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Arms Trade, Human Rights and the Jurisdictional Threshold

On the Responsibility of Arms Transferring States Under the European Convention on Human Rights

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Contents

Summary

The Arms Trade Treaty (ATT) as well as Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (EU Common Position) impose substantive obligations on states for the purpose of minimising the adverse humanitarian effects of global arms trade. Notwithstanding these commitments, arms trade is an expanding business. Moreover, an increasing share of European arms are exported to states engaged in armed conflict. In Yemen, European arms transfers to partners of the Saudi-led Coalition have contributed to maintaining human rights abuses against the civilian population.

The arms supplies to Saudi-led Coalition partners providing the contextual framework for discussion, this thesis explores possible avenues for holding European arms transferring states accountable for human rights violations in third states where such arms are used. The purpose is to ascertain liability directly under international human rights law (IHRL) and, more specifically, within the context of the European Convention on Human Rights (ECHR). In this respect, the thesis primarily employs a doctrinal research method which is applied critically with a view to establishing not only what the law *is* but also what it *should* be, i.e., a discussion *de lege ferenda.* To this end, the thesis mainly relies on subsidiary sources of international law such as legal doctrine and case law.

Finding that arms transferring activities can expose individuals in third states to treatment contrary to ECHR standards, notably Article 2, the core issue of this thesis is determining to what extent the jurisdictional threshold in Article 1 ECHR could be overcome. For this purpose, a functional account of jurisdiction is introduced. Applying such a model of jurisdiction, the thesis argues that the issuance of an arms export license could engage the transferring state's responsibility under the ECHR for the conceivable effects occurring outside its territory. This rationale would only apply to those rights which the arms transferring states have a functional capacity to protect – including the right to life. Such an approach, under which the issuance of an export license may give rise to IHRL considerations, is argued to contribute to ensuring the humanitarian principles of the ATT and the EU Common Position. The legal argument could also be expanded so as to better capture transnational state conduct having ripple human rights effects in third states, directly under IHRL regimes.

Sammanfattning

Under vapenhandelsfördraget och rådets gemensamma ståndpunkt 2008/944/GUSP av den 8 december 2008 om fastställande av gemensamma regler för kontrollen av export av militär teknik och krigsmateriel (EU:s gemensamma ståndpunkt) är stater skyldiga att minimera de humanitära konsekvenserna av internationell export och överföring av vapen. Vapenhandel är alltjämt en växande industri. En allt större andel av den europeiska vapenexporten sker dessutom till länder som är inblandade i väpnade konflikter. I Jemen har den Saudiledda koalitionen dragit nytta av storskalig sådan import från Europa i sitt krig mot huthirebellerna, trots att koalitionen vid upprepade tillfällen kränkt de mänskliga rättigheterna.

Denna export utgör ramen för uppsatsen, vilken undersöker möjliga vägar för ansvarsutkrävande av europeiska vapenöverförande stater för kränkningar av mänskliga rättigheter i tredjeländer, där sådana vapen används. Syftet är att fastställa ansvar direkt under internationell människorättslagstiftning och särskilt inom ramen för Europakonventionen om skydd för de mänskliga rättigheterna och de grundläggande friheterna (EKMR). Genom en rättsdogmatisk metod utreds rättsläget för att vidare problematiseras. Med ett kritiskt förhållningssätt diskuteras rättsläget härvid *de lege ferenda*. För detta ändamål används främst subsidiära folkrättsliga källor, såsom doktrin och rättspraxis.

Uppsatsen påvisar ett tydligt samband mellan vapenexport och kränkningar av konventionsrättigheter under EKMR i tredjeländer, särskilt artikel 2 och rätten till liv. För att åberopa en sådan kränkning krävs dock att staten i fråga utövat jurisdiktion i enlighet med artikel 1 EKMR. Mot denna bakgrund är uppsatsens huvudfokus att undersöka hur tröskelkriteriet i artikel 1 kan övervinnas. Härvid föreslås en funktionell modell av jurisdiktion. Utifrån tillämpningen av en sådan modell hävdar denna uppsats att en stat skulle kunna hållas ansvarig för de tänkbara effekter som uppstår utanför dess territorium som följd av en vapenexport. Detta ansvar skulle begränsas till de rättigheter som vapenexporterande stater har reell förmåga att skydda, däribland rätten till liv. En sådan lösning, genom vilken ett utfärdande av exportlicens kan ge upphov till skyldigheter direkt under internationell människorättslagstiftning, skulle bidra till att effektivt stärka efterlevnaden av de humanitära principerna i vapenhandelsfördraget och EU:s gemensamma ståndpunkt. Det rättsliga argumentet skulle vidare kunna tillämpas på annan statlig verksamhet av gränsöverskridande karaktär med kedjeeffekter på de mänskliga rättigheterna i tredjeländer.

Preface

Med blandade känslor har jag nu nått slutet av mina studier på Juridicum i Lund. Ni är många som på olika sätt förgyllt min tillvaro här, och till er vill jag rikta ett särskilt tack.

First and foremost, I would like to thank my supervisor, Daria. For your insightful comments, support, and for making this thesis better. For that I am forever grateful.

Till min familj, för allt ert stöd och för att ni alltid trott på mig. Speciellt du mamma.

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Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ATT	The Arms Trade Treaty
ECCHR	European Center for Constitutional and Human Rights
ECHR	European Convention on Human Rights
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Common Position	Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment
GC	Grand Chamber
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
NGO	Non-Governmental Organisation
SIPRI	Stockholm International Peace Research Institute
TRNC	Turkish Republic of Northern Cyprus
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UN Group of Experts	United Nations' Group of Eminent International and Regional Experts on Yemen
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNSC	United Nations Security Council
US	United States
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

The Arms Trade Treaty (ATT), which regulates the international trade in conventional arms, entered into force on 24 December 2014. With 141 signatories and 110 state parties, it sets out to prevent and eliminate illicit trade and diversion of conventional arms by establishing international standards for the purpose of contributing to peace, security and stability and reducing human suffering.[1] Correspondingly, the Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (EU Common Position) imposes substantive obligations on European Union (EU) states to deny certain arms transfers which would have detrimental effects in third states.[2]

Yet, global arms trade is continuously on the rise. In 2019, world military expenditure was estimated to US$1,917 billion, with an increase of 3.6 per cent from the previous year. The growth in military spending in 2019 constituted the fifth consecutive annual global increase and the single largest of the last decade. Top global exporters of conventional arms are the United States (US) and Russia, along with Canada and various Western European states such as France and Germany. The world's biggest importers include Saudi Arabia, China, the United Arab Emirates (UAE) and Qatar.[3]

Arms exports have long been a tool for developed states to assert influence and military power on the global arena. They have contributed to the achievement of foreign-policy goals and the development of a robust defence infrastructure. Arms trade, however, can have adverse effects in recipient states as well as in those states, where such arms are used. It can fuel the prolongation of conflict and contribute to the destabilisation of society and institutions.[4] EU Member States have, despite their international commitments through the adoption of the ATT as well as the EU Common Position, increased their export of arms and related items to countries engaged in

[1] The Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 1; The Arms Trade Treaty, 'Treaty Status' <https://thearmstradetreaty.org/treaty-status.html?templateId=209883> accessed 22 April 2021.
[2] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] OJ L335/99.
[3] Stockholm International Peace Research Institute (SIPRI), 'SIPRI Yearbook 2020: Armaments, Disarmament and International Security' (Summary, 2020) <https://sipri.org/sites/default/files/2020-06/yb20_summary_en_v2.pdf> accessed 22 April 2021.
[4] Jennifer Erickson, *Dangerous Trade: Arms Exports, Human Rights, and International Reputation* (CUP 2015) 8–9.

armed conflict. In 2003, exports to states engaged in armed conflict amounted to only around 5 per cent of all conventional arms exports from the EU. In 2017, that same number had gone up to 25 per cent.[5] Large scale arms trade and the excessive proliferation of conventional arms can further have a direct negative impact on the enjoyment of human rights.[6] Amnesty International, for instance, has projected that 60 per cent of documented human rights violations involve the use of small arms and light weapons.[7]

One recent example of how arms exports have the potential of inducing violence and gross violations of human rights is within the context of the armed conflict in Yemen. According to the Stockholm International Peace Research Institute (SIPRI), European states are among the largest suppliers of conventional arms to the leading members of the Saudi-led Coalition, namely Saudi Arabia and the UAE.[8] Reports from United Nations (UN) agencies and leading international Non-Governmental Organisations (NGOs) show that the Coalition has repeatedly violated international humanitarian law (IHL), including with, but not limited to, systematic attacks on civilian targets.[9] The Coalition's arms arsenal is largely comprised of military aircraft and guided bombs from European companies. These include the French companies Dassault Aviation S.A., Thales France and MBDA France S.A.S., German companies Airbus Defence and Space GmbH, British companies BAE Systems Plc. and Raytheon Systems Ltd., Spanish company Airbus Defence and Space S.A. as well as Italian company Leonardo S.p.A. Remnants of such exported arms have been discovered on the ground following attacks which have allegedly breached IHL standards and are directly linked to serious violations of international human rights law (IHRL). Subject to government authorisation, these arms exports

[5] Delàs Centre of Studies for Peace, The School for a Culture of Peace and The Human Rights Institute of Catalonia, 'Arms trade, conflicts and human rights. Analysis of European arms exports to countries in armed conflict and human rights violations' (2020), 54 <https://escolapau.uab.cat/img/programas/alerta/informes/ComercioArmas_IN.pdf> accessed 11 May 2021.

[6] United Nations Human Rights Council (UNHRC), 'Impact of Arms Transfers on the Enjoyment of Human Rights: Report of the Office of the United Nations High Commissioner for Human Rights' (3 May 2017) UN Doc A/HRC/35/8.

[7] Amnesty International, 'Killer Facts: The impact of the Irresponsible Arms Trade on Lives, Rights, and Livelihoods' (2010), 3 <https://www.amnesty.org/download/Documents/36000/act300052010en.pdf> accessed 12 May 2021.

[8] Mark Bromley and Giovanna Maletta, 'The Conflict in Yemen and EU:s arms export controls: Highlighting the flaws in the current regime' (SIPRI, 16 March 2018) <https://www.sipri.org/commentary/essay/2018/conflict-yemen-and-eus-arms-export-controls-highlighting-flaws-current-regime> accessed 22 April 2021.

[9] Amnesty International, *Amnesty International Report 2020/21: The State of the World's Human Rights* (Amnesty International 2021) 397 et seq; Human Rights Watch, *World Report 2021: Events of 2020* (Human Rights Watch 2021) 749 et seq; UNHRC, 'Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the United Nations High Commissioner for Human Rights' (29 September 2020) UN Doc A/HRC/45/CRP.7.

have all been essentially licensed by competent state organs in Europe.[10] In addition, reports affirm that the French majority state-owned DCI group has provided mission-critical training to the Saudi military, engaged in ground and air combat in Yemen.[11]

Individuals have had little remedies for holding transferring foreign states accountable for the human rights impact of arms trade. In this respect, the issuing of arms exporting licenses came under the scrutiny of the First Chamber of the European Commission of Human Rights (EComHR) in 1995.[12] The case, *Tugar v Italy*, concerned the alleged failure of Italy to comply with its obligations under the European Convention on Human Rights (ECHR, or the Convention), where it knowingly allowed the export of arms to a third state which used the arms contrary to human rights standards.[13] The applicant had stepped on an Italian exported mine in Iraq whereby he suffered severe injuries and had to amputate one of his legs. In referring to *Soering v United Kingdom*,[14] in which the Court had found the United Kingdom (UK) liable for an expulsion under Article 3 of the Convention with respect to the prospective treatment of an individual by authorities in a third state, the applicant submitted that that he had suffered a violation of his right to life under Article 2 following the 'exposure' by Italy to the risks associated with the 'indiscriminate use' of the arms related products at issue. Having recognised that Italy was in no way responsible for the act of planting the mines itself, the Commission had to consider whether Italy had breached any obligation bestowed directly upon the state in relation to the impugned transfer and the supposed failure to have in place a functioning license regime. In rejecting the applicant's claim, the Commission held that: "There is no immediate relationship between the mere supply, even if not properly regulated, of weapons and the possible 'indiscriminate' use thereof in a third country, the latter's action constituting the direct and decisive cause of the accident which the applicant suffered."[15] Thus, the Commission considered that the factual circumstances applicable to alleged

[10] European Center for Constitutional and Human Rights (ECCHR), 'Made in Europe, Bombed in Yemen: How the ICC could tackle the responsibility of arms exporters and government officials' (Last updated February 2020) <https://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf> accessed 22 April 2021.
[11] Nikolaj Nielsen, 'Exposed: French Complicity in Yemen and Libya' *EU Observer* (Brussels 18 November 2020) <https://euobserver.com/investigations/150097> accessed 22 April 2021.
[12] *Tugar v Italy* No 22869/93 (EComHR 18 October 1995). NB the EComHR was a special body to the Council of Europe, with a mandate to hear individual cases launched under the ECHR. The EComHR ceased to function in 1998.
[13] *Tugar* (n 12).
[14] *Soering v United Kingdom* No 14038/88 (ECtHR 7 July 1989).
[15] *Tugar* (n 12).

human rights violations arising out of arms exports were in all relevant aspects different from the rationale adopted in *Soering* and other expulsion cases. The Commission hereby found that Italy had not exercised jurisdiction, why its responsibility could in no way be engaged under the Convention.

This would lead to the conclusion that justice for those individuals, which are targeted by exported arms and related products, must primarily be sought within the framework of domestic fora or directed against the states carrying out the attacks. Where the states at issue are torn by conflict or lack plausible mechanisms for filing a successful claim of a breach, individuals would lack all avenues for effectively reinforcing their human rights. This limitation, which stems from an orthodox notion on the territoriality of law, could be seen as an unprincipled gap in the protections provided for by international human rights standards.[16] To transcend this limitation, this thesis explores to what extent the *Tugar* rationale could be reappraised so as to hold arms transferring states accountable for their own conduct under IHRL for allowing dubious arms sales to go through.

1.2 Purpose and Research Question

Arms transfers facilitate the perpetration of acts, which if committed by the authorising states themselves would seemingly amount to serious violations of human rights. Still, there are many legal obstacles which preclude any efficient liability mechanisms under international law for authorising arms exports to conflict areas and/or states with a poor human rights record.

Namely, the most important international instruments for the regulation of conventional arms trade lack effective enforcement provisions for negligence in human rights due diligence.[17] Under general international law, the narrow construction of complicity further inhibits arms transferring states' ancillary responsibility for the later use of exported arms by third states. Only exports carried out with some degree of malicious intent would in principle give rise to responsibility under Article 16 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), an element which does not commonly apply to arms transfers.[18]

[16] cf Mark Gibney et al, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights Journal 267, 267–268.
[17] cf text to n 103.
[18] James Crawford, *State Responsibility: The General Part* (CUP 2013) 405–408; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 149. This argument is developed in text to n 184.

Under IHRL, any responsibility is contingent upon the respondent state having exercised jurisdiction *vis-à-vis* those individuals claiming a violation of their human rights. In this respect, the primarily territorial interpretation of jurisdiction under the ECHR and other international human rights treaties have substantially limited the applicability of these instruments as regards extraterritorial violations. It might further be difficult to establish a jurisdictional link and 'capture' conduct, which forms part of a series of transnational composite acts, eventually having a human rights impact in a third state. In fact, globalisation processes have amplified such cross-border 'externalities'.[19] That is, given the augmented interdependence of states and new forms of international cooperation, policy decisions and administrative measures are nowadays more likely to have ripple effects abroad. In light of conventional conceptualisations of IHRL and jurisdiction, these phenomena can pose additional problems for the purpose of incurring responsibility.[20]

Having recognised these complexities, this dissertation takes a *de lege ferenda* approach for the purpose of establishing the liability of arm transferring states under international law for human rights violations in third states where such arms are used. More specifically, the focus of this dissertation is on potential avenues directly under IHRL and state parties to the ECHR.[21] Thus, the emphasis is on seeking redress for victims of human rights violations before the European Court of Human Rights (ECtHR, or the Court). In a larger context, this thesis sets out to explore how the jurisdictional clause in IHRL could be interpreted so as to allow claims against states, which by means of their conduct expose individuals in third states to a substantial risk of suffering a violation of their human rights.

In light of the above, this thesis aims to answer the following research question:

How can the responsibility of European arms transferring states be engaged for human rights violations suffered by individuals in third states, where such arms are used?

To address the question above, the following sub-question will also be answered:

[19] cf Jim Leitzel, *Concepts in Law and Economics: A Guide for the Curious* (OUP 2015) 108.
[20] Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29(2) European Journal of International Law 581, 584.
[21] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

How can the jurisdictional threshold in the ECHR be overcome in claims against arms transferring states?

For the purpose of further contextualisation of the research question, the present study will draw on arms transfers, which are authorised and carried out by state parties to the ECHR to state members of the Saudi-led Coalition, involved in the armed conflict in Yemen. The legal analysis presented herewith will be based on potential violations of Article 2 ECHR, namely the right to life.

1.3 Delimitations

Arms can be defined in multiple ways as to encompass a range of items and activities. For the purpose of aligning this thesis with applicable international arms trade regulation and prior legal research on the topic, only the transfer of conventional arms as authoritatively defined in Article 2 ATT are considered. These include battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; and small arms and light weapons.

This thesis does not aim to exhaustively cover the governance of international arms trade. Thus, it will not provide an in-depth study into the provisions of the ATT and the regional instruments applicable to arms trade. Chapter two of the thesis only aims to provide an overview of the regulatory framework for the purpose of establishing the state's role in arms transferring activities and to which extent the competent authorities must exercise human rights due diligence in relation to prospective exports. Considering that the purpose of this thesis is to explore state responsibility in the context of the ECHR, the EU Common Position is the only regional instrument which will be discussed.

This thesis examines the applicability of the ECHR since, as indicated above, some of the world's largest arms exporters as well as exporters of weaponry to the Saudi-led Coalition are also parties to the Convention. This might therefore be considered the most viable legal strategy to hold them accountable. While case law from other IHRL regimes is discussed where it serves to clarify institutional and substantive provisions of the ECHR, the main focus of the thesis will remain on the potential for yielding concrete results before the ECtHR.

Whereas arms trade might be considered to cause multiple human rights violations, this thesis mainly evaluates potential breaches of Article 2 ECHR, namely the right to life. In this regard, the discussion does not relate to any

specific individual claim. Rather, it assesses how a specific group of individuals may suffer treatment contrary to Article 2 through the use of transferred arms. It must further be stressed that this thesis is not primarily concerned with the material scope of the right to life, but rather its extraterritorial reach. Hence, there is no exhaustive review of positive and negative obligations arising out of Article 2. In this respect, the thesis confines itself to conclude that arms transfers would engage positive as well as negative duties.

The purpose of the thesis being the appraisal of the applicability of the ECHR to arms transferring activities and human rights violations in *third states*, the main focus is on Article 1 and the issue of establishing jurisdiction. This argument pertains to the substantive obligations owed under the ECHR at large. Thus, while the present analysis limits its contextual considerations to Article 2, similar arguments could be applied to other Convention rights provided that the impugned effects, amounting to a *prima facie* breach, are as closely associated to arms transfers as the inflicting of lethal force and other treatment which equals a deprivation of the right to life.

As far as the discussion on the armed conflict in Yemen is concerned, only attacks carried out by the Saudi-led Coalition are acknowledged. While other parties to the armed conflict in Yemen could also be responsible for breaches of IHRL in the course of their operations, this thesis only takes into consideration the parties which undoubtedly benefit from large-scale supplies of arms from European companies.

In this respect, it is further worth highlighting that the thesis is not primarily concerned with ascertaining breaches of IHL. IHL will only be considered for contextual value and for the purpose of establishing its relation to IHRL in armed conflict.

Lastly, arms transfers could be argued to amount to an act of complicity falling under Article 16 ARSIWA. However, this thesis does not set out to establish such ancillary liability under general international law.[22] As will be clarified subsequently in this thesis, the focus is rather on the proper responsibility of arms transferring states for the assumed failure of complying with ECHR obligations, bestowed directly under the Convention.

[22] For such an approach, see eg: Eric David et al, 'Opinion on the Legality of Arms Transfers to Saudi Arabia, The United Arab Emirates and other members of the coalition militarily involved in Yemen' (IPIS Research, 10 December 2019) <https://ipisresearch.be/wp-content/uploads/2019/12/191209-Yemen-EN_WEB-2.pdf> accessed 22 April 2021.

1.4 Method and Material

This thesis aims to establish the extent to which the ECHR might be applied to arms transferring activities. For this purpose, a doctrinal research method is adopted. The doctrinal research method consists of an analytical examination of conventional sources of law in order to determine the established law.[23] In this regard, Article 38(1) of the Statute of the International Court of Justice (ICJ) sets out the traditional sources of international law. These include international conventions, international customary law and general principles. As the primary sources of international law can only provide limited guidance to the applicability of the Convention to conventional arms transfers, the main material is confined to secondary sources, namely case law and legal doctrine.[24]

Moving beyond a strict interpretation of the doctrinal research method, the approach of this thesis is also critical with a view to finding a solution to what is defined as a legal problem – namely, the difficulty in ascertaining liability for human rights violations in international arms trade. Taking an external perspective on the established law, it is possible to discuss and analyse findings on the basis of *de lege ferenda,* i.e., what the law should be.[25]

Considering the particular characteristics of international law, the doctrinal research method is complemented by the rules of treaty interpretation. The general rule of treaty interpretation is laid down in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (VCLT), which further reflects customary international law.[26] According to this rule of interpretation, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". On this basis, the ordinary meaning of a treaty provision must always be considered first. If a term is considered vague or ambiguous whereby the ordinary meaning is difficult to define and construe, the object and purpose may provide authoritative instruction as to how it is to be interpreted. The object and purpose relevant for treaty interpretation should generally coincide with the object and purpose which the state parties have awarded the treaty.[27] As further stated in Article 31(3a–c), treaty

[23] Terry Hutchinson, 'Doctrinal research: Researching the jury', in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 9–10.
[24] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1055, 33 UNTS 933.
[25] Lena Olsen, 'Rättsvetenskapliga perspektiv' (2004) Svensk Juristtidning 105, 122–124; Nils Jareborg, 'Rättsdogmatik som vetenskap' (2004) Svensk Juristtidning 1, 4.
[26] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Judgment) [12 November 1991] ICJ Rep 53, para 48; Richard Gardiner, *Treaty Interpretation* (2nd ed, OUP 2015) 7.
[27] Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 203.

interpretation could also include subsequent agreements or practice as well as relevant rules of international law applicable in the relation between the parties. In accordance with Article 32, preparatory works constitute supplementary means of interpretation. The ECtHR has held that the VCLT rules of treaty interpretation constitute generally accepted principles of international law, by which they provide valuable guidelines to interpreting the Convention.[28]

Besides the VCLT general codifications, the special character of the ECHR as a human rights treaty requires complementary means of interpretation. Accordingly, the Court has developed specific rules and interpretative mechanisms, including the margin of appreciation, comparative interpretation techniques, the doctrine of the living instrument and the principle of effectiveness.[29] In the context of this thesis, the doctrine of the living instrument is of particular significance. This rule prescribes that the Convention should be interpreted in light of present-day conditions.[30]

1.5 Original Contribution of This Thesis

In the field of international relations and security studies, the international trade of conventional weapons has attracted considerable attention. For an extensive overview of the global arms trade from the perspective of international security, *The Global Arms Trade: A handbook* by Andrew T.H. Tan (ed) constitutes a standard reference on the topic.[31] A more recent and critical work is *Dangerous Trade: Arms exports, human rights and international reputation* by Jennifer Erickson in which she challenges existing international relations theories relevant to arms trade by providing insight into the role of international reputation in humanitarian arms control.[32]

To a large extent, conventional arms transfers were not internationally regulated before the adoption of the ATT in 2014. Prior to this, legal doctrine on the subject matter was thus relatively scarce, one important exception being *The Arms Trade and International Law* by Zeray Yihdego.[33] Upon the entering into force of the ATT, the international regulation of the trade in conventional arms has attracted much more attention from lawyers. In this regard, *The Arms Trade Treaty: A Commentary* by Andrew Clapham et al.

[28] *Golder v the United Kingdom* No 4451/70 (ECtHR 21 February 1975), para 29.
[29] Conall Mallory, *Human Rights Imperialists: The Extraterritorial Application of the European Convention on Human Rights* (Bloomsbury Publishing 2020) 42.
[30] *Tyrer v The United Kingdom* No 5856/72 (ECtHR 25 April 1978), para 31.
[31] Andrew T H Tan (ed), *The Global Arms Trade: A Handbook* (Routledge 2014).
[32] Erickson (n 4).
[33] Zeray Yihdego, *The Arms Trade and International Law* (Hart Publishing 2007).

(eds) provides authoritative guidance to the treaty text.[34] In *Law and the Arms Trade: Weapons, Blood and Rules*, Laurance Lustgarten takes a comparative approach to arms trade regulation.[35] The book's systematic examination of applicable rules and policies on the international, regional as well as national level makes it a useful source in the continuance of this thesis.

Arms transfers could raise issues of indirect participation in the commission of internationally wrongful acts. In this respect, the concept of complicity in international law has generated a significant amount of literature. Seminal works include *Complicity in International law* by Miles Jackson[36] and *Complicity and its Limits in the Law of International Responsibility* by Vladyslav Lanovoy.[37] The closer issue of state responsibility in the context of arms trade, however, has not been dealt with as extensively in academia. In a blog post from 2017, Elif Askin examines the extent to which the due diligence obligation under international human rights law could be extended to mitigate a potential accountability gap in existing rules of state responsibility as regards arms transfers to non-state actors.[38] Another important contribution to the field is Maya Brehm's article *The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law* in which she surveys the legality of arms trade in reference to IHL and IHRL, albeit only briefly in relation to the latter and before the adoption of the ATT and the EU Common Position.[39] A more recent work on the topic of state responsibility in regard to arms trade is the *Opinion on the Legality of Arms Transfers to Saudi Arabia, The United Arab Emirates and other members of the coalition militarily involved in Yemen* by Eric David et al., which is also concerned with the transfer of arms to the warrying parties in Yemen. However, that piece is primarily concerned with the ancillary responsibility of arms supplying states under general international law and not within the context of IHRL regimes.[40]

Considering that this thesis aims to establish the responsibility for arms transferring states for alleged human rights violations in third states, a fundamental question to consider is to which extent IHRL may be applied to

[34] Andrew Clapham et al, *The Arms Trade Treaty: A Commentary* (OUP 2016).
[35] Lawrence Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (Hart Publishing 2020).
[36] Miles Jackson, *Complicity in international law* (OUP 2015).
[37] Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart Publishing 2016).
[38] Elif Askin, 'Due Diligence Obligation in Times of Crisis: A Reflection by the Example of International Arms Transfers' (EJIL: Talk!, 1 March 2017) <https://www.ejiltalk.org/due-diligence-obligation-in-times-of-crisis-a-reflection-by-the-example-of-international-arms- transfers/> accessed 22 April 2021.
[39] Maya Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law' (2007) 12(3) Journal of Conflict and Security Law 359.
[40] David et al (n 22).

impugned events abroad. In this regard, it should be stressed that the extraterritorial application of IHRL in general and ECHR in particular has been duly examined in academia, most notably by Marko Milanovic,[41] Michal Gondek,[42] and Fons Coomans and Menno Kamminga (eds).[43] However, the issue remains contested in the literature, not least because the approach taken by the courts, notably the ECtHR, is far from clear and systematic. There is also no exhaustive literature on the extraterritorial application of human rights treaties to arms transfers. This thesis sets out to bridge that gap and explore to which extent the Convention would accommodate claims against arms transferring states for allowing dubious sales to go through. In this respect, it will further contribute to the research on how state jurisdiction in general and Article 1 ECHR in particular is to be interpreted as to the issue of ascertaining liability for policy decisions and/or administrative measures having 'spill-over' human rights effects in third states.

1.6 Terminology

Conventional weapons or *conventional arms* as defined in Article 2 of the ATT encompass the following items:

a) battle tanks;
b) armoured combat vehicles;
c) large-calibre artillery systems;
d) combat aircraft;
e) attack helicopters;
f) warships;
g) missiles and missile launchers; and
h) small arms and light weapons.

The *extraterritorial application of human rights* refers to the applicability of a human rights treaty to impugned events, alleged to amount to a human rights violation, occurring outside the territory of the respondent state.[44]

[41] Marko Milanovic, *Extraterritorial application of human rights treaties: law, principles, and policy* (OUP 2011).
[42] Michal Gondek, *The reach of human rights in a globalizing world: Extraterritorial Application of Human Rights Treaties* (Intersentia 2009).
[43] Fons Coomans and Menno T Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004).
[44] Gondek, *The reach of human rights in a globalizing world: Extraterritorial Application of Human Rights Treaties* (n 42) 1.

The *Saudi-led Coalition* is one of the warrying parties in the armed conflict in Yemen. It consists of Bahrain, Egypt, Jordan, Kuwait, Morocco, Saudi Arabia, Senegal, Sudan, the UAE and until 2017, Qatar.[45]

The terms *trade* and *transfer* of conventional arms are to be considered as synonyms in the ATT as well as within the context of this thesis. In line with Article 2(2) ATT, both terms encompass the international export, import, transit, trans-shipment, and brokering of conventional arms.

1.7 Outline

Following this introduction, *chapter two* provides a background to international arms trade regulation by examining key instruments of global and regional governance, namely the ATT and the EU Common Position, to further examine the state's role in authorising arms transfers and the human rights considerations arising out of these activities.

Chapter three conceptualises the impact of arms trade on the enjoyment of human rights. It provides an understanding of the extent to which arms trade may undermine and induce human rights violations abroad, drawing on the case of Yemen in light of the right to life as construed under Article 2 ECHR.

Chapter four is concerned with ascertaining the liability of arms transferring states in the context of the ECHR. Having established a linkage between arms transfers and human rights violations, most notably with respect to the right to life, this chapter assesses the extent to which such a right might apply extraterritorially and invoked *vis-à-vis* an arms transferring state party. Hence, focus is on overcoming the jurisdictional threshold in Article 1 ECHR so as to engage the state's responsibility under the Convention.

Chapter five summarises the findings of this thesis in relation to its purpose and research question, although there is also a continuous analysis at the end of each chapter as well as interim conclusions in the course of the argumentation.

[45] UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), Annex I; UNHRC, 'Situation of human rights in Yemen, including violations and abuses since September 2014: Report of the United Nations High Commissioner for Human Rights containing the findings of the Group of Independent Eminent International and Regional Experts and a summary of technical assistance provided by the Office of the High Commissioner to the National Commission of Inquiry' (17 August 2018) UN Doc A/HRC/39/43, Annex IV para 1.

2 The Governance of International Arms Trade

2.1 The Arms Trade Treaty

2.1.1 Background

In 2009, the UN General Assembly (UNGA) adopted resolution 64/48 in which states recognised that the absence of international standards for the trade of conventional arms constituted a contributory factor to armed conflict, displacement of peoples and organised crime.[46] On that basis, states set out to convene a United Nations Conference on the Arms Trade Treaty to conclude common standards, applicable to the international community at large.[47] Following a lengthy process of negotiation, the final text of the ATT was adopted by UNGA resolution 67/234B.[48] In accordance with Article 22 of the treaty text, the ATT entered into force on 24 December 2014 upon the ratification of Argentina, Bahamas, Bosnia and Herzegovina, the Czech Republic, Portugal, St Lucia, Senegal and Uruguay two months previously.[49] Before its adoption, no legally binding instrument had regulated the international trade of conventional weapons.[50]

As of 2021, the ATT has 110 state parties. All EU Member States are parties to the treaty as well as China, Australia and Canada amongst others. Some of the world's largest arms traders, however, have yet to join the ATT. These include the US, Russia, Saudi Arabia and India.[51] The fact that key states have opted out demonstrates the great divergence in views in the negotiating process of the treaty text. There were notable divisions between importers and exporters, and competing views on how far the treaty should go in terms of export controls and human rights standards. The ATT in its current shape and form is largely a result of compromise, and not of overwhelming international consensus.[52]

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[46] UNGA Res 64/48 'The arms trade treaty' (2 December 2009) UN Doc A/RES/64/48.
[47] ibid, para 4.
[48] UNGA Res 67/234B 'The Arms Trade Treaty' (2 April 2013) UN Doc A/RES/67/234B.
[49] The Arms Trade Treaty, 'Treaty Status' (n 1).
[50] There were however regional and supra-regional treaties and guidelines in place. See for example Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and All Parts and Components that Can Be Used for their Manufacture, Repair and Assembly (adopted 30 April 2010); EU Common Position (n 2).
[51] The Arms Trade Treaty, 'Treaty Status' (n 1). Note that the US has signed the ATT but has of yet not ratified the treaty why it is not considered a State Party.
[52] Lustgarten (n 35) 400.

Crucially, the ATT lacks stringent enforcement provisions. It does not establish any policing body, administrative authority or judicial forum. In short, there is therefore no specific remedies, provided for under the ATT regime, available for holding state parties accountable for violations of the treaty.[53]

2.1.2 Object and Purpose

According to Article 1, the object and purpose of the ATT is to establish the highest possible standards for the regulation of international trade in conventional arms and eradicate any such illicit trade and diversion. It aims to contribute to peace, security and stability, reduce human suffering and promote cooperation, transparency and responsible action by all state parties. Keeping in mind that the ATT is the first global treaty to regulate conventional arms transfers, it constitutes an important building block in international disarmament law.[54] Upon entering into force, the hope was that the treaty might have cascade effects on the global governance of arms trade by which international norms would successively materialise.[55] The treaty establishes only minimum requirements. Thus, states are free to adopt additional regulatory measures.[56]

In setting out its object and purpose, the ATT is aligned with the UN Charter and the UN system of collective security. Article 1 explicitly refers to one of the pillars of the UN, namely *peace and security* while the two remaining pillars (*human rights* and *development*) may be inferred from the purpose of reducing human suffering.[57] The preamble of the ATT further refers to Article 26 of the UN Charter by which it recalls the connection between an internationally regulated arms trade and the maintenance of international peace and security.[58] In reference to the aim of reducing human suffering, the ATT corresponds to UN Sustainable Development Goal 16.1, which aims to significantly reduce all forms of violence and related deaths everywhere.[59] The preamble of the ATT further recognises that the illicit and unregulated trade of conventional arms may have social, economic and

[53] ibid 426.
[54] Clapham et al (n 34) 46.
[55] Lustgarten (n 35) 397.
[56] ATT preamble para 5.
[57] Clapham et al (n 34) 53.
[58] ATT preamble para 2. This link has further been confirmed by UN Principal Organs, see eg UNGA Res 61/64 'Relationship between disarmament and development' (6 December 2006) UN Doc A/RES/61/64; UN Secretary General and UN Department for Disarmament Affairs, *The relationship between disarmament and development in the current international context* (UN 2004).
[59] UNGA Res 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1.

humanitarian consequences. It recalls that civilians, in particular women and children, account for the vast majority of those affected by armed conflict and armed violence.[60]

2.1.3 The Imposing of Substantive Obligations

The treaty imposes certain substantive obligations on arms exporting states. These provisions, as set out in Articles 6–7 of the ATT, constitute both peremptory prohibitions of certain arms transfers as well as 'softer' obligations to weigh and balance any prospective arms transfer against acknowledged interests of international law, peace and security. The articles apply equally to conventional arms as the complementary categories of military equipment laid down in Articles 3–4, namely ammunitions/munitions as well as parts and components.

Article 6 bars the authorisation of transfers, which would either violate UN Security Council (UNSC) resolutions adopted under Ch.VII of the UN Charter (§ 1) or international agreements to which the state is a party (§ 2). Moreover, under Article 6(3), no state party shall authorise a transfer where it has *knowledge* at the time of authorisation that the arms or related items would be used to commit genocide, crimes against humanity, or certain grave violations of IHL. This knowledge criterion is based on what the state ought to have known at the time of issuing the arms exporting license. Thus, it is not construed as a subjective element which requires malicious intent on part of the transferring state. Worth highlighting is that the breach of Article 6(3) would occur at the issuance of the license. That is, the importing or arms using state does not need to carry out any of the given violations for the purpose of ascertaining the liability of the transferring state. It suffices to conclude that those events would indeed occur upon the transfer of military equipment and impute knowledge thereof to the state.[61] Considering, however, the difficulties of construing an objective and external standard on the knowledge of grave violations of IHL in a specific state, there would rarely be any liability for failing to properly investigate those risks intrinsic in the transfer. Thus, the knowledge criterion constitutes an effective threshold for the purpose of finding any violation of Article 6(3).[62]

If none of the nuclear prohibitions in Article 6 apply, the exporting state must in accordance with Article 7(1)(a) further assess whether the arms or arms related items would contribute to undermining international peace and security. In this regard, any transfer of weaponry to a state, oppressing its

[60] ATT preamble paras 9–10.
[61] Clapham et al (n 34) 204–207.
[62] Lustgarten (n 35) 411.

own people, or a national minority would likely constitute conduct which might endanger international peace and security. Transfers to a state engaging in the unlawful use of force or where trade would foreseeably prompt a regional arms race would potentially be considered additional examples, falling under this provision.[63]

Pursuant to Article 7(1)(b), states are also required to assess the potential that the weaponry could be used to commit or facilitate any serious violation of IHL or IHRL. Contrary to the peremptory prohibition in 6(3), which is only triggered when it is established that the arms would be used in the *direct* commission of the relevant acts, Article 7(1)(b) is engaged upon considering that the transfer of weapons would significantly *contribute* to those offences.[64] As to what might constitute a *serious* violation of either IHL or IHRL, the former would include all war crimes and grave breaches as set out in the Geneva Conventions of 1949 and their Additional Protocols and further acknowledged in customary international law.[65] In reference to the latter, the seriousness of a human rights violation is normally determined by the character of the right; the magnitude of the violation; the vulnerability of the victim; and the impact of the violation.[66] With respect to these criteria, the decisive factor should be the *quality* of the violation. Thus, in determining whether a future potential violation is to be qualified as serious, the level of harm inflicted on the victim is the cardinal reference.[67] In this respect, all breaches of *jus cogens* norms would most definitively constitute serious violations of IHRL. In addition, any violation of the right to life would inherently fall within this definition.[68]

Having identified risks under Article 7(1), the exporting state is under the obligation to consider if there are any measures in place to reduce the harmful effects of a transfer. These include any confidence-building measures and joint programs agreed with the importer state. If there is an overriding risk that any of the negative potential consequences arising out of the transfer would indeed materialise, the state must in accordance with Article 7(2) deny the authorisation in question. 7(3) requires special regards to be taken in relation to risks of gender-based violence and violence against women and children.

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[63] Clapham et al (n 34) 255.
[64] ibid.
[65] ibid 257.
[66] Geneva Academy of International Humanitarian Law and Human Rights, *What amounts to 'a serious violation of international human rights law'?: An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty* (Geneva Academy of International Humanitarian Law and Human Rights 2014) 34.
[67] Clapham et al (n 34) 270–271.
[68] ibid 260.

As indicated before, the export assessments, which a state is obliged to carry out under Article 7 are of a weighing and balancing character. This, in turn, means that state parties enjoy a certain scope of discretion as to what conclusions are to be drawn in a specific case and whether or not to proceed in granting the transfer at issue.[69] The open-ended language has resulted in divergencies in the export policies of treaty states.[70]

2.2 The Regional Framework: The EU Common Position

2.2.1 Introduction

In May 1998, the EU adopted a Code of Conduct, under which Member States committed themselves to set high common standards in conventional arms transfers and to reinforce cooperation and convergence within the EU. The Code established a set of criteria to evaluate licensing applications for the transfer of arms to third states. The Code of Conduct also required states to share information on the denials of licenses and regularly report on the implementation of the criteria to the Council.[71] In the form of a council declaration, the Code of Conduct was never legally binding but rather a set of political commitments.[72]

Acting under the Common Foreign and Security Policy, the Council of the EU adopted the Common Position in 2008 by which the Code of Conduct was replaced in favour of a legally binding document.[73] Amended in 2019, the Common Position applies equally to government-to-government trade as commercial sales of military equipment.[74] Apart from strengthening the criteria and formally establishing the range of activities, which should be covered by the Member States' arms export licensing systems, the substance of states' obligations under the EU Common Position largely coincides with the former provisions of the EU Code of Conduct.[75] The Common Position could be understood as an attempt to balance the interests of the European

[69] Lustgarten (n 35) 414.
[70] Giovanna Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (2021) 56(1) The International Spectator 73, 74.
[71] Council Agreement on the European Union Code of Conduct on Arms Exports [1998] Document no 8675/2/98 Rev 2.
[72] Lustgarten (n 35) 47; Mark Bromley, 'The Review of the EU Common Position on Arms Exports' (SIPRI Non-Proliferation Papers, January 2012), 3 <https://www.sipri.org/sites/default/files/Nonproliferation7.pdf> accessed 23 April 2021.
[73] EU Common Position (n 2).
[74] Council Decision 2019/1560 of 16 September 2019 amending Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment [2019] OJ L239/16.
[75] Bromley (n 72) 4–6; Lustgarten (n 35) 47.

defence and military industries against the humanitarian need to defer from particularly harmful arms transfers.[76]

By means of the Common Position, the policy and regulatory framework of arms transfers is largely consolidated across all EU Member States. It sets out a standard, which Member States must not depart from in its licensing activities. However, the commitments are not supported by any administrative or judicial mechanisms within the EU system, which is why there is significant variance in the compliance by Member States with the specific criteria. Overall, decisions to approve or deny licenses for arms exports are still largely influenced by economic and political considerations. The framework of the law, based on more humanitarian motives, is not considered absolute but rather a point of reference.[77]

2.2.2 The Criteria

Article 2 of the EU Common Position sets out eight criteria, by which Member States must abide when taking the decision to either authorise or deny a transfer of military technology or equipment. Overall, the criteria provide for a predictive and preventative approach to the authorisation of arms transfers. Recognising that there is always a level of indeterminacy in establishing the conduct and attitude of a prospective purchaser, Member States must adopt cautiousness in its licensing activities in order to minimise the risk that the equipment is misused or abused by the recipient. The first four criteria are expressed in terms of stringent prohibitions, i.e., an application to export arms must be denied if certain conditions are met. The four latter criteria, however, provide for certain factors only to be taken into account when deciding in a specific case.[78]

The first criterion of the EU Common Position seeks to ensure compliance with the transferring states' international obligations. The second criterion calls for a more in-depth reading. It requires Member States to bar any transfer of military equipment if there is a clear risk that the goods might be used

[76] An Vranckx et al (eds), *Lessons from MENA: appraising EU transfers of military and security equipment to the Middle East and North Africa: a contribution to the review of the EU common position* (Academia Press 2011) 10.
[77] Lustgarten (n 35) 64. Over the course of the last years, however, there have been several cases brought to national courts for the purpose of challenging arms exports in light of the EU Common Position. With respect to arms trade with Saudi-led Coalition partners, there have been notable examples of domestic judicial review in the UK and Italy. On this issue, see eg Giovanna Maletta, 'Legal challenges to EU member states' arms exports to Saudi Arabia: current status and potential implications' (SIPRI, 28 June 2019) <https://www.sipri.org/commentary/topical-backgrounder/2019/legal-challenges-eu-member-states-arms-exports-saudi-arabia-current-status-and-potential> accessed 23 April 2021.
[78] Lustgarten (n 35) 71.

for *internal repression* or in the commission of *serious violations of international humanitarian law*. In reference to the risk of facilitating internal repression, the criterion calls on states to exercise special caution with regard to destinations where serious violations of human rights have taken place. In this respect, it is reflective of the EU's Global Strategy, in which Member States acknowledge that the protection of human rights are the best means of strengthening the international order.[79] Violations of human rights must not be systematic or widespread to be regarded as 'serious'. As set out in the User's Guide to the EU Common Position, *internal repression* would *inter alia* include torture, further acts of physical cruelty, arbitrary detentions and other major violations of acknowledged rights and freedoms as construed under the Universal Declaration on Human Rights and International Covenant on Civil and Political Rights (ICCPR).[80] As to the second consideration under this criterion, namely concerning violations of IHL, the language echoes the common Article 1 of the Geneva Conventions, which is generally seen as imposing an obligation on all states to ensure that arms exports do not contribute to *jus in bello* violations.[81] Any breach of the laws and customs of war, including attacks on civilians and civilian objects, would be regarded as serious in the exercise of a criterion two analysis.[82]

The third criterion establishes that Member States must not grant an export licence for military equipment, if this would provoke or prolong armed conflict or aggravate tension short of conflict in the country of final destination. In this respect, it sets out an absolute policy of abstention. That is, under such circumstances all supplies of arms are strictly prohibited, including cases where the prospective recipient is a legitimate government or proxy, which intends to use the arms for the purpose of quelling a domestic rebellion or resistance.[83] Criterion four further seeks to ensure the preservation of regional peace, security and stability. It prescribes that Member States shall deny an export license if there is a clear risk that the prospective purchaser would use the arms aggressively against another state or to assert by force a territorial claim.

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[79] European External Action Service, 'Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy' (2016), 39 <https://eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf> accessed 23 April 2021.
[80] User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment [2015] Document no 10858/15, 43.
[81] Bromley (n 72) 5.
[82] Lustgarten (n 35) 75; cf *Prosecutor v Tadic* (Appeals Chamber Decision) ICTY 94-1 (2 October 1995), para 90.
[83] cf Lustgarten (n 35) 89. Note that this criterion might be considered to establish a stronger position than what is required under general international law, which in principle allows for intervention by invitation.

Criteria five to eight establish that Member States shall consider, *inter alia*, the following when deciding whether to grant or deny an export license: (5) their proper defence and security interests as well as those of friendly and allied countries; (6) the prospective buyer's potential support for or encouragement of terrorism, its compliance with international law particularly as regards IHL and the use of force as well as its commitments on non-proliferation and disarmament; (7) the risk that the exported arms might be diverted to an undesirable end-user or for an undesirable end use; and lastly (8) whether an export is compatible with the technical and economical capacity of the recipient state, taking into account that security and defence expenses should not encroach on other human and economic needs of the population at large.

2.3 The State Licensing Regime in a Nutshell

2.3.1 The Exercise of Control

Sales of military equipment have always been different from sales of any other industrial goods. The export of arms is closely related to a state's foreign policy in that it may induce and aggravate conflict and war. Thus, it is a tool by which states may impact and take a stance in international politics. Because of that, arms trade has long been subject of considerable state and government control. In the exercise of such public powers, states have historically enjoyed a relatively great scope of discretion.[84]

Acceding to the regulatory provisions of the ATT and the EU Common Position, states are more constrained in their licensing activities. As presented in the previous sections of this thesis, the ATT and the EU Common Position impose substantive obligations on states to prohibit the export of conventional arms and related arms under certain conditions. All states, which are bound by these provisions, must thus operate strict legal regimes to comply with their international obligations.[85] Hence, all exports of military equipment must be authorised by competent national authorities in order to be lawful.[86] To this end, there are government agencies or committees, responsible for implementing arms export controls and deciding on whether or

[84] Lustgarten (n 35) 27.
[85] Under art 5.1 ATT, states are required to establish export control systems.
[86] See eg the French and German licensing requirements: Article L.2335-2 of the French Defence Code (*Code de la défense*) "L'exportation sans autorisation préalable de matériels de guerre et matériels assimilés vers des Etats non membres de l'Union européenne ainsi que des territoires exclus du territoire douanier de l'Union européenne est prohibée."; §2(2) of the German War Weapons Control Act (*Gesetz über die Kontrolle von Kriegswaffen*) "Wer die tatsächliche Gewalt über Kriegswaffen von einem anderen erwerben oder einem anderen überlassen will, bedarf der Genehmigung".

not to issue a license.[87] Notwithstanding the framework of the law, the state in its capacity to issue or deny an export license still exercises an extensive degree of control in the ambit of arms trade. The two regimes both allow for ample interpretative wiggle room by which states may take into account other interests than mere legal considerations in their arms transferring activities.[88]

2.3.2 The Case-by-Case Approach

As set out in the EU Common Position, all export license approvals must be made on an individual, case-by-case basis, so that each application is processed and reviewed separately.[89] This enables the competent authority to quickly adapt to political and security developments in order to ensure continuous compliance with the state's international obligations. Any existing license may moreover be revoked, suspended or amended if there is a material change of circumstance, which would make the export unlawful.[90]

While the case-by-case standard may facilitate an agile and adaptable approach to export licensing, it also allows for dubious arms deals to slip through. Where there are no arms embargoes to consider, neither the ATT nor the EU Common Position prescribe absolute prohibitions on exports to specific states. Rather, all applications are assessed on their merits. The competent authority –if it considers that the military equipment at issue will not further or facilitate such offences– may thus grant an export licence to a destination where gross violations of international law, including human rights infringements, have occurred.[91] In this respect, the approach leaves further leeway for states to align its arms transferring activities with foreign policy considerations, i.e., it may justify the issuing of an export license that appears harmful by claiming guarantees from the importing state. These guarantees, in turn, are not always respected. Ultimately, the case-by-case approach results in inconsistent state practice.[92]

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[87] Lustgarten (n 35) 164, 184. For example, the responsible licensing body of France is the Cross-Ministerial Committee for Consideration of War Material Exports (CIEEMG) whereas in Germany, the competence is split between the Federal Office for Economic Affairs and Export Control (BAFA) and the Federal Ministry for Economic Affairs and Energy.
[88] Lustgarten (n 35) 28–29.
[89] EU Common Position art 1.
[90] Lustgarten (n 35) 31. See also eg Article L.2335-4 of the French Defence Code; §7 German War Weapons Control Act.
[91] Lustgarten (n 35) 31.
[92] ibid. See also Borja Álvaro Álvarez Martínez, 'A Balance of Risks: The Protection of Human Rights in International Arms Trade Agreements' (2018) 29 Security and Human Rights 199, 203; Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (n 70) 78.

2.3.3 The Element of Risk

A pervasive feature of states' licensing activities is the assessment of risk, as referred to both in the ATT and the EU Common Position.[93] Apart from the relatively few rules imposing a nuclear prohibition on arms exports, the determination of risk constitutes the most fundamental element of consideration when deciding in a specific case so as to control and limit any potential harm of a transfer.[94] In this respect, the competent authority must assess risks against certain thresholds.[95] In assessing those human rights risks, the ATT provides for a system of weighing and balancing in which states may consider potential harms against available mitigating measures. Only where these are considered insufficient, a transfer must be denied.[96]

To the extent that the ATT and the EU Common Position impose an obligation to conduct such risk assessments, states are bound to exercise due diligence.[97] For this purpose, the User's Guide to the EU Common Position mandates Member States to carry out a detailed analysis prior to any export.[98] The guiding document to the ATT speaks of a due diligence standard by which states must comply. That is, states are required to inquire and investigate humanitarian risk factors so as to determine whether a transfer would give rise to any serious harms in the country of final destination.[99]

2.4 Concluding Remarks

Different from most other businesses, arms trade can have cascade effects on international relations, war and global security. In this respect, states are bound to ensure that companies within their jurisdiction defer from certain transfers having a detrimental impact on political stability and human lives. Any prospective sale is thus to be authorised by the state and preceded by thorough risk assessment by the competent authorities. While it could be relevant to discuss if international law imposes any positive duties on arms

[93] ATT art 7; EU Common Position criteria two, four, five and seven.
[94] Lustgarten (n 35) 32.
[95] Under the ATT, a state is *inter alia* to consider whether arms 'could be used' to commit or facilitate serious violations of international human rights law and shall deny such a transfer when this risk is deemed to be 'overriding' (art 7.1) whereas under the EU Common Position, a state is *inter alia* to deny a transfer if there is a 'clear risk' that the arms 'might be used' for internal repression, taking into account serious violations of human rights alleged to have happened in the country of final destination (criterion 2, §2).
[96] cf Álvarez Martínez (n 92) 211.
[97] ibid 212.
[98] User's Guide (n 80), 43.
[99] UN Office for Disarmament Affairs, 'ATT implementation toolkit: Module 6, Export', 12 <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2015/08/2015-08-21-Toolkit-Module-6.pdf> accessed 23 April 2021.

trading companies to conduct proper inquiry, the ultimate responsibility arguably remains with the state.[100] Crucially, it is the state, not least through its adherence to the ATT and the EU Common Position, which is to exercise due diligence in relation to humanitarian risks and ensure compliance with international standards on arms trade.

For the purpose of minimising the impact of arms trade on the enjoyment of human rights, the ATT and the EU Common Position mandate states to take a precautionary approach with respect to sales to countries where serious violations of IHRL may occur. Such a commitment could be seen as an effort towards the understanding that arms transferring states have a *responsibility to prevent* human rights violations abroad.[101] Despite being bound by these same provisions, state practice of granting or denying export licenses seems inconsistent and in some cases, even incompatible.[102] While it is possible that an authoritative body of state *A* draws a different conclusion in regard to certain human rights risk factors than the authoritative body of state *B*, taking into account the interpretative wiggle room provided for in the ATT and the EU Common Position, it might also be reflective of the unsatisfactory enforcement mechanisms under these regimes.[103] Namely, neither regime provide for a judicial, policing or administrative body for the purpose of ensuring deference why states may well bend the terms to meet their own ends rather than fulfilling their obligations in good faith.

This could be considered to echo a more general tendency of states to promote human rights and advertise their international social responsibility through political assurances rather than compliance. Foreign policy goals, in particular those relating to humanitarian concerns, are satisfied when acceding to a set of norms, which are not necessarily internalised and respected.[104] In the context of arms trade, ethical and legal considerations must be weighed against military and strategic incentives. Where these interests in-

[100] For a review of arms trading corporations' international criminal responsibility, see ECCHR (n 10); Kai Ambos, 'Corporate Complicity in International Crimes through Arms Supplies despite National Authorisations?' (2021) 21(1) International Criminal Law Review 181. On corporate social responsibility within the arms trading industry, see also Edmund Byrne, 'Assessing arms makers' corporate social responsibility' (2007) 74(3) Journal of Business Ethics 201.

[101] Elli Kytömäki, 'The Arms Trade Treaty and Human Security: Cross-Cutting Benefits of Accession and Implementation' (Chatham House, 20 February 2015) <https://www.chathamhouse.org/2015/02/arms-trade-treaty-and-human-security-cross-cutting-benefits-accession-and-implementation> accessed 23 April 2021.

[102] Álvarez Martínez (n 92) 211; Maletta 'Legal challenges to EU member states' arms exports to Saudi Arabia: current status and potential implications' (n 77); Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (n 70) 78.

[103] cf Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (n 70).

[104] cf Lustgarten (n 35) 29. See also Erickson (n 4).

herently clash, Hansen argues that states may take advantage of what is construed as an 'ambiguity' in the established law by which governments can allow questionable arms transfers to go through whilst having the benefit of a 'moral shelter' of political commitments to apparently restrictive policies.[105]

This 'ambiguity' in the law is argued to have led states to stretch the substantive obligations under the ATT and the EU Common Position beyond reason. To illustrate, the large-scale supplies of European arms to the Saudi-led Coalition in Yemen is a prominent example of authorising states purportedly defeating the purpose of these regimes and disrespecting numerous of the common and legally binding standards to which they have agreed.[106] Having found that the ATT and the EU Common Position above all constitute a 'moral shelter', lacking those stringent provisions necessary so as to ascertain liability for such arms supplies, states' failure to exercise proper human rights due diligence would have to be enforced through other international legal mechanisms. On that basis, this thesis will now proceed to explore if IHRL and the ECHR more specifically, might provide for a more viable alternative for the purpose of holding arms transferring states accountable for human rights violations in third states, where such arms are used. In this respect, it first needs to be appraised to what extent arms transfers expose individuals abroad to human rights risks. To this end, European arms supplies to the Saudi-led Coalition in relation to the right to life as construed under Article 2 ECHR will serve as the contextual point of departure for the forward discussion.

[105] Susanne Therese Hansen, 'Taking Ambiguity Seriously: Explaining the Indeterminacy of the European Union Conventional Arms Export Control Regime' (2016) 22(1) European Journal of International Relations 192, 192–194.
[106] cf Maletta, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (n 70); UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), paras 413–414.

3 Arms Transfers and Human Rights Violations Abroad: The Case of Yemen and the Right to Life

3.1 Introduction

As already mentioned in the background section of this thesis, there is an inherent conflict in the interaction between arms trade and human rights – a concern which is not least manifested in cardinal clauses of the ATT and the EU Common Position.[107] By fuelling armed conflict, the international sale and proliferation of arms could i.e. be linked to the spread of disease, deprivation of food and basic necessities, forced disappearances, sexual abuse, torture, slavery and death.[108] Thus, while trade in military equipment and military technology may satisfy the security needs of an importing state, it undoubtedly has harmful effects on the enjoyment of fundamental human rights. Globally, millions of people experience serious human rights violations as a direct result of arms transfers and the final use of transferred arms. The unwarranted proliferation of weapons can further have destabilising regional effects, especially in regard to transfers to states with poor structure of governance, where weapons are more easily diverted. [109]

3.2 The Armed Conflict in Yemen

In 2011, the then President of Yemen, Ali Abdullah Saleh, was removed from power ensuing a popular revolution and replaced by former Vice-President Abd Rabbo Mansour Hadi. A consolidating process, including the arrangement of a National Dialogue Conference and the drafting of a new constitution, was initiated with a view to building stable institutions and quelling tensions between the country's different ethnic groups. The process, however, was unsuccessful and in 2014 a conflict arose between those loyal to the regime and other groups opposing the proposed amendments and new mechanisms for distributing political power. In September 2014, armed forces under the control of the former Head of State, Ali Abdullah Saleh, entered the capital of Sana'a and established control over critical functions and infrastructure. Following the seizure of Sana'a, the armed

[107] Álvarez Martínez (n 92) 200.
[108] David P Southall and Bernadette O'Hare, 'Empty Arms: The Effect of the Arms Trade on Mothers and Children' (2002) 325 BMJ 1457, 1459.
[109] UNHRC, UN Doc A/HRC/35/8 (n 6).

forces loyal to Saleh consolidated power and control over numerous regions all over Yemen.[110]

Shortly after the surge of hostilities in Yemen, the recognised President Hadi requested the military support of his Gulf Cooperation Council partners. In March 2015, Saudi Arabia formed a coalition with Bahrain, Egypt, Jordan, Kuwait, Morocco, Senegal, Sudan, the UAE and Qatar[111] for the purpose of assisting government forces in taking action against enemy bands and stifling the insurgencies. The enemy bands were commonly referred to as Houthi-Saleh fighters until the death of Saleh in December 2017. Houthi commands, however, remain the de-facto authorities in many governorates of Yemen and constitute the most prominent actors to resist the joint forces of the Yemeni military loyal to president Hadi and the Saudi-led Coalition.[112] The armed conflict between state actors, on one side, and anti-state actors, on the other, could be characterised as a non-international armed conflict.[113]

Since its start in 2014, the war in Yemen has continued unabated. Admittedly, the continuous hostilities have brought endless suffering to the civilian population. The Office of the United Nations High Commissioner for Human Rights has estimated that the number of casualties between March 2015 and June 2020 amounted to over 20,000, with 7,825 killed and another 12,416 people injured as a direct result of the ongoing conflict.[114] Human Rights Watch reported 18,400 civilian deaths as a result of the war in its World Report 2021.[115] For its part, the Yemen Data Project estimated the number of civilian casualties to 18,580 as of 28 April 2021.[116] Including also indirect casualties, a report enabled by the United Nations Development Program (UNDP) projects that 130,000 people had died as a consequence of the deteriorating effects on the economy, availability to health and humanitarian aid that the conflict had had by the end of 2019.[117]

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[110] UNHRC, UN Doc A/HRC/39/43 (n 45), para 17.
[111] Qatar, however, left the Coalition in 2017.
[112] UNHRC, UN Doc A/HRC/39/43 (n 45), para 18; UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), Annex I para 24.
[113] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, art 3; International Commission of Jurists, 'Bearing the Brunt of War in Yemen: International Law Violations and Their Impact on the Civilian Population' (July 2018), 5 <http://www.icj.org/wp-content/uploads/2018/09/Yemen-War-impact-on-populations-Advocacy-Analysis-Brief-2018-ENG.pdf> accessed 28 April 2021.
[114] UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), para 39.
[115] Human Rights Watch, *World Report 2021: Events of 2020* (n 9) 749.
[116] Yemen Data Project <https://www.yemendataproject.org> accessed 28 April 2021.
[117] Jonathan D Moyer et al, 'Assessing the Impact of War on Development in Yemen' (UNDP and Frederick S. Pardee Center for International Futures, 2019), 37

3.3 Factual Findings of Attacks on Civilians in Yemen by the Saudi-led Coalition[118]

Since its military intervention in 2015, the Saudi-led Coalition has been found to conduct offensives which have indiscriminately targeted civilians and civilian objects, including attacks on schools, private homes, hospitals and local markets.[119] The United Nations' Group of Eminent International and Regional Experts on Yemen (UN Group of Experts) concluded in 2018 that Coalition airstrikes had up until that point been the leading direct cause of civilian casualties and damage in the course of the armed conflict. The death toll in such operations was then estimated to have exceeded 4,300.[120] As of 28 April 2021, the Yemen Data Project had accounted for a total of 22,879 Coalition air raids in Yemen.[121] Besides conducting air operations, the Coalition has provided critical ground support to Yemeni government forces loyal to Hadi. In many of these attacks, there have been findings of fire weapons and small arms targeting the civilian population.[122] The UN Group of Experts has repeatedly confirmed that Coalition states, namely Saudi Arabia and the UAE, are responsible for breaches of IHL as well as serious violations of IHRL –including the arbitrary deprivation of the right to life and forced disappearances– in the course of their military operations in Yemen.[123]

Between the months of April and May 2015, the Coalition carried out bomb raids in the Sa'dah Governorate of Yemen, resulting in numerous casualties and destruction of critical infrastructure. After the first campaign of air raids, satellite images showed over 3,000 separate impact locations. One airstrike is alleged to have hit a private home in which 17 children were killed.

<https://www.undp.org/content/dam/yemen/General/Docs/ImpactOfWarOnDevelopmentInYemen.pdf> accessed 28 April 2021.

[118] The review of events accounted for in this section is by no means meant to be exhaustive. For a more comprehensive list of coalition attacks on civilians documented by the UN Group of Experts, see eg UNHRC, UN Doc A/HRC/39/43 (n 45), Annex IV; UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), para 41 et seq.

[119] Amnesty International, 'Nowhere Safe for Civilians: Airstrikes and Ground Attacks in Yemen' (18 August 2015) <https://www.amnesty.nl/content/uploads/2015/08/nowhere_safe_for_civilians_-_taiz__aden_report.pdf?x44743> accessed 11 May 2021; Human Rights Watch, *Targeting Saada: Unlawful Coalition Airstrikes on Saada City in Yemen* (Human Rights Watch 2015).

[120] UNHRC, UN Doc A/HRC/39/43 (n 45), Annex IV para 3.

[121] Yemen Data Project (n 116).

[122] UNHRC, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014: Report of the Group of Eminent International and Regional Experts as submitted to the United Nations High Commissioner for Human Rights' (9 August 2019) UN Doc A/HRC/42/17, para 96.

[123] ibid, para 94 et seq; UNHRC, 'Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen' (28 September 2020) UN Doc A/HRC/45/16, para 103 et seq.

In August 2016, further airstrikes were carried out in the Abs district within the Hajjah governorate of Yemen. On August 15, the Coalition struck Abs Hospital, which according to Doctors Without Borders resulted in 19 deaths and another 24 injured.[124] Throughout 2017 and 2018, the Coalition continued to conduct airstrikes, targeting residential buildings, civilian vehicles and weddings. In a notable attack on Al-Kubra Hall in the capital of Sana'a, the Coalition was responsible for bombing a funeral in which 137 civilians, including 24 children, were killed.[125] In 2017, the UN documented that there had been 52 attacks on hospitals and schools since the start of the conflict. Nearly three out of four of these attacks were attributed to the Saudi-led Coalition forces.[126]

In 2019, the UN Group of Experts reported on incidents of Coalition backed forces engaging in shelling attacks on the ground in Yemen. Notably, UAE-affiliated groups were alleged to have carried out indiscriminate offensives against civilians with shelling artillery in the Yemeni governorates of Ta'izz and Al-Hudaydah.[127] In February 2019, CNN reported that the Coalition had carried out air raids in the Sa'dah governorate whereby a school bus was hit, altogether killing 51 people, 40 of whom were children.[128] In its report from 2020, the UN Group of Experts maintains that the *modus operandi* of the Coalition remains principally unchanged. Airstrikes have been carried out in the capital of Sana'a as well as in the Abyan Governorate of Yemen, including attacks by UAE-backed forces on civilians in the northern parts of the country. While Coalition forces have withdrawn from some of the critical combat regions, there are still a significant number of such troops on the ground in Yemen. As of 2020, the estimated number of UAE-backed fighters in Yemen amounted to 90,000.[129]

[124] UNHRC, UN Doc A/HRC/39/43 (n 45), Annex IV para 3 et seq.
[125] ibid, para 18.
[126] UNGA and UNSC, 'Children and Armed Conflict: Report of the Secretary General' (24 August 2017) UN Doc A/72/361–S/2017/821, para 193.
[127] UNHRC, UN Doc A/HRC/42/17 (n 122), para 38 et seq.
[128] Nima Elbagir et al, 'The schoolboys on a field trip in Yemen were chatting and laughing. Then came the airstrike.' (CNN, 27 February 2019) <https://edition.cnn.com/2018/08/13/middleeast/yemen-children-school-bus-strike-intl/index.html> accessed 29 April 2021.
[129] Office of the United Nations High Commissioner for Human Rights, 'Press briefing note on Yemen' (6 August 2019) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24871&LangID=E> accessed 28 April 2021; UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), para 41 et seq.

3.4 EU Sales of Conventional Arms to the Saudi-led Coalition and the Reported Use of Such Arms in Yemen

The leading members of the Saudi-led Coalition, namely Saudi Arabia and the UAE, constitute two of the most important customers for the EU military industry. During 2013–2017, EU exports of conventional arms to Saudi-Arabia went up by 225 per cent while sales to the UAE rose by approximately 50 per cent. The total value of EU export licenses to the two states also rose by nearly 50 per cent between 2015 and 2016 to a net worth of €43 billion. In 2016, during the height of the Yemen conflict, the UK, France and Germany accounted for 85 per cent of all issued EU export licenses to Saudi Arabia and 76 per cent of export licenses to the UAE. [130] Since 2016, arms transfers to the Saudi-led coalition have decreased. Still, the value of EU export licenses to Saudi Arabia and the UAE amounted to €16 billion in 2019. EU exports to Egypt, another member of the coalition, has meanwhile steadily increased and the country is as of 2020 by far the largest importer of conventional arms from the EU.[131]

Across the EU, the policy on arms exports to the Saudi-led Coalition is not by any means uniform. The Netherlands and Sweden are amongst those Member States with a consistently more restrictive policy on arms transfers to Coalition partners. Germany, which has been one of the most important exporters of arms to both Saudi-Arabia and the UAE, announced in 2018 that it will also deny all licenses for military equipment to be used in the armed conflict in Yemen.[132] Having repeatedly justified that large-scale arms transfers to the Saudi-led Coalition is not contrary to its international obligations, Italy has now similarly declared a permanent ban on arms sales to Saudi Arabia as well as the UAE for the purpose of preventing any further aggravation of the conflict.[133] In contrast, Italy continues to carry out

[130] Bromley and Maletta (n 8).
[131] European External Action Service, 'EU Database on Arms Exports' <https://webgate.ec.europa.eu/eeasqap/sense/app/75fd8e6e-68ac-42dd-a078-f616633118bb/sheet/ccf79d7b-1f25-4976-bad8-da886dba3654/state/analysis> accessed 2 February 2021.
[132] Bromley and Maletta (n 8). Notwithstanding its 'restrictive' policy on exports to Coalition forces, Sweden exported arms to a net worth of 1,3 billion SEK to the UAE in 2019, making it the largest importer of arms from Sweden, see Save the Children, 'Nya Siffror: Sverige exporterar mer vapen än någonsin till de som bombar barn i Jemen' (20 March 2020) <https://press.raddabarnen.se/pressreleases/nya-siffror-sverige-exporterar-mer-vapen-aen-naagonsin-till-de-som-bombar-barn-i-jemen-2983899> accessed 21 May 2021; Svenska Freds- och Skiljedomsföreningen, 'Snabba Fakta om Vapenexport' (Last updated March 2021) <https://www.svenskafreds.se/vad-vi-gor/vapenexport/snabba-fakta-om-vapenexport/> accessed 21 May 2021.
[133] Al Jazeera, 'Italy permanently halts arms sales to Saudi Arabia, UAE' (29 January 2021) <https://www.aljazeera.com/news/2021/1/29/italy-makes-permanent-arms-sale-freeze-to-

arms transfers to Egypt.[134] The UK[135], France, and Spain have, as of April 2021, not imposed any general restrictions on arms transfers to neither Saudi Arabia, nor to the UAE.[136] In 2019, the UK and France together issued around 500 export licenses to Saudi Arabia and the UAE for a total value of over €14 billion.[137] While the UK did pause exports to the Coalition during a short window in 2019 and 2020, license requests were re-considered and arms transfers resumed upon an announcement from the British Government on 7 July 2020. The Secretary of State for International Trade then held that there were no immediate issues arising out of such exports under the EU Common Position so as to necessarily block all prospective arms transfers.[138]

While it is difficult to retrieve altogether credible and exhaustive proof on the usage of European arms by Coalition forces, independent findings would assert that such military equipment to a considerable degree maintains the armed conflict in Yemen. In a report enabled by the Yemeni NGO Mwatana for Human Rights, several instances of UK-made weapons used in airstrikes targeting civilian businesses and schools are accounted for.[139] Hakim, a series of guided munition by British company GEC-Marconi Dynamics, are for instance found to have been used in an attack on a factory near the capital of Sana'a in 2015, resulting in three casualties. In its report, the NGO finds that the attack was targeting civilians, which would constitute breaches

saudi-arabia> accessed 23 April 2021; The Local, 'Italy blocks arms sales to Saudi Arabia permanently' (29 January 2021) <https://www.thelocal.it/20210129/italy-stops-arms-sales-to-saudi-arabia-permanently> accessed 23 April 2021.

[134] Al-Monitor, 'Italy advances arms deals with Egypt despite opposition' (27 March 2021) <https://www.al-monitor.com/originals/2021/03/italy-advances-arms-deals-egypt-despite-opposition> accessed 6 May 2021.

[135] Post-Brexit, the UK is no longer bound by the provisions of the EU Common Position. Nonetheless, the Criteria are all incorporated into national legislation why the legal framework of its export licensing system, as of now, does not differ in any important aspects from the EU requirements. See Campaign Against Arms Trade, 'Implications of Brexit' <https://caat.org.uk/challenges/government-support/european-union/brexit/> accessed 23 April 2021.

[136] Bromley and Maletta (n 8); Joseph Stepanski, 'Advocates see opportunity in US review of Saudi arms sales' (Al Jazeera, 3 April 2021) <https://www.aljazeera.com/news/2021/4/3/advocates-see-opportunity-us-review-saudi-arms-review> accessed 25 May 2021; Rayhan Uddin, 'Saudi Arabia Arms Sales: Which countries are still exporting?' (Middle East Eye, 19 February 2021) <https://www.middleeasteye.net/saudi-uae-coalition-arms-sales-country-breakdown> accessed 28 April 2021.

[137] European External Action Service, 'EU Database on Arms Exports' (n 131).

[138] UK Parliament, 'Trade Update' (Statement made on 7 July 2020 by Elizabeth Truss, the Secretary of State for International Trade) <https://questions-statements.parliament.uk/written-statements/detail/2020-07-07/HCWS339> accessed 28 April 2021.

[139] Ruhan Nagra and Brynne O'Neal, 'Day of Judgment: The Role of the US and Europe in Civilian Death, Destruction, and Trauma in Yemen' (Mwatana for Human Rights, University Network for Human Rights and Pax, 13 March 2019), 9–10 <https://reliefweb.int/sites/reliefweb.int/files/resources/Yemen-report-draft_3.5_PDF-w-cover.pdf> accessed 23 April 2021.

of IHL and IHRL.[140] Furthermore, there are testimonies of Italian made suspension lugs being used in Coalition airstrikes. After a notable such attack on a residential area in the Hudaydah Governorate of Yemen in October 2016, lugs from RVM Italia S.p.A., an Italian subsidiary of the German registered company Rheinmetall AG, were found on the ground. The attack had six casualties, including four children and one pregnant woman. Similar to the attack near Sana'a, the attack could have given rise to violations of IHL as well as IHRL.[141]

The ECCHR has presented further claims of the Saudi-led Coalition relying on military equipment from European companies in the course of their ground and air operations. For instance, European fighter jets produced and exported by multinational companies with their base in Germany, France, and Spain are alleged to have been used in airstrikes which have targeted civilians in Yemen. These fighter jets have further been equipped with guided bombs manufactured mainly in Italy and the UK. Following Coalition attacks, there have been findings of remnants of such arms and related products, including: Paveway IV munition produced by British Company Raytheon, bombs from the MK 80 series produced by RVM Italia S.p.A., as well as the Storm Shadow and Brimstone Missiles produced conjointly by MBDA UK and MBDA France.[142]

Moreover, Amnesty has in collaboration with the news site Disclose presented evidence of 'widespread use' of French exported arms by Coalition forces in leaked government documents. French-supplied CAESAR howitzers, a gun which can fire six shells per minute and with a range of up to 42 kilometres, were in 2019 positioned by Saudi-Arabia on 48 locations near the border to Yemen. According to the aforementioned government documents, over 400,000 civilians were within the range of potential artillery by CAESAR howitzers at that time. Several incidents taking place in this very area would confirm that CAESAR howitzers were in fact used in offensives and attacks on civilians in Yemen. No other equivalent military equipment would at those intervals have been placed close enough to carry out the shelling attacks. In total, 52 bombardments within the range of the 48 French-made guns were realised by Coalition forces between 2016 and 2018, with 35 civilians killed as a direct result of these attacks. In addition, there is evidence of French-made Leclerc tanks, exported to the UAE, deployed in conflict areas in Yemen. It is estimated that the use of these tanks was responsible for the death of 55 civilians in the course of the conflict as

[140] ibid 98–99.
[141] ibid 50–52.
[142] ECCHR (n 10).

of November 2018. French-exported air attack weaponry, including the Mirage 2000-9 and the Cougar combat helicopter, are also alleged to be directly used in combat on part of the Coalition forces in Yemen.[143]

There are further claims of the Coalition forces benefitting from military equipment produced and exported by Spain. Lighthouse Reports has presented findings of transfers of Airbus A330 MRTT refueling tankers from Spain to the Royal Saudi Air Force. These tankers have supported critical air raids and bombing missions against the civilian population in Yemen.[144]

3.5 The Right to Life in Light of the Impugned Arms Transfers

3.5.1 Preliminary Remarks on the Applicability of IHRL in Armed Conflict

In defining the war in Yemen as a non-international armed conflict, IHL applies accordingly.[145] In its Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ has affirmed that IHRL does not in general cease to apply in times of armed conflict.[146] This was reiterated by the ICJ in another Advisory Opinion of 2004, namely on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[147] and later sustained in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* in which it found that IHRL would be taken into account parallel to IHL.[148] In sum, IHRL is therefore generally applicable to events taking place in the course of the armed conflict in Yemen.

[143] Amnesty, 'France: Leaked military documents underscore need to end flow of arms to Yemen conflict' (15 April 2019) <https://www.amnesty.org/en/latest/news/2019/04/france-leaked-military-documents-underscore-need-to-end-flow-of-arms-to-yemen-conflict/> accessed 11 May 2021; Disclose, 'Yemen Papers' (15 April 2019) <https://made-in-france.disclose.ngo/en/chapter/yemen-papers/>, accessed 11 May 2021. See also UNHRC, UN Doc A/HRC/45/CRP.7 (n 9), para 61.
[144] Lighthouse Reports, 'Spain maintains war in Yemen' <https://www.lighthousereports.nl/investigation/spain-maintains-war-in-yemen/> accessed 3 May 2021.
[145] UNHRC, UN Doc A/HRC/39/43 (n 45), para 15.
[146] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [8 July 1996] ICJ Rep 226, para 25.
[147] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [9 July 2004] ICJ Rep 163, para 106.
[148] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgement) [19 December 2005] ICJ Rep 116, paras 215–216.

For its part, the ECtHR has confirmed that the Convention may apply concurrently to IHL.[149] In *Hassan v the UK*, the Court disregarded the UK's argument that IHL takes precedence over the ECHR in times of armed conflict.[150] In view of the general rules of treaty interpretation, the Court further found that the Convention rights must be interpreted in "harmony with other rules of international law of which it forms part", namely the Geneva Conventions.[151]

3.5.2 The Legal Standard: Article 2 ECHR

Article 2 of the Convention provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 establishes one of the most fundamental provisions of the Convention. Enshrining one of the basic values of democratic societies, the ECtHR has held that the right to life must be strictly construed.[152] Considering the Convention as an essential instrument for the protection of individual human beings, Article 2 must be interpreted in such a way as to ensure the practical and effective safeguards of the provision.[153] Save to the extent that exceptions are permissible in lawful acts of war, the right to life is non-

[149] cf Stefan Kirchner, 'The Jurisdiction of the European Court of Human Rights and Armed Conflicts' (Recent Developments in International Law Working Paper 12 May 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=420100> accessed 23 April 2021.
[150] *Hassan v the United Kingdom* [GC] No 29750/09 (ECtHR 16 September 2014), para 77.
[151] ibid, para 102.
[152] *McCann and Others v the United Kingdom* [GC] No 18948/91 (ECtHR 27 September 1995), para 147.
[153] *Soering* (n 14), para 87.

derogable.[154] As to what might constitute a lawful act of war, IHL is considered the cardinal reference.[155] The Court has hereby affirmed that the right to life in armed conflict should "be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict".[156]

The arbitrary killings and excessive use of force against civilians in the course of Coalition operations would according to the UN Group of Experts amount to breaches of the right to life as generally construed under IHRL on part of those states carrying out the attacks, namely Saudi Arabia and the UAE.[157] In this respect, the ECtHR has repeatedly confirmed that states have a duty under Article 2 to refrain from deliberate and unjustified killings.[158] In *Vilnes and others v Norway,* the Court found that the right to life is applicable where an individual is victim of a conduct which by its very nature puts their life at risk.[159] Any resort to arms must be preceded by precautionary measures and thorough training,[160] and the use thereof is strictly confined to situations in which the amount of inflicted violence is proportionate, with a view to achieving a legitimate aim.[161]

Article 2 imposes a two-fold obligation whereby states are enjoined to not only defer from conduct that subjects the individual to a deprivation of their right to life, but also protect this right by positive action.[162] The positive obligation under Article 2 requires state parties to take appropriate steps to ensure and safeguard the right to life for those within its jurisdiction. This entails the duty to provide regulatory framework and take preventive operational measures. These positive obligations apply in the context of any public or non-public state activity, where the right to life may be at stake.[163] The

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[154] art 15(2) ECHR.
[155] Bernadette Rainey et al, *Jacobs, White and Ovey: The European Convention on Human Rights* (7th ed, OUP 2017) 117.
[156] *Varnava and Others v Turkey* [GC] Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECtHR 18 September 2009), para 185.
[157] UNHRC, UN Doc A/HRC/42/17 (n 122), para 94 et seq.
[158] *Boso v Italy* [Admissibility Decision] No 50490/99 (ECtHR 5 September 2002). See also *McCann and Others v. the United Kingdom* (n 152), para 148.
[159] *Vilnes and Others v Norway* Nos 52806/09 and 22703/10 (ECtHR 5 December 2013), para 219.
[160] *McCann and Others v the United Kingdom* (n 152), para 151.
[161] *Case of the Santo Domingo Massacre v Colombia* Series C No 259 (Inter-American Court of Human Rights 20 November 2012), para 216 et seq.
[162] Council of Europe, 'Guide on Article 2 of the Convention – Right to life', 6 (Last updated 31 December 2020) <https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf> accessed 23 April 2021.
[163] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] No 47848/08 (ECtHR 17 July 2014), para 130.

ECtHR has held that positive obligations under Article 2 may arise in different situations, including when a state engages in dangerous activities. In *Öneryildiz v Turkey*, the Court found that a state's responsibility is determined by the "harmfulness of the phenomena inherent in the activity in question" as well as "the contingency of the risk to which the applicant was exposed by reason of any life-endangering circumstances".[164] In this respect, Article 2 would enjoin states to regulate the sales, marketing and use of conventional arms.[165] States would moreover be obliged to take appropriate action following any illegitimate use of weapons by third subjects, including the conviction of those responsible for the unlawful conduct as well as ensuring the payment of compensation to any such victims.[166] Harm arising out of arms possession and the use of arms related products should by all available means be diligently avoided.[167] In *Albekov and Others v Russia*, Russia was found to have been in breach of Article 2 ECHR following the state's failure to confine a mined area and properly notify the residents.[168]

As far as arms transfers are concerned, however, the issuing of an export license could admittedly be considered both in relation to negative and positive duties. It is equally relevant to discuss to what extent ECHR enjoin states to *refrain* from granting a certain license, as it is to discuss a state's duty to *protect* individuals by positive action, namely through proper human rights due diligence. For this reason, in the continuance of this thesis, no further significance will be awarded to a strict distinction between positive and negative obligations.

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[164] *Öneryildiz v Turkey* [GC] No 48939/99 (ECtHR 30 November 2004), para 73.
[165] Centre for Humanitarian Dialogue, 'International law and small arms and light weapons control: Obligations, challenges and opportunities' (March 2006) <https://www.hdcentre.org/wp-content/uploads/2016/07/Internationallawandsmallarmsandlightweaponscontrol-March-2006.pdf> accessed 29 April 2021; UN Commission on Human Rights, 'The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms' (30 May 2002) UN Doc E/CN.4/Sub.2/2002/39, para 46.
[166] Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (CUP 2021) 298. See also UN Human Rights Committee, 'Concluding Observations: Israel' (18 August 1998) UN Doc CCPR/C/79/Add.93, paras 17–18.
[167] The due diligence obligations of preventing harm arising out of arms transfers is also interesting to study from a business and human rights-perspective. In this respect, see eg Christian Schliemann and Linde Bryk, 'Arms Trade and Corporate Responsibility: Liability, litigation and legislative reform' (Friedrich-Ebert-Stiftung, November 2019) <http://library.fes.de/pdf-files/iez/15850.pdf> accessed 6 May 2021.
[168] *Albekov and Others v Russia* No 68216/01 (ECtHR 9 October 2008), para 85 et seq.

3.6 Concluding Remarks

Articles and testimonies from Yemen convey a story of immense human suffering.[169] The data collected by UN agencies and NGOs presented above largely confirms the picture portrayed in media and supports the notion that the armed conflict in Yemen has indeed had an appalling impact on the civilian population. In the course of the on-going strives, civilians have consistently been exposed to a demonstrated danger of falling victim to airstrikes and armed violence. Meanwhile, significant arms transfers to one of the warrying parties, namely the Saudi-led Coalition, have as of April 2021 not ceased. Despite alarming reports from the UN Group of Experts of repeated accounts of indiscriminate attacks against civilians and widespread violations of IHRL by Coalition forces, key EU and Council of Europe Member States are continuing their supply of military equipment, including combat aircraft, guided bombs and tankers to both Saudi Arabia and the UAE as well as Egypt. Independent reports have traced these arms to specific attacks carried out in Yemen. Attacks, which have generated numerous casualties and given rise to human rights considerations.

The ECHR, binding upon all major European arms transferring states, including France, UK, Italy, Germany, and Spain,[170] require contracting states to *inter alia* respect and protect the right to life. In the context of the armed conflict in Yemen, individuals have purportedly fallen victims to such lethal force in military operations, enabled by arms transfers from European states, so as to amount to treatment contrary to Article 2. Where the attacks have breached IHL standards, e.g., in targeting civilians contrary to the principle of distinction,[171] there would be no permissible grounds for derogation under Article 15.2.

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[169] Numerous articles in newspapers all over the world have covered the armed conflict since its start. For a few illustrative examples, see eg Bethan McKernan, '"Now it's just ghosts": Yemenis living under the shadow of death by airstrike' *The Guardian* (London, 30 September 2019) <https://www.theguardian.com/world/2019/sep/30/yemenis-living-under-the-shadow-of-death-by-airstrike> accessed 26 April 2021; Declan Walsh, 'The Tragedy of Saudi Arabia's War' *The New York Times* (New York, 26 October 2018) <https://www.nytimes.com/interactive/2018/10/26/world/middleeast/saudi-arabia-war-yemen.html> accessed 23 April 2021.

[170] Council of Europe, 'Chart of signatures and ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms' (Status as of 11 May 2021) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=OAc9EhHh> accessed 11 May 2021.

[171] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 13(2). The principle of distinction also forms part of customary international law.

Any responsibility under the Convention, however, is as per Article 1 ECHR contingent upon the establishment of jurisdiction between the state and the individual. In this context, it should first and foremost be stressed that no responsibility for arms transferring states would arise in relation to those *specific attacks* carried out by Coalition forces. While the ECtHR has previously found reasons to attribute the conduct of third state agents to contracting parties,[172] this would be of limited importance with respect to arms transferring activities. Although there is an established linkage between the supply of arms and the subsequent realisation of military attacks with such arms in Yemen, it may arguably not be so strong as to find the transferring states directly responsible for those later events, not least considering that the acts at issue take place outside their own territory.[173]

The fact remains that the arms transferring activities as such evidently have the potential of placing a fixed group of people in a position where they are exposed to an adverse risk of suffering human rights violations, namely the depriving of their right to life. Admittedly, Article 2 would further enjoin states to properly regulate the sale of arms and ensure effective compensation for any victims of the unlawful use of arms. However, as per Article 1, these considerations would again only apply within the jurisdiction of that contracting state. Thus, the issuing of arms export licenses to third states would in principle fall entirely outside the scope of the Convention, provided that the human rights consequences of such conduct occur abroad.[174]

For the purpose of ascertaining liability under the Convention, it must thus be appraised how the jurisdictional threshold in Article 1 ECHR could be overcome so as to hold arms transferring states responsible for their own conduct, in relation to those impugned events and effects thereof occurring abroad. Here, the focus is whether the granting of an export license could be perceived to *subject* individuals in third states to human rights violations and whether such subjection would amount to jurisdiction. The discussion will continually relate to Article 2 ECHR and arms transfers carried out to Coalition partners.

[172] *El-Masri v the Former Yugoslav Republic of Macedonia* [GC] No 39630/09 (ECtHR 13 December 2012).
[173] cf ibid, para 206 "the acts complained of were carried out in the presence of officials of the respondent State and within its jurisdiction. Consequently, the respondent State must be regarded as responsible under the Convention for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities".
[174] Monnheimer (n 166) 299; cf art 1 ECHR.

4 Overcoming the Jurisdictional Threshold?

4.1 Preliminary Remarks on Attribution

Fundamental to consider when approaching any issue of international law is the basic rules of state responsibility. In this context, a state is considered to commit an internationally wrongful act where a conduct is attributable to the state, a conduct which would further constitute a breach of its international obligations.[175] While the issue of state responsibility for human rights violations is a difficult and debated topic,[176] Crawford and Keene argue that it is as relevant to consider in the case of IHRL as in claims of breaches of other international legal obligations.[177] Thus, before turning to the central argument of this chapter, namely overcoming the jurisdictional threshold so as to hold arms transferring states' accountable under the Convention for human rights violations in third states where such arms are used, some preliminary remarks in regard to state responsibility –and particularly the question of attributability– are necessary. The question of attribution should be considered preliminary to any establishment of state jurisdiction under Article 1.[178]

The general rules on attributability have been laid down by the International Law Commission (ILC) in ARSIWA.[179] In *Banković and Others v Belgium and Others*, the ECtHR affirmed that the Court

> must […] take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine

[175] ILC, 'Report of the International Law Commission on the Work of its 53rd Session: Draft Articles on Responsibility of States for Internationally Wrongful Acts' (23 April–1 June and 2 July–10 August 2001) UN Doc Supp No 10 (A/56/10), art 2.
[176] cf Bruno Simma, 'Human Rights and State responsibility' in August Reininsch and Ursula Kriebaum (eds), *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing 2007); James Crawford and Amelia Keene, 'The Structure of State Responsibility under the European Convention on Human Rights' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018); Malcom Evans, 'State Responsibility and the ECHR' in Malgosia Fitzmaurice and Dan Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (Hart 2004).
[177] Crawford and Keene (n 176) 197–198.
[178] *Behrami and Behrami v France and Saramati v France, Germany and Norway* [GC, Admissibility Decision] Nos 71412/01 and 78166/01 (ECtHR 2 May 2007), para 151; Crawford and Keene (n 176) 180–183, 192–193.
[179] ILC (n 175).

> State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty.[180]

Thus, while the ECHR to some extent operates under distinct rules, ARSIWA still constitutes a point of reference when approaching the issue of attributability. Irrespective of whether it concerns a state's negative or positive obligations under the Convention, the application of ARSIWA must not be avoided in its entirety.[181]

In accordance with Article 4 ARSIWA, any act of state agents is naturally and inherently attributable to that state. Applied to the context of arms transfers, the granting of export licenses by the competent authority and allowing the trade of military equipment under its domestic administrative laws would thus unequivocally be attributable to the exporting state. A more challenging question, however, is that of attributing the acts of foreign states to the transferring state. In this context, it would be difficult to establish any such attributability under ARSIWA standards. In relation to Articles 17–18, there is normally no element of coercion, direction or control so as to engage the responsibility of an arms transferring state.[182] Likewise, this thesis does not make any claim to establish attributability on the basis of complicity as construed under Article 16 ARSIWA. The provision reads as follows:

> 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 the knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.

Provided that the complicit state must have knowledge of the circumstances making the conduct of the assisted state unlawful, the arms transferring state would normally not assume the risk that its material assistance or aid may be used to violate international law.[183] A second threshold in applying Article 16 to arms transfers relates to the fact that such an export would in principle have to be given *for the purpose* of facilitating the commission of the

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[180] *Banković and Others v Belgium and 16 Others* [GC, Admissibility Decision] No 52207/09, (ECtHR 12 December 2001), para 57.
[181] Crawford and Keene (n 176) 180–183.
[182] cf Miles Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (2017) 27(3) European Journal of International Law 817, 819. While Jackson's article is on information sharing and assistance in torture, the same reasoning could easily be applied to arms transfers.
[183] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 18) 149. The knowledge criteria, however, is controversial. In this respect, see also Jackson, *Complicity in International Law* (n 36) 159 et seq.

wrongful act.[184] While legal doctrine might accommodate a more progressive approach to holding an arms transferring state *complicit* for human rights violations abroad, this thesis would argue that it is difficult to support such a claim.[185] Lastly, and most importantly, the principal states in our scenario –state members of the Saudi-led Coalition– are not parties to the ECHR. The opposability clause would consequently prohibit any invocation of state responsibility under the Convention on the basis of complicity.[186]

In sum, it is exclusively the arms transferring state's own conduct which is under review in this thesis. Namely, the granting of export licenses for conventional arms transfers. While such conduct would be inherently attributable to the state under Article 4 ARSIWA, state responsibility is further corollary of a *breach of an international obligation.* Thus, any liability under the Convention is contingent upon the arms transferring state having breached an obligation bestowed directly upon the state for its own actions or omissions. Admittedly, this is where the jurisdictional threshold materialises.[187] Seeing that Article 1 ECHR instructs state parties to secure the rights and freedoms defined therein only to individuals under their jurisdiction, how would the Convention apply to those subjects suffering treatment contrary to ECHR standards *abroad*? Where such a jurisdictional link is not established, there would be no grounds for invoking state responsibility under the Convention pursuant to Article 2 ARSIWA and the underlying principles of international law.

4.2 The Concept of Jurisdiction in IHRL: Article 1 ECHR

Article 1 of the ECHR reads:

> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Firstly, it is important to recognise that the term 'jurisdiction' in IHRL refers to the jurisdiction of the state rather than that of the court. Whereas the

[184] Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (n 18) 149.
[185] cf Brehm (n 39) 385. For an alternative approach, see eg David et al (n 22).
[186] art 16(b) ARSIWA.
[187] cf Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (n 182) 820; Rick Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights', in Coomans and Kamminga (n 43), 86.

Court's jurisdiction is indeed contingent upon the establishment of a jurisdictional link, that is not the subject of inquiry with respect to Article 1 ECHR.[188]

Furthermore, the concept of jurisdiction under IHRL must be separated from its wider meaning under public international law. Namely, depending on the legal environment in which the concept of jurisdiction is used, it has distinctive roles and functions.[189] In general international law, Milanovic notes that jurisdiction is an "emanation or aspect of [… a state's] sovereignty, its right to regulate its own public order".[190] In this respect, jurisdiction refers to a state's prescriptive and executive powers to regulate the conduct of private and public subjects.[191] Whereas the executive jurisdiction is exclusively territorial, i.e., a state must not enforce its laws on the territory of another state without consent, the jurisdiction to prescribe is much wider. That is, a state may under certain conditions adopt laws and make them applicable to subjects both within and beyond its territory.[192] In exercising jurisdiction, whether prescriptive or executive, states can be considered to assert their right as sovereign entities.[193]

In a human rights context however, the concept of jurisdiction can be defined as a responsibility which gives rise to certain legal obligations.[194] By means of a 'threshold criterion', Besson describes jurisdiction as conditioning "the applicability of those rights and duties on political and legal circumstances where a certain relationship exists between right-holders and state parties".[195] In doing so, she claims that jurisdiction is an 'all-or-nothing matter'. It can either apply whereby states are required to comply and act in full accordance with a treaty's provisions. If not, they are on the other hand

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[188] Milanovic, *Extraterritorial application of human rights treaties: law, principles, and policy* (n 41), 20.
[189] Alexander Orakhelashvili, 'Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights' (2003) 14(3) European Journal of International Law 529, 539 et seq.
[190] Marko Milanovic, 'From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties' (2008) 8(3) Human Rights Law Review 411, 420.
[191] The concept of jurisdiction under general international law can also be considered to include adjudicatory powers. Such competence may however be subsumed under the two other sets of powers. See eg Malcom Shaw, *International Law* (5th ed, CUP 2003) 572.
[192] Milanovic, 'From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties' (n 190) 421. See also *SS Lotus (France v Turkey)* [1927] PCIJ Rep Series A No 10.
[193] Joanne Williams, 'Al Skeini: A flawed interpretation of Banković' 23 Wisconsin International Law Journal 687, 691.
[194] Altwicker (n 20) 588; Cedric Ryngaert, *Jurisdiction in International Law* (2nd ed, OUP 2015) 22–26.
[195] Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) Leiden Journal of International Law 857, 860.

relieved from any such obligations.[196] Thus, it can be considered an absolute prerequisite for incurring the responsibility of a state under a human rights treaty.[197]

Having established this distinction between the two concepts of jurisdiction, Mallory notes that there is a 'fundamental conflict' in the application of jurisdiction as construed under public international law in the context of human rights, considering that its function shifts from a state's privileges to its obligations.[198] In this respect, it is important to note that the application of human rights law is not incumbent on the lawfulness of that act under the rules of jurisdiction in general international law. Thus, while a state may have acted *ultra vires* and asserted its authority beyond its sovereign competence, it can still be held liable for human rights violations in the course of such conduct.[199]

State jurisdiction in IHRL is by all means a vague concept. Moreno-Lax describes it as "de facto political and legal authority of the sovereign". Where it manifests such power and coercion over the individual, the jurisdictional link is established.[200] In this respect, territoriality forms a presumption of jurisdiction. That is, an individual having suffered a human rights violation will easier argue that the state activity at issue amounts to an exercise of jurisdiction if it occurred on the territory of the contracting state.[201] The drafters of the ECHR, however, had admittedly not sought to exclusively restrict the Convention obligations to the territories of the contracting parties. Robertson contends that the wording of the current provision was purposely chosen in favour of the more restrictive phrasing "all persons residing within their territories".[202] While the *travaux preparatoires* does not make it clear to what extent the treaty would apply abroad, it is evident from the ne-

[196] ibid 878.
[197] *Ilaşcu and Others v Moldova and Russia* No 48787/99 (ECtHR 8 July 2004) para 311.
[198] Mallory (n 29) 26–27. See also Virginia Mantouvalou, 'Extending judicial control in international law: human rights treaties and extraterritoriality' (2005) 9(2) International Journal of Human Rights 147, 160.
[199] Gondek, *The reach of human rights in a globalizing world: Extraterritorial Application of Human Rights Treaties* (n 42) 56–57.
[200] Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, SS and Others v. Italy, and the "Operational Model"' (2020) 21(3) German Law Journal 385, 397.
[201] ibid 398.
[202] AH Robertson, 'The European Convention for the Protection of Human Rights' (1950) 27 British Yearbook of International Law 145, 152. See also Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights' (n 187) 88 et seq.

gotiating discussions that many of the drafters had conceived a rather extensive understanding of jurisdiction.[203] Interestingly, the French treaty text implies a somewhat wider notion of jurisdiction than what can be inferred from the English version.[204]

Recognising that (i) the public international law approach to the concept of jurisdiction is not accommodating of the special character of the ECHR as a human rights document and (ii) the drafting of Article 1 is imprecise; it is difficult to infer from the treaty text alone whether the Convention is applicable or not to a particular claim, specifically in relation to human rights violations suffered in third states. The ordinary meaning of the term would not serve so as to conclusively specify and delimit the situations in which an individual is within the *jurisdiction* of a contracting state.[205] While this ambiguity in the reading of Article 1 could be considered to constitute a lack of judicial certainty,[206] it might also further a progressive interpretation of the Convention, conforming to legal developments.[207] In this respect, Mahoney has argued that "the open textured language and the structure of the Convention leave the Court significant opportunities for choice in interpretation; and in exercising that choice […], the Court makes new law".[208]

In filling out this blank and giving meaning to Article 1, the ECtHR has historically found that jurisdiction is primarily a territorial notion. In doing so, the question arises to which extent a state may be considered to have exercised its jurisdiction in extraterritorial contexts.

4.3 Traditional Accounts of Jurisdiction as Construed by the ECtHR

The contemporary and primarily territorial approach to jurisdiction in the Strasbourg case law was first laid down by the Court in the infamous *Banković* case in which the Court addressed the question of whether the applicants, which had been struck in a NATO air raid in Belgrade, Serbia,

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[203] Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights' (n 187) 89–90.
[204] Mallory (n 29) 22. "Les Hautes Parties contractantes reconnaissent à toute personne *relevant de leur juridiction* les droits et libertés définis au titre I de la présente Convention" (emphasis not in original).
[205] Mallory (n 29) 27–29.
[206] Björnstjern Baade, 'The ECtHR's Role as a Guardian of Discourse: Safeguarding a Decision-Making Process Based on Well-Established Standards, Practical Rationality, and Facts' (2018) 31(2) Leiden Journal of International Law 335, 340.
[207] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (2nd ed, CUP 2016) 50.
[208] Paul Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism' (1998) 19(1) Human Rights Law Journal 1, 2.

were within the jurisdiction of those state parties responsible for carrying out the attack.[209] Sharing the views of the respondent governments, the Court found that no jurisdictional link could be established. In this respect, it concluded that "Article 1 of the Convention must be considered to reflect […the] ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case".[210] The Court reached this conclusion on the basis of Article 31 VCLT, holding that a primarily territorial account of jurisdiction would be reflective of its ordinary meaning under public international law.[211] Moreover, the Court considered the applicants' claim of gradual jurisdiction unfounded. That is, the Court disagreed with the argument that the protection awarded by the Convention would be proportional to a state's control over a certain area or peoples, thus reiterating the jurisdictional clause as an 'all-or-nothing matter'.[212]

In sum, the Court in *Banković* may be considered to have taken a restrictive approach to the issue of extraterritorial claims of human rights violations under the Convention. However, in establishing territoriality as a rule in relation to Article 1, the Court acknowledged that there may be exceptions thereto. In this context, the Court explicitly recognised that there may be a basis for extraterritorial jurisdiction of a contracting state where it exercises public powers on the territory of another state by means of "effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of […that] Government."[213] This basis for extraterritorial jurisdiction is commonly referred to as the 'spatial model'. Furthermore, the Court did not clearly hold that effective control over territory abroad would be the *only* exception to the otherwise strict territorial notion of jurisdiction. Thus, the decision could be read so as to allow for further deviation to the territorial rule, not necessarily corresponding to that formulated by the Court in *Banković*.[214] Whereas *Banković* is still cited and referred to by the ECtHR,[215] it is evident that this decision alone does not suffice to appreciate the Court's approach to the extraterritorial reach of the Convention. Below,

[209] *Banković* (n 180).
[210] ibid, para 61.
[211] ibid, para 59.
[212] ibid, para 75. See also Besson (n 195) 878.
[213] *Banković* (n 180), para 71.
[214] Gondek, *The reach of human rights in a globalizing world: Extraterritorial Application of Human Rights Treaties* (n 42) 174; Michel Gondek, 'Extraterritorial application of the European Convention on Human Rights: territorial focus in the age of globalization?' (2005) 52(3) Netherlands International Law Review 349, 371. See also *Banković* (n 180), para 71.
[215] *Al-Skeini and Others v the United Kingdom* [GC] No 55721/07 (ECtHR 7 July 2011), para 74.

the principal models of applying the Convention extraterritorially, as construed by the Court, are discussed in more detail.[216]

4.3.1 The Spatial Model

In the landmark *Loizidou v Turkey* case, the Court addressed the applicant's claim that Turkey was violating her rights under Article 1 of Protocol no. 1 and Article 8 ECHR by refusing her to return to her home in Northern Cyprus. Turkey, on the other hand, argued that they could not be held liable under the Convention, considering that the acts were carried outside of their territory, and thus fell outside of their jurisdiction. The acts would not be imputable to them, but rather the Turkish Republic of Northern Cyprus (TRNC). The Court, however, did not find the Turkish arguments convincing. It held that:

> In this respect the Court recalls that, although Article 1 sets limits on the reach of the Convention, the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. […] Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[217]

In the merits stage of the proceedings, the Court affirmed that Turkey, through its army, had indeed exercised effective control over Northern Cyprus so as to place the actions of the TRNC within its jurisdiction.[218] In the *Cyprus v Turkey* case, the Court similarly found that Turkey had effective overall control over Northern Cyprus to the extent that their responsibilities were engaged under the Convention.[219]

The exercise of effective control over an area abroad might thus amount to jurisdiction within the meaning of Article 1.[220] This was indeed confirmed

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[216] On the 'spatial' and 'personal' model, see generally Marko Milanovic, 'Extraterritoriality and human rights: Prospects and challenges' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge 2016).
[217] *Loizidou v Turkey* (Preliminary Objections) [GC] No 15318/89 (ECtHR 23 March 1995), para 62.
[218] *Loizidou v Turkey* (Merits) [GC] No 15318/89 (ECtHR 18 December 1996), para 56.
[219] *Cyprus v Turkey* [GC] No 25781/94 (ECtHR 10 May 2001), para 77.
[220] Milanovic, *Extraterritorial application of human rights treaties: law, principles, and policy* (n 41) 127.

by the Court in *Banković*.[221] In rejecting the applicants' claim in *Banković*, the Court ostensibly did not find that an airstrike or complete control over an airspace were enough to trigger the respondent states' jurisdiction in that case. In this respect, the precise element of control required to meet the jurisdictional threshold under the spatial model is not obvious.[222]

4.3.2 The Personal Model

Under the ICCPR, the Human Rights Committee early recognised a personal model of jurisdiction in relation to extraterritorial claims of human rights violations. In *Lopez Burgos v Uruguay*, the Committee held that:

> The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" […] is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.
>
> […] Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. […][223]

This personal conception of jurisdiction has since been recognised also by the ECtHR. In the case of *Öcalan v Turkey*, a previous leader of the Kurdish PKK submitted a complaint to the Court that his arrest and abduction by Turkish police force in Kenya had violated his rights under Article 3 and 5 ECHR. The Court was thus asked to confront the issue of state jurisdiction and applicability of the Convention, to cases of extraterritorial rendition. In this respect, the Court, sitting in Grand Chamber, found that:

> directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the 'jurisdiction' of that State for the purposes of Article 1 of the

[221] On the compatibility between *Banković* and the cases concerning Northern Cyprus, see generally Lawson, 'Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights'Lawson (n 187) 121.
[222] cf Gondek, *The reach of human rights in a globalizing world: Extraterritorial Application of Human Rights Treaties* (n 42) 174.
[223] UN Human Rights Committee, *Sergio Ruben Lopez-Burgos v Uruguay* Communication No 52/1979 (29 July 1981) UN Doc CCPR/C/13/D/52/1979, paras 12.2–12.3.

> Convention, even though in this instance Turkey exercised its authority outside its territory […].[224]

A state party is thus bound by the Convention where agents act on its behalf abroad. This constitutes a separate model of extraterritorial application of the ECHR, distinct from effective control over *territory*. Rather, it would be a state's effective control over *persons* through the physical authority exercised by its agents that is triggering of jurisdiction as per Article 1.[225]

Issa v Turkey further stretched the concept of jurisdiction under Article 1 so as to encompass conduct of state agents abroad. The case concerned alleged breaches by Turkey of several Convention rights, including Article 2 and 3. As to the facts of the case, six women claimed that the Turkish army had crossed the border into Iraq where it had detained and killed Iraqi nationals. While the Court did not conclusively find evidence of the Turkish army liable for the killings, it notably pointed out that:

> a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating - whether lawfully or unlawfully - in the latter State […]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own.[226]

In this respect, the Court would seem to reject its own conclusions in *Banković*. Taking into account the last sentence of its §71 formula cited above and recognising that a state party would not be within its rights to carry out an aerial bombing against its own inhabitants at home, it would similarly be prohibited to conduct such a strike abroad. Moreover, the Court in *Banković* avoided to make reference to the *Lopez Burgos* case, invoked by the applicants in support of their claim. The *Issa* ruling on the other hand contains explicit citations of that very jurisprudence. [227] In sum, there are

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[224] *Öcalan v Turkey* [GC] No 46221/99 (ECtHR 12 May 2005), para 91.
[225] Helen McDermott, 'Application of the International Human Rights Law Framework in Cyber Space' in Dapo Akande et al (eds), *Human Rights and 21st Century Challenges* (OUP 2020) 200–201; Rick Lawson, 'Moving beyond Banković: The gradually expanding reach of the European Convention on Human Rights' (The Rule of Law in Peace Operations, 17th International Congress, Scheveningen, 16–21 May 2006) 17 Recueils de la Societé Internationale de Droit Penal Militaire et de Droit de la Guerre 473, 481.
[226] *Issa v Turkey* No 31821/96 (ECtHR 16 November 2004), para 71.
[227] cf ibid and *Banković* (n 180), paras 26, 48 "the Human Rights Committee has sought to develop, in certain limited contexts, the Contracting States' responsibility for the acts of their agents abroad" and "Citing one case of the Human Rights Committee […]" respectively.

therefore grounds to believe that the Court in *Issa* might have taken a delibarate step to soften an overly territorial notion of jurisdiction.[228]

Considering the inconsistency in the Court's case law in regard to *Banković* and *Issa* respectively, *Al-Skeini and Others v the UK* provided the Court an opportunity in 2011 to revise and align its jurisprudence on the issue of extraterritoriality. The case concerned the killing of six Iraqi nationals by British armed forces on Iraqi territory.[229] Here, the Court confirmed the applicability of both the spatial and the personal model. As to the personal model, it held that:

> […] whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.[230]

Moreover, it rejected the Court's view in *Banković* of jurisdiction as an absolute notion. Rather, it held that rights could indeed be 'divided and tailored' depending on the circumstances at issue.[231] As to the Court's conclusions on the applicability of the Convention, it found that there was a jurisdictional link between the UK and the applicants at the time of their death.[232]

While there are distinctive differences between the two models assessed thus far, the Court's rationale for applying the Convention is ultimately the same. Namely, a state's responsibility is engaged where it exercises *physical* power and control over the individual at issue.[233]

4.3.3 Territorial Acts with Extraterritorial Effects

Besides these two recognised accounts of extraterritorial state jurisdiction, the Convention may further be applicable to acts carried out 'at home', giving rise to violations abroad. In cases of *refoulement* and extradition, the Court has found a contracting state's responsibility to be engaged where it

[228] Lawson, 'Moving beyond Banković: The gradually expanding reach of the European Convention on Human Rights' (n 225) 482.
[229] *Al-Skeini* (n 215).
[230] ibid, para 137.
[231] ibid.
[232] ibid, para 149.
[233] ibid, para 136.

upon removal of an individual, exposes him or her to the risk of being deprived of their rights under the Convention.[234] This issue was first dealt with by the Court in the *Soering* case, where a German national in the UK faced extradition to the US, where there were substantial grounds for believing that he would fall victim of treatment contrary to Article 3 ECHR. The Court in *Soering* began by clarifying that Article 1 ECHR only confers an obligation on state parties to secure the rights and freedoms prescribed therein to individuals within its jurisdiction. It does not in any way set out to govern the conduct of third states and neither does it enjoin an obligation on state parties to impose Convention standards on states not parties to it.[235] Albeit these considerations, the Court found that a contracting state is not relieved from all responsibility for the foreseeable consequences that an individual may suffer upon the removal from its territory. In conclusion, it found the extradition of Mr. Soering to engage the responsibility of the extraditing state so as to give rise to a violation of Article 3.[236]

The rationale of the Court in the *Soering* case presents some interesting food for thought for the purpose of this thesis. Namely, the respondent state's responsibility was engaged through its own actions (the removal of Mr Soering from its territory); for a violation which would have taken place within the jurisdiction of a state not party to the Convention; a violation which moreover had not yet taken place.[237] In the course of the decades following *Soering*, the Court has had the opportunity to deal with similar issues arising out of Article 3 in relation to extradition activity. In the cases of *Al Nashiri v Poland* and *El-Masri v The Former Yugoslav Republic of Macedonia*, the court confirmed its view that a contracting state must consider *ipso facto* and 'intrinsic in the transfer' any risk that an individual within its jurisdiction would be subject to treatment contrary to Article 3 upon removal from its territory into the hands of a third state.[238] This approach, whereby the Court has found a state liable for territorial acts with extraterritorial effects,

[234] See eg *Al-Saadoon and Mufdhi v the United Kingdom* No 61498/08 (ECtHR 2 March 2010); *M.S.S. v Belgium and Greece* [GC] No 30696/09 (ECtHR 21 January 2011); *Saadi v Italy* [GC] No 37201/06 (ECtHR 28 February 2008).
[235] *Soering* (n 14), para 86.
[236] ibid, paras 88, 91.
[237] cf Diego Mauri, 'On American Drone Strikes and (Possible) European Responsibilities: Facing the Issue of Jurisdiction for "Complicity" in Extraterritorial Targeted Killings' (2019) 28 Italian Yearbook of International Law 249, 257.
[238] *Al Nashiri v Poland* No 28761/11 (ECtHR 24 July 2014), para 454; *El-Masri* (n 172), para 212.

is not restricted to Article 3 rights. The Court has relied on a similar rationale for the purpose of engaging the responsibility of a contracting state in regard to Article 2[239] as well as to Article 5.[240]

4.3.4 Interim Conclusions: Applying Traditional Accounts of Jurisdiction to Arms Transfers

Despite the progressing jurisprudence on this very issue, the Court still considers jurisdiction as primarily a territorial notion. In the *Al-Skeini* case, the Court reiterated its formula in *Banković* that any claim of extraterritorial violation constitutes an exception to the rule and that, as such, it has to be legitimatised and demonstrated in the specific case at issue.[241] Moreno-Lax refers to this practice as the 'exceptionalisation of extraterritorial jurisdiction'.[242] As per the Court's application of Article 1 ECHR, three separate such accounts of jurisdiction have specifically been established, namely: the spatial model, the personal model and territorial acts with extraterritorial effects.

Turning then to the central question of this thesis, namely arms transferring states' responsibility under the Convention, it must first be stressed that no human rights violations are *suffered* on the territory of a contracting state. Rather, the claim is that third state individuals, such as those comprising the civilian population in Yemen, are deprived of their human rights in the course of a state's arms transferring activities. Any liability would thus be contingent upon the 'extraterritorialisation' of the Convention. In this respect, none of the traditional accounts of jurisdiction would purportedly serve to engage the states' responsibility as per Article 1.

In regard to the spatial model, European arms transferring states are in no way exercising effective overall control over the areas in which the human rights violations are alleged to occur. As to the acts carried out in the course of the Yemen conflict more specifically, there are neither European armed forces deployed on the territory at issue, nor can they be considered responsible for the maintenance of security in the region.

In regard to the personal model, no agents of the arms transferring states are directly involved in the later use of the military equipment in third states. Again, returning to the facts of the armed conflict in Yemen, the European

[239] *Al Nashiri v Romania* No 33234/12 (ECtHR 31 May 2018), paras 726–729; *Al Saadoon and Mufdhi* (n 234), para 123; *Husayn (Abu Zubaydah) v Poland* No 7511/13 (ECtHR 24 July 2014), para 454.
[240] *El-Masri* (n 172), para 239.
[241] *Al-Skeini* (n 215), para 131.
[242] Moreno-Lax (n 200) 397.

arms transferring states are by no means directly exercising their physical authority over individuals on the territory of Yemen why any application of the personal model must also be ruled out.

Still to consider is the applicability of the third and final account of jurisdiction, namely that of territorial conduct with extraterritorial effects. As held before, this approach would successfully 'capture' conduct and engage a state's responsibility for its own actions; for a violation which would have taken place within the jurisdiction of a state not party to the Convention; a violation which moreover has yet to take place.[243] As is evident from the Court's jurisprudence, this rationale can as easily be applied to the right to life (Article 2) as other Convention rights, making it *prima facie* applicable to the present case of arms transfers to state members of the Saudi-led Coalition and the later depriving of individuals' in Yemen right to life. However, drawing on the Court's findings in *Soering* as well as its subsequent case law, any responsibility would in principle require the presence of the individual claiming a violation on the territory of the respondent state. This approach would find its support in the Court's observations that the contracting states must consider any overwhelming risk of an individual being deprived of their rights under the Convention 'intrinsic in the transfer'.[244] In the context of arms transfers, the individuals at issue are not at any critical time present on the territory of the arms transferring states. As construed accordingly, there would thus not be any basis for jurisdiction under this model.

These conventional approaches are thus insufficient for the purpose of establishing liability for arms transferring states under the Convention. However, the models all principally apply to cases of *physical* control, i.e., situations in which agents of the respondent state have in some way engaged physically with the applicants. Where the control at issue is of another character, namely based on policy implementation, foreseeable impact and significant influence – the *state-authority nexus* might best be understood through a different lens. In this respect, the Convention might be accommodating of a more expansive understanding of jurisdiction than accounted for thus far so as to possibly engage a state's responsibility in settings of 'contact-less control'. A *functional* approach to jurisdiction would find support in a theoretical argument as well as an alternative reading of the Court's case law.[245]

[243] cf Mauri (n 237) 257.
[244] *Al Nashiri v Poland* (n 238), para 454; *El-Masri* (n 172), para 212.
[245] cf Mauri (n 237); Moreno-Lax (n 200).

4.4 A Functional Approach to Jurisdiction

4.4.1 The Theoretical Case for Functionalism

The Court's approach and 'exceptionalisation' of extraterritorial claims is largely based on its view that jurisdiction would in principle require *territoriality.* That view, first established in *Banković* by relying on the general rules of treaty interpretation, could however be considered flawed. As noted by Milanovic, the Court's position with respect to the territoriality of jurisdiction is incorrectly based on the presumption that the function of jurisdiction under general international law and IHRL, respectively, would correlate.[246] As recognised in the previous sections of this chapter, jurisdiction is not a static concept. Its meaning under general international law does not *ipso facto* apply in a human rights setting. Under Article 1 ECHR, jurisdiction is not at all territorial, but functional. In fact, territory constitutes one of the many dimensions of jurisdiction. By this means that it is a consequence of jurisdiction rather than its triggering effect.[247]

Provided that the ordinary meaning does not suffice to illustrate how jurisdiction is to be conclusively interpreted within the meaning of Article 1, the context as well as object and purpose would suggest a much wider reading of jurisdiction than what can be inferred from a first glance of the Court's case law. In this respect, the preamble of the Convention stipulates that its objective is "the maintenance and further realisation of human rights and fundamental freedoms".[248] In light thereof, the object and purpose of the ECHR enjoin states to narrowly construe any limitations or restraints to the enjoyment of Convention rights.[249] On these bases, Williams argue that the territorial notion of jurisdiction is unfounded.[250] For Meron, a primarily territorial application would be an 'anathema' to the underpinning idea of universalism in IHRL.[251] Arguing that universalism must be the guiding principle in determining the scope of application of the Convention, Judge Bonello noted the following in his concurring opinion in *Al-Skeini*:

> The founding members of the Convention, and each subsequent Contracting Party, strove to achieve one aim, at once infinitesimal and infinite: the

[246] Milanovic, 'From compromise to principle: clarifying the concept of state jurisdiction in human rights treaties' (n 190) 419.
[247] Besson (n 195) 863.
[248] third preambular clause ECHR.
[249] *Klass v Federal Republic of Germany* No 5029/71 (ECtHR 6 September 1978), para 42; *The Sunday Times v United Kingdom* No 6538/74 (ECtHR 26 April 1979), para 65; *Wemhoff v Federal Republic of Germany* No 2122/64 (ECtHR 27 June 1968), paras 6–8.
[250] Williams (n 193) 713–715.
[251] Theodor Meron, 'Extraterritoriality of Human Rights Treaties' (1995) 89 American Journal of International Law 78, 82.

> supremacy of the rule of human rights law. In Article 1 they undertook to secure *to everyone within their jurisdiction* the rights and freedoms enshrined in the Convention. This was, and remains, the cornerstone of the Convention. That was, and remains, the agenda heralded in its preamble: "the *universal* and effective recognition and observance" of fundamental human rights. "Universal" hardly suggests an observance parceled off by territory on the checkerboard of geography.[252]

Functionalism is in essence a claim for universalism. It is based on the notion that states are bound to protect and safeguard human rights wherever they may operate, within their territory or beyond their borders.[253] In this respect, Moreno-Lax notes that jurisdiction is always functional, manifesting itself through "legislative, executive, and or adjudicative activity, by which the state exercises its powers, combining personal and geographical aspects." In light thereof, jurisdiction for her is 'multifactoral and composite'.[254] Of importance is that states are capable of exerting control in numerous ways, including through policy measures and operational implementation. Admittedly, a state may express its will and manifest its public powers through the adoption of laws, legal measures and administrative decisions in the same vein as it exercises physical control over space or persons.[255] The common denominator is not whether there has been any physical constraint, but rather the critical element of coercion. That is, in the exercise of a state's public powers, an individual is to a certain extent bound to comply. Thus, what triggers the Convention must be this very degree of 'state deliberation and volition', which in its manifestations creates a sovereignty-power nexus between a state and the individual and subjects the latter to an interference with their human rights. The function of jurisdiction hereby lies in the situational and *relational* control over the individual at issue.[256]

The question is thus what degree of state deliberation amounts to an exercise of jurisdiction within the meaning of Article 1. In this respect, Shany argues that any jurisdictional link is contingent upon a special relationship between the state and the individual. More specifically, he proposes to delineate the applicability of IHRL in line with two notions: (i) 'the intensity of power relations' and (ii) 'special *legal* relations'. The first standard would suggest that the Convention is applicable to cases where the state activity at

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[252] *Al-Skeini* (n 215), Concurring opinion of Judge Bonello, para 9 (emphasis in original).
[253] Yuval Shany, 'Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law' (2013) 7(1) Law and Ethics of Human Rights 47, 67.
[254] Moreno-Lax (n 200) 401 et seq.
[255] cf *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Judgment) [1926] PCIJ Rep Series A No 7, 19.
[256] Moreno-Lax (n 200) 401 et seq.

issue amounts to a conduct with 'direct, significant and foreseeable' human rights impact. Thus, a state's responsibility under the Convention would be engaged where there is an apparent human rights risk and notwithstanding this risk, the state implements policy or adopt measures likely to produce those negative effects. Admittedly, this standard would also cover clear omissions or a failure to act, where this non-performance may be considered to correspond to active conduct in terms of causality, impact and predictability.[257] The second standard would submit that the jurisdictional link is established where a 'special *legal* relation' exists between a state and the individual at issue. This notion suggests that a state should consider and protect the human rights of an individual, where there are strong reasons for it to do so. Thus, its responsibility is engaged where the state, in such a context, infringes on the individual's rights as provided for by the Convention. Here, Shany speaks of a "legal context [which] generates legitimate expectations to this effect".[258] Such a legal relation could be considered to arise in different situations, including onboard ships hoisting the state's flag or where, similar to the factual circumstances in *Al-Skeini*, a state is entrusted to uphold peace and security in a specific territory. In these cases, the state is purportedly filling a legal vacuum to the extent that no other subjects of international law are better equipped to provide human rights guarantees to those individuals concerned.[259]

This functionalist account of jurisdiction would reject any division between negative and positive obligations as to their extraterritorial applicability under the Convention.[260] While a state is required to *refrain* from human rights violations wherever these may take place, Milanovic argues that a state would not to the same extent be obliged to *secure and safeguard* the rights of individuals outside of its borders.[261] This approach, however, has been largely criticised in the literature.[262] Moreno-Lax argues that such a construction of jurisdiction would fail to recognise the inherent difficulties in distinguishing between positive and negative obligations and that it does not

[257] Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 Israel Law Review 17, 64; Shany (n 253) 68 et seq.
[258] Shany (n 253) 70.
[259] ibid.
[260] ibid 61 et seq.
[261] Milanovic, *Extraterritorial application of human rights treaties: law, principles, and policy* (n 41) 209 et seq. See also Mallory (n 29) 206–211.
[262] See eg Besson (n 195) 879; Moreno-Lax (n 200) 386; Yuval Shany, 'Bad Cases Make Bad Law, but Good Law Books!' (EJIL: Talk!, 1 December 2011) <www.ejiltalk.org/bad-cases-make-bad-law-but-good-law-books> accessed 26 April 2021.

provide a sufficiently coherent model to extraterritorial human rights violations.[263] Reflective of the indivisibility of ECHR rights, negative and positive obligations are complementary to each other. That is, the need to respect an individual's human right is a corollary of the state having a duty to ensure this right.[264] In his account of functionalism, Shany agrees with the aforementioned arguments. According to him, it would be arbitrary to prescribe importance to borders only with respect to positive obligations.[265] In this regard, he reiterates that jurisdiction concerns the functional capacity of a state to comply with substantive obligations under a human rights treaty. On this basis, the only critical difference between negative obligations and positive obligations from a jurisdictional point of view would lie in the approach of establishing the relational power between the state and the individual so as to generate a legitimate expectation of compliance. Shany notes that: "a violation of a negative obligations proves that jurisdiction had existed (i.e. there was a capacity to generate harm), whereas for positive obligations such proof is found not in the violation of a right but in its actual observance (i.e. actual protection underscores the capacity to protect)".[266]

In sum, Shany's functionalist account of jurisdiction would thus dismiss Milanovic's model in favour of a solution which relies on relational power and constrains state responsibility to situations where there is a relationship founded on control ('the intensity of power relations') or of a special legal character, generating legitimate expectations of compliance.[267]

4.4.2 Functionalism in the Court's Case Law

Besides the established accounts of jurisdiction, implicit precedents suggest that the Court might be supportive of a functional conceptualisation of Article 1.[268] In these cases, the invoking of responsibility might be justified with reference to Shany's proposition of functionalism, in particular his first notion of 'the intensity of power relations'.[269]

Under Shany's notion of 'intensity of power relations', in fact, a state's conduct would trigger the jurisdictional link where such an act or omission has 'direct, significant and foreseeable' impact on the enjoyment of an individual's human rights. This conceptualisation of jurisdiction is similar to that invoked by the applicants in *Banković*. In relying on the Court's findings

[263] Moreno-Lax (n 200) 386. See also Besson (n 195) 879.
[264] cf *Isaak v Turkey* No 44587/98 (ECtHR 24 June 2008), para 106.
[265] Shany (n 253) 64.
[266] ibid 66.
[267] ibid 67.
[268] In this respect, see generally Mauri (n 237), who takes a similar position in regard to ECtHR case law, albeit from a somewhat different perspective.
[269] cf Shany (n 253).

and conclusions in the *Soering* case, the applicants in *Banković* submitted that the injuries they had suffered were the direct results of decisions taken by state parties, thus engaging their responsibility under the Convention.[270] The Court, however, rejected any such embedding of a 'jurisdiction to decide' within the meaning of Article 1.[271] Again, the *Soering* rationale would in this respect require the presence of an individual on the territory of the contracting state at issue, a factor which was not applicable to the applicants in *Banković*.[272]

While it is safe to say that any decision producing an extraterritorial impact does not give rise to jurisdiction, the conclusions in *Soering* might be reimagined as a matter of law. Jackson argues that the Court's precedent is not at all limited to cases where the claimant is present on the territory of the respondent state.[273] The rationale for engaging the responsibility of the UK in *Soering* would rather lie in the "foreseeable consequences of extradition suffered outside […its] jurisdiction".[274] Similar to Shany's functional conceptualisation of jurisdiction, such an emphasis would not place any adverse importance on the territorial aspects, but rather on the power relations between the state and the individual. That is, where an individual is fully exposed to the state for the continuous non-violation of their human rights, a state might be considered to have exercised jurisdiction with respect to anyone whose rights are in its 'line of fire'. Such a reading would thus suggest that the Court in *Banković* might have misconstrued *Soering* so as to dismiss the applicants' arguments too easily. Albeit tacitly, this argument would find additional support in later rulings by the Court.

The *Women on Waves* case concerned the interception of a Dutch ship on the High Seas by Portuguese authorities.[275] More precisely, a naval vessel had positioned itself alongside the aforementioned ship, thus preventing it from continuing its journey onwards into Portuguese territory. While issues with respect to the substantive breaches of ECHR obligations arising out of this case are not relevant for the purpose of this thesis, the judgement is above all interesting from a jurisdiction point of view. The conduct of the Portuguese authorities, which the Court concluded had been contrary to the Convention provisions, was carried out outside the territory of Portugal. The

[270] *Banković* (n 180), para 53. See also *Soering* (n 14).
[271] *Banković* (n 180), para 77. See also *Tugar* (n 12).
[272] cf text to n 244.
[273] Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (n 182) 823.
[274] *Soering* (n 14), para 86.
[275] *Women on Waves and Others v Portugal* No 31276/05 (ECtHR 3 February 2009).

Court, however, only tacitly established that Portugal had exercised jurisdiction with respect to the alleged violations.[276] In this regard, it is important to note that neither did Portugal exercise any effective spatial control over the area where the violations had taken place, namely on international waters, nor had the applicants at any critical time been present on Portuguese territory. Moreover, the applicants had never come under the physical authority of Portuguese state agents so as to engage the state's responsibility under the personal model.[277] Thus, none of the traditional accounts of jurisdiction would serve to explain how the Court reached its conclusion in this respect.

Conversely, the critical factor and rationale for applying the Convention in the *Women on Waves* case could be understood to be the situational control which the state exercised *vis-à-vis* the applicants. In this view, albeit under the radar, the Court might be considered to have adopted an impact model of jurisdiction, reflective of a functional conceptualisation of Article 1. That is, Portugal's responsibility may have been engaged on the basis of its very decision to obstruct the passage of the ship and the extraterritorial impact it had on the individuals concerned. In preventing the alien ship from continuing its journey onwards, the Portuguese authorities manifested their public and coercive powers, invested in them in the capacity of sovereign state organs. Taken in this situation of functional authority, the decision at issue, having a 'direct, significant and foreseeable' human rights impact on the applicants, would hereby have engaged the respondent state's responsibility under the Convention.

A second testimony of a functional approach to jurisdiction is *Kebe v Ukraine*, which concerned a number of third-state nationals who were denied entry into Ukraine.[278] In the course of the judicial proceedings, the Ukrainian government objected to the claim that it had exercised jurisdiction over the individuals concerned, which were on board a Maltese registered ship that had disembarked in a Ukrainian port. According to its objections, neither conventional account of jurisdiction would be applicable to the situation.[279] The Court, however, took the view that the respondent state had a jurisdiction to *decide* on the matter of the applicants' respective entry into Ukraine.[280] Whereas the Court could have invoked that the ship was docked in the territorial waters of Ukraine, thus within their 'spatial control', it instead chose to rely on the sovereign powers of the state to adopt a decision,

[276] cf Michael Duttwiler, 'Authority, control and jurisdiction in the extraterritorial application of the European Convention on Human Rights' (2012) 30(2) Netherlands Quarterly of Human Rights 137, 147.
[277] cf Mauri (n 237) 260.
[278] *Kebe v Ukraine* No 12552/12 (ECtHR 12 January 2017).
[279] ibid, para 67.
[280] ibid, para 75.

which supposedly had 'direct, significant and foreseeable' consequences for the applicants' rights under the Convention.[281] The *intensity of power relations* between the state and the individuals would in this respect provide the basis for a jurisdictional link. Admittedly, it would also be possible to argue that there was a *special legal relationship* between Ukraine and the applicants at the critical time of denying them entrance. Namely, considering that the applicants were within the territorial waters of the state, Ukraine was in a unique position to extend human rights protection to the individuals concerned. There would thus be legitimate expectations on the state to incur those IHRL obligations arising out of this situation of relative control. In sum, Shany's two notions would respectively justify the application of the Convention to the impugned events.

The *Andreou v Turkey* ruling is further illustrative of a functional proposition.[282] As to the facts of the case, the TRNC armed forces opened fire against a group of protesters and UN forces whereby the applicant was shot. In inflicting lethal force against her, she claimed that Turkey had violated her right to life. Notwithstanding that the injuries were suffered in an area over which Turkey exercised no control, the Court accepted her arguments and found that Turkey had breached its Convention obligations. It justified invoking Turkey's responsibility on the grounds that "the opening of fire on the crowd from close range […] was the *direct and immediate cause* of […her] injuries".[283] The Court would thus seem to accept the notion that sovereign activity and manifestations of public powers might be reflective of state jurisdiction within the meaning of Article 1 of the Convention, even where the effects thereof are suffered extraterritorially.[284] Its reasoning implies that it is neither the spatial nor personal control exercised *vis-à-vis* the individuals which was triggering of Turkey's jurisdiction. Rather, it suggests that the critical factor was the acknowledged and irrefutable causal link between the state activity and the impugned events. Notwithstanding evident human rights risks, Turkish authorities carried out acts, exclusively within the domain of public powers, having 'direct, significant and foreseeable' effects on the applicants' rights under the Convention.

In the case of *Pad and Others v Turkey*,[285] Turkey was considered to have exercised jurisdiction over the applicants at issue, which had been hit in an airstrike carried out by national authorities. The parties disagreed as to

[281] cf Francesca De Vittor, 'Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di'accordi'per il controllo extraterritoriale della migrazione' (2018) 12(1) Diritti umani e diritto internazionale 5, 21.
[282] *Andreou v Turkey* No 45653/99 (ECtHR 27 October 2009).
[283] ibid, para 25 (emphasis not in original).
[284] cf Moreno-Lax (n 200) 405.
[285] *Pad and Others v Turkey* No 60167/00 (ECtHR 28 June 2007).

whether the incident had taken place on Turkish or Iranian territory. The Court, however, did not find it necessary to establish the exact location of the incidents for the purpose of invoking Turkey's responsibility under the Convention. The fact that the shots were fired by Turkish state agents sufficed to establish its jurisdiction within the meaning of Article 1.[286] Rather than relying on a spatial or personal conception of jurisdiction, the Court's reasoning suggests that Turkey's responsibility was again based on the causal link between its actions and the subsequent damages, supposedly underpinned by the critical power relation between the state and the individuals concerned. In this respect, it would not be the act of shooting the applicants itself which brought them under the jurisdiction of Turkey, but instead the indication of them as targets of the airstrike or the factual locking of the bombsight so as to place the individuals' rights in their 'line of fire'. Following such an indication or 'locking' by Turkish authorities, there were apparent human rights risks for the individuals concerned, not least in relation to the right to life as construed under Article 2. They were fully exposed to Turkey for the continuous non-violation of that right. In these situations, the jurisdictional link would be established upon the functional capacity and legitimate expectations of the state to *protect* the individual from those human rights violations. Acting on those risks, the state's responsibility is engaged for the conceivable effects of such conduct.[287]

In sum, the Court has arguably adopted a rationale which is comparable to Shany's notions of functionalism for the purpose of engaging a contracting state's responsibility in relation to human rights violations suffered extraterritorially. Close proximity between a state's sovereign activities and their human rights impact would be, per the Court's reading of Article 1, indicative of jurisdiction.[288]

4.4.3 Interim Conclusions: Applying a Functional Approach to Arms Transfers

The functional account of jurisdiction makes the claim that an individual's *subjection* to a state's public powers triggers the Convention as per Article 1 ECHR. For Shany, any responsibility would in this respect require a special relationship, motivated by factual or legal considerations, between the transferring states on the one hand and the individuals who risk suffering from

[286] ibid, para 54 "While the applicants attached great importance to the prior establishment of the exercise by Turkey of extraterritorial jurisdiction with a view to proving their allegations on the merits, the Court considers that it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters had caused the killing of the applicants' relatives".
[287] cf Shany (n 253) 66 et seq.
[288] Mauri (n 237) 263.

the later use of that military equipment on the other. That is, the states must be considered to have been particularly well-placed to comply with its Convention obligations *vis-à-vis* the individuals concerned. There has to be a normative relationship which is both concrete and precise.[289]

Admittedly, the issuing of an export license is, in fact, a manifestation of the state's 'public powers'. It is an administrative measure taken by competent authorities. In these activities, the authorities act upon the *sovereign* mandate of the state for the purpose of ensuring compliance with international law and pursuing certain foreign policy goals. On the basis of its close human rights impact, arms transferring activities could hereby under limited circumstances be considered an extraterritorial projection of power in relation to individuals abroad, placing the latter under the *situational control* of the state. In such situations, applying Shany's model of functionalism, factual as well as legal considerations would support engaging the arms transferring states' responsibility under the Convention. In this respect, arms transfers to the Saudi-led Coalition in light of Article 2 ECHR provides further conceptualisation of this argument.

From a factual point of view, it could *first* be established that the Saudi-led Coalition is largely dependent on arms transfers from European states to uphold their military arsenal. *Second*, the Coalition has regularly carried out attacks on civilians, amounting to lethal force whereby thousands of people have died as a direct result. *Third*, remnants of exported arms have been found in areas where the Saudi-led coalition have carried out such ground and air attacks against civilians. On account of these findings, it is evident that certain arms transfers to Coalition partners would pose imminent human rights risks in relation to residents in conflict areas in Yemen. The granting of export licenses could hereby be considered to have 'direct, significant and foreseeable' consequences for those individuals' rights under the Convention.

Just as the victims' rights in *Pad*, or *Banković* for that matter, might be considered to have come within the respondent state's 'line of fire' upon the 'locking' of a target, placing them under the authority of the state at issue, a resident in one of the war zones in Yemen might in a similar vein be considered exposed to the competent body of an arms transferring state for the continuous non-violation of their right to life during that interval in which a specific license request to one of the Coalition partners is considered. Admittedly, the individuals would not enjoy any such protection by the recipient states. Albeit in a more intangible and complex power dynamics, the

[289] cf Altwicker (n 20) 590–591; Besson (n 195) 878.

transferring state could at that time be considered to exercise *relational control* over the individuals at issue. Granting an export license despite the conceivable effects thereof, namely the inflicting of lethal force through the use of that military equipment, would as per Shany's notion of *the intensity of power relations* engage the state's responsibility under the Convention.[290]

This argument is further sustained by legal considerations. Through the ATT and the EU Common Position, European states have a corresponding duty to exercise due diligence and refrain from transfers which would facilitate any serious breaches of IHRL.[291] In the course of a state's arms transferring activities, it might thus be argued that there is an identifiable right holder (an individual in a third state) and a duty-bearer (the arms transferring state),[292] i.e., a *legal context* generating legitimate expectations to a certain effect – namely the non-interference with human rights in third states. While a state is evidently not in a unique position to extend protection over all individuals who might fall victim of the proliferation of conventional arms at any given time, it is argued that arms trading activities provide for time and space-specific factors which render state authorities particularly well-placed to protect a fixed group of people from human rights violations during limited intervals.[293] In receiving an export license solicitation to a Coalition partner, the transferring state is at that specific time legally bound under the ATT and the EU Common Position to consider the IHRL implications of such an export on the civilian population in Yemen. Admittedly, a legal relation is established *vis-à-vis* those residents whereby the arms transferring state by virtue of administrating and deciding on the prospective export is responsible for ensuring the continuous non-violation of their human rights in relation to those transfers. In such time and space-specific circumstances, states would be 'particularly well-situated to incur IHRL obligations'. Again, it is important to stress in this context that the importing states and Coalition partners are seemingly not to any considerable extent providing such comparable protection. Under Shany's conceptualisation of functionalism, the bond between the arms transferring states and the civilians in Yemen would hereby amount to a *special legal relationship*, entailing a further basis for extraterritorial applicability.[294]

[290] cf Shany (n 253) 68–69.
[291] In *Soering* (n 14), the existence of a similar obligation under international law beyond the Convention constituted a critical factor in justifying the engaging of the respondent state's responsibility, see para 88.
[292] cf Altwicker (n 20) 591.
[293] cf Besson (n 195) 878.
[294] cf Shany (n 253) 69–70.

In sum, the issuance of an export license for arms transfers is argued to be a projection of state powers upon which individuals in Yemen may come under the *functional* jurisdiction of the arms transferring state at issue. Namely, the arms transferring activities would be an expression of 'state deliberation and volition', which at the critical time of issuing the license subject these individuals to a possible interference with their human rights. At those very intervals, the state exercises *relational* control over the subjects. Under Shany's conceptualisation of functional jurisdiction, factual as well as legal considerations would support engaging the state's responsibility under the Convention for those human rights effects, which are triggered upon the failure of the contracting state to incur relative protection. Drawing on Jackson's idea of 'freeing' and extending the *Soering* rationale, the argument would thus be that by allowing arms transfers to go through to the Saudi-led Coalition, the authorising state is exposing the civilian population in Yemen to a substantive risk of subjection to treatment contrary to ECHR standards, notably the inflicting of lethal force.[295] Having established a jurisdictional link, the overt subjection to such treatment by the contracting state would thus amount to a violation. Similar to the factual circumstances applicable in *Al-Skeini*, such a responsibility would admittedly be 'divided and tailored' so as to only extend to those rights which the arms transferring states have a functional capacity to protect, including precisely the right to life as enshrined in Article 2 ECHR.[296]

4.5 Concluding Remarks

The purpose of this chapter has been to explore possible ways of overcoming the jurisdictional threshold so as to engage the responsibility of arms transferring states for human rights violations suffered by individuals in third states where such arms are used. Whereas none of the traditional accounts of jurisdiction would serve this aim, a functional approach would – under strict time and space specific circumstances– admittedly provide for such a basis. Theoretical justifications as well as implicit precedents from Strasbourg would suggest that a functional construction of Article 1 is indeed viable and legitimate.

In adopting such a view, a contracting state's responsibility would be engaged on the basis of its own actions and omissions in the course of its arms transferring activities for the foreseeable consequences suffered outside its jurisdiction. The fact that the granting of an export license is part of a series of cross border conduct eventually having a human rights impact abroad

[295] cf Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (n 182).
[296] *Al-Skeini* (n 215), para 137.

would not pose an absolute obstacle to incurring the state's responsibility under the Convention. Similar to extraditions, the arms transferring states would in this case not be held to account for the actions of Saudi Arabia or other members of the Coalition. Rather, in "[facilitating] the whole process, […creating] the conditions for it to happen and […making] no attempt to prevent it from occurring" the convention states could be considered to have breached obligations bestowed directly upon them.[297] As in *Soering*, the arms transferring states would thus be held liable for the conceivable effects occurring outside its jurisdiction.[298] Hence, the breach would occur at the time of issuing a particular license to a Coalition partner.

Again, translating this responsibility into breaches of negative and positive obligations, the issuing of a license could admittedly be considered to fall into either category. While the conduct could be construed so as to amount to a failure by the arms transferring states to *refrain* from granting an export license (equal to a breach of a negative duty), it could as easily be viewed as a noncompliance to *ensure and take practical steps* to prevent the violation at issue (equal to a breach of a positive duty). However, as noted previously in this chapter, a functional account of Article 1 concentrates on the relational power between the state and individual rather than the dichotomy between negative and positive obligations. Thus, a definitive classification as to the nature of the violation would be irrelevant for the purpose of ascertaining liability.

To that end, the Court should upon the submission of such a claim re-animate a discussion on arms transferring states' responsibility under the Convention, thus far only examined briefly in the *Tugar* Decision. While the Court has stated that "it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reasons, from precedents laid down in previous cases",[299] *Tugar* lacks the authority of a contemporary ruling on the merits. It was further delivered before the adoption of the ATT and the EU Common Position, which have strengthened states' requirements to exercise human rights due diligence in arms transfers, albeit through other international fora.[300]

In this respect, the interpretative doctrine of the Convention as a *living instrument* provides that the jurisdictional clause in Article 1 must be adapted

[297] *Al Nashiri v Poland* (n 238), para 517.
[298] *Soering* (n 14), para 86. See also Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (n 182) 823.
[299] *Beard v United Kingdom* No 24882/94 (ECtHR 18 January 2001), para 81; *Chapman v. United Kingdom* No 27238/95 (ECtHR 18 January 2001), para 70.
[300] The *Tugar* Decision was delivered in 1995, whereas the ATT came into force in 2014 and the EU Common Position in 2008.

to present-day conditions.[301] The Convention's constitution as a document aimed at the protection of fundamental freedoms further obliges "that its provisions be interpreted and applied so as to make its safeguards practical and effective".[302] Thus, the proposition would be the following: when interpreting and applying the Convention, the Court should be mindful of legal and societal developments and changing attitudes so as to define human rights "in light of evolving standards of decency that mark the progress of a maturing society".[303] Considering that the protection of individuals from the adverse effects of the proliferation of conventional arms has purportedly become an acknowledged interest as per the intensive regularisation of the international trade thereof, the Court ought in accordance with the living instrument doctrine better accommodate claims against states which undermine these objectives. Reflective of those very developments, the application of the Convention to the aforementioned cases would undoubtedly contribute to a progressive understanding of the Convention, making the safeguards therein practical and effective.[304]

[301] *Tyrer* (n 30), para 31. Admittedly, application of the living instrument doctrine is not confined to the substantive provisions of the Convention. In this respect, see *Loizidou* (Preliminary Objections) (n 217), paras 70–72. See also Lord Phillips of Worth Matravers, 'The Elastic Jurisdiction of the European Court of Human Rights' (Lecture at the Oxford Centre for Islamic Studies, 12 February 2014) <https://www.oxcis.ac.uk/events/the-elastic-jurisdiction-of-the-european-court-of-human-rights> accessed 26 April 2021.
[302] *Soering* (n 14), para 87.
[303] *Reyes v R (Belize)* [2002] UKPC 11, para 26.
[304] cf Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (n 182) 825.

5 Findings and Conclusions

Arms trade is a thousand-billion-dollar business. The industry, however, has historically not been subject to any considerable international regulation. In this respect, the ATT and the EU Common Position have constituted important building blocks in generating common and legal standards, applicable to exporting states at large. While one of the fundamental aspects of these instruments has been to introduce humanitarian concerns in states' arms transferring activities and make these considerations into 'hard law', European states are continually and to an increasing extent carrying out arms exports to states engaged in armed conflict. Hereby, large-scale human rights abuses are maintained by arms manufactured in Europe and exported under the authority of competent state bodies. These arms transfers are not, however, subject to international judicial review under any direct provision of the ATT or the EU Common Position. In light of this, the purpose of this thesis has been to reappraise the need to more efficiently hold states accountable for allowing arms exports to third states to go through despite the apparent human rights risks intrinsic in many of those transfers.

Having found that the ATT and the EU Common Position have failed to inhibit European states from prioritising foreign policy interests over humanitarian concerns in their arms transferring activities, the focus of this thesis has been on ascertaining liability for human rights abuses in the context of the ECHR. The legal analysis herewith has pertained to European arms sales to the Saudi-led Coalition partners in Yemen. In this respect, the thesis has continually argued that such arms transfers have contributed to fuelling the armed conflict. Crucially, exports by notable EU and Council of Europe Member States including the UK, Italy, France, Germany, and Spain have enabled the inflicting of lethal force and unjustified killings of civilians in Yemen. The state issuing such export licenses would hereby have exposed the Yemeni civilian population to an overwhelming risk of suffering treatment contrary to Article 2 ECHR.

Building on the above, the core issue of this thesis has been to explore to what extent the jurisdictional threshold in Article 1 ECHR could be overcome so as to engage the responsibility of arms transferring states for the 'exposure' to such treatment in third states. To this end, the concept of jurisdiction in IHRL has been deconstructed and examined. Conventional accounts of jurisdiction, as per the Court's conceptualisation of Article 1, have not been found to apply to arms transfers.

On this basis, the thesis has introduced an alternative approach to jurisdiction. Literature as well as implicit precedents in the Court's case law have been compared with a view to accommodating a functional account of jurisdiction, emphasising the relational control between a state and an individual. In this respect, Shany's notion of functionalism has been critical for the purpose of delineating state responsibility. As per Shany's conceptualisation of functionalism, any jurisdiction is contingent upon the embodiment of a *special relationship*, based on factual or legal considerations, between the state and the subject claiming a violation of their human rights.

A functional account of jurisdiction is hereby found to potentially 'capture' the conduct of granting an export license of conventional arms to third states, where such arms are used contrary to human rights standards. With respect to arms transfers to the Saudi-led Coalition partners more specifically, the issuance of a license has been considered to have direct, significant and foreseeable human rights consequences for the civilian population in Yemen as well as amounting to a legal context by which the arms transferring states have a duty to incur IHRL obligations *vis-à-vis* those individuals. Failing to meet these functional standards of conduct, the arms transferring activities would engage the state's responsibility under the Convention for those conceivable effects occurring outside its jurisdiction. In this respect, the argument relates to Jackson's notion of a 'preventive complicity rule', borne out of an alternative reading of *Soering*.[305] As to the precise issue of arms transfers carried out to Coalition partners, it has thus been contended that the granting of an export license of certain lethal arms would at the time of issuance amount to a violation of Article 2 ECHR in relation to those individuals residing in conflict areas in Yemen.

Turning back to the overall research question – "How can the responsibility of European arms transferring states be engaged for human rights violations suffered by individuals in third states, where such arms are used?", this thesis has argued that liability could be ascertained in the framework of the ECHR. Crucially, it proposes the following: Arms transferring activities have the capacity of subjecting individuals in third states to treatment, which is contrary to the standards enshrined in the Convention. Applying a functional account of jurisdiction would allow for the means to overcome the threshold in Article 1 ECHR and hold arms transferring states responsible in relation to such treatment. Needless to say, any responsibility would invariably be contingent upon a sufficiently strong causal link between the state's conduct of granting the license and the impugned effects thereof,

[305] Jackson, 'Freeing Soering: The ECHR, state complicity in torture and jurisdiction' (n 182).

amounting to a treatment contrary to a specific Convention right and corollary obligation. Only under those circumstances would the arms transferring activities equal an 'exposure' or 'subjection' to an interference with the human rights of a fixed group of individuals. Although the present analysis has been limited to exports to the Saudi-led Coalition partners and in light of Article 2 ECHR, this rationale would apply with as much force to other specific arms transfers as well as in relation to other substantive rights, enjoying a comparable protection to the right to life.

Considering that other IHRL regimes contain similar jurisdictional clauses as well as substantive safeguards in relation to which arms transfers may have adverse effects in third states, the legal argument would moreover not be exclusively applicable to European states or the ECHR. In this respect, similar propositions could *inter alia* be made for the purpose of ascertaining liability for arms transferring states under the ICCPR to which a considerable number of states are parties, including those major arms exporting states not bound by the ECHR.

The approach set out in this thesis, whereby arms transferring states can be held accountable directly under IHRL regimes, has the potential of having principled outcomes. Chiefly, it would better enjoin states to properly conduct human rights due diligence in all ambits of their arms transferring activities and positively defer from those sales, which are associated with intrinsic risks of human rights abuse. At the level of principle, this proposal would further contribute to the object and purpose of the ATT and the EU Common Position, namely ensuring the humanitarian considerations of international arms trade. Still, bowing to the fact that this would be an obligation of conduct rather than of result, a state's liability would by definition not extend beyond the means of its power and foreseeability.

Expanding this argument, territoriality would lose much of its normative importance by which it would be easier to incur IHRL obligations for transnational state conduct, having ripple effects in third states. Namely, making state jurisdiction a matter of relational power rather than contingent upon the location of the impugned events or any form of physical coercion would oblige states to secure IHRL in situations, where they have the means and functional capacity to do so. Such an approach would better capture present-day 'externalities' under IHRL and ensure the universality of human rights. For the purpose of future research, it would be interesting to assess to what extent the jurisdictional threshold could be overcome in relation to other 'dangerous' state activities taking the form of a state policy decision and/or administrative measure, such as the emission of greenhouse gases, also having a tantamount human rights impact abroad.

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