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## TRACKING IHL VIOLATIONS THROUGH ARMS EXPORT IN THE CONTEXT OF THE RUSSIAN AGGRESSION AGAINST UKRAINE<sup>1</sup>

**Abstract.** The paper tracks challenges to litigating (direct and indirect) imports of military equipment to Russia and Russia's subsequent international humanitarian law of armed conflicts (IHL) violations committed in indiscriminate attacks in Ukraine. It asks whether arms export control is capable of preventing or mitigating the results of indiscriminate attacks in Ukraine. It is assumed that IHL compliance can be complemented by preventing military equipment from being delivered to recipients when there is a risk of serious IHL violations being committed with that equipment. By comparing arms transfers from Iran with other controversial arms exports, the paper examines if increased protection for IHL ensued by arms export control laws can remedy deficiencies in arms transfer decisions that do not account for IHL. If an answer is negative, corporate due diligence will perform a complementary role in respecting IHL when state authorisation for arms transfer fails to account for IHL.

**Keywords:** indiscriminate attacks, Russia, arms transfer, business, due diligence

## NARUSZENIA MIĘDZYNARODOWEGO PRAWA HUMANITARNEGO W ZAKRESIE EKSPORTU BRONI PODCZAS ROSYJSKIEJ AGRESJI PRZECIWKO UKRAINIE

**Streszczenie.** Artykuł prezentuje wyzwania związane ze sporami sądowymi dotyczącymi importu sprzętu wojskowego do Rosji oraz naruszeń przez Rosję międzynarodowego prawa humanitarnego dotyczącego konfliktów zbrojnych (MPHKZ). Praca weryfikuje, czy kontrola eksportu sprzętu wojskowego jest w stanie zapobiec nierozróżniającym atakom na Ukrainie. Zadaje pytanie, czy kontrola eksportu broni jest w stanie zapobiec masowym atakom na Ukrainie lub je złagodzić. Zakłada się, że uzupełnieniem zgodności z MPHKKZ może być zapobieganie dostarczaniu sprzętu wojskowego do odbiorców, gdy istnieje ryzyko popełnienia przez ten sprzęt poważnych naruszeń MPHKKZ i praw człowieka. Porównując transfery broni z Iranu z innymi transferami w artykule zbadano, czy zwiększona ochrona MPHKKZ wynikająca z przepisów dotyczących kontroli eksportu broni może stanowić remedium na transfery broni prowadzące do nierozróżniających

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ataków. W razie negatywnej odpowiedzi, standard *due diligence* pełniłby rolę uzupełniającą, gdy autoryzacja państwa na transfer broni nie uwzględnia MPHKZ.

**Słowa kluczowe:** ataki nierozróżniające, Rosja, transfer uzbrojenia, biznes, należyta staranność

## 1. INTRODUCTION

The full-scale Russian aggression against Ukraine on February 24<sup>th</sup>, 2022, has initiated broad discussions on the effectiveness of the international legal order to prevent and respond to violations of peremptory rules of international law. Even more tragic in terms of civilian harm and damage have been Russian military operations conducted in the territory of Ukraine, many of which amount to indiscriminate attacks. Russian missiles and munitions deployed to launch these attacks are reported to consist of microchips and microprocessors produced by foreign – including EU- and US-based – companies, such as STMicroelectronics, Intel, Thales, and Souriau (Bouissou 2023; Bilousova et al. 2023; Bilousova, Shapoval, Vlasiuk 2023). Despite sanctions being imposed on trade with the Russian Federation and increased arms export control laws, the supply of electronic components has continued.

Controversial arms exports have been widely researched, in particular concerning the Saudi-led invasion against Yemen in 2015 (Arms 2021; Auble 2022; David et al. 2019; ECCHR 2023; Group of Eminent International and Regional Experts on Yemen 2020; Aksenova, Bryk 2020). In 2019, several NGOs submitted a communication to the Office of the Prosecutor of the International Criminal Court (ICC) to investigate alleged war crimes committed by several European arms exporters who transferred weapons to Saudi-led coalition states, which were later used in indiscriminate attacks in Yemen (The Office of the Prosecutor of the ICC 2020, para. 35). However, as of November 2023, the subsequent reports of the Office of the Prosecutor remain silent on the topic. In the meantime, China, Venezuela, Iran, and North Korea, among others, cooperate with the Russian Federation in arms transfers.

This paper asks what paths to litigate arms transfers with a state allegedly involved in indiscriminate attacks exist. In a broader sweep of the military-industrial complex, the paper verifies if reports on indiscriminate attacks affect authorising states' and arms manufacturers' willingness to supply military equipment to the recipient (perpetrator) state and, therefore to question that arms transfers cease when the recipient state is involved in indiscriminate attacks.

The legal basis for assessing the legality of arms transfers from the disarmament law perspective is as follows: the Arms Trade Treaty of 2013 (*The Arms Trade Treaty* Adopted April 2<sup>nd</sup>, 2013, Entered into Force December 24<sup>th</sup>, 2014, 2013), the EU Common Position of 2008 (*Council Common Position 2008/944/CFSP of December 8<sup>th</sup>, 2008, Defining Common Rules Governing*

*Control of Exports of Military Technology and Equipment* 2008), both applicable to France and Italy but not to Iran, as well as the law on state responsibility (identified in Articles on State Responsibility for Internationally Wrongful Acts of 2001 – hereinafter ARSIWA), (*Articles on Responsibility of States for Internationally Wrongful Acts* 2001), and IHL applicable to every examined state as customary law.

There are several sources in which states register their arms transfers, such as the UN Register of Conventional Arms (UN General Assembly 1991), the Monitor of the Arms Trade Treaty (*The Arms Trade Treaty* Adopted April 2<sup>nd</sup>, 2013, Entered into Force December 24<sup>th</sup>, 2014, 2013), and the Wassenaar Arrangement (*Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* 1996). All of these registers meet participation and reliability of information challenges. In this paper, I have selected the SIPRI Trade Registers as a comprehensive collection of the statistical data on arms transfers related to actual deliveries of primary conventional weapons that use a trend-indicator value.<sup>2</sup> The number of arms transfers registered annually covers civil and military equipment uses. SIPRI Trade Registers were used to demonstrate the states that transferred significant amounts of weapons to the Russian Federation between the pre-annexation and pre-aggression periods of the 2010–2022 period. Data for 2023 has not been available yet. These states are as follows: China (transferring ship engines that were ordered after Germany imposed arms embargoes on the Russian Federation in response to the annexation of Crimea in 2014), the Czech Republic (with the last transfer in 2017), France (last transfer in 2013), Iran (transferring armed unmanned aerial vehicles, including Shahed-136, that were bought for use against Ukraine), Israel (last transfer in 2010), Italy (last transfer in 2015), Ukraine (last transfer in 2014 after Ukraine stopped exports to the Russian Federation that year), the United States (transferring vehicle engines for Taifun – produced in the Russian Federation as KamAZ), as well as unknown supplier (Ukrainian merchant ship sold to Turkish company, resold to a UK company and bought by Russian navy via Mongolian and/or Russian company for transport of military equipment to Syria). The final results concerning the number of transfers are affected by the post-COVID consequences, since any technology transfer to the Russian Federation was impacted by lower production in times of the COVID-19 pandemic globally (Bilousova et al. 2023).

The paper uses three case studies to analyse the interconnection between arms transfers and indiscriminate attacks. The study has compared the legal consequences of Iranian arms transfers to the Russian Federation (that continue) with the cases litigating arms transfers in France and Italy to recipients engaged

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<sup>2</sup> This unit represents the transfer of military resources rather than the financial value of arms transfers. Since information is updated on a yearly basis, the available information can be reduced to a specific period of time (for example, a year).

in other armed conflicts, namely Israel and the Kingdom of Saudi Arabia (both of which allegedly involved indiscriminate attacks). The paper demonstrates obstacles in preventing indiscriminate attacks facilitated by the transfers. To demonstrate other available paths to litigating arms transfers, the paper occasionally refers to other cases in which arms manufacturers were successfully sentenced for aiding or abetting serious IHL or human rights violations. It must be noted that the additional cases refer to armed conflicts or internal disturbances that differ from the analysed case studies. Although this work is a critical review of the effects of arms transfers to states involved in armed conflicts, the selected case studies are only exemplary and do not create a consistent overview of the challenges in various jurisdictions to litigating all arms transfers that facilitated indiscriminate attacks.

The qualitative method has supported identifying and analysing the relevant social, political, and normative landscapes for addressing the consequences of challenging transfers to the Russian Federation by states and private corporate entities. These transfers only exemplify the whole spectrum of dimensions in which the defence industry contributes to IHL violations. The temporal and material grounds for decisions on arms transfers are as follows: the period from 2014 to 2022 (annexation of Crimea and war crimes committed in the eastern part of Ukraine), an act of aggression of February 24<sup>th</sup>, 2022, and the period from February 24<sup>th</sup>, 2022, until now. However, the accessible data on arms transfers is limited to the end of 2022, as reports are released annually. To ensure consistency of the analysis, the paper will only examine the responses to revelations on indiscriminate attacks (and neither the act of annexation of Crimea nor the act of aggression on February 24<sup>th</sup>, 2022).

Numerous reports have indicated that the Russian Federation has launched indiscriminate attacks on the territory of Ukraine, including with the use of the so-called kamikaze drones transferred from other states (O.A.H. Hathaway Ryan, Goodman 2022; Khan 2022; Sabbagh, Higgins, Lock 2022; Feldstein 2022; Koshiw 2022; Wintour 2022). For this paper, an *indiscriminate attack* refers to Art. 51(4) of the Additional Protocol I to the Geneva Conventions of 1949 and a corresponding customary rule (Henckaerts, Doswald-Beck 2005). It is understood as an attack not directed at a specific military objective, employing a method or means of combat which cannot be directed at a specific military objective, or employing a method or means of combat the effects of which cannot be limited as required by IHL; and consequently, is of nature to strike military objectives and civilians or civilian objects without distinction (*Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts*, Adopted June 8<sup>th</sup>, 1977, Entered into Force December 7<sup>th</sup>, 1978). With individual criminal responsibility, indiscriminate attacks amount to a war crime under art. 8(2)(b)(i) of the ICC Statute (*Rome Statute of the International Criminal Court*, Adopted July 17<sup>th</sup>, 1998, Entered into Force July 1<sup>st</sup>, 2002, 1998), to which Iran and the Russian Federation have not adhered.

## 2. CASE STUDIES OF ARMS SUPPLIES

### **Case 1. Iranian and West – manufactured components found on the crime scenes in Ukraine**

Iran has transferred unmanned aerial vehicles, including Shaheed-131, Shahed-136, and Qods Mohajer-6, to Russia, which were used to carry out indiscriminate attacks in Kyiv, Odesa, and Kharkiv. Iran claims that the drones were sent to Russia before the aggression. Russia later re-branded these loitering munitions to Geran-1 and -2 models. The USA imposed sanctions against Iranian state organs, private corporations, and individuals for transferring drones to Russia in the full knowledge that these weapons significantly contribute to the commission of war crimes. The sanctions included, among others, the Iranian entities involved in the production and ongoing transfer of unmanned aerial vehicles to Russia (Islamic Revolutionary Guards Corps Aerospace Force, Qods Aviation Industries and Shahed Aviation Industries Research Center). On November 16<sup>th</sup>, 2022, Ukraine recovered parts of the unmanned aerial vehicles Shahed 131/136, partly manufactured by the companies registered in several EU Member States, the USA, Japan, and Israel. The USA sanctioned the Iranian arms manufacturers, but no case was brought against the companies supplying Iranian manufacturers (Reuters 2022; Talley 2022; Blinken 2022; ‘Israeli Parts Found in Iranian Drones Used by Russia – WSJ’ 2022).

### **Case 2. Eurofard France – produced components found on the crime scene in the Gaza Strip**

On July 17<sup>th</sup>, 2014, a missile hit the roof of a civilian object in Gaza City, killing three children. In the accident, a missile, probably fired by a drone, hit a civilian object and killed three civilians. The missile fired by the drone was precise as it did not extend beyond an expressly framed area and was designed to kill a human being without destroying an object. A Hall effect sensor manufactured by Eurofard France (now Exxelia Technologies) was found on the ground. In France, a criminal case against the French arms manufacturer Exxelia Technologies was brought by a Palestinian family who lost three children in this attack launched by the Israeli armed forces. The family of victims, supported by an NGO, brought a criminal case against the arms manufacturer, claiming that the company supplied the Israeli armed forces with the full knowledge that it would be part of a missile and with knowledge of the risks that their military products might be used to commit war crimes. Thus, the complainants argued that Exxelia Technologies was complicit in a war crime or manslaughter. The criminal case was dismissed, but as of November 2023, the civil action for assisting in harm against the arms manufacturer is ongoing (Ayad 2023; Al Mezan Center for Human Rights 2016, 2023).

### Case 3. RWM Italia SpA – produced weapons found in Yemen

On October 8<sup>th</sup>, 2016, as the result of the airstrike on the village of Deir Al-Hajari, six civilians, including four children, were killed. The remnants at the scene of the attack were identified as produced by RWM Italia SpA and transferred to Saudi Arabia after the UN human rights bodies and NGOs had reported serious IHL violations committed by the Saudi-led coalition. In the case *EECHR et al. vs UAMA's officials and managers of RWM Italia S.p.A.*, the criminal case was launched against the Italian Ministry of Foreign Affairs officials and RWM Italia directors. It could have opened the way to addressing arms manufacturers' responsibility for complicity in potential war crimes. The Italian Minister of Defence stated that the bombs found on the ground were not Italian but contracted by an American company and subcontracted to the German Rheinmetall, who owned factories in Italy. Even though the Italian Court assessed that the Italian National Authority for the Export of Armament was undoubtedly aware of the possible use of the arms transferred by RWM Italia to Saudi Arabia in the conflict in Yemen, it continued to license arms transfers in violation of Art. 6 and 7 of the ATT (prohibiting arms transfers if the transferring state is aware of the possible use of arms against civilian targets). On March 15<sup>th</sup>, 2023, the case was dismissed on grounds of the lack of proof that the RWM Italia profited from the abuse of power.

In contrast, Italian officials had complied with the binding arms export laws. As of November 2023, an application was lodged before the European Court of Human Rights (ECtHR) alleging the violation of Article 2 of the ECHR by Italian authorities who were aware at the moment of authorisation that the continued transfer could be used in indiscriminate attacks by the recipient ('Italy: Indictment against Manager of Rheinmetall Subsidiary RWM Italia for Contributing to Potential War Crimes in Yemen Dismissed' 2023; ECCHR 2023; De Boni 2023). The European Centre has argued that the Italian court left the question of arms manufacturer unresolved and "entirely neglected that considerations on doubling the turnover of the company and granting employment were actively put forward, by both the company and Italian public officials, throughout the licensing decision-making process, as a justification to grant authorisation for the export of bombs" (ECCHR, Mwatana for Human Rights, and Rete Italiana Pace Disarmo 2023).

### 3. DISCUSSION

The analysed case studies demonstrated several ways in which victims of indiscriminate attacks can litigate arms transfer decisions. In both Italian and French cases, NGOs were involved in assisting victims of indiscriminate attacks. NGOs are, therefore, the first contact line for victims to seek advice on accessible

legal proceedings and remedies. Then, litigation usually initiates before municipal criminal courts as the cases of alleged war crimes. It is the first way to challenge state authorisation that allegedly aided or abetted war crimes. Should private entities be also concerned, the criminal case against individuals embraces state officials and representatives of arms manufacturers who were responsible for the particular arms transfer. Should corporate criminal responsibility exist in municipal law, the criminal case can be lodged directly against the arms manufacturer. However, both cases were dismissed because of insufficient evidence that the accused individuals/companies contributed to the indiscriminate attacks. Afterwards, if the civil procedure allowed, the alleged victims brought a civil action against the arms manufacturer for assisting in the harm occurring from the indiscriminate attack. If, however, criminal proceedings failed and the party exhausted all domestic proceedings, the application was lodged against a state before the ECtHR.

The legal assessment of Iranian (and indirect EU-based) transfers to the Russian Federation is different since there are two types of technology transfer relevant in the context of military equipment used in indiscriminate attacks by the Russian Federation. The first path, mostly sanctioned now, is through state authorisation and arms export control regimes, either through arms export or licensing weapons free of charge. States are gatekeepers of the arms trade, which leads to the arms sector being governed by multiple regulatory frameworks. These regimes differ among states, with some parties to the Arms Trade Treaty of 2013 or even further to the EU Common Position of 2008. The ATT of 2013 does apply to the UK, France, Germany, Italy, and, most recently, to China (from July 6<sup>th</sup>, 2020), but not to the USA, Turkiye, Iran, and the Russian Federation. Similarly, the EU Common Position of 2008 applies only to the EU Member States. Both documents require risk assessment before state authorisation is granted. The risk assessment embraces the facilitation of serious violations of IHL, such as indiscriminate attacks, or serious human rights violations. If a particular transaction presents these risks, the transfer shall be prohibited. Under art. 6 of the ATT, states shall deny transfer where there is a likelihood that IHL violations will occur. Similarly, under Criterion Two of the E.U. Common Position of 2008, EU Member States shall deny an export licence if there is a clear risk that the military equipment might be used in the commission of serious IHL violations. A state must assess the recipient's attitude towards the relevant IHL principles when making a licensing decision. Despite the wording differences between the two documents (Maletta 2021, 77–79), both require risk assessment in licensing decisions and, thus, open up a domestic path to challenge authorisations of transfers that facilitated serious IHL violations.

Valentina Azarova, Roy Isbister and Carlo Mazzoleni have presented case studies challenging licensing decisions concerning the intervention in Yemen. The authors noted that after the ATT entered into force, litigating arms transfer

decisions increased. In contrast, neither Iran nor the Russian Federation adhered to the ATT, which makes litigating transfers from Iran (even if Iran acts as an intermediary to the EU-based companies) to the Russian Federation unaccessible (Bryk, Sluiter 2022). Another contributing factor to the increased litigation was the amount of IHL violations committed by the Saudi-led coalition using the military equipment transferred from the state parties to the ATT and, when applicable, the EU Common Position of 2008. Victims of these violations would be left alone in the legal proceedings if the position of the civil society that assisted victims in litigating licensing decisions was not sufficiently solid and transnationally linked (Azarova, Isbister, Mazzoleni 2021).

Even though Iran is not a party to the ATT, Iran's responsibility for aiding and abetting as a state is considered from the perspective of Art. 16 and 41(2) of the Articles on Responsibility of States for Internationally Wrongful Acts of 2001, ARSIWA ('Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' 2001). Article 16 of the ARSIWA stipulates that a state aiding or abetting in the commission of an internationally wrongful act by another state is responsible, provided that it did the act with knowledge of the circumstances of the act and that the act would be internationally wrongful if committed by that state. The Commentary to art. 16 of the Articles has set forth the examples of aiding and abetting by essentially facilitating the wrongful act but limits aiding and abetting, firstly, to the relevant state organs being aware of the circumstances making the act wrongful. In the analysed case, Iranian organ authorising transfer of Shaheds to the Russian Federation should be considered from the acts between 2014 and 2022 related to annexation of Crimea, the act of aggression on February 24<sup>th</sup>, 2022, and then separately from indiscriminate attacks which amount to an internationally wrongful act on both transferring and recipient states, of course assuming that the prohibition of aggression and the prohibition of indiscriminate attacks (regulated in art. 51 of the Additional Protocol I of 1977) are the rules of customary law applicable to both states. The second limitation refers to the Iranian authorisation of the transfer of Shaheds being given to facilitate and actually facilitating the indiscriminate attacks. The link between facilitation and the commission of indiscriminate attacks is determined, among other things, by the mental element of the authorising organ that intended to facilitate the wrongful act by at least significantly (and not essentially) contributing to the indiscriminate attacks. The intent relates to foreseeable consequences of the authorisation and transfer (Goodman and Jackson 2016). The widespread reports of indiscriminate attacks being committed using Shaheds are indicative of the foreseeable consequences of Shahed's transfers to the Russian Federation by Iran.

With arms transfers assessed under the ATT (e.g. arms transfers by China after it had adhered to the ATT), Tomas Hamilton has argued that the knowledge test is not satisfied when the aider or abettor knows that indiscriminate attacks will be committed with the supplied weapons. In contrast, when indiscriminate attacks



are numerous or systematic, any arms transfer to the Russian Federation would suffice the knowledge test (Hamilton 2022a). In case of eventual ICJ proceedings, one cannot lose sight of the so-called Monetary Gold principle in this respect. The principle would prevent the ICJ's jurisdiction over the responsibility of a state if it had to decide on the lawfulness of the act of another state (in this case, the Russian Federation) that is absent or has not consented to it. The Monetary Gold principle does not exclude other lawful state responses to aiding or abetting in indiscriminate attacks, such as through diplomatic protests or sanctions (Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) 1954, 1954, 32; 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' 2001, 67).

The reports have suggested that little evidence can be brought to indicate that armed conflicts lead to reducing arms transfers, irrespective of the opposite indications found in the municipal law and policies of the exporting states. On the contrary, the outbreak of armed conflicts appears to contribute to an increased probability of arms transfers to areas affected by armed conflicts (Perlo-Freeman 2021, 5–6). *Andrew Feinstein* has pointed to a concept of the 'shadow world' in which arms manufacturers will sell military equipment irrespective of the recipient's profile and compliance with the law. It has even been suggested that a presumption of the ability to control where the arms go after the transfer and how they are used is a myth (Feinstein 2012; Holden et al. 2017).

Since the requirement of state authorisation depends on what is and is not classified as military equipment, another regime regulates dual-use technology. Since dual-use technologies that are imported to Russia by private corporate entities operating in the UK, the USA, Germany, the Netherlands, Japan, Israel, and China are challenging to regulate through export control laws (Bilousova et al. 2023, 5), there are calls for expanding sanctioned products to other goods (Bilousova, Shapoval, Vlasiuk 2023, 6). Direct and indirect arms exports to the Russian Federation constitute a challenge in a broader sweep of military and dual-use components. The Russian Federation relies heavily on foreign information and communication technologies to conduct its invasion on the territory of Ukraine, including through command and control, targeting, surveillance, reconnaissance, and targeting. Most imports of dual-use technologies into the Russian Federation come from the EU, the UK, and the USA. Since there is no clear separation between civil and military information and communication technologies exported to the Russian Federation, targeting these transfers solely through arms export control laws is not easy. Therefore, there is an increasing demand to sanction the transfer of these technologies, including by third parties. A proposed sanction coordination mechanism could be modelled in the Financial Action Task Force or the Wassenaar Arrangement (Azhniuk et al. 2022, 7). Components transferred from the EU, the UK, and the USA are found on the crime scenes of indiscriminate

attacks in Ukraine. Many of these components are argued to be transferred after 2014 despite the sanctions imposed on the Russian Federation (Conflict Armament Research 2023).

EU- and US-based producers of the electronic components found in Shaheed 131 and 136 have indirectly continued trade relations with the Russian Federation after February 24<sup>th</sup>, 2022, predominantly through intermediary states. It has been suggested that these trade patterns reflect money laundering practices by involving illegal networks, creating one-day shell companies, multiplying the number of suppliers, and engaging in fake transit operations. After the full-scale invasion, trade with the Russian Federation was reduced. However, at the end of 2022, the trade stabilised with the intensified trade passes through Kazakhstan, Kyrgyzstan, and Armenia, as well as by opening production facilities in China (the latter remains the first supplier of military and dual-use technologies to the Russian Federation). By producing components outside of the territory of a state that imposed sanctions against the Russian Federation, manufacturers are left alone to determine their compliance with sanctions. Along with delays in investigating violations of sanctions, the practices of transferring technology to the Russian Federation are only exemplary reasons behind the US- and EU-manufactured components being found on the crime scenes in Ukraine (Bilousova, Shapoval, Vlasiuk 2023, 5, 17–19).

The kamikaze drones Shaheed 131 and 136 are of particular concern for IHL compliance, since they have been used in indiscriminate attacks, including against the Ukrainian cities and energy infrastructure, all of which deepen the humanitarian crisis in Ukraine. The further challenging practice of the Russian Federation was that it removed the Iranian origin of the vehicles and left them without marking. Whereas the serious IHL violations committed by the members of the Russian armed forces need to be accounted for, the practices of foreign corporations based in the USA and EU Member States require further attention. The International Working Group on Russian Sanctions has indicated that “the crux of the challenges lies in the accessibility of these components, with a substantial portion being readily obtainable through publicly accessible channels” (Bilousova, Shapoval, Vlasiuk 2023, 9–12).

Samuel Perl-Freeman has further argued that armed conflicts are precisely the factor that fosters increasing arms transfers to parties to armed conflicts (Perlo-Freeman 2021, 5). In addition, *Giovanna Maletta* has noted a gap between rhetoric and compliance with arms export control laws on the part of state parties to the ATT. Some states may assert that they fully comply with ATT obligations while continuing controversial technology and weapons transfers (Maletta 2021, 75).

Nevertheless, another layer of arms transfers remains under-regulated under international law. The defence sector consists of various actors producing or being directly linked to research, development, design, production, delivery, maintenance, and repair of military technology, including weapons systems,

subsystems, parts, components, and other supporting equipment. This sector further covers actors that provide technical assistance, training, financial, or other assistance related to military activities. These actors rely on complex international supply chains for their products (UN Working Group on Business and Human Rights 2022, 1; ‘Outsourcing Responsibility: Human Rights Policies in the Defence Sector’ 2019, 8). Defence sector actors are neither parties to IHL nor arms export control treaties. While the legal arms transfers are conducted through state authorisation, these actors are not required (by an authorising state) to conduct IHL due diligence in the licensed operations. It allows the private companies to hide behind state authorisation that allegedly supersedes the corporate due diligence since states are obliged to ensure respect for IHL. Such practices are justified by the symbiotic relationship between states and arms manufacturers in protecting national security interests or fostering state foreign policy, among other things (UN Working Group on Business and Human Rights 2022, 4).

The primary international documents relating to corporate due diligence belong to soft law (OHCHR 2011; OECD 2011; ‘OECD Due Diligence Guidance for Responsible Business Conduct’ 2018). It means that they do not create duties on the part of the defence sector. Therefore, municipal, EU (if applicable) arms export control frameworks, and IHL continue to apply to the defence sector. For those companies registered in the states that have not yet adopted a duty of due diligence, the due diligence constitutes a standard of care in causing or contributing to adverse IHL impacts by their products or services. For the companies operating, for example, in France, which adopted the Vigilance Law of 2017, due diligence is an obligation to verify their supply chains and business partners and to consider ceasing activities contributing to adverse IHL impacts seriously. Taking into account that the Russian Federation heavily relies on electronic supply chains in its weapons and electronic warfare, the continuance of electronic sales to the Russian Federation is questionable after the annexation of Crimea in 2014 until February 24<sup>th</sup>, 2022, and then after full-scale aggression on February 24<sup>th</sup>, 2022, until now (when the number of serious IHL violations increased). However, depending on whether municipal law provided separate due diligence obligations for private companies or not, the practices of some remain normatively irrelevant (Bryk and Sluiter 2022; *LOI N° 2017–399 Du 27 Mars 2017 Relative Au Devoir de Vigilance Des Sociétés Mères et Des Entreprises Donneuses d’ordre (I)* 2017). The scope of the military-industrial complex in which states control the defence sector remains relevant for state responsibility in authorising arms transfers to the Russian Federation.

When litigating arms transfer decisions and corporate due diligence failures, *Linde Bryk* and *Goran Sluiter* have proposed an international criminal law framework applying to the actors in the defence sector who continued trading with the Russian Federation. The authors have analysed two Dutch cases of Van Anraat and Kouwenhouwen as potential litigation of aiding or abetting in war crimes

committed on the territory of Ukraine. The analysis has been conducted from the perspective of provisions of art. 25(3)(c) and (d) of the ICC Statute implemented in the Dutch law. The first case related to the armed conflict between Iran and Iraq, in which an individual, Frans Van Anraat, delivered Thiodiglycol, a material necessary to produce mustard gas, to the regime of Saddam Hussein between 1980 and 1988. The Dutch court decided that Van Anraat played an essential role by supplying the regime with materials used against the civilian population and Iranian combatants. *Dolus eventualis* was considered sufficient by the court as the mental element for his responsibility for aiding and abetting war crimes. The second case also relied on *dolus eventualis* in aiding or abetting in war crimes and crimes against humanity being committed by the President of Liberia, Charles Taylor, during NIAC in Sierra Leone. Guus Kouwenhoven was convicted for exercising effective control over two companies involved in the smuggling of weapons to Liberia in violation of the UN arms embargo. He was, therefore, an accomplice in war crimes by deliberately providing an essential contribution to the IHL violations through arms supply. The evidence used to prove *dolus eventualis* was media reports on IHL violations committed by Charles Taylor (Bryk, Sluiter 2022; Schliemann, Bryk 2019, 15–16).

Nonetheless, there are difficulties in proving criminal responsibility for commercial activities that eventually resulted in indiscriminate attacks. The crime of indiscriminate attack is a crime of conduct, meaning that the criminal responsibility of arms manufacturers depends on whether arms manufacturers controlled the recipient's behaviour to carry out an indiscriminate attack. In contrast, when crimes of result are concerned, the question is whether arms manufacturers exercised causal control over an indiscriminate attack (Bo 2022). *Tomas Hamilton* has doubted whether the involvement of EU companies in supplying Iran could demonstrate these companies aiding or abetting in indiscriminate attacks committed by Russia. Their contribution to the supply of drones is one step removed (both physically and causally) from the indiscriminate attacks (Hamilton 2022b).

#### 4. CONCLUDING REMARKS

This paper asked about the paths to litigate arms transfers with a state allegedly involved in indiscriminate attacks. The analysed cases have demonstrated that adhering to international arms export control laws, such as the ATT or the EU Common Position of 2008, allows victims to question whether licensing decisions complied with IHL before the municipal courts, first in criminal proceedings and then for war torts. Once the procedure fails, human rights framework enables alleged victims to lodge an application before the ECtHR. However, neither the Russian Federation nor Iran are parties to the ECHR, so the UN Human

Rights Committee would be the accessible litigation path (unless the substantive jurisdiction provides otherwise, but for human rights violations only and not IHL violations). Otherwise, regime on state responsibility seems to be the main available path for the states concerned. The reports on indiscriminate attacks may affect authorising states and arms manufacturers' willingness to supply military equipment to the recipient (perpetrator) state, but arms transfers did not cease when the recipient state was involved in the alleged indiscriminate attacks.

The analysis of arms transfers to the Russian Federation after the annexation of Crimea and the full-scale invasion against Ukraine has proved that states generally ceased reporting official arms transfers to the Russian Federation. Reports on the alleged indiscriminate attacks after December 31<sup>st</sup>, 2022, would count for risk assessment in arms transfer decisions made after that date. Therefore, it is crucial for each state and each company transferring military equipment to the Russian Federation to constantly monitor reports on IHL compliance. Transfers of electronic components to the Russian Federation continued despite sanctions being imposed. The difficulties in litigating the transfer of dual-use items to the Russian Federation and Iran despite human rights and NGO reports informed on the serious IHL violations committed by the recipient state arise, since the supply chain is blurred by using intermediaries and the classification of dual-use goods.

For arms transfers, the licensing decision is crucial for ensuring IHL compliance. The interdependencies between a state and the defence sector harden identifying IHL concerns being taken into consideration in transferring decisions. The more states occupy the primary role in ensuring respect for IHL, the less actors from the defence sector are expected to account for IHL in their due diligence practices. It should be concluded that state IHL assessment and corporate IHL due diligence exist independently as states may have various interests (and hence be unable or unwilling to comply with IHL) in licensing decisions.

Further interesting topics regarding arms and technology supply in this armed conflict need to be researched. The question of neutrality, for example, does not prevent third states from trading with the belligerent parties. It is debatable whether the massive supply of weapons, military advice, and material assistance to Ukraine no longer violates the neutrality of supplying states as they provide assistance to support the international legal order in cases of a breach of the prohibition of aggression (O.A. Hathaway, Shapiro 2022; Heller, Trabucco 2022, 255–263). Another topic worth developing is the individual criminal responsibility of employees of corporations that aid or abet in war crimes. Under the ICC case law, interpreting the purpose-based mental element of aiding or abetting in international crimes remains unresolved. The Russian aggression against Ukraine has forced states, international organisations, and private actors to develop new and increase the existing sanction mechanisms for supporting the war efforts.

Arms export control can contribute to preventing or mitigating the results of indiscriminate attacks in Ukraine. The increased protection for IHL ensued by the ATT and the EU Common Position of 2008 can remedy deficiencies in arms transfer decisions that do not account for IHL. However, as long as the supplying state is not the party to the ATT, the law on state responsibility for aiding and abetting indiscriminate attacks remains relevant for victims of these attacks. The support of NGOs in proving that the state authorisation violated arms export control laws is crucial for victims of indiscriminate attacks. Since the Russian Federation withdrew from the European Convention on Human Rights, and Iran is not a party to the ECHR, the UN Human Rights Committee would be an interesting option to litigate aiding and abetting indiscriminate attacks (of course within its human rights and not IHL jurisdiction). Last but not least, corporate due diligence is a complementary safeguard in respecting IHL when state authorisation for arms transfer fails to account for IHL.

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