REPORT

THE LEGAL FRAMEWORK REGULATING PROXY WARFARE

DECEMBER 2019

American Bar Association’s Center for Human Rights & Rule of Law Initiative
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Front Cover: As part of Operation Roundup—the offensive to eliminate pockets of Islamic State of Iraq and Syria (ISIS) fighters in the Middle Euphrates River Valley in Syria—Syrian Democratic Forces watch the aftermath of an airstrike on an ISIS location near the Iraq-Syria border.


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Indirect warfare—or warfare by and through local partners—has become more common as global powers seek to reduce the costs of direct intervention and regional powers seek to extend their influence outside their borders. At the same time, more armed groups have emerged in the last six years than in the last six decades, including militias, terrorist organizations, organized crime networks, and private security contractors. These groups often depend on state support in the form of arms, money, logistics, military advice, and political assistance. Research suggests that the proliferation of armed groups has made it more difficult to resolve conflicts and increased the risks to civilians in the course of military operations. While these concerns are present in every region, the humanitarian impact of proxy warfare is particularly pronounced in the Middle East and North Africa due to the absence of democratic institutions to check executive overreach, the lack of effective dispute resolution mechanisms, and the compounding effect of competition between global powers in the region.

To address these challenges, the American Bar Association Center for Human Rights and Rule of Law Initiative convened an Expert Working Group to examine whether gaps in the law have contributed to the adverse impacts of indirect warfare. This report will first summarize the literature concerning the impact of proxy warfare on the duration of armed conflicts and the impact on the civilian population.

**BASED ON THIS REVIEW,** the Working Group concluded that there are a number of risks associated with indirect warfare, including:

1. Increased tendency toward prolonged conflict;
2. Diversion of weapons and the emergence of conflict economies that incentivize ongoing conflict;
3. Increased chances of atrocities; and
4. Protracted challenges establishing the rule of law in post conflict settings due to difficulties in demobilizing or integrating armed groups and the tendency of such groups to engage in criminal activity.

Next, the report will address the legal framework regulating indirect warfare. It concludes that, while there continue to be disputes regarding interpretations of the law, the existing framework generally provides clear parameters for the provision of assistance to proxy forces, whether state or non-state actors. Moreover, courts are increasingly holding states responsible for internationally wrongful conduct by their proxies. This jurisprudence is underpinned by growing consensus in the international community that states should exercise greater restraint in the export of defense articles and services.

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Nevertheless, states continue to rely on proxies, often in an attempt to evade legal responsibility, and some indicators suggest this trend is increasing. While international law generally prohibits the provision of support where it is likely and foreseeable that such support will be used in internationally wrongful acts, global and regional powers continue to provide assistance to proxies engaging in a consistent pattern of unlawful conduct. The body charged with addressing threats to international stability, the U.N. Security Council, has not been effective in addressing this issue in part due to the fact that veto-wielding members of the Council have provided assistance to proxies engaged in mass atrocities in Syria and Yemen, notwithstanding the fact that it is likely and foreseeable that such assistance will be used in furtherance of unlawful activities. The primary challenge therefore appears to be not gaps in the law, but failures of enforcement.

To ensure compliance with the law, reduce civilian casualties, and reverse escalatory dynamics—especially in the Middle East and North Africa—states need to re-commit to basic parameters regulating the support of armed proxies. In light of these findings, the Expert Working Group on Proxy Warfare recommends that states providing assistance to organized armed groups should establish more effective oversight regimes. Additionally, they should support the development of multilateral capabilities to monitor compliance with relevant legal obligations regarding material support for state and non-state organized armed groups engaged in hostilities. They should also increase transparency regarding the export of defense articles and services and conduct comprehensive risk assessments prior to providing assistance.

No assistance should be provided to proxies with a past record of serious violations of international law unless those responsible have been held accountable. Once a decision is made to provide assistance, it should be conditioned on the proxy’s compliance with relevant legal obligations and cooperation with investigations by an impartial third-party into any allegations of misconduct. States should only support non-state organized armed groups when strictly necessary for self-defense purposes and only where the sponsor is able to effectively mitigate the risks inherent in supporting such groups. States must ensure that all contractors are subject to the effective criminal jurisdiction of either the employing state or the host state. Finally, they should create civil remedies to ensure judicial review of assistance to armed groups. If fully implemented, these recommendations will reduce the risk of civilian casualties and protracted conflict.
BACKGROUND

PURPOSE AND METHODOLOGY

To address these challenges, the American Bar Association Center for Human Rights and Rule of Law Initiative convened an expert working group (Working Group) to examine the legal framework regulating foreign support of armed groups engaged in hostilities. The Working Group consisted of an interdisciplinary team of experts in counterterrorism, conflict studies, international law, and regional dynamics. The findings of these experts were then presented to a group of regional experts with extensive experience working in conflict-affected countries. The regional experts validated the findings of the Working Group and made recommendations on how to address the adverse impacts of proxy warfare. The following report reflects the findings and recommendations of the Working Group.

In addition, members of the Working Group researched the export control regimes of relevant global suppliers and regional powers, as well as actual exports of arms to parties to the conflict in Syria and Yemen. These case studies were selected because they provide a representative picture of the regional dynamics driving proxy warfare as well as the profound humanitarian impacts of such dynamics. Further, these case studies focus on the conduct of veto-wielding members of the U.N. Security Council, the body ultimately charged with ensuring peace and security in the region. This research is summarized in the annexes.

DEFINITIONS

For the purpose of this report, the term “proxy warfare” means support of armed third parties—whether state or non-state actors—engaging in hostilities or activities incidental to the conduct of hostilities (including detention operations) as a means to achieve national objectives. Some commentators use the term “proxy warfare” to refer solely to the support of non-state actors. Others use the term indirect warfare—also described as military operations “by, through and with” partners—to encompass support of both state and non-state actors. This report will use the term “proxy warfare” to also describe situations in which the sponsor state both provides support to local actors while also directly engaging in hostilities.

Some experts use the term “surrogate warfare” rather than “proxy warfare” because the latter term suggests that the sponsor state has the ability to control the activities of its proxies in a manner akin to that of a principal-agent relationship. The term “surrogacy” is intended to capture a broader range of relationships in which one party seeks to support another party engaging in hostilities but where the sponsor state may not exercise the ability to control its surrogate. The degree of control that a sponsor exercises over a surrogate or proxy has implications for the legal responsibility of the sponsor. However, neither phrase is a term of art defined by law. Therefore, this report will use the terms interchangeably with the understanding that the exact nature of a sponsor-proxy relationship is factually dependent and may not involve a significant degree of control by the sponsor. This is especially true of sponsor-proxy relationships between states.

SCOPE

Sponsors provide a wide range of support to proxies, including arms, military advice, and funding, as well as logistical, political, and ideological support. This report will focus on

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A Syrian woman and child walk down a destroyed street as civilians and rebels prepare to evacuate one of the few remaining rebel-held pockets in Arbin, part of Eastern Ghouta, on the outskirts of the Syrian capital of Damascus.

Photo Credit: Abdulmonam Eassa / AFP (2018)
the legal implications of material support to armed proxies engaged in hostilities, including in particular weapons, training, and logistical support, while recognizing that ideological and political support significantly contribute to the activities of armed groups. While the use of proxies is not limited to situations of armed conflict, the focus of this report will be on armed conflict due to the heightened risk associated with the use of proxies in the course of hostilities. Proxies—armed and otherwise—nonetheless play an important role in many contested areas, such as occupied territories, even in the absence of armed conflict.

The focus of the report is the international framework regulating support of both state and non-state armed groups, including general principles of state responsibility, international humanitarian law (including the Geneva Conventions), and the Arms Trade Treaty. This will be informed by a review of related bodies of law, including international criminal law and domestic laws in select jurisdictions.

Separate legal regimes concerning terrorist organizations also regulate the material support of armed groups designated as terrorist organizations. A discussion of these regimes is beyond the scope of this report, but it is worth noting that groups that intentionally target civilians may be ineligible for military assistance both under international humanitarian law and counterterrorism regimes. Many of the concerns about lack of effective enforcement mechanisms apply to states that support groups that target civilians and therefore are—or should be—designated as terrorist groups.

While the legal framework is global in nature and support for armed proxies is a worldwide phenomenon, this report will focus in particular on trends in the Middle East and North Africa and nearby countries intricately linked to the region, including Somalia and Afghanistan. This focus was chosen due to the profound role that proxy relationships have had on conflicts in the region, particularly over the last two decades.

Indirect warfare benefits both sponsor states and proxies but often exacerbates a number of risks inherent in armed conflict, including the risk of escalation of conflict, frozen conflict, and cycles of conflict.

FACTUAL CONTEXT

While a comprehensive review of the literature on the impact of proxy warfare is outside the scope of this report, a short summary is warranted to inform the discussion. Indirect warfare benefits both sponsor states and proxies but often exacerbates a number of risks inherent in armed conflict, including the risk of escalation of conflict, frozen conflict, and cycles of conflict.

Proxy warfare can also lead to unintended consequences that undermine the sponsor state’s goals, including the diversion of weapons and emergence of criminal organizations. While some sponsor states have employed various measures to mitigate the adverse effects of proxy warfare, including training and vetting of partner forces, the efficacy of these methods is unclear. The following section will outline these trends and the particular challenges of addressing these problems in the Middle East and North Africa.

A. Benefits

States employ both state and non-state proxies for a range of reasons. The primary reason is to reduce casualties among the sponsor states’ armed forces and to reduce the financial costs associated with projecting force abroad. Sponsor states may also feel that local groups are more likely to garner the support of the local population, have a better knowledge of local terrain and the capacity to contain threats over the long term after the end of the sponsor state’s intervention. The use of proxies can help sponsors exert influence in places where
their own forces may be unable to do so. Further, the use of proxies allows for deniability by sponsor states, which may be desirable to avoid domestic political costs or to evade legal responsibility. For example, at least one state in the Middle East reportedly facilitated the training and support of opposition forces in Libya and Syria in potential breach of a U.N. Security Council Resolution, with the tacit approval of others.

Proxies in turn rely on sponsors for a variety of reasons, including to offset support of rivals by other sponsors and to increase the capacities of their own forces. Non-state actors in conflict with state actors may be dependent upon the assistance of a sponsor to make it possible to challenge superior forces.

B. Risks

The advantages of employing proxies are offset by a number of risks, many of which have long-term implications that are not well understood. Notwithstanding these long-term implications, the use of proxies has become more widespread since the end of the Cold War.

Support of armed proxies can make conflict more likely and longer lasting. Such support increases the risk of conflicts because sponsors may be willing to support proxies to address lower-level risks that do not warrant the higher costs of direct intervention. Proxies may become emboldened with the support of a sponsor, engaging in conflicts they otherwise might have avoided.

Foreign support of local fighters can also trigger an escalatory dynamic between rival sponsors and contribute to arms races. For example, one study has shown that “in the 114 civil wars between 1946 and 2002 where at least 900 people were killed, no rebel group was transferred major conventional weapons without the government also receiving arms from another source.”

Competition between rival sponsors can contribute to “frozen conflicts”, i.e. protracted conflict caused by a “cycle of intervention.” Support of proxies may also lead sponsors to become entangled in conflicts they were seeking to avoid where proxies they have supported are unable to prevail without direct intervention by the sponsor.

Empirical studies have shown that foreign interventions on average increase the duration of hostilities. Several such conflicts have lasted decades, suggesting that the increase in the number of parties to the conflict may increase the risk of intractable conflict.

Once hostilities have commenced, support for armed groups entails numerous risks. Empirical research suggests that while the provision of arms may not alone spark conflict, it likely increases the duration and intensity of conflict. Weapons provided to proxies are difficult to track and can be easily diverted to unintended recipients. Arms supplied to both the Syrian military and militias in Syria and to
Empirical studies have shown that foreign interventions on average increase the duration of hostilities. 

Saudi and Emirati forces operating in Yemen\textsuperscript{15} have reportedly ended up in the hands of ISIS and Iranian-linked groups. In 1989, the United States provided anti-aircraft missiles to the mujahideen in Afghanistan and these weapons were later found as far afield as Bosnia, Iran, Kashmir, Tunisia, and Palestine.\textsuperscript{16}

The diversion of weapons can also fuel a corrupt war economy that strengthens individual strongmen, tribal, rebel, or ideological leaders who are using the war to improve personal standing.\textsuperscript{17} For example, some commentators have concluded that lethal and non-lethal aid provided to the Syrian National Council and the Free Syria Army was diverted to build institutional patrimonies instead of operational effectiveness.\textsuperscript{18} In light of political and economic dynamics, swift resolution of the conflict might not be the primary interest of local proxies.\textsuperscript{19}

Similar dynamics have plagued efforts to combat terrorism through the training and equipping of state security forces. One study concluded that states suffering from insurgency or terrorism are often characterized by weak institutions, corruption, or clientelism.\textsuperscript{20} In such states, the study concluded, “self-interested proxies use the flow of resources for their own opportunistic ends, diverting aid to favored constituencies, using foreign-trained troops to fight sectarian battles, or otherwise benefitting their own political agendas.”\textsuperscript{21} As a result, the proxy often “fails to achieve the goals desired by the principal, such as suppressing terrorism, insurgency or drug trafficking.”\textsuperscript{22} In such circumstances, training and equipping state security forces “may be effective in preserving allied governments from overthrow, but it will often be more conducive to a stalemate than to outright victory.”\textsuperscript{23}

It is unclear whether efforts to support non-state armed groups to combat terrorism is effective in the long-term. While militias may have better knowledge of the terrain and willingness to fight terrorists, one study of the use of proxies in Libya, Syria, and Mali concluded that such groups “lack the legitimacy, effectiveness, and staying power to hold and sustain military gains.”\textsuperscript{24} In the case of Syria, a U.S. Inspector General recently concluded that ISIS was resurging in Syria in the summer of 2019 due to the inability of U.S.-backed Syrian Defense Forces “to sustain long-term operations against ISIS militants.”\textsuperscript{25}

Research also suggests that armed groups with access to external resources—whether provided by outside parties or natural resources—are less likely to need the support of local populations and may therefore be more likely to engage in atrocities.\textsuperscript{26} Such groups are less likely to

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\textsuperscript{16} Pfaff, \textit{supra} note 7, at 342.
\textsuperscript{17} Krieg, \textit{supra} note 4, at 110.
\textsuperscript{18} \textit{David W. Lesch, Syria: The Fall of the House of Assad} 168 (2012).
\textsuperscript{19} Krieg, \textit{supra} note 4, at 110.
\textsuperscript{20} Stephen Biddle, \textit{Policy Implications for the United States, in Proxy Wars: Suppressing Violence through Local Agents} 264, 265 (Eli Berman & David A. Lake eds., 2019).
\textsuperscript{22} \textit{Id}
\textsuperscript{23} Biddle, \textit{supra} note 20, at 284.
\textsuperscript{24} \textit{Brian Katz, Ctr. for Strategic Int’l Stud., Imperfect Proxies: The Pros and Perils of Partnering with Non-State Actors for CT} 1 (2019).
Research also suggests that armed groups with access to external resources—whether provided by outside parties or natural resources—are less likely to need the support of local populations and may therefore be more likely to engage in atrocities.

demobilize after the end of hostilities. In certain settings, foreign support might result in the exacerbation of factionalism, which has been prevalent in the conflict in Syria.

In many post-conflict settings, the inability to demobilize and reintegrate former insurgents can contribute to well-trained and armed criminal organizations that challenge the state. Such organizations can undermine efforts to establish the rule of law for decades and contribute to narcotics trafficking, human smuggling, and migration.

Equally problematic, but perhaps less well understood, are the long-term implications of failure to demobilize state-aligned armed groups. Such groups may morph into private security groups or clandestine organizations that operate at the margins of the law. Long term, they can have a corrupting influence on government institutions. In extreme cases, they may capture state institutions for criminal purposes and thereby contribute to failed states. Such dynamics have contributed significantly to governance problems for decades after the end of the armed conflict.

C. Efforts to Mitigate Risks

While a growing body of research outlines the risks associated with supporting armed proxies, reliance on such groups nonetheless continues. The Working Group—including several individuals who served in high-level U.S. government positions involved in decisions concerning support to armed groups—noted that the secondary effects of supporting proxies are not well understood. Lack of transparency about which states are supporting which proxies makes it difficult for researchers and policymakers to fully weigh the long-term costs against the short-term gains associated with employing proxies. Government studies on the topic appear to be rare and not well known among policymakers, thus exacerbating the challenges associated with incorporating lessons learned into relevant policies and procedures.

At the same time, in light of past experiences with the diversion and misuse of weapons, some states have gone to great lengths to reduce these risks. As a leader in global arms sales and foreign military deployments, the United States has been forced to grapple with these challenges perhaps more than any other country. In response, the United States has a complicated legal framework that ostensibly prohibits, under certain circumstances, the transfer of weapons to foreign security forces with a record of misusing them or engaging in human rights violations. It also requires the vetting of some foreign partners before they receive military training and provides training to encourage compliance with the laws of armed conflict. The United States conducts end-use monitoring to assess the risk of diversion.

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28 Pfaff, supra note 7, at 336.
However, these laws have a number of exceptions, as described in more detail in Annex C. Moreover, the United States has undertaken a major reform of its regulations to facilitate the export of defense articles and services. This reform has contributed to a reduction in oversight of such sales.  

An increasing number of states have recognized the need to adopt safeguards, similar to those established in the United States, both domestically and at the international level. This increased commitment to reduce irresponsible arms transfers is most evident in the high number of signatories to the recently adopted Arms Trade Treaty, which now has over 100 state parties. That treaty requires states to take steps to prevent the diversion and misuse of weapons. The European Council’s Common Position on arms sales includes similar safeguards to the Arms Trade Treaty.

Unfortunately, however, many of the safeguards have not proven to be effective in preventing diversion or misuse of assistance provided to armed groups. Arms export control laws often do not state clear redlines for cutting off sales or assistance to those engaged in serious violations of international law. Vetting programs often have loopholes or lack the information necessary to be effective. Reviewing the records of individual units or personnel has limited utility where the armed group is engaged in widespread or systematic abuses. While training may be effective in encouraging compliance with the law under certain circumstances, such as training on targeting techniques, it is less clear that training is effective in situations where the perpetrator is intentionally targeting civilians as part of a strategy of intimidating the civilian population, a common fact-pattern in current conflicts in the region. Research on training aimed at reducing civilian casualties shows mixed results.

In contrast, conditioning assistance on compliance with relevant requirements has been demonstrated to have an impact in certain situations. For example, for a brief period during the war in Iraq, the United States conditioned certain support on a reduction in sectarian behavior by the Iraqi Security Forces with some success. Similarly, conditions on security assistance to Colombia contributed to achieving U.S. objectives in that country. Some combination of training and conditionality is therefore more likely to ensure recipient compliance with sponsor directions. As discussed below, in addition to raising difficult policy questions, concerns about the efficacy of mitigation measures have legal implications with regards to whether a state has fulfilled its duties under various treaties.

D. Challenges in the Middle East and North Africa

Complications associated with indirect warfare are particularly prominent in the Middle
East and North Africa. For example, non-international armed conflicts in Iraq, Libya, Syria, and Yemen are all complicated by competition for influence by other states.

A report by the Carnegie Endowment for International Peace summarized the difficulty as follows:

Four factors in particular have served to escalate and perpetuate conflicts. First, the regional balance of power has been highly uncertain following the 2011 uprisings as well as the aftermath of the 2003 U.S. invasion of Iraq. Second, local disputes have become the stage on which ever-present regional rivalries are playing out in larger, more lethal conflicts. Third, arms imports to the region have skyrocketed—sales for which the United States and its European allies actively compete. And fourth, the Middle East suffers from a notable dearth of norms of warfare and dispute resolution mechanisms in comparison with other regions of the world. The result is a complicated hornet’s nest of military interventions across the region.\(^{38}\)

While these dynamics are unlikely to be resolved soon, regional powers may be beginning to feel the high financial costs of these open-ended conflicts. In Iran, there is public dissent concerning the “perhaps $20 billion spent supporting Assad” while Saudi Arabia’s expenditures in Yemen are estimated to be “$3 billion to $5 billion a month.”\(^{39}\)

The Carnegie report recommended a number of measures to de-escalate conflict and reduce the risk of miscalculation. These include: multilateral measures to increase transparency on military issues, supporting neutral states, advocating for more limited interventions, planning for peace enforcement, establishing new arms sales parameters, and encouraging the Arab League and the Organization of Islamic Cooperation to rearticulate their commitment to international humanitarian law.

Transparency may be particularly key to resolving escalatory dynamics. While plausible deniability may serve legitimate interests under certain circumstances, any advantages must be weighed against the risk that it could provoke a miscalculation by regional or global rivals. As one study found, “[i]n an international environment where multipolarity, the proliferation of high-powered weaponry, and armed groups are increasingly shaping threat perceptions, the covert nature of sponsor-proxy ties paradoxically raises the risk of strategic miscalculation.”\(^{40}\)

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ARMS IMPORTS TO THE REGION HAVE SKYROCKETED
—sales for which the United States and its European allies actively compete.”

- Perry Cammack & Michele Dunne, Carnegie Endowment for International Peace

- Arms exports to the Middle East and North Africa totaled nearly $25 billion in 2017 and 2018 according to SIPRI’s Arms Transfer Database.
The legal framework regulating the support of armed proxies engaged in hostilities consists of a patchwork of international treaties, customary international law, and domestic statutes. This report will present an overview of the main substantive rules concerning resort to the use of force (jus ad bellum) and those concerning the manner in which force is used (jus in bello). It will then address general principles of customary international law concerning state responsibility for the conduct of third parties. These principles are summarized by the International Law Commission’s (ILC) Draft Articles on State Responsibility. Next, it will outline Common Article 1 of the Geneva Conventions which requires state parties to ensure respect for the Conventions. Lastly, it will address the Arms Trade Treaty and related transparency initiatives that oblige state parties to conduct risk assessments before transferring weapons and prohibits transfers where there is a significant risk of atrocity crimes or diversion.

It is beyond the scope of this project to summarize the extensive literature and jurisprudence concerning both the substantive rules regulating the use of force and the principles concerning state responsibility for the conduct of third parties. The purpose of this study is to provide a basic outline concerning the legal framework to aid policymakers in determining whether gaps exist in the legal framework that are contributing to the duration of hostilities or civilian casualties.

This report concludes that, though there are a number of challenges concerning the interpretation and implementation of these intersecting bodies of law, taken together they form a robust framework to regulate support of armed proxies. Although some states have adopted very narrow interpretations of their legal obligations, courts are increasingly holding states responsible for the internationally wrongful acts of their proxies. Greater emphasis on implementation of the legal regime by states is needed to ensure compliance with their legal obligations. In particular, states need to ensure that meaningful risk assessments are conducted prior to the provision of assistance, that mitigation measures are appropriately tailored to the risks identified, and that impartial investigations of alleged misconduct are conducted.

States have resisted oversight and transparency in their support of proxies in an apparent effort to retain policy flexibility, especially in light of the fact that some states—including some major global suppliers—have not demonstrated a commitment to complying with their legal obligations. While policy flexibility may be desirable, particularly as regards important national security priorities, for the reasons outlined above, the absence of clear limits has contributed to escalatory dynamics and protracted conflict. Absent a renewed commitment to basic parameters, in particular by major global suppliers, these dynamics are likely to continue.

**SUBSTANTIVE RULES ON THE USE OF FORCE**

The U.N. Charter generally prohibits the use of force except in narrow circumstances, including peace-building operations authorized by the U.N. Security Council and activities undertaken by states pursuant to their inherent right to self-defense. The use of force in self-defense must be proportionate and necessary to achieving legitimate self-defense objectives.41

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Regardless of whether the resort to the use of force is justified under the U.N. Charter, the manner in which force is used must comply with the laws of armed conflict as set forth by the Geneva Conventions, the Additional Protocols, and customary international law. According to the U.S. Department of Defense, four general principles regulate the use of force during an armed conflict the principles of: (1) proportionality; (2) distinction; (3) necessity; and (4) humanity. Others include the principle of precaution. These principles are designed to reduce human suffering in the course of military operations. The laws of armed conflict also regulate the detention of persons in the course of hostilities. While the exact obligations of states vary depending on whether the conflict is between two states or between states and non-state actors, these principles are generally accepted as binding in all conflicts.

**ATTRIBUTION OF CONDUCT BY NON-STATE ACTORS TO A STATE**

**A. Legal Framework**

States may be responsible for the internationally wrongful acts of others based on several different legal theories. The conduct of non-state actors may be directly attributed to states where they exercise control over those non-state actors. A sponsor state may also be responsible for the wrongful acts of another state where it provides substantial support in the knowledge that it will be misused.

Article 8 of the ILC Draft Articles on State Responsibility addresses the situations in which the conduct of non-state actors can be attributed to states. It provides that:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

This ILC Draft Article is based in large part upon a seminal decision of the International Court of Justice (ICJ), which addressed when a sponsor state could be held accountable for the actions of a non-state armed group. In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua)*, the ICJ held that a state may be held accountable for the violations of international law by a non-state actor if the state had effective control over the military or paramilitary operations in the course of which the alleged violations were committed.

In the *Nicaragua* decision, the Court found that violations of international law committed by the *contras*, a non-state organized armed group engaged in hostilities with the government of Nicaragua, were not attributable to the United States. Despite the fact that the Court found that the United States financed, organized, trained, supplied, and armed the *contras* and had organized a number of military and paramilitary operations conducted by the *contras*, it held that the United States did not exercise effective control over the *contras*. Rather, the Court found that Nicaragua failed to show a direct link between the support provided by the U.S. and the execution of any particular operation conducted by the *contras*.

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46 Id. at ¶ 114–16.

47 Id. at ¶ 116.
be discussed below, the Court did find that the United States’ support of the *contras* contravened its obligation to ensure respect for the Geneva Conventions. It also found that U.S. support for the *contras* violated the norm of non-intervention.\(^{48}\)

The Court clarified under what circumstances the conduct of a non-state actor can be attributed to a state sponsor in the *Bosnian Genocide* case. In that case, the ICJ held that private conduct that is *merely* supported, financed, planned, or otherwise carried out on behalf of a state is not attributable to that state unless it also exercises a high level of control “in respect of *each operation* in which the alleged violations occurred.”\(^{49}\) Again, as in the *Nicaragua* case, the Court held that Serbia was responsible for failing to abide by its separate duty under the Convention to prevent acts of genocide.

There is some debate among international tribunals and scholars over whether conduct can be attributed to a state where it exercises *overall control* of a third party instead of *effective control*. The International Criminal Tribunal of Yugoslavia (ICTY) held that conduct by non-state actors could be attributed to a state if it exercises *overall control* of that non-state actor. The ICTY Appeals Chamber defined overall control as control over the coordination of general planning of a third party’s activity.\(^{50}\) However, the ICTY utilized this test for the purpose of determining whether a conflict was of an international or non-international character. The ICJ expressly rejected the overall control test for the purpose of attributing responsibility for the conduct of non-state actors to states.\(^{51}\)

While states may not be responsible for the internationally wrongful acts of proxies that they do not control, they may have treaty obligations that require them to take steps to prevent or prosecute certain misconduct. As discussed below, Common Article 1 of the Geneva Conventions requires state parties to ensure respect for the Conventions. This is generally considered to include the obligation to not encourage violations of the Conventions by proxies, even if they are not subject to the effective control of the sponsor. In addition, the Convention Against Torture requires state parties to take measures to prosecute misconduct.

However, these treaties do not cover all possible misconduct and these measures are subject to jurisdictional and practical limitations. For example, states are obliged by the Convention Against Torture and the Geneva Conventions to prosecute those subject to their jurisdiction if they commit war crimes, extrajudicial killings, and torture.\(^{52}\) While some states have interpreted this to mean that they must exercise criminal jurisdiction over anyone who commits these crimes anywhere in the world—and all state parties are required to do so for grave breaches of the Geneva Conventions and Additional Protocol I\(^{53}\)—other states only exercise jurisdiction national of that state.\(^{54}\)

\(^{48}\) *Id.* at ¶ 242.


\(^{50}\) Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 131 (Int’l Crim. Trib. For the Former Yugoslavia July 15, 1999).

\(^{51}\) *Bosnian Genocide*, supra note 49, at ¶ 404.


Sponsors also attempt to distance themselves from proxies for political reasons and potentially in an effort to avoid legal responsibility.

One case in which this jurisdictional question often lacks clarity is in the employment of third-party private military contractors. When states employ third-country nationals as security contractors in another state, they may not be able to exercise effective jurisdiction to ensure compliance with these treaty obligations. In many cases, states that deploy their troops abroad sign agreements with the host nation exempting their service members and contractors from the host nation’s criminal laws, creating further gaps in the oversight regime. The United States’ experience in attempting to assert extraterritorial jurisdiction over contractors in Iraq is discussed in Annex A.

B. Analysis

In practice, few non-state actors surrender control of their operations to foreign sponsors. Both the Working Group and the regional experts agreed that non-state actors go to great lengths to maintain their independence. They often play competing sponsors off one another to do so. Other proxy groups intentionally distance themselves from their sponsors in order to retain legitimacy with local populations. Sponsors also attempt to distance themselves from proxies for political reasons and potentially in an effort to avoid legal responsibility. As a result, the practical application of Article 8 may be limited.

However, private military contractors are likely subject to the effective control of states by virtue of their contractual relations. Other non-state armed groups, including in particular local militias, are less likely to operate under the effective control of sponsors. States nonetheless remain legally responsible for the misconduct of such organized armed groups under certain circumstances (in particular as described in the section below on Common Article 1 of the Geneva Conventions).

Where states have a formal contractual relationship with a proxy, the conduct of the proxy is generally attributable to the state. While the contractual nature of the relationship may give the state additional legal avenues to address misconduct by the proxy, such as disbarment from future contracts, the use of security contractors poses unique oversight challenges. For example, as many companies employ third-country nationals, it can be more difficult for sponsors to exercise criminal jurisdiction over such contractors.

Security contractors who are employed purely for defensive purposes or to provide training do not violate the general ban on employing mercenaries, provided their activities remain within the assigned mission. In practice, however, the distinction between offensive and defensive operations can become unclear. Contractors purportedly employed for training purposes may also be embedded in foreign security forces in the course of operations, blurring the line between combat and training. Where contractors are likely to participate in hostilities, inadvertently or otherwise, states have a responsibility to ensure that such contractors are capable of doing so in a manner that complies with international law and to ensure they are held accountable for violations of the law, including by maintaining the ability to investigate reported violations.

In response to concerns regarding oversight of security contractors, the International

55 See Oona A. Hathaway, Emily Chertoff, Lara Domínguez, Zachary Manfredi & Peter Tzeng, Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors, 95 Tex. L. Rev. 540, 562–64 (discussing the perverse incentives states have to refrain from training or instructing in order to not exercise effective control).

56 International Convention against the Recruitment, Use, Financing, and Training of Mercenaries art. 1, opened for signature Dec. 4, 1989, 2163 U.N.T.S. 75 (entered into force Oct. 20, 2001) (defining a mercenary as any person specially recruited to fight in an armed conflict who is motivated by the desire for private gain and is promised material compensation, by or on behalf of a party to the conflict, substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party). The Convention has only 36 state parties.
Committee of the Red Cross conducted an initiative to compile legal standards and best practices to promote respect for international humanitarian law and human rights law whenever private military and security companies are present in armed conflicts. The resulting Montreux Document was adopted by consensus by seventeen states in 2008. At the time of publication, fifty-six states and three international organizations are participating in the initiative.

**LEGAL FINDINGS & RECOMMENDATIONS**

States must ensure that individuals under their control comply with the law. Because the legal principles are not entirely settled, states should proceed with caution when arming, financing, providing intelligence, training, and otherwise offering significant support to non-state actor groups. In particular, they should take precautions to ensure that those groups are not engaging in violations of international law. They should, moreover, observe the good practices of the Montreux Document and establish a licensing and registration regime for the export of defense services, including armed security personnel. In addition, authorizations for the export of defense services should be publicly disclosed and ideally reported to a relevant multilateral body, such as United Nations Register of Conventional Arms (UNROCA).

States should ensure that they have the capacity—both legally and practically—to exercise effective jurisdiction over any international crimes committed by their contractors, including torture, extrajudicial killing, and war crimes. Given the practical challenges of conducting criminal investigations in foreign jurisdictions, especially in war zones, states should not seek to exempt by bilateral agreement their contractors from local law unless they have the capacity to investigate and prosecute any violations by their contractors.

**STATE RESPONSIBILITY FOR THE INTERNATIONALLY WRONGFUL ACTS OF OTHER STATES**

A. **Legal Framework**

States can also be responsible for aiding and abetting the internationally wrongful acts of other states. State responsibility for the acts of other states is addressed in ILC Draft Article 16. That Article provides that a:

State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

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59 ILC Draft Articles, supra note 44, at 65.
The International Court of Justice has held that Article 16 reflects customary international law. In other words, a state may be responsible for aiding and abetting internationally wrongful acts when four conditions are met: (1) the state aids or assists another state in the commission of an internationally wrongful act; (2) such aid or assistance contributes to the commission of that act; (3) the assisting state has the intention to facilitate and/or knowledge of the circumstances of the internationally wrongful act; and (4) the recipient state’s act would also be wrongful if committed by the assisting state.

There is little confusion as to what is meant by requirements (1) and (4). Any method of support is covered by the “aids or assists” phrase, including the “transfer of weapons, the provision of technical support, [and] the sharing of intelligence.” Further, in nearly all situations, serious violations of international humanitarian law by one state would be considered a violation if conducted by the assisting state.

The disputes regarding Article 16 focus primarily on the second and third requirements. In regards to the second element—the nexus between assistance and the principal wrong—the ILC Commentary on the Draft Articles provides that “the assisting State will only be responsible to the extent that its own conduct has caused to or contributed to the internationally wrongful act.” The ILC Commentary also makes clear that aid or assistance does not have to be essential to the performance of the internationally wrongful act, only that it contributed significantly. While there are some arguments that a “minor degree” of assistance would be sufficient, there is a stronger argument for a de minimis threshold above mere assistance in a remote and indirect or minimal way. Ultimately, the standard is most likely one requiring significant contribution.

i. Knowledge vs. Intent

The third element, that of intent and knowledge, is the most debated element. The confusion associated with the third element is due in part to the fact that the text of Article 16 refers to “knowledge of the circumstances of the internationally wrongful act,” while the ILC’s commentary specifies that no responsibility arises unless the assisting state “intended ...to facilitate the occurrence of the wrongful conduct.”

In practice, there may be little difference between a knowledge and an intent standard. Under well-settled principles of international law, states “must be supposed” to intend the foreseeable consequences of their actions. Therefore, if a state has actual or near certain knowledge of specific illegality, it does not matter whether it provides assistance with the specific purpose of aiding in the wrongful act.

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60 Bosnian Genocide, supra note 49, at ¶ 420.
62 Id.
63 See Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, Yemen: Is the U.S. Breaking the Law, 10 Harv. Nat’l Sec. J. 1, 64 (2019) (quoting ILC Draft Articles, supra note 46, at 65) (arguing that even those States which have not signed onto Additional Protocol II to the Geneva Conventions regulating non-international armed conflicts, such as the United States, are still bound by customary international law to adhere to the core principle of the laws of armed conflict in non-international armed conflicts).
64 ILC Draft Articles, supra note 44, at 66.
65 Id.
67 ILC Draft Articles, supra note 44, at 66 (emphasis added).
68 Goodman & Jackson, supra note 67; see also Moynihan, supra note 67, at ¶ 74.
69 Moynihan, supra note 67, at ¶ 70.
is consistent with the examples cited by the ILC of state responsibility for passively supporting or tolerating wrongful acts of other states. For example, where there is a consistent pattern of internationally wrongful acts by the principal using assistance provided by another state, then the assisting state would likely bear responsibility if it continues to provide support.

The intent of the state committing the wrongful act may be relevant under certain circumstances. For the purpose of certain violations of international humanitarian law, it is immaterial whether the state committing the internationally wrongful act did so intentionally. In contrast, the Genocide Convention requires specific intent to destroy a protected group in whole or in part. Therefore, assisting states would only be responsible for acts of genocide if they provided assistance in the knowledge that the perpetrating state intended to commit genocide.

ii. Degree of Certainty

There is further debate concerning the degree of certainty of the circumstances required to give rise to state responsibility. Lack of certainty can arise either due to the concerns about the veracity of reports of past misconduct or to controversy over the probability of future misconduct.

With regards to questions about the veracity of past reports, the debate often revolves around whether after-the-fact reports can establish with certainty whether loss of civilian life pursuant to military operations was disproportionate to a legitimate military objective. In most circumstances, U.N. and non-governmental organizations report on potential violations of international humanitarian law by visiting the location of the incident, reviewing physical evidence—such as autopsies, remains, remnants.

70 Id. at ¶ 69.  
71 Brian Finucane, Partners and Legal Pitfalls, 92 Int’l L. Study 407, 411–12 (2016) (stating that violations of international humanitarian law “may arise not only from deliberate and intentional misconduct, but also due to incompetence”).  
72 See Bosnia Genocide, supra note 49, at ¶ 421.
of armaments, and damage to infrastructure—and interviewing witnesses. Such reporting cannot definitely rule out that combatants may have been present at the time of the alleged misconduct. In such cases, consistent reporting from independent sources—such as multiple eyewitnesses—is generally considered to be credible, especially where the armed actor alleged to have engaged in the misuse of force refuses to disclose information in its possession regarding any evidence of a legitimate military objective.

Even where the veracity of reports of past violations are well established, sponsor states may question whether the past misconduct necessarily means that future misconduct is likely. For example, sponsors might provide assistance aimed at reducing violations by partner forces and then continue to provide support in the belief that future violations are unlikely.

In practice, policymakers often cite a lack of certainty about facts on the ground when justifying the decision to continue supporting partners who have been accused of violations of international humanitarian law. While this may preserve policy options in difficult situations, proceeding in the face of reports of gross or systematic violations can damage the reputation of sponsor states and may, in certain cases, expose officials to criminal responsibility.

International criminal law defines criminal intent to include purposeful conduct undertaken in the knowledge that the unlawful consequence will occur in the ordinary course of events. While principles of state responsibility are separate from the rules regulating individual criminal responsibility, it may nonetheless be wise as a policy matter to harmonize these bodies of law where possible to avoid a situation where states deny responsibility for acts for which individual officials could be held responsible.

### iii. Known or Should have Known

In addition to establishing the degree of certainty of circumstances, there must be some determination of the level of knowledge required for aiding and abetting liability under Article 16. During the drafting of the ILC Draft Articles, the Netherlands suggested a “known or should have known” standard. The “should have known” standard is well established in international criminal law. It applies in situations where an individual has an affirmative obligation to remain informed about the facts—e.g., military commanders’ obligations to take reasonable measures to remain informed about the conduct of subordinates—or where facts are widely known. The “should have known” standard was rejected by the ILC for the purpose of Draft Article 16.

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74 See Rome Statue of the International Criminal Court art. 30(2), open for signature July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) (stating that a person has criminal intent where: “(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events”).

75 The U.S. Foreign Assistance Act includes a provision that, if fully implemented, would help protect against criminal liability for government personnel charged with managing security assistance. Section 502B of that Act prohibits the provision of security assistance, including weapons, to countries where the government engages in a consistent pattern of gross violations of internationally recognized human rights. See, e.g., Human Rights and Security Assistance 22 U.S.C. § 2304 (1974, amended 2014).

76 See, e.g., CHANTAL MELONI, COMMAND RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 183 (2010), https://www.icc-cpi.int/RelatedRecords/CR2018_00044.PDF.

77 Moynihan, supra note 67, at ¶ 40 (citing the Dutch proposition that the text include the term “should have known” but was rejected).
As the ILC rejected a “should have known” standard, states arguably have no affirmative obligation to remain informed about potential misconduct by partners. However, the Geneva Conventions and other treaties require states to ensure respect for the treaties. As discussed below, this may entail an affirmative duty to remain informed.

Additionally, the commentary to ILC Draft Article 41 states that knowledge may be presumed where there are violations of peremptory norms—i.e. those universally recognized as permitting no derogation—on the grounds that acts of such gravity would not generally escape international attention.78 These peremptory norms include “basic rules of international humanitarian law.”79

Actual knowledge can also be inferred by the surrounding circumstances. In the Corfu Channel case, the ICJ examined circumstantial evidence to determine whether Albania had knowledge that a ship was laying mines that exploded in its territorial waters. The ICJ determined that Albania “must have known” about the illegal acts in question based on the circumstantial evidence that it would have been impossible for Albania to not notice a ship laying mines near Albania’s coast.80

Many experts have argued that states may not evade responsibility through “willful blindness”—defined as “a deliberate effort by the assisting state to avoid knowledge of illegality on the part of the state being assisted, in the face of credible evidence of present or future illegality.”81 Credible evidence includes such information as “the evidence...from fact-finding commissions, or independent monitors on the ground.”82 In other words, states do not have an affirmative obligation to remain informed but once they have actual knowledge of credible allegations, they have an obligation to ascertain whether the allegations are true before continuing assistance.

B. Analysis

Greater adherence to generally accepted interpretations of Article 16 would likely reduce foreign support for armed groups engaged in serious violations of international law in current conflicts in the Middle East and North Africa. For example, global arms suppliers have continued to provide significant support for military operations by state security forces engaged in a consistent pattern of indiscriminate or disproportionate strikes on civilian targets in Syria and Yemen. Credible reports about these violations of international law, including reports by U.N. entities, have been debated in U.N. bodies of which the suppliers are members. Therefore, significant grounds exist for concern that global suppliers have provided support to the Syrian regime and to Saudi-led coalition operations in Yemen notwithstanding the fact that it was foreseeable that such assistance would be used in internationally wrongful acts. Russian support for the Syrian regime is discussed in Annex B. U.S. and U.K. support for the Saudi-led coalition in Yemen is discussed in Annex C. While regional powers also employ proxies in a manner that likely violates international law, this report will focus on the role of Russia, the United States, and the United Kingdom because—as veto-wielding members of the U.N. Security Council—they are essential to efforts to ensure proper implementation of the law.

The situations in Syria and Yemen illustrate two distinct problems concerning adherence to international law. Syria illustrates the impact of the lack of an effective enforcement mechanism for states aiding and abetting intentionally wrongful acts by other states. Support for the Saudi-led coalition in Yemen raises the question of whether sponsor states are responsible for the wrongful acts of recipient states when it is disputed if the conduct in question was intentional and whether mitigation measures by the sponsor states were sufficient to prevent ongoing abuses.

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78 ILC Draft Articles, supra note 44, at 115 (finding that “it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State”).
79 Id. at 113.
81 See Moynihan, supra note 67, at ¶ 43.
82 Id. at ¶ 45.
Russia has generally responded to claims that it is supporting internationally wrongful conduct by Syria with outright denials, notwithstanding the clearly intentional use of chemical weapons by Syria in violation of international law, including the reported use of Russian-origin helicopters to drop chlorine-filled barrel bombs. The failure of Russia to cut off assistance is therefore likely due in large part to the absence of a meaningful enforcement regime. As a veto-wielding member of the U.N. Security Council, Russia has been able to block efforts to refer the matter to the International Criminal Court. In response, the U.N. General Assembly established the International Independent and Impartial Mechanism to collect evidence of atrocities in Syria that may ultimately be used in appropriate courts.

With regards to military operations in Yemen, the United States and United Kingdom have expressed concern about civilian casualties without necessarily reaching a conclusion as to the lawfulness of particular military operations conducted by the Saudi-led coalition. The U.N. has specifically identified the use of U.S.-origin munitions in a number of likely unlawful strikes and noted that members of the coalition have refused to provide information on the unlawful strikes requested by U.N.-appointed investigators, in contravention of relevant Security Council resolutions. The U.S. Secretary of State has certified that the Saudi-led coalition has generally complied with end-use agreements but “with rare exception” has violated those agreements, suggesting that the weapons have been used against other than legitimate military targets.

84 Mark Kersten, *International Justice has Done Little for Syria, but Syria has Done a lot for International Justice*, JUSTICE IN CONFLICT (Mar. 4, 2019), https://justiceinconflict.org/2019/03/04/international-justice-has-done-little-for-syria-but-syria-has-done-a-lot-for-international-justice.
85 Id.
86 See Annex C.
87 See Newton, supra note 31, at 13.
In response to allegations that their weapons have been misused, the United States and the United Kingdom have questioned whether the unlawful strikes were intentional. Both countries have also provided assistance aimed at preventing unintentionally disproportionate strikes.\^{89} However, both have continued to provide assistance notwithstanding evidence that the training and other mitigation measures were not effective.\^{90} These decisions have been challenged in both countries.\^{91} The decision to continue to provide assistance may therefore stem as much from the absence of an effective enforcement regime as from any meaningful dispute about the assisting states’ legal obligations.

**LEGAL FINDINGS & RECOMMENDATIONS**

In summary, states may not provide assistance to other states where it is likely and foreseeable that the assistance will be used in internationally wrongful acts. In particular, where there is credible evidence of systematic or gross violations of peremptory norms—including the basic rules of international humanitarian law—states are not permitted to provide or continue providing assistance to states that could be used in furtherance of such violations. Mitigation measures may be employed to reduce the risk of noncompliance, but the continued provision of assistance after it has become clear that the mitigation measures are ineffective may incur legal responsibility for ongoing commissions of wrongful acts by proxies.

In order to ensure compliance with these legal obligations, states should conduct risk assessments prior to providing assistance. The assessment should examine whether the recipient is willing and able to adhere to relevant legal requirements. Vetting of individual units should supplement, but not supplant, an assessment of the proposed recipient’s systemic compliance with its legal obligations. Tailored mitigation measures and contingency planning should be developed to address any risks identified in the assessment. Training should be provided to address any deficits in the recipient’s capacity to adhere to the law, but should not be considered an effective mitigation strategy where there is evidence that the recipient intentionally engages in internationally wrongful acts, such as reports of systematic violations.

Assistance should be conditioned on compliance with the law and an agreement to cooperate in oversight by an independent third-party. Sponsor states should provide civil remedies for victims of serious violations committed by proxies and to ensure judicial review of the state’s compliance with relevant legal obligations. States should cease providing support when mitigation measures prove ineffective.

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\^{89} See Annex C.
\^{90} Id.
\^{91} Id.
COMMON ARTICLE 1 OF THE GENEVA CONVENTIONS

A. Legal Framework

Common Article 1 of the Geneva Conventions obligates states to “ensure respect” for the rules set forth in the Conventions. This obligation has been determined to have both a negative and positive obligation, ultimately requiring state parties to both refrain from assisting or encouraging others to violate international humanitarian law and a requirement to take steps, to the degree possible, to prevent violations of the Conventions.

These obligations apply regardless whether the sponsor is interacting with a non-state actor or a state actor.

i. Negative Obligation

The negative obligation imposed by Common Article 1 is well established in international law. In the Nicaragua decision, the ICJ determined that Common Article 1 obligated the United States “not to encourage persons or groups engaged in the conflict...to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.” The United States was held to have violated Common Article 1 because it had provided a manual that encouraged acts contrary to general principles of international humanitarian law. The Court found that the United States was aware of allegations of violations of international law by the contras when it issued the manual. Indeed, the Court inferred such knowledge from the United States’ claim that the manual was issued in part to mitigate such abuses. It follows that a state may not be relieved of its responsibility under Common Article 1 by instructing the supported state or non-state actor to abide by the law or obtaining assurances from the recipient that it will abide by the law if doing so has proven ineffective in the past.

It should be noted that the United States was held to be in violation of Common Article 1 even though the Court did not find that the United States had effective control of the non-state actors responsible for the violations of the laws of armed conflict. As such, the threshold for responsibility under Common Article 1 is lower than the effective control test for attribution of non-state actor’s conduct to a state.

Intent to facilitate a wrongful act is not necessary for a state to breach Common Article 1. The ICRC, therefore, concludes that “Common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.”

ii. Positive Obligation

Additionally, there is a positive obligation imposed by Common Article 1. While this duty is more controversial, it too has been supported by international courts and state practice. The ICJ, in its 2004 Wall Advisory Opinion, found that Common Article 1 imposed some positive third-state obligations. In the Wall Advisory Opinion, the ICJ held that “every State party to [the Fourth Geneva] Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.”

92 See Geneva I-IV, supra note 53, at art. 1.
94 See Hathaway, supra note 58, at 574 (citing Nicaragua, supra note 45, at ¶ 220 and the ICRC Commentary of 2016, infra note 100, as evidence that states are required to ensure respect of the Geneva Conventions in their interactions with both state and non-state actors).
95 Nicaragua, supra note 45, at ¶ 220.
97 Id.
98 See Hathaway, supra note 56, at 568.
100 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 158.
The ICJ applied this obligation by requiring “all the States Parties to the Geneva Convention...to ensure compliance by Israel with international humanitarian law embodied in that Convention.”\textsuperscript{101} Based on this, Professor Oona Hathaway (a member of the Working Group) argues that, in this decision, the ICJ “explicitly found that Common Article 1 imposed third-state obligations on all High Contracting Parties to halt Israel’s violation of the Fourth Convention.”\textsuperscript{102} Professor Hathaway also argues that the \textit{Wall} Advisory Opinion “takes this a step further, suggesting that third states might even be liable for their failure to take preventative action against foreseeable IHL violations by other states.”\textsuperscript{103} The ICJ’s \textit{Wall} Advisory Opinion thus supports the existence of a positive obligation of state parties to ensure respect of international humanitarian law.

The ICRC similarly takes the position that Common Article 1 “goes beyond the mere obligation to respect the Geneva Conventions at the domestic level” because this principle is already acknowledged through \textit{pacta sunt servanda}.\textsuperscript{104} State practice reaffirms this positive obligation. The United Nations Security Council and General Assembly have many times issued resolutions reaffirming the existence of the legal obligations of third states to ensure respect in conflicts where they are not a party.\textsuperscript{105} For example, third-party states have been called upon to ensure compliance with international humanitarian law in Israel, Bosnia and Herzegovina, and Rwanda.\textsuperscript{106}

While Common Article 1 requires states “to exercise due diligence in choosing appropriate measures to induce belligerents to comply with the law,” it does not require states to attain “specific outcome[s].”\textsuperscript{107} Other commentators suggest that states take “all possible steps, as well as any lawful means at their disposal” to ensure respect.\textsuperscript{108} This reading is consistent with international jurisprudence concerning related concepts of the duty to prevent in the Genocide Convention and the duty to protect in human rights conventions.\textsuperscript{109} The ICRC “embraces an interpretation of Common Article 1 obligations that, unlike attribution doctrine, does not establish a bright-line rule.”\textsuperscript{110} These obligations “do not have a geographic or temporal threshold” and “apply to any and all state interactions...whenever the Geneva Conventions are applicable.”\textsuperscript{111}

\textbf{iii. Duty to Investigate}

Sponsor states have an obligation to investigate serious violations of Common Article 1. Any serious breach of international humanitarian law, including Common Article 1, is a war crime.\textsuperscript{112} States have an obligation to investigate war crimes.\textsuperscript{113} It therefore follows that sponsor states must independently investigate allegations of serious breaches involving assistance provided by the sponsor. For example, if a sponsor encouraged a proxy to target civilians, then it would not be enough for the sponsor state to rely on the investigations of the proxy

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\textsuperscript{101} \textit{Id.} at ¶ 159.
\textsuperscript{102} Hathaway, supra note 56, at 570.
\textsuperscript{103} \textit{See id.} at 571.
\textsuperscript{106} \textit{See Dörmann, supra note 105, at 717–18.}
\textsuperscript{107} \textit{Id.} at 724.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} ICRC Commentary of 2016, supra note 100, at ¶ 166.
\textsuperscript{110} Hathaway, supra note 56, at 573.
\textsuperscript{111} \textit{Id.} at 576.
\textsuperscript{113} \textit{See Int’l Comm. of the Red Cross, supra note 54 (arguing that the obligation to investigate covers all war crimes, not just grave breaches of the Conventions)}.  

\[July 9\] [hereinafter \textit{Wall Advisory Opinion}].
into the alleged breach. The sponsor state must independently investigate whether its own agents encouraged the commission of war crimes.

Both the United States and the United Kingdom have appeared to suggest that they would only have a duty to investigate alleged war crimes by foreign forces that they support if they were co-belligerents in the conflict. Based on the above analysis, the U.S. or the U.K. would not need to be co-belligerents in order to trigger the duty to investigate credible allegations of a serious violation of Common Article 1, such as the continued provision of assistance in the face of a consistent pattern of war crimes.

B. Analysis

Common Article 1 establishes more stringent requirements for states than those set by the ILC Draft Articles, at least with regard to violations of international humanitarian law. Common Article 1 likely imposes a duty to investigate serious violations of international humanitarian law by states or non-state actors receiving support even where there may be no such requirement under Draft Articles 8 or 16. In the case of non-state actors, Common Article 1 prohibits support of proxies where it is likely and foreseeable that the support will be used to commit abuses even if the proxy is not under the effective control of the sponsor. While the exact contours of the affirmative duties under Common Article 1 may not be settled, the jurisprudence of the ICJ outlined above and analogous jurisprudence under human rights conventions are clearly moving in the direction of prohibiting assistance where it is likely and foreseeable that the assistance will be used to commit violations of international humanitarian law, even where there is no specific intent on the part of the sponsor to aid and abet unlawful conduct.

Such a reading is entirely consistent with the gravity of offenses prohibited by international humanitarian law and the need to protect innocent civilians. If Common Article 1 is read to only apply to situations where there is specific intent to aid and abet unlawful conduct, it might be difficult to establish that, for example, Iran was responsible for the misconduct of Hezbollah forces it supports or that Russia is responsible for unlawful acts by Ukrainian militias. An objective standard based on the likelihood and foreseeability of unlawful conduct is therefore easier to enforce and less likely to create a perverse incentive to outsource military operations in order to evade responsibility.

The standard adopted by the ICJ in the Nicaragua case does not require actual knowledge that assistance will be misused or a specific intent to aid and abet a crime. This reading is consistent with the gravity of the offenses at issue. It is also consistent with jurisprudence interpreting the duty to prevent or protect clauses in other treaties. In the Bosnian Genocide case, the ICJ held that:

[A] State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.

Independent of Common Article 1, states may also incur responsibility for the wrongful acts of their proxies pursuant to human rights treaties. For example, a High Court in Denmark

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115 Hathaway, supra note 56, at 569 (citing Nicaragua, supra note 45).


118 Bosnian Genocide, supra note 49, at ¶ 432.

119 See Moynihan, supra note 67, at ¶ 100 (discussing jurisprudence in the European Court of Human Rights finding state responsibility where the sponsor “knew or should have known” that there was a “real risk” of an internationally wrongful act).
has held Danish authorities responsible for the inhuman treatment of Iraqi detainees by Iraqi forces where Danish forces turned over the detainees to British forces knowing that they would be transferred to the Iraqis. The Court found that Danish forces knew that there was a “real risk” that the detainees would be mistreated and therefore found Danish authorities responsible for their mistreatment under Article 3 of the European Convention on Human Rights and Danish law.  

Greater attention to the enforcement of Common Article 1 is particularly important with regards to support of organized armed groups that are not formally integrated into the security forces of the state and therefore pose a number of challenges related to ensuring compliance with relevant legal standards. Many such groups are not formally trained or subject to legally enforceable command structures. They often resort to illegal activities to raise funds or recruit members. Unlike security contractors, such groups are not limited to defensive operations and often receive support for the purpose of engaging in hostilities. In order to ensure appropriate oversight over such groups, sponsors need to employ different approaches in order to address these challenges.

Assisting states may be responsible for ensuring respect by organized armed groups, even if they are also loosely affiliated with the local government. For example, in Afghanistan, the United States supported the establishment of a temporary auxiliary police force drawn from militias loyal to local governors. Many experts and members of the regular police force expressed misgivings about the creation of this force, perceiving it as a way to legalize illegal militias with

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a history of human rights abuses and tribal loyalties. The United States nonetheless persisted in establishing the auxiliary police in an effort to “hold” territory in southern Afghanistan that U.S. forces had “cleared.” Ten years later, much of this territory is effectively controlled by the Taliban, raising questions about the long-term efficacy of such militias. Support of such militias is covered by Common Article 1 regardless of whether the sponsor has effective control of the militia. For example, if a militia has a record of requesting air strikes on unlawful targets, then a sponsor state supporting the militia must ensure respect for international humanitarian law by refusing to respond to these requests, even if the state does not have effective control over the militia. It would not be sufficient for the sponsor state to rely on assurances provided by the proxy or training or instructions to the proxy to abide by the laws of war, if the violations continue after such assurances are provided or training and instructions delivered.

122 Wilder, supra note 122, at 15.
123 Perito, supra note 122, at 13.
In order to ensure compliance with Common Article 1, states supporting state and non-state actors should employ mitigation strategies to ensure respect for international humanitarian law by these actors, including risk assessments, training, vetting, accountability mechanisms, and conditioning assistance on compliance with legal obligations. Such mitigation measures might include a requirement for joint after-action assessments to ensure compliance with legal obligations and to reduce civilian casualties, especially where the recipient does not have the capacity to conduct such assessments on its own.

Given the difficulties of ensuring accountability for non-state organized armed groups—especially those without prior military training, command structure, or accountability mechanisms—states may need to put in place additional oversight mechanisms to ensure that assistance to such groups complies with Common Article 1. They should observe the good practice of only supporting such groups where they are essential to achieving legitimate self-defense objectives and only where the group will be amenable to demobilizing or integrating into the armed forces of the state at the end of hostilities.

To ensure compliance with the Geneva Conventions, states should assess the risk, prior to the provision of assistance, that the support will contribute to civilian casualties or other violations of international humanitarian law. Redlines should be established to ensure compliance with the sponsor’s legal obligations. Where the proposed recipient has a past record of misconduct, states should proceed with particular caution and should carefully consider the legal liability that providing support to such a group might entail. Risk assessments should inform the formulation of mitigation measures and controls designed to address identified risks. The assessments should evaluate, *inter alia*, whether the proposed recipients:

- Share the same strategic goals as the sponsor state;
- Are likely to achieve these goals;
- Are willing and able to exert command and control of their members and comply with their legal obligations;
- Have the ability to investigate allegations of misconduct and agree to cooperate in investigations by independent third-parties; and
- Have a past record of diversion of weapons to unauthorized end-users.

If the assessment indicates that the group poses a significant risk to efforts to prevent civilian casualties or resolve the underlying conflict, the sponsor should assess whether there is a reasonable likelihood that mitigation measures, such as training and vetting, will meaningfully address this risk. If not, the sponsor should identify alternate means of addressing the threats in question.
THE ARMS TRADE TREATY

The Arms Trade Treaty (ATT)\(^\text{125}\) was adopted to regulate the international trade in conventional arms.\(^\text{126}\) In addition to various provisions requiring states to establish domestic controls, the Treaty: (1) prohibits states from supplying certain weapons if they would be used in atrocity crimes; (2) requires risk assessments prior to the transfer of weapons; and (3) requires reporting on the export and import of weapons.

A. Legal Framework

i. Prohibition on Transfers that Would be Used in Atrocity Crimes

Article 6 prohibits the transfer of arms if the exporting state “has knowledge at the time of the authorization” that they “would be used in the commission of genocide, crimes against humanity, breaches of the Geneva Conventions, attacks directed against civilians, or other war crimes.”\(^\text{127}\) Article 6 closely tracks existing state responsibility under Article 16 of the ILC Draft Articles on State Responsibility, except that Article 16 is not limited to the atrocity crimes specified in the ATT and there is no express requirement in the ATT that the arms transfers substantially assist in the commission of an internationally wrongful act. Rather, it is implied that the export of weapons in the knowledge that they would be used in the commission of the wrongful act would substantially assist such a violation.

As with Article 16, there is some debate among states on the meaning of the term “knowledge” in the ATT. Some states have taken the view that “the State Party concerned shall not authorise the transfer if it has reliable information providing substantial grounds to believe that the arms or items would be used in the commission of the crimes listed.”\(^\text{128}\) During the negotiation of the Treaty, some states advocated for a constructive knowledge standard which would have prohibited transfers where the exporting state “should have known” about the potential that the arms would be used in the commission of an atrocity crime, e.g. situations where ongoing abuses are widely reported. As this proposal was rejected, the reach of this Article is likely coterminous with the knowledge requirement in Article 16 of the Draft Articles of State Responsibility, namely that the state knew or must have known given the nature of the underlying offense. Given that Article 6 only applies to certain conventional arms and a limited number of internationally wrongful acts, it does not significantly expand state responsibility beyond that already reflected in Article 16.\(^\text{129}\)

ii. Duty to Conduct a Risk Assessment

Article 7 of the ATT requires an exporting state party to conduct an objective and non-discriminatory evaluation to determine whether there is an “overriding risk” of listed negative consequences.\(^\text{130}\) The negative consequences include “the potential” that the arms or items “would contribute to undermine peace and security” or “could be used to commit or facilitate” a serious violation of international humanitarian law, a serious violation of international human rights law, or an act constituting an offence under international instruments relating to terrorism or to transnational organized crime to which the exporting state is a party.\(^\text{131}\) This threshold of risk is lower than the risk required in Article 6, as it is enough that there be potential and that facilitation is sufficient.

After considering this risk, state parties must determine whether these risks can be overcome with mitigation measures. State parties may also


\(^{126}\) Id. at art. 1.

\(^{127}\) Id. at art. 6(1)-(3).

\(^{128}\) For state parties’ declarations and reservations, see ATT, supra note 126. Interpretative declarations made by Lichtenstein (16 December 2014) and Switzerland (30 January 2015) upon ratification of the ATT (emphasis added).

\(^{129}\) ATT, supra note 126, at art. 2(1) limits the conventional arms to certain categories.

\(^{130}\) Id. at art. 7(3).

\(^{131}\) Id. at art. 7(1).
request end-use or end-user documentation, which an importing state party is required to provide.\footnote{132}{Id. at art. 8(1).} In analyzing mitigation measures and end-use documentation, states are additionally required to assess the “risk of diversion” of the export, but this is an independent assessment that does not affect the balancing test required in Article 7.\footnote{133}{Id. at art. 11(2).}

After assessing whether there is a potential that the arms transfer would either contribute to, commit, or facilitate violations of international humanitarian law or human rights laws listed in Article 7 and, assessing any mitigation measures, the transferor state must conduct an objective and non-discriminatory assessment to determine whether there is an overriding risk of whether the listed violations would occur.

iii. Status of Ratification

Over 100 states have ratified the Treaty. However, the United States, Russia, and China—three of the largest major global arms suppliers—have not. Within the Middle East and North Africa, only Lebanon has ratified the Treaty. The U.A.E. and Bahrain have signed but not ratified the Treaty. While this is unlikely to change in the short term, the widespread acceptance of the Treaty may nonetheless encourage states not party to the ATT to adopt more robust domestic controls.

While the United States originally signed the Treaty, it was never ratified. Subsequently, the United States withdrew its signature. As the largest arms supplier in the world, the United States decision to withdraw its signature from the Treaty sent a negative signal.\footnote{134}{Given that U.S. law prohibits the transfer of certain defense articles and services to countries that have misused such articles and services in the past, or that have a consistent pattern of abuses, ratifying the Treaty would not require any change in U.S. law. The U.S. also maintains control lists for both military exports and the exports of dual-use items and publicly discloses certain information on exports of defense articles and services. See 22 U.S.C. § 2304, supra note 76, Eligibility for Defense Services or Defense Articles 22 U.S.C. § 2753 (2014). See also ABA CTR. FOR HUM. RTS., supra note 76, at 4, 10.}

Universal ratification of the Treaty would arguably serve the interests of states not party to the ATT by leveling the playing field for all manufacturers. It would also reduce the risk that manufacturers would be held criminally liable for aiding and abetting atrocities committed with their weapons.

States in the Middle East have adopted export control regimes in an apparent effort to encourage sales from global suppliers. After the United Arab Emirates was identified as a major transshipment point for nuclear-related materials imported into Iran, it amended its laws to increase oversight of the import and export of defense articles. Global suppliers may be able to encourage the adoption and implementation of domestic legislation by conditioning sales on the enactment and enforcement of such a regime. See Annex D for further discussion of U.S. efforts to encourage the U.A.E. to adopt stronger controls.


\footnote{133}{Given that U.S. law prohibits the transfer of certain defense articles and services to countries that have misused such articles and services in the past, or that have a consistent pattern of abuses, ratifying the Treaty would not require any change in U.S. law. The U.S. also maintains control lists for both military exports and the exports of dual-use items and publicly discloses certain information on exports of defense articles and services. See 22 U.S.C. § 2304, supra note 76, Eligibility for Defense Services or Defense Articles 22 U.S.C. § 2753 (2014). See also ABA CTR. FOR HUM. RTS., supra note 76, at 4, 10.}

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\footnote{136}{See 22 U.S.C. § 2304, supra note 76, Eligibility for Defense Services or Defense Articles 22 U.S.C. § 2753 (2014). See also ABA CTR. FOR HUM. RTS., supra note 76, at 4, 10.}
B. Analysis

The term “overriding risk” has been the subject of much debate. The terms “likely” or “substantial” risk were included and subsequently changed in previous drafts, suggesting that it is not the nature of the risk, but the balance of the risk as compared to any advantages associated with the transfers that should be assessed. In practice, this distinction may not make any difference, as any conduct posing a clear risk of serious human rights or humanitarian law violations is unlikely to serve any legitimate military objective that would override the risk.

The European Council Common Position concerning exports of military technology and equipment requires state parties to deny an export license if there is a “clear risk” that the military technology might be used in the commission of serious violations of international humanitarian law. During the negotiations for the ATT, France and the United Kingdom interpreted the Common Position to be in line with Amnesty International’s Golden Rule, which states that no arms transfers will be approved if there is a substantial risk that the arms could be used to commit or facilitate serious violations of international humanitarian law or international human rights. Further, New Zealand, Lichtenstein, and Switzerland all have interpreted “overriding risk” progressively to mean either substantial or likely.

A review of reports prepared by state parties to the Treaty indicate that most have adopted export control legislation that includes human rights as one of several factors to be assessed when making an export decision, but few have adopted clear redlines for rejecting exports. In practice, while some states have monitoring regimes in place to detect diversion, most have not established the capacity to monitor whether the intended user utilizes defense articles in a manner consistent with relevant legal requirements. Though the United States conditions sales on compliance with end-use agreements, in practice this provision is rarely enforced. Annex D summarizes the key components of the export control regimes of the main global arms exporters.

One notable exception is Germany, which has prohibited sales to certain high-risk areas. In February 2019, a German court convicted employees of German arms manufacturer, Heckler and Koch, and fined the company for exporting assault rifles to Mexican security forces without approval from German authorities. At the time, Germany prohibited exports of such arms to certain states in Mexico that it considered high risk. The weapons were reportedly used in a high-profile case concerning the forced disappearance of forty-three students by local police.

141 See interpretative declarations made upon ratification by Lichtenstein (Dec. 16, 2014), Switzerland (Jan. 30, 2015), and New Zealand (Sept. 2, 2014).
142 See Vestner, supra note 33, at 7–13.
143 For a discussion of the United States’ and the United Kingdom’s end-use monitoring in Yemen, see Annex C.
144 Id.
Several states, including India and China, have argued for a blanket ban on arming non-state actors. The United States has historically opposed such a ban. While there is not currently an international consensus regarding the inadvisability of arming non-state armed groups, due in part to difference in opinion about the legitimacy of supporting armed opposition to undemocratic regimes, this negotiating history may indicate growing recognition of the inherent challenges of controlling non-state organized armed groups. If so, future discussions might focus on prohibiting sales to certain non-state armed groups that fail to demonstrate the will or ability to abide by international humanitarian law.

During negotiations, a number of states objected to the creation of a secretariat charged with overseeing implementation of the Treaty. As a result, the final Treaty does not create such a body. While there may not yet be a consensus on the need for such a body to oversee arms transfers generally, a monitoring mechanism concerning the transfer of small arms and ammunition into conflict-affected areas may be particularly crucial to efforts to stem civilian casualties. Demand for small arms and spare parts fuel diversion from licit to illicit markets. However, existing oversight mechanisms typically focus on the illicit market.

The U.N. Office for the Coordination of Humanitarian Affairs has also recommended greater oversight of sanctions compliance as a means to reduce civilian casualties. Non-governmental organizations that monitor the flow of armaments into conflict zones have noted that key supplier states often refuse to share information necessary to trace the source of conflict armaments. While an international tracing mechanism exists to facilitate information sharing between states, lack of political will impedes the impact of such efforts.

As discussed in the annexes on Syria and Yemen, the need for such a body is also demonstrated by the fact that several fact-finding bodies have been established on an ad hoc basis to investigate allegations of violations of international law in ongoing conflict. Such temporary bodies lack the capacity to retain institutional knowledge and lessons learned across different conflicts. Charging an existing body with developing and maintaining these capabilities, or creating a new body to undertake this responsibility, would ensure retention of these capabilities. Such a body could also help sponsor states fulfill their obligations to conduct risk assessments and investigate allegations of misconduct by proxies, and thereby reduce the need for each state to develop these capabilities.

150 Holtom, supra note 149. See also President Obama, Remarks at G20 Press Conference, November 16, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/11/16/remarks-president-obama-g20-press-conference-november-16-2014 (“And one of those principles is, is that you don’t invade other countries or finance proxies and support them in ways that break up a country that has mechanisms for democratic elections.”).
LEGAL FINDINGS &

RECOMMENDATIONS

State parties to the ATT must meet their public reporting obligations by submitting complete and accurate information in a timely manner. They must also ensure that their domestic laws establish clear parameters for arms transfers, including a prohibition on the transfer of defense articles or services where they would be used in serious violations of international law. States that have not ratified the treaty should do so. All states should:

1. condition sales to other states on the implementation of effective domestic control regimes; and
2. develop the capacity to conduct monitoring of the end use of defense articles and services.

Additionally, the international community should institute a monitoring and reporting mechanism to ensure compliance with relevant sanctions regimes and treaty obligations concerning the flow of defense articles and services, particularly ammunition, into armed conflicts.

TRANSPARENCY OBLIGATIONS

State parties to the Arms Trade Treaty are required, under Article 13(3), to submit an annual report with information “concerning authorized or actual exports and imports of conventional arms covered under Article 2(1)” made in the preceding year. The treaty does allow for reports to exclude “commercially sensitive or national security information.” The Arms Trade Treaty also commits countries to create an “effective and transparent national control system” for the transfer of conventional arms. In 2018, only thirty-six of eighty-nine countries obligated to submit annual reporting data for 2017 had done so by the reporting deadline. However, fifty-eight States Parties have now submitted their 2017 reports.

European Union members are bound by the European Council’s Common Position on exports of military technology and equipment, which commits them “to strengthen the exchange of relevant information with a view to achieving greater transparency” around the transfer of military technologies and equipment. They also must annually publish a national report and contribute to a yearly EU-wide report on transfers of military technologies and equipment.

The United Nations maintains a voluntary United Nations Register of Conventional Arms (UNROCA)—an annual reporting mechanism through which governments share information on weapons transferred during the previous year. The U.N. General Assembly has adopted resolutions calling upon U.N. Member States to provide data annually to the Register “with a

157 2008 O.J. (L 335/99), supra note 140, at ¶ 3
view to achieving universal participation.”

Parties to the Arms Trade Treaty may submit their UNROCA submissions to satisfy the Treaty’s reporting requirement.

Significant gaps in reporting remain a serious issue. Looking at 2017 and 2018 data, submissions by the United States and Russia appear incomplete (for example, Russian submissions list no transfers to Syria; U.S. submissions do not list any imports despite other nations asserting that they exported systems to the U.S.) and China did not make a submission. Major arms exporters—including Russia, China, France, Italy, Israel, and the United States—have a spotty history of reporting that includes missed reports, delays, and inaccurate information.

The Wassenaar Arrangement, a voluntary multilateral export control regime established in 1996, calls on its members states to voluntarily exchange information and notifications regarding their activities relating to export of armaments identified in the Arrangement’s control lists. It states that members “will exchange, on a voluntary basis, information that will enhance transparency, will lead to discussions among all Participating States on arms transfers, as well as on sensitive dual-use goods and technologies, and will assist in developing common understandings of the risks associated with the transfer of these items.”

In practice, the forty-two member nations—which include the United States and Russia—exchange information about covered transfers to non-Wassenaar members identified according to eight broad categories: battle tanks, armored fighting vehicles, large-caliber artillery, military aircraft, military helicopters, warships, missiles or missile systems, and small arms and light weapons.

The International Aid Transparency Initiative (IATI) was launched at the Third High Level Forum on Aid Effectiveness in Accra, Ghana in September 2008. IATI is a global initiative that invites governments, multilateral institutions, and other stakeholders to publish information about their foreign aid activities in order to improve the transparency of resources flowing into developing countries. Currently, over ninety nations are members of IATI, including major arms exporters (the United States, the United Kingdom, and France) and some nations in the region (Lebanon, Somalia, Syria, and Yemen). Participation is voluntary, and nations have reached different interpretations about their obligations to provide information about armaments transfers and military capacity-building under the Initiative.

RECOMMENDATIONS

States should commit to improving ATT and UNROCA reporting by:

1. supplying complete and timely information on both exports and imports; and

2. including data on small arms and light weapons and defense services (including military advisory and armed personal security) in UNROCA reporting.

States should also publicly disclose information about annual military budgets, particularly with regards to the arms trade.

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159 Id. at ¶ 2.
LEGAL REQUIREMENTS

Sponsors may not provide support where it is likely and foreseeable that such assistance would be used in the commission of internationally wrongful acts. States may not provide assistance that could be used in internationally wrongful acts where the recipient has committed gross or systematic violations of peremptory norms, including the basic rules of international humanitarian law, unless those responsible for the violations have been held accountable. Before providing assistance to a party to a conflict, sponsors must assess whether the proposed recipient is willing and able to comply with its legal obligations under international humanitarian law. States may employ mitigation measures—such as training and vetting—to reduce the risk that their assistance will be used in internationally wrongful acts, but they may not continue to provide assistance in the knowledge that the assistance is being misused and the mitigation measures are ineffective.

States are required to investigate and prosecute violations of the Geneva Conventions, the Convention Against Torture, and relevant human rights treaties. Sponsor states may not encourage or aid and abet violations of international humanitarian law and must independently investigate credible allegations that any assistance provided by the sponsor contributed to serious violations of international humanitarian law. States party to the ATT may not transfer arms if they know that such arms would be used in atrocity crimes.
GOOD PRACTICES

To ensure compliance with their legal obligations, states should:

RISK ASSESSMENT AND REDLINES

1. Assess the risk, prior to the provision of assistance, that the support will contribute to civilian casualties or make it more difficult to resolve the underlying conflict. Redlines should be established to ensure compliance with the sponsor’s legal obligations, especially where the proposed recipient has a past record of misconduct. Results of the assessments should inform the formulation of mitigation measures and controls designed to address identified risks. The assessments should evaluate, inter alia, whether the proposed recipients:

   - Share the same strategic goals as the sponsor state;
   - Are likely to achieve these goals;
   - Are willing and able to exert command and control over their members and comply with their legal obligations;
   - Have the ability to investigate allegations of misconduct and agree to cooperate in investigations by independent third-parties; and
   - Have a past record of diversion of weapons to unauthorized end-users.

2. Develop mitigation measures to address any risks identified, including a determination concerning the likelihood that mitigation measures will effectively address these risks. The effectiveness of mitigation measures should be continually assessed and assistance should be suspended if the mitigation measures prove to be ineffective. In particular, mitigation measures such as training, vetting, and assurances should be evaluated based on the following:

TRAINING

Sponsors should train proposed recipients on the use of arms prior to their transfer if they have reason to know that the proposed recipient has not had adequate training to ensure use of the arms in a manner that complies with international law. States should assess whether such training is likely to be implemented by examining, inter alia, whether the recipient intentionally engages in internationally wrongful acts, including systematic or gross violations.

VETTING

Individuals or units receiving assistance should be vetted but, given the difficulty of comprehensively collecting information on violations, such vetting should be supplemented with a broader assessment of the recipient’s record of compliance with the law to ascertain whether there is a pattern of misconduct.

ASSURANCES

Sponsors should make clear the conditions for ongoing assistance, including compliance with the law, but should not rely on assurances from those with a past record of not complying with assurances.

3. Only provide material support to non-state armed groups where the groups are essential to achieving legitimate self-defense objectives and the groups will be amenable to demobilizing or integrating into the armed forces of the state at the end of hostilities.
OVERSIGHT

4 Condition tranches of assistance upon compliance with international law.

5 Continually assess the recipient’s compliance with the law and the effectiveness of mitigation measures.

6 Observe the good practices identified by the Montreux Document concerning security contractors.

7 Subject the export of defense articles and services, including the provision of armed security personnel, to a licensing and registration requirement pursuant to a national system of export controls.

DUTY TO INVESTIGATE

8 Ensure that their contractors and any other individuals under their effective control can be held criminally accountable under the domestic jurisdiction of the host country or under the domestic jurisdiction of the deploying/sponsor country.

9 Condition assistance on the recipient’s cooperation in independent, third-party investigations of allegations of misconduct if the recipient has a past record of failing to conduct an impartial investigation or obstructing investigations into allegations of misconduct.

10 Provide civil remedies for victims of serious violations committed by proxies and ensure judicial review of the sponsor’s compliance with relevant legal obligations.
11 Ratify the Arms Trade Treaty if they have not done so already.

12 Conduct monitoring of the end-use of exported defense articles and services to ensure that such articles and services have not been diverted to unauthorized end-users or used in a manner that violates relevant legal obligations.

13 Condition sales to other states on the implementation of effective domestic control regimes and proper end-use.

14 Commit to improving public reporting by:
   • supplying complete and timely information on both exports and imports for the purpose of UNROCA and ATT reporting; and
   • including data on small arms, light weapons, and defense services (including military advisory and armed personal security) in UNROCA reporting.

15 Support efforts by multilateral bodies to establish a standing investigative body with the capacity to trace the source of defense articles and services used in armed conflicts and determine whether such articles or services have been used in an unlawful manner.
market in Sana’a, Yemen prior to the ongoing conflict that has resulted in a famine threatening over 10 million people.
ANNEXES

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ANNEX A:
Oversight of Non-State Actors — U.S. Contractors in Iraq

The United States has an oversight regime in place for security contractors. Nonetheless, it is inconsistent and significant gaps remain. In the wake of the torture of Iraqi detainees in the Abu Ghraib, the United States amended the Military Extraterritorial Jurisdiction Act (MEJA) to extend its criminal jurisdiction to all federal contractors who were directly supporting Defense Department missions.\(^\text{162}\) Previously, only Defense Department contractors had been subject to MEJA. The amended law was later used to prosecute Blackwater guards involved in the 2007 killing of Iraqi civilians in Nisour Square. After that incident, the United States further strengthened its oversight regime. It amended its Federal Acquisition Regulations to require the use of contractors that train and vet their employees.\(^\text{163}\)

Consistent with its treaty obligations, the United States has also established criminal jurisdiction over any U.S. person who commits a war crime or anyone who commits a war crime against any U.S. person anywhere in the world. The War Crimes Act penalizes war crimes when a member of the Armed Forces of the United States or a national of the United States commits a war crime or is victim of a war crime. The War Crimes Act prohibits murder, including the intentional killing or attempted killing of one or more persons taking no part in active hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.\(^\text{164}\)

While the War Crimes Act and various provisions of U.S. law provide extraterritorial jurisdiction in limited circumstances depending on the nature of the crime, the location of the crime and the contractual relationship with the United States, currently there is no U.S. law that establishes domestic criminal jurisdiction over all U.S. contractors, leaving a significant number of contractors beyond the scope of U.S. criminal jurisdiction for crimes that do no rise to the level of war crimes or are committed by non-U.S. nationals. Specifically, non-Defense Department security contractors who are not directly supporting Defense Department missions (for example, State Department contractors providing embassy security) are not covered. Attempts to adopt a Civilian Extraterritorial Jurisdiction Act to fill this gap have stalled.\(^\text{165}\)

The United States also maintains a licensing regime that currently requires contractors to obtain a license from the State Department before providing military training. However, the State Department has proposed an amendment to these regulations that would remove the requirement for a license for many of these services.\(^\text{166}\)


ANNEX B:
Russian Support for the Syrian Regime

The conflict between the Syrian Government of Bashar al-Assad and various rebel groups has been ongoing since 2011. Many foreign entities have supported the parties to the conflict. Russia and Iran have taken the side of the Syrian government, providing military, political, and financial support. Hezbollah and various Shia Muslim militias have also taken the side of the Syrian government. There have been allegations of international humanitarian law violations against several parties to the conflict. This annex will focus on Russian support of the Syrian regime to illustrate the challenges inherent in holding sponsors accountable for the conduct of proxies.

There are grounds for concern that Russia has continued to provide significant support to Syrian security forces notwithstanding credible reports of consistent violations of international law by those forces. Russian exports of arms to Syria continued after the war began, selling nearly $1 billion worth of arms in 2011, and included a complete upgrade of the Syrian air-defense system. In 2017, Russian military instructors reportedly trained over 1,000 troops near Damascus. In 2018, a U.S. commander testified that the Syrian regime “is highly dependent on billions of dollars in external Iranian and Russian economic and military support[.]"

The Syrian government has allegedly committed international humanitarian law violations that would, if committed by Russia, be considered international humanitarian law violations by Russia. The Syrian government reportedly used chemical weapons against civilians, conducted deliberate and indiscriminate attacks against civilians and civilian infrastructure, withheld humanitarian aid, employed starvation as a war tactic, and displaced civilians in contravention of international law.

There are grounds for concern that Russia contributed significantly to military actions that violated international humanitarian law. By providing training to troops near Damascus, Russia may have contributed to the deliberate starvation and relentless bombardments of eastern Ghouta, a suburb of Damascus with roughly 400,000 civilian residents. There are also allegations that the Syrian regime used Russian-supplied helicopters to drop chlorine-filled barrel bombs, in violation of international law. As discussed above, states may be responsible for the internationally wrongful acts of other states, regardless of whether they are directly involved, or provide assistance that is essential to the wrongful act. It is sufficient that the state significantly contributed to the wrongful act.

Lastly, Russia clearly knew of, or was willfully blind to, these credible reports. High-profile organizations, including U.N. entities, all reported several instances of violations of international

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168 Id.
175 Kimball, supra note 84; BBC, supra note 84.
humanitarian law. In 2012, U.S. Secretary of State, Hillary Clinton, challenged Russia’s decision to supply military helicopters to Syria on the grounds that they would likely be used in an unlawful manner. Further, Russia itself has protected Syria against claims of these types of violations in the U.N. Security Council, showing knowledge of highly credible reports. Russia had knowledge of these reports but continued to aid and assist Syria. It, therefore, appears that Russia could be found responsible for internationally wrongful acts committed by Syrian security forces.

177 Colum Lynch, Clinton Accuses Russia of Providing Syria Attacks Helicopters, WASH. POST (June 12, 2012).
ANNEX C:
U.S. and U.K. Support for the Saudi-led Coalition in Yemen

Yemen has been embroiled in an armed conflict since 2015 between the ousted regime of President Abd Rabbuh Mansur Hadi and Houthi insurgents. During the course of the conflict, both sides have been provided support from foreign sponsors. Iran has supported the Houthis, while a coalition of countries led by the Kingdom of Saudi Arabia have supported the Hadi regime. The United States and the United Kingdom have supported the Saudi-led coalition. The United Nations has documented violations of humanitarian law by both sides in the conflict. This annex will focus on U.S. and U.K. assistance to the Saudi-led coalition, which has been the subject of debate in the legislatures of both countries as well as the subject of litigation in the United Kingdom.

Both the United States and the United Kingdom have provided substantial assistance to Saudi Arabia, the United Arab Emirates, and other members of the coalition, including precision-guided munitions, that have been used in unlawful airstrikes over the course of several years. While both the United States and the United Kingdom have sought assurances from the Saudi-led coalition that their support will not be used in unlawful strikes and provided training to prevent such misuse of their equipment, unlawful strikes have continued after such training and assurances were rendered. Continued sales of such munitions would therefore likely give rise to state responsibility and violate Common Article 1 of the Geneva Conventions.

BACKGROUND

Both the United States and the United Kingdom have actual knowledge of credible reports of the use of U.S. and U.K. assistance in military operations in Yemen that—according to a United Nations panel of experts—almost certainly violate international humanitarian law. If these internationally wrongful acts had been committed by either the United States or the United Kingdom, they would have violated those countries obligations under international humanitarian law as well.

A U.N. Panel of Experts on Yemen, established pursuant to Security Council Resolution 2140 (2014), found “little evidence of any attempt by parties to the conflict to minimize civilian casualties.” In 2016, the Panel found that the unlawful strikes were at times “widespread and systematic.” In 2017, the Panel examined ten airstrikes—including eight involving precision-guided munitions—that “almost certain[ly]” did not meet international humanitarian law requirements. The disproportionate killing of civilians violates international humanitarian law, and, if committed by the United States or the United Kingdom, would be considered a violation of their obligations under international humanitarian law.

184 The conflict in Yemen is considered a non-international armed conflict. The United States has not ratified Additional Protocol II to the Geneva Conventions which regulates non-international armed conflicts. The U.K, the Kingdom of Saudi Arabia, and the United Arab Emirates have, but in some cases with reservations or declarations. However, the prohibition on disproportionate strikes is part of customary international humanitarian law binding on all states.
The United States has acknowledged that the Saudi-led coalition has caused civilian casualties in Yemen and has used U.S.-origin defense articles or services in violation of relevant end-use agreements, suggesting that they have been used against something other than legitimate military targets. Notwithstanding this acknowledgment, in May 2019, the United States authorized the sale of precision-guided munitions even after it became clear that previously provided precision-guided munitions had been used repeatedly in air strikes that were likely unlawful.

While the United States’ has not offered a legal justification for the sale with regards to its international law obligations, the Secretary of State has certified to the Congress that the Saudi-led coalition has taken demonstrable steps to reduce civilian casualties. This factual assertion has been challenged by a bipartisan group of Members of Congress, as well as former U.S. officials, who worked with members of the coalition to reduce civilian casualties. The Congress has passed several bills that would limit U.S. assistance to the coalition, including bills to restrict the sales of precision-guided munitions. However, these bills have been vetoed.

One possible explanation for the United States’ position is that it has adopted a narrow interpretation of principles of state responsibility that would not impose liability in the absence of specific intent to aid and abet unlawful activity. During the drafting of the Articles on State Responsibility, the United States took the position that state responsibility incurs only where: the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both aware that its assistance will be used for an unlawful purpose and intends its assistance to be so used; and (3) the assistance is clearly and unequivocally connected to the subsequent wrongful act.

As outlined in the section on Article 16, this position conflicts with the plain text of Article 16, which only requires knowledge of the circumstances, not specific intent to further a wrongful act. It further conflicts with Article 41, which also has no intent requirement for assistance to gross or systematic violations of peremptory norms, including violations of the basic rules of international humanitarian law.

This interpretation also arguably conflicts with U.S. law. Section 502B of the Foreign Assistance Act prohibits security assistance to governments that engage in a consistent pattern of gross violations of internationally recognized human rights and requires annual reporting on such violations—as well as war crimes—for the purpose of assessing eligibility for security assistance. The provision contains narrow exceptions based on a presidential waiver for assistance to certain law-enforcement entities and military training. The text of Section 502B indicates that the provision was enacted to ensure

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185 NDAA Certification, supra note 89 (stating that the Coalition has violated the Arms Export Control Act “with rare exception”). The Arms Export Control Act permits the use of U.S. origin defense articles and services for limited purposes, not including against other than “legitimate military targets.” Newton, supra note 31, at 18. It also prohibits the re-transfer of such articles without prior authorization. The Pompeo certification does not specify the nature of the violation of the AECA but mentions them in the context of a certification that the coalition was taking steps to reduce civilian casualties.


187 NDAA Certification, supra note 89.


192 Id.
U.S. adherence to the U.N. Charter. Section 3 of the Arms Export Control Act also prohibits sales of defense articles and services to countries that have committed “substantial violations” of end-use agreements that only permit the use of such equipment in a manner consistent with the U.N. Charter. This provision also has a presidential waiver. Both of these provisions are clearly implicated by the ongoing sale of weapons to the Saudi-led coalition. The President has not issued a waiver pursuant to either Act, nor would doing so absolve the United States of responsibility under international law.

The United States takes the position that Common Article 1 only requires the High Contracting Parties to ensure respect by its population. The ICRC notes that, notwithstanding this interpretation, the drafters adopted a broad formulation which has been upheld in subsequent practice. The United States has also rejected the ICRC’s position that Common Article 1 creates an affirmative obligation to prevent abuses by others.

While the exact contours of the affirmative obligation under Common Article 1 are disputed, there is less dispute that Common Article 1 imposes a duty not to aid and abet abuses, even in the absence of specific intent to further a wrongful act. The ICJ held in the Nicaragua case that the United States violated Common Article 1 based on the finding that the United States knew that its assistance to the contras was likely and foreseeable to contribute to abuses, notwithstanding claims by the United States that it did not intend to support such abuses and provided a manual to discourage such abuses. Pursuant to this standard, there are grounds for concern that the United States’ ongoing provision of assistance conflicts with its obligations under Common Article 1.

U.K. ASSISTANCE

Ongoing litigation in the United Kingdom has addressed the question of whether consistent reporting of serious violations of international humanitarian law in Yemen was sufficient to establish knowledge on the part of the United Kingdom that there was a “clear risk” that weapons provided by the Kingdom would be used to commit serious violations of international humanitarian law and therefore conflict with the European Council’s Common Position on Arms Exports. In 2017, the trial court upheld an administrative judgment that there was a risk but it was not clear. The court rested its opinion, in part, upon classified evidence and on the determination that the United Kingdom had gone to great lengths to encourage recipients of its weapons—including the Kingdom of Saudi Arabia—not to misuse them.

The decision was subsequently overturned on appeal. The Appellate Court ruled that the United Kingdom had an obligation to determine whether there had been an “historic pattern” of violations of humanitarian law in order to determine whether there was a clear risk of future violations.
According to the Court:

If the result of historic assessments was that violations were continuing despite all [mitigation] efforts, then that would unavoidably become a major consideration in looking at the “real risk” in the future. It would be likely to help determine whether Saudi Arabia had a genuine intent and, importantly, the capacity to live up to the commitments made.\(^{205}\)

In the meantime, the House of Lords Foreign Committee has found that there is a clear risk of misuse of U.K. weapons.\(^{206}\) In light of these developments, it is likely that further provision of similar assistance would incur responsibility under both Article 16 and Common Article 1.

\(^{205}\) Id. at ¶ 144.

ANNEX D:
Domestic Arms Control Laws and Policies in Key States

This annex describes domestic arms control laws and policies in several relevant states, including representative examples of major arms suppliers and regional states.

UNITED STATES

While not a party to the ATT, the United States has enforced laws that comply with its policy on arms sales and defense trade, a policy wherein “[e]ach proposed transfer is carefully assessed on a case-by-case basis, and approved only if found to further U.S. foreign policy and national security interests.” The Arms Export Control Act (AECA) is the “cornerstone of U.S. munitions export law,” and authorizes the President to control the exports and imports of defense articles and services; implement a registration and licensing scheme for manufacturers, exporters, and importers of designated defense articles; and establish penalties for violation of the statute, which includes a fine of up to $1,000,000 or imprisonment for up to twenty years for violation of the statute. The President also controls the review of the Munitions List, a compilation of items that warrant export controls. Additionally, the AECA exempts Canada from licensing requirements and authorizes the President to exempt other countries from licensing requirements if a bilateral agreement or defense trade cooperation treaty is concluded. The AECA allows the President to freeze assistance or sales provided under the Foreign Assistance Act of 1961 or the Food for Peace Act to less developed countries if the President discovers the countries are diverting those assets to military expenditures.

The AECA constrains the President’s power by requiring reports and certifications to Congress on military exports and by banning transactions with countries that are either supporting acts of international terrorism or not fully cooperating with the United States’ anti-terrorism efforts. A recent Second Circuit case involving an arms exporter who attempted to export defense articles without the required license upheld the constitutionality of the AECA. The Second Circuit ruled that the statute provides an adequate intelligible principle because it provides the President with general policy guidance: “furtherance of world peace and the security and foreign policy of the United States.”

RUSSIA

Russia is an important actor in international the arms export control sphere because it holds nuclear materials, weapons of mass destruction, and dual-use technology. The newly-emerged Russian
Federation saw many of the Soviet Union’s former clients disappear, including the former Warsaw Pact members and Iraq after 1991.\(^\text{217}\) It regained its economic footing by exploring new markets, including sales to a Chinese military that was massively expanding in the 1990s.\(^\text{218}\) There was no comprehensive export control law in Russia to regulate these sales before 1998.\(^\text{219}\) The Russian President made decisions on arms transfer policy and the government strictly controlled the import and export of arms, including approving the list of states to which the arms could be exported.\(^\text{220}\)

“On Export Control,” the first federal comprehensive arms export law passed in 1999, provided that export control lists should be drawn up by the President in consultation with the Parliament and industry representatives.\(^\text{221}\) This modification was thought to indicate a change in arms export control law because the President previously had sole discretion over the contents of these lists.\(^\text{222}\) There are two categories of control lists: the Equipment Control List and the State Control List.\(^\text{223}\) The former is the list of military products authorized for transfer abroad, which is drawn up on the basis of recommendations by the government and requires the President’s approval.\(^\text{224}\) The latter is the list of states to which the transfer of military products is authorized, which also requires the President’s approval.\(^\text{225}\) If the President so chooses, he may remove a country from this list as an authorized recipient of military weapons should he deem it “unsafe.”\(^\text{226}\)

The regulatory principles for the arms export industry were set by a 1998 federal law on “Military-Technical Cooperation with Foreign States,” known as the MTC.\(^\text{227}\) Only national negotiators, entities with state authorization to conduct foreign trade activities in the military sphere, can ship military items abroad.\(^\text{228}\) These negotiators must obtain a license every time they wish to export or import a specific item.\(^\text{229}\) Rosoboronexport, the state-controlled arms export enterprise, dominates the arms export market but has nominal competition from other authorized arms dealers.\(^\text{230}\) Rostec, a sprawling government-owned conglomerate, purchased Rosoboronexport in 2007.\(^\text{231}\)

A negotiator must obtain Presidential approval to conduct trade activities in the foreign military sphere and obtain a license from the Federal Service of Military-Technical Cooperation (FSMTC) to be able to export or import these items.\(^\text{232}\) The FSMTC operates under the authority of the Ministry of Defense and verifies whether the items to be exported are authorized as listed on the Equipment Control List.\(^\text{233}\) Further, the FSMTC approval process is entirely government-controlled, and the FSMTC determines whether to approve or deny the license application, taking into account end-users, the technology involved, and the item to be exported.\(^\text{234}\)


\(^{218}\) Id.

\(^{219}\) Zotkin et al., supra note 217, at 264.


\(^{221}\) Zotkin et al., supra note 217, at 264.

\(^{222}\) Id.

\(^{223}\) Id. at 269.

\(^{224}\) Id. at 271.

\(^{225}\) Id. at 271–72.

\(^{226}\) Id. at 271.

\(^{227}\) Id. at 268.

\(^{228}\) Id. at 268–69.

\(^{229}\) Id. at 269.

\(^{230}\) Id. at 280.


\(^{232}\) Zotkin et al., supra note 217, at 270.

\(^{233}\) Id.

\(^{234}\) Id. at 271.
export license include: (1) the item which the applicant wishes to export could be used to create weapons of mass destruction, (2) the importing country is not a “friendly country” according to the State Control List, or (3) the item which the applicant wishes to export is not authorized by the Equipment Control List.\footnote{Id. at 272.}

The government declares that only “official national defense and law-enforcement agencies of partner countries can be end consumers of the military goods supplied by” Rosoboronexport.\footnote{Status, ROSOBORONEXPORT, http://roe.ru/eng/rosoboronexport/status (last visited Oct. 18, 2018).} The Federal Service for Technical and Export Control (FSTEC) oversees the end-use of exported goods.\footnote{Igor S. Vishnevetsky, Regulatory and Legal Framework for Licensing in the Russian Federation and Mechanisms for Monitoring the End-Use, in 11 UNODA OCCASIONAL PAPERS: UNITED NATIONS SEMINAR ON IMPLEMENTING UN SECURITY COUNCIL RESOLUTION 1540 IN ASIA AND PACIFIC 121, 122 (2008).} The exporter is entitled to check whether the exported goods are used in compliance with the stated purposes under certain regulations or upon FSTEC request.\footnote{Id. at 126.} A request is submitted through the Ministry of Foreign Affairs, and if the Ministry and the FSTEC determine that the foreign importer violated its end-use obligations, the foreign importer can be included in the list of unreliable foreign countries to which export of items is restricted or banned.\footnote{Id.} The Russian government claims that this “watch list” is updated regularly.\footnote{Id.} Russian government passed a resolution on post-shipment verification in 2006, more formally requiring a follow-up check by the exporter that the items were received and used as intended in the receiving country.\footnote{Saferworld, Russia’s Impact on Global Security (April 2007), https://www.saferworld.org.uk/resources/publications/295-russias-impact-on-global-security.} Anyone who violates the laws governing the import or export of military materials is subject to civil, administrative, and criminal law sanctions.\footnote{Id.}

The Russian government declares that Rosoboronexport’s activities are in compliance with Russia’s commitments in the field of arms export control.\footnote{Arms Control and Proliferation Profile: Russia, ARMS CONTROL ASS’N (Oct. 2018), https://www.armscontrol.org/factsheets/russiaexport.} Russia has neither signed nor ratified the Arms Trade Treaty, but it is a member of other international arms trade treaties, including the Nuclear Suppliers Group, the Missile Technology Control Regime, and the Wassenaar Agreement.\footnote{Id.} Russia claims to adhere to the rules and control list of the Australia Group, an informal group of countries that works to harmonize export controls in order to prevent the spread of chemical and biological weapons, despite not being a member.\footnote{Id.}

**CHINA**

China has gradually created regulations that incorporate other countries’ export control policies and international standards in the past thirty years.\footnote{Chin-Hao Huang, FOREIGN & COMMON OFF. COUNTER-PROLIFERATION PROGRAMME, “Bridging the Gap”: Analysis of China’s Export Controls Against International Standards 4 (April 2012).} China adheres to three principles when exporting arms: the export (1) should enhance the self-defense capacity of the importing countries; (2) should not harm regional or international peace, security, and stability; and (3) should not interfere with the domestic affairs of the importing countries.\footnote{People’s Republic of China Foreign Trade Law, MINISTRY OF COM. OF CHINA (July 1, 2004), http://www.mofcom.gov.cn/article/swfg/swfgbf/201110/20111007350814.shtml.} The state may take any necessary measures to safeguard national security regarding the import and export of goods and technologies related to weapons, ammunition, or other military materials under Article 17 of the People’s Republic of
China's legislation on export control includes a licensing system and end-user or end-use certification. China requires the recipient government to commit to refrain from transferring arms imported from China to any third party without prior consent of the Chinese Government according to China’s Policy and Regulations on Arms Trade. The scope of the regulations are “basically identical” with international practices, but China is not a member of any international arms trade agreements.

China’s standards may be similar to those of the international community, but it has enforcement issues. The government’s ability to detect, investigate, and penalize parties that violate the regulations is underdeveloped. The weakness in investigative capabilities is apparent in their reactive approach, which mainly relies on intelligence data by the United States, United Kingdom, or the European Union. There were only a handful of publicly-made cases of export control violations in 2012. Officials are unwilling to pursue investigations against influential, state-owned enterprises, and there are problems with domestic intelligence gathering of possible violations.

China’s arms trade is largely an administrative matter, and governmental agencies control the exports conducted by authorized companies. The division of labor between the various agencies is not fully formalized, especially as it relates to risk assessment before authorizing exporters. Since this process is conducted privately by administrative agencies, the process itself and information about the process cannot be fully assessed by lay-people.

China’s “Regulations on the Administration of Arms Exports” was amended in 2002 to be in line with international supplier regime standards. The regulation is the only document accessible to the public, and it outlines the government’s licensing procedures and principles for arms transfers. Chinese officials state that the Office of Trade Military Products exists, but the agency is merely cosmetic because other agencies carry out its functions. The State Administration for Science, Technology and Industry for National Defense oversees the issuance of licenses in consultation with the General Armament Department. The Ministry of Commerce is responsible for granting licenses in other contexts, but it is limited to only enforcing transfer controls of small arms and light weapon exports. China’s regulations do not address end-use monitoring, and there are no specific regulations around the transporting the weapons. Shipping companies currently have discretion to select the transport route for weapons exports.

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248 Id.
250 Id.
252 Huang, supra note 247, at 14.
253 Id.
254 Id.
255 Id.
257 Id.
258 Id.
259 Id. at 22.
260 Id.
261 Id. at 23.
262 Id.
263 Id.
264 Id.
265 Id. at 25.
China has released a draft of a new export control law that establishes a unified export control system. The draft law contains a controlled item list and a license system for exporters that would build from existing lists. The licensing agency considers seven factors in the determination of issuing licenses, including the end-user, the end-use, international obligations, and external commitments. The draft law introduces new penalties against violators, which could help strengthen the illegal exporting of arms to countries such as Iran and North Korea.

**GERMANY**

Despite its historical status as a major arms exporter, Germany demonstrated commitment to monitoring and controlling the trade of armed weapons earlier and more stringently than many other countries, including others in Europe. The War Weapons Control Act, which was passed in 1961 and subsequently amended in 1991 and 2002, applies to all German citizens, companies, and organizations as well as any non-German individual, company, or organization conducting business in or transporting weapons through Germany. Key provisions include the requirement of a federal license to produce, assume “actual control of,” transport weapons inside or outside of German federal territory, broker, and conclude contracts for the sale of war weapons.

The German government does not automatically grant licenses, and it reserves the right to revoke a license at any time. Specific criteria for potential denial of a license include: (1) there are reasons to assume that granting the license would go against Germany’s interests in maintaining favorable relations with other countries; or (2) the individual who transfers the actual control of war weapons to or acquires such control from the carrier is not a German national. The reasons for mandatory denial of the license under the War Weapons Control Act include the potential that the weapons would be used for a war of international aggression, the license would violate Germany’s international obligations, or the applicant failed to satisfy the requirement of reliability.

The statute outlines licensee duties and reporting requirements. Duties include keeping registers of war weapons after the weapons leave licensee possession, copies of the licenses to present to officials, reports on stock of war weapons, or reports on the weapons to the relevant authority upon finding arms or relinquished control of weapons. Germany also prohibits the production or trade of nuclear weapons, biochemical weapons and anti-personnel mines. Violations of the law can result in civil sanctions and penal actions. Germany is a party to the ATT, and it has been aggressively promoting a system of post shipment controls to the EU and NATO allies. The regulations in place in Germany to mechanize both the ATT

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266 Id.
268 Id.
270 China Trade Controls, *supra* note 268.
272 Weapons Control Act, §§ 2–4 (Ger.).
274 Weapons Control Act, § 6.
275 Id.
276 Weapons Control Act, §§ 17–19.
277 Id.
278 Id.
and its own domestic law are: the German Regulation Implementing the Foreign Trade and Payments Act (Außenwirtschaftsverordnung, or AWV); and the German Export List (Ausfuhrliste, or AL) as an annex to AWV. Section 1(2) AWG explicitly stipulates that European law on foreign trade takes precedence over respective national legislation. Germany’s legislature is currently considering a bill to ban weapons exports to Turkey, Saudi Arabia, and the U.A.E. due to their contributions to the military conflict in Yemen and Syria.

FRANCE

France recently overhauled their domestic arms control regime in an attempt to simplify and clarify the system. France divided the law by creating two separate regimes: one for exports of military technology and equipment within the EU, and the other for exports outside of the EU. Three new and important provisions are: (1) a single license that covers the export operation from negotiation to leaving France, (2) general licenses, and (3) the establishment of an ex-post control system. France requires any legal entity or individual intending to produce, trade, or engage in brokering of conventional weapons or other related defense products must receive a “production, trading, or brokering license” (AFCI) from the Ministry of Defense for a maximum renewable period of five years.

An “export license” is necessary for arms exports to non-EU nations, and a “transfer license” is required for defense-related products to EU members. The criteria for these licenses include the criteria included in the Wassenaar agreement and the European Council Common Position 2008/944/CFSP. There are three categories of export/transfer licenses: (1) individual licenses authorizing the shipment of goods to one recipient; (2) global licenses authorizing the shipment of goods to one or more recipients for a specified period of time, with no quantity or amount restrictions; and (3) general licenses authorizing transfer of materials to recipients specified by the government. Manufacturers must obtain commitments from their client regarding end-use and non-re-export to third parties in order to receive a license. The Interministerial Commission for the Study of Military Equipment Exports (CIEEMG) assesses each export license application. It assesses a license based on the potential consequences of the goods with regard to regional peace and security, the practices of the end-user country with regard to human rights, and the risk of diversion to non-authorized end-users. Guidelines are promulgated every year that incorporate these criteria, which are approved by the political authorities because decisions on arms exports implicate foreign policy concerns that fall in the political domain.

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280 Id.
281 Id.
284 Id.
285 Id.
287 Id.
288 Ministry of Def., supra note 284, at 13.
289 Id.
290 Id. at 14.
291 Id. at 13.
292 Id.
293 Id. at 20.
The French government has imposed several ex-post control measures to verify that arms shipment operations match the authorizations that were granted. These include the adoption of the “Best Practices to Prevent Destabilizing Transfers of Small Arms and Light Weapons through Air Transport” and the “Code of Conduct to Combat Illegal Flows of Conventional Arms by Sea.” There are two specific actions taken by Ministry of Defense personnel: (1) control of export declaration documents and contracts and (2) checks that are carried out on the exporting country’s premises. The Ministry of Defense annually compiles a list of companies that will be subject to such on-site ex-post controls. Companies are required to send biannual reports to the Ministry of Defense listing the equipment orders received and the deliveries made.

THE EUROPEAN UNION

The EU passed a regulation in 2009 that effectively governs all listed dual-use items. Dual-use items are products that can be used for military and civil purposes, including goods “which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.”

There are four major export control regimes. First, the Australia Group (AG) is an informal commitment that countries will ensure that exports do not contribute to the development of chemical and biological weapons by adapting national control measures. The second export control regime is the Wassenaar Arrangement on Export Controls of Conventional Arms and Dual Use Goods and Technologies, an intergovernmental arrangement to ensure that transfers of conventional arms and dual-use items do not contribute to the development of military capabilities or undermine international peace and security. The Missile Technology Control Regime is the third regime, and it is an informal association of states that facilitates delivery of weapons of mass destruction (WMD) and coordinates the participating states’ national licensing efforts. Fourth, the Nuclear Suppliers Group is a group of countries supplying nuclear weapons who aim to ensure the non-proliferation of nuclear weapons by using two sets of guidelines for nuclear-related exports: the Treaty on the Non-Proliferation of Nuclear Weapons and regional agreements.

The EU regime of export control of dual-use items involves the Regulation (EC) No. 428/2009 and the Council Joint Action 2000/401/CFSR. The regulation binds and applies to all member states, but the Joint Action must be transposed into the member states’ domestic legislations. The regulation establishes common rules and a list of controlled items common throughout the EU, but it gives member states discretion as to the adoption of policies for implementation of this regulatory scheme.

294 Id. at 15.
295 Ministry of Def., supra note 284.
296 Id. at 15.
297 Id. at 15–16.
298 Id. at 15.
299 Id.
300 2009 O.J. (L 428) art. 2(1).
302 Id.
303 Id. at 164–65.
304 Id. at 165.
305 Id.
307 Id.
308 Alavi, supra note 302, at 166.
There are four types of licenses under the regime:

- the Community General Export Authorization for non-EU transfers allows the transporting of dual-use items to certain destinations under specific conditions;
- the National General Export Authorizations issued by member states to exporters who are established in or residents of the authorizing state;
- the Global Export Authorizations cover several countries of destination or several end-users;
- individual licenses granted by national authorities to an exporter to cover exports of one or more dual-use items to an end-user in a non-EU country.309

The regulation includes a provision requiring authorization of unlisted items if the items could be used for the production and development of chemical, biological, or nuclear weapons.310 Article 25 of the regulation provides that the Commission shall review the member states’ implementation every three years and identify possible areas of reform.311

**UNITED ARAB EMIRATES**

**i. Laws in Place**

On August 19, 2007, the United Arab Emirates (U.A.E.) enacted a comprehensive export control law known as Federal Law No. 13 of 2007 (On the Commodities Subject to the Monitoring of Imports and Exports).312 Among other things, Federal Law No. 13, as summarized by the U.A.E. government:

- “Authorizes government bodies to restrict or ban the import, export, or re-export of goods [both nuclear-related and non-nuclear-related] deemed a threat to the U.A.E.’s national security, foreign policy, natural resources, public health and safety, or the environment.
- Bans the export or re-export of strategic goods, including arms and military hardware, chemical and biological materials, and dual-use items without a special license.
- Establishes a national committee with clear oversight and management responsibility for U.A.E. export control procedures. This committee has the ability to categorize goods and technologies as strategic and controlled, if they can be used for military purposes or in conventional weapons or weapons of mass destruction.
- Specifies penalties, up to imprisonment for one year and/or fines of over US $270,000.”313

Federal Law No. 13 was amended in September 2008.314 While the 2007 law and the 2008 amendment provide the broad foundation for an effective export control system, the U.A.E.’s legislature left the implementation of the law to a committee known as the Committee on Commodities Subject to Import and Export Control, which was established in 2009.315

Federal Law No. 13 is administered by the U.A.E. Export Control Executive Office (ECEO) (for non-nuclear-related items) and the U.A.E. Federal Authority for Nuclear Regulation (FANR) (for

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309 Id. at 169.
310 Id. at 170.
311 Id.
314 Id.
315 Id.; U.A.E. Transshipment Chronology, supra note 313.
nuclear-related items). FANR promulgated FANR-REG-09 (Regulation on the Export and Import Control of Nuclear Material, Nuclear-Related Items and Nuclear-Related-Dual-Use Items) to implement Federal Law No. 13.

While the U.A.E. is not a participant in any multilateral export control regime, its trade control program aligns with the control lists established by the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Agreement. As summarized by the U.S. Department of Commerce, Bureau of Industry and Security (BIS):

The United Arab Emirates requires authorization for imports and exports of all items subject to the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Wassenaar Arrangement. In addition, an authorization is required for the transit/transshipment of Nuclear Suppliers Group-controlled items. These requirements apply equally in the free trade zones.

ii. Reasons for Adoption

Until the fall of 2007, the U.A.E. did not possess a comprehensive export control law at the federal level. Without such a law, other states were able to exploit the U.A.E.—the home of the Arabian Gulf’s largest seaport and airport—by using it as a front for illegal nuclear proliferation. For example, the gap allowed Iran to station intermediaries in the U.A.E. to help it obtain goods and technologies that international sanctions prevented it from acquiring directly. The United States was long concerned that, without an effective export control law allowing for cooperation and assistance in the investigation and prosecution of international proliferation and smuggling schemes, the U.A.E. would undermine the efforts by the EU, United States, and other nations to deter and counter the unregulated and unlawful proliferation and diversion of arms, Chemical Biological and Nuclear (CBN) weapons equipment, technology, and delivery systems, and other dual-use items by Iran, North Korea, Syria, other nation states, and transnational criminal and terrorist organizations.

The U.A.E.’s enactment of Federal Law No. 13 appears to have been driven largely by that concern. The passage of the law reportedly followed at least two years of diplomatic pressure from the United States, which culminated in the Bush Administration’s February 2007 proposal to create a new category of countries known as “Destination of Diversion Countries” (reportedly to include the U.A.E.) to which the US would restrict the export of certain technologies and establish additional license requirements. Such a designation would have been embarrassing to the U.A.E. and would

320 Early, supra note 320, at 1.
322 Aaron Dunne, EU NON-PROLIFERATION CONSORTIUM NON-PROLIFERATION PAPERS, Strategic Trade Controls in the United Arab Emirates: Key Considerations for the European Union (March 2012), https://www.sipri.org/sites/default/files/EUNPC_no-12.pdf,
have damaged its efforts to solidify its reputation as a hub for global trade. Shortly after the proposal, the U.A.E. enacted Federal Law No. 13 and the United States backed away from its threat.\footnote{Implementation}{323}

## Implementation

While the U.A.E.’s export control system is still developing, the country appears to have undertaken significant efforts to implement and enforce it. According to the U.A.E., its authorities used Federal Law No. 13 to shut down forty companies allegedly involved in selling dual-use exports to Iran and other countries.\footnote{Implementation}{324} The U.A.E. also claims to have interdicted a number of ships suspected of carrying illicit cargo, including shipments bound for Iran that could have been used in the manufacture of nuclear weapons.\footnote{Implementation}{325}

Independent sources such as the Wisconsin Project and its Risk Report provide additional examples of U.A.E. enforcement of applicable laws and international sanctions, including through seizures, forfeitures, and prosecutions. For example, on April 26, 2017, an Iranian businessman was convicted and sentenced to ten years in prison in the U.A.E. for attempting to ship a dual-use power generator and other devices to Iran for use in its nuclear program.\footnote{Implementation}{326} On August 28, 2009, the U.A.E. seized a Bahamian-flagged vessel carrying ten containers of weapons and related items from North Korea to Iran.\footnote{Implementation}{327} According to a U.N. diplomat, that shipment was ordered by an Iranian company that previously was subject to international bans on importing weapons-related items.\footnote{Implementation}{328} Likewise, U.A.E. authorities reportedly seized a North Korean military ship bound for Iran in July 2009, impounded a Chinese shipment of titanium sheets bound for Iran in August 2008, and disrupted the import and re-export of 240 kilograms of zirconium in March 2008.\footnote{Implementation}{329}

In addition, the U.A.E. regularly cooperates in international investigations, particularly in those involving the United States. For example, on May 10, 2018, the U.S. Department of the Treasury’s Office of Foreign Asset Control designated nine Iranian entities for supporting a currency exchange network that transferred millions of U.S. dollars to the Islamic Revolution Guard Corps-Qods Force.\footnote{Implementation}{330} That action was taken jointly with the U.A.E.\footnote{Implementation}{331}

Neutral observers characterize the implementation of the U.A.E.’s export control law as mixed but improving.\footnote{Implementation}{332} As observers have noted, the U.A.E. is attempting to implement a very complicated system in a relatively short amount of time, a task made more challenging by the country’s location and the high volume of trade it conducts with sanctioned states.\footnote{Implementation}{333} While the U.A.E.’s export control program is far from fully mature, the country has made significant progress over the past decade in developing a control regime which is generally consistent with international standards and which allows the U.A.E. government to cooperate extensively with international investigations of the unlawful smuggling and diversion of arms and controlled dual-use items.

\footnote{Implementation}{324} Id.
\footnote{Implementation}{325} Strategic Trade Controls, supra note 323, at 10–11.
\footnote{Implementation}{326} Export Control and Combating Terror Financing, supra note 314.
\footnote{Implementation}{328} Id.
\footnote{Implementation}{329} Id.
\footnote{Implementation}{330} U.A.E. Transshipment Chronology, supra note 313.
\footnote{Implementation}{331} \textit{U.A.E. News Briefs}, supra note 327.
\footnote{Implementation}{332} Id.
\footnote{Implementation}{333} Strategic Trade Controls, supra note 323, at 10; Early, supra note 320, at 7.
LEBANON

Lebanon’s export control laws stand in stark contrast to those of the U.A.E. In Lebanon, export control is governed not by specific export control legislation but by the country’s overall Weapons and Ammunition Law (Legislative Decree No. 137, dated June 12, 1959) and Customs Law (Legislative Decree No. 4461, dated December 15, 2000).334

Under the Weapons and Ammunition Law, the Ministry of Economy and Trade imposes license requirements on the import and export of arms, ammunition, explosive material, and military items. Specifically, Article 17 of that law makes the import, export, and re-export of war material, weapons, ammunition, and related parts contingent on permission from the Lebanese government.335

Title Two, Chapter Two of the Customs Law (Restrictions Imposed on the Entry and Exit of Certain Types of Merchandise) also contains import and export restrictions. However, while that law defines “prohibited merchandise” and “restricted merchandise,” it does not list the specific goods that fall under each of those categories.336 Instead, Lebanon’s Customs website enumerates such items in lists available online in Arabic.337 According to the World Trade Organization, Lebanon prohibits the export of approximately seventy-six goods and imposes export licenses on approximately 171 goods.338

In United Nations filings, Lebanon claims not to produce or export small arms, not to be a transit country for trade in such arms, and to have taken sufficient measures to combat their illegal trade (including the enactment of the Weapons and Ammunition Law).339 Arms trafficking continues to be an issue in Lebanon despite some efforts to curb smuggling.340 Evidence of international cooperation is also lacking, although certain reports of successful prosecutions appear to reflect limited Lebanese assistance. For example, on December 12, 2008, Fawzi Assi was sentenced to ten years’ imprisonment in the United States for attempting to provide material support to Hezbollah.341 According to the United States, the individual attempted to board an airplane in an effort to illegally export night vision goggles, GPS modules, and a thermal imaging scanner destined for two men in Lebanon whom he believed to be members of Hezbollah.342 The individual was arrested in Lebanon by the FBI.343

Given Lebanon’s lack of a comprehensive, stand-alone export control law and its limited enforcement and cooperation efforts, it may be advisable for major supplier states to take steps to pressure the country to enact a comprehensive export control program, as the United States did to the U.A.E. in the mid-2000s. Failing that, there is a significant risk that weapons, munitions, and similar materials may pass undetected through Lebanon into the hands of militia and other groups engaged in indirect warfare.

336 Customs Law, Title Two, Chapter Two, Article 57.
340 See Matthew Levitt, Hezbollah’s Procurement Channels: Leveraging Criminal Networks and Partnering with Iran, 12 CTC Sentinel 13 (Mar. 2019); Weapons of the Islamic State, Conflict Armaments Research, (December 2017) 60.
342 Id.
343 Id.