

STATE RESPONSIBILITY FOR AUTHORIZING PRIVATE ARMS EXPORTS: EXPANDING THE SUBSTANTIVE OBLIGATION UNDER COMMON ARTICLE ONE TO THE FOUR GENEVA CONVENTIONS

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I. INTRODUCTION

“Common Article 1 is a living provision which must be interpreted in the overall context of the Conventions and, where applicable, the Protocols, and the international legal order as a whole. Its content will be further concretized and operationalized in the decades ahead.”

– ICRC 2016 Commentary to the four Geneva Conventions.

Some States authorize the export of weapons knowing they will probably be used to commit war crimes. This flow of weapons continues because many States refuse to impose any limitations on their arms transfers.¹ However, there are States that have ratified treaties limiting arms transfers,² enacted domestic laws incorporating international humanitarian standards,³ or ceased to export weapons into these regions as a matter of foreign policy.⁴ The underlying problem is that most States are not willing to ratify a treaty obligating them to investigate the commission of war crimes before authorizing arms deals. The only feasible alternative is to advocate for a more

1. See, e.g., Bill Chappell, *Trump Moves to Withdraw U.S. From U.N. Arms Trade Treaty*, NPR POLITICS (Apr. 26, 2019, 2:53 PM), <https://www.npr.org/2019/04/26/717547741/trump-moves-to-withdraw-u-s-from-u-n-arms-trade-treaty>; (President Trump announced he was “unsigning” the Arms Trade Treaty (ATT) and informing the UN Secretary-General the US had no legal obligations arising out of its previous signature).

2. See, e.g. Arms Trade Treaty, art. 2, ¶1, Apr. 2, 2013, 3013 U.N.T.S. 52373, <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52373/Part/I-52373-08000002803628c4.pdf>.

3. See Council Common Position, 2008/944/CFSP of 8 Dec. 2008, art. 1-16, O.J. (L 335) 99 [hereinafter Common Position] (Adopted by the European Union, the Common Position requires a Member State to “deny an export license if there is a clear risk the military technology or equipment might be used in the commission of serious violations of international humanitarian law.”); see also, User’s Guide to Council Common Position 2008/944/CFSP, defining common rules governing the control of exports of military technology and equipment, at 45 COM (2015) 10858 (Jul. 20, 2015), <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf> [hereinafter User’s Guide].

4. New Desk, *UK follows Germany, Court of Appeal forbids arms sale to Saudi Arabia*, GLOBAL VILLAGE SPACE, (June 21, 2019), <https://www.globalvillagespace.com/uk-follows-germany-court-of-appeal-forbids-arms-sale-to-saudi-arabia/> (noting Germany has publicly banned the export of certain arms into Saudi Arabia after the death of journalist Jamal Khalsoggi).

expansive definition of existing international treaties that will obligate States to investigate war crimes and cease the private export of arms.⁵

Ongoing academic discussion has mostly centered on whether States are responsible for providing official government support to non-state actors who actively engage in war crimes. This discussion does not address whether States are responsible for allowing their own private businesses to sell weapons to parties who commit war crimes. The latter implicates less government control, indirect involvement, and a lack of knowledge of the circumstances on the ground.

The Campaign Against Arms Trade (CAAT) judgment is a major step towards expanding current treaty obligations to address this issue. The UK Court of Appeals decided the British government acted unlawfully by failing to deny an export license without considering the clear risk that the military equipment would likely be used to commit serious violations of international law.⁶ The court noted that the government failed to adhere to its international legal obligations under Common Article One of the Geneva Conventions that requires States to adopt all reasonable measures to avoid violations from occurring.⁷ According to this interpretation of Common Article One, if any State fails to properly assess the likelihood its authorized weapons shipments by its private businesses will be used to commit war crimes, then they should also be held in violation of the Geneva Conventions. But more importantly, if any State does authorize the transfer of weapons into one of these regions then the State should be held responsible under Article One of the Geneva Conventions in circumstances where they (a) fail to account for previous violations in their assessment of the likelihood of future violations, and/or (b) ignore factual findings resulting from independent investigations from public

5. Any reference to “arms” or “weapons” shall reflect the ATT’s definition of conventional arms in article 2(1), except for “small arms and light weapons” – i.e. missiles, aircraft, tanks, etc. See Arms Trade Treaty, *supra* note 2.

6. R. ex rel Campaign Against Arms Trade v. Sec’y of State for Int’l Trade [2019] EWCA (Civ) 1020 [138]-[139] (Eng.), <https://www.judiciary.uk/wp-content/uploads/2019/06/CAAT-v-Secretary-of-State-and-Others-Open-12-June-2019.pdf>.

7. *Id.* ¶ 21; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art.1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

sources such as social media, news reports, the United Nations, or other Non-Governmental Organizations (NGOs).⁸

II. BACKGROUND

The CAAT judgment was handed down in response to the conflict in Yemen. In March 2015, the Saudi-UAE coalition (“Coalition”) intervened in the civil war in Yemen pursuant to the government’s request for support against the Houthi rebels.⁹ The armed intervention included arms and technical support from third parties, like the United Kingdom and the United States.¹⁰ The goal of the operation was to stop the Houthis from controlling additional territory in the region.¹¹ The operation consisted of air bombings, a sea blockade, and a dispersal of ground forces. Roughly four years since the intervention elapsed, millions of innocent Yemeni lives have been displaced, starved, and killed.

Worse still, war crimes have reportedly been committed by the Coalition forces and Houthi rebels. For example, the Coalition has reportedly dropped bombs on weddings, funerals, and hospitals in a seemingly indiscriminate and reckless fashion.¹² According to reports, the Coalition engaged in “double tap” airstrikes where a single bomb hits a target then a second bomb lands only minutes later endangering first responders.¹³ The Houthis have similarly engaged in humanitarian law violations by leaving landmines scattered throughout the region without regard for Yemeni residents who are returning to their war-torn neighborhoods.¹⁴

In response to this crisis, the United Nations Human Rights Council submitted resolution 36/31 requesting the United Nations High Commissioner for Human Rights to send a group of experts to investigate

8. *Id.*

9. Hubert Swietek, *The Yemen War: A Proxy War, or a Self-Fulfilling Prophecy*, 26 POL. Q. INT’L AFF. 162, 43 (2017).

10. *U.S. boosts assistance to Saudis fighting rebels in Yemen*; CNN POLITICS (Apr. 9, 2015), <https://www.cnn.com/2015/04/08/politics/yemen-u-s-assistance-saudi-coalition/index.html>.

11. *See* Swietek, *supra* note 9.

12. Adil Ahmad Haque, *The UN Report and the Indiscriminate Attacks on Yemen*, JUST SECURITY (Sept. 13, 2019), <https://www.justsecurity.org/66170/the-un-report-and-indiscriminate-attacks-in-yemen/>.

13. *See* Annual Rep. of the U.N. High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, *Situation of Human Rights in Yemen, including Violations and Abuses Since September 2014*, ¶ 1 at ¶¶ 24-30, U.N. Doc. A/HRC/42/17 (Aug. 9, 2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/A_HRC_42_17.pdf [hereinafter A/HRC/42/17].

14. *Id.* ¶¶ 43-46.

violations of international human rights in Yemen.¹⁵ Not only did the experts have reason to believe war crimes were committed, but they claimed third-party States indirectly contributed to the war crimes by providing weapons, intelligence and general support to the Saudi-UAE coalition.¹⁶ The involvement of Britain alone ranged from the sale of missiles to training Saudi pilots in the region. At one point there were roughly 6,300 private British contractors stationed in Saudi Arabia.¹⁷ Since 2015, the United Kingdom government licensed more than six billion dollars in weapons to Saudi Arabia.¹⁸

Despite the wealth of information on humanitarian law violations and the continuous flow of weapons encouraging them, countries like the United Kingdom are likely to escape responsibility by claiming the Coalition alone is choosing who to target. The former justification is tough to counter because holding a State responsible for supplying weapons to another State that is allegedly committing war crimes is a legally complicated manner.

The Articles on the Responsibility of States for Internationally Wrongful Acts (“Articles”) have been generally accepted as the governing law on the issue.¹⁹ The Articles are a product of the United Nations’ International Law Commission and were approved by the General Assembly.²⁰ The Articles’s framework requires applicants to meet unreal evidentiary burdens, and it is referred to as the “attribution doctrine.”²¹ According to the International Law Commission’s Commentary on Article Sixteen, an applicant must show: (1) the third-party State was *aware* of the specific circumstances surrounding the wrongful act, (2) the third-party State gave aid with the *intent* to facilitate the

15. *See id.*

16. Annual Rep. of the U.N. High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, *Situation of Human Rights in Yemen, including Violations and Abuses Since September 2014*, ¶ 902, U.N. Doc. A/HRC/42/CRP.1 (Sept. 3, 2019) [hereinafter A/HRC/42/CRP.1].

17. Arron Merat, “*The Saudis couldn’t do it without us*”: *The UK’s true role in Yemen’s deadly war*, THE GUARDIAN (June 18, 2019), <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

18. Dan Sabbagh & Beth McKernan, *UK arms sales to Saudi Arabia unlawful, court of appeal declares*, THE GUARDIAN (June 20, 2019), <https://www.theguardian.com/law/2019/jun/20/uk-arms-sales-to-saudi-arabia-for-use-in-yemen-declared-unlawful>.

19. Articles on the Responsibility of States for Internationally Wrongful Acts, art. 16 (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [hereinafter Articles].

20. *See generally* Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 65-67 (2001) [hereinafter ILC Report].

21. Oona A. Hathaway, et. al., *Ensuring Responsibility: Common Article 1 & State Responsibility for Non-State Actors*, 95 TEX. L. REV. 539, 548-63 (2017).

commission of the specific act, and (3) that the specific act *actually occurred*.²²

These requirements for state responsibility under the Articles are simply unworkable. If any theory of responsibility is going to be advanced, then it must be based on something less stringent than the attribution doctrine under the Articles. Common Article One to the Four Geneva Conventions (“Article One”) offers a feasible alternative.²³ Under Article One, states are obligated to take all reasonable measures to ensure respect for international humanitarian law (“IHL”). Article One imposes on States a positive obligation to undertake respect, and a negative obligation to ensure respect for the Geneva Conventions. At issue is the negative obligation imposed on third-party States requiring them to neither encourage, nor aid or assist in the commission of violations of the Conventions.²⁴

Using Article One in this manner is not a novel concept. In *Nicaragua v. US* (1986), the International Court of Justice stated the U.S. could be held accountable under Article One for encouraging non-state actors to commit war crimes.²⁵ Further, the International Committee of the Red Cross (“ICRC”) released its commentaries on the Geneva Conventions in 2016 and suggested the obligation to ensure respect for the conventions extended to interactions between a State and its own private citizens, as opposed to just non-state actors.²⁶ More recently, legal commentators have also supported the idea of expanding the standard for third party accountability under Article One.²⁷ Oona Hathaway has suggested third-party States should be held accountable under Article One when IHL violations are “likely or foreseeable.”²⁸ This is a great starting point, but it is just commentary without

22. See generally ILC Report, *supra* note 20, at Chapter IV, 64-71.

23. See generally Int’l Committee of the Red Cross, Commentary, art. 1, ¶ 158 (Mar. 22, 2016), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD> [hereinafter ICRC Commentary]; see generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW - VOLUME 1: RULES, at 509-513 (2005).

24. ICRC Commentary, art. 1, ¶ 158.

25. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

26. ICRC Commentary, *supra* note 23, ¶ 154.

27. See Hathaway, *supra* note 21; See also ICRC Commentary, *supra* note 23.

28. See also *Nicar. v. U.S.*, 1986 I.C.J., ¶ 256 (the ICJ in *Nicaragua* used the “foreseeability” standard and held the U.S. in violation of Common Article One. The court stated the U.S. ought to have known that their continued military assistance to non-state actors (“Contras”) was encouraging them to violate humanitarian law. The court referred to the distribution of military manuals to the Contras as evidence of the U.S. government’s knowledge of the commission of war crimes).

the force of law. Luckily, the UK Court of Appeals handed down a judgment that sheds considerable light on one possible application of the doctrine.²⁹ This judgment provides an important international precedent for state responsibility for aiding another state that commits humanitarian law violations. The UK Court of Appeals took the position that the State's licensing of arm exports to Saudi Arabia ignored a clear risk of international humanitarian law violations and constituted a failure to "ensure" respect for humanitarian law under Article One.³⁰

Part One will review why the Articles are an inadequate tool to deal with third party accountability regarding the sale of weapons as assistance in the commission of war crimes. State responsibility under the Articles require IHL violations to be directly attributable to the third party. Although this might be the case where third parties are choosing the targets for drone strikes, it does not suffice for the transfer of weapons. Furthermore, the legal frameworks elaborated by commentators do not adequately address the unique circumstances where a State can be held to encourage the commission of war crimes by authorizing its private businesses to continue supplying weapons to these conflict regions. Part Two will discuss how the CAAT judgment confirms Common Article One's use as a source of State responsibility when a State authorizes a sale of weapons. This discussion will be supplemented by the recommendations for accountability in the UN reports. Part Three will elaborate on the due diligence factors future courts should consider in holding a State responsible under Common Article One. The analysis is confined to instances when a State authorizes the sale of weapons and how this authorization is alleged to be a form of assistance in the commission of war crimes.

If any State does authorize the transfer of weapons into one of these regions then the State should be held responsible under Article One of the Geneva Conventions in circumstances where they (a) fail to account for previous violations in their assessment of the likelihood of future violations, and/or (b) ignore factual findings resulting from independent investigations from news reports, social media, the United Nations, or other Non-Governmental Organizations.

III. INTERNATIONAL STATE RESPONSIBILITY UNDER THE ARTICLES AND

29. See generally *R. ex rel Campaign Against Arms Trade v. Sec'y of State for Int'l Trade* [2019] EWCA (Civ) 1020 [138]-[139] (Eng.).

30. *Id.* ¶ 21.

BEYOND

The Articles do not provide a feasible legal basis for holding a State responsible when it authorizes the private sale of weapons. First, a direct causal link must be shown between the transport of weapons and the commission of a specific war crime. Second, the Articles require an applicant to prove a State rendered assistance with the intent of facilitating a specific commission of a humanitarian law violation.

A. *State Responsibility under the Articles*

The Articles are the authoritative source on international State responsibility. The Articles on State Responsibility for Internationally Wrongful Acts were adopted by the International Law Commission (“ILC”) in August 2001. Chapter IV of the Articles contains provisions detailing the responsibility of a State in connection with the acts of another State. More specifically, Article 16 deals with aiding or assisting another State in committing an internationally wrongful act. An internationally wrongful act is simply conduct that is attributable to the State and consists of a breach of an international obligation of the State.³¹

Article 16 places stringent limits on third-party State responsibility for aiding and assisting another State that commits an internationally wrongful act. First, the third-party State must be aware of the circumstances that make the conduct of the assisted State an internationally wrongful act.³² Second, an assisting State must give aid with the intent of facilitating the commission of the wrongful act and the wrongful act must occur. Although responsibility is predicated on linking the assistance to the occurrence of the wrongful act (i.e. causation), the ILC states it is enough if the assistance significantly contributed to the wrongful act.³³ The last requirement is that the wrongful conduct committed by the assisted State would similarly constitute a breach of the assisting State’s international obligations.

The Articles’ legal framework cannot adequately address the United Kingdom’s authorization of export licenses into Saudi Arabia (which has presumably committed wrongful acts). In its report, the ILC writes that a State which simply provides material assistance “does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act” and further elaborates that States which are unaware of the

31. Articles, *supra* note 19, art. 16.

32. ILC Report, *supra* note 20, at 65.

33. *Id.* at 66.

exact circumstances pertaining to the wrongful act cannot be held responsible.³⁴ This means a government that merely approves export licenses from its private companies will not be held accountable under the Articles for aiding and assisting another State that commits a wrongful act.

First, a third-party State who provides weapons to another State does not assume the risk they will be used to commit war crimes. This form of assistance is different than providing direct government assistance to non-state actors by training them and supplying them with weapons. The former only indirectly facilitates the commission of a wrongful act and it is a form of assistance that is considerably removed from war crimes themselves.

Some argue this provision means the State must intend to give the assistance, but a closer reading of the ILC's commentary explicitly refers to the intention of facilitating the occurrence of the wrongful act.³⁵ This straightforward reading of the text in Article 16 makes more sense. The ILC's commentary tells us the assistance only needs to significantly contribute to the occurrence of the wrongful act. At first glance this interpretation of causation may seem to support responsibility in the case of authorizing the sale of weapons, but it does not. This interpretation does not diminish the fact that assistance must be directly linked to the occurrence of the specific wrongful act. It is nearly impossible to prove the second requirement absent a showing of direct linkage between the sale of a specific set of weapons and the occurrence of a wrongful act enabled by the sale of those weapons.³⁶ At most, the assisting State is acting recklessly.³⁷

B. *State Responsibility under Common Article One*

However, Common Article One can be used to establish responsibility where the Articles failed. Common Article One, as a source of international obligations, is enjoying a resurgence in the international legal community. The International Committee of the Red Cross³⁸ issued its Commentaries on

34. *Id.*

35. Compare Hathaway, *supra* note 21, at 55 with ILC Report, *supra* note 20, at 66.

36. The third requirement as elaborated in the ILC Report is not discussed and is presumably met since the conduct of Saudi Arabia if attributed to the UK would constitute a breach of its own international obligations. See ILC Report, at 66.

37. If a mental state had to be ascribed, then a State providing military assistance (i.e. weapons) would most likely be ascribed the U.S.'s Model Penal Code definition of recklessness: "consciously disregards a substantial and unjustifiable risk." MODEL PENAL CODE §2.02(2)(c) (AM. LAW INST., Proposed Official Draft 1962).

38. The International Committee of the Red Cross ("ICRC") is a private humanitarian organization headquartered in Geneva, Switzerland. The ICRC was established in 1863 and seeks to protect victims of war. In addition, its assistance is recognized and expressly welcomed in all

the Four Geneva Conventions in March 2016. These commentaries provided the spark that ignited the legal discussion on a broader application of Common Article One.³⁹ The Commentaries explain the substantive obligations under Common Article One that developed in the years since the promulgation the Geneva Conventions. The ICRC recognizes that originally Common Article One was not a substantive provision, instead it was a “mere stylistic clause.”⁴⁰ In particular, the ICRC and legal commentators have elaborated: (1) the types of obligations Common Article One imposes, (2) who is obligated under Common Article One, and (3) which affirmative defenses a party may offer to excuse accountability.

The 2016 Commentaries were designed to consider developments in the implementation of the four Geneva Conventions (collectively, “Conventions”) since 1950. In 1950 the ICRC published its first set of commentaries to the four Geneva Conventions of 1949 to give “practical guidance on their implementation,” which set humanitarian law standards within conflict regions.⁴¹ For example, the first Geneva Convention protects soldiers who are wounded and sick on land during war, the second Geneva Convention is the same as the first Geneva Convention but applies to the sea, the third Geneva Convention covers the treatment of prisoners of war, and the fourth Geneva Convention pertains to the protection of civilians during times of war. Further, Common Article 3 governs the general rules for conflicts that are not of international character (e.g. Yemen civil war).⁴²

C. *Who is Obligated to Ensure Respect Under Common Article One?*

The relevant text of Common Article One requires the High Contracting Parties to “undertake to respect and ensure respect for the present Conventions in all circumstances.”⁴³ The duty to ensure respect extends to the High Contracting Parties engaged in multinational operations.⁴⁴ These operations are normally thought of as coordination with non-state actors,⁴⁵

four Geneva Conventions. Geneva I, *supra* note 7, art. 3; Geneva II, *supra* note 7, art. 3; Geneva III, *supra* note 7, art. 3; Geneva IV, *supra* note 7, art. 3.

39. See generally ICRC Commentary, *supra* note 23.

40. ICRC Commentary, *supra* note 23, ¶ 121.

41. *Updated Commentary brings fresh insights on continued relevance of Geneva Conventions for warfare at sea*, INT’L COMMITTEE OF THE RED CROSS (May 4, 2017), <https://www.icrc.org/en/document/updated-commentaries-second-geneva-convention>.

42. Geneva I, *supra* note 7, art. 3; Geneva II, *supra* note 7, art. 3; Geneva III, *supra* note 7, art. 3; Geneva IV, *supra* note 7, art. 3.

43. ICRC Commentary, *supra* note 23, ¶125.

44. *Id.* ¶¶ 133-37.

45. Hathaway, *supra* note 21.

but the operations may take any variety of forms and extend beyond armed forces acting on behalf of the High Contracting Parties whose conduct is attributable to them. More importantly, the duty to ensure respect extends to States who fail to monitor the behavior of private individuals over whom the State exercises authority.⁴⁶ Further, the duty to ensure respect extends to States who are not a party to the conflict but still exercise some degree of influence in the conflict (i.e. sale of weapons).

D. *What is the Extent of the Obligation to Ensure Respect under Common Article One?*

Under the 2016 Commentary, the duty to undertake to respect and ensure respect for the Conventions represents two types of obligations. The negative obligation, implied from the duty to undertake to respect, demands that the High Contracting Parties neither encourage nor aid or assist in the commission of violations of the Conventions.⁴⁷ The positive obligation, implied from the duty to ensure respect, requires the High Contracting Parties to take affirmative measures that will lead to the prevention and extinguishing of violations of the Conventions.⁴⁸

In 1986, the International Court of Justice (ICJ) held that Common Article One imposed substantive obligations on States aiding non-state actors. In the *Nicaragua* decision, the ICJ stated that the US had a duty to refrain from encouraging parties to conflict and commit violations of the Conventions.⁴⁹ The ICJ determined the US had reason to know about the commission of war crimes because the US distributed military manuals to the rebel forces instructing them on humanitarian law. The ICJ held that the US violated its negative obligation under Common Article One by rendering direct assistance and encouraging the commission of war crimes.

Unlike the Articles, the negative obligation under Common Article One does not require intent by the States to facilitate the occurrence of a wrongful act.⁵⁰ Rather, Common Article One only requires that a third-party State render military aid knowing the likely result is further commission of war

46. ICRC Commentary, *supra* note 23, ¶ 150.

47. *Id.* ¶ 154.

48. *Id.* ¶ 159 (regarding positive obligations, the High Contracting Parties who exercise considerable influence in the conflict had a duty to leverage their influence to prevent foreseeable violations. This type of affirmative obligation is less widely accepted in the international community because it creates an affirmative duty).

49. *See* Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

50. ICRC Commentary, *supra* note 23, ¶ 159.

crimes. The 2016 Commentary recognizes that this negative obligation extends to arms transfers and requires the assisting States to withhold transfers that will likely violate the Conventions (based on facts or knowledge of prior violations).⁵¹

A violation is not established if a State provides military weapons to another party who is likely to commit war crimes. The next step for the courts is to identify whether a State has done its due diligence in investigating the possible contributions to humanitarian law violations. Matters are further complicated when recipients of weapons refuse to respond to any inquiries about war crimes. This type of situation raises the question whether States, whose citizens continue to supply the weapons, should still be held responsible in the absence of any inquiries into the recipient's conduct.

Oona Hathaway argues that States providing military assistance violate their Common Article One obligations when war crimes are likely to result.⁵² States who provide military assistance violate the Conventions regardless of providing aid to non-state actors or authorizing the weapons' export.⁵³ According to Hathaway, States breach their Common Article One obligation by (a) failing to properly assess whether assisting a non-state actor will likely violate the Geneva Conventions and (b) failing to exercise due diligence and take affirmative steps that assure non-state actors do not violate the Geneva Conventions.⁵⁴ Hathaway also supports the recognition of an affirmative defense for those states who make attempts to assess possible violations or exercise due diligence only to trigger responsibility under the Articles. Hathaway calls for an affirmative defense when States exercise reasonable care to prevent and rectify non-state actor violations of the Conventions. The example given in her article concerns a training program that instructs non-state actors on international humanitarian law standards. In this example, a State which institutes a training program in good faith and exercises reasonable care sufficiently carries out its Common Article One obligation to ensure respect for the Conventions.⁵⁵

A problem arises when trying to reconcile how a due diligence standard might look for States attempting to meet their Common Article One obligations. How could a State possibly account for the aggregate conduct of its private citizens? The *Nicaragua* decision shows it would be too easy to compare domestic criminal law theory on incitement to commit an offense,

51. *Id.* ¶ 162.

52. *See* Hathaway, *supra* note 21, at 568-69.

53. *Id.* at 578-79.

54. *Id.* at 578-82.

55. *Id.* at 68-69.

with international law theory on incitement by an entire State to commit a wrongful act.⁵⁶ The main difference between the two is the ability to pinpoint an individual's guilty state of mind and the inability to do the same for a sovereign State. With so many individuals to account for, how can it possibly be fair to hold an entire State liable for failing to observe its obligation not to encourage the commission of IHL violations? Along the same line of reasoning, what affirmative defenses could a State raise on behalf of its citizens who conduct independent transactions with another State?

IV. THE UK COURT OF APPEAL JUDGMENT AND THE EU COMMON POSITION

The UK Court of Appeal Judgment and the EU Common Position perfectly align with the 2016 ICRC Commentary's and Oona Hathaway's conception of a Common Article One obligation.⁵⁷ However, the UK Court of Appeals took it one step further by clarifying: (1) what it means for an IHL violation to be "foreseeable," and (2) what type of evidence may be considered to determine whether a third-party State knows about the IHL violation.

A. *Background to the Litigation*⁵⁸

The European Union's Common Position ("Common Position") integrated international humanitarian obligations and imposed them on Member States.⁵⁹ Until further notice, the Common Position remains applicable to the United Kingdom despite its withdrawal from the European

56. *See generally* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 220 (June 27).

57. Common Position, *supra* note 3.

58. *See* R. *ex rel* Campaign Against Arms Trade v. Sec'y of State for Int'l Trade [2019] EWCA (Civ) 1020 [12]-[25] (Eng.) (The UK Court of Appeals expressly referred to Common Article One as a relevant legal principle (i.e. binding authority). The Court confirmed Common Article One is generally interpreted as obligating third-party States, who are not parties to a conflict, to refrain from encouraging the parties to the conflict to violate international humanitarian standards. The Court similarly confirmed third-party States should take steps to prevent the violations of humanitarian law. More specifically, the Court referred to those third-party States who supply weapons and could exercise their influence to ensure respect for the Conventions by withholding the means. The Court concluded by recommending that States should exercise caution to ensure exports are not used to commit violations of humanitarian law).

59. Common Position, *supra* note 3. (Germany, Italy, France, Poland, Spain are all part of the European Union and have signed off on the Common Position).

Union (EU) on January 31, 2020.⁶⁰ The Common Position requires Member States to assess requests for export licenses on a case-by-case basis in accordance with the User's Guide.⁶¹ More specifically, the Common Position requires that Member States shall:

(b) exercise special caution and vigilance in [granting] licenses, on a case-by-case basis and taking into account the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, the EU or the Council of Europe; and

(c) deny an export license if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.⁶²

CAAT initiated proceedings against the Secretary of State for Business, Innovation and Skills by filing a judicial review claim form on December 9, 2015.⁶³ The claim was approved on June 30, 2016, and Amnesty International, Human Rights Watch, Rights Watch (UK) and Oxfam International were permitted to intervene as co-parties. CAAT sought review of the Secretary of State for International Trade's decision to approve an export license of arms into Yemen when there was a clear risk the military equipment would be used in the commission of IHL violations by the Saudi-UAE Coalition.⁶⁴ More specifically the claim form alleged that the Secretary of State failed to make sufficient inquiries into the possibility that the military equipment would be used in the commission of an IHL violation.⁶⁵ CAAT requested relief in the form of an order prohibiting the government from granting new licenses to Saudi Arabia for the sale or transfer of arms, pending a lawful review by the Secretary of State to determine whether the license grant complied with the European Union Common Position standards (i.e. whether special caution was exercised and whether there was a clear risk the arms transferred might be used to commit war crimes).

60. See Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 2019 O.J. (L 335) 99 [hereinafter EU Withdrawal Agreement] ("... Union law, including international agreements, should be applicable to and in the United Kingdom... with the same effect as regards the Member States [until] ... agreement(s) on the future relationship [are] negotiated.").

61. User's Guide, *supra* note 3, at 14, 73, 80, 121.

62. Common Position, *supra* note 3, art. 2, sec. 2(b)-(c).

63. Michael Plachta, *UK Appeal Court Held Licensing Arms to Saudi Arabia Illegal*, 35 INT'L ENFORCEMENT L. REP. 266, 267 (2019).

64. *R. ex rel Campaign Against Arms Trade v. Sec'y of State for Int'l Trade* [2019] EWCA (Civ) 1020 [30] (Eng.) (noting the Secretary of State for International Trade was substituted as defendant for the Secretary of State for Business, Innovation, and Skills).

65. *Id.*

On July 10, 2017, the Divisional Court of the Queen's Bench Division dismissed the claim for judicial review applied for by the CAAT. The Divisional Court held the Secretary of State's calculation of a clear risk did not solely depend on the recipient's historical record of serious violations. Instead the Common Position required a prospective assessment of the risk of serious violations, of which the history of prior IHL violations was only a factor.⁶⁶ Another noteworthy basis for the dismissal was the Divisional Court's rejection of the criticism lodged against the Ministry of Defense by the CAAT. The Divisional Court claimed the Ministry of Defense's central database for storing information on reports of IHL violations was a reliable source for making its legal determinations. According to the Court, the Ministry of Defense's database provided valuable, instructive, and sophisticated information about the Coalition's specific operations.⁶⁷

The case was appealed shortly thereafter to the United Kingdom's Court of Appeal – the second highest court in the UK. The only ground for appeal granted by the Court was based on the concrete evidence that showed how the Secretary of State's evaluation of Saudi Arabia's pattern of IHL violations was “fundamentally deficient.”⁶⁸ Further, the “central contention” for Ground 1 of the appeal was that the Secretary's assessment of previous IHL breaches and the subsequent “estimation of the risk of future violations” was erroneous as a matter of law.⁶⁹ The Court granted the appeal and issued a judgment in favor of the CAAT because there were no documents identifying or even attempting to identify previous breaches of IHL. As a result, the Secretary of State acted irrationally and unlawfully by granting the export licenses without assessing the clear risk of the weapons being used in the commission of war crimes.⁷⁰

B. *What It Means for IHL Violations to be “Foreseeable”*

The Common Position only requires a “clear risk the military technology or equipment *might be* used in the commission of serious violations of international humanitarian law.”⁷¹ A pattern of previous violations is a major factor in assessing the risk (i.e. foreseeability) of future violations that cannot

66. *Id.* ¶ 38.

67. *Id.* ¶ 57.

68. *Id.* ¶ 49.

69. *Id.* ¶ 62.

70. *Id.* ¶ 145.

71. Common Position, *supra* note 3, art. 2, sec. 2(c).

be ignored. As the User's Guide explains, the burden of proof for denying an export license is very low.

In applying this standard, the UK Court of Appeals concluded the Secretary of State erred as a matter of law in its overall risk assessment by not investigating whether previous IHL violations had taken place.⁷² The Court determined it was irrational to approve licenses without addressing Saudi Arabia's pattern of previous violations.⁷³

The Secretary of State's prospective analysis based on past conduct is misleading and speculative, and changing factors make it impossible to predict the future from the past. However, the CAAT judgment is very clear in stating that the overall assessment, of whether weapons might be used to commit war crimes, is partially based on the country's previous usage.⁷⁴ According to the Court, the rationality of the decision to continue supplying weapons into the region was questionable as a matter of law considering the reports from independent bodies such as the UN and NGOs regarding the Saudi-UAE coalition's track record. More importantly, the information gathered by the major NGOs and UN panel of experts could have supplemented the information from the government's databases.

Other factors affecting the foreseeability of future IHL violations include the recipient's intentions as expressed through formal commitments, the recipient's capacity to ensure that the equipment is not diverted to usage concerning IHL violations, and the recipient's attitudes.

C. *Deference to the United Nations and other Competent Bodies for Information*⁷⁵

Previous violations are an important factor for determining the foreseeability of future violations, but who establishes the previous violations is the determinative factor. The Common Position requires States to, "exercise special caution and vigilance in granting licenses, on a case-by-case basis and taking into account the nature of the equipment, to countries *where serious violations of human rights have been established by the*

72. R. *ex rel* Campaign Against Arms Trade v. Sec'y of State for Int'l Trade [2019] EWCA (Civ) 1020 [145] (Eng.).

73. *Id.*, ¶¶ 57, 167 (noting the matter was remitted to the Secretary of State to "reconsider in accordance with the correct legal approach").

74. *Id.* ¶¶ 38, 94.

75. User's Guide, *supra* note 3, at 42 (Member States shall ... exercise special caution and vigilance in issuing licenses ... to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or the Council of Europe").

*competent bodies of the United Nations...*⁷⁶ The User's Guide to the Common Position presumes governments will investigate reports from news sources confirming humanitarian law violations. The information sources vary greatly from the EU Council statements and conclusions on certain countries, to the United Nations, ICRC and international NGOs documents and reports.⁷⁷

It is within the backdrop of the UN Human Rights Council's reports and the media reports that the UK Court of Appeals issued its judgment.⁷⁸ In response to the crisis in Yemen, the United Nations mandated an investigation into possible humanitarian violations and ordered a group of experts to conduct their own analysis of the crisis.⁷⁹ During independent investigations, over 600 interviews were conducted with victims, witnesses, and other affected parties.⁸⁰ The group of experts determined that the intervention by the Coalition significantly exacerbated the "world's worst humanitarian crisis."⁸¹

According to the UN Report, the experts had reasonable grounds to believe the coalition was guilty of violating humanitarian law under the Geneva Conventions. The "double tap" air strikes are one of several highly criticized practices that indiscriminately and disproportionately result in unnecessary civilian casualties. "Double tap" air strikes are those that come within several minutes of the first bombing and kill first responders or any civilians who rush to aid the wounded.⁸²

In their report, designated experts stated the Yemeni government, the Saudi-UAE coalition members, the non-State armed groups within Yemen, and third-party States exercising influence in the conflict were either directly or indirectly accountable under international law. The UN stated third-party States such as the United States, UK, and France, may be responsible for aiding and therefore facilitating the commission of these international law

76. Common Position, *supra* note 3, art. 2, sec. 2(b); *see also* Campaign Against Arms Trade, 2019 EWCA 1020, ¶ 134.

77. User's Guide, *supra* note 3, at 41-42 (noting that some of the information sources include "(1) documentation from the United Nations, the ICRC, and other international and regional bodies; (2) reports from international NGOs; and (3) information from civil society").

78. *See* S.C. Res. 2216 ¶ 1 (Apr. 14, 2015); *see also*, Letter from Abdrabuh Mansour Hadi, Pres., Yemen, to U.N. Security Council (Mar. 24, 2015) (on file with the U.N. SCOR).

79. A/HRC/42/17, *supra* note 13, ¶ 1.

80. *Id.* ¶ 6.

81. *Id.* ¶ 14.

82. *See generally* Arron Merat, *The Saudis Couldn't Do it Without Us*, THE GUARDIAN (June 18, 2019, 1:00 PM), <https://www.theguardian.com/world/2019/jun/18/the-saudis-couldnt-do-it-without-us-the-uks-true-role-in-yemens-deadly-war>.

violations.⁸³ The designated experts concluded their report by recommending that third-party States should prohibit the authorizing transfers of arms that could potentially be used in the conflict.⁸⁴

V. WHAT A POTENTIAL COMMON ARTICLE ONE OBLIGATION COULD LOOK LIKE

The CAAT judgment set an expansive precedent for the Common Article One's obligation to refrain from encouraging the commission of war crimes. Under the CAAT judgment, Common Article One is breached when a third-party State authorizes an export of private arms sales with a conscious disregard of the risk that the weapons could foreseeably be used to commit war crimes. Further, a third-party State that is exporting arms is held to have knowledge of the risk of IHL violations pursuant to the investigations conducted by regional and international competent bodies.⁸⁵

A. *When and to What Extent is a Third-Party State Accountable?*

The CAAT judgment established that a third-party State is responsible for failing to ensure respect for the Conventions the moment it authorizes the sale of weapons to a recipient who will foreseeably use them to commit war crimes. This is a big departure from the Articles's requirements. Under the Articles, a State was responsible only if their assistance succeeded in causing or significantly contributing to an actual war crime.⁸⁶ In contrast, Common Article One simply demands that a violation be likely or foreseeable and that the third-party State authorized the export.⁸⁷

The foreseeability of future violations is a product of several factors. A pattern of previous violations serves as a significant factor.⁸⁸ The UK Court of Appeals claimed the government had an obligation not to encourage IHL violations by authorizing exports when previous violations had been found. The Secretary of State violated this obligation when he approved export licenses and failed to offer any evidence assessing how these previous violations filtered into his current assessment of future violations. Under Common Article One, third-party States are obligated to withhold the

83. See A/HRC/42/17, *supra* note 13, ¶ 92.

84. A/HRC/42/CRP.1, *supra* note 16, ¶ 933.

85. User's Guide, *supra* note 3, at 64.

86. ILC Report, *supra* note 20, at 66-67.

87. ICRC Commentary, *supra* note 23, ¶ 150.

88. User's Guide, *supra* note 3, at 43; *see also* R. *ex rel* Campaign Against Arms Trade v. Sec'y of State for Int'l Trade [2019] EWCA (Civ) 1020 [139] (Eng.).

transfer of arms when they will likely be used to violate the Conventions. The CAAT judgment clarifies that the likelihood of future violations must be determined by assessing previous violations.

Another factor that should be considered in determining the likelihood of future violations is the recipient's attitudes.⁸⁹ A strong example of this is when a country refuses to cooperate with a group of experts sent by the United Nations Human Rights Council.⁹⁰ The Saudi authorities refused to cooperate when Amnesty International approached them to share their finding of any documented air strikes.⁹¹

The UK Court of Appeals referred to specific inquiries a decisionmaker should make when issuing a license. For example: "Have any other arms bearers taken up similar measures to ensure respect of international humanitarian law standards?"⁹² This refers to the conduct of other similarly situated States and the actions taken by that State. For instance, Germany chose to ban all arms exports to Saudi Arabia in 2018.⁹³ The User's Guide has a complete list of questions for the States to consider and among them are: "[h]as the international humanitarian law been incorporated in military doctrine and military manuals, rules of engagement, instructions and orders?" Or "[d]oes the end-user have the capacity to use the equipment in accordance with international humanitarian law?"⁹⁴

Foreseeability should not be viewed through the domestic criminal or tort law lens because the justifications for doing so are absent in the international law context. Although many of these concepts may seem intuitive, it is noteworthy to remember Judge Ago's comments in the *Nicaragua* decision cautioning against borrowing directly from criminal law theory on aiding and abetting. Whereas the justification for punishing aiders and abettors rests on the assumption that individuals helping one another are equally culpable, the same cannot be said about a State entity that enables its private businesses to transfer weapons into these war-torn regions.

For example, in the tort context foreseeability and proximate cause are largely a matter of whether it is fair to hold someone accountable for their *individual* actions. Importing these principles into the international context is unreasonable because now the question becomes whether or not it is fair to

89. User's Guide, *supra* note 3, at 44.

90. A/HRC/42/17, *supra* note 13, ¶ 7.

91. *See id.*

92. *R. ex rel Campaign Against Arms Trade v. Sec'y of State for Int'l Trade* [2019] EWCA (Civ) 1020 [21] (Eng.); *see also* User's Guide, *supra* note 3, at 55-58.

93. Plachta, *supra* note 63, at 268.

94. User's Guide, *supra* note 3, 55-57.

hold Country X accountable for the private actions of its individual citizens. Thus, it makes more sense to argue that a pattern of previous violations is sufficient to make it foreseeable that a future violation may occur, and thus a failure to adequately investigate these previous violations directly results in a violation of Common Article One.

B. Information from Independent Competent Bodies: Attributing Knowledge of the Risk of IHL Violations

One of the biggest obstacles to accountability under the Articles was the knowledge requirement. The Articles require an assisting State to give aid with the intent of facilitating the commission of the wrongful act. Under Common Article One, a third-party State is accountable when it consciously disregards the risk of IHL violations. Further, a third-party State is held to be aware of such a risk against the backdrop of investigations and findings from competent bodies, such as the UN Human Rights Council.⁹⁵

Once it is established that the investigations from independent international bodies warrant assessment before exportation, a third-party State should be held to know about the risk of future violations. As the UK Court of Appeals put it, “how can such an approach be rational, when other important and authoritative bodies, such as the UN Panel of Experts, Human Rights Watch and Amnesty International have been able to make and publish such assessments, and conclude that widespread violations have been demonstrated?”⁹⁶ To put things in perspective, a summary of Amnesty International’s work in Yemen consisted of seven field missions, interviews with survivors, victims, witnesses, journalists, lawyers, government officials and corroboration via satellite imagery and medical reports.⁹⁷

VI. CONCLUSION

The academic discussion on whether States are responsible for their joint operations with other countries or non-state actors that actively engage in war crimes does not answer the practical question of whether a State is responsible for allowing its own private businesses to provide weapons to these same countries or non-state actors engaged in war crimes. The CAAT’s answer is yes, the State is responsible for encouraging violations of the

95. *Campaign Against Arms Trade*, 2019 EWCA 1020, ¶ 134.

96. *Id.* ¶ 62.

97. *Id.* ¶ 90.

Conventions through the private conduct of its individuals (at least under circumstances where it authorizes the export of weapons).

The Court of Appeals decided the British Government acted unlawfully and irrationally when the Secretary of State for International Trade failed to deny an export license because there was a clear risk the military equipment would be used to commit serious violations of international law.⁹⁸ The CAAT judgment established that a third-party State is responsible for failing to ensure respect for the Conventions the moment it authorizes the sale of weapons to a recipient who will foreseeably use them to commit war crimes. The UK Court of Appeals took it one step further by clarifying (1) what it means for IHL violations to be “foreseeable,” and (2) what type of evidence may be considered in determining whether a third-party State ought to know about these foreseeable violations.⁹⁹

In sum, if any State does authorize the transfer of weapons into one of these questionable regions then the State should be held responsible under Common Article One to the Geneva Conventions in circumstances where they (a) fail to account for previous violations in their assessment of the likelihood of future violations, and/or (b) ignore factual findings resulting from independent investigations on behalf of the media, United Nations, or other Non-Governmental Organizations.¹⁰⁰

98. *Id.* ¶¶ 61-63.

99. *See id.*

100. *See* Written Statement from Elizabeth Truss, Sec’y of State for Int’l Trade, to Parliament, HCWS339 (Jul. 7, 2020), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-07-07/HCWS339/>. The United Kingdom’s Secretary of State for International Trade announced the government was withdrawing their appeal to the Supreme Court and that they were now in compliance with the new legal approach articulated by the UK Court of Appeal, *id.*, and as a result, the government is going to resume the granting of export licenses since “there is not a clear risk that the export of arms and military equipment to Saudi Arabia might be used in the commission of a serious violation of IHL.”