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ARMS TRANSFERS, STATE COMPLICITY IN INTERNATIONAL CRIMES AND DUE DILIGENCE: LESSONS FROM THE ARMED CONFLICTS IN GAZA AND UKRAINE

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1. *Introduction and Research Plan*

The massive transfers of arms and other military equipment to Ukraine by many states of the international community[1], following the Russian invasion that began in 2022 has rekindled the debate among international law's scholars about the legal foundation of the supply of weapons to states involved in an armed conflict. The resurgence of the armed

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[1] According to SIPRI*, Trends in International Arms Transfers, 2023*, SIPRI Fact Sheet, March 2024, p. 10: «Arms imports by states in Europe were 94 per cent higher in 2019–23 than in 2014–18. Ukraine received 23 per cent of the region's arms imports in 2019–23. It was, by far, the largest arms importer in Europe and the fourth largest in the world. […] At least 30 states supplied major arms to Ukraine after the full-scale Russian invasion in February 2022, mostly as military aid, meaning that Ukraine was by some distance the world's largest arms importer in the year 2023. The USA supplied 39 per cent of Ukrainian arms imports in 2019–23, followed by Germany (14 per cent) and Poland (13 per cent). To broaden Ukraine's military capabilities, suppliers began to deliver long-range systems in 2023. For example, Poland and Slovakia donated 27 surplus combat aircraft, and France and the UK supplied missiles with a range of 300 kilometers. During the year, Belgium, Denmark, the Netherlands and Norway also started to prepare the delivery of over 50 surplus combat aircraft. Russia relies primarily on its own industry for its major arms. However, in 2022–23 it imported flying bombs from Iran and ballistic missiles from North Korea, the latter in violation of a United Nations arms embargo on North Korea».

conflict between Israel and Hamas in the Gaza Strip after the well-known events of October 2023 and the subsequent flow of weapons[2], has further enlivened and widened this discussion, also considering the position of non-states actors as recipients of arms from non-belligerent states[3].

Scholars have investigated arms transfers to Ukraine mostly relying on arguments traceable to the international law on the use of force (*ius ad bellum*) and neutrality. This debate has revealed numerous controversial points regarding the legality of arms transfers in armed conflicts[4]. This study analyses other sources of international law relevant to arms transfers. Risks associated with arms transfers can be tracked to two specific set of primary norms aiming to prevent and to establish state complicity in international crimes (war crimes, crimes against humanity and genocide) under international humanitarian law (IHL), international human rights law (IHRL) and arms control instruments. States bound by these norms, in deciding whether to deliver arms or other military equipment to recipients involved in an armed conflict, are obliged to consider possible grave misuses associated with the weapons transferred, namely that the arms "would be" used to commit international crimes. Consequently, the possibility to incur international responsibility for complicity in international crimes because of an arms transfer. The International Court of Justice (ICJ) following a few disputes brought to its examination has recently considered these norms in connection with the armed conflict in the Gaza Strip[5].

[2] «Between 2014–18 and 2019–23, arms imports by Israel rose marginally (+5.1 per cent). The USA accounted for 69 per cent and Germany for 30 per cent of Israeli arms imports. Imported weapons, in particular combat aircraft received from the USA over several decades, have played a major role in Israel's military actions against Hamas and Hezbollah. At the end of 2023. USA rapidly delivered thousands of guided bombs and missiles to Israel, but the total volume of Israeli arms imports from the USA in 2023 was almost the same as in 2022. By the end of 2023, pending deliveries of major arms to Israel included 61 combat aircraft from the USA and 4 submarines from Germany»; see SIPRI, *Trends in International Arms Transfers, 2023*, cit., pp.11-12; other military exporters to Israel include France, the United Kingdom, Canada and Australia.

[3] Iran is the main supplier of arms to Palestinian armed groups, including Hamas and Islamic Jihad; see Human Rights Watch, *Suspend Arms to Israel, Palestinian Armed Groups, Countries Providing Weapons Risk Complicity in Grave Abuses*, 06.03.2023.

[4] Some authors have argued for the legitimacy of arms supplies to Ukraine on the basis of collective self-defense under Art. 51 of the UN Charter and customary international law; see K. AMBOS, *Will a state supplying weapons to Ukraine become a party to the conflict and thus be exposed to countermeasures?* In *EJIL: Talk!,* march 02.03.2022,; M. KRAJEWSKI, *Neither Neutral nor Party to the Conflict? On the Legal Assessment of Arms Supplies to Ukraine,* in *International law* & *international legal thought*, 09.03.2022; *contra* see J. UPCHER, *Neutrality in Contemporary International Law*, Oxford, 2020, at p. 24. A minority of authors have resorted to individual or collective countermeasures against violations of the prohibition of aggression to legally justify arms transfers to Ukraine; see R.P. PEDROZO, *Ukraine Symposium – Is the Law of Neutrality Dead?* in *Articles of war*, Liber Institute West Point, 31.03.2022,; and P. CLANCY, *Neutral Arms Transfers and the Russian Invasion of Ukraine*, in *International and Comparative Law Quarterly,* Vol. n. 72, April 2023 pp. 527–543. The dominant position in favour of the legitimacy of arms transfers to Ukraine is based on the so-called "qualified or benevolent neutrality", according to which the right of neutrality would allow an exception when a belligerent violates the rules of *ius ad bellum*, in this case by committing aggression; see *ex multis*, W. HEINTSCHEL VON HEINEGG, *Neutrality in the War against Ukraine*; in *Articles of war*, Liber Institute West Point, 31.03.2022; *contra* see K. J. HELLER-L. TRABUCCO, *The Legality of Weapons Transfers to Ukraine Under International Law*, in *Journal of International Humanitarian Legal Studies* 13 (2022) pp. 251–274.

[5] See section n. 2, *infra.*

A complementary duty arising from arms control instruments relates to norms posing to exporting states an obligation of conduct[6] based on due diligence[7] to minimize the "risk" that arms transferred "could be" used to commit international crimes and/or other grave criminal activities such as organized crime and terrorist activities. The first part of this study examines all these norms and takes as a case study of reference the armed conflict in Gaza[8].

Arms control instruments pose also to states several due diligence obligations to prevent[9] "diversion", that is the deviation of weapons legally transferred towards unauthorized recipients/end-users (organized criminal groups, armed militias, terrorists) or to the purpose to commit wrongful activities (international and transnational crimes), armed violence, and other human rights violations. The second part of this research investigates these norms, focusing on the armed conflict in Ukraine as a case study[10].

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[6] In this study, the distinction between "obligations of conduct" and "obligations of result" follows the predominant interpretation traceable to the civil law systems, according to which obligations of conduct are obligations "to endeavour" or "obligations of best effort nature". These obligations require a state to display its best effort (a due diligence) toward the achievement of a particular result, without the guarantee of success. On the contrary, "obligations of result" are obligations to guarantee the result set by the obligation; see M. LONGOBARDO, *L'obbligo di prevenzione del genocidio e la distinzione fra obblighi di condotta e obblighi di risultato*, in *Diritti umani e diritto internazionale*, Fasc. 2, maggio-agosto 2019, pp. 243-247. This distinction modelled on civil law legal systems is today «the terminology current in international law»; see International Tribunal for the Law of the Sea (ITLOS), 'Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the International Seabed Area'*,* Request for Advisory Opinion Submitted to the Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, paras. 110, 117; see also ICJ, 'Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide' (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), Judgement of 26 February 2007, para. 430, in which the ICJ has employed the concept of obligations of conduct to construe the nature of the obligation to prevent genocide as a best-effort obligation. For an examination of the international practice on the distinction between obligations of conduct and obligations of result also discussing the positions of scholars that contested this taxonomy derived from civil law doctrine, see A. OLLINO, *Due diligence Obligations in International Law*, Cambridge, 2022, pp. 76-97.

[7] In the context of obligations of conduct, that require states to deploy adequate means to obtain a certain result, the notion of due diligence, which calls for an assessment *in concreto*, is of critical importance. M. LONGOBARDO, *L'obbligo di prevenzione del genocidio,* cit., pp. 245-247 argues that the notion of due diligence identifies a "measure" of the state's efforts towards achieving a given result. The diligence required ("due") by a given primary rule, has to be identified through the interpretation of the rule itself. The assessment of the diligence must be conducted "objectively", considering the measures concretely taken by a state, rather than abstract psychological notions such as "fault" or "negligence". In this regard, the ITLOS pointed out: «The content of 'due diligence' obligations may not be easily described in precise terms. Among the factors that make such a description difficult is the fact that 'due diligence' is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific and technological knowledge. It may also change in relation to the risk involved in the activity»; see ITLOS, 'Responsibilities and Obligations of States*'*, cit., para. 117. From these observations of ITLOS, A. OLLINO, *Due diligence Obligations in International Law,* cit., p. 98 ss. inferred three main structural elements of due diligence obligations. These are: i) the association of the obligation with the concept of risk; ii) the "conduct" nature of due diligence obligations (due diligence obligations are by nature obligations of conduct). This overlapping however does not exclude that some primary rules characterized by due diligence may be worded as obligations of result; iii) the flexible character of obligations imbued with due diligence.

[8] See sections n. 2 and 3, *infra*.

[9] A. OLLINO, *Due diligence Obligations in International Law* cit., at p. 117 convincingly contended that obligations to prevent overlap with due diligence obligation stating that: «a distinction between obligations to prevent and due diligence obligations does not appear conceptually sound. From the perspective of their nature, obligations to prevent share all the structural components of due diligence obligations and therefore, they are to be classified as such».

[10] See section n. 4, *infra.*

The proposed analysis will also require clearing the distinction between state responsibility for a violation of a due diligence obligation and complicity in the commission of a wrongful act by another state (aid and assistance) pursuant secondary rules contained in the Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ARSIWA) and its implications in the realm of arms transfers[11].

By the exam of the practice emerging from the armed conflicts in Gaza and Ukraine, alongside the recent jurisprudence of the ICJ, this study aims to demonstrate that the aforementioned legal frameworks, if properly implemented, provide sound legal parameters for both assessing the compliance with international law of arms transfers in armed conflicts and possibly establishing the responsibility of states at the international level in the case of irresponsible transfers, and also contain very effective measures to prevent arms diversion in situations of armed conflict in the medium and long term.

2. *Arms Transfers, Prevention and State Complicity in International Crimes: Implications of Recent Developments before the International Court of Justice and in State Practice Regarding the Armed Conflict in Gaza*

The plausibility of serious violations of IHL and IHRL arose from the beginning of the military operations launched by Israel in the Gaza Strip, in response to the Hamas attack of 7 October 2023[12]. The dramatic escalation of violence and the numerous alleged violations of the principles of distinction, proportionality and precaution by all belligerents involved in the conduct of hostilities in Gaza have been the subject of countless reports[13]. The highest cost of these atrocities is borne by the civilian population, including children[14], who are daily victims of direct and/or indiscriminate attacks often resulting in massive civilian casualties[15], and other serious violations of IHL. There have also been numerous public calls for an end to the massacre and for the cessation of arms and military supplies to the warring parties

[11] See section n. 6, *infra.*
[12] Human Rights Watch, *Israel's military campaign in Gaza seen as among the most destructive in recent history, experts say*, Associated Press, 11.01.2024.
[13] See, for instance, United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *Hostilities in the Gaza Strip and Israel, Flash Update # 116*, 12.02. 2023.
[14] Human Rights Watch, *Gaza: Israeli Attacks Devastate Lives of Children with Disabilities Explosive Weapons, Unlawful Blockade Inflict Profound Trauma, Suffering*, 30.09.2024.
[15] OCHA, *Hostilities in the Gaza Strip and Israel, Flash Update # 126*, 26.02.2024.

from high-level institutional representatives of international organisations[16], UN human rights bodies[17], and reports of civil society[18].

Against this background, the duty of third states to consider not only the political or moral implications but also the legal risks of supplying arms to Israel has become a matter of serious concern, especially following some recent developments before the ICJ and in the practice of states in relation to the armed conflict in Gaza. On 26 January 2024, the ICJ issued an order for provisional measures in response to South Africa's application to institute proceedings against Israel alleging violations by Israel of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention) because of its actions in the Gaza Strip since 7 October 2023 (*South Africa* v. *Israel*)[19]. The Court found that, considering the evidence presented by South Africa, as well as numerous reports by Special Rapporteurs and statements by various UN officials and agencies, it was plausible that Israel was committing acts that constituted genocide and other acts prohibited by the Genocide Convention[20], and that there was a real and imminent risk of irreparable damage to the rights protected by the Genocide Convention[21]. As a result, the Court ordered six provisional measures[22]. The Court's recognition *prima facie* of the plausibility of genocide may have far-reaching implications for states parties to the Genocide Convention that continue to supply weapons used by Israel in Gaza[23].

On 1 March 2024, Nicaragua brought an application before the ICJ against Germany, which included a request for the indication of provisional measures, alleging that Germany had assisted and was assisting Israel in its military operations in the Occupied Palestinian Territory, in particular in the Gaza Strip, by providing arms and other military equipment to Israel. This, in alleged violation of the Genocide Convention and the 1949 IHL Geneva Conventions including their two Additional Protocols of 1977 (*Nicaragua v. Germany*)[24]. In its decision of 30 April 2024, the Court, having rejected Nicaragua's request for provisional

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[16] *Letter dated 6 December 2023 from the Secretary-General addressed to the President of the Security Council*, UN DOC S/2023/962, 06.12.2023; European Union External Action Service, *Informal Foreign Affairs Council (Development): Remarks by High Representative Josep Borrell at the press conference*, 12.02.2024.

[17] See press releases from the Office of the UN High Commissioner for Human Rights (OHCHR), signed by several human rights Special Rapporteurs and Independent Experts Office of the UN High Commissioner for Human Rights, *States and companies must end arms transfers to Israel immediately or risk responsibility for human rights violations*, 20.06.2024 and *Arms exports to Israel must stop immediately: UN experts*, 23.02.2024; Human Rights Council, *Anatomy of a genocide Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, A/HRC/55/73, 01.07.2024; Human Rights Council Resolution of 05.04.2024, A/HRC/RES/55/28, 16.04.2024.

[18] Human Rights Watch, *Joint Letter to President Biden Urging Suspension of Arms Transfers to Israel*, 03.09.2024; Human Rights Watch, *Suspend Arms to Israel, Palestinian Armed Groups. Countries Providing Weapons Risk Complicity in Grave Abuses,* 06.11.2023.

[19] ICJ, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip' (*South Africa* v. *Israel*), Provisional Measures, Order, 26.01.2024.

[20] *Ibidem*, para. 54.

[21] *Ibidem*, para. 74.

[22] Based on the change in the situation in Gaza, the ICJ delivered another Order indicating additional provisional measures; see ICJ, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip' (*South Africa* v. *Israel*), Provisional Measures, Order, 28.03.2024.

[23] See sections n. 2.1, and 3, *infra.*

[24] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Application instituting proceedings, 01.03.2024.

measures[25], considered it: «particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the above-mentioned Conventions. All these obligations are incumbent upon Germany as a state party to the said Conventions in its supply of arms to Israel»[26]. Finally, the Court held that, in the absence of a manifest lack of jurisdiction, it could not accede to Germany's request that the case be removed from the Court's docket[27].

No less importantly, some states have begun to reconsider their policies on arms transfers to Israel[28], and some cases have been brought before national courts to denounce such arms transfers[29].

All these developments provide interesting food for thought in examining the risk that authorisations for arms transfers to Israel (and Hamas) in the Gaza Strip may result in violations of the obligations of third states under customary and conventional international law to prevent and not to be complicit in genocide, crimes against humanity and war crimes. It is also interesting to discuss these issues under the relevant provisions of arms control instruments.

2.1. *The Duty to Prevent Genocide under the Genocide Convention*

The ICJ's recognition of the plausibility of genocide committed by Israel, also including other prohibited acts under the Genocide Convention in *South Africa* v. *Israel*[30] could have several legal implications for states not parties to the conflict that are parties to that Convention and that supply arms (and other military material) used by Israel in Gaza[31]. The obligation to implement the provisional measures established by the Court, implicates the responsibility of third states by virtue of the application of the Genocide Convention itself. The legal basis for the obligations of third states was clarified by the ICJ decision, which confirmed the *erga omnes partes* character of the obligations contained in the Genocide Convention, which means that such obligations «are owed by any State Party to all other States Parties to the relevant Convention»[32]. Accordingly, third states have certain obligations

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[25] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Provisional Measures, Order, 30.04.2024, para. 20.

[26] *Ibidem*, para. 24.

[27] *Ibidem*, para. 21.

[28] See OHCHR, *Arms exports to Israel must stop immediately: UN experts*, cit., in which the experts welcomed the suspension of arms transfers to Israel by Belgium, Italy, Spain, the Netherlands and the Japanese company Itochu Corporation. Canada and UK have recently decided to restrict their export of weapons to Israel; see M.T. KLARE, *Canada and UK Restrict Arms Sales to Israel Over Gaza War*, in *Arms Control Today*, October 2024.

[29] For an overview of recent domestic lawsuits targeting government decisions to allow the export of arms to Israel see V. LANOVOY, *Arms Transfers to Israel: Knowledge and Risk of Violations of International Law*, in *Just Security,* 17.04.2024, pp. 1-6.

[30] See ICJ, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip' (*South Africa* v. *Israel*) Provisional Measures, Order, cit., para. 54. According to Art. III of the Genocide Convention the following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

[31] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted on 09.12.1948, and entered into force on 12.01.1951; it has 153 states parties, including US, Germany and Israel; see UN *Treaty Series*, vol. 78, p. 277.

[32] See ICJ, 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip' (*South Africa* v. *Israel*), Provisional Measures, Order, cit., para. 33.

under the Genocide Convention, namely, to prevent and punish genocide[33] and to refrain from certain acts, including complicity in genocide[34].

In its application to the ICJ, Nicaragua argued, first, that by providing political, financial and military support to Israel, Germany had failed to fulfil its obligation to prevent the genocide committed by Israel against the Palestinian people - including its part in the Gaza Strip - and had also contributed "as an accomplice" to the commission of genocide in violation of the Genocide Convention[35]. International legal scholars who have studied this issue agree that the ICJ's order in *South Africa* v. *Israel*, while not explicitly stating so, is consistent with the obligation of third states parties to the Genocide Convention to carefully consider both the risk that arms transfers to Israel may determine possible violations on their part of their responsibility to prevent genocide in Gaza, and the legal and moral risk of complicity in genocide[36].

Legal parameters for establishing the link between arms transfers and the risk of genocide under the Genocide Convention can be drawn from the ICJ judgment in *Bosnia and Herzegovina* v. *Serbia and Montenegro*[37] in which the Court explicitly relied on the Genocide Convention to resolve the dispute between the two states. In this judgment, the ICJ highlighted two main aspects linked to the prevention of genocide that could be relevant in the assessment of arms transfers in Gaza. First, the Court held that «State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed»[38]. The application of this temporal parameter could mean that any state party to the Genocide Convention could incur state responsibility for violating the duty to prevent genocide for any authorised arms transfer to Israel. At least from the date of the adoption of the ICJ decision on provisional measures in *South Africa v. Israel,* which found that there was a serious risk of genocide[39].

Second, each state party to the Genocide Convention has an obligation under the Convention to do everything in its power to prevent the commission of genocide. This is an obligation of conduct under which states that supply arms are obliged to exercise due diligence to make a concrete assessment of the risks associated with an arms transfer and to take all reasonable measures at their disposal to prevent the occurrence of a genocide. In

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[33] Art. I Genocide Convention.

[34] Art. III Genocide Convention. The issue of complicity in genocide through the supply of weapons is discussed in section n. 3, *infra*.

[35] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory' (*Nicaragua* v. *Germany*), Application instituting proceedings cit., para. 3. Germany invoked due diligence in its defence before the ICJ to deny Nicaragua's accusation that it had violated its duty to prevent genocide under the Genocide Convention, arguing that it had done its utmost both to use its influence with the Israeli partners to improve the situation and to provide humanitarian aid itself; see ICJ, 'Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory' (*Nicaragua* v. *Germany*), Oral Proceedings, Verbatim Record 2024/16, pp. 37-38, paras. 20-21

[36] J. DILL, *Top Experts' Views of Int'l Court of Justice Ruling on Israel Gaza Operations (South Africa v Israel, Genocide Convention Case),* in *Just Security*, 26.01.2024; for an account of this debate See Y. AL TAMIMI, *Implications of the ICJ Order (South Africa v. Israel) for Third States*, in *EJIL:Talk!,* 06.02.2024.

[37] ICJ, 'Case concerning application of the Convention on the Prevention and Punishment of the crime of Genocide' (*Bosnia And Herzegovina* v. *Serbia And Montenegro*), Judgment, cit.

[38] *Ibidem,* para. 431.

[39] Nicaragua argued that since October 2023 there has been a clear risk of genocide against the Palestinian people, initially directed against the population of the Gaza Strip; see ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Application instituting proceedings cit., para. 16.

Bosnia and Herzegovina v. *Serbia and Montenegro* the ICJ ruled that a breach of the duty to prevent genocide occurs «if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide»[40].

In other words, a state can be held responsible if it fails to act with the available legal means when it could have done so. Particularly, states that are in a position to influence the state that is likely to commit genocide, or that is already committing genocide, have a heightened duty[41]. This implies a higher responsibility to prevent genocide on the part of states such as the US and Germany, which have strong political ties and provide financial aid and weapons to Israel. In this regard, it has been persuasively argued that, as a result of the "capacity to influence" requirement established by the ICJ in *Bosnia and Herzegovina* v. *Serbia and Montenegro*, the provision of arms or the failure to suspend arms transfers to Israel once a serious risk has been clearly identified could be considered a failure to prevent genocide[42].

2.2. *Serious Violations of International Humanitarian Law*

State complicity in international crimes committed during an armed conflict because of an arms transfer may be based on different primary rules. In the recent case brought by Nicaragua against Germany before the ICJ, Nicaragua asked the Court to condemn Germany not only for violating the Genocide Convention, but also for failing to comply with its obligations under international humanitarian law, as derived from the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, as well as from the intransgressible principles of IHL[43]. Nicaragua contended that despite the fact that serious violations of IHL committed by Israel in the Gaza Strip were evident from the beginning of the military offensive on 7 October 2023, Germany continued to supply arms to Israel, knowing full well at the time of authorisation that the military equipment would or could be used by Israel to commit serious violations of the Geneva Conventions, attacks against civilian objects or civilians protected as such, or other war crimes, and in disregard of its own obligations[44].

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[40] ICJ, 'Case concerning application of the Convention on the Prevention and Punishment of the crime of Genocide' (*Bosnia And Herzegovina* v. *Serbia And Montenegro*), Judgment, cit., para. 430.
[41] *Ibidem.* In finding responsibility for failing to prevent genocide, the Court saw that Serbia was in a position to influence the perpetrators of the Srebrenica genocide «owing to the strength of the political, military and financial links»; (para. 434). The Court also added that once a State learns that a serious risk of genocide exists, and «if the State has available to it means likely to have a deterrent effect […] it is under a duty to make such use of these means as the circumstances permit.» (para. 431).
[42] J. BASTAKI, *The "Capacity to Influence", State Responsibility, and the Obligation to Prevent Genocide*, in *Opinio Juris*, 30.03.2024; for a less strict interpretation of the impact of due diligence obligation to prevent genocide on arms transfer see Y. AL TAMIMI, *Implications of the ICJ Order (South Africa* v. *Israel) for Third States*, cit., at p. 4; according to this author: «Due diligence thus demands that States make concrete assessments about the provision of military and other assistance and how it is employed by Israeli forces on the battleground. Following the ICJ Order, States that provide financial, intelligence and military assistance to Israel's campaign are likely under a stricter obligation to afford less leeway to Israeli assurances about compliance, demonstrate higher scrutiny when approving export and transit of military assistance, and set up more stringent regulation as provided under Article V of the Convention».
[43] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Application instituting proceedings cit., para. 3.
[44] *Ibidem*, para. 31. On this point (at para. 13) Nicaragua added: «In particular, the military equipment provided by Germany enabling Israel to perpetrate genocidal acts and other atrocities, included supplies to the front line and warehouses, and assurances of future supplies such as ammunition, technology and diverse components necessary for the Israeli military».

Nicaragua argued before the Court that common Art. 1 of the four Geneva Conventions and their Additional Protocols oblige states not to aid and assist parties to an armed conflict that are in breach of international humanitarian law and moreover, to ensure respect for these norms[45]. Germany, on the contrary, contested that this provision generates a negative obligation to refrain completely from military support to a state involved in an armed conflict[46]. Nicaragua's conclusion on this point is in line with the position expressed by authoritative scholars of international law, who have contended that the prohibition of arms transfers to states and non-state actors (NSAs) that "undoubtedly" commit serious violations of IHL should be interpreted in the light of the obligation to enforce IHL as set forth in Common Art. 1 of the four Geneva Conventions of 1949 and the First Additional Protocol of 1977, and that this prohibition reflects a norm of customary international law[47].

A contribution to shedding light on this issue comes also from the position of the UN independent experts of human rights on the conflict in the Gaza Strip, according to which the obligation to "ensure respect" for IHL requires in all circumstances states not parties to a conflict to «refrain from transferring weapons or ammunition - or parts for them - if, on the basis of the facts or past patterns of behaviour, it is to be expected that they would be used to violate international law»[48].

3. *Arms Transfers, Complicity in International Crimes and Risk Assessment under Arms Control Instruments and Customary International Law*

In *Nicaragua* v. *Israel*, the ICJ's order refusing to grant provisional measures reminds all states to respect their obligations regarding the transfer of arms to parties to an armed conflict under various primary rules of international law, including those contained in arms control instruments[49]. The Arms Trade Treaty (ATT)[50] provides the most articulated legal

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[45] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Application instituting proceedings cit., para. 88.

[46] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Oral Proceedings, cit., pp. 38-39, paras. 26-27; according to Germany: «While the scope of common Article 1 is contested and requires further discussion, even taken at its broadest plausible interpretation, the obligation to ensure respect embodied in common Article 1 can do no more than suggest that all States must conduct a proper risk assessment for decisions regarding exports of military equipment and arms».

[47] T. RUYS, *Of Arms, Funding and "Non-Lethal Assistance". Issues Sur rounding Third-State Intervention in the Syrian Civil War*, in *Chinese Journal of International Law*, Vol. 13, No. 1, March 2014, p. 13 ss., pp. 28-29; M. SASSOLI, *State Responsibility for Violations of International Humanitarian Law*, in *International Review of the Red Cross*, Vol. n. 84, 2002, p. 401 ss.; with regard to Art. 1 common to the four Geneva Conventions of 1949, the ICJ, in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons,* stated that this rule must be observed by all states whether or not they have ratified the conventions that contain them; moreover the Court added that this rule incorporates an obligation which is essentially of an *erga omnes* character; see ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 199-200, paras. 157-158.

[48] See OHCHR, *Arms exports to Israel must stop immediately: UN experts*, cit.

[49] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Provisional Measures, Order, 30.04.2024, cit., para. 16.

[50] The Arms Trade Treaty was adopted on 02.04.2013, and entered into force on 24.12.2014; it has 116 states parties; see UN *Treaty Series*, vol. 3013, p. 269. All EU member states, which are among the main suppliers of

framework for arms transfers in international law and imposes numerous legal obligations on states parties. The broad scope of the ATT makes it highly relevant to the study of arms transfers in armed conflicts. First, the ATT covers arms transfers of most types of lawful conventional weapons likely to be used in armed conflict[51]. Second, according to the prevailing teleological interpretation[52] the scope of the ATT includes commercial transfers as well as arms transfers under military agreements, or arms transfers free of charge for ideological reasons or for political-strategic interests (donations). Third, the ATT does not place any specific restrictions on the recipients of weapons, who may be states or NSAs.

The ATT provides for a two-stage decision-making process for the authorization of arms transfers. The former requires a state party to determine whether any of the treaty's mandatory prohibitions apply to an arms transfer[53]; the latter obliges a state party to assess certain potential risks associated with an arms transfer[54]. Both apply to ammunition and components as fully as to conventional arms.

The first prohibition of the ATT on the authorizations of arms transfers requires states parties to respect arms embargoes established by the UN Security Council under Chapter VII of the UN Charter[55]. The second obligation concerns the prohibition of authorizing transfers that conflict with conventional obligations entered into under other international agreements, in particular "but not exclusively" those relating to the transfer of or illicit trafficking in conventional weapons[56]. Because of this coordination rule, authorizations for arms transfers under the ATT issued by states parties must be consistent with obligations under international treaties prohibiting gross violations of human rights and other international crimes[57].

The third prohibition is one of the key norms of the ATT[58]. According to this provision states parties are obliged not to authorize arms transfers if, at the time of "authorization"[59], they have "knowledge" that the arms "would be used" to commit

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arms to Ukraine (see footnote n. 1, *supra*), are parties to the ATT. However, the US, which is the main supplier of arms to Ukraine and Israel, is not a party to the ATT. Neither Ukraine nor Israel are parties to the ATT.

[51] The ATT (Art. 2, para. 1) applies to eight categories of conventional weapons, which include the seven found in the UN Register of Conventional Arms (UNROCA), with the addition of small arms and light weapons (SALW).

[52] See, *ex multis*, L. LUSTGARTEN, *The Arms Trade Treaty. Achievements, Failings, Future*, in *International & Comparative Law Quart*erly, 2015, pp. 578-579.

[53] Art. 6 ATT.

[54] Art. 7 ATT.

[55] Art. 6, para. 1 ATT.

[56] Art. 6, para. 2 ATT.

[57] By virtue of this provision, the authorization of an arms transfer by a state party to the ATT that conflicts with a conventional instrument of IHL or IHRL (see sections n. 2.1 and 2.2, *supra*) constitutes a violation of the ATT itself. As stated in its principles, the ATT complements and gives specific expression to the overarching customary obligation of each state to respect and ensure respect for IHL and IHRL.

[58] Art. 6, para. 3 ATT.

[59] A serious shortcoming resulting from Art. 6, para. 3 of the ATT is that the risk of misuse must be assessed at the time of the authorisation of an arms transfer. However, there is no mention of the obligation of a state party to suspend or revoke an authorization in the light of information that becomes available only after the authorisation has been granted; on this issue see L. LUSTGARTEN, *The Arms Trade Treaty* cit., p. 590. On the other hand, such an obligation exists in the context of the risk assessment procedure under Art. 7 of the ATT (see footnote n. 95, *infra*).

genocide, crimes against humanity and certain categories of war crimes[60]. This rule raises difficulties with regard to the determination of the international responsibility of the state in the event of a violation of the prohibition established by the treaty. In the context of the ATT, the question of clarifying the meaning of the term "knowledge" is not an easy one, as it indicates the circumstances in which the state is assisting or has assisted in the commission of such crimes. Legal scholars have identified various solutions for interpreting this legal requirement[61]. The most convincing interpretation of the notion of knowledge under the ATT is based on parameters borrowed from secondary norms of state responsibility, i.e. the complicity of a state in the commission of an internationally wrongful act by another state (aid and assistance*)*[62] under the ARSIWA[63], which is considered part of customary international law[64]. In *Nicaragua* v. *Germany*, Nicaragua contended that Germany was complicit in genocide and war crimes allegedly committed by Israel by participating in the facilitation of unlawful activities relating to the laws of war[65] and facilitating the commission of genocide"[66], and cited this as a separate basis for German responsibility. These allegations are because arms and military assistance provided to Israel would or could be used in the commission of genocide, crimes against humanity and war crimes[67]. Germany rejected all these allegations on the grounds that the basic requirements for state complicity under customary international law were not met in this case[68].

There are two constituent elements of complicity: a material element, given by the participation in the commission of an unlawful act, and a subjective element, inherent in the knowledge of the circumstances of the act itself[69]. With respect to the material element of

[60] For a detailed examination of the international crimes referred to in Art. 6, para. 3 of the ATT, see L. LUSTGARTEN, *ibidem,* pp. 590-591; A. COCO, *I divieti di trasferimento ai sensi degli articoli 6 e 7 del Trattato sul commercio delle armi*, in *Rivista di diritto internazionale*, Vol. 96, No. 4, 2013, pp. 1221 ss., esp. pp. 1237-1241.
[61] A solution identified by the doctrine was to resort by analogy to standards developed in international criminal law (aiding and abetting), even though these cannot be simply transposed to regimes that are primarily concerned with the responsibility of states; see N.H.B. JØRGENSEN, *State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty*, in *American Journal of International Law* , Vol. 108 , Issue 4 , October 2014 , pp. 722-749; L. LUSTGARTEN, *The Arms Trade Treaty* cit., at p. 589, criticized the knowledge requirement in the ATT arguing that: «Given that the Treaty does not impose any penalties, let alone criminal sanctions, an objective standard, rather than one based on intent or requiring demonstration of actual knowledge, would have been more appropriate. In this context there is no question of liability for negligence: the goal is to put States under a duty to inquire diligently about what uses weapons made on their soil are likely to be put».
[62] V. LANOVOY, *Arms Transfers to Israel*, cit., p. 8; A. COCO, *I divieti di trasferimento,* cit., pp. 1229-1236.
[63] Art. 16 ARSIWA.
[64] ICJ, 'Case concerning application of the Convention on the Prevention and Punishment of the crime of Genocide', (*Bosnia And Herzegovina* v. *Serbia And Montenegro*), Judgment, cit., para. 420; for a criticism not of the substance, but of the method used by the ICJ in reconstructing the customary nature of Art. 16 ARSIWA see G. PUMA, *Complicità di Stati nell'illecito internazionale*, Torino, 2018, pp. 40 ss.
[65] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Application instituting proceedings cit., para. 17.
[66] *Ibidem*, para. 16.
[67] *Ibidem*, para. 31.
[68] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Oral Proceedings, cit., p. 35, para. 8.
[69] Complicity has a "derivative" character, i.e. it is attributed to a subject because of an act which in itself is attributable to another subject. Complicity is thus accessory in nature. The conduct of the accessory party cannot be qualified as an offence until the principal offence has been materially committed; see *ex multis*, J. QUIGLEY, *Complicity in International Law: a New Direction in the Law of State Responsibility*, in *British Yearbook of International Law*, 1986, p. 77 ss., p. 80, p. 86.

complicity, the ARSIWA is general, if not contradictory[70]; however, under customary international law, the standard required to establish causation is that of a "significant contribution" to the principal conduct. This causality requirement means that any act having even a minimal causal effect may constitute complicity[71]. It is not necessary that the assistance provided be a cause or *conditio sine qua non* of the principal wrongful conduct. In other words, in order to establish state complicity in an international crime by virtue of an arms transfer under both customary international law and the ATT, it is sufficient that the accessory conduct (i.e. the provision of arms) may facilitate the commission of the principal wrongful act (an international crime), as may easily be the case with the supply of weapons in an armed conflict. In *Nicaragua* v. *Germany,* Germany, in its defence before the ICJ, seems to have offered a much more restrictive interpretation of the notion of "significant contribution" according to customary international law[72].

Identifying the subjective element of state complicity in an international crime as the result of arms transfer also raises some problematic issues. Considering the combination of the literal wording of the ARSIWA and its commentary[73], it could be argued that a state would be internationally responsible for supplying arms to another state if its knowledge and intent to facilitate the commission of an international crime were proven. The absence of evidence of the intent requirement of the principal perpetrator was assumed by Germany in *Nicaragua* v. *Germany* in order to reject Nicaragua's charge of complicity in genocide[74]. In support of its position, Germany explicitly relied on the ICJ judgment in *Bosnia and Herzegovina* v. *Serbia and Montenegro* in which, according to Germany, the Court found that the absence of this threshold was decisive to exclude Serbia's complicity in genocide[75]. Germany's argument before the ICJ on this point is far from convincing[76]. The need to prove intent would make any legal assessment of complicity in an international crime on the basis

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[70] ARSIWA p. 66 (para. 5), p. 67 (para 10).

[71] G. Puma, *Complicità di Stati nell'illecito internazionale*, cit., pp. 69-72.

[72] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Oral Proceedings, cit., p. 35, paras. 9-10; for a critique of Germany's position on this point before the ICJ, see also V. Lanovoy, *Arms Transfers to Israel,* cit., p. 13.

[73] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, (2008), Art. 16, p. 66, paras. 3-5.

[74] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua* v. *Germany*), Oral Proceedings, cit., p. 36, paras 11-16.

[75] Germany quoted the following passage from the ICJ's judgment: «[…] there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless *at the least* that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity»; italics added; ICJ, 'Case concerning application of the Convention on the Prevention and Punishment of the crime of Genocide', (*Bosnia And Herzegovina* v. *Serbia And Montenegro*), Judgment, cit., para. 421.

[76] In *Bosnia and Herzegovina* v. *Serbia and Montenegro* the ICJ, in order to resolve the dispute between the two states, did not consider it relevant to rule on the *mens rea* of the accomplice of genocide in general terms; see M. Milanović, *State Responsibility for Genocide: A Follow-Up*, in *European Journal of International Law*, 2007, p. 669 ss., at 689. According to the Court, knowledge of the circumstances of the principal conduct constitutes the minimum threshold and thus the sufficient condition "at the least" in the presence of which the subjective requirement of complicity can be deemed to be satisfied. In this regard, however, it appears objectionable that the Court considered that the case of complicity is only fulfilled if the accomplice has full knowledge of the special intent, in this case the genocidal intent of the principal perpetrator. On the contrary, under general international law, the subjective requirement of complicity is to be sought in the accomplice's knowledge of the circumstances in which the principal offence was committed. In many cases this requirement can be presumed; see G. Puma, *Complicità di Stati nell'illecito internazionale*, cit., pp. 107 ss.

of an arms transfer practically impossible. From a legal point of view, this narrow interpretation of the subjective element of complicity in an international crime, as put forward by Germany before the ICJ, contradicts the predominant interpretation of Art. 16 ARSIWA[77] and, in view of its negotiation process, the ATT itself[78], according to which the knowledge of the circumstances of the internationally wrongful act committed by another state (i.e. an international crime) is sufficient to establish the responsibility of the state transferring weapons for aid or assistance[79]. This conclusion suggests an "objective" interpretation of the subjective element of complicity in international crimes through an arms transfer, in which the intention to facilitate the commission of the crime - referred to in the Commission's Commentary[80] - is somehow "presumed" if the circumstances of the transfer are known at the time of authorization[81]. In light of the foregoing, it can be concluded that under both customary international law and the ATT states have an obligation to refrain from transferring arms or ammunition that would be used by Israel in Gaza, as it is reasonable to believe, on the basis of the facts or recent past patterns of behaviour, that they would be used to commit serious violations of IHL and IHRL, thereby rendering states supplying them complicit in international crimes.

Where not prohibited by the ATT, a state party is additionally obliged, in order to grant an arms export authorization, to carry out an impartial (and non-discriminatory[82]) "risk assessment"[83] to evaluate (the potential for) several pre-defined risks and the ultimate use to which the transferred arms will be put. These include the risk that the arms would contribute to or undermine peace and security[84]; and/or "could be" used to commit or facilitate a serious violation of international humanitarian and human rights law[85](i.e. war crimes, crimes against

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[77] See G. PUMA, *ibidem*. According to V. LANOVOY, *Arms Transfers to Israel,* cit., at p. 14, state practice and *opinio iuris*, including the comments made during the drafting of Art. 16 of ARSIWA and subsequent debates in the context of a similar provision in the draft articles of responsibility of international organizations are not conclusive to determine that this interpretation of Art. 16 ARSIWA reflects customary international law. Anyway, this author concluded that: «the actual knowledge of the circumstances of the wrongful act is a sufficient test by default for the engagement of responsibility. However, evidence of intention on the part of the aiding or assisting State when authorizing the delivery of aid or assistance could indeed affect the determination of the scope and content of responsibility of that State at a subsequent stage of analysis».

[78] A. COCO, *I divieti di trasferimento*, cit., pp. 1234-1235.

[79] See É. DAVID, D. TURP, B. WOOD, V. AZAROVA, *Opinion on the International Legality of Arms Transfers to Saudi Arabia, the United Arab Emirates and Other Members of the Coalition Militarily Involved in Yemen*, December, 2019; pp. 67-68; H. MOYNIHAN, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism,* Chatham House, Research Paper, November 2016.

[80] See footnote n. 73, *supra*.

[81] For example, the factual and legal position adopted by the ICJ concerning the alleged commission of genocide by Israel in the Gaza Strip (see ICJ,.'Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip', (*South Africa* v. *Israel*), Provisional Measures, Order, cit., para. 54) could be taken as an objective "circumstantial evidence" of knowledge of the circumstances of arms transfer to Israel, for the purpose of determining responsibility for complicity in genocide from the date of the Court's decision.

[82] See the list of Principles in the Chapeau; Arts. 5, para. 1 and 7, para. 1 ATT. On the difficulties in applying the principle of non-discrimination to arms transfers see L. LUSTGARTEN, *The Arms Trade Treaty*, cit., p. 592.

[83] According to L. SAMMARTINO, *La ricerca di regole applicabili al "commercio" internazionale di armi convenzionali*, Roma, 2021, at p. 327, the procedural obligation of states to conduct an impartial risk assessment of all information relevant to determining the level of risk associated with arms transfers, established by the ATT and provided for in many international instruments, is an application of the principle of precaution, and it reflects a norm of customary international law. The principle of precaution applies to situations where risks are possible, under doubt, and are neither known nor measurable through probability.

[84] Art. 7, para. 1(a) ATT.

[85] Art. 7, para. 1(b)(i)(ii) ATT.

humanity and genocide); and/or other serious offences, such as crimes related to terrorism and transnational organised crime in the importing country[86]. This obligation corresponds to the establishment of an internal administrative procedure. Although this procedure is discretionary in nature, once states parties have determined the likelihood that a risk identified in the Treaty may materialise, they are required to use all means reasonably available to them to prevent that risk. This due diligence also requires the exporting state to consider whether there are measures that could mitigate such risks. These include confidence-building measures, joint programs agreed with the importing state[87] and the obligation to exchange information between exporting and importing states before granting the requested authorization[88]. According to the ATT, a state party shall not grant a licence if, after considering available mitigation measures, it determines that there is an "overriding risk"[89] that the weapons "could be" used to commit the serious abuses envisaged by the Treaty. The term overriding risk in the text of the ATT is highly controversial because it implies a balancing of unspecified factors. During the negotiation of the ATT this phrase has been interpreted in different ways by states[90]. International legal scholars are also divided on the interpretation of this concept[91]. The key point is the "degree of probability"[92] that a harmful event will occur before a transfer should be prohibited. The most convincing interpretation of this concept is that an overriding risk means that there is a high risk that an unlawful effect will occur, even with the adoption of available mitigation measures[93]. This is the typical situation during an armed conflict "especially in the context of high-intensity military operations", in which also the principle of precaution obliges the state to refuse to authorize the transfer of weapons[94].

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[86] Art. 7, para. 1(b)(iii)(iv) ATT.
[87] Art. 7, para. 2 ATT. For a discussion of the risk mitigation measures established by the ATT, which also apply to the prevention of weapons diversion, see section n. 4, *infra*.
[88] See section n. 5, *infra*.
[89] Art. 7, para. 3 ATT.
[90] Some states supported the view that the "prevalence" of the risk of negative humanitarian consequences should be weighed against other factors, such as the potential contribution of the arms to peace and security in the area of destination, in the decision-making process. Such an interpretation could, for example, be used by a state to justify the provision of arms to some NSAs engaged in an internal armed conflict against the government of a particular state. This interpretation should be rejected, as it would have very dangerous consequences and would be contrary to the aims and spirit of the Treaty; on this point see A. CLAPHAM, *The Arms Trade Treaty: A Call for an Awakening*, in *Antonio Cassese Initiative for Justice, Peace and Humanity, A Letter*, vol. 2, issue 5, 2013.
[91] Most scholars argue that the concept of overriding risk in the ATT identifies a very high-risk threshold to trigger the prohibition of authorisation and it «makes it far too easy for a State to approve a transfer whilst claiming compliance with the Treaty because the risk of some evil, though undeniably present, is not of the great magnitude required»; see L. LUSTGARTEN, *The Arms Trade Treaty*, cit., p. 596.
[92] Due diligence obligations are associated with the concept of risk (see footnote n. 7, *supra*). This structural element means that «the result pursued by the obligation is conditioned by a particular latitude of risk»; see R. PISILLO MAZZESCHI, *The Due Diligence Rule and the Nature of International Responsibility of States*, in *German Yearbook of International Law*, vol. 35, 1992, p. 49. States are required to act with due diligence in carrying out their duties, to minimize the risk that a violation will occur. As in the case of the prevention of cross-border harm from hazardous activities, with regards to the arms trade the state engages in a lawful activity that entails a certain degree of risk that the transferred weapons may lend themselves to serious abuse, and it cannot completely nullify the risk of such abuse materialising, but only minimise its extent.
[93] L. LUSTGARTEN, *The Arms Trade Treaty*, cit., p. 596; É. DAVID, D. TURP, B. WOOD, V. AZAROVA, *Opinion on the International Legality of Arms Transfers,* cit., at p. 89.
[94] See footnote n. 83, *supra*.

The application of proper risk assessment procedures, as required by the international legal standards just reviewed, would make clear that any arms transfer to Gaza should be banned or suspended[95]. In this context, it should be noted that some EU member states, and other countries have suspended arms supplies to Israel[96]. The position of the US and Germany, the two main arms suppliers to Israel[97], is under discussion. In response to Nicaragua's allegation that Germany's arms export control practice violates IHL, Germany replied that it had acted with due diligence in its arms exports to Israel on the basis of a solid domestic legal framework that provides for a very strict risk assessment of arms transfers by the government, subject to parliamentary control. In particular, Germany stated that, considering the nature and quantity of military technology or equipment supplied, its arms transfers to Israel did not entail a violation of the "risk thresholds" established by the EU Common Position defining common rules governing control of exports of military technology and equipment (EU Common Position)[98] and the ATT[99] for denial of a licence.

The US, although not a party to the ATT, issued a Memorandum on United States Conventional Arms Transfer Policy (CAT) – (NMS-18) in February 2023[100], in the midst of the conflict in Ukraine. This document provides guidance for the executive branch's review and evaluation of all proposed arms transfers. It identifies arms transfers as an important tool of national security and foreign policy that can enhance international peace and security, but which requires compliance with laws and norms on human rights and the protection of civilians. The policy states that before approving a potential arms transfer, the US should consider the risk that «the recipient may use the arms transfer to contribute to a violation of human rights or international humanitarian law, based on an assessment of available information and relevant circumstances». Despite the introduction of this policy of respecting IHL and IHRL in arms transfers, in December 2023 the US government announced the use of the so-called emergency authority'[101] for the supply of ammunition to Israel[102]. This is a simplified arms delivery procedure that effectively allows the US government to bypass Congressional review, undermining effective oversight of arms transfers and significantly limiting the impact of the US CAT policy (NMS-18) on US arms

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[95] Art 7 para. 7 of the ATT provides that: «if, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization».
[96] See footnote n. 28*, supra.*
[97] See footnote n. 2*, supra.*
[98] EU Council Common Position 2008/944/CFSP of 8 December 2008, in *OJEU* L 335/99, 13.12.2008; as amended by Council Decision (CFSP) 2019/1560 of 16 September 2019, in *OJEU* L 239/16, 17.9.2019.
[99] ICJ, 'Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory', (*Nicaragua v. Germany*), Oral Proceedings, cit., pp. 39-41, esp. paras. 36 and 38. The EU Common Position provides for a lower threshold of risk of misuse - i.e. the existence of a "clear risk" (see art. 2, para. 2 Criterion Two, let. (a)and (c), instead of an "overriding risk" as established by the ATT to deny an export licence.
[100] White House Press Release, *Memorandum on United States Conventional Arms Transfer Policy* (Feb. 23, 2023); for a comment see J. K. COGAN (ed.), *President Biden Issues Conventional Arms Transfer Policy That Emphasizes Human Rights Considerations*, in *American Journal of International Law,* Vol. 117:3, 2023, pp. 500-505.
[101] Under the Arms Export Control Act (AECA) (1976), the US President is required to notify Congress of many major weapon sales to other countries 30 days before concluding the transaction. However, the Act also provides the president with the power to waive this requirement if he/she declares «that an emergency exists which requires the proposed sale in the national security interest of the United States» and provides a detailed justification.
[102] On December 9, 2023, US Secretary of State Antony Blinken invoked "emergency authority", approving the immediate sale of nearly 14,000 120-millimeter (mm) tank munition cartridges to Israel and bypassing a standard required 15-day period of congressional review.

transfers to Israel[103]. On February 8, 2024, the Biden Administration issued another National Security Memorandum on Safeguards and Accountability With Respect to Transferred Defense Articles and Defense Services (NMS - 20)[104]. This document states that the recipient state may be required to provide «credible and reliable written assurances» that the state will not use the weapons in a manner contrary to IHL and, as applicable, other international law. NMS-20, also adds that if the US doubts the assurances, it will consider «appropriate next steps to assess and remedy the situation». On 10 May 2024, the Secretary of State issued the State Department's report to Congress on NMS-20[105], in which the State Department acknowledged possible violations of IHL in Gaza and called on the Israeli authorities to provide appropriate assurances in this regard, as required by the Memorandum. Notwithstanding this finding, the Department found insufficient evidence of violations of international humanitarian law to cut off US arms to Israel. There has been criticism from international law scholars that in this report the State Department did not conduct a thorough or convincing risk analysis of whether the assurances provided by Israel were credible and reliable for a number of reasons, and its failure to do so suggests that as a result the US may not be complying with international standard to prevent the misuse of exported arms[106].

4. *Due Diligence and Measures to Prevent Arms Diversion: The Armed Conflict in Ukraine*

The risk of arms diversion refers to the possibility that arms transferred under a regular licence may be diverted to a destination other than that intended or to unauthorised recipients (e.g. organised armed groups and irregular gangs, criminal organisations and terrorist groups). Such a situation may occur during the transfer of the arms, once the arms have reached their destination, or after delivery. The problem of diversion increases disproportionately in situations of armed conflict, as it is much more difficult to effectively control arms in circulation in the context of active hostilities. The risk of diversion is even greater in post-conflict situations, especially when adequate security measures are not in place to trace and secure the storage of weapons[107]. In the context of the armed conflict in Ukraine, the massive supply of military equipment, combined with Ukraine's history as a hub for illicit arms trafficking, has exacerbated such risks[108]. International arms control instruments contain several due diligence obligations and recommendations to mitigate the risk of arms

[103] Emergency authority has rarely been used by the US. The Biden administration announced the use of this procedure at a time when the Secretary of state has also expressed heightened disappointment at Israel's failure to protect civilians in a military campaign that has claimed thousands of lives, and at a time when US-made weapons have been implicated in civilian casualties. The Biden administration previously used emergency authority to sell tank ammunition to Ukraine in 2022, but this transfer was made without any evidence of civilian harm on the part of the Ukrainian military.

[104] https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2024/02/08/national-security-memorandum-on-safeguards-and-accountability-with-respect-to-transferred-defense-articles-and-defense-services/.

[105] *Report to Congress under Section 2 of the National Security Memorandum on Safeguards and Accountability with Respect to Transferred Defense Articles and Defense Services (NSM-20)*.

[106] W. WORSTER, *The Inadequacy of the US State Department Report on Arms Exports Assurances: Part I*, in *Opinio Juris*, 21.06.2024.

[107] See section n. 4.2, *infra*.

[108] R. STOHL, E. YOUSIF, *The Risks of US Military Assistance to Ukraine,* Stimson Center*,* 13.07.2022.

diversion. These provide for the application of measures that can have a preventive effect in the short, medium and long term, and cover: the decision-making process for authorising transfers; the stage at which arms are transferred from one country to another (delivery); and the stage after the arms have reached their destination (post-delivery). These three different phases are examined in the following sections.

4.1 *Due Diligence and Arms Diversion Risk Assessment at the Licensing Stage*

The legal obligations of EU member states to prevent the risk of diversion of arms transferred to Ukraine derive mainly from the EU Common Position and the ATT. The EU Common Position introduces the risk assessment of arms diversion as a possible criterion for denying an export licence, requiring member states to assess on a case-by-case basis «the existence of a risk that the military technology or equipment will be diverted within the buyer country or re-exported under undesirable conditions»[109]. This assessment will consider, *inter alia*, the technical capability of the recipient country to use the technology or equipment, its capacity to apply effective export controls, and the risk that the technology or equipment might be re-exported to undesirable destinations or to terrorist organisations or individual terrorists[110]. If this assessment is not reassuring, the export licence must be denied. According to available information the arms sent to Ukraine by EU member states have been transferred in the framework of recent EU Council Decisions (CFSP) on assistance to Ukraine and the European Peace Facility (EPF)[111], without any prior assessment of the risk of diversion. Therefore, the compliance of these arms transfers with the EU Common Position is rather doubtful. However, one point of discussion is the applicability of the EU Common Position to European arms transfers to Ukraine. Some authors argue that the EPF would suspend, albeit implicitly, the application of the EU Common Position[112]. On the contrary the applicability of the ATT to arms transfers to Ukraine cannot be contested, since this treaty does not provide for any exemption or suspension clause in case of necessity. The ATT does not explicitly mention the risk of diversion as a criterion for denying consent to a transfer under the Treaty[113]. It does, however, provide for a number of measures specifically aimed at preventing the diversion of transferred arms, which include not only the primary responsibility of the exporting state, but also the obligation of states parties involved in the chain of an arms transfer[114].

A state party intending to proceed with an arms export has a prior obligation to assess the existence of a risk of diversion and to work to mitigate it, if necessary, by taking appropriate measures[115], before granting an authorization. To this end, the ATT provides an illustrative list of measures, including confidence-building measures or programmes jointly

[109] EU Common Position, see art. 2, para. 2, Criterion 7.
[110] *Ibidem*.
[111] Council Decision (CFSP) 2023/230 of 2 February 2023 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force; in *OJEU*, L 32/62, 03.03.3023. For the financial part, the legal basis for the European action goes back to establishing a European Peace Facility (EPF), and repealing Decision (CFSP) 2015/528; in *OJEU*, L 32/62, 24.03.2021.
[112] A. PIETROBON, *La fornitura di armi all'Ucraina: quali regole e quali cautele?*, in *Eurojus*, Fasc. n. 3, 2023, pp. 138-139, 143.
[113] Arts. 6 and 7 ATT.
[114] Art. 11 ATT.
[115] Art. 11, para. 2 ATT.

developed and agreed by the exporting and importing states, as well as other preventive measures such as the provision of additional documentation by the importing state, including end-user certificates[116]. If the available measures are not sufficient to reduce the risk of diversion, the licence should not be granted. EU member states do not appear to have carefully considered these due diligence obligations under the ATT. In this regard, EU CFSP conditions for arms deliveries provide for the adoption of specific *ad hoc* bilateral agreements that EU member states should have concluded with Ukraine. However, these bilateral agreements were never concluded[117]. Conversely, the US, which is not bound by the ATT, has established a series of safeguards to prevent the diversion of arms transferred to Ukraine, including measures to be taken during delivery and after delivery[118].

4.2. *Obligation to Take Measures to Mitigate the Risk of Arms Diversion at the Delivery and Post-delivery Stages*

One issue that has been debated is the temporal scope of the obligation to take measures to mitigate the risk of diversion. Some scholars have argued that, unlike the EU Common Position, it is not clear whether the ATT imposes an obligation on states parties to take measures to mitigate the risk of diversion after the licence has been granted, including at the delivery stage, and after the arms have been delivered to their destination[119]. This interpretation is inconsistent with the objective of the ATT to prevent diversion[120]. The due diligence nature of the obligation to minimize the risk of diversion in the ATT[121], not only implies action by states parties, but also requires them to monitor this risk on an ongoing basis and to exercise a certain degree of vigilance, including at the time of delivery and after delivery of the weapons at their final destination[122]. Any other interpretation would have very dangerous practical consequences, since the greatest risks of diversion occur after the weapons have reached their destination, in the medium and long term. The US has adopted a number of best practices to reduce the risk of arms diversion. This policy essentially consists of monitoring US international arms transfers through a collection of End-Use Monitoring (EUM) programmes run either by the Department of State, Defense, or Commerce[123]. In the exceptional circumstances of the armed conflict in Ukraine, the EUM

[116] On this point L. LUSTGARTEN, *The Arms Trade Treaty* cit., at p. 595 observed: «Example of risk mitigation measures that have been suggested include insisting that end-user certificates require that re-export is forbidden without approval of the exporting State's authorities; capacity-building measures could include demonstrable improvements in physical security and management of stockpiles of the imported weaponry. It seems sensible to allow exporters to take into account of genuine efforts by the importer to curb some of the abuses the Treaty is designed to address, though confidence building measures may well take considerable time to produce demonstrable results. But what should not be counted as an acceptable measure of 'confidence building' is a generalized improvement in diplomatic relations».

[117] See A. PIETROBON, *La fornitura di armi all'Ucraina*, cit., pp. 139-140 and 149-150.

[118] See next section.

[119] A. PIETROBON, *La fornitura di armi all'Ucraina*, cit., p. 144, footnote n. 44.

[120] Art. 1 ATT. On this point see, S. CASEY-MASLEN, A. CLAPHAM, G. GIACCA, S. PARKER, *Art. 11 Diversion*, in A. CLAPHAM, S. CASEY-MASLEN, G. GIACCA, S. PARKER, *The Arms Trade Treaty: A Commentary*, Oxford, 2016, p. 356.

[121] Art. 11, para. 2 ATT.

[122] Regarding the "continuing character" of due diligence obligations see A. OLLINO, *Due diligence Obligations in International Law,* cit., p. 107.

[123] See Bureau of Political-Military Affairs, *End-Use Monitoring of U.S.-Origin Defense Articles*, Fact Sheet, 20.01.2021.

programmes have been modified and supplemented by the US Plan to Counter Illicit Diversion of Certain Advanced Conventional Weapons in Eastern Europe to Prevent Illicit Diversion of Weapons in Ukraine (US Plan)[124].

This comprehensive plan has three main lines of action: first, storage and accountability measures to secure and account for the transfer, storage and use of weapons and ammunition in Ukraine and neighbouring countries[125]; second, strong regional border management and security[126]; third, capacity building of security forces, law enforcement and border control agencies in the region to deter, detect and interdict illicit arms trafficking[127].

While recognising the valuable steps taken by the US to mitigate the risk of weapons diversion in Ukraine and noting Ukraine's effective cooperation[128], significant challenges remain and require the development and adaptation of mitigation measure.

This includes better coordination between the US and other states in region[129]and, in the longer term, the need for more tailored and effective measures to prevent the diversion of small arms and light weapons (SALW), particularly in the US government's post-conflict planning for weapons recovery, accounting for weapons distributed to paramilitary forces, destruction of surplus stockpiles, or plans for registering and cataloguing the presence of weapons where disarmament is not possible or desirable[130]. In this regard, states should carefully consider whether they are fulfilling their obligations to implement international standards and norms, as well as recommendations relevant to the tracing of arms (marking, record-keeping and information exchange) provided by global arms control instruments, such as the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (UN Firearms Protocol)[131] and the UN

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[124] Cfr. *US Plan to Counter Illicit Diversion of Certain Advanced Conventional Weapons in Eastern Europe*, fact sheet (The Plan is classified); for a comment see R. STOHL, E. YOUSIF, *A US Plan to Prevent Arms Diversion in Ukraine is Welcome But Just the First Step*, Stimson Center, 10.11.2022; see also R. STOHL, E. YOUSIF, *Ukraine Risks Revisited*, Stimson Center, 21.02.2024.

[125] *Ibidem*.

[126] *Ibidem*.

[127] *Ibidem*.

[128] Available reports show little evidence of significant international diversion of arms supplied to Ukraine since the start of the conflict; see R. STOHL-E. YOUSIF, *Ukraine Risks Revisited,* cit.

[129] As for US efforts to work with the OSCE, the EU, and others to align policies and programmes and to coordinate planned assistance activities along the Plan's three lines of action, see United States Mission to the OSCE, *US Statement for the Forum for Security Cooperation: Security Dialogue on SALW/SCA*, FSC.DEL/16/23, 25.01.2023.

[130] In this regard, R. STOHL, E. YOUSIF, *A US Plan to Prevent Arms Diversion in Ukraine,* cit., argued: «However the plan leaves unaddressed a number of concerns that could undercut the effort's overall efficacy. First, while the plan's prioritization of Man-Portable Air Defense Systems (MANPADS) and Anti-Tank/All-purpose Tactical Guided Missiles (ATGMs) is understandable given the highly sensitive nature of those systems and the potential capability evolution they could offer non-state actors, the focus on high-tech systems could divert attention away from the particularly acute risks posed by small arms and light weapons (SALW). Washington has transferred thousands of SALW to Ukraine, and millions of rounds of related ammunition. These kinds of materiel have long been a staple of the illicit arms market, are easily concealed and secreted across borders, are simple to use and maintain, and in high demand by illicit groups of all kinds. Moreover, SALW proliferation has consistently posed the most immediate global threat to civilian protection, be that from armed groups, criminal organizations, or others».

[131] The UN Firearms Protocol was adopted on 31.05.2001 and entered into force on 3.7.2005; it has 123 states parties, see UN *Treaty Series*, vol. 2326, p. 209. For instance, as a result of the coordination rule contained in Art. 6, para. 2 of the ATT (see section n. 3, *supra*, esp. footnotes n. 56-57), a state party to both the ATT and the UN Firearms Protocol shall only authorize an export, if the exported arms are duly marked and registered

Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (the Programme of Action)[132], complemented by the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (the International Tracing Instrument)[133]. To date, there is no evidence that states supplying arms to Ukraine have taken significant measures to ensure long-term tracing as part of their own policies to mitigate the risks of diversion.

5. *Transparency in Arms Transfers*

Due diligence is linked to several categories of international obligations, including those requiring states to ensure that the competent national authorities provide certain information. The obligation to share relevant information is a corollary of the principle of transparency of arms transfers. The obligations to exchange information contained in the ATT cover the different stages involved in transferring arms. First, with the purpose to mitigate the risk of misuse, the ATT provides an obligation to exchange information between exporting and importing states before granting the requested authorization[134]. Second, states parties shall submit annually to the Secretariat a report concerning authorized or actual exports and imports of conventional arms covered under the ATT, with the possibility to exclude commercially sensitive or national security information[135]. Somewhat surprisingly, a recent report concludes that the war in Ukraine has not eroded the level of transparency in ATT reporting nearly as much as might have been expected[136]. Third, according to the ATT[137], once an arms transfer has been authorized, all states parties involved have an obligation to co-operate and exchange information, where appropriate and feasible, in order to address the risk of diversion[138]. This obligation binds not only the authorizing state and the state of destination, but also the states of transit (and transhipment) of the goods. The ATT does not prescribe the measures to be taken. It is up to each state to determine, on a case-by-case basis, the most appropriate measures in accordance with its national law. Under this regime, however, none of the states involved is exempted from the obligation of transparency in arms transfers. Fourth, the ATT provides for a very detailed information-sharing obligation for any state party that detect diversion[139]. In addition, any state party that

(arts. 7 and 8 of the UN Firearms Protocol) and if the importing state and all transit states have authorized the transfer (Art. 10 of the UN Firearms Protocol).

[132] See *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, New York, 9-20 July 2001, UN Doc. A/CONF.192/15.

[133] UN A/RES/60/81, 8.12.2005.

[134] Arts. 7, para. 6 and Art. 8, para. 1 ATT. On the importance of transparency in arms transfers for domestic public opinion see Z. YIHDEGO, *Arms Trade and Public Controls: The Right to Information Perspective*, in *Northern Ireland Law Quarterly*, 2007, vol. 59, n. 4, pp. 379–394.

[135] Art. 13, para. 3 ATT.

[136] R. FLETCHER, R. STOHL, *Arms Trade Transparency in Conflict: ATT Reporting on Arms Transfers to Ukraine*, Stimson Center, Policy Paper, August 2023.

[137] Art. 11, para. 3 ATT.

[138] Art. 11, para. 3 ATT. 2. The ATT also encourages states parties to report to other states parties, through the Secretariat, information on measures taken that have been proven effective in addressing the diversion of transferred conventional arms covered under Art. 2, para. 1 ATT.

[139] Art. 11, para. 4 ATT.

comes into possession of relevant information is "encouraged" to share it with others: «Such information may, for example, relate to illicit activities, including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch or destinations used by organised groups involved in diversion»[140].

The ATT also encourages states parties to consult and exchange information on matters of mutual interest relating to the implementation and application of the Treaty, as part of the broader obligation to cooperate that requires each state party to endeavour to ensure the effective functioning of the Treaty[141]. Without prejudice to the interests of each state party in its own security and defence, the ATT does not go so far as to establish an actual obligation to exchange essential information. However, the obligation to co-operate requires due diligence, namely that the state party in possession of useful information does not remain passive in situations where there is a risk of misuse or diversion of weapons but takes effective and timely action to deal with them in good faith and in the common interest[142]. It is noteworthy that the US, which is not a state party to the ATT, has shown a rather surprising commitment to public transparency with regard to its arms transfers in Ukraine, although more could be done in this area[143].

6. *Conclusion: Arms Transfers and Issues of State Responsibility in Case of Violations of Due Diligence Obligations and Complicity in International Crimes*

This study found that several primary norms from different branches of international law are relevant to arms transfers in armed conflicts and to existing state obligations in this regard. These include some norms of IHL and IHRL, as well as norms contained in international arms control instruments, that establish the complicity of states in international crimes committed by other states (and non-state actors) as a result of an arms transfer, and those that impose due diligence obligations on states to mitigate the risk of misuse and diversion of arms.

The issue of international responsibility of states following irresponsible arms transfers has become increasingly important, as evidenced by the recent ongoing cases before the ICJ concerning the Gaza Strip investigated in this study[144]. In conclusion, it is therefore necessary to better clarify the distinction between state responsibility for violations of a primary norm establishing a due diligence obligation and international responsibility of states for complicity under secondary norms (ARSIWA) and its implications for arms transfers. The two most

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140 Art 11, para. 5 ATT.

141 Art. 15, paras. 2-3 ATT. According to Art. 15, para. 4: «States Parties are also encouraged to cooperate, pursuant to their national laws, in order to assist national implementation of the provisions of this Treaty, including through sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms covered under Article 2 (1)»; according to L. SAMMARTINO, *La ricerca di regole applicabili al "commercio" internazionale di armi convenzionali*, cit., p. 285 the large number of conventions that provide for this, together with the large number of states that have ratified them, makes it possible to affirm that the obligation to cooperate in the exchange of information on arms transfers has acquired a customary character.

142 A. PIETROBON, *La fornitura di armi all'Ucraina*, cit., p. 145.

143 According to R. STOHL,E. YOUSIF, *Ukraine Risks Revisited,* cit., «Vitally, the administration should provide publicly available progress reports on its diversion mitigation plan's implementation – it has been 16 months since the plan was first announced, yet little information has been provided on what the approach has looked like in practice»; and again: «Publishing more comprehensive and methodologically robust factsheets, improving the specificity of reports, and providing updates on EUM and other mitigation efforts should be a priority».

144 See section n. 2, *supra*.

problematic issues in establishing a state's responsibility for a breach of a due diligence obligation in the context of an arms transfer relate to the question of the breach and the *momentum a quo* of the breach. For a breach of a due diligence obligation to occur, it is not decisive that the state does not achieve the result expected by the primary norm in question (i.e. the prevention of the misuse and/or diversion of arms). What matters for the determination of a violation is that «[...] the State fails to achieve the best effort threshold required by the content of the primary norm»[145]. In other words, states are required to act with due diligence in order to try to prevent the risks associated with an arms transfer from materialising[146]. The standards of due diligence required by the primary international norms relevant to arms transfers point to the obligation of states bound by such norms to establish a domestic *ad hoc* impartial and non-discriminatory administrative procedure for risk assessment, to take appropriate measures to mitigate the risk of misuse and diversion of arms and to respect the principle of transparency. These obligations comport that the states monitor these risks on an ongoing basis, and cover the entire arms transfer cycle, including the authorization, delivery and post-delivery phases. The practice examined in this study shows that EU member states supplying arms to Ukraine have not fully complied with their due diligence obligations applicable to arms transfers under international instruments. For example, it is questionable whether Italy has adequately considered its due diligence obligations under the ATT, both to ensure compliance with IHL/IHRL and to reduce the risk of diversion of supplies[147]. Also, puzzling is the US practice, revealed by this study, of applying a double standard of due diligence (more stringent in the case of Ukraine, much less so in the case of Gaza) to the measures taken to mitigate the risk of misuse and diversion of the arms supplied.

Evidence of a state's lack of commitment to make its best efforts to prevent the misuse or diversion of arms is sufficient to establish the *momentum a quo* of a breach of a due diligence obligation in connection with an arms transfer. Indeed, notwithstanding some elements of uncertainty in international practice[148], due diligence obligations are breached at the moment when a state fails to make the efforts required by the primary rule, without the occurrence of the wrongful event that the norm seeks to prevent (the misuse or diversion of weapons)[149]. On the contrary, the occurrence of the harmful event associated with the principal conduct (i.e. the commission of an international crime) facilitated by an arms transfer, is a *conditio sine qua non* in cases of complicity in a wrongful act committed by another state[150].

[145] See footnote n. 6, *supra*.
[146] See footnote n. 92, *supra*.
[147] On the constitutionality implications of this conclusion see A. PIETROBON, *La fornitura di armi all'Ucraina*, cit., p. 150.
[148] A. OLLINO, *Due diligence Obligations in International Law,* cit., pp. 202-213.
[149] In this regard M. LONGOBARDO, *L'obbligo di prevenzione del genocidio,* cit., pp. 245-246, observed that in the case of obligations of conduct, if the result sought by the norm has not been achieved, the state may nevertheless prove that it exercised the diligence required in attempting to achieve that result and thus not incur international responsibility. It follows that in obligations of conduct there is a reversal of the burden of proof: the occurrence of the event that the norm seeks to prevent does not automatically imply that the obligation has been breached but requires the state to prove that it took all measures within its power to prevent the occurrence of that event.
[150] See footnote n. 69, *supra*. As for the finding of a breach, according to S. CASEY-MASLEN, A. CLAPHAM, G. GIACCA, S. PARKER, *Art. 6: Prohibitions*, in A. CLAPHAM, S. CASEY-MASLEN, G. GIACCA, S. PARKER, *The Arms Trade Treaty: A Commentary*, cit., p. 204, the requirement of knowledge must be ascertained at the time of the authorisation and, except for the mental element of aid and assistance established by Art. 16 of the ARSIWA, which requires that the wrongful act actually occurs, under Art. 6, para. 3 of the ATT, «... no act need occur; it

The distinction between breaches of due diligence obligations and complicity requires further analysis, particularly when failure to act with due diligence conflates with aiding and assisting by omission[151]. This is the case in which the lack of due diligence required (for instance, the absence of a risk assessment procedure or the lack of measures adopted to mitigate the risk of misuse and diversion of arms) may constitute the material element of complicity by omission. This kind of state responsibility may be established only if, in addition to the omission, also the subjective element, that is the "knowledge of the circumstances"[152] of the principal offence is present[153]. As seen in this study, this appears to be the case with regard to arms transfers in Gaza. In such circumstances, there are no structural differences between responsibility for complicity or responsibility for a failure of due diligence. Instead, it will eventually be for the international court called upon to decide whether to attribute the state that authorize the arms transfer the greater "social disvalue"[154] that complicity carries than responsibility for the violation of a due diligence obligation.

is sufficient that the potential transfer would be used for the commission of an act in the future. The obligation of the State Party is to act to prohibit a transfer so that the act does not occur in the first place».

[151] This possibility rests on a central premise, namely that complicity can be accomplished through omission. In ICJ 'Case concerning application of the Convention on the Prevention and Punishment of the crime of Genocide', (*Bosnia And Herzegovina* v. *Serbia And Montenegro*), Judgment, cit., para. 432, the Court rejected this conclusion. However, international practice demonstrates that there are no reasons to exclude *a priori* that an omission could constitute the material element of complicity; see G. PUMA, *Complicità di Stati nell'illecito internazionale*, cit., p. 72 ss.

[152] See section n. 3, *supra.*

[153] Due diligence is an objective standard of conduct against which it is not necessary to assess the subjective element of the responsible state (see R. PISILLO MAZZESCHI, *Due diligence e responsabilità internazionale degli Stati*, Milano, 1989, P.57). In this case, on the contrary, the breach of a *due diligence* obligation is part of another wrongful act, that is complicity; G. PUMA, *Complicità di Stati nell'illecito internazionale*, cit., pp. 100-101.

[154] A. OLLINO, *Due diligence Obligations in International Law,* cit., pp. 217-218.