

THE LIMITS OF COMPLICITY: STATE RESPONSIBILITY FOR AIDING IHL VIOLATIONS IN LIGHT OF THE COMMON ARTICLE 1 AND THE OBLIGATION TO ENSURE RESPECT

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Abstract

The paper examines the obligation to respect and ensure respect under common article 1 of the Geneva Conventions, specifically addressing state responsibility for financial and military support to the violators of International Humanitarian Law. It analyses key jurisprudence from international courts and argues that the obligation should be extended to third-party states in both international and non-international armed conflicts across the globe.

Furthermore, the research highlights the legal implications of arms transfers and complicity using case studies. Lastly, the researchers advocate strengthening the 'ensure respect obligation' by mandating the cessation of support for actors violating the humanitarian principles.

1. Introduction

Since the start of human civilization, there has always been a fight for power and control between men. At first, it was on a small scale, tribal warfare, and city-states fighting amongst one another. However, with human evolution, this grew tenfold, with wars covering thousands of acres and affecting millions in their midst. While the paper does not aim to discuss the evolution of war over the course of human settlement on this planet, it aims to address an issue related to warfare that poses a serious threat to human existence in the contemporary world.

After the World Wars, the states vowed to reduce the conflicts and to try to resolve them through dialogue and diplomacy. The UN Charter effectively outlawed war

between states unless forced to act in self-defence.¹ Although it was a great gesture to exemplify the unified goal of pacificism by the state parties to the UN Charter, it stood merely as a symbolic gesture, as it did not, in fact, rid the human race of the scourge of war. And currently, there are remnants of preceding and existing wars in almost all continental landmasses.²

However, modern warfare is quite complex and interlinked with not just two states or two groups engaged in combat, but multiple parties clashing at various levels. This ladder of support by various states is so twisted that the obligation to ensure respect for the Geneva Conventions by the Contracting Parties has been broken repeatedly. This raises numerous questions, most importantly, whether the states providing logistical and financial support for the actors or states violating the conventions should be held responsible for failing to fulfil their obligations under international law.

This paper will try to point out the fallibilities in the existing legal and diplomatic frameworks, while analysing the realities of various ongoing conflicts in the world to propose prospective developments in the field that will lead to holding responsible the states violating international law. However, the scope of the research has been limited to only financial support and arms trade to reach a more focused and feasible conclusion in light of the existing world order.

2. What are the Geneva Conventions?

The Geneva Conventions in their history predate the existing United Nations structure, although their focus initially was to merely protect civilians and the wounded soldiers from the scourge of war. Henry Dunant, known as the father of the International Humanitarian Law (IHL), advocated for the protection of wounded and medical personnel through his memoir of the Battle of Solferino.³ And through his efforts, the First Convention was thus signed in 1864.⁴

Although the first convention was a significant step towards a regulated and humane war, it was far from a complete code for warfare. Over the next decades, the

¹ Article 2(4), UN Charter.

² War Watch, RULAC.

³ Henry Dunant, *A Memory of Solferino*, ICRC 1959 (the French version was published in 1862 and was later translated into English).

⁴ Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, adopted 22 August 1864, entered into force 22 June 1865.

Conventions were expanded and revised to address the evolving realities of warfare since the world was rapidly developing following the Second Industrial Revolution (Technological Revolution). In 1906, a new convention was adopted to extend the existing legal framework to the conflicts at sea.⁵ Subsequently, in 1929, inspired by the effects of the First World War, or the Great War as it was called back then, the convention about the treatment of prisoners of war was introduced.

World War II drastically changed the global order and brought about an everlasting change for human civilization. Subsequently, the law of war was not immune to the change brought along with it. World War II not only forced the states to move to criminalize breaches of the existing laws of war but also laid the foundation for the modern International Criminal Law through the Nuremberg and Tokyo trials.⁶

Additionally, the atrocities and widespread suffering brought about by World War II emphasized the need for a more comprehensive and robust set of humanitarian laws. Thus, the 1949 Geneva Convention, built upon the existing treaties, was a monumental revision. There are four Conventions; the First Geneva Convention protects wounded and sick soldiers on land; the Second Geneva Convention extended the protection of wounded and sick soldiers to shipwrecked members of armed forces at sea; the Third Geneva Convention addresses the treatment of prisoners of war, whereas the Fourth Convention was a new introduction to the law of armed conflict. The convention protected civilians in times of war and those under occupation. This was a response to the devastating loss of civilian life sustained in World War II.

3. Respect and Ensure Respect: A Brief History

The core goal behind the conventions has always been to reduce the suffering during armed conflicts regardless of their status. One of the pivotal elements of the conventions has been the obligation of all the parties to always respect and ensure respect for the conventions.

There are certain provisions of the conventions referred to as the general provisions that remain largely common to all four conventions. The International Committee of the Red Cross (ICRC) placed these articles as principal provisions of a

⁵ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, adopted 6 July 1906, entered into force 6 August 1907.

⁶ International Military Tribunal (Nuremberg); International Military Tribunal for the Far East (Tokyo).

general nature that have been incorporated to enunciate the fundamental principles of the conventions.⁷

Similarly, Article 1, being a part of the general provisions, remains common to all four conventions. The article imposes the duty on all Contracting Parties to respect and always ensure respect for the conventions. The initial conventions of 1864 and 1906 did not include such a provision. However, both these elements are deemed to be implicit in the 1864 Convention,⁸ and that implicit obligation to respect and ensure respect was carried forward by reproducing the said provision in both the 1906 Geneva Convention⁹ and the 1907 Hague Convention.¹⁰

The principle of *pacta sunt servanda* was expressly incorporated in the 1929 Conventions, which were complemented by the words ‘in all circumstances.’¹¹ Subsequently, the said article was polished and moved to the prominent position of being the first article of all four Conventions. Moreover, the element to ensure respect was added to ‘stress that if the system of protection of the Convention is to be effective, the High Contracting Parties cannot confine themselves to implementing the Convention’ but ‘must also do everything in their power to ensure that the humanitarian principles on which the Convention is founded shall be universally applied.’¹² Furthermore, this obligation is not restricted to the Geneva Conventions, but rather it qualifies as customary IHL as per the study by the ICRC.¹³

3.1. Scope of Application

*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.*¹⁴

It must be understood that the said provision is equally applicable in peacetime as it is in armed conflict. This is apparent by the obligation being addressed to the High

⁷ Report of the Conference of Government Experts of 1947, p. 332, and Draft Conventions submitted to the 1948 Stockholm Conference, p. 4.

⁸ Article 8, Geneva Convention (1864).

⁹ Article 25, Geneva Convention (1906).

¹⁰ Article 19, Hague Convention (X) (1907).

¹¹ Article 25(1), Geneva Convention on the Wounded and Sick (1929); Article 82(1), Geneva Convention on Prisoners of War (1929).

¹² Draft Conventions submitted to the 1948 Stockholm Conference, pg. 5.

¹³ Rule 139, Customary International Humanitarian Law, ICRC Study on Customary International Humanitarian Law (2005).

¹⁴ Common Article 1, Geneva Conventions (1949).

Contracting Parties in a general manner rather than a specific address to the *parties to the conflict*. This stance is further strengthened by the discussions of the 1929 Diplomatic Conference.¹⁵ The phrase “in all circumstances,” also reflects the intention to extend the temporal scope of application for both peacetime and armed conflict. Additionally, Des Gouttes’ French Commentary on the 1929 Convention indicates the desire of the treaty parties to extend the scope of such a provision to both wartime and peacetime.¹⁶

The phrase “in all circumstances” also serves to partially detach the application of the Conventions’ rules from any principle of reciprocity. Put differently, a State’s duty to comply with the Conventions is, as a general matter, not contingent upon an adversary or any other State’s adherence to them. Although some scholars have questioned whether reciprocity has truly been eliminated from the law of armed conflict, there is broad consensus that most of the Conventions’ obligations do not rely on reciprocal compliance.

Additionally, it is understood that the phrase ‘in all circumstances’ also points to the unconditional application of the Conventions. Thus, alluding that the obligations apply regardless of the *casus belli* (reason of war), whether the state fights as an aggressor or in self-defence.¹⁷

The doctrine of military necessity operates as a limited exception within IHL, permitted only where specific treaty provisions expressly allow it. For instance, Article 23(g) of the Hague Regulations authorizes the destruction or seizure of enemy property solely when “**imperatively demanded by the necessities of war.**”¹⁸ Read literally, the phrase “in all circumstances” in Common Article 1 might be taken to require compliance with the Geneva Conventions even where military necessity would otherwise be invoked to justify departure from certain rules. Such an interpretation reflects pre–Second World War theories that treated military necessity as a general principle capable of overriding legal obligations. That concept has since been rejected in modern IHL.

In the immediate post-war period, international and military tribunals consistently affirmed that military necessity or expediency cannot justify violations of positive rules of humanitarian law, including in the context of war crimes prosecutions.

¹⁵ Proceedings of the Geneva Diplomatic Conference of 1929, pp. 329–330.

¹⁶ Des Gouttes, *Commentaire de la Convention de Genève de 1929 sur les blessés et malades*, ICRC, 1930, p. 186.

¹⁷ Lieber Institute, *Articles of War*, Common Article 1, Michael N. Schmitt and Sean Watts, April 12, 2024.

¹⁸ www.icrc.org/ihl.nsf/FULL/195?OpenDocument.

This jurisprudence has been reinforced in subsequent treaty law, which makes clear that military necessity may operate only where the applicable instrument explicitly recognizes its justificatory effect, and never as a general defence. Since 1945, military necessity has accordingly been understood as legally relevant only in those limited situations where a treaty expressly provides for it¹⁹. The 1949 Geneva Conventions contain no general military necessity clause, and even if they did, a general obligation under Common Article 1 would not supersede a clear, specific provision authorizing such an exception.

The understanding of the phrase “the present Convention” extends to the nature of conflict. And the provision is not merely applicable to international armed conflict, which includes occupation under common Article 2, but the provision is also applicable to non-international armed conflict as per the common Article 3. Therefore, the obligation to respect and ensure respect extends to non-State groups as well, which has been affirmed by the International Court of Justice (ICJ) in the Merits Judgment of the Nicaragua Case.²⁰

3.2. How to Ensure Respect?

The phrase ‘respect’ can be easily understood as directly imposing the obligations on a state to comply with the provisions and principles of IHL. This includes adherence to the cardinal principles of IHL and refraining from acts that might be in contravention of the said principles.

On the other hand, the 2016 ICRC Commentary on the First Convention points out that the expression ‘ensure respect’ has raised a variety of questions over the decades. It must be noted that the provision of ensuring respect goes beyond the State’s own conduct and actually requires the State to act appropriately to ensure other States, armed groups or actors comply with and respect the Conventions. The late Professor Frits Kalshoven, in what is the most in-depth inquiry into the subject to date, concluded:

The point remains that the primary legal obligation arising from common Article 1 is for States Parties to impose respect for the applicable rules of international humanitarian law, ‘in all circumstances’, on their armed forces,

¹⁹ US V List (Annual Digest, Vol XV, 647); Manstein (Annual Digest, Vol XVI, 511–513); The Peleus (Law Reports of Trials of War Criminals, Vol I); Additional Protocol I, Art 41(3).

²⁰ ICJ, Military and Paramilitary Activities in and against Nicaragua case, Merits, Judgment, 1986, para. 220.

including armed groups under their control, and on their populations: for the implementation of this obligation, they can be held legally responsible. No such legal liability attaches to their moral duty to endeavour to ensure respect by their peers. Since it is their right to do this under the law of treaties, they cannot be reproached for doing so either²¹.

This position is also supported by the original commentaries to the 1949 Geneva Conventions prepared under the general editorship of Jean Pictet and published in the authors' private capacities between 1952 and 1960.²² The position subsequently remains the currently prevailing view in the 2016 Commentary and is supported by the ICRC. This is quite broad compared to the preceding view on the phrase, which advocated for states to adopt all measures that are necessary to ensure respect only by their organs and private individuals within their own jurisdictions.²³

The contemporary view is much more coherent and aligned with the goals of the legislators. Thus, the obligation to ensure respect encompasses significant obligations that directly address the state's support for violations. But to comprehend and to evaluate the obligations and their implications, the situations of direct state responsibility must be analysed.

4. Direct State Responsibility

A state is directly responsible under IHL for any violations of the Conventions that are attributed to it. The attribution to the state can be through multiple means.²⁴ Primarily, all acts committed by members of their armed forces would be directly attributable to the state, regardless of whether they operate domestically or overseas.²⁵

Secondly, any violations by people or entities who are exercising government authority on behalf of the state are also attributable to the state that has authorized them.²⁶ Moreover, any violations by private actors that are acknowledged by the state as

²¹ Frits Kalshoven, *The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit*, 2 Yearbook of International Humanitarian Law 3, 7 (1999) at 60.

²² Jean Pictet, *Commentary on the First Geneva Convention*, 1952, p. 26.

²³ ICRC, *Commentary on the First Geneva Convention*, Article 1, 2016, page 61.

²⁴ Jean-Marie, Louise Doswald-Beck, Carolin Alvermann, Knut Dörmann, and Baptiste Rolfe. "Responsibility and Reparation (Rules 149–150)." Chapter. In *Customary International Humanitarian Law*, 530–50. Cambridge: Cambridge University Press, 2005.

²⁵ Diakonia International Humanitarian Law Centre, 'For whose actions is the state responsible?'.
²⁶ Ibid.

their own are attributable to the state. Under the Geneva Conventions, States are obligated to criminalise and prosecute grave breaches and be responsible themselves for any violations and crimes that might be committed by their agents.²⁷

Additionally, any acts committed by people or groups acting under the state's instructions, direction or control are also attributable to the state. This is in line with the ICJ's stance established under the *Nicaragua v. United States* case, where the court stated that mere financing, training, equipping, and strategic guidance of armed groups is insufficient for full attribution of their acts to the supporting state.²⁸ It reiterated that the state providing support cannot be absolved of its responsibility for its own conduct in that regard.

The Court clarified that while "effective control" over specific operations is required for full attribution, supporting states remain responsible for their own unlawful assistance when they are aware of violations being committed by the groups they support.²⁹

5. Jurisprudence on Aiding and Assisting: Analysis of ICJ Cases

The ICJ's jurisprudence provides insight into the established application of the common article in situations that involve the aiding or assisting of IHL violations.

5.1. *Nicaragua v. United States* (1986)

In this particular case, although the ICJ did not find the United States directly responsible for the IHL violations committed by the Contras, due to a lack of effective control over their specific operations. The court did hold the US responsible for its own conduct, particularly in encouraging violations by dissemination of a war manual on Psychological Operations in Guerrilla Warfare.³⁰ The ICJ held that the United States had obligations under Common Article 1 to ensure that the paramilitary forces it supported abided by Common Article 3 obligations, even when the United States was not itself a party to the conflict:

²⁷ Practical Guide to Humanitarian Law, 'Responsibility' (Doctors Without Borders).

²⁸ Oona A Hathaway, Emily Chertoff, Lara Domínguez, Zachary Manfredi and Peter Tzeng, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95 Texas Law Review 539.

²⁹ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) (Merits) [1986], para. 392.

³⁰ *Nicaragua v. United States of America* (1986).

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.³¹

The ruling by the international court established a precedent for the negative obligation under the common article 1 to refrain from encouraging violations. This further integrates the indirect support by states under the ambit of state responsibility.³²

5.2. Wall Advisory Opinion (2004)³³

The ICJ’s Advisory Opinion on the Wall further clarified the external dimensions of the Common Article 1. The court reiterated that the states that are party to the Convention have a duty under Article 1 not only to respect the Convention but also ‘to ensure that other parties also respect the Convention.’³⁴ The court further stated that this imposed a specific duty not to recognise the legal situation created by the Wall and not to provide aid or assistance for its construction. This stance by the court explicitly links the obligation to ensure respect with the obligations of non-recognition and non-assistance in maintaining illegal situations.³⁵

The ICJ adopted an interpretation of Common Article 1 that points toward the existence of certain positive obligations for third States³⁶. The Court held that Common

³¹ *Nicar. v. U.S.*, 1986 I.C.J. 14, para 220.

³² Marko Milanovic, ‘Common Article 1 Does Prohibit Complicity in IHL Violations, Through Arms Transfers or Otherwise’ (EJIL: Talk! 15 April 2024).
<https://www.ejiltalk.org/common-article-1-does-prohibit-complicity-in-ihl-violations-through-arms-transfers-or-otherwise/>.

³³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004).

³⁴ Chatham House, *The ICJ Advisory Opinion on the Wall: Summary of Discussion at the International Law Programme Discussion Group* (26 November 2004).

³⁵ Amnesty International, ‘Chapter 6: Settlements and Third State Responsibility’ (30 January 2019)
<https://www.amnesty.org/en/latest/campaigns/2019/01/chapter-6-settlements-and-third-state-responsibility/>.

³⁶ *Wall Advisory Opinion*, 2004 I.C.J. 136, para 156–60.

Article 1 requires “every State party” to the Fourth Geneva Convention to take steps to “ensure that the requirements” of the Convention are respected:

The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.³⁷

In applying this principle, the Court concluded that “all the States parties to the Geneva Convention ... are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with IHL as embodied in that Convention.”³⁸ The Court therefore expressly recognized that Common Article 1 imposes obligations on third States, namely, all High Contracting Parties, to take steps to halt Israel’s violations of the Fourth Geneva Convention. This interpretation necessarily suggests the existence of a positive duty, particularly because many States Parties have no direct involvement in Israel’s military operations in Palestine. Furthermore, the Court’s qualification that such obligations must be fulfilled “while respecting the UN Charter” reinforces the ICRC’s view that Article 2(4) of the Charter delineates the limits of permissible measures taken to ensure compliance with Common Article 1.

The Wall Advisory Opinion indicates that third states may be liable for their failure to take preventive action against foreseeable IHL violations by other states, but it must be stressed that advisory opinions are non-binding. Given the limited depth of the Court’s analysis, the evident divergence among the judges, and the non-binding character of the findings as they relate to States not party to the proceedings, the judgment and the accompanying opinions provide only weak and unreliable support for the existence of an external dimension to the “ensure respect” obligation.³⁹

³⁷ Wall Advisory Opinion, 2004 I.C.J. 136, para 158.

³⁸ Wall Advisory Opinion, 2004 I.C.J. 136, para 159.

³⁹ Wall Advisory Opinion, 2004 I.C.J. 136.

5.3. Bosnia v. Serbia (2007)⁴⁰

Although the case particularly concerned the Srebrenica Massacre and whether the actions of the perpetrators could be attributed to Serbia. However, the Court discussed the element of ensuring respect under the Geneva Conventions. In this regard, the Court chose to include a due diligence obligation. The clause requires that states use all means reasonably available to prevent breaches by parties over which they have influence. The court set about a standard for this clause, which is that the state must prevent breaches by all means at its disposal, and this is dependent upon the capacity, relationship, and foreseeability of those violations to be committed.⁴¹

Specifically, about the issue of due diligence, the ICJ noted:

A State cannot be under an obligation to succeed, whatever its circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible.⁴²

This reasoning yields two insights relevant to the interpretation of the obligation to ensure respect. First, compliance with the duty cannot be assessed solely by reference to the eventual outcome of a state's efforts. A State may employ "all means reasonably available" yet still fail to halt or prevent the violations in question. Accordingly, the obligation to ensure respect is one means of conduct, rather than a guarantee of results. Second, states seeking to ensure respect are required to take only those measures that are "reasonably" within their capacity in the circumstances and that are appropriate in light of the degree of influence they possess over the parties to the conflict.

A very useful summary of the principle of this case is provided by Tzevelekos.

For the state to escape responsibility for lack of diligence, it needs to demonstrate that it did everything that was possible to fight wrongfulness. To

⁴⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment), (2007).

⁴¹ ICJ, Bosnia v. Serbia, para 430.

⁴² Case concerning application of the Convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) (2007) ICJ, para 430.

comply with diligence, states need to suitably use the pertinent means at their disposal... due diligence generates obligations of means...⁴³

6. Financial Support as a Potential Breach

Although the ICJ has previously absolved states of responsibility for any violations of IHL if they are merely financing the group or state that is actively committing such violations, this view would be in contravention of the opinion adopted by the ICRC with respect to the phrase ‘ensure respect’. Moreover, this grey area in the law opened avenues for states to avoid any repercussions despite actively financing genocides and war crimes in other states.

The International Law Commission’s Articles on State Responsibility (ARSIWA) have extended the responsibility by codifying the preceding view and diverging from the ICJ’s stance in Nicaragua. Article 16 states that

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- a. that State does so with knowledge of the circumstances of the internationally wrongful act; and
- b. the act would be internationally wrongful if committed by that State.⁴⁴

While some elements of State responsibility under Article 16 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts are relatively straightforward, others are more complex. The concepts of aid and assistance are broad, encompassing the provision of weapons, logistical and technical support, financial assistance, and intelligence-sharing. Likewise, the requirement for a causal nexus is met whenever the aid or assistance makes a material contribution to the internationally wrongful act. The term “internationally wrongful” under Article 3 of ARSIWA encompasses acts such as the commission of war crimes. The most contentious element,

⁴³ Tzevelekos, V. (2013) Revisiting the Humanisation of International Law: Limits and Potential. *Erasmus Law Review* 1, para 73.

⁴⁴ Article 16, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

however, is the knowledge requirement under Article 16. Part of the difficulty arises from inconsistencies in the ILC's treatment of the concept⁴⁵.

While Article 16 itself employs the term "knowledge," the ILC's commentary at times refers to intent rather than knowledge. Scholarly opinion and State practice are similarly divided. Under a knowledge-based interpretation, a state is complicit if it knowingly assists another state that will use it to commit internationally wrongful acts, including war crimes. By contrast, an intent-based interpretation requires that the assisting State act with the purpose of facilitating the wrongful conduct.

The obligations under Article 16 are further reinforced by Article 41, which prohibits a State from aiding or assisting in the maintenance of situations created by a serious breach of a peremptory norm (*jus cogens*) of international law. Such peremptory norms include, *inter alia*, the prohibition on acts of aggression, crimes against humanity, and genocide. This framework underscores that State assistance facilitating serious violations of fundamental international law can trigger both State responsibility and, in some cases, individual criminal accountability.

In practice, this means that any state that knowingly funds or arms a state to commit violations and breaches of the Geneva Conventions would make the state liable as well. The particular provision has a narrow scope and has been tailored to address state-to-state aid, but it reiterates the principles that States should not be intentionally facilitating violations of the Conventions.

Scholars argue that the difference between the obligations of Common Article 1 and Article 16 may not be so stark. The ARSIWA requires intent on the part of the state, but an oblique intent may suffice for imposing responsibility.⁴⁶

In contrast, for Common Article 1-specific complicity, some arguments suggest that the subjective element of "intent" to facilitate the wrong is unnecessary. Instead, "knowingly contributing" or "conscious risk-taking akin to recklessness" is argued to be sufficient if the aid facilitates a serious IHL violation.⁴⁷

⁴⁵ Intelligence Sharing in Multinational Military Operations and Complicity under International Law by Marko Milanovic 97 INT'L L. STUD. 1269 (2021).

⁴⁶ James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013).

⁴⁷ Milanovic (n 26).

7. Arms Trade as a Breach of IHL

Under International Law, arms trade deals are also a point of scrutiny if the trade deals are resulting in violations of the established law. The Arms Trade Treaty (ATT) of 2013 aimed to correct this issue in particular, as it imposed the obligation on states not to export arms that could, in turn, result in IHL violations, commission of genocide, war crimes, and crimes against humanity.⁴⁸ The treaty also imposes a duty upon the state parties to conduct a thorough risk assessment and deny any such arms transfer if there is an existence of an overriding risk that the arms could be used to commit IHL and human rights violations.⁴⁹

Under customary international law reflected in the ARSIWA, a State incurs international responsibility when it aids or assists another State in committing an internationally wrongful act. Article 16 captures not only the transfer of weapons but also a wide spectrum of support that meaningfully contributes to wrongful conduct. Such support may include logistical, technical, or financial assistance, the sharing of intelligence, or the provision of equipment and other resources that enable or facilitate the commission of the unlawful act.

EU Member States are further constrained by the Council Common Position of 8 December 2008⁵⁰, which establishes uniform rules for the control of military technology and equipment exports. Under this framework, Member States are required, *inter alia*, to refuse an export license where there exists a clear risk that the military technology or equipment in question could be used to commit serious violations of IHL.

Members of the Organization for Security and Cooperation in Europe (OSCE), including the United States, are bound by the OSCE Principles Governing Conventional Arms Transfers (OSCE Principles) when making decisions regarding arms exports⁵¹. Principle 4 obliges States to “promote and, by means of an effective national control mechanism, exercise due restraint in the transfer of conventional arms and related technology.” To implement this principle, States must consider a range of factors when assessing proposed arms exports and are required to refrain from any transfers that would contravene the criteria set out in the OSCE Principles. Failure by States to take

⁴⁸ Article 6, Arms Trade Treaty, adopted 2 April 2013, entered into force 24 December 2014.

⁴⁹ Article 7, Arms Trade Treaty, adopted 2 April 2013, entered into force 24 December 2014.

⁵⁰ EUR-Lex - 02008E0944-20250415 - EN - EUR-Lex.

⁵¹ <https://www.osce.org/files/f/documents/3/6/42313.pdf>.

preventive or corrective action may also amount to complicity in internationally wrongful acts, including the aiding or abetting of international crimes. This, in turn, could expose senior officials of such States to individual criminal responsibility under Article 25(3)(c) of the Rome Statute of the International Criminal Court for aiding and abetting the commission of war crimes and crimes against humanity.⁵²

The unfortunate truth about international law has always been the lack of uniform enforceability of the laws globally due to the absence of unanimity among states on different treaties. Similarly, the states that are involved in conflicts are not state parties to the treaties. Furthermore, the treaty does not provide any punishment for violation apart from international condemnation.

Although domestic judicial reviews were introduced in many countries as part of the integration of the treaty, the governments have rarely been forced to suspend their arms trade deals as a result. In the *CAAT v. UK*, the British government adopted a vague stance on arms deals, identifying the violations as isolated events and subsequently carrying on the trade deals.⁵³

Although the EU regulations are much stricter in this regard, they are also not uniformly imposed on states, as national laws and state interests often override the protection of international law. A notable exception in this regard is the order by the District Court of The Hague, as well as the Hague Court of Appeal, for the Dutch government to suspend arms trade with Egypt due to its involvement in the violations of international law in Yemen.⁵⁴

The Dutch government has also been stopped from selling F-35 parts to Israel by the Hague Court of Appeal due to the use of the aircraft in the bombing of Gaza. The court reversed a lower court's decision and held that the Minister of Foreign Trade had conducted an inadequate reassessment of an arms export permit. The HCA first focused on whether a "clear risk" of violations of IHL existed, as required under Article 2 of the EU Common Position on Arms Exports and Article 7 of the United Nations Arms Trade Treaty (ATT). Importantly, the court emphasized that judicial confirmation of actual

⁵² Rome Statute of the International Criminal Court, July 17, 1998, *United Nations Treaty Series*, vol. 2187, no. 38544.

⁵³ *R (Campaign Against Arms Trade) v Secretary of State for International Trade* (2019) EWCA Civ 1020.

⁵⁴ *PAX and Others v The State of the Netherlands*, District Court of The Hague, 23 November 2021; *PAX and Others v The State of the Netherlands*, Hague Court of Appeal, 17 May 2022.

violations is not required to establish a clear risk; conditioning the assessment on past violations would render the standard meaningless.

According to the EU User's Guide, a determination of clear risk necessitates a thorough assessment of the recipient's past and present respect for IHL, their expressed intentions through formal commitments, and their capacity to ensure that the transferred equipment or technology is used consistently with IHL. In evaluating the risk, the court considered extensive evidence, including UN statistics on civilian casualties, destruction of infrastructure, hospitals, and water supplies, reports by UN Special Rapporteurs, and Amnesty International investigations concluding that attacks on civilian targets were indiscriminate.

The court also referenced statements by Israeli military officials regarding attacks on Gaza. Arguments by the Dutch government questioning the reliability of these sources were rejected. On this basis, the court concluded that the potential violations were grave, noting the scale of civilian casualties, destruction of residential areas, use of indiscriminate munitions, attacks on essential services, and the abandonment of prior limitations on collateral damage.

Following this finding, the court reaffirmed that the Dutch international commitments required the authorities to reassess the export permit in light of new circumstances arising after 7 October 2023. Although the EU Common Position and the ATT do not explicitly impose a general obligation to review permits, the court reasoned that failing to do so in the presence of a clear risk of grave IHL violations would defeat the purpose of these agreements. The court further held that such an obligation aligns with Common Article 1 of the Geneva Conventions, which requires States to ensure respect for IHL "in all circumstances," including by other States.

The court also found that the Minister had applied an improper assessment framework, giving undue weight to general foreign policy considerations, such as Israel's interest in preventing regional escalation and the Netherlands' desire to maintain relations with the United States and Israel. The court concluded that when a clear risk of IHL violations exists, the Minister must halt arms exports regardless of political considerations.

Finally, arguments by the Dutch government that plaintiffs lacked standing or that a cease order would breach contracts with the United States were rejected. The

court emphasized that compliance with international obligations outweighs contractual or political concerns, even in the context of complex multinational arms programs such as the F-35 fighter jet project.⁵⁵

Apart from the Dutch courts, there is a lack of jurisprudence on such issues, and even in cases where the court orders either to halt sales or reconsider sales, they are seldom enforced due to policy reasons and the precedence of diplomatic relations over international relations.

8. Application of Common Article 1 in Non-International Armed Conflicts

It is important to address its potential application to non-international armed conflicts (NIACs), given their prevalence in contemporary conflicts. The text of Common Article 1 is broadly framed, obliging States to “respect and ensure respect for the present Convention in all circumstances,” suggesting no inherent limitation on the types of conflicts or provisions to which the duty applies. Its placement at the beginning of the Conventions, preceding Common Articles 2 (international armed conflicts) and 3 (non-international armed conflicts), further supports a wide interpretation. Extending Common Article 1, including its external obligations, to NIACs aligns with the humanitarian purpose of the Conventions, as failing to do so would leave most contemporary conflicts without enforcement mechanisms⁵⁶.

Although there is substantial subsequent State practice supporting the existence of an external obligation under Common Article 1, the bulk of this practice has emerged in the context of international armed conflicts, most prominently in relation to the Israeli occupation of Palestinian territory. This has contributed to the perception that the obligation to “ensure respect” operates primarily, or even exclusively, within the inter-State paradigm. Nevertheless, more recent practice indicates a broader understanding of the obligation. In statements made before the UN Security Council and General Assembly, as well as in regional and multilateral instruments, several States have articulated the duty to ensure respect for IHL in terms that are not limited to international armed conflicts.⁵⁷ Instead, these interventions frame Common Article 1 as

⁵⁵ Oxfam Novib and Others v The State of the Netherlands, Court of Appeal of The Hague, 12 February 2024.

⁵⁶ See, e.g., the latest analysis from the Uppsala Conflict Data Program comparing the number of interstate and intrastate conflicts (albeit defined non-legally) since 1946: S Davies, T Pettersson and Möberg, ‘Organized Violence 1989–2021 and Drone Warfare’ (2022) 59 JPeaceRes 593, 597 (figure 3).

⁵⁷ Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations,” *International Review of the Red Cross* 96, no. 895/896 (2014): 707.

applying to armed conflict as such, thereby encompassing non-international armed conflicts where serious violations occur.

While this practice remains less extensive and less consolidated than that relating to international armed conflicts, it nevertheless points towards an emerging acceptance of the external obligation's relevance beyond the traditional inter-State context.⁵⁸ Explicit rejection of this position is also rare. The main instance often cited is the Canadian government and the Federal Court of Canada's suggestion, in the context of the non-international armed conflict in Yemen, that Common Article 1 does not apply to NIACs⁵⁹.

Yet this conclusion was reached without substantive reasoning. Both the government and the Federal Court of Canada relied on earlier Canadian jurisprudence, which stated that Common Article 1 does not impose obligations in the context of non-international armed conflicts where the State in question is not involved in the underlying hostilities. At the same time, this reasoning leaves open the possibility that Common Article 1 may still give rise to obligations in certain non-international conflicts where a State is sufficiently implicated.⁶⁰

Overall, supporting practice for applying Common Article 1 to NIACs is less developed and less consistent than the practice relating to international conflicts. While few States have expressly opposed the broader interpretation, it is difficult to determine whether the silence of many States amounts to acquiescence. As a result, the level of "agreement" required under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) appears weaker in this context.⁶¹ Nonetheless, extending Common Article 1 to internal conflicts strongly advances the humanitarian object and purpose of the Geneva Conventions, which may compensate for the relatively limited supporting practice.

⁵⁸ See, e.g., statements by States in UN fora and multilateral instruments extending Common Article 1 to all armed conflicts: UNSC S/PV.8953 (Scandinavian States); UNSC S/PV.8596 (Belgium); UNGA A/C.6/73/SR.16; Council of the European Union, *User's Guide to Common Position 2008/944/CFSP* (2015); ICRC, *30th International Conference* (2007), Resolution 3.

⁵⁹ *Daniel Turp v Minister of Foreign Affairs* [2017], para 22 (on the government's submissions) and para 71 (on the Court's view).

⁶⁰ *Turp* (ibid) paras 22, 71–73, relying on *Sinnappu v Canada (Minister of Citizenship and Immigration)* [1997] 2 FC 791, where the Court rejected Common Article 1 claims without substantive analysis and emphasised Canada's lack of involvement in the Sri Lankan civil war.

⁶¹ *Vienna Convention on the Law of Treaties*. May 23, 1969. *United Nations Treaty Series*, vol. 1155, no. 18232.

The *travaux préparatoires* of the 1949 Conventions provide little guidance on this issue. The preparatory works suggest that the drafters at the 1949 Diplomatic Conference did not envisage the application of Common Article 1 to non-international armed conflicts. The records indicate that the phrase “in all circumstances” was carried over from the 1929 Conventions chiefly to signal the abandonment of the *clausula si omnes*, a rule under earlier law whereby treaty obligations applied only if all belligerents were parties to the relevant convention.⁶² and to reaffirm that the Geneva Conventions are applicable both in wartime and peacetime.⁶³ However, the ICRC also partly influenced Common Article 1 pre-1949 efforts to encourage States to promote respect for IHL among their populations, including in situations of civil war⁶⁴. This indicates that there may be some historical foundation for extending Common Article 1 to non-international armed conflicts. Furthermore, the absence of a parallel provision in Additional Protocol II (as opposed to Additional Protocol I) does not undermine this interpretation. The draft of AP II was drastically narrowed in scope at the last minute during the 1974–77 Diplomatic Conference to prevent the negotiations from failing⁶⁵. Consequently, the omission of certain provisions from AP II should not be given significant interpretive weight⁶⁶.

In conclusion, while State practice regarding NIACs is limited, the text, context, and humanitarian purpose of Common Article 1 support its applicability in such conflicts. This interpretation is also supported by the ICJ and other scholars⁶⁷. Importantly, applying Common Article 1 to NIACs does not expand the substantive scope of the Conventions: third States must ensure respect only for provisions relevant to NIACs⁶⁸. Moreover, the due diligence standard for positive obligations means that third States with no involvement in an NIAC would generally discharge their duties without difficulty.

⁶² Hague Convention (IV) respecting the Laws and Customs of War on Land (1907) art 2, limiting the application of the Convention to conflicts between contracting powers where all belligerents were parties.

⁶³ F Kalshoven, ‘The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit’ (1999), 6–10.

⁶⁴ Kalshoven, *Ibid.*, 13.

⁶⁵ S Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 50–1.

⁶⁶ For the same point in a different context, see N Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009) 29.

⁶⁷ See, e.g., Nicaragua para 220; HRC, Syria para 111; HRC, ‘Situation of Human Rights in Yemen, including Violations and Abuses since September 2014’ (9 August 2019), UNDoc A/HRC/42/17, para 11.

⁶⁸ GC I Commentary, 26, particularly given the absence of any actual discussion of the application of common art. 1 in non-international armed conflicts at the 1949 diplomatic conference, is a restatement of this point: that applying common art. 1 in internal conflicts cannot have the effect of extending every substantive provision to those situations, rather than that the provision itself cannot apply. Indeed, this was the ICJ’s approach in Nicaragua, in which it held the US to be under an obligation not to encourage others in the non-international armed conflict to violate common art. 3: Nicaragua, para 220.

The ongoing Sudanese civil war provides a contemporary illustration of how States have failed to discharge their Common Article 1 obligations in the context of a non-international armed conflict. In late October 2025, the Rapid Support Forces (RSF) seized El Fasher, the last major Sudanese Armed Forces (SAF) stronghold in Darfur, triggering mass civilian displacement and reports of widespread killings and sexual violence. Although States have publicly condemned these atrocities and declined to recognize the RSF's self-proclaimed parallel government, such non-recognition has not prevented extensive indirect support that enables the RSF's continued operations.⁶⁹

A complex regional network of complicity demonstrates the international dimension of the conflict. Despite formal denunciations, several States have allowed their territories, airspace, or commercial sectors to function as logistical corridors for the RSF's acquisition of arms, military equipment, and gold-smuggling revenue. This conduct directly engages the "duty to ensure respect" under Common Article 1, which, when interpreted in light of its drafting history and subsequent State practice, requires States not only to refrain from violating IHL themselves, but also to prevent their territory or resources from being used to facilitate violations by parties to the conflict.

Chad's role illustrates this tension. Early in the conflict, credible evidence emerged that airports in Amdjarass and Abéché were used for UAE-supported resupply flights to the RSF.⁷⁰ Although domestic pressure and SAF threats prompted Chad to scale back cooperation, illicit transfers through its northern regions continue, demonstrating a failure to adequately prevent support that contributes to ongoing IHL violations. Comparable patterns have emerged in Kenya, Uganda, South Sudan, and the Central African Republic (CAR). Kenyan- and South Sudanese-registered aircraft have delivered supplies to RSF-controlled Nyala; Ugandan-based operators have been linked to cargo flights carrying RSF material; and South Sudan has become a central conduit in the RSF's multi-billion-dollar gold-smuggling economy, which finances its military abuses. Even the CAR has been implicated as a potential emerging hub for external military assistance, facilitated in part by the Russia-aligned Wagner Group.

⁶⁹ Eromo Egbejule, 'Dire warnings over aid and hunger following RSF's capture of Sudanese city' The Guardian (London, 12 November 2025) <https://www.theguardian.com/world/2025/nov/12/sudan-north-darfur-aid-malnutrition-rsf-el-fasher-tawila>.

⁷⁰ UNSC, 'Final report of the Panel of Experts on the Sudan' (15 January 2024) UN Doc S/2024/65 <https://docs.un.org/S/2024/65>

Collectively, these examples reveal a sustained failure of regional States to prevent their territory, infrastructure, and commercial networks from enabling RSF operations. Under an expanded reading of Common Article 1 applicable to NIACs, such omissions may constitute violations of the obligation to “ensure respect” for IHL. States cannot merely condemn atrocities; they must take proactive measures to disrupt support networks that materially contribute to war crimes and serious abuses. The Sudan case therefore demonstrates both the contemporary relevance of Common Article 1 in NIACs and the significant gap between its legal obligations and actual State practice.

9. The Current Global Scenario

In recent years, the world has changed dramatically, and armed conflict has become veiled and disguised under the pretext of diplomacy and trade. While states may posture themselves as the flagbearers of international law and human rights, their trade deals can easily be traced to be financing atrocities and violations of the Conventions in another state. Weapons deals are arming belligerent groups and states, further putting the international legal order under threat.

And while certain states are directly financing states or armed groups that are clearly violating the principles of the law of war with no repercussions whatsoever, they are evading responsibility merely on the argument that they do not exercise effective control over the actions of the perpetrators.

The hypocrisy of states has become more visible following the Israeli onslaught on the Palestinian population due to its conflict with Hamas. While there has been a gradual realisation by many states that their trade deals are financing the violations of international law, many of the global powers are still in denial of their complicity in the conflict, while also acknowledging the gravity of the situation.

The United Nations Special Rapporteur on the Occupied Palestinian Territories’ 2025 report⁷¹ provides one of the clearest contemporary illustrations of how extensive, multi-layered third-State involvement can sustain, enable, and legitimize atrocity crimes. The report characterizes the situation in Gaza as a “collective crime” perpetrated not only by Israel but also through the material, political, and economic participation of a range

⁷¹ A/80/492: “Gaza Genocide: a collective crime” – Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 by Francesca Albanese.

of third States whose support has been indispensable to the continuation of the assault and blockade. It documents that several States, including the United States, Germany, the United Kingdom, Italy, Canada, Australia, and others, continued to supply Israel with advanced weapons systems, precision-guided munitions, armoured platforms, surveillance infrastructure, and dual-use technologies, even after the ICJ's finding of a plausible risk of genocide established a legal duty of prevention and abstention under the Genocide Convention and Common Article 1 of the Geneva Conventions.

Some of these States simultaneously expanded intelligence-sharing agreements and military-industrial cooperation that directly reinforced Israel's operational capacity, facilitating aerial bombing campaigns and targeted operations in densely populated civilian areas.

Beyond arms transfers, the report highlights an entrenched ecosystem of foreign economic and technological support that has helped maintain the occupation's coercive architecture. International technology companies based in the U.S. and Europe continued supplying biometric, cyber-surveillance, and population-monitoring tools integrated into Israel's control of movement, biometric registries, and predictive policing systems across Gaza and the West Bank. These exports, including AI-enabled targeting platforms, have enabled the systematic identification, tracking, and mass detention of Palestinians, materially contributing to violations that the report describes as part of a broader system of domination.

Third States also maintained extensive trade relations, including in goods and components used in weapons production and border-control systems, thereby sustaining an economic environment that subsidizes and facilitates Israel's military capacity. Diplomatic shielding by powerful third States forms another pillar of complicity identified in the report. The United States, the United Kingdom, and others used their political influence in the UN Security Council and other multilateral forums to block or dilute efforts seeking ceasefires, arms embargoes, accountability mechanisms, or international investigations, thereby prolonging the conditions under which violations occurred.

Several States also adopted domestic legal measures restricting or criminalizing criticism of Israeli policies, suppressing advocacy efforts by civil society and diaspora communities that sought to mobilize pressure and humanitarian relief.

The report further documented the deliberate sabotage of humanitarian mechanisms through restrictions on UNRWA and the humanitarian system. After unsubstantiated allegations against UNRWA staff, numerous States abruptly suspended or froze funding, despite being aware that such withdrawals would critically undermine the delivery of food, medical aid and shelter to a population experiencing famine and disease outbreaks, and despite subsequent investigations finding no evidence validating the allegations.

Some major donors replaced UN-mandated channels with parallel “humanitarian corridors” coordinated with Israel and foreign militaries, which the report finds were weaponized as tools of forced displacement, produced lethal crowd-control incidents, and repeatedly failed to deliver meaningful relief to starving civilians.

Taken together, the Special Rapporteur concludes that this constellation of military, economic, technological, diplomatic, and humanitarian involvement by third States has materially contributed to the continuation of mass atrocities in Gaza and the sustainability of Israel’s occupation regime. This demonstrates a contemporary pattern in which third States do not merely fail to prevent violations but actively enable, shield, and sustain them, precisely the type of conduct that engages State responsibility under Articles 16 and 41 of the ILC Articles on State Responsibility and violates the negative obligation under Common Article 1 to refrain from providing assistance that contributes to serious IHL breaches.

Germany’s support for Israel has become a focal point of this discourse. Although the historical and political basis of Germany’s relationship with Israel is long-standing, the continuation of military cooperation during active hostilities has raised concerns about whether such assistance aligns with the duty to “ensure respect” for IHL. Germany has supplied defence equipment and dual-use items potentially deployable in Gaza, prompting allegations that it is facilitating the commission of serious violations. This debate took legal form in *Nicaragua v. Germany* (2024)⁷², where Nicaragua argued before the International Court of Justice (ICJ) that Germany’s ongoing arms exports and diplomatic backing amounted to a failure to exercise due diligence under Common Article 1. Nicaragua contended that when a State knowingly supports a party engaged in conduct that poses a clear risk of serious IHL violations, it is no longer merely failing to influence its peer but may be actively contributing to internationally wrongful acts.

⁷² *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)* (Provisional Measures, Order of 30 April 2024) <https://www.icj-cij.org/case/193>

By contrast, Germany invoked the narrower interpretation of Article 1, one closely reflected in the analysis of the Lieber Institute⁷³, that the legal obligation under Common Article 1 pertains primarily to ensuring respect by a State's own organs and forces, whereas efforts to influence other States fall within a political or moral sphere rather than a legally enforceable one. Under this reading, Germany argued that it cannot be held legally responsible for not compelling another sovereign State, Israel, to alter its military strategy.

The ICJ did not grant provisional measures against Germany, but the Court's reasoning nonetheless reflected a degree of unease. While it refrained from finding Germany in violation, the Court noted the "plausibility" of serious violations occurring in Gaza. This acknowledgement, although limited, has significant implications: it suggests that where the risk of violations is patent and well-documented, States cannot rely exclusively on a narrow reading of Article 1 to justify continued support without scrutiny. In other words, even if the obligation to influence peers is not strictly enforceable as a matter of treaty law, the combination of customary developments, due diligence principles, and the broader objectives of IHL may collectively raise the standard of conduct expected from States.

States like Spain have cut off weapons trade deals with Israel on the grounds that they do not want to be complicit in the violations that it may be committing.⁷⁴ While others are pressing for sanctions and suspension of arms deals, some states are outright refusing to accept the existence of humanitarian law violations despite international lawyers and rapporteurs categorically taking the stance that the situation on the ground resembles genocide and must be prosecuted by the courts.⁷⁵

Former State Department spokesman for the United States, Matthew Miller, is on record as stating that while Israel is not committing a genocide, it has 'without doubt' committed war crimes in Gaza. He also acknowledged that the USA could have done more to prevent deaths in Gaza. Miller was a public face for the Biden government's staunch support for Israel, while it flattened the Occupied Territories to rubble and killed tens of thousands of Palestinians. This raises a question on why the United States

⁷³ Michael N Schmitt and Sean Watts, 'Common Article 1 of the 1949 Geneva Conventions' (*Articles of War*, 12 April 2024) <https://lieber.westpoint.edu/common-article-1-1949-geneva-conventions/>

⁷⁴ Jerusalem Post Staff, 'Spain Halts Arms Sales to Israel as Pressure Mounts to Cancel Contracts' (The Jerusalem Post, 23 October 2024).

⁷⁵ Al Jazeera, 'Ex-Biden Official Says, "Without Doubt" Israel Committed War Crimes in Gaza' (3 June 2025).

continued to arm Israel despite there being a realisation in the power circles of the fact that the military aid was being directly attributed to hostilities. The irony of this situation remains that the United States actually has laws that restrict military aid to countries in violation of human rights.⁷⁶

Regarding Common Article 1 and NIAC, Sudan's recent proceedings before the International Court of Justice (ICJ) further illustrate the external dimension of Common Article 1 obligations in the context of the Sudanese civil war. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. United Arab Emirates)*,⁷⁷ Sudan alleges that the UAE has provided extensive financial, political and military support to the RSF, support which Khartoum claims has enabled mass killings, systematic rape and the forced displacement of the non-Arab Masalit community in West Darfur.

The conflict has produced one of the world's gravest humanitarian catastrophes, with tens of thousands killed, over 12.4 million displaced, and famine and disease overwhelming what remains of Sudan's basic services. Sudan argues that the UAE's alleged conduct amounts to complicity in genocide and has requested provisional measures requiring the UAE to take all steps within its power to prevent further atrocities by the RSF and allied militias. While the case proceeds under the Genocide Convention, its factual assertions underscore the broader principle that States must not, through action or omission, facilitate serious violations of IHL by parties to a non-international armed conflict.

This aligns with the external limb of Common Article 1, reinforcing that States have a positive obligation to withhold support, restrict the use of their territory, and prevent material contributions to IHL violations committed by armed groups.⁷⁸

⁷⁶ US Department of State, 'Export Controls and Human Rights Initiative Code of Conduct Released at the Summit for Democracy' (30 March 2023).

⁷⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in Sudan (Sudan v. United Arab Emirates)* (Provisional Measures, Order of 5 May 2025).

⁷⁸ Vibhu Mishra, 'World Court begins hearing Sudan's case accusing United Arab Emirates of "complicity in genocide"' (*UN News*, 10 April 2025) <https://news.un.org/en/story/2025/04/1162066>

10. The Way Forward

While Article 3(e) of the Genocide Convention⁷⁹ incriminates the complicity in genocide, there is little to no formal global legislation that incriminates the complicity through financing in armed conflicts. ARSIWA, despite addressing this, is merely a set of draft articles and lacks legal enforceability. The European Union has an existing framework under the Council Common Position 2008/944/CFSP,⁸⁰ which lays out eight binding criteria to be assessed before authorization of any arms exports. However, even European states escape the restrictions under this framework, as licensing of such arms deals remains a national subject.

Unfortunately, the global order is not poised in a manner that would encourage international treaty-making; however, the realization by states that to comply with the obligation to ensure respect under the Geneva Conventions could actually be a step forward in ensuring better enforcement of IHL.

Even though judicial decisions of the International Court of Justice are not binding upon the ICJ itself, they have immense importance in the development of international jurisprudence and act as a source of law under the ICJ Statute.⁸¹ The mere fact that the court has recognised the applicability of the ensure respect clause to extend to states to ensure that no breaches of international law by all means at their disposal, should be enough to acknowledge that the scope of effective control goes beyond the restrictive definition of effective control in preceding decisions.

Although the scope and the applicability of the ensure respect clause of the Common Article 1 is not particularly codified, the actions of states do reiterate the fact that states are not to engage in such acts that may result in IHL violations by third parties. Thus, recognising an *opinio juris* is required for making a particular law a customary international law. The current codified customary law rule⁸² on ensuring respect only recognises the scope of the rule to the limit of those on whom there is a level of control by the state party in question, this rule can be developed in light of the current state

⁷⁹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, entered into force 12 January 1951.

⁸⁰ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, (2008).

⁸¹ Article 38, Statute of the International Court of Justice, annexed to the Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945.

⁸² Rule 144, Customary International Humanitarian Law, ICRC Study on CIHL (2005).

practise by numerous states to cut off arms deals with the violators of international law and once it is codified it acquires a particular level of recognition internationally.

11. Conclusion

Although the Rome Statute of the International Criminal Court allows for individual criminal responsibility for aiding and abetting war crimes, there is a lack of effective legislation that restricts and incriminates states for aiding such acts. And even though the International Law Commission's Articles on State Responsibility (ARSIWA), particularly Article 16, and the Arms Trade Treaty aim to hold states accountable, their effectiveness is limited. ARSIWA, being merely a set of draft articles, lacks legal enforceability, whereas the Arms Trade Treaty has no provisions for punishment beyond international condemnation. Furthermore, many states involved in conflicts are not even parties to these treaties.

Despite the apparent weaknesses, the principle of 'respect and ensure respect' as enshrined in the Common Article 1 of the Geneva Conventions offers a promising avenue for strengthening IHL and its applicability to states. This obligation requires states to do everything in their power to ensure that humanitarian principles are universally applied and is not limited to the state's own conduct but rather extends to the actions of other states and armed groups.

Despite the ICJ not attributing complete responsibility for violations by armed groups they support in the absence of 'effective control', it has emphasized that states have a duty to prevent breaches by parties over which they may have influence, using all reasonable means. This evolving interpretation demonstrates that the scope of effective control may be expanding. The increasing practise of cutting off arms trade deals with states that are violating international law by states like Spain, Ireland, and the Netherlands demonstrates a developing legal custom or *opinio juris*.

To bridge the gap between legal theory and practical enforcement, it's crucial to solidify this emerging customary international law. This could be achieved by codifying the "ensure respect" clause to explicitly include the obligation of states not to engage in acts, such as financial and arms support, that may subsequently lead to IHL violations by third parties.

Although the current global order may not be conducive to a new international convention, there is an apparent trend of powerful states acknowledging the violations of international law and resultantly leading to cutting off ties with violators. Thus, leveraging the immense importance of ICJ jurisprudence and the actions of states can strengthen the legal precedent.

Ultimately, holding states responsible for their complicity in atrocities is essential to upholding the foundational goals of the Geneva Conventions, to reduce suffering and ensure respect for human life during armed conflicts.

