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Evaluating Arms Transfers in the Russia-Ukraine Conflict in the Light of the Arms Trade Treaty, State Responsibility, and the Law of Neutrality

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Summary: Since the beginning of the Russia-Ukraine conflict, States worldwide have provided support, primarily through various weapon supplies to both parties. This paper analyses whether these arms transfers follow international law from three perspectives. The first perspective looks at treaties governing the trade of prohibited weapons before looking at the general trade of weapons under the Arms Trade Treaty and state obligations under its articles. The second perspective evaluates the derivative liability incurred by any State which makes such arms transfers under Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts, 2001, and how it is impacted in light of humanitarian law violations by Ukraine. The third perspective accounts for the arms transfers and support provided in the eyes of the law of neutrality.

Keywords: Arms transfers, Arms Trade Treaty, Humanitarian Law, Neutrality, State responsibility, Ukraine.

1 Introduction

On 21st February 2022, President Vladimir Putin recognised two provinces in East Ukraine, Donetsk and Luhansk, as independent states. On 24th February 2022, in a bid for 'liberalisation' of these provinces, he invaded Ukraine.[1] In a televised speech, he justified the armed attack against Ukraine as a special military operation carried out primarily in self-defence.[2]

1 PRESIDENT OF RUSSIA. Address by the President of the Russian Federation. [online]. Available at: <http://en.kremlin.ru/events/president/news/67843> Accessed: 13.11.2022; KIRBY, Paul. Why has Russia invaded Ukraine and what does Putin want? [online]. Available at: <https://www.bbc.com/news/world-europe-56720589> Accessed: 13.11.2022.

2 THE PRINT TEAM. Full text of Vladimir Putin's speech announcing 'special military operation' in Ukraine. [online]. Available at: <https://theprint.in/world/full-text-of-vladimir-putins-speech-announcing-special-military-operation-in-ukraine/845714/>

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The United Nations General Assembly ('UNGA') qualified the Russian attack on Ukraine as an act of aggression in violation of Article 2 (4) of the UN Charter.[3] In a resolution of 24th March 2022, the General Assembly, meeting in a special emergency session, requested an 'immediate cessation of hostilities by the Russian Federation against Ukraine, particularly for any attacks against civilians and civilian objects.'[4] A United Nations Security Council ('UNSC') draft resolution deploring the Russian Federation's military aggression and deciding to withdraw the Russian Federation's military forces was vetoed by the Russian Federation, deadlocking the UNSC from taking any resolute action.[5]

In response to the aggression displayed and actions carried out by the Russian Federation, multiple members of the international community rallied behind Ukraine. States provided both military and financial aid to Ukraine.[6] Even countries that did not provide financial or military assistance provided humanitarian aid, including earmarked funds, to help the citizens and improve Ukraine's on-ground situation.[7]

Accessed: 13.11.2022.

3 UNITED NATIONS GENERAL ASSEMBLY. A/ES-11/L.1, Aggression against Ukraine. [online]. Available at: <https://daccess-ods.un.org/tmp/2931354.04586792.html> Accessed: 13.11.2022. 1 March 2022. The Resolution was adopted in a GA Emergency Session called for by the UN Security Council by Resolution 2623(2022) under the Uniting for Peace resolution as the Security Council was prevented from exercising its primary responsibility for peace and security.

4 UNITED NATIONS MEETINGS COVERAGE. General Assembly Adopts Text Recognizing Scale of Humanitarian Woes Arising from Russian Federation's Ukraine Offensive as Unseen in Many Decades. [online]. Available at: <https://www.un.org/press/en/2022/ga12411.doc.htm> Accessed: 13.11.2022.

5 UNITED NATIONS MEETINGS COVERAGE. Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto. [online]. Available at: <https://press.un.org/en/2022/sc14808.doc.htm> Accessed: 13.11.2022.

6 GOVERNMENT OF CANADA. Canadian Military Support to Ukraine. [online]. Available at: <https://www.canada.ca/en/department-national-defence/campaigns/canadian-military-support-to-ukraine.html> Accessed: 13.11.2022; MINISTRY FOR FOREIGN AFFAIRS OF FINLAND. Finland's Additional Support to Ukraine. [online]. Available at: <https://um.fi/finland-s-support-to-ukraine> Accessed: 13.11.2022; GOVERNMENT OF FRANCE, MINISTRY FOR FOREIGN AND EUROPEAN AFFAIRS. Ukraine – France Mobilize to Deliver Emergency Medical Aid to Victims of the Conflict. [online]. Available at: <https://www.diplomatie.gouv.fr/en/country-files/ukraine/news/article/ukraine-france-mobilizes-to-deliver-emergency-medical-aid-to-victims-of-the> Accessed: 13.11.2022; THE FEDERAL GOVERNMENT OF GERMANY. Military Support for Ukraine. [online]. Available at: <https://www.bundesregierung.de/breg-en/news/military-support-ukraine-2054992> Accessed: 13.11.2022.

7 See, AGENDA.GE. Georgia Extending "Clear and Active" Support for Ukraine at all Levels. [online]. Available at: <https://agenda.ge/en/news/2022/1180> Accessed: 13.11.2022; REPUBLIC OF CYPRUS, MINISTRY OF FOREIGN AFFAIRS. Press Release Regarding the Shipment of the First Tranche of Humanitarian Aid to the People of Ukraine. [online]. Available at: <https://mfa.gov.cy/press-releases/2022/03/09/cyprus-humanitarian-aid-to-ukraine/> Accessed: 13.11.2022; REUTERS. China to Provide 5 mln Yuan Worth of

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The President of Ukraine has called for an increased number of weapons for self-defence, and even demanded that Western countries place sanctions on the Russian Federation in the name of justice.[8] In response, the Russian Federation has warned against the supply of certain weapons to Ukraine, calling it an 'escalation of hostilities.'[9] There have also been reports of Iran supplying weapons to Russia, although these have been denied by Iranian officials.[10]

However, is this supply of weapons a valid act under international law? The current analysis of the question will focus on three perspectives. The first perspective ponders the conformation of the weapons to material standards established by the Arms Trade Treaty. The second perspective analyses the responsibility incurred by sending States under the ambit of the Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA'). The final perspective tackles the question of neutrality, and whether a State providing support violates its duties as a 'neutral' State.

2 Nature of the Arms Supplied to Ukraine

As a matter of customary, treaty, and *erga omnes* obligations of IHL, States assume wide-ranging duties, which are generally applicable to all legal weaponry regimes.[11] There is broad international agreement that 'the irresponsible and unregulated trade in conventional arms has devastating consequences for ordinary

Humanitarian Assistance to Ukraine. [online]. Available at: <https://www.reuters.com/world/china-provide-5-mln-yuan-worth-humanitarian-assistance-ukraine-2022-03-09/> Accessed: 13.11.2022.

8 REUTERS. Ukraine President Calls for More Russia Sanctions, Invokes Greek Battle Cry. [online]. Available at: <https://www.reuters.com/world/europe/ukraines-zelenskiy-says-russia-must-be-brought-justice-2022-04-07/> Accessed: 13.11.2022; KOZHUKHAR, Oleksandr and KARAZY, Sergiy. Zelenskiy Demands Western Nations Give Arms to Ukraine, Asks If They're Afraid of Moscow. [online]. Available at: <https://www.reuters.com/world/europe/ukraine-leader-demands-western-nations-give-arms-asks-if-theyre-afraid-moscow-2022-03-26/> Accessed: 13.11.2022.

9 ALJAZEERA. Russia Warns West Against Providing Ukraine Long-Range Weaponry. [online]. Available at: <https://www.aljazeera.com/news/2022/5/27/russia-warns-west-against-giving-kyiv-long-range-weaponry> Accessed: 13.11.2022; FAULCONBRIDGE, Guy. Russia Warns United States Against Sending More Arms to Ukraine. [online]. Available at: <https://www.reuters.com/world/europe/russia-warned-united-states-against-sending-more-arms-ukraine-2022-04-25/> Accessed: 13.11.2022.

10 KENNEDY, Niamh, MAHMOODI, Negar, KOTTASOVA, Ivana, RAINE, Andrew. Iran Denies Supplying Russia with Weapons for Use in Ukraine. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiK9oLekKX7AhUpTWwGHbZkANYQFnoECCwQAQ&url=https%3A%2F%2Fwww.cnn.com%2F2022%2F10%2F15%2Feurope%2Firan-denies-supplying-russia-weapons-ukraine-intl-hnk%2Findex.html&usg=AOvVaw15YPQQ3SXXyxyXra4tyK_o> Accessed: 11.11.2022.

11 YIHDEGO, Zeray. *The Arms Trade and International Law*. Bloomsbury Publishing, 2007, p. 203.

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people across the globe.'[12] The Arms Trade Treaty ('ATT') is 'an example of the multilateralization of efforts to prevent atrocities.'[13] In addition to the ATT, the United Nations Office for Disarmament Affairs also lists four more major conventions that regulate arms transfer and disarmament – The Anti-Personnel Landmines Convention, The Convention on Cluster Munitions, The Convention on Certain Conventional Weapons, and The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol).[14]

Arms transfer includes the commercial trade in weapons, any exchange of arms that embrace aid schemes and other non-monetary arrangements, and military cooperation between and among States or other private citizens.[15] Essentially, this includes: export, import, transit, trans-shipment, brokering, foreign aid, grants, and goods received as a result of off-set or barter arrangements.[16] The ordinary meaning of 'transfer' is broad, incorporating commercial transactions, leases, gifts, loans, and aid.[17] The aid provided to Ukraine is, thus, definitively governed by any treaty that would govern arms transfers.

Since the start of the Russian invasion, Ukraine has received billions of dollars worth of weapons and military equipment from at least 28 countries, 25 of which are NATO members.[18] The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1980 and its Protocols prohibit only the use of weapons which injure the human body by fragments that escape x-ray detection,[19]

12 CLARKE, Jesse, STOHL, Rachel, DA SILVA, Clare, SUCHAN, Gregory, DUNCAN, John. Irresponsible Arms Trade and the Arms Trade Treaty. *American Society of International Law Proceedings*, 2009, vol. 103, pp. 331–343; INTERNATIONAL COMMITTEE OF THE RED CROSS. Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty, 15th December 2013. [online]. Available at: <https://www.icrc.org/en/publication/4069-protecting-civilians-and-humanitarian-action-through-arms-trade-treat> Accessed: 13.11.2022; UNITED NATIONS SECURITY COUNCIL. S/RES/1261(1999), Resolution 1261 (1999) / adopted by the Security Council at its 4037th meeting, on 25 August 1999. [online]. Available at: <https://digitallibrary.un.org/record/278324?ln=en> Accessed: 13.11.2022. p. 3.

13 HENDERSEN, Stacy. The Arms Trade Treaty: Responsibility to Protect in Action? *Global Responsibility to Protect*, 2017, vol. 9, no. 2, p. 155.

14 UN OFFICE FOR DISARMAMENT AFFAIRS. Legal Instruments. [online]. Available at: <https://www.un.org/disarmament/legal-instruments/> Accessed: 13.11.2022.

15 FREY, Barbara. The Question of Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms: Working Paper Submitted in Accordance with Sub-Commission Decision 2001/120. Geneva, 2002, ¶ 5.

16 Article 2.2, The Arms Trade Treaty. New York City, 03 June 2013; Article 2, Nobel Peace Laureates' International Code of Conduct on Arms Transfer. New York, 29 May 1997.

17 Article 31, Vienna Convention on the Law of Treaties. Vienna, 23 May 1969.

18 DUGGAL, Hanna, ALI, Marium. What Weapons has Ukraine Received From the US and Allies? [online]. Available at: <https://www.aljazeera.com/news/2022/6/15/infographic-what-weapons-has-ukraine-received-from-the-us-and-al> Accessed: 13.11.2022.

19 Protocol on Non-Detectable Fragments (Protocol I). Geneva, 10 October 1980.

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mines and booby-traps,[20] and incendiary weapons.[21] None of them prohibit the use of any of the weapons supplied by States as of 10th November 2022. The absence of any form of mines or cluster munitions being transferred to Ukraine precludes it from any prohibitions laid down in the Anti-Personnel Landmine Convention and the Convention on Cluster Munitions.[22] The Firearms Protocol does not prohibit the legitimate transfer of weapons between States and, thus, does not warrant any further analysis.[23]

Analysis of the issue beyond meeting the terms of the aforementioned treaties brings us to two significant questions. The first is regarding the legality of the transfer of these weapons during times of international armed conflict and the second is the nature of state responsibility in these circumstances. The ATT governs the transfer of these weapons, conditional on States being a party to it.[24]

3 The Arms Trade Treaty

The ATT is the first global Treaty enacted to regulate the transfer of arms between States. Ukraine and Russia are not parties to the Treaty[25] but most of the States sending arms have ratified it.[26] The Treaty lays down a two-step process to determine whether a particular arms transfer is permitted under international law: first, determine if any of the Article 6 prohibitions apply; second, if no restriction under Article 6 is applicable, the clauses of Article 7 must be applied.[27]

Article 6 of the ATT lays down three circumstances in which arms transfers are prohibited:

20 The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Amended Protocol II). Geneva, 03 May 1996.

21 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Geneva, 10 October, 1980.

22 See, Article 1, Convention on Cluster Munitions. Oslo, 03 December, 2008; See also Article 1, The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Ottawa, 03 December, 1997.

23 The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol). New York City, 11 July 2001.

24 Article 2.1, The Arms Trade Treaty. New York City, 03 June 2013.

25 ARMS TRADE TREATY. List of Signatory States. [online]. Available at: <https://thearmstradetreaty.org/hyper-images/file/List%20of%20ATT%20Signatory%20States%20(26%20September%202022)/List%20of%20ATT%20Signatory%20States%20(26%20September%202022).pdf> Accessed: 08.11.2022.

26 ARMS TRADE TREATY. List of State Parties. [online]. Available at: <https://thearmstradetreaty.org/hyper-images/file/List%20of%20ATT%20States%20Parties%20(alphabetical%20order)(26%20September%202022)/List%20of%20ATT%20States%20Parties%20(alphabetical%20order)(26%20September%202022).pdf> Accessed: 08.11.2022.

27 Article 7.1, The Arms Trade Treaty. New York City, 03 June 2013.

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1. If the transfer would violate the sending States' obligations under measures adopted by the UNSC acting under Chapter VII of the UN Charter, in particular, arms embargoes;[28]
2. If the transfer would violate the sending States' relevant international obligations under international agreements to which it is a Party;[29] and
3. If the sending State has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.[30]

Article 6 (1) links violations of UNSC arms embargoes to the widening legal implications of state responsibility,[31] raising the potential for States to be held responsible for complicity in an embargoed transfer.

Implications under Article 6 (2) vary according to the State and the treaties to which it is a party. In this particular instance, the Hague Conventions V and XIII prohibit the transfer of war materials[32] and possibly prohibit the transfer of weapons from sending States which are a party to it. The same question is addressed in further parts of the paper.[33]

The list of grave crimes in Article 6 (3) are the core crimes of the Rome Statute and are prosecutable in the International Criminal Court.[34] The prohibition 'formulates a substantive rule that prohibits the transfer of conventional arms in specific circumstances…[and] helps to reinforce well-established norms of international conventional and customary law.'[35] This standard requires a State Party to know that a causal link between the transfer and a forthcoming atrocity crime exists; the State must have knowledge at the time of authorising the transfer that the arms to be transferred would be used to commit one or several of the crimes listed in Article 6 (3).[36] However, prosecutions of conventional weapons

28 Article 6.1, The Arms Trade Treaty. New York City, 03 June 2013.
29 Article 6.2, The Arms Trade Treaty. New York City, 03 June 2013.
30 Article 6.3, The Arms Trade Treaty. New York City, 03 June 2013.
31 KELLMAN, Barry. Controlling the Arms Trade: One Important Stride for Humankind. *Fordham International Law Journal*, 2014, vol. 37, no. 3, p. 708.
32 Article 2, Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907; Article 6, Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907.
33 Refer to Section on Neutrality.
34 Article 5, Rome Statute of the International Criminal Court. Rome, 17 July 1998.
35 JORGENSEN, Nina. State Responsibilities for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty. *American Journal of International Law*, 2014, vol. 108, no. 4, p. 725.
36 HENDERSON, Stacey. The Arms Trade Treaty: Responsibility to Protect in Action? Global Responsibility to Protect, 2017, vol. 9, no. 2, p. 163.

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sellers for their buyers' international crimes have been less than rare since the prosecution of Nazi industrialists at Nuremberg.[37] In spite of about a dozen U.N. investigative reports on violations of arms embargoes imposed on gross abusers — in Angola,[38] Liberia,[39] Rwanda,[40] Sierra Leone,[41] and Somalia[42] — not one of the persons named in the reports has been convicted in national courts for having breached these embargoes.[43] The challenges of verifying embargo compliance are compounded when States, especially traditional suppliers and adjacent States, do not have an adequate system of national laws and/or regulations and administrative procedures to exercise effective control over armaments and the export and import of arms in order to prevent illicit arms trafficking.[44] This is particularly important because the UN Sanctions Committees themselves have no operational verification mechanisms. UN investigative teams tasked with monitoring the embargoes are given woefully inadequate resources and time to do their difficult job given the inherently clandestine nature of such traffic and its grave consequences.[45]

37 See generally, DANNER, Allison. The Nuremberg Industrialist Prosecutions and Aggressive War. *Virginia Journal of International Law*, 2005, vol. 46, no. 4, pp. 651–676.

38 RELIEF WEB. Angola: Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA. [online]. Available at: <https://reliefweb.int/report/angola/angola-report-panel-experts-violations-security-council-sanctions-against-unita> Accessed: 11.11.2022.

39 UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER. Expert Panel on Liberia Presents Report to Security Council, with Proposals for Furthering Peace in Mano River Region. [online]. Available at: <https://www.ohchr.org/en/press-releases/2009/10/expert-panel-liberia-presents-report-security-council-proposals-furthering> Accessed: 11.11.2022.

40 HUMAN RIGHTS WATCH. Rearming with Impunity: International Support for the Perpetrators of the Rwandan Genocide. [online]. Available at: <https://www.hrw.org/reports/1995/Rwanda1.htm> Accessed: 11.11.2022.

41 UNITED NATIONS. SC Takes Up Report on Diamonds, Arms in Sierra Leone; Expert Panel Says Council Sanctions Broken 'with Impunity.' [online]. Available at: <https://press.un.org/en/2001/sc6997.doc.htm> Accessed: 11.11.2022.

42 UNITED NATIONS. Arms Embargo Against Somalia Constantly Violated, UN Security Council Told. [online]. Available at: <https://news.un.org/en/story/2003/11/85022> Accessed: 11.11.2022.

43 MISOL, Lisa. Weapons and War Crimes: The Complicity of Arms Suppliers. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiDlMXjiIX7AhUQALcAHR1LBe0QFnoECA8QAQ&url=https%3A%2F%2Fwww.hrw.org%2Flegacy%2Fwr2k4%2Fdownload%2F13.pdf&usg=AOvVaw3V8WaAZUOrMoSubFCG_3zx> Accessed: 08.11.2022, p. 2.

44 WOOD, Brian. Strengthening Compliance with UN Arms Embargoes – Key Challenges for Monitoring and Verification. Amnesty International. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjo59zEo6X7AhUoT2wGHVAdCdQQFnoECAwQAQ&url=https%3A%2F%2Fwww.amnesty.org%2Fen%2Fwp-content%2Fuploads%2F2021%2F08%2Fior400052006en.pdf&usg=AOvVaw1k6kjB8Ne4cPdGgIVbDSKT> Accessed: 11.11.2022. ¶ 2.

45 SPRAGUE, Oliver. UN Arms Embargoes: An Overview of the Last Ten Years. *Oxfam International*. [online]. Available at: <https://policy-practice.oxfam.org/resources/un-arms-

In this context, there is no question of liability for negligence: the goal is to put States under a duty to inquire diligently about what uses the weapons made on their soil are likely to be put to.[46] 'Knowledge' is a legal standard higher than strict liability but lower than international criminal law's requirement of intention to aid and abet the wrongful act.[47] The knowledge standard is satisfied if any wrongful activity is brought to the officials' attention and if the relevant officials do not undertake reasonable measures to investigate and stop the authorization of that transfer as the circumstances warrant.[48] However, a State implementing the ATT need only take account of war crimes defined in 'international instruments to which it is a party,' which means that the vast number of States which have either not signed or ratified the Rome Statute need not do so.[49]

Article 7 requires sending States to assess the potential that the arms:[50]

1. Would contribute to or undermine peace and security;
2. Could be used to:
    a) commit or facilitate a serious violation of international humanitarian law;
    b) commit or facilitate a serious violation of international human rights law;
    c) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
    d) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organised crime to which the exporting State is a Party.

The sending States are obliged to make this assessment in an 'objective and non-discriminatory manner' under their national control system.[51] The sending State cannot authorise the transfer if the assessment concludes that, despite the mitigating factors, there is an 'overriding risk' of the negative consequences mentioned above.[52] This assessment requirement is usually executed with Article 11

embargoes-an-overview-of-the-last-ten-years-123930/> Accessed: 11.11.2022, p. 3.

46 LUSTGARTEN, Laurence. The Arms Trade Treaty: Achievements, Failings, Future. *International and Comparative Law Quarterly*, 2015, vol. 64, no. 3, p. 589.

47 KELLMAN, Barry. Controlling the Arms Trade: One Important Stride for Humankind. *Fordham International Law Journal*, 2014, vol. 37, no. 3, p. 711.

48 KELLMAN, Barry. Controlling the Arms Trade: One Important Stride for Humankind. *Fordham International Law Journal*, 2014, vol. 37, no. 3, p. 712.

49 LUSTGARTEN, Laurence. The Arms Trade Treaty: Achievements, Failings, Future. International and Comparative Law Quarterly, 2015, vol. 64, no. 3, p. 591.

50 Article 7.1, The Arms Trade Treaty. New York City, 03 June 2013.

51 Article 7.1, The Arms Trade Treaty. New York City, 03 June 2013.

52 Article 7.3, The Arms Trade Treaty. New York City, 03 June 2013.

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(2)'s requirement that States, in connection with any conventional arms transfer, assess the risk that transferred conventional arms could be diverted.[53]

Without a central administrative enforcement authority or a tribunal to review decisions, eliminating discrimination during the assessment – on political, economic, ethnic, or other grounds – is not a serious possibility.[54] Thus, not only can States deny transfers to violators of IHL, they can do so while permitting transfers to other States equally guilty of such violations. The ATT's assessment requirement is one of conduct, not of result.[55] This provision remains highly contentious. It appears to create a significant loophole because a transfer that would otherwise be unlawful under the article, might nevertheless be authorised and 'legal' if a state party claims to have determined that its effect on peace and security would be positive.[56]

We see this discretion being exercised clearly in the context of Ukraine. Sending States have almost unanimously decided that protecting Ukraine's territorial integrity is the most crucial aspect of the conflict compared to all other possible violations or considerations of divergence, misuse, increasing regional instability, and prolonging the conflict. In fact, when Iran sent missiles and drones to Russia,[57] several EU States were quick to impose sanctions "for undermining or threatening the territorial integrity, sovereignty and independence of Ukraine."[58]

Due to the inherent drawbacks of the ATT, the establishment of some safeguards, and the unanimous opinion to support Ukraine as a 'victim' of aggression, no State parties are questioning the basis for the transfers on a level significant enough to encourage stricter compliance or a re-assessment of the Treaty's provisions. Therefore, the real-time effect of the ATT is an abuse of the discretion afforded to States.

Ukraine has an unfortunate history as a hub of the illicit arms trade.[59] Ukraine became a centrepiece of the global illicit arms market, with its weap-

53 Article 11.2, The Arms Trade Treaty. New York City, 03 June 2013.

54 LUSTGARTEN, Laurence. The Arms Trade Treaty: Achievements, Failings, Future. *International and Comparative Law Quarterly*, 2015, vol. 64, no. 3, p. 592.

55 KELLMAN, Barry. Controlling the Arms Trade: One Important Stride for Humankind. *Fordham International Law Journal*, 2014, vol. 37, no. 3, p. 714.

56 GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS. Academy Briefing Paper No 3: The Arms Trade Treaty. *Geneva Academy of International Humanitarian Law and Human Rights*, 2013, p. 20.

57 REUTERS. Iran Agrees to Ship Missiles, More Drones to Russia. [online]. Available at: https://www.reuters.com/world/exclusive-iran-agrees-ship-missiles-more-drones-russia-defying-west-sources-2022-10-18/. Accessed: 08.11.2022.

58 COUNCIL OF THE EUROPEAN UNION. Ukraine: EU Sanctions Three Individuals and One Entity in Relation to the Use of Iranian Drones in Russian Aggression. [online]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2022/10/20/ukraine-eu-sanctions-three-individuals-and-one-entity-in-relation-to-the-use-of-iranian-drones-in-russian-aggression/. Accessed: 08.11.2022.

59 STOHL, Rachel, YOUSIF, Elias. The Risks of U.S. Military Assistance to Ukraine. [online].

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onry providing the means of violence for battlefields in Sierra Leone,[60] Liberia,[61] Afghanistan,[62] and many others, all the while sustaining and promoting criminal networks in Ukraine.[63] Additionally, following the violence in 2014, the European Union announced the decision to suspend licences for the export of equipment which might be used for internal repression and to reassess export licences for military equipment to Ukraine.[64] It is well established that flooding conflict zones with weapons leads to unintended consequences.[65] Despite this, countries worldwide continue to push weapons and money into this conflict zone, especially one that has already been proven vulnerable to trafficking and has previously warranted strict action.

US Officials admit that it is difficult to track these arms supplies long-term, and there is a risk of them ending up in the hands of militia that were never intended to receive them. However, they view failing to adequately arm Ukraine as a greater risk than the misuse and divergence of arms.[66] In fact, the US has deployed military personnel for on-site inspections of the weapons and equipment sent in an effort to mitigate the risk.[67] The US administration maintains that

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Available at: <https://www.stimson.org/2022/the-risks-of-u-s-military-assistance-to-ukraine/> Accessed: 13.11.2022.

60 MCMAHON, Robert. UN: Bulgaria, Ukraine Linked To Illegal Arms Sent To Sierra Leone. [online]. Available at: <https://www.rferl.org/a/1094455.html> Accessed: 13.11.2022.

61 HUMAN RIGHTS WATCH. No Questions Asked: The Eastern Europe Arms Pipeline to Liberia. [online].

Available at: <https://www.hrw.org/legacy/backgrounder/arms/liberia1115.htm> Accessed: 13.11.2022.

62 GILSON, Dave. Ukraine: Cashing in on Illegal Arms. [online]. Available at: https://www.pbs.org/frontlineworld/stories/sierraleone/context.html. Accessed: 13.11.2022.

63 HUDSON, John. Flood of Weapons to Ukraine Raises Fear of Arms Smuggling. [online].

Available at: <https://www.washingtonpost.com/national-security/2022/05/14/ukraine-weapons-trafficking/> Accessed: 13.11.2022.

64 EU FOREIGN AFFAIRS COUNCIL. Council Conclusions on Ukraine. [online]. Available at: <https://www.sipri.org/sites/default/files/2016-03/EU-Council-conclusions-Ukraine--20-February-2014.pdf> Accessed: 13.11.2022. ¶ 4.

65 HAMILTON, Tomas. Articulating Arms Control Law in the EU's Lethal Military Assistance to Ukraine. [online]. Available at: <https://www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine/https://www.justsecurity.org/80862/articulating-arms-control-law-in-the-eus-lethal-military-assistance-to-ukraine/> Accessed: 13.11.2022.

66 BO LILLIS, Katie, HERB, Jeremy, BERTRAND, Natasha, LIEBERMANN, Oren. What Happens to Weapons Sent to Ukraine? The US Doesn't Really Know. [online].

Available at: <https://edition.cnn.com/2022/04/19/politics/us-weapons-ukraine-intelligence/index.html> Accessed: 13.11.2022.

67 U.S DEPARTMENT OF STATE. U.S. Plan to Counter Illicit Diversion of Certain Advanced Conventional Weapons in Eastern Europe. [online]. Available at: <https://www.state.gov/u-s-plan-to-counter-illicit-diversion-of-certain-advanced-conventional-weapons-in-eastern-europe/> Accessed: 08.11.2022; KUBE, Courtney, MCCAUSLAND, Phil. U.S. Military Inspectors in Ukraine to Keep Further Track of Weapons and Equipment. [online]. Available at: <https://www.nbcnews.com/news/us-news/us-military-inspectors-ukraine-

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they do not provide assistance to units of foreign security forces when there is credible information that the unit committed a gross violation of human rights.[68]

Similarly, the EU has recognized the risks of arms transfers prolonging the conflict, facilitating the commission of international human rights law ('IHRL') and IHL violations, and instigating Russia to respond in a way inimical to the interests of the EU.[69] However, the EU has held the cost of inaction to be greater than these risks.[70] The EU has implemented some safeguards, such as not providing equipment deemed to exceed the necessary operational capacities of Ukrainian forces, requiring Ukraine to grant all requests for on-site verification, and prohibiting transfer to third parties without the approval of the High Representative.[71] Europol has even committed to working closely with Ukraine to prevent the threat of arms trafficking.[72] The EU even launched an 'EU Support Hub' to provide expertise and cooperation to combat issues such as weapons smuggling.[73]

Despite not ratifying the Treaty, Ukraine has taken a few initiatives to preserve the 'legality' of arms transfers received by its military forces. The parlia-

keep-track-weapons-equipment-rcna54891> Accessed: 08.11.2022.

68 DANSSAERT, Peter, WOOD, Brian, FAHLBUSCH Markus. End-Use Monitoring of Military Assistance to Ukraine. [online]. Available at: <https://ipisresearch.be/weekly-briefing/arms-trade-bulletin-march-april-2022/> Accessed: 13.11.2022.

69 EUROPEAN UNION. Concept Note for an Assistance Measure Under the European Peace Facility for the Supply to the Ukrainian Armed Forces of Military Equipment, and Platforms, Designed to Deliver Lethal Force, p. 5. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiM14-G9uP5AhWKPpQKHU18AfEQFnoECAIQAQ&url=https%3A%2F%2Fwww.statewatch.org%2Fmedia%2F3168%2Feu-council-ukraine-csdp-epf-military-assistance-concept-note-6661-22.pdf&usg=AOvVaw00o7vOgPj9UXgbHqKJUW5n> Accessed: 13.11.2022.

70 EUROPEAN UNION. Concept Note for an Assistance Measure Under the European Peace Facility for the Supply to the Ukrainian Armed Forces of Military Equipment, and Platforms, Designed to Deliver Lethal Force, p. 4. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiM14-G9uP5AhWKPpQKHU18AfEQFnoECAIQAQ&url=https%3A%2F%2Fwww.statewatch.org%2Fmedia%2F3168%2Feu-council-ukraine-csdp-epf-military-assistance-concept-note-6661-22.pdf&usg=AOvVaw00o7vOgPj9UXgbHqKJUW5n> Accessed: 13.11.2022.

71 EUROPEAN UNION. Concept Note for an Assistance Measure Under the European Peace Facility for the Supply to the Ukrainian Armed Forces of Military Equipment, and Platforms, Designed to Deliver Lethal Force, p. 6. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiM14-G9uP5AhWKPpQKHU18AfEQFnoECAIQAQ&url=https%3A%2F%2Fwww.statewatch.org%2Fmedia%2F3168%2Feu-council-ukraine-csdp-epf-military-assistance-concept-note-6661-22.pdf&usg=AOvVaw00o7vOgPj9UXgbHqKJUW5n> Accessed: 13.11.2022.

72 EUROPOL. Europol Statement on the Cooperation with Ukraine. [online]. Available at: <https://www.europol.europa.eu/media-press/newsroom/news/europol-statement-cooperation-ukraine> Accessed: 13.11.2022.

73 EUROPEAN COMMISSION. Informal Home Affairs Council: EU launches the Support Hub for Internal Security and Border Management in Moldova. [online]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4462> Accessed: 13.11.2022.

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ment of Ukraine created a temporary oversight committee to track the use and receipt of arms transferred to their country by international partners.[74] Ukraine even uses a NATO logistics and account control system in a limited way and has invited foreign officials to observe it.[75] This was done to help Ukraine monitor the use of these weapons and counter Russian allegations and misinformation about lax export controls.

The authors believe that the sending States' actions comply with the provisions of the ATT and are thus, legitimate under international law. These States have completed the assessments required under the ATT and positively concluded that the cause warrants a continued transfer of arms. Additionally, they have run the necessary checks on the entities receiving the arms and completed the arms transfers only after verification. These States have met the standards required by the Treaty. Whether the ATT itself is adequate to maintain international peace and security, control illicit arms transfers, and ease the consequences of such transfers on the victims of armed conflict is questionable.

4 State Responsibility for Arms Transfers

While the sanctions provided for in the ATT attempt to deter any wrongful transfer of arms, responsibility in international law is only possible when a 'wrongful act' is attributable to a State.[76] Therefore, after looking at the transfers to Ukraine according to the mechanisms of the ATT, one must look at the overall responsibility of the States undertaking such actions. While understanding the responsibility and liability of States assisting Ukraine through the transfer of arms, two points of international law and facts compel inquiry. First, the nature of derivative state responsibility pertaining to the sending State and the receiving State; second, whether the sending State will be affected by any possible violations of IHL by Ukraine.

74 KIZILOV, Yevhen. Verkhovna Rada has Created a Commission for Monitoring Arms Supplies to Ukraine. [online]. Available at: <https://www.pravda.com.ua/eng/news/2022/07/19/7359026/> Accessed: 13.11.2022; THE NEW VOICE OF UKRAINE. Ukraine Establishes Parliamentary Committee to Oversee Western Arms Shipments. [online]. Available at: <https://english.nv.ua/nation/parliament-establishes-oversight-committee-for-western-weapons-ukraine-war-50257459.html> Accessed: 13.11.2022.

75 MILLER, Christopher, MCLEARY, Paul, FORGEY, Quint. Ukraine Invites Allies to Check on their Weapons Donations. [online]. Available at: <https://www.politico.com/newsletters/national-security-daily/2022/07/19/ukraine-invites-allies-to-check-on-their-weapons-donations-00046501> Accessed: 13.11.2022.

76 INTERNATIONAL LAW COMMISSION. Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Article 1 and 2.

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4.1 Derivative State Responsibility

The first point of inquiry becomes relevant to assess the complicity of the sending State regarding the receiving State's capacity to violate international law.[77] First, we look at how derivative state responsibility operates and then if arms transfers *ipso facto* amount to state responsibility. Article 16 of ARSIWA[78] extends state responsibility to States which grant any material or financial aid and/or assistance to the wrongful act of another state.[79]

For a sending State to be held responsible under Article 16, three conditions must be satisfied:

1. the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State wrongful under international law;
2. the aid or assistance must be given with a view to facilitating the commission of that act and must actually do so;
3. the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[80]

If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility.[81] Mere association or general cooperation with a State that uses unlawful methods is not enough to trigger responsibility under the rubric of aid and assistance.[82] Pure negligence, weak, or ineffective arms export licensing sys-

77 BELLAL Annyssa. CASEY-MASLEN, Stuart (ed.) *Arms Transfers and International Human Rights Law in Weapons Under International Human Rights Law*. Cambridge: Cambridge University Press, 2014, pp. 448–447; See also JORGENSEN, Nina. State Responsibilities for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty. *American Journal of International Law*, 2014, vol. 108, no. 4, p. 730.

78 ARSIWA is not a treaty, but a customary norm of International Law codified by the International Law Commission. *See*, INTERNATIONAL LAW COMMISSION, Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10 (A/56/10), p. 31; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [26 February 2007] ICJ Rep 2007 ¶ 401.

79 CRAWFORD, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002, p. 149, ¶ 4.

80 INTERNATIONAL LAW COMMISSION. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Article 16, ¶ 3.

81 INTERNATIONAL LAW COMMISSION. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1. Article 16, ¶ 4.

82 CRAWFORD, James. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge: Cambridge University Press, 2002, p. 337.

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tems, or failing to foresee that a recipient will re-export arms in violation of international law would not be sufficient to establish responsibility under ASRIWA.[83]

Article 16 is generally applied to military assistance provided by States not party to a particular conflict. Military assistance includes any and all actions by States, international organisations, or non-state actors that directly or indirectly contribute to the military efforts of a combatant. The term 'military assistance,' then, refers not only to the supply of military hardware but also to the provision of training, logistical support, intelligence information, political backing, financial aid, or sanctuary.[84]

The State requesting military assistance thereby permits the actions of the States assisting on request. This permission allows the terms 'request' and 'consent' to be used interchangeably.[85] The notion of 'consent' corresponds to the customary international law concept of consent being a key manifestation of state sovereignty.[86] Thus, seeking military assistance by request is categorised as a sovereign act of a State and, therefore, can be differentiated from unlawful intervention or an act of international aggression.

Military assistance can be divided into two categories. The first is direct support provided to a State engaged in an inter-State conflict,[87] such as Ukraine. The

83 BREHM, Maya. The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law. *Journal of Conflict & Security Law*, 2008, vol. 12, no. 3, p. 385.

84 INTERNATIONAL LAW COMMISSION. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, November 2001, Supplement No. 10, chp.IV.E.1. Article 16, ¶ 8–11; UNITED NATIONS GENERAL ASSEMBLY. A/37/745, Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, December 14 1982. [online]. Available at: <https://digitallibrary.un.org/record/39284/files/A_37_745-EN.pdf?ln=en> Accessed: 13.11.2022. p. 50. See also, NEUMAN Steaphanie G., The Arms Trade, Military Assistance, and Recent Wars: Change and Continuity. *The Annals of the American Academy of Political and Social Science*, 1995, vol. 541, pp. 47–74;

85 DE WET, Erika. Military *Assistance on Request and the Use of Force*. Oxford: Oxford University Press, 2020, Introduction, p. 1.

86 See INTERNATIONAL LAW COMMISSION. Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, November 2001, Supplement No. 10, chp.IV.E.1. The ILC Commentary to art 20 ¶ (1) described consent as a 'basic international law principle;' See also, HAFNER, Gerhard. Final Report: Intervention by Invitation. Annuaire de l'Institut de Droit International, 2009, vol. 73; BYRNE, Max. Consent and the Use of Force: An Examination of Intervention by Invitation as a Basis for US Drone Strikes in Pakistan, Somalia and Yemen. *Journal on the Use of Force and International Law*, 2016, vol. 3, no. 1, p. 101.

87 DE WET, Erika. *Military Assistance on Request and the Use of Force*. Oxford: Oxford University Press, 2020, Introduction, p. 2.

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second is military assistance provided to a State engaged in an internal armed conflict, such as the conflicts in Yemen[88] and Syria.[89]

Additionally, there is a distinction between *ad hoc* requests for (or consent to) military assistance in response to a particular situation that has arisen in the territorial State and *ex-ante* consent included in a pro-invasion ('guarantee') treaty clause. Most requests for military assistance in the post-Cold War era have been extended to individual States or groups of States based on *ad hoc* agreements.[90] In the present case, Ukraine is observed to have sought *ad hoc* military assistance from Europe and USA.[91] As Ukraine's need for arms grows, it is clear that the aid needs to be structured at a more fundamental level, i.e. at an administrative and legislative level.[92] This would, however, deepen the complicity of sending States for any of Ukraine's internationally wrongful acts. This will be analysed further in the paper.

4.2 Instances of Military Assistance

Since the end of the Cold War, military assistance on request has been undertaken by individual States or coalitions.[93] It is to be noted that while the ambit of

88 See, UNITED NATIONS. S/2015/217. Statement issued by the Kingdom of Saudi Arabia, the United Arab Emirates, the Kingdom of Bahrain, the State of Qatar, and the State of Kuwait, enclosure to annex of identical letters dated 26 March 2015 from the Permanent Representative of Qatar to the United Nations addressed to the Secretary-General and the President of the Security Council. [online]. Available at: <https://digitallibrary.un.org/record/790821?ln=en> Accessed: 17.02.2023.

89 DE WET, Erika. Reinterpreting Exceptions to the Use of Force in the Interest of Security: Forcible Intervention by Invitation and the Demise of the Negative Equality Principle. *American Journal of International Law*, 2017, vol. 111, p. 310.

90 In fact, in the post-Cold War era military assistance by individual states that were based on ex-ante consent expressed in pro-invasion treaty clauses hardly ever occurred. For an example of such a treaty clause dating from the Cold War era, see the Treaty of Guarantee of Nicosia of 16 August 1960, 382 UNTS 3, between the United Kingdom, Greece, Turkey, and Cyprus; See also, HAFNER, Gerhard. Final Report: Intervention by Invitation. *Annuaire de l'Institut de Droit International*, 2009, vol. 73.

91 BERGMANN, Max. Europe Needs Its Own Ukraine Assistance Act. [online]. Available at: <https://www.csis.org/analysis/europe-needs-its-own-ukraine-assistance-act> Accessed: 13.11.2022.

92 BERGMANN, Max. Europe Needs Its Own Ukraine Assistance Act. [online]. Available at: <https://www.csis.org/analysis/europe-needs-its-own-ukraine-assistance-act> Accessed: 13.11.2022; BOWEN, Andrew. Russia's War in Ukraine: Military and Intelligence Aspect. [online]. Available at: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjyt5-0w-v5AhWJaN4KHf9yDjsQFnoECAUQAQ&url=https%3A%2F%2Fcrsreports.congress.gov%2Fproduct%2Fpdf%2FR%2FR47068&usg=AOvVaw2r1-4vS-w8KO0wghCNl6RJ> Accessed: 13.11.2022. pp. 10–15.

93 US DEPARTMENT OF STATE. Security and Defence Cooperation Agreement Between the Islamic Republic of Afghanistan and the United States of America. [online]. Available at: <https://www.justsecurity.org/wp-content/uploads/2014/10/BSA-ENGLISH-AFG.pdf> Accessed: 13.11.2022; US DEPARTMENT OF STATE. Agreement Between the

military assistance is very wide, there does not exist practice for such assistance during inter-state conflicts. However, there have been multiple instances of such military assistance being provided to States undergoing internal conflict. While the rules for assistance to States for internal conflicts and inter-state conflicts are not *pari materia*, an analysis of these events would provide insight into the realistic perception of military assistance in the international community. Such military assistance has not been protested by third-party States uniformly.[94] No third-State has objected to these 'consensual' interventions by claiming them to be violative of principles of IHL.[95] In response to these acts, such inaction by third-States can amount to *opinio juris*.[96] In 2011, Kenya and Ethiopia supported military assistance to Somalia to fight Al-Shabaab – a designated terrorist group. The UNSC unanimously authorised the African Union to lead a multinational peacekeeping force in Somalia, known as AMISOM.[97] Uganda, Burundi, Ethio-

United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq of 17 November 2008 (Status of Forces Agreement). [online]. Available at: <https://www.peaceagreements.org/masterdocument/1577> Accessed: 13.11.2022; UNITED NATIONS SECURITY COUNCIL. S/2011/646, Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council, (18 October 2011). [online]. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/553/96/PDF/N1155396.pdf?OpenElement> Accessed: 13.11.2022; UNITED NATIONS SECURITY COUNCIL. S/2013/189, Report of the Secretary-General on the Situation in Mali, 26 March 2013, [online]. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/269/64/PDF/N1326964.pdf?OpenElement> Accessed: 13.11.2022. ¶¶ 3, 4, 44 ff; NICHOLS, Michelle. UPDATE 1 – Yemen Asks UN to Back Military Action by "Willing Countries." [online]. Available at: <https://www.reuters.com/article/yemen-security-un-idUKL2N0WQ29620150324> Accessed: 13.11.2022; UNITED NATIONS SECURITY COUNCIL. S/2015/792, Letter dated 15 October 2015 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the President of the Security Council, UN Doc (15 October 2015). [online]. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/317/91/PDF/N1531791.pdf?OpenElement> Accessed: 13.11.2022; UNITED NATIONS SECURITY COUNCIL. S/PV.7387, Verbatim Record, 18 February 2015. [online]. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N15/044/41/PDF/N1504441.pdf?OpenElement> Accessed: 13.11.2022. p.7

94 See, DE WET, Erika. The (im)permissibility of Military Assistance on Request During a Civil War. *Journal on the Use of Force and International Law*, 2020, vol. 7, no.1, pp. 26–34.

95 See generally, DE WET, Erika. *Military Assistance on Request and the Use of Force*. Oxford: Oxford University Press, 2020, Chapter 3: Direct Military Assistance on Request During Civil Wars.

96 That is, conduct 'undertaken with a sense of legal right or obligation', for the purpose of identifying customary international law; See, INTERNATIONAL LAW COMMISSION. A/71/10, Report of the Work of the Sixty Eighth Session, Identification of Customary International Law (2016), Chapter V, Conclusion 9 (1) and 10(3).

97 UNITED NATIONS SECURITY COUNCIL. S/RES/1744 (2007), On the Political Process in Somalia and Establishment of the African Union Mission in Somalia (AMISOM), 21 February 2007. [online]. Available at: https://digitallibrary.un.org/record/593199?ln=en. Accessed: 17.02.2023.

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pia, Kenya, and Djibouti sent forces as part of it.[98] Kenya relied on the agreement with Somalia as a legal basis for its operation.[99] Unlike Kenya, however, Ethiopia did not publicly invoke any legal basis for its military actions.[100]

In 1984, the Islamic Republic of Iran protested against the United Kingdom's supply of financial and military aid to Iraq, which allegedly included chemical weapons used in attacks against Iranian troops. Iran objected on the ground that the assistance was facilitating Iraqi acts of aggression.[101] The Government of the United Kingdom denied the allegation that it had supported Iraq's chemical weapons program.[102] Although protested against by Iran, this supply of military aid met virtually no international criticism or objections.[103]

In 1998, a similar allegation surfaced that Sudan had assisted Iraq in manufacturing chemical weapons by allowing Sudanese installations to be used by Iraqi technicians in the production of nerve gas. Iraq's representative to the United Nations denied this allegation.[104]

In the Tugar case, an Iraqi deminer stepped on a mine laid by Iraqi forces. The mine had been illegally sold to the Iraqi government by a private Italian company. The European Commission on Human Rights dismissed the case, stating that:[105]

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98 KLOBUCISTA, Claire, MASTERS, Jonathan, ALY SERGIE, Mohammed. Al-Shabaab. [online]. Available at: https://www.cfr.org/backgrounder/al-shabaab. Accessed: 17.02.2023.

99 BBC. Kenya Sends Troops into Somalia to Hit Al-Shabab. [online]. Available at: <https://www.bbc.co.uk/news/world-africa-15331448> Accessed: 11.11.2022; UNITED NATIONS SECURITY COUNCIL Letter dated 17 October 2011 from the Permanent Representative of Kenya to the United Nations Addressed to the President of the Security Council (UN Doc S/2011/646) (18 October 2011).

100 MARTIN, Jean-Christophe. The Ethiopia Military Intervention in Somalia—2011. in Jean-Christophe Martin, 'The Ethiopia Military Intervention in Somalia—2011' in Ruys and Corten, 808.

101 ALI, Javed. Chemical Weapons and the Iran-Iraq: A Case Study in Non-Compliance. The Nonproliferation Review, 2001, p. 57, fn 41; THE NEW YORK TIMES. The New York Times, 6 March 1984. [online]. Available at: <https://www.nytimes.com/1984/03/06/nyregion/tuesday-march-6-1984-international.html> Accessed: 13.11.2022. p. A1.

102 ALI, Javed. Chemical Weapons and the Iran-Iraq: A Case Study in Non-Compliance. *The Nonproliferation Review*, 2001, p. 57, fn 41; THE NEW YORK TIMES. The New York Times, 5 March 1984. [online]. Available at: <https://www.nytimes.com/1984/03/05/nyregion/monday-march-5-1984-international.html> Accessed: 13.11.2022. p. A3.

103 ALI, Javed. Chemical Weapons and the Iran-Iraq War: A Case Study in Non-Compliance. *The Nonproliferation Review*, 2001, p. 48; See, UNITED NATIONS SECURITY COUNCIL. S/RES/598, Security Council Resolution 598 (1987) [Iraq-Islamic Republic of Iran], 20 July 1987.

104 ROTH, Richard, REUTERS, CNN. U.N. Panel Confirms Nerve Gas in Iraqi Warheads. [online]. Available at: <http://edition.cnn.com/WORLD/meast/9810/26/iraq.vx/index.html> Accessed: 13.11.2022.

105 European Court of Human Rights (22869/93) – Commission (First Chamber) – Decision – TUGAR v. ITALY. p. 4.

1. *'[T]here is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country;'*
2. *'the 'adverse consequences' of the failure of Italy to regulate arms transfers to Iraq are 'too remote' to attract the Italian responsibility;' and*
3. *'the injuries suffered by the applicant are exclusively attributable to Iraq' and not to Italy, under Article 2 of the European Convention.*

In the Tripoli bombing incident of 1986, the Libyan Arab Jamahiriya charged the United Kingdom with responsibility for the event, based on the fact that the United Kingdom had allowed several of its air bases to be used to launch United States fighter planes to attack Libyan targets.[106] The Libyan Arab Jamahiriya asserted that the United Kingdom 'would be held partly responsible' for having 'supported and contributed in a direct way' to the raid.[107] The General Assembly called upon all States 'to refrain from extending any assistance or facilities for perpetrating acts of aggression against the Libyan Arab Jamahiriya.'[108]

This shows that military assistance may not attract attribution owing either to the lack of active international consensus to that effect or due to the lack of a clear nexus between the supply and the State sought to be held responsible. While the clauses of ARSIWA are clear on the grounds for responsibility, establishing a trend of holding supplying States attributable for their arms transfers seems unlikely. This is especially evident when four of the largest arms exporters are permanent members of the UNSC.[109] Their political affluence, the rest of the world's need for arms, and their ability to veto resolutions effectively prevents the international community from taking any enforceable action against them.

It is the authors' opinion that these issues with ascertaining attribution will remain the same in cases of inter-State military assistance, if not amplified. For inter-state conflicts, the situation is worsened due to the nature of inter-state relations. No State party engaged in conflict can be isolated from the global com-

106 See UNITED STATES DEPARTMENT OF STATE, Department of State Bulletin, No. 2111 (June 1986). [online]. Available at: <https://babel.hathitrust.org/cgi/pt?id=msu.31293008122453&view=1up&seq=34&q1=libya> Accessed: 13.11.2022. p. 8.

107 See THE TIMES. The Statement of Ambassador Hamed Houdeiry, Libyan People's Bureau, Paris, The Times, 16 April 1986. [online]. Available at: <https://www.nytimes.com/1986/04/16/nyregion/news-summary-wednesday-april-16-1986.html> Accessed: 13.11.2022. p. 6; See also, MCCREDIE, Jeffrey. The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal. *Case Western Reserve Journal of International Law*, 1987, vol. 19, no. 2.

108 UNITED NATIONS GENERAL ASSEMBLY. A/RES/41/38, Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986: resolution / adopted by the General Assembly, 20 November 1986. ¶¶. 1 and 3.

109 KUIMOVA, Alexandra, WEZEMAN, Siemon, WEZEMAN, Pieter. *Trends in International Arms Transfers*, 2021. Stockholm International Peace Research Institute, 2022, p. 1.

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munity for their wrongful actions, due to the nature of their political influence and bilateral relations. This renders the unanimous condemnation of the assisting State, involved in an armed conflict, impossible.

4.3 International Considerations while Providing Military Assistance

The UNGA has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.[110]

Transferring weapons when:[111] (a) there is no respect for IHL; or (b) there is no stability and security in a country of destination; or (c) there is a problem of unregulated diffusion of Small Arms and Light Weapons ('SALW') in the destination; or (d) there is a lack of capacity to maintain effective control over imported SALW; or (e) there is a possibility of diversion of end-uses or end-users; and/or (f) satisfactory preventative measures are not in place; could be useful tests to determine whether a particular transfer breaches the obligations at hand.

Providing support in the form of arms, ammunition, and other means of warfare gives rise to various direct risks to civilians and combatants and can have indirect and long-term negative humanitarian consequences.[112] Specific risks include the death of and injury to civilians and non-combatants; damage to or destruction of civilian objects and specially protected objects (e.g. cultural property and medical facilities); civilian harm resulting from the indirect (reverberating) effects of the damage to or destruction of civilian objects and displacement.[113]

An arms-transferring State, consistent with its obligations under IHL, must assess whether the recipient is likely to use the weapons to commit serious violations of IHL. If there is an expectation that this will happen, based on facts or knowledge of past patterns, the State must refrain from transferring the weapons.[114]

110 UNITED NATIONS GENERAL ASSEMBLY. A/37/745, Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII. p. 50.

111 YIHDEGO, Zeray. *The Arms Trade and International Law*. Bloomsbury Publishing, 2007, p. 287.

112 ICRC, ALLIES, PARTNERS AND PROXIES MANAGING SUPPORT RELATIONSHIPS IN ARMED CONFLICT TO REDUCE THE HUMAN COST OF WAR [hereinafter 'APP'], p. 49, ¶ 3.3.2.

113 ICRC, ALLIES, PARTNERS AND PROXIES MANAGING SUPPORT RELATIONSHIPS IN ARMED CONFLICT TO REDUCE THE HUMAN COST OF WAR, p. 43.

114 See, INTERNATIONAL COMMITTEE OF THE RED CROSS. Commentary on the First Geneva Convention. [online]. Available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> Accessed: 13.11.2022, ¶¶ 158–163; DORMANN, K., SERRALVO, J. Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations. International *Review of the Red Cross*, 2015, No. 895/896, pp. 707–736.

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The mitigation of risks is to be carried out provided that the mitigation is timely, robust, and reliable, and the exporter and importer have the capacity to implement them effectively and in good faith.[115] Specific risk-mitigation measures could include training by the exporting State of the recipient's armed and security forces in IHL and IHRL.[116]

The ICRC has stated that exporter States have a moral, political, and legal responsibility to the international community for the use of their weapons and ammunition. The primary responsibility of compliance with IHL falls upon the users of weapons.[117] Thus, selling to, providing, or facilitating the transfer of weapons to a country, while being aware of wrongful acts of the importer State entails responsibility on the sending State. Additionally, any serious breach of IHL by a receiving State would be of the same stature as if committed by the sending State.[118]

Some States contend that countries such as France, South Africa, and Egypt have provided weapons and contributed to the Rwandan Genocide.[119] Countries such as China, France, Iran, Iraq, Russia, South Africa, and the US have given weapons and other support to Sudan's civil war, in which two million people died.[120] China and Bulgaria contributed to Burundi's internal conflict by supplying weapons.[121] In all these cases, governments and guerrillas have been involved

115 INTERNATIONAL COMMITTEE OF THE RED CROSS. Understanding the Arms Trade Treaty from a Humanitarian Perspective. International Committee for the Red Cross, 2016, Geneva, pp. 38–39.

116 Article 3, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 08 June 1977; INTERNATIONAL COMMITTEE FOR THE RED CROSS. Understanding the Arms Trade Treaty from a Humanitarian Perspective. International Committee for the Red Cross, 2016. Geneva, pp. 38–39.

117 HERBY, Peter. Arms Transfers, Humanitarian Assistance and International Humanitarian Law. *International Review of the Red Cross*, 1998, no. 325, p. 689.

118 YIHDEGO, Zeray. The Arms Trade and International Law. Bloomsbury Publishing, 2007, p. 291; INTERNATIONAL COMMITTEE FOR THE RED CROSS. Arms Availability and the Situation of Civilians in Armed Conflict: A Study Presented by the ICRC. 1999, p. 25, ¶ 2, and pp. 21–22 [emphasis added]; See also, GILLARD, Emanuela. *What is Legal? What is Illegal? Limitations on Transfers of Small Arms under International Law*. Lauterpacht Research Centre for International Law, Cambridge, 2000, p. 8, ¶ 32; See also, FREY, Barbara. The Question of Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms: Working Paper Submitted in Accordance with Sub-Commission Decision 2001/120. Geneva, 2002, ¶ 73.

119 HUMAN RIGHTS WATCH. Arming Rwanda – The Arms Trade and Human Rights Abuses in the Rwandan War. *Human Rights Watch Arms Project*, 1994, vol. 6, no. 1, p. 14.

120 See generally, HUMAN RIGHTS WATCH. Global Trade, Local Impact: Arms Transfers to all Sides in the Civil War in Sudan. *Human Rights Watch*, 1998, vol. 10, no. 4 (A), Chapter 4: Arms Transfers to the Government of Sudan.

121 IMMIGRATION AND REFUGEE BOARD OF CANADA. Burundi: Arms Sales by China to the Government of Burundi (1997-2002). [online]. Available at: <https://www.refworld.org/docid/3f7d4d573f.html> Accessed: 13.11.2022.

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in gross violations of IHL. These abuses included indiscriminate attacks, sexual violence against women and children, ethnic violence, etc.[122] Arguably, 'these governments are, by their acts of commission, or omission, or by sheer neglect, accessories to the abuses [...] committed.'[123] It is inherently necessary to examine whether Ukraine's actions in the present conflict violate the principles of international humanitarian law in order to subsequently determine the sending States' responsibility.

4.4 Ukraine's Current Violations of International Humanitarian Law

This point of inquiry will crystallise the exact violations which may be extended to an arms transferring State in case derivative state responsibility can be proven. The ATT and customary international law agree that arms should not be transferred to a State when that State is guilty of committing serious violations of IHL.

It is often challenging to assess violations of IHL in a conflict zone due to limited access. For the international community to clarify the nature and extent of IHL violations in Ukraine, a few reports were made. On 3rd March 2022, the Moscow Mechanism of the Human Dimension of the Organisation for Security and Co-operation in Europe (OSCE) was invoked by Ukraine, supported by 45 participating States. Under the mechanism, a Mission was appointed to deliver a report concerning the violations of IHL committed in Ukraine from 24th February 2022 until 1st April 2022.[124] Another report was prepared by the UN Human Rights Monitoring Mission in Ukraine,[125] covering the period from 24th February 2022 to 15th May 2022. Another report concerning the same period was made by the Independent International Commission of Inquiry on Ukraine.[126]

122 UNITED NATIONS COMMISSION ON HUMAN RIGHTS. E/CN.4/RES/1996/76, Situation of Human Rights in Rwanda, 23 April 1996.

123 HUMAN RIGHTS WATCH. State Responsibility in the Arms Trade and the Protection of Human Rights for the Workshop on Small Arms, Organized by the Government of Switzerland, Geneva. [online]. Available at: <https://www.hrw.org/news/1999/02/17/state-responsibility-arms-trade-and-protection-human-rights> Accessed: 13.11.2022; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) [1986] ICJ Rep 14, 115–117, 215–216, 254–256.

124 ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE. Report of the OSCE Moscow Mechanism's Mission of Experts Entitled 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022.' [online]. Available at: <https://www.osce.org/odihr/515868> Accessed: 13.11.2022.

125 UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022.

126 INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON UKRAINE. Report of the Independent International Commission of Inquiry on Ukraine. [online].

The following paragraphs containing details only of Ukraine's violations of IHL stem primarily from these three reports.

It is clear that violations have occurred on both sides.[127] Applying IHL equally to both sides is difficult since Russia, being the aggressor, has committed more egregious violations. Overall, there have been innumerable attacks from both sides on civilians, non-combatants, civilian objects, and the other side's military forces.[128] By the principle of equal application, IHL applies to all parties to an armed conflict, even if one side has violated the prohibition on using force (Russia) and the other is acting in self-defence (Ukraine).[129]

Respecting the dead, combatants, and non-combatants alike, is vital to IHL.[130] Ukraine has violated these provisions by posting pictures of deceased soldiers online.[131] More violations were committed[132] when Ukraine started utilizing a Telegram service to convey news of deceased soldiers to their families.[133]

Available at: <https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary> Accessed: 08.11.2022.

127 ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE. Report of the OSCE Moscow Mechanism's Mission of Experts Entitled 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022.' [online]. Available at: <https://www.osce.org/odihr/515868> Accessed: 13.11.2022. p. ii; INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON UKRAINE. Report of the Independent International Commission of Inquiry on Ukraine. [online]. Available at: <https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary> Accessed: 08.11.2022. ¶ 109.

128 See generally, UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022. ¶¶ 50–59.

129 SCHMITT, Michael. Ukraine Symposium – Amnesty International's Allegations of Ukrainian IHL Violations. [online]. Available at: <https://lieber.westpoint.edu/amnesty-allegations-ukrainian-ihl-violations/> Accessed: 08.11.2022.

130 Article 17, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Article 34 (1), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 08 June 1977.

131 Articles 16 and 17, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Articles 19 and 20, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Article 33 (2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 08 June 1977.

132 Article 13 (2), Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

133 GOLOVKO, Christina. Ukraine Creates Telegram Channel to Facilitate Search for Missing Family and Loved Ones. [online]. Available at: https://www.pravda.com.ua/eng/news/2022/03/7/7329091/. Accessed: 13.11.2022.

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Ukraine has also failed to notify the International Committee for the Red Cross ('ICRC') of the identities of all the deceased Russian soldiers[134] and prisoners of war ('POWs')[135] as required by law.[136]

There are instances of Ukrainian forces mistreating, torturing, and committing summary executions of Russian POWs,[137] all of which are violations of IHL. However, the Prosecutor General's Office of Ukraine informed that his office has opened criminal proceedings regarding some cases.[138] The Human Rights Watch even noted the hundreds of photos and videos of captured Russian soldiers posted on the Internet, often with their passports and identification documents. Some of the soldiers were blindfolded, gagged, or masked.[139] This violation was aggravated by posts with screenshots of correspondence of captured Russian soldiers with their families and friends appearing on the Internet[140] and bringing POWs to press conferences to discuss their roles in the invasion.[141] Whether or

134 ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE. Report of the OSCE Moscow Mechanism's Mission of Experts Entitled 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022.' [online]. Available at: <https://www.osce.org/odihr/515868> Accessed: 13.11.2022, p. 7

135 ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE. Report of the OSCE Moscow Mechanism's Mission of Experts Entitled 'Report On Violations Of International Humanitarian And Human Rights Law, War Crimes And Crimes Against Humanity Committed In Ukraine Since 24 February 2022.' [online]. Available at: <https://www.osce.org/odihr/515868> Accessed: 27.01.2023. p. 9.

136 Articles 70, 122, and 123, Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Article 16, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

137 UN OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022. ¶ 105; INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON UKRAINE. Report of the Independent International Commission of Inquiry on Ukraine. [online]. Available at: <https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary> Accessed: 08.11.2022. ¶ 86 and 87.

138 INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON UKRAINE. Report of the Independent International Commission of Inquiry on Ukraine. [online]. Available at: <https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary> Accessed: 08.11.2022. ¶ 86.

139 HUMAN RIGHTS WATCH. Ukraine: Respect the Rights of Prisoners of War? [online]. Available at: <https://www.hrw.org/news/2022/03/16/ukraine-respect-rights-prisoners-war> Accessed: 13.11.2022.

140 ECONOMIC TIMES. Ukraine Parades Captured Russian Soldiers for Cameras. [online]. Available at: <https://economictimes.indiatimes.com/news/defence/ukraine-parades-captured-russian-soldiers-for-cameras/articleshow/90059145.cms?from=mdr> Accessed: 13.11.2022.

141 AMNESTY INTERNATIONAL. Russia/Ukraine: Prisoners of War Must be Protected from Public Curiosity under Geneva Convention. [online]. Available at: <https://www.amnesty.

not their statements were coerced, such practices violate IHL.[142] Similarly, publicly available videos of Russian POWs being interrogated and made to apologize to the Ukrainian people, glorify the Ukrainian armed forces, denigrate their command, or call on relatives to end the war[143] are in breach of IHL.[144]

POWs were even held in pre-trial centres, while under IHL, they should be held in camps, not in penitentiaries.[145] However, the government of Ukraine later established a camp which meets most of the requirements laid down by IHL.[146]

Civilians, believed to be pro-Russian supporters, were beaten in territory under Ukraine's control.[147] There have been numerous cases of credible allegations of ill-treatment by Ukraine's forces.[148] There have even been multiple alle-

org/en/latest/news/2022/03/russia-ukraine-prisoners-of-war-must-be-protected-from-public-curiosity-under-geneva-convention/> Accessed: 13.11.2022; KHURSHUDYAN, Isabelle, WESTFALL, Sammy. Ukraine Puts Captured Russians on Stage. It's a Powerful Propaganda Tool, but is it a Violation of POW rights? [online]. Available at: <https://www.washingtonpost.com/world/2022/03/09/ukraine-russiaprisoners-pows/> Accessed: 13.11.2022.

142 Article 13 (2), Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

143 UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. Update on the Human Rights Situation in Ukraine, Reporting period: 24 February – 26 March 2022. [online]. Available at: <https://www.ohchr.org/sites/default/files/2022-03/HRMMU_Update_2022-03-26_EN.pdf> Accessed: 13.11.2022. ¶ 48.

144 HUMAN RIGHTS WATCH. Ukraine: Respect the Rights of Prisoners of War. [online]. Available at: <https://www.hrw.org/news/2022/03/16/ukraine-respect-rights-prisoners-war> Accessed: 27.01.2023; Articles 13 (2), 17 (1) and (4), Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

145 SOUTH CHINA MORNING POST. Ukraine War: An Inside Look at Prison Life for Captured Russian Troops. [online]. Available at: <https://www.scmp.com/news/world/europe/article/3186711/inside-look-ukraine-prison-life-captured-russian-troops-everyone> Accessed: 13.11.2022; Article 21, Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

146 UNITED NATIONS. More than 8 months into Russia's Armed Attack on Ukraine and the Ensuing Escalation in Hostilities the UN Reports Widespread Abuse, Torture of Prisoners of War. [online]. Available at: <https://ukraine.un.org/en/207332-more-8-months-russias-armed-attack-ukraine-and-ensuing-escalation-hostilities-un-reports> Accessed: 27.01.2023.

147 UNITED NATIONS OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022. ¶ 94.

148 UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. Update on the Human Rights Situation in Ukraine, Reporting period: 24 February – 26 March 2022. [online]. Available at: <https://www.ohchr.org/sites/default/files/2022-03/HRMMU_Update_2022-03-26_EN.pdf> Accessed: 13.11.2022. ¶ 41.

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gations of conflict-related sexual violence where the perpetrators were from the Ukrainian forces.[149] All these actions are violations of IHL.[150]

Ukrainian armed forces took up positions either in residential areas or near civilian objects,[151] from where they launched military operations without taking measures to protect the civilians present, as required under IHL.[152] Additionally, Ukrainian forces made it impossible for some residential areas to be evacuated,[153] aggravating the harm and risks that non-combatants were exposed to. Ultimately, if Ukraine determines that these actions were to have a 'definite military advantage,' they would not have violated IHL.

Ukrainian authorities called upon civilians to find weapons and prepare Molotov cocktails to fight the Russian invaders.[154] This violates the principles of distinction and prevention of unnecessary suffering.[155] In many well-documented cases, cluster munitions have been used.[156] Since Ukraine is not a party

149 UNITED NATIONS OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022. ¶ 98 & 102.

150 Articles 75 (1) and (2) (a) and (b), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 08 June 1977.

151 UNITED NATIONS OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022. ¶ 34; INDEPENDENT INTERNATIONAL COMMISSION OF INQUIRY ON UKRAINE. Report of the Independent International Commission of Inquiry on Ukraine. [online]. Available at: https://www.ohchr.org/en/documents/reports/a77533-independent-international-commission-inquiry-ukraine-note-secretary. Accessed: 08.11.2022. ¶ 55.

152 Article 58, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 08 June 1977.

153 UNITED NATIONS OFFICE OF THE HIGH COMMISSION FOR HUMAN RIGHTS. The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation (24 February – 15 May 2022). [online]. Available at: <https://ukraine.un.org/en/188379-situation-human-rights-ukraine-context-armed-attack-russian-federation> Accessed: 13.11.2022. ¶ 35.

154 OSBORNE, Samuel. Ukraine Invasion: Civilians Help Make Molotov Cocktails to Take on Russian Forces. [online]. Available at: <https://news.sky.com/story/ukraine-invasion-civilians-help-make-molotovcocktails-to-take-on-russian-forces-12552181> Accessed: 13.11.2022.

155 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, ¶ 78.

156 See, HUMAN RIGHTS WATCH. Ukraine: Russian Cluster Munition Hits Hospital. [online]. Available at: <https://www.hrw.org/news/2022/02/25/ukraine-russian-cluster-munition-hits-hospital#> Accessed: 13.11.2022; HUMAN RIGHTS WATCH. Ukraine: Deadly Attacks Kill, Injure Civilians, Destroy Homes. [online]. Available at: <https://www.

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to the Oslo Convention, the use of cluster munitions is not prohibited as such. However, their use is still subject to the general rule of proportionality under IHL, like all other weapons.[157]

These violations of IHL are regular to international and non-international armed conflicts and are only aggravated by an increase in the supply of arms by third-party States. They have been the cause of immense distress in countries such as Columbia, Guatemala, Iraq, Côte d'Ivoire, Myanmar, Somalia, Sudan, and Chad.[158] Ultimately, there is no evidence that Ukrainian soldiers are currently using Western-supplied weapons to commit grave breaches of the Geneva Conventions, i.e. war crimes.[159] Even when acknowledging that Ukraine has committed war crimes during its conflict with Russia, the infrequency of their commission means that, at present, Western states can be neither virtually certain that Ukraine intends to commit future war crimes nor virtually certain that Ukraine will commit those crimes with their weapons.[160] Regardless of alleged war crimes by Ukraine in the past, no implications towards the actual knowledge of future perpetration of war crimes can be made from earlier incidents or the current situation.[161] Thus, sending States cannot be presumed to have 'knowledge' about such plans and cannot be implicated under Article 16 of ARSIWA.

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hrw.org/news/2022/03/18/ukraine-deadly-attacks-kill-injure-civilians-destroy-homes> Accessed: 13.11.2022; HUMAN RIGHTS WATCH. Ukraine: Cluster Munitions Repeatedly Used on Mykolaiv. [online]. Available at: <https://www.hrw.org/news/2022/03/17/ukraine-cluster-munitions-repeatedly-used-mykolaiv> Accessed: 13.11.2022; HUMAN RIGHTS WATCH. Ukraine: Cluster Munitions Launched Into Kharkiv Neighborhoods. [online]. Available at: <https://www.hrw.org/news/2022/03/04/ukraine-cluster-munitions-launched-kharkiv-neighborhoods> Accessed: 13.11.2022; UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS. Update on the Human Rights Situation in Ukraine, Reporting period: 24 February – 26 March 2022. [online]. Available at: <https://www.ohchr.org/sites/default/files/2022-03/HRMMU_Update_2022-03-26_EN.pdf> Accessed: 13.11.2022. ¶ 9.

157 Article 51 (5) (b), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 08 June 1977; Article 8 (2) (b) (iv), Rome Statute of the International Criminal Court. Rome, 17 July 1998.

158 See generally, AMNESTY INTERNATIONAL. Blood at the Crossroads: Making the Case for a Global Arms Trade Treaty. London: Amnesty International Publications, 2008.

159 HELLER, Kevin Jon, TRABOCCO, Lena. The Legality of Weapons Transfers to Ukraine Under International Law. *Journal of International Humanitarian Legal Studies,* 2022. [online] Available at: <https://brill.com/view/journals/ihls/aop/article-10.1163-18781527-bja10053/article-10.1163-18781527-bja10053.xml#ref_fn000101> Accessed: 08.11.2022.

160 HELLER, Kevin Jon, TRABOCCO, Lena. The Legality of Weapons Transfers to Ukraine Under International Law. *Journal of International Humanitarian Legal Studies*, 2022. [online] Available at: <https://brill.com/view/journals/ihls/aop/article-10.1163-18781527-bja10053/article-10.1163-18781527-bja10053.xml#ref_fn000101> Accessed: 08.11.2022.

161 ZADEMACK, Sophia, JAMES, Luke. Western Weapons in Ukraine. [online]. Available at: <https://opiniojuris.org/2022/02/08/western-weapons-in-ukraine/> Accessed: 08.11.2022.

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5. Support in the Context of Neutrality

The support provided by States to Ukraine and Russia has not taken the form of any troops being deployed on the ground,[162] but merely the use of territory[163] and the transfer of weapons to both States, though primarily Ukraine. These actions do not directly make the States party to the conflict, but Russia's warnings[164] prove that the point at which a neutral State becomes party to a conflict is unclear.

Broadly speaking, the law of neutrality regulates the co-existence of States part of an International Armed Conflict and States at peace.[165] Neutrality is traditionally defined as 'the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents ... creating rights and duties between the impartial States and the belligerents.'[166]

Knowledge of an armed conflict triggers neutral rights and duties[167] and automatically becomes effective at the outbreak of war between third States.[168] No

162 LEBLANC, Paul. Why the US isn't Sending Troops into Ukraine. [online]. Available at: https://edition.cnn.com/2022/02/27/politics/us-troops-ukraine-russia-what-matters/index.html. Accessed: 25.08.2022; ATWOOD, Kylie, COLE, Devan. US Will Not Use American Troops to Create No-Fly Zone in Ukraine, Says UN Ambassador. [online]. Available at: <https://edition.cnn.com/2022/02/27/politics/russia-ukraine-no-fly-zone-linda-thomas-greenfield-cnntv/index.html?utm_term=PRV-1646008888349a6676650a2d2&utm_source=cnn_What+Matters+for+February+27%2C+2022&utm_medium=email&bt_ee_preview=hbFduul55Q%2FXrgsCF5h9NJy3K0GbQv4fI%2FGq%2Fc6jwbQ8qAiF%2BQDuXeXbSU%2F5YMFj&bt_ts_preview=1646008888356> Accessed: 11.11.2022.

163 REUTERS. Belarus's Lukashenko warns Ukraine, deploys troops with Russia. [online]. Available at: <https://www.reuters.com/world/europe/belarus-russia-form-joint-military-group-lukashenko-says-2022-10-10/> Accessed: 08.11.2022.

164 FAULCONBRIDGE, Guy. Russia Warns West: Don't Test Our Patience. [online]. Available at: <https://www.reuters.com/world/europe/russia-warns-west-dont-test-our-patience-2022-04-28/> Accessed: 13.11.2022; FAULCONBRIDGE, Guy. Putin Warns United States Against Supplying Ukraine Longer Range Missiles. [online]. Available at: <https://www.reuters.com/world/europe/putin-warns-west-russia-will-strike-harder-if-longer-range-missiles-supplied-2022-06-05/> Accessed: 13.11.2022.

165 While the original perception of neutrality was inherently tied into the concept of war, the ICJ's judgement in the Nicaragua case applied the law of hostilities regardless of the status of the conflict as a 'war.' This position has further been echoed in the writings of Bindschedler, Kussbach, Kopfer and more.

166 OPPENHEIM, L. LAUTERPACHT (ed.) *International Law* Volume II. London: Longman Greens & Co., 1952. p. 293.

167 OPPENHEIM, L. LAUTERPACHT (ed.) *International Law* Volume II. London: Longman Greens & Co., 1952, p. 307 (noting that treaty law requires that belligerents notify neutrals of outbreak of war because knowledge of conflict marks commencement of neutrality).

168 OPPENHEIM, L. LAUTERPACHT (ed.) *International Law* Volume II. London: Longman Greens & Co., 1952. p. 307.

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formal declaration of neutrality is required.[169] The law of neutrality also forms a cornerstone of customary international law, and must be complied with.[170]

Similarly, there are multiple methods to forfeit neutrality. A State may, at any time, lose their neutral status by entering the war. However, merely using force as a response to a violation of its neutrality does not negate its status as a neutral State. If the war in question terminates, so does the status of neutrality offered.

The boundaries concerning the forfeiture of neutrality by indirectly participating in hostilities are unclear. Depending on its nature, the 'aid and assistance' provided by a State may count as a belligerent act that forfeits the State's neutrality.[171]

The Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and the Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War are the primary conventions which lay down the rules of neutrality in international law. The authors, at this point, find it pertinent to note that while not ubiquitous, a large number of the States currently supplying weapons to Ukraine and Russia are parties to at least one, if not both, of the conventions.[172] Article 2 of the Fifth Convention states that 'Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.'[173] Article 6 of the Thirteenth Hague Convention states that 'The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatsoever, is forbidden.'[174]

169 BINDSCHEDLER, Rudolf. Neutrality, Concept and General Rules, in: BERNHARDT (ed.), *Encyclopedia of Public International Law*. North-Holland Publishing Company, 1992, pp. 9–14.

170 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep. 226, [88]

171 UPCHER, James. *Neutrality in Contemporary International Law*. Oxford: Oxford University Press, 2020 p. 84.

172 See INTERNATIONAL COMMITTEE FOR THE RED CROSS. Treaties, States parties, and Commentaries, Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907. [online]. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=200> Accessed: 13.11.2022; See INTERNATIONAL COMMITTEE FOR THE RED CROSS. Treaties, States parties, and Commentaries, Convention (XII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907. [online]. Available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=240> Accessed: 13.11.2022.

173 Article 2, Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.

174 Article 6, Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907.

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The term 'war material' has not been defined in the conventions, and has multiple clashing interpretations. According to Bothe,[175] the prohibition on supply covers weapons, a definition that seems to be in line with writings from the period of the drafting of the Hague Conventions.[176] Thus, any form of supply or transfer of weapons and ammunition by a neutral State to a belligerent would violate international law. Impartial transfer of arms made by neutral parties to belligerents would also not be tolerated.[177]

However, the writings of authors such as James Upcher claim that state practice since the Second World War has shown evidence contrary to these rules.[178] There have been multiple instances of States which are neutral to a conflict transferring weapons to either one or more of the belligerent States. During World War II, Switzerland, a party to Hague Convention XIII, decided to continue selling arms to France, Britain, and Germany,[179] and their provision of weapons did not stop until years later.[180] Sweden also provided thousands of firearms, artillery, and other war supplies to Finland during the Finnish Winter War of 1939–1940 without criticism from the international community.[181]

The Iran-Iraq conflict in the 1980s is another clear example of neutral countries supplying weapons while asserting their neutrality – in fact, the number of arms suppliers to both countries increased after the declaration of war.[182] Certain States such as Soviet Russia and France provided Iraq with a majority of the weapons, contradicting the principle of impartial sale of goods to belligerents.[183] France continued this supply of weapons while simultaneously emphasising its

175 BOTHE, Michael. The Law of Neutrality. FLECK, Dieter. (ed), *The Handbook of International Humanitarian Law*. Oxford: Oxford University Press, 2008, p. 584

176 HYDE, Charles Cheney. The Hague Convention Respecting the Rights and Duties of Neutral Powers in Naval War. *The American Journal of International Law*, 1908, Vol. 2, No. 3, p. 510; DINSTEIN, Yoram. The Laws of Neutrality. *Israel Yearbook on Human Rights*, 1984, vol. 14, p. 95; See also, PREUSS, Lawrence, et al. Some Effects of Governmental Controls on Neutral Duties. *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, 1937, vol. 31, pp. 108–35.

177 HYDE, Charles Cheney. The Hague Convention Respecting the Rights and Duties of Neutral Powers in Naval War. *The American Journal of International Law*, 1908, Vol. 2, No. 3, p. 510.

178 UPCHER, James. *Neutrality in Contemporary International Law*. Oxford: Oxford University Press, 2020 p. 116–120.

179 VAGTS, Detlev F. Switzerland, International Law and World War II. *The American Journal of International Law*, 1997, vol. 91, no. 3, p. 469.

180 VAGTS, Detlev F. Switzerland, International Law and World War II. *The American Journal of International Law*, 1997, vol. 91, no. 3, p. 469.

181 MÜLLER, Leos. *Neutrality in World History*. New York: Routledge, 2019, p. 136.

182 BRZOSKA, Dr. Michael, OHLSON, Thomas. *Fact Sheet: The Iraq-Iran War and Arms Trade*. Stockholm International Peace Research Institute, 1984, p. 3.

183 See, Article 7 and Article 9, Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907.

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impartiality towards the conflict and its desire to end it.[184] China's transfer of large amounts of arms to Iran prompted questioning from the United States to ascertain the former's neutrality.[185]

However, Bothe, while writing on the prohibition of weapon transfers, refers to those transfers which Upcher relies on during the Iran-Iraq conflict as objectionable under the law of neutrality, and the prohibition as absolute.[186]

Whether the use of Belarus' territory by Russia is a violation of neutrality is also unclear. Article 1 of the Fifth Hague Convention states that the territory of neutral States is inviolable. Not only do belligerent States have a duty to not use the territory of neutral States, neutral States have the duty to repel any violation of this neutrality, even by force.[187]

Kuwait's involvement during the Iran-Iraq war proves enlightening when studying the state practice surrounding the use of neutral State's territory. At multiple points during the conflict, Iran protested against Kuwait's conduct, which it believed to be breaching its neutrality by assisting Iraq.[188] In a letter to the United Nations on 25th September 1985, Iran alleged that despite notifications to Kuwait and contrary to the principles of neutrality, cargo ships for Kuwait had on-board arms headed towards Iraq.[189] On 5th January 1987, Iran published the remarks of a captured Iraqi pilot who stated that Iraqi pilots used Kuwaiti airspace.[190] Consequently, in a letter to the United Nations on 14th August 1987, Iran stated that Kuwait had violated its position of neutrality and would no longer be treated as a neutral State; instead, it would be treated as a partner of Iraq in the war.[191]

184 CHARPENTIER, Jean. Pratique française du droit international – 1983. *Annuaire français de droit international*, 1983, vol. 29, p. 854.

185 TRAN, Mark. China Role in War Worries US/Reagan Administration Calls on Peking to Confirm Neutrality in Iran-Iraq Conflict. [online]. Available at: <https://theguardian.newspapers.com/image/260262016/?terms=US%20REAGAN&match=1> Accessed: 13.11.2022.

186 BOTHE, Michael. The Law of Neutrality. FLECK, Dieter. (ed), *The Handbook of International Humanitarian Law*. Oxford: Oxford University Press, 2008, p. 584

187 BOTHE, Michael. The Law of Neutrality. FLECK, Dieter. (ed), *The Handbook of International Humanitarian Law*. Oxford: Oxford University Press, 2008, pp. 582–584

188 UPCHER, James. *Neutrality in Contemporary International Law*. Oxford: Oxford University Press, 2020 p. 85.

189 UNITED NATIONS SECURITY COUNCIL. S/17496, Letter Dated 25 September 1985 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General 25 September 1985.

190 UNITED NATIONS SECURITY COUNCIL. S/18557, Letter Dated 5 January 1987 From the Charge D'Affaires A I of the Permanent Mission of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General 5 January 1987.

191 UNITED NATIONS SECURITY COUNCIL. S/19041, Letter Dated 14 August 1987 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General 14 August 1987.

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However, other States rejected the inclusion of Kuwait as a belligerent by Iran[192]. The idea that mere use of territory does not equate to participation in hostilities was also repeated later on, such as in the Italian role during the 2003 intervention of Iraq. Here, Italy allowed its airspace to be used by the belligerents' combat aircrafts.[193]

On 12th March 2022, the Russian Federation made a statement that weapons sent by the Western States could become a legitimate target as the Russian army carried on its advances in Ukraine.[194] On 25th April 2022, Russia, via its ambassador to the United States, warned against sending more arms to Ukraine, stating that it was 'pouring oil on the flames.'[195] When long-range weapons were supplied to Ukraine, President Vladimir Putin issued another warning, stating that the list of targets in Ukraine would be expanded if the transfer occurred.[196] However, in all three statements, Russia, despite issuing threats, did not allege the violation of neutrality by any State. There is also no allegation of violation of neutrality in the letter to the Security Council sent by the State.[197] A further lack of widespread criticism by the international community about the transfer of weapons further lends itself to the conclusion that States do not currently view the transfer of weapons and the use of territory as a violation of neutrality.

Thus, with respect to, both, the transfer of weapons and the use of territory, conflicting viewpoints arise. However, the absence of any widespread state practice, and the lack of a consensus between the global community on the permissibility of such forms of assistance indicates that these forms of support are not valid under international law. Whether these actions are numerous enough to result in a forfeiture of the overall status of neutrality, however, is unclear. It took multiple consistent violations of neutrality for Iran to term Kuwait as a co-belligerent. Russia and Ukraine's statements throughout the conflict make it clear that

192 UPCHER, James. *Neutrality in Contemporary International Law*. Oxford: Oxford University Press, 2020 p. 87–89.

193 HOFFMANN, Tamás. War or Peace? – International Legal Issues concerning the Use of Force in the Russia-Ukraine Conflict. *Hungarian Journal of Legal Studies,* 2022, vol. 63, no. 3, p. 28. *Also see* NAGY, B. Hadban állunk? (Are We at War?). (1999) 43 Élet és Irodalom 3 for the issue of neutrality being raised for Hungary's involvement in the 1999 NATO intervention of Kosovo.

194 ALJAZEERA. Russia Says it could Target Western Supplies to Ukraine. [online]. Available at: <https://www.aljazeera.com/news/2022/3/12/russia-says-it-could-target-western-arms-supplies-to-ukraine> Accessed: 13.11.2022.

195 FAULCONBRIDGE, Guy. Russia Warns United States Against Sending More Arms to Ukraine. [online]. Available at: <https://www.reuters.com/world/europe/russia-warned-united-states-against-sending-more-arms-ukraine-2022-04-25/> Accessed: 13.11.2022.

196 BBC. Ukraine War: Putin Warns Over Western Long-Range Weapons. [online]. Available at: <https://www.bbc.com/news/world-europe-61697093> Accessed: 13.11.2022.

197 UNITED NATIONS SECURITY COUNCIL. S/2022/575, Letter dated 25 July 2022 from the Chargé d'affaires a.i. of the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General and the President of the Security Council 25 July 2022.

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neither considers any State providing support to either to have forfeited their neutrality. Thus, it is clear to the authors that while the actions of the supporting States violate neutrality, they cannot be termed as belligerents to the conflict. As of now, the aforementioned category of States are likely to retain their status as Neutral States. A recalibration of the standards of neutrality seems necessary to provide a definite solution to this dilemma. Whether this recalibration is effected by codification or uniform state practice remains to be seen.

6 Conclusion

The ATT aims to govern transfers between States and protect their citizens from the harmful consequences of such transfers. An analysis of the current provisions and thresholds established by the Treaty, the assessments conducted by sending States, and the multitude of safeguards implemented proves that the arms transfers to Ukraine comply with the ATT.

Clearly, attributing liability to transferring States is unlikely when looking at State practice and other factors. Furthermore, Ukraine's military actions, though violative of IHL, do not clearly establish systematic violations of IHL serious enough to incur derivative State responsibility upon transferring States.

While the clauses of the Hague Conventions on neutrality prompt a discussion on the types of materials included, it is clear to the authors that the transfer of conventional weapons would violate the principles of neutrality. However, the current violations of neutrality are not enough to consider any supporting State as part of the conflict, although this may change in the future if the support provided escalates.

After a detailed analysis of arms transfers from three perspectives, the authors hold that the arms transfers to Ukraine do not violate the conventions governing it, do not invoke the rules of state responsibility, but violate the norms of state neutrality. However, the same analysis poses serious questions to the impregnable definition of neutrality, the exact threshold of IHL violations necessary to apply derivative state responsibility, and efficacy of the ATT regime during the times of war. Ultimately, international law is subject to the real-time political concerns of States. When the international community rallies behind a cause, it not only accepts actions contrary to a strict interpretation of the law but also follows suit. These unresolved questions should drive the States to establish more concrete positions of law, which are more conducive to the world's present needs.

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