purposes or are extremely difficult to divert, there would not be legal obstacles to authorize their transfer; on the other hand, if they are small arms or light weapons, more susceptible to being diverted to illicit trafficking, and less capable of being controlled,⁶⁶ it may be necessary to weigh the advantages and disadvantages and only decide in favor of such a transfer if there are considerable guarantees that existing risks have been minimized as much as possible. Review measures, such as the implementation of end-user control mechanisms and the continuous monitoring of operations, ought to be taken by supplier states in order to show their commitment and intention to mitigate the dangers inherent in such an operation and to avoid the overriding risks of aggravating the conflict.⁶⁷

When assessing each transfer, the issue is whether the exporting state might aggravate the situation in the receiving state through such action, or

62. U.N. Charter art. 51, ¶ 1.

63. Max Bergmann & Naz Gocek, *Europe Needs Its Own Ukraine Assistance Act*, CTR. FOR STRATEGIC & INT'L STUD. (June 24, 2022), <https://www.csis.org/analysis/europe-needs-its-own-ukraine-assistance-act>.

64. Compare U.N. Charter art. 51, ¶ 1 (allowing for the right of self-defense in the face of an armed attack), with U.N. Charter art. 2.4 (prohibiting the "use of force").

65. Council Common Position 944/2008/CFSP, *supra* note 53.

66. Alberto Estévez, *Is It Legal to Send Weapons to Ukraine?*, INDEP. (Mar. 23, 2022), <https://www.elindependiente.com/71pinión/2022/03/23/es-legal-enviar-armas-a-ucrania/>.

67. Elias Yousif & Rachel Stohl, *Under Caution: Assessing Arms Transfer Risk in Ukraine*, HENRY L. STIMSON CTR. (Mar. 7, 2022), <https://www.stimson.org/2022/under-caution-assessing-arms-transfer-risk-in-ukraine/>.

whether, on the contrary, the contribution of such arms would be limited to assisting in the reestablishment of a legal order that has been breached.⁶⁸ In other words, the following question should be asked: Should aid to a state that has been the object of an act of aggression, and whose security must be safeguarded, take precedence over the weapons' potential to aggravate the existing conflict, or not?⁶⁹ To respond to the dilemma in a particular circumstance, it is necessary to carry out a detailed scrutiny of the foreseeable consequences of each specific transfer in order to conclude on their concrete legality.⁷⁰

Finally, concerning actions taking place in the context of an international armed conflict, it is also necessary to recall the generic obligation set out in article 1 common to the Geneva Conventions of 1949:⁷¹ “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”⁷² The 2016 Commentary makes it clear that there are negative obligations arising from this general commitment.⁷³ To illustrate such obligations, it states that “Common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.”⁷⁴ Here, again, the need for a preliminary examination is postulated and the subjective element of “knowledge” and the calculation of potential effects are determined as criterion for assessing the lawfulness of an arms transfer.⁷⁵ On the basis of the legal framework, the conclusion here is that, if a state assessing the transfer or supply of arms *knows* that the recipient state is committing systematic violations of IHL or human rights law, such exports must clearly be detained.⁷⁶ Similarly, if the state committed those violations in the recent

68. *Id.*

69. *Id.*

70. See Hamilton, *supra* note 21 (concluding that in making decisions and publishing communications, the EU should consider a long list of risks allowing weapons into Ukraine).

71. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

72. GC II, *supra* note 71, art. 1.

73. INT'L COMM. RED CROSS, COMMENTARY OF THE FIRST GENEVA CONVENTION ¶ 162 (Knut Dormann et al. eds., 2016).

74. *Id.*; see also Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707, 732–35 (2014); Cordula Droège, *Le Commerce des Armes et L'obligation de Respecter et Faire Respecter le Droit International Humanitaire*, in HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: WHAT CONSEQUENCES FOR THE TRANSFER OF CONVENTIONAL ARMS?, *supra* note 32, at 119.

75. INT'L COMM. RED CROSS, *supra* note 73.

76. This is even if, in future cases, it may be feasible for weapons to be used lawfully. Cf. Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism*, CHATHAM HOUSE

past, and the existence of a “pattern” suggests that the weapons delivered would contribute to those violations in the future, export authorizations cannot be granted either.⁷⁷

IV. THE LEGAL FRAMEWORK RELATED TO THE INTERNATIONAL RESPONSIBILITY OF THE STATE

An analysis of the applicable legal framework needs to consider the specific rules referring to the derivations of the collaboration of third states in the commission of acts considered in violation of international law, which complement the substantive provisions identified so far.⁷⁸ Regarding the transfer of conventional weapons, article 16 of the Draft Articles on International Responsibility of States for Internationally Wrongful Acts (ARSIWA), elaborated by the International Law Commission (ILC),⁷⁹ is of relevance. Its text indicates that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) [T]hat State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) [T]he act would be internationally wrongful if committed by that State.⁸⁰

These elements require precision. As stated in the ILC’s own commentary, in order to speak of “aid” or “assistance” giving rise to responsibility, it is essential first that the state is aware of the situation and does so knowingly.⁸¹ In addition, the conduct performed should affect an obligation that is binding upon the state carrying out its aid or assistance.⁸² Thirdly, the action should be carried out with a view of facilitating the commission of the wrongful act and effectively facilitating it.⁸³ This

27 (Nov. 2016), <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf>.

77. These obligations do not seem to reflect customary international law. There is little state practice that can be shown in order to consider the existence of a customary rule prohibiting transfers that threaten international or regional peace, security, or stability. See Maya Brehm, *Conventional Arms Transfers in the Light of Humanitarian and Human Rights Law*, 28–30 (2005) (L.L.M. Thesis in International Humanitarian Law, University Centre for International Humanitarian Law).

78. See generally Benedek et al., *supra* note 3 (discussing violations of international law).

79. U.N. General Assembly, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Y.B. OF THE INT’L L. COMM’N 2001, Vol. II, Part 2, at 26–31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (2001); G.A. Res. 56/83 (2001).

80. U.N. General Assembly, *supra* note 79.

81. *Id.* at 66.

82. *Id.*

83. *Id.*

threshold means that, for example, pure negligence is not enough to hold a supplier responsible—neither is a weak or inefficient licensing system.⁸⁴

In spite of these clear requirements, the content of article 16 of the ARSIWA does not provide any indication on how such aid or assistance should be carried out in practical terms.⁸⁵ It has been determined that, in this sense, the only requirement is the existence of a *causative contribution* to the wrongful act.⁸⁶ Although this is a well-defined customary rule,⁸⁷ some doubts remain as to whether a transfer of arms would imply a case of “aid and assistance,” and even more, whether it could constitute a case of shared responsibility for what may happen with the use of such weapons in the future.⁸⁸

In terms of IHL, it could be said that the mere supply of arms in times of armed conflict would not amount to a direct participation in hostilities. Although there may be some hesitation as to whether the principle of neutrality would be affected (because this act would clearly support of one of the parties to the conflict),⁸⁹ it seems difficult to identify the supply of arms as a concrete military intervention; unless military items are sent with the precise indication or order of their use in the commission of a violation of IHL, the mere delivery of arms would not constitute a direct contribution to the war effort because, in general, the causal link between the state exporting arms and the state utilizing them in a potentially illicit manner is not direct.⁹⁰ Delivering weapons does not mean exercising an efficient control over what is done with such arms *on the ground*.⁹¹ In sum, just as the law of neutrality cannot prevent third states from intervening in favor of a state unjustly attacked,⁹² the mere supply of arms would not lead to consider, *per se*, that

84. Brehm, *supra* note 77, at 62.

85. U.N. General Assembly, *supra* note 79.

86. JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 402 (2013).

87. See HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 97–191 (2011). The customary character of the principle was recognized in the case concerning the Application of the Convention on the Prevention and Suppression of the Crime of Genocide. *Bosnia & Herzegovina v. Serbia & Montenegro*, Judgment, 2007 ICJ 43, ¶ 420 (Feb. 26).

88. See Mariana Eudes, *L'argument de la omplicité de Crime International* [Mariana Eudes, *The Argument of Complicity in an International Crime*], in *HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: WHAT CONSEQUENCES FOR THE TRANSFER OF CONVENTIONAL ARMS?*, *supra* note 32, at 131.

89. See Michael Bothe, *The Law of Neutrality*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 549 (D. Fleck ed., 3d ed. 2013); see also Brehm, *supra* note 77, at 55–57 (discussing arms transfers in relation to humanitarian and human rights laws).

90. See Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT'L HUMANITARIAN LEGAL STUD. 251, 264–65 (2022).

91. See *id.*

92. Kai Ambos, *Will a State Supplying Weapons to Ukraine Become a Party to the Conflict and Thus Be Exposed to Countermeasures?*, EJIL:TALK! (Mar. 2, 2022), <https://www.ejiltalk.org/will-a-state-supplying-weapons-to-ukraine-become-a-party-to-the-conflict-and-thus-be-exposed-to-counter-measures/>.

such third states change their legal status by becoming parties to the conflict.⁹³

Several debates have taken place around the question of responsibility.⁹⁴ Regarding possible “complicity” of the supplier state in the later use of such weapons by the importing state, it should be pointed out that, in general, the transfer of arms and military technology could be considered an act of “[a]iding and [a]betting”;⁹⁵ however, it would only constitute a case of joint liability in the event that such provision is directed for the specific purpose of assisting an aggressor state.⁹⁶ But some views consider that our reasoning should be based on less rigorous standards.⁹⁷ It has been pointed out that it would be sufficient to show that the assistance has been “deliberate” without this necessarily presupposing *knowledge* of the ultimate and precise purpose for which the weapons will be used.⁹⁸ Others, in a similar vein, have argued that *awareness* on the part of the state providing the weapons would be sufficient, and that the higher threshold of *knowledge* should not be required as such: according to this interpretation, if a state has a mere *perception* that another state is violating the rules and standards of international law and nevertheless proceeds and provides the weapons, courts could assume that an underlying intention (consciousness) exists that would consequently entail its potential responsibility.⁹⁹

These more flexible readings, however, do not seem to enjoy widespread support.¹⁰⁰ In a much more restrictive sense, relevant case law has indicated that the link between the arms supply and the later utilization

93. See *id.*; Heller & Trabucco, *supra* note 90, at 264–65.

94. See, e.g., Tugar v. Italy, App. No. 22809/93, Eur. Ct. H.R. (1995) (using strict immediate relationship standard of responsibility). *But see* Annysa Bellal, *Arms Transfers and International Human Rights Law*, in WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW 453 (Stuart Casey-Maslen ed. 2014) (arguing that a state only needs a perception that the importing state is violating human rights to be held responsible).

95. Heller & Trabucco, *supra* note 90, at 271.

96. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY, PART I 191 (Clarendon Press 1983). On the lack of usefulness of the concept of “complicity” when thinking about the international responsibility of the State, see Oliver Corten, *La ‘complicité’ dans le droit de la responsabilité internationale: un concept inutile?*, 57 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 57 (2011) [Oliver Corten, ‘Complicity’ in the Law of International Responsibility: A Useless Concept?, 57 FRENCH Y.B. OF INT’L L. 57 (2011)] (author’s translation). On the complex questions surrounding this idea of a shared responsibility, compare John Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. OF INT’L L. 77 (1986), with Vladyslav Lanovoy, *Complicity in an Internationally Wrongful Act*, in PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW: AN APPRAISAL OF THE STATE OF THE ART 134 (A. Nollkaemper & I. Plakokefalos eds., 2014).

97. See, e.g., Paolo Palchetti, *State Responsibility for Complicity in Genocide*, in THE UN GENOCIDE CONVENTION: A COMMENTARY (P. Gaeta ed. 2009) (suggesting that a state could be liable from a mere showing of a deliberate act).

98. This has been suggested, for the specific case of assistance in the commission of genocide. *Id.* at 381, 389.

99. Bellal, *supra* note 94, at 453.

100. See, e.g., Tugar v. Italy, App. No. 22809/93, Eur. Ct. H.R. (1995) (stating the Italian Government carries no responsibility).

of those weapons is always distant, and that only if an “immediate relationship” between the two extremes is established, it would be appropriate to attribute responsibility to the supplier state.¹⁰¹ In any case, the evaluation that is required by the transferring state in order to avoid responsibility consists of examining, before authorizing an export, whether the weapons “would be used” in the commission of human rights law or IHL violations.¹⁰² This translates into a “reasonable degree of likelihood” that those illicit acts can be produced, meaning that there is “a real possibility” or a “real risk” of its occurrence.¹⁰³

The problem here, of course, is again a practical one. For instance, in the case of a transfer of small arms or light weapons that circulate widely with limited control, the whole picture becomes much more complex.¹⁰⁴ Additionally, even in those situations in which the link between the transfer and the utilization of the weapon can be proven, it is almost impossible to track the negative consequences of the use of specific imported weapons in the course of an armed conflict.¹⁰⁵ As a result, there is no easy way to assess, in concrete terms, the consequences of establishing the precise degree of responsibility of the state that delivered the weapons, which has deep effects for instance in terms of the type or amount of reparations that courts could impose.¹⁰⁶

In any case, taking the example of the Russian-Ukrainian armed conflict, it is reasonable to conclude that states currently transferring weapons to the Russian Federation (which has been openly accused of violating an international peremptory rule) could be considered responsible for that act in terms of complicity because they authorized the delivery of weapons in spite of their knowledge that these arms would be employed for offensive purposes against civilian (i.e., illicit) targets.¹⁰⁷ The same argument cannot necessarily be applied to the delivery of military material to Ukraine, such as those transfers of defensive weapons that took place at the beginning of the conflict; the reason for this is that the key criterion—the necessary “knowledge” of the commission of an unlawful act—was not met in most of the reported cases (at that time it was expected that the weapons would be

101. *Id.*

102. Philippe Sands et al., *The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia’s Military Intervention in Yemen*, AMNESTY INT’L U.K. (Dec. 11, 2015), https://amnesty.org.uk/files/webfm/Documents/issues/Legal_opinion_on_saudi_arms_exports_16_december_2015_correction.pdf.

103. *Id.*

104. Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT’L REV. RED CROSS 467 (2005). On the historical challenges of international law in dealing with this problem of small arms and light weapons, see Z. YIHDEGO, *THE ARMS TRADE AND INTERNATIONAL LAW* (2007).

105. MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW* (2015).

106. *Id.*

107. Heller & Trabucco, *supra* note 90, at 269.

only used in a limited way to repel the Russian military attacks).¹⁰⁸ More than one year later, however, the assessment could be different. Facing a possible offensive use of the weapons that have been transferred, it should be examined now whether the supplier state knew that it was likely that violations of human rights law or IHL would be committed as a result of those operations.¹⁰⁹ With the available information regarding possible legal breaches by Ukraine, there might be some doubt concerning the legality of those supplies.¹¹⁰ An additional doubt arising from the delivery of conventional weapons to Kyiv relates to the fate of these weapons once the armed conflict is over; considering that the passing of time weakens the element of knowledge, it seems clear that a negative use of the supplied weapons well beyond the situation of the armed conflict is hard to foresee at

108. *Id.* at 259. *Ratione brevitatis*, I had to exclude here an examination of the responsibility of private corporations and individuals engaged in activities related to the transfer of weapons to countries involved in armed conflicts. This study would have complemented the legal considerations made relating the responsibility of states, since some standards are similar. See Rome Statute of the Int'l Crim. Ct. art. 25, § 3(c), July 17, 1988, 2187 U.N.T.S. 90. This establishes that a person shall be criminally responsible if he or she, “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or . . . attempted commission, including providing the means for its commission.” *Id.* It has been acknowledged in CH. SCHLIEMANN & L. BRYK, ARMS TRADE AND CORPORATE RESPONSIBILITY, LIABILITY, LITIGATION AND LEGISLATIVE REFORM 28 (2019) that the required elements include assistance and knowledge (even though this last concept is not mentioned in the text itself). *Id.* As with states, arms exporting companies are responsible for the use of their military equipment when “they can foresee that their products might have an adverse impact on human rights or might be used in the commission of violations of international humanitarian law and international crimes.” *Id.* A brief selection of domestic judicial decisions can be mentioned here to illustrate these considerations. In the Dutch case, *Pub. Prosecutor v. Van Anraat*, Case No. 2200050406-2, Judgment, 25 App. Ct. Hague (2007), the defendant was convicted because when transferring chemical products to Iraq that could produce mustard gas to be used against the Kurdish minority, he provided a “substantial contribution” to the attack and was knowledgeable about the commission of a human rights violation. In *Pub. Prosecutor v. Kouwenhoven*, Case No. 20/001906-10, Judgment, App. Ct. s’Hertogenbosch (2017), the Director of Operations of the Oriental Timber Company and the Royal Timber Company was condemned because he facilitated Charles Taylor’s import of weapons in Liberia. Finally, in the *Sig Sauer Case*, Judgment of Apr. 3, 2019 (Dist. Ct. Kiel 2019), three leaders of the company were convicted for having declared on an end-user certificate that 47,000 guns would be transferred to the US, when at least 38,000 of those weapons were reexported to Colombia between 2009 and 2011, a country to which these exports were not authorized by the national authorities. See J. Tous, *La participation des entreprises aux conflits armés à travers leur activité de transfert d’armes: quelles responsabilités en cas d’infractions au droit international humanitaire et d’atteinte aux droits de l’homme?* [J. Tous, *The Participation of Corporations in Armed Conflicts Through their Activities Related to Arms Transfer: What Is their Responsibility in Case of Violations of International Humanitarian Law and Human Rights?*], in HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW: WHAT CONSEQUENCES FOR THE TRANSFER OF CONVENTIONAL ARMS?, *supra* note 32, at 91 (explaining the elements required to assert individual responsibility related to arms transfers); M. KANETAKE & C. RYNGAERT, DUE DILIGENCE AND CORPORATE LIABILITY OF THE DEFENCE INDUSTRY: ARMS EXPORTS, END USE & CORPORATE RESPONSIBILITY (John Linnegar ed. 2023) (discussing the obligation for private enterprises to conduct adequate due diligence when performing these transfers).

109. See JACKSON, *supra* note 105, at 201.

110. *Id.*

the time of the transfer and cannot be used as an argument to hinder such action.¹¹¹

V. CONCLUDING REMARKS

When examining the actions of various states, the Group of Eminent International and Regional Experts on Yemen, appointed by the United Nations Human Rights Council, denounced the transfer of arms to that country. The Group considered that the supply of such material was occurring without taking into account the documented patterns of violations of IHL and human rights, and therefore, could generate international responsibility of the states that approved them.¹¹² Could the same conclusion be drawn with respect to the current transfer of arms to Ukraine?

On the question of whether the supply of armaments in times of international armed conflict is an internationally wrongful act, or whether, on the other hand, it constitutes a sovereign act that does not give rise to liability on the part of those who carry it out, it is feasible to conclude that there is no unequivocal answer because the answer to each case would depend on the context in which such activity has taken place.¹¹³ Focusing on the action itself, we cannot ignore the fact that, currently, transferring weapons is an activity that is not prohibited in international law, provided that the process is periodically reviewed and that the risks of each transfer are minimized.¹¹⁴ The transfer would be legal, of course, unless the supplier state knows that, through that action, it is contributing to an aggravation of the situation in the territory to which the arms are directed; this conclusion derives both from the provisions of the ATT and from the more general customary rules incorporated in the ARSIWA.¹¹⁵ The existence of international responsibility on the part of the supplier state will depend on whether the state was aware, in the specific circumstances, of the harmful or negative effects that could be generated by the arms export.¹¹⁶ And in this case, even if it is obvious that the state would be responsible if the weapons transfer is made with the *purpose* of committing a violation of human rights law or IHL, a case-by-case

111. *Id.*

112. Hum. Rts. Council, Situation of Human Rights in Yemen, Including Violations and Violations Committed Since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen, on its Forty-Fifth Session, ¶ 61, U.N. Doc. A/HRC/45/6 (Sept. 28, 2020).

113. *Id.* ¶ 105.

114. See Jean-Claude Martinez, *Le Droit International et le Commerce des Armes*, in LE DROIT INTERNATIONAL ET LES ARMES (COLLOQUE DE MONTPELLIER DU 3 AU 5 JUIN 1982) 145 (1983) (discussing how the few existing rules applicable to arms transfers show that the principle here is the commercial freedom of sovereign states).

115. CASEY-MASLEN & VESTNER, *supra* note 30, at 28.

116. See JACKSON, *supra* note 105, at 201.

analysis would have to be conducted whenever an illicit act is merely a *foreseeable consequence* of such supply.¹¹⁷

Beyond the specific norms I have described, which in general aim at reducing violence and conflict,¹¹⁸ there is a final element that, in my opinion, cannot be left out of these reflections. It should be realized that, when acting in the international arena, states are committed to act on the basis of good faith;¹¹⁹ therefore, when conducting commercial activities they should behave in a responsible manner.¹²⁰ This essential aspect has been recognized as an interpretive guideline in the context of the Wassenaar Arrangement, a non-binding, multilateral mechanism promoting good practices in the control of exports of conventional arms and dual-use materials and technologies.¹²¹

Any operation involving the transfer of arms from one state to another, whether for profit or not, must be based not only on legal but also on ethical criteria.¹²² In times of universally accepted human rights, any supply of arms by a government that might result in the violation of the fundamental rights of individuals in a foreign territory has clear destabilizing effects and could entail the responsibility of the state that provided those weapons or technology.¹²³ In addition to the aforementioned legal norms, it is not possible to forget the unquestionable standards of morality which rest in the respect of human rights, as enshrined in the various treaties on conventional weapons and other specific international instruments.¹²⁴ At the same time, and as a closing remark, I contend that this consideration should arouse a certain caution, which may overcome the limits of a strict legal analysis. A final comparison could explain this point. The rhetorical uses of the so-called

117. *Id.*

118. Kellman, *supra* note 17, at 731.

119. *See id.* at 713.

120. JENNIFER L. ERICKSON, DANGEROUS TRADE: ARMS EXPORTS, HUMAN RIGHTS, AND INTERNATIONAL REPUTATION 16 (2015).

121. Both the Russian Federation and Ukraine participate in the Wassenaar Arrangement as well as many of the states interested in sending arms to the region. *See About Us*, THE WASSENAAR ARRANGEMENT, <https://www.wassenaar.org/about-us/> (last visited Sept. 5, 2023); *see also* R. A. Corti, *Acuerdo Wassenaar*, in EL DESARME Y LA NO PROLIFERACIÓN EN EL ESCENARIO ARGENTINO 23 (Sevilla, G. A. & A. S. Bernacchi eds., 2006) (discussing the importance of this forum in political terms).

122. *See* Thomas H. Andrews, *Myanmar: UN Expert Urges Security Council Resolution to Stop Weapons Fueling Spike in Military Attacks on Civilians*, U.N. HUM. RTS. COUNCIL (Feb. 22, 2022), <https://www.ohchr.org/en/press-releases/2022/02/myanmar-un-expert-urges-security-council-resolution-stop-weapons-fueling>.

123. Maya Brehm, *The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law*, 12 J. CONFLICT & SEC. L. 359, 397 (2007). At its forty-ninth session this year, the Human Rights Council dealt precisely with a report of the Special Rapporteur on the Situation of Human Rights in Myanmar focused specifically on the problem of arms transfers by UN member states to the military government; many of the elements considered here in terms of human rights violations were highlighted. Hum. Rts. Hum. Council, *Enabling Atrocities: UN Member States' Arms Transfers to the Myanmar Military*, U.N. Doc. A/HRC/49/CRP.1 (Feb. 22, 2022).

124. The idea of complicity, in fact, "heralds the extension of legal responsibility into areas where States have previously carried moral responsibility[,] but the law has not clearly rendered them responsible for the acts that they facilitate." *See* VAUGHAN LOWE, INTERNATIONAL LAW 121 (2007).

“humanitarian intervention,” whereby certain states resort to the argument of the violation of human rights to interfere in the sovereign affairs of other countries, are a sign of alert; we must be aware of the existence of widespread arguments through which unilateral actions deployed to intervene in sovereign states can be easily concealed from the public eye.¹²⁵ In this sense, when assessing arms transfers, the international community should make sure that any legal supply of weapons, performed under an alleged interest in the respect of fundamental legal rights, does not, in fact, hide an attempt to intervene in an armed conflict with the purpose of obtaining economic advantages at the unbearable cost of the suffering of the local civilian population.¹²⁶

125. *Id.* at 281.

126. *See id.* I would like to thank the organizers and participants at the 2023 Criminal Law Symposium *Russia, Ukraine, and the Challenge of Wartime Accountability* (Texas Tech University, Lubbock, Apr. 14, 2023) for their useful and pertinent comments on a preliminary draft of this paper.