

Complicity, International Law, and the American Subsidization of Israel's Arms Exports

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For the past four decades, the United States has heavily subsidized Israel's domestic arms industry and funded the research, development, and production of Israeli weapons systems. With substantial American financial support, Israel has become the world's tenth-largest arms exporting State. Furthermore, Israel routinely exports these American-subsidized weapons to States engaged in serious human rights violations like Myanmar throughout the ethnic cleansing of the Rohingya population, South Sudan during its civil war, and Azerbaijan as the conflict in Nagorno-Karabakh escalated.

Scholars, human rights organizations, and United Nations experts have concluded that these Israeli arms exports likely violate Common Article 1 of the Geneva Conventions, which prohibits arms transfers to States engaged in violations of international humanitarian law. Therefore, the United States has subsidized the development and production of weapons systems which are subsequently exported in violation of international law. Though many scholars have analyzed the legality of Israel's arms exports, one question has remained largely overlooked: Should the United States also incur liability under international law for its heavy subsidization and support of Israel's unlawful arms exports?

Under Article 16 of the Articles on State Responsibility for Internationally Wrongful Acts, a State is complicit under international law when its "aid or assistance" facilitates another State's unlawful conduct. This Article presents a novel contribution to our understanding of the arms trade and complicity under international law by applying Article 16's jurisprudence and scholarship to the United States' aid and assistance for Israel's unlawful arms exports. By subsidizing the development of indigenous Israeli weapons systems, the United States may be liable for the unlawful transfers of these weapons, too.

DOI: <https://doi.org/10.15779/Z38V40K16C>.

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INTRODUCTION

The United States has assisted in the development of Israel’s domestic arms industry by directly subsidizing the research, development, and production of indigenous Israeli weapons systems. Through the Foreign Military Financing program (“FMF”), the United States issues grants or loans to “foreign militaries

for the purchase of US defense equipment, training, and services.”¹ All recipients are required to use these funds “exclusively” for the purchase of American defense equipment—except Israel.² Not only does Israel receive far more Foreign Military Financing than any other recipient, but it also enjoys a unique privilege through a mechanism known as the “Offshore Procurement Clause.” Under this clause, the United States grants Israel the right to use a significant portion of its Foreign Military Financing to fund its own “research, development and procurement of advanced weapons systems.”³ No other recipient of American Foreign Military Financing is granted this right. Over the last 35 years, the United States has given Israel tens of billions of dollars to directly fund its own weapons production, allowing Israel to build up a massive defense industry oriented toward exports.⁴ Due in large part to this significant subsidization and support, Israel is now the tenth largest arms exporter in the world.⁵

Furthermore, Israel’s arms export policy lacks sufficient human rights vetting mechanisms, oversight, and transparency.⁶ Israel routinely exports American-subsidized weapons to States engaged in gross violations of international law, including ethnic cleansing and genocide.⁷ For example, Israel has transferred American-subsidized Israeli weapons to South Sudan during its civil war; Myanmar throughout the ethnic cleansing of the Rohingya population; and Azerbaijan during its attack on Nagorno-Karabakh.⁸ In total, Israel has

1. *U.S. to Provide Latvia with Foreign Military Financing to Strengthen Deterrence*, U.S. EMBASSY IN LATVIA (Oct. 7, 2022), <https://lv.usembassy.gov/u-s-to-provide-latvia-with-foreign-military-financing-to-strengthen-deterrence/>.

2. JEREMY M. SHARP, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL 8 (2023), <https://sgp.fas.org/crs/mideast/RL33222.pdf> [hereinafter U.S. FOREIGN AID TO ISRAEL].

3. Jacob Batinga, *Should Biden’s New Arms Transfer Policy Apply to Israel?*, RESPONSIBLE STATECRAFT (Mar. 8, 2023), <https://responsiblestatecraft.org/2023/03/08/should-bidens-new-arms-transfer-policy-apply-to-israel/>.

4. Donatas Palavenis, *Adaptive Israel Defense Industry: Myth or Reality?*, 27 *ISR. AFFS.* 976-77 (2021).

5. Pieter D. Wezeman, Alexandra Kuimova & Siemon T. Wezeman, *Trends in International Arms Transfers, 2021* STOCKHOLM INT’L PEACE RSCH. INST., (March 2022) https://www.sipri.org/sites/default/files/2022-03/fs_2203_at_2021.pdf.

6. See Oded Yaron, *‘The State’s Right’: Top Court Refuses to Rule on Israeli Sale of Spy Tech to Russia*, HAARETZ (June 28, 2021), <https://www.haaretz.com/israel-news/tech-news/2021-06-28/ty-article/.premium/top-court-refuses-to-rule-on-israeli-sale-of-spy-tech-to-russia/0000017f-e568-d97e-a37f-f76dc4350000>; Avidan Freedman, *Opinion: How Israel’s Supreme Court Rubber Stamps Arms Deals to Dictators*, HAARETZ (July 16, 2023), <https://www.haaretz.com/opinion/2023-07-16/ty-article-opinion/.premium/how-israels-supreme-court-rubber-stamps-arms-deals-to-dictators/00000189-5ebe-d481-afbd-5ebe14a00000>.

7. See Amos Harel, *Arming Dictators, Equipping Pariahs: Alarming Picture of Israel’s Arms Sales*, HAARETZ (May 19, 2021) <https://www.haaretz.com/israel-news/2019-05-19/ty-article/.premium/israel-arms-sales-to-dictators-pariahs-states-alarming-picture/0000017f-e8d7-dc91-a17f-fcdafb40000>.

8. See Oded Yaron, *Israel Sold Arms to Myanmar Even After the 2021 Military Coup*, HAARETZ (Sept. 5, 2023), <https://www.haaretz.com/israel-news/security-aviation/2023-09-05/ty-article/.premium/israel-sold-arms-to-myanmar-even-after-the-2021-military-coup/0000018a-6000-d339-a3af-f5b673e90000>; Avi Scharf & Oded Yaron, *92 Flights From Israeli Base Reveal Arms*

exported weapons to over 100 States, many of which engage in serious and well-documented human rights abuses with these weapons.

Israel's exports constitute violations of the Geneva Conventions. Common Article 1 of the Conventions requires States to "refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used" to commit gross violations of international humanitarian law.⁹ Scholars and human rights organizations have analyzed Israel's arms exports to States engaged in these gross violations of international law and concluded that Israel's arms transfers are likely unlawful under Common Article 1.¹⁰ However, the question of the United States' liability under international law for subsidizing these unlawful exports has yet to be comprehensively analyzed.

Under Article 16 of the Draft Articles on State Responsibility, a State incurs liability under international law when it facilitates the wrongful acts of another State through its "aid or assistance."¹¹ Article 16 has attained the status of customary international law and is therefore binding on all States.¹² Courts, States, and human rights organizations have interpreted this provision broadly to include "aid or assistance" in the form of arms sales, logistical support, access to airspace and territory, and intelligence sharing.¹³ If a sufficient link exists between an assisting State's support of a recipient State's violations of international law, and the assisting State has knowledge of those violations, the assisting State is liable under Article 16.¹⁴

This Article offers a novel contribution by applying Article 16 jurisprudence and scholarship to the United States' subsidization of Israel's arms industry and subsequent exports to States engaged in gross violations of international law. A *prima facie* case can be made that the United States is liable under Article 16 due to its significant subsidization and support for Israel's unlawful arms exports. To

Exports to Azerbaijan, HAARETZ (Mar. 6, 2023), <https://www.haaretz.com/israel-news/security-aviation/2023-03-06/ty-article-magazine/premium/92-flights-from-israeli-base-reveal-arms-exports-to-azerbaijan/00000185-fd3d-d96e-aded-ff3dc38e0000>; Gili Cohen, *Israeli Arms Exports to South Sudan Are Lawful, State Tells High Court*, HAARETZ (Aug. 10, 2017), <https://www.haaretz.com/israel-news/2017-08-10/ty-article/state-to-high-court-arms-exports-to-south-sudan-lawful/0000017f-e57b-df2c-a1ff-ff7bb3b90000>.

9. Commentary of 2020, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

10. See H.R. COUNCIL, THE ECONOMIC INTERESTS OF THE MYANMAR MILITARY INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR, 107, U.N. Doc. A/HRC/42/CRP.3 (Aug. 5, 2019); *UN Security Council: Impose Arms Embargo on Myanmar*, HUM. RTS. WATCH (Feb. 24, 2021), <https://www.hrw.org/news/2021/02/24/un-security-council-impose-arms-embargo-myanmar#:~:text=Governments%20that%20permit%20arms%20transfers,%2C%20munitions%2C%20and%20related%20equipment>.

11. U.N. Int'l Law Comm'n, 53rd Sess., *Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/49 Vol. I (2001).

12. Harriet Moynihan, *Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism* 6 (Chatham House, 2016).

13. *Id.* at 8.

14. See Moynihan, *supra* note 12, at 10.

this end, Section I of this Article briefly overviews the history of American military aid to Israel, showing that Israel's massive domestic arms industry and export capability can be directly attributed to American subsidization. Section II scrutinizes Israel's arms exports to States engaged in gross violations of international law using exports to Myanmar and Azerbaijan as case studies. Section II concludes that Israel's exports of American-subsidized weapons constitute clear violations of Common Article 1 of the Geneva Conventions. Section III defines Article 16 of the Draft Articles on State Responsibility's scope and application as established by the International Court of Justice, domestic courts, scholars, and human rights organizations. Section III further examines the elements required to establish a State's liability for its "aid and assistance" of another State's internationally unlawful acts. Finally, Section IV applies Article 16 of the Draft Articles on State Responsibility to the United States' subsidization of Israel's arm exports, arguing that this subsidization is sufficient to generate American liability for Israel's unlawful arms exports.

This Article does not address American liability for Israel's violations of international humanitarian law in the Occupied Palestinian Territories,¹⁵ and instead focuses on the humanitarian impact and legal implications of the United States' support for Israel's weapons transfers.

I. BACKGROUND: A BRIEF HISTORY OF ISRAEL'S ARMS INDUSTRY AND AMERICAN SUPPORT

A. *Israel's Military Development*

Israel's arms industry first emerged in the 1930s when the Haganah (the pre-State predecessor to the Israeli Defense Forces) established "Israel Military Industries" and began manufacturing small arms in clandestine weapons factories in British Mandatory Palestine.¹⁶ Pre-State arms production was largely limited to producing rifles, mortars, and other light weaponry. In the years leading up to the establishment of the State of Israel and the war with the Arab States in 1948, the Haganah domestically produced weapons at a greater scale using "surplus United States machinery acquired as scrap after World War II."¹⁷ The Haganah also repurposed weapons left by the British following its withdrawal from Mandatory Palestine and imported large quantities of arms from Czechoslovakia, which were considered "crucial to Israel's victory in its war with the Arab States that year."¹⁸ The United States did not send weapons to the Israeli forces during

15. See USA: Stop Arms Transfers To Israel Amid Growing Evidence Of War Crimes In Gaza, AMNESTY INT'L, (July 31, 2014), <https://www.amnesty.org/en/latest/news/2014/07/usa-stop-arms-transfers-israel-amid-growing-evidence-war-crimes-gaza>.

16. See HELEN CHAPIN METZ, ISRAEL: A COUNTRY STUDY 314 (1988).

17. *Id.* at 314.

18. Guy Laron, *Working Paper #55: Cutting the Gordian Knot: The Post-WWII Egyptian Quest for Arms and the 1955 Czechoslovak Arms Deal*, COLD WAR INT'L HIST. PROJECT WORKING PAPER

the war and instead maintained an arms embargo on both the Jewish militias and the Arab States.¹⁹

Following its victory against the Arab States and the establishment of the State of Israel, Israel began importing greater quantities of arms from foreign States and developing an official defense industry.²⁰ Though the United States began selling arms to Israel in 1962, this support was limited because of its wariness to cause conflict with neighboring Arab States and provoke a regional arms race in the Middle East.²¹ France, on the other hand, already had a strained relationship with these Arab States due to its ongoing colonial war with Algeria and “shared with Israel a strategic interest in combating radical Arab nationalism.”²² From the early 1950s to 1967, France was Israel’s primary supplier of both advanced weaponry (such as fighter jets and tanks) and small arms (such as rifles).²³

During this period of French support, Israel’s arms industry experienced modest growth but remained small and relatively unsophisticated. In the 1950s, Israel established and expanded several State-owned weapons companies, producing “mainly ammunition, mortars and small arms.”²⁴ These companies assembled fighter jets and manufactured parts for advanced weaponry under a license agreement with the French government.²⁵ Israel’s nascent arms industry did not develop significant indigenous advanced weaponry during this period and continued to be heavily dependent on French technology and arms imports, which Israeli authorities expected to continue.²⁶ Following France’s defeat in Algeria in 1962, however, French President Charles de Gaulle shifted policy towards mending relationships with the Arab world and minimizing France’s close alliance with Israel.²⁷ France imposed an arms embargo on Israel three days before the Six-Day War of 1967, cutting off exports of French advanced weaponry (including orders that Israel had already paid for).²⁸

Though Israel was ultimately victorious against belligerent Arab States in the Six-Day War, the abrupt and unexpected termination of weapons imports from France caused Israel to radically overhaul its industrial policy and prioritize the

SERIES, 5 (Feb. 2007),
https://www.wilsoncenter.org/sites/default/files/media/documents/publication/WP55_WebFinal.pdf.

19. JEFFREY HERF, *ISRAEL’S MOMENT: INT’L SUPPORT FOR AND OPPOSITION TO ESTABLISHING THE JEWISH STATE, 1945–49*, 293 (2022).

20. See Metz, *supra* note 16, at 314–16.

21. Abraham Ben-Zvi, *Influence and Arms: John F. Kennedy, Lyndon B. Johnson and the Politics of Arms Sales to Israel, 1962–66*, 10 *ISR. AFFS.* 29 (2004).

22. Gary J. Bass, *When Israel and France Broke Up*, *N.Y. TIMES* (Mar. 31, 2010), <https://www.nytimes.com/2010/04/01/opinion/01bass.html>.

23. See Farah Naaz, *Israel’s Arms Industry*, 23 *STRATEGIC ANALYSIS* 2077 (2000).

24. *Id.*

25. *Id.*

26. *Id.*

27. See *id.*; see also Bass, *supra* note 22.

28. Naaz, *supra* note 23.

development of a powerful domestic arms industry. Following these experiences during the war, Israel “embarked on an all-out policy of self-sufficiency trying to develop and produce all its defense needs.”²⁹

The Six-Day War also marked a major shift in American-Israel military relations. The American government recognized the strategic value of a stronger alliance with Israel; Israel had just defeated a coalition of Arab States, which, according to American policymakers, had “permanently drifted toward the Soviets.”³⁰ With bipartisan support from Congress, President Johnson increased arms sales to Israel in 1968, and transferred advanced weapons systems including a fleet of F-4 Phantom fighter jets.³¹ Five years later, during the Yom Kippur War between Israel and Egypt, the Nixon Administration increased weapons transfers and replenished Israel’s arms supplies in an emergency airlift.³² Following Israel’s victory over Egypt, the United States quadrupled its military aid to Israel.³³ This made the United States Israel’s largest arms supplier and “virtually the sole outside source of sophisticated weaponry” for Israel.³⁴ In 1974, President Nixon approved \$2.2 billion in military aid to Israel, and, in 1975, President Ford lifted the restrictions on sending Israel the most advanced military equipment, including F-15s and F-16s.³⁵ By the mid-1970s, the United States was sending Israel a “steady flow of aircraft, Hawk missiles, self-propelled artillery, M-48 and M-60 tanks, armored personnel carriers, helicopters, and antitank missiles.”³⁶

Under official and unofficial United States policy, Israel has had a significant regional advantage in the import of US weaponry since the late 1960s. Though tacitly embraced by every administration since President Johnson, the United States officially adopted a policy of “Qualitative Military Edge” (“QME”) towards Israel during the Reagan Administration, which has since been codified in American law.³⁷ The QME policy obligates the United States to ensure that Israel has a military advantage over any regional adversary by “downgrading the capability of weapons systems that it sold to the Arab States or upgrading versions sold to Israel.”³⁸ Thus, in practice, when the United States sells arms packages to regional allies in the Middle East, even larger arms packages are sold to Israel in order to ensure the superiority of Israel’s military capabilities. Under the policy

29. *Id.*

30. William Wunderle & Andre Briere, *U.S. Foreign Policy and Israel’s Qualitative Military Edge: The Need for a Common Vision* 5 WASH. INST. FOR NEAR E. POL’Y, Policy Focus No. 80 (2008), <https://www.washingtoninstitute.org/media/3468>.

31. *See id.*

32. Metz, *supra* note 16, at 321.

33. Wunderle & Briere, *supra* note 30, at 5.

34. Metz, *supra* note 16, at 320.

35. Bernard Gwertzman, *U.S. Decides to Sell Some Arms to Israel That It Blocked in Past*, N.Y. TIMES (Oct. 12, 1976), <https://www.nytimes.com/1976/10/12/archives/us-decides-to-sell-some-arms-to-israel-that-it-blocked-in-past.html>.

36. Metz, *supra* note 16, at 321.

37. *See* Wunderle & Briere, *supra* note 30, at 1, 6.

38. *Id.* at 6.

of QME, the United States also provides Israel with significant technical assistance, joint weapons development programs, and research sharing.³⁹

Consecutive presidential administrations continued to increase American military aid to Israel. In 1999, the Clinton Administration signed a 10-year Memorandum of Understanding (“MOU”), granting Israel \$21.2 billion in military aid over ten years.⁴⁰ The Bush Administration signed a second MOU in 2008, agreeing to dispense \$30 billion in military aid over the ten-year period from 2009 to 2018.⁴¹ Finally, in 2016, the Obama Administration signed a third ten-year MOU with Israel, committing to provide an additional \$38 billion in military aid: \$33 billion in direct aid and \$5 billion earmarked specifically for missile defense programs.⁴² In total, Israel is the largest recipient of American weapons and military aid since 1945 and currently receives more military aid from the United States than any other country.⁴³

B. From Transfers to Direct Subsidization exclusively for Israel via the Offshore Procurement Clause

From 1968 to the present, Israel’s indigenous arms industry has experienced a massive expansion. Israel’s domestic investments in arms development increased during this period, but the Israeli arms industry did not gain substantial size and export capability solely through internal funding and foreign arms imports. Through the “Offshore Procurement Clause” of the Foreign Military Financing Program, the United States has heavily subsidized—and continues to subsidize—Israel’s domestic arms industry, greatly contributing to its current status as the tenth largest arms exporter in the world.

The United States sells weapons to foreign governments through direct commercial sales or “Foreign Military Sales.” Through direct commercial sales, foreign governments purchase weapons directly from American-based defense corporations with oversight from the US State Department.⁴⁴ Through Foreign Military Sales, foreign governments purchase weapons from the United States through the Defense Security Cooperation Agency (a division of the Department of Defense), which negotiates the contracts and procures weapons from American defense corporations.⁴⁵ According to the Department of Defense, Foreign

39. *Id.* at 16.

40. Joint Statement by the President and Prime Minister Ehud Barak of Israel, 2 PUB. PAPERS 1252, (July 19, 1999), <https://www.govinfo.gov/content/pkg/PPP-1999-book2/pdf/PPP-1999-book2-doc-pg1252.pdf>.

41. U.S. FOREIGN AID TO ISRAEL, *supra* note 2.

42. JEREMY M. SHARP ET AL., CONG. RSCH. SERV., R44984, ARM SALES IN THE MIDDLE EAST: TRENDS AND ANALYTICAL PERSPECTIVES FOR U.S. POLICY (2020), <https://crsreports.congress.gov/product/pdf/R/R44984>.

43. U.S. FOREIGN AID TO ISRAEL, *supra* note 2, at 10, app. A.

44. U.S. DEP’T OF STATE, BUREAU OF POL.-MIL. AFF., U.S. ARMS SALES AND DEFENSE TRADE FACT SHEET (2021), <https://www.state.gov/u-s-arms-sales-and-defense-trade/>.

45. Batinga, *supra* note 3.

Military Sales are a “fundamental tool of US foreign policy” and play a vital role in maintaining and strengthening American allies.⁴⁶

Additionally, the United States provides funding to dozens of countries to finance their acquisition of American weapons. Through the FMF, the United States issues grants or loans “to foreign militaries for the purchase of US defense equipment, training, and services.”⁴⁷ In other words, the United States supplies foreign governments with funds that are exclusively earmarked for the purchase of American weapons and defense-related services. Currently, Israel receives more than \$3.3 billion in FMF annually, which is more than every other FMF recipient combined.⁴⁸ In total, the United States has provided Israel upwards of \$150 billion in military aid since 1948.⁴⁹

Crucially, Israel enjoys a unique privilege under the FMF program: unlike all other recipients of American military aid, the United States government allows Israel to spend a significant portion of these funds on domestic weapons production, thereby directly subsidizing Israel’s domestic defense industry.⁵⁰ Whereas all other FMF recipients are required to use their FMF to purchase American defense equipment, Israel is permitted to convert 26.3% of its FMF funds to local currency (Israeli Shekels) and invest in research, development, and production of indigenous weapons systems.⁵¹ Israel’s ability to use a portion of its FMF for domestic subsidization is known as the “Offshore Procurement Clause” (“OSP”).⁵²

The United States’ subsidization of Israel’s arms industry has shifted from earmarked grants for production of specific Israeli weapons systems to broad subsidization of Israel’s weapons development via OSP. The United States first granted Israel permission to use a portion of its FMF for domestic procurement in 1977, when Israel requested to use \$107 million of its FMF to develop and produce the Merkava Tank.⁵³ In 1983, the United States also granted Israel’s

46. Press Release, U.S. Dep’t of Def., Department of Defense Unveils Comprehensive Recommendations to Strengthen Foreign Military Sales (June 13, 2023), <https://www.defense.gov/News/Releases/Release/Article/3425963/department-of-defense-unveils-comprehensive-recommendations-to-strengthen-forei/>.

47. U.S. EMBASSY IN LATVIA, *supra* note 1.

48. Josh Ruebner et al., *Bringing Assistance to Israel in Line with Rights and U.S. Laws*, CARNEGIE ENDOWMENT FOR INT’L PEACE (May 12, 2021), <https://carnegieendowment.org/2021/05/12/bringing-assistance-to-israel-in-line-with-rights-and-u.s.-laws-pub-84503>.

49. SHARP, *supra* note 42, at 2.

50. NAME REDACTED, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL 5 (2016), https://www.everycrsreport.com/files/20161222_RL33222_38d8a59f2caabde9af8a6cdabfabb963ae8b63ae.pdf.

51. *Id.* at 11; See also ANNE MARIEL ZIMMERMAN, US ASSISTANCE, DEVELOPMENT, AND HIERARCHY IN THE MIDDLE EAST: AID FOR ALLIES, 8-9, (2017).

52. CONG. RSCH. SERV., *supra* note 50.

53. Guy Paglin, *New/Old Trends Affecting the Defense Industries*, in ISRAEL’S DEFENSE INDUSTRY AND US SECURITY AID 121–22 (Sasson Hadad et al. eds., 2020) https://www.inss.org.il/wp-content/uploads/2020/08/Memo202_e.pdf.

request to use \$250 million of its FMF to develop the Lavi, an advanced fighter jet.⁵⁴ Congressional legislation passed in 1983 allowed for additional annual FMF funding of the Lavi between 1983–88, which amounted to a total of between \$1.3 and \$1.8 billion.⁵⁵ However, the United States had a change of heart in 1988 when it recognized that the Lavi, if completed, would be a major competitor to American-made F-16s.⁵⁶ In order to extinguish the threat that the Lavi posed to the United States' advanced jet exports, American policymakers pressured Israel to terminate production of the Lavi, and Israel obliged.⁵⁷ In exchange for termination—and to offset the costs associated with the Lavi program—the United States incorporated the OSP into American-Israeli military aid agreements, granting Israel the right to use 26.3% of its FMF annually on domestic research, development, and production.⁵⁸ Unlike the earlier earmarked grants to fund the Merkava tank and Lavi jet, the OSP funding was not tied to any specific weapons program but rather functioned as a general subsidization of Israel's arms industry.⁵⁹

Today, Israel has one of the largest defense budgets in the world, and American military aid accounts for around one-fifth of Israel's *total military budget*.⁶⁰ Since the OSP funds are tied to Israel's overall military aid (26.3% of its FMF), OSP funding has grown proportionally with increases in American military aid. This funding reached its height in 2019, when OSP funding “amounted to an \$815 million annual subsidization by US taxpayers of Israeli weapons manufacturers.”⁶¹ Since the implementation of OSP funding in 1988, the United States has provided tens of billions of dollars in direct subsidization of Israel's now-massive domestic arms industry.⁶²

54. NAME REDACTED, *supra* note 50.

55. *Id.* at 5.

56. Sasson Hadad, *Is the Aid Agreement Essential for Israel? A Cost-Benefit Analysis*, in ISRAEL'S DEFENSE INDUSTRY AND US SECURITY AID 150-51 (Sasson Hadad et al. eds., 2020) https://www.inss.org.il/wp-content/uploads/2020/08/Memo202_e.pdf.

57. See generally, Duncan L. Clarke & Alan S. Cohen, *The United States, Israel, and the Lavi Fighter*, 40 MID. E. J. 16 (1986); JOHN W. GOLAN, *LAVI: THE UNITED STATES, ISRAEL, AND A CONTROVERSIAL FIGHTER JET* (2016).

58. *Id.*

59. *Id.*

60. Zimmerman, *supra* note 51.

61. Ruebner, *supra* note 48.

62. To note, the Offshore Procurement Clause is set to sunset by 2028. In the negotiations leading up to the 2016 Memorandum of Understanding, both Israeli and American diplomats recognized that Israel's arms industry was not a major US competitor. According to one negotiator, “Israeli defense industry was now mature, competitive, and had customers around the world — in some markets even competing with US companies — and therefore OSP had outlived its original purpose. Therefore, the US position was that Israel's FMF program could now return to normal, to be run as FMF was in all other countries.” ISRAEL'S DEF. INDUS. AND US SEC. AID, *supra* note 56, at 66.

II. ISRAEL'S ARMS EXPORTS AND INTERNATIONAL HUMANITARIAN LAW

A. Common Article 1 of the Geneva Conventions

The Geneva Conventions and subsequent Additional Protocols to the Conventions represent the “core of international humanitarian law.”⁶³ Common Article 1 of the Geneva Conventions requires States to broadly “undertake to respect and to ensure respect” for international humanitarian law.⁶⁴ All United Nations member States are party to the Geneva Conventions, and the provisions therein are universally regarded as customary international law. The commentary of the International Committee of the Red Cross—widely considered the authoritative interpretation⁶⁵ of the Geneva Conventions—states that “Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions.”⁶⁶ This negative obligation to avoid transferring weapons to States engaged in violations of international humanitarian law has additionally been recognized in multiple holdings of the International Court of Justice⁶⁷, the International Criminal Court,⁶⁸ and State parties to the Conventions.⁶⁹

Furthermore, Common Article 1 includes a positive obligation on arms exporting States to conduct “due diligence” and “make every effort” to terminate a recipient State’s violations of international humanitarian law.⁷⁰ States providing weapons and military support to parties engaged in violations of international humanitarian law are liable under Common Article 1 unless “they have done everything reasonably in their power to bring the violations to an end.”⁷¹ In the

63. *The Geneva Conventions and their Commentaries*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> (last visited Oct. 4, 2023) [hereinafter Geneva Commentary 2016].

64. Commentary of 2016, Geneva Convention Relative to the Treatment of Prisoners of War for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, <https://ihl-databases.icrc.org/en/ihl-treaties/geci-1949/article-12/commentary/2016>.

65. H.R. Council, *Enabling Atrocities: UN Member States’ Arms Transfers to the Myanmar Military* at 8, UN H.R.C., U.N. Doc A/HRC/49/CRP.1 (Feb. 22, 2022) [hereinafter H.R. Council, *Enabling Atrocities*].

66. Geneva Commentary 2016, *supra* note 63.

67. *Military and Paramilitary Activities in and Against Nicaragua*, Judgment, (Nicar. v. U.S.) 1986 I.C.J. Rep. 14, 191 (June 27).

68. Alexandra Boivin, *Complicity and Beyond: International Law and The Transfer of Small Arms and Light Weapons*, 87 INT’L REV. RED CROSS 467, 468 (2005).

69. Marko Milanovic, *Intelligence Sharing in Multinational Military Operations and Complicity Under International Law*, 97 INT’L L. STUD. 1269, 1329 (2021).

70. Geneva Commentary 2016, *supra* note 63.

71. *Id.*

Bosnian Genocide case, the ICJ held that this positive obligation is of “critical importance.”⁷²

Common Article 1 prohibits arms transfers where there is a mere “expectation”⁷³ that the weapons would be used to violate international humanitarian law; that is, there is no subjective “intent” requirement nor a severity threshold.⁷⁴ According to the Human Rights Council, once an assisting State becomes aware of the recipient State’s violations of international law, the “transferring [S]tate has to deny further transfers of those weapons, even if those weapons could also be used lawfully.”⁷⁵ Relevant violations of international humanitarian law include, for example, war crimes, attacks on civilians, deprivation of the right to life, forcible transfers, and ethnic cleansing.

B. *Israel’s Arms Exports and International Law*

Israel’s arms exports are not subject to disclosure procedures and are conducted by the Israeli Ministry of Defense in near-total secrecy.⁷⁶ Several human rights groups have sued the Israeli government for information on Israeli arms exports but to no avail. Recently, a high-profile group of human rights activists sued the Israeli government, demanding “that the country’s Ministry of Defense releases documents and records pertaining to the sale of weapons and military systems to countries under military embargo, engaged in civil wars and in systematic violation of human rights.”⁷⁷ The Israeli Supreme Court refused to hear the case, however, stating that “[t]he decision by regulators and those overseeing the exports is accepted... on the basis of defense considerations and Israel’s international commitments. Like with other issues relating to national defense and security, the prerogative is the State’s, and the law provides it with very wide discretion.”⁷⁸

72. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 1996 I.C.J. Rep. 595 (July 1996) [hereinafter “*Bosnia v. Serbia*”].

73. Geneva Commentary 2016, *supra* note 63.

74. Odile Dua, *Arms Supply to Saudi Arabia: A Possible Implementation of Belgium’s State Responsibility?*, 52 REV. BDI 531, 543 (2019).

75. H.R. Council, *Enabling Atrocities*, *supra* note 65.

76. Harel, *supra* note 7.

77. Shir Hever, *Israel Arms Sales: Court Decision Ends Hopes For Transparency*, MID. E. EYE, (July 1, 2021) <https://www.middleeasteye.net/news/israel-arms-sales-transparency-court-decision-ends-hopes>.

78. Yaron, *supra* note 6.

However, foreign States' import records,⁷⁹ government disclosures,⁸⁰ and leaks to the media⁸¹ have shed significant light on Israel's arms exports. Since the onset of American OSP funding in 1988, Israel has exported arms to over 100 countries, including many States engaged in gross human rights violations.⁸² According to a report by Amnesty International, "the absence of monitoring and transparency have for decades let Israel supply equipment and defense-related knowledge to questionable States and dictatorial or unstable regimes that have been shunned by the international community."⁸³ Two such examples are treated in turn.

1. Myanmar

In late 2016, revelations related to Myanmar's persecution of the Rohingya population sparked international outrage. The military's violence steadily increased until it peaked in the summer of 2017 with a "campaign of mass rape, burnings and drownings against entire families that killed more than 9,000 people and forced nearly one million to flee the country."⁸⁴ In 2021, the Myanmar military overthrew the civilian government and subsequently increased its persecution against the Rohingya population yet again. Since the 2021 coup, human rights organizations have documented that the military junta's additional "war crimes and crimes against humanity," including "mass killings, arbitrary arrests and detention, torture, sexual violence, and attacks on civilians in conflict areas."⁸⁵

There is widespread recognition among States, human rights organizations, and international bodies that Myanmar has engaged in gross violations of the Geneva Conventions. In June 2021, the United Nations General Assembly passed a resolution calling on "all member states to prevent the flow of arms into

79. Sahar Vadi, *This Database is Exposing Decades of Israel's Shady Arms Deals*, 972 MAG., (database updated Feb. 10, 2021), <https://www.972mag.com/israel-arms-exports-database/>.

80. Oded Yaron, *Israeli Governments Approved Every Single Arms Deal Brought to Them Since 2007*, HAARETZ (Dec. 2, 2022), <https://www.haaretz.com/israel-news/security-aviation/2022-12-02/ty-article/israeli-governments-approved-every-single-arms-deal-brought-to-them-since-2007/00000184-ce97-d4f4-a79d-de978e910000>.

81. Simona Weinglass, *Questions On Arms Sales, Funding Bring 2nd Israeli Astronaut Back Down To Earth*, TIMES OF ISR. (Jan. 21, 2021), <https://www.timesofisrael.com/questions-on-arms-sales-funding-bring-2nd-israeli-astronaut-back-down-to-earth/>.

82. Ayelett Shani, *Israel Would Be Embarrassed if It Were Known It's Selling Arms to These Countries*, HAARETZ (Aug. 7, 2015), <https://www.haaretz.com/2015-08-07/ty-article/premium/turning-blood-into-money/0000017f-eda5-d3be-ad7f-ffaf42480000>.

83. Harel, *supra* note 7.

84. Lara Jakes, *Myanmar's Military Committed Genocide Against Rohingya*, U.S. SAYS, N.Y. TIMES (Mar. 21, 2022), <https://www.nytimes.com/2022/03/21/us/politics/myanmar-genocide-biden.html>.

85. *Myanmar: Abuses Mount Since Military Coup*, HUM. RTS. WATCH (Jan. 12, 2023), <https://www.hrw.org/news/2023/01/12/myanmar-abuses-mount-military-coup>.

Myanmar,” with only one dissenting vote (Belarus).⁸⁶ The United Nations Special Rapporteur on the situation of human rights in Myanmar called on the international community to pass a binding arms embargo on Myanmar,⁸⁷ and the United Nations Security Council issued a resolution condemning the Myanmar military’s “attacks against civilians and civilian infrastructure.”⁸⁸ The European Union issued a resolution prohibiting all member States from sending weapons to the military junta, and the United States reaffirmed its binding “comprehensive” arms embargo on Myanmar.⁸⁹

Despite the clear evidence of widespread human rights violations and ethnic cleansing, Israel continued supplying weapons to the government of Myanmar as well as the subsequent military junta. The Stockholm International Peace Research Institute, which monitors the global arms trade, confirmed that Israel transferred Super Dvora MK gunboats and Armored Personnel Carriers to Myanmar until 2019, three years after the major upsurge in violence against the Rohingya in 2016.⁹⁰ According to a report by the Human Rights Council, Israel’s transfers of these weapons “likely violate[] international humanitarian law.”⁹¹

Furthermore, significant evidence has emerged suggesting that Israel’s arms exports to Myanmar were far greater in scale than initially assumed by the Human Rights Council. Import records and leaked documents published in *Haaretz* reveal that Israel continued sending weapons to Myanmar until early 2022—seven years after the escalation against the Rohingya and a full year after the military coup.⁹² According to *Haaretz*’s reports, between 2018 to 2022, Israel transferred over 100 tanks, advanced radar systems, naval patrol boats, drone parts, and molds for the production of rifles and other small arms to Myanmar.⁹³ Over these four years, Israeli exports to Myanmar totaled 250 metric tons.⁹⁴ As human rights organizations have demonstrated, Myanmar heavily relied on weapons supplied by foreign States—including Israel—to carry out grave violations of international humanitarian law.⁹⁵

86. *UN Adopts Nonbinding Arms Embargo on Myanmar*, ARMS CONTROL ASSOC. (2021), <https://www.armscontrol.org/act/2021-07/news-briefs/un-adopts-nonbinding-arms-embargo-myanmar>.

87. U.N. Hum. Rts. Off. of the High Comm’r, *Myanmar: UN Expert Urges Security Council Resolution to Stop Weapons Fueling Spike in Military Attacks on Civilians* (Feb. 22, 2022), <https://www.ohchr.org/en/press-releases/2022/02/myanmar-un-expert-urges-security-council-resolution-stop-weapons-fueling>.

88. S.C. Res. 2669 (Dec. 21, 2022).

89. *EU Arms Embargo on Myanmar (Burma)*, STOCKHOLM INT’L PEACE RSCH. INST. (last updated Dec. 20, 2022), https://www.sipri.org/databases/embargoes/eu_arms_embargoes/myanmar; H.R. Council, *Enabling Atrocities*, *supra* note 65; *see also UN Security Council: Impose Arms Embargo on Myanmar*, HUM. RTS. WATCH (Feb. 24, 2021), <https://www.hrw.org/news/2021/02/24/un-security-council-impose-arms-embargo-myanmar>.

90. *Id.*

91. H.R. Council, *Enabling Atrocities*, *supra* note 65.

92. Yaron, *supra* note 6.

93. *Id.*

94. *Id.*

95. H.R. Council, *Enabling Atrocities*, *supra* note 65.

Israel's arms exports to Myanmar clearly violate Common Article 1 of the Geneva Conventions, which obligates parties to "refrain from transferring weapons if there is an expectation, based on facts or knowledge of past patterns, that such weapons would be used to violate the Conventions."⁹⁶ There is no question that Israel had actual knowledge of Myanmar's violations of international humanitarian law while continuing to transfer weapons. Myanmar's violations of international humanitarian law have been well documented by human rights organizations, the United Nations, and State parties since 2017, yet Israel continued to send weapons to Myanmar until 2022. Indeed, the Special Rapporteur on the situation in Myanmar concluded that all State parties had the requisite knowledge of Myanmar's violations of international humanitarian law since 2018:

The Myanmar military's systemic violation of the Geneva Conventions and perpetration of atrocity crimes have been reported by a variety of organizations for over three decades. Despite the longstanding evidence, the Special Rapporteur submits that at a *minimum by 2018 all Member States knew, or would have expected, that arms transferred to Myanmar would be used in attacks against civilians in violation of international law.*⁹⁷

Israel continued to transfer weapons to Myanmar even *after* the General Assembly resolution calling for an arms embargo, the United States and European Union's comprehensive arms embargo, the Security Council's condemnation of the military junta's violence against civilians, and the wealth of documentation provided by human rights organizations. Though not required by Common Article 1, Israel's subjective knowledge of Myanmar's violations of international humanitarian law can also be conclusively demonstrated: not only did Israel vote in *favor* of the General Assembly resolution calling for an arms embargo on Myanmar, but Israel's Foreign Ministry also condemned Myanmar's violence against the Rohingya in 2019—and then continued to supply Myanmar with weapons for the next three years.⁹⁸

2. Azerbaijan

In September 2020, Azerbaijan launched a military offensive in the Armenian-populated region of the disputed territory of Nagorno-Karabakh.⁹⁹ The conflict lasted for nearly two months and resulted in the deaths of over 7,000

96. Geneva Commentary 2016, *supra* note 63.

97. H.R. Council, *Enabling Atrocities*, *supra* note 65 (emphasis added). See *Israel Denounces Atrocities Against Rohingya in Myanmar After Diplomat's Tweet*, TIMES ISR. (Nov. 28, 2019), <https://www.timesofisrael.com/israel-denounces-atrocities-against-rohingya-in-myanmar-after-diplomats-tweet/>.

98. See TIMES ISR., *supra* note 97; see also *Resolutions and Decisions adopted by the General Assembly*, G.A. RES. 75/49 (VOL. III), 74 (2021) https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Website/A_75_49_Vol_III-EN.pdf.

99. Michael Safi, *At Least 16 Dead in Armenia-Azerbaijan Clashes over Disputed Region*, GUARDIAN, (Sept. 27, 2020), <https://www.theguardian.com/world/2020/sep/27/armenia-martial-law-clashes-azerbaijan>.

people and the displacement of upwards of 70,000 Armenians.¹⁰⁰ By the time both sides accepted a ceasefire, Azerbaijan had won a decisive territorial and military victory.¹⁰¹ In September 2023, Azerbaijan violated the ceasefire and began shelling Armenian villages in Nagorno-Karabakh, reigniting the conflict.¹⁰²

Like the previous case study, Azerbaijan's violations of international humanitarian law have been widely documented and established. Investigations by Amnesty International¹⁰³ and Human Rights Watch¹⁰⁴ revealed that both Armenia and Azerbaijan committed grave war crimes, including indiscriminate attacks on civilians and summary executions. Human Rights Watch also documented Azerbaijan's "deliberate targeting" of civilian infrastructure in "violation of the laws of war."¹⁰⁵ The United Nations High Commissioner for Human Rights expressed concern over Azerbaijan and Armenia's "continuing indiscriminate attacks in populated areas in and around the Nagorno-Karabakh conflict zone."¹⁰⁶ Additionally, Amnesty International, Human Rights Watch, and the United Nations documented Azerbaijan's repeated use of cluster munitions on civilian-populated areas, in grave violation of international humanitarian law.¹⁰⁷

European and American policymakers harshly rebuked Azerbaijan's violations of international humanitarian law and called for investigation and

100. Ctr. for Preventive Action, *Nagorno-Karabakh Conflict*, COUNCIL ON FOREIGN REL. (Sept. 28, 2023), <https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict>.

101. Robyn Dixon, *Cease-Fire in Nagorno-Karabakh Provokes Protests in Armenia, Celebrations in Azerbaijan*, WASH. POST (Nov. 10, 2020), https://www.washingtonpost.com/world/europe/nagorno-karabakh-ceasefire-armenia-russia-azerbaijan/2020/11/10/b1b9bcc0-231b-11eb-9c4a-0dc6242c4814_story.html.

102. Editor's Note, *Azerbaijan's Offensive in Nagorno-Karabakh and the Evolution of its Dispute with Armenia*, Int'l Inst. For Strategic Studs., STRATEGIC COMMENTS, Vol. 29, Dec. 2023, <https://www.iiss.org/publications/strategic-comments/2023/azerbaijans-offensive-in-nagorno-karabakh-and-the-evolution-of-its-dispute-with-armenia/>.

103. *Armenia/Azerbaijan: Decapitation and War Crimes in Gruesome Videos Must be Urgently Investigated*, AMNESTY INT'L (Dec. 10, 2020), <https://www.amnesty.org/en/latest/press-release/2020/12/armenia-azerbaijan-decapitation-and-war-crimes-in-gruesome-videos-must-be-urgently-investigated/>.

104. Tanya Lokshina, *Survivors of Unlawful Detention in Nagorno-Karabakh Speak Out About War Crimes*, HUM. RTS. WATCH (Mar. 12, 2021), <https://www.hrw.org/news/2021/03/12/survivors-unlawful-detention-nagorno-karabakh-speak-out-about-war-crimes>.

105. *Azerbaijan: Attack on Church Possible War Crime*, HUM. RTS. WATCH (Dec. 16, 2020), <https://www.hrw.org/news/2020/12/16/azerbaijan-attack-church-possible-war-crime>.

106. U.N. Office of the High Comm'r for Hum. Rts. (OHCHR), *Nagorno-Karabakh Conflict: Bachelet Warns of Possible War Crimes as Attacks Continue in Populated Areas* (Nov. 2, 2020), <https://www.ohchr.org/en/press-releases/2020/11/nagorno-karabakh-conflict-bachelet-warns-possible-war-crimes-attacks> [hereinafter Press Release, OHCHR].

107. *See Armenia/Azerbaijan: First Confirmed Use of Cluster Munitions by Armenia 'Cruel And Reckless'*, AMNESTY INT'L (Oct. 29, 2020), <https://www.amnesty.org/en/latest/press-release/2020/10/armenia-azerbaijan-first-confirmed-use-of-cluster-munitions-by-armenia-cruel-and-reckless/>; *see also Azerbaijan: Cluster Munitions Used in Nagorno-Karabakh*, HUM. RTS. WATCH (Oct. 23, 2020), <https://www.hrw.org/news/2020/10/23/azerbaijan-cluster-munitions-used-nagorno-karabakh>; *see also* Press Release, OHCHR, *supra* note 106.

prosecution of suspected war criminals.¹⁰⁸ Senator Bob Menendez, Chairman of the Senate Foreign Relations Committee, condemned Azerbaijan's "assault [. . .] on innocent civilians" and accused Azerbaijan of attempting to "eradicate Armenians from Nagorno-Karabakh."¹⁰⁹

While dozens of States imposed an arms embargo on Azerbaijan, Israel was its primary weapons supplier. In the five years leading up to the conflict, Israel equipped the Azerbaijani military with almost 70% of its weapons,¹¹⁰ accounting for roughly 17% of Israel's total arms exports.¹¹¹ Israeli arms sales to Azerbaijan—totaling upwards of \$5 billion since 2016—from small arms like assault rifles to advanced weapons systems such as battleships, ballistic missiles, artillery, anti-tank missiles, drones, and loitering munitions.¹¹² Israeli-made drones and loitering munitions—also known as "suicide drones"—were crucial to Azerbaijan's victory. According to one military strategist:

Azerbaijan's UAVs obliterated Armenia's formidable array of ground-based air defences, after which they systematically decimated Armenia's ground force matériel, including tanks, artillery pieces, and supply trucks. This onslaught forced Armenia to accept a humiliating ceasefire imposed by Russia.¹¹³

Israel's arms transfers to Azerbaijan clearly run afoul of Common Article 1 of the Geneva Conventions. Human rights organizations and journalists have documented that Azerbaijan used Israeli weapons—including ballistic missiles, artillery, UAVs, and loitering munitions—in the commission of grave violations of international humanitarian law.¹¹⁴ Azerbaijan reportedly fired several rounds of Israeli-origin cluster munitions in "residential areas" of Armenian-populated Nagorno-Karabakh.¹¹⁵ Most of the international community—over 124 States—

108. See Asbarez Staff, *European Lawmakers Accuse Azerbaijan of War Crimes*, ASBAREZ (Oct. 11, 2022), <https://www.asbarez.com/european-lawmakers-accuse-azerbaijan-of-war-crimes/>.

109. S. Foreign. Rels. Comm., *Chairman Menendez Statement on Azerbaijan's Assault in Nagorno-Karabakh* (Sept. 19, 2023), <https://www.foreign.senate.gov/press/dem/release/chairman-menendez-statement-on-azerbaijans-assault-in-nagorno-karabakh>.

110. Scharf & Yaron, *supra* note 8.

111. Pieter D. Wezeman et al., *Arms Transfers to Conflict Zones: The Case of Nagorno-Karabakh*, STOCKHOLM INT'L PEACE RSCH. INST. (Apr. 30, 2021), <https://www.sipri.org/commentary/topical-backgrounder/2021/arms-transfers-conflict-zones-case-nagorno-karabakh>.

112. Scharf & Yaron, *supra* note 8.

113. Eado Hecht, *Drones in the Nagorno-Karabakh War: Analyzing the Data*, 7 MIL. STRATEGY MAG. 31 (2022), <https://www.militarystrategymagazine.com/article/drones-in-the-nagorno-karabakh-war-analyzing-the-data/>.

114. Vinoam Idan & Brenda Shaffer, *Israel's role in the Second Armenia-Azerbaijan War*, in THE KARABAKH GAMBIT: RESPONSIBILITY FOR THE FUTURE 200–02 (Turan Gafarli & Michael Arnold eds., 2021) https://www.fdd.org/wp-content/uploads/2021/12/The-Karabakh-Gambit_IsraelRole-1.pdf; Eitay Mack, *As Tensions over Nagorno-Karabakh Rise, Israel Must Halt Arms Sales to Azerbaijan*, 972 MAG. (Oct. 9, 2020), <https://www.972mag.com/nagorno-karabakh-israel-weapons/>; Haaretz Staff, *Israel's Fingerprints Are All Over the Ethnic Cleansing in Nagorno-Karabakh*, HAARETZ (Sept. 27, 2023), <https://www.haaretz.com/opinion/editorial/2023-09-27/ty-article-opinion/israels-fingerprints-are-all-over-the-ethnic-cleansing-in-nagorno-karabakh/0000018a-d331-d13d-a98f-dbb5028e0000>.

115. Scharf & Yaron, *supra* note 8.

considered cluster munitions prohibited weapon of war due to their “widespread indiscriminate effect and long-lasting danger to civilians.”¹¹⁶

The evidence demonstrates that Israel knowingly supplied arms to Azerbaijan while it was committing grave violations of international humanitarian law. Between 2016 and 2023, Israel sent ninety-two arms shipments to Azerbaijan, all while violence in Nagorno-Karabakh escalated. Notably, Israel did not terminate arms sales to Azerbaijan during periods of extreme violence. On the contrary, Israel’s arms shipments to Azerbaijan *increased* as the conflict intensified: “[the arms sales] data expose an increasing pace of flights to Baku especially in the middle of 2016, in late 2020, and at the end of 2021 – which coincide with periods of fighting in Nagorno-Karabakh.”¹¹⁷ Additionally, Armenia brought this issue directly to Israel’s attention: In October 2022, Armenia withdrew its ambassador to Israel, explicitly denouncing “Israel’s supply of ultra-modern weapons to Azerbaijan.”¹¹⁸ That same month, *de facto* President Arayik Harutyunyan, the Armenian leader of Nagorno-Karabakh, stated that Israel was “responsible for the genocide in Karabakh” due to its transfers of advanced weaponry to Azerbaijan.¹¹⁹ Human rights organizations, journalists, the United Nations, policymakers in the United States, and the European Union all vocally condemned Azerbaijan’s violations of international humanitarian law, which is a clear indication that Israel knew of Azerbaijan’s human rights violations.

3. *A Consistent Pattern*

The two case studies of Myanmar and Azerbaijan are emblematic of Israel’s willingness to supply weapons to States engaged in gross violations of international humanitarian law. It is important to note that the foregoing case studies are not anomalous but rather represent a pattern of systematic and continuous Israeli violations of Common Article 1. Indeed, since the early 1980s, Israel has transferred weapons to the repressive Latin American military juntas in Guatemala, El Salvador, and Argentina;¹²⁰ apartheid-era South Africa even *after* the international arms embargo;¹²¹ South Sudan during its civil war which left

116. Convention on Cluster Munitions, States Parties and Signatories by Region, *Cluster Munition Coalition*, <https://www.clusterconvention.org/states-parties/> (last visited Oct. 4, 2023), HUM. RTS. WATCH, *supra* note 107.

117. Scharf & Yaron, *supra* note 8.

118. *Armenia Recalls Ambassador from Israel to Protest Sale of Weapons to Azerbaijan*, TIMES ISR. (Oct. 1, 2020), <https://www.timesofisrael.com/armenia-recalls-ambassador-from-israel-to-protest-sale-of-weapons-to-azerbaijan/>.

119. Cnaan Liphshiz, *Armenian Leader Accuses Israel of Aiding ‘Genocide’ Against His People*, TIMES ISR. (Oct. 19, 2020), <https://www.timesofisrael.com/armenian-leader-accuses-israel-of-aiding-genocide-against-his-people/>.

120. BISHARA BAHBAH & LINDA BUTLER, *ISRAEL AND LATIN AMERICA: THE MILITARY CONNECTION* (Bishara Bahbah ed., 1986), https://link.springer.com/chapter/10.1007/978-1-349-09193-5_3.

121. Glenn Frankel, *Israel’s Most Illicit Affair*, FOREIGN POL’Y (May 24, 2010), <https://foreignpolicy.com/2010/05/24/israels-most-illicit-affair/>.

400,000 dead;¹²² Chile during the dictatorship of Augusto Pinochet;¹²³ Serbia during the ethnic cleansing of Bosnians;¹²⁴ and the genocidal Hutu government of Rwanda.¹²⁵ Israel is currently exporting weapons to major human rights violators, including the United Arab Emirates,¹²⁶ Bahrain,¹²⁷ Morocco,¹²⁸ the Philippines,¹²⁹ Sri Lanka,¹³⁰ and Cameroon.¹³¹ In sum, Israel has transferred American-subsidized weapons to over 100 countries—including many serious human rights-abusing States.

The record demonstrates that Israel has repeatedly violated Common Article 1 through its weapons exports to States engaged in gross violations of international humanitarian law. Due to the United States' significant subsidization and support for Israel's arms exports, the United States could also incur liability under Article 16 of the Articles on State Responsibility.

III. ELEMENTS OF STATE LIABILITY UNDER ARTICLE 16

When certain conditions are met, a State may be liable under international law for facilitating or supporting another State's violations of international law.¹³² This principle of third-party liability is codified in Article 16 of the Articles on State Responsibility for Internationally Wrongful Acts ("ASRIWA"), drafted by

122. *Israel Named World's 8th Largest Arms Exporter*, TIMES ISR. (Mar. 13, 2019), <https://www.timesofisrael.com/israel-named-worlds-8th-largest-arms-exporter/>.

123. Harel, *supra* note 7.

124. Yair Auron, *Israel, Partner in Genocides*, HAARETZ (Oct. 2, 2017), <https://www.haaretz.com/opinion/2017-10-02/ty-article/premium/israel-partner-in-genocides/0000017f-e33b-d804-ad7f-f3fb30370000>.

125. Uri Misgav, *The Israeli Guns That Took Part in the Rwanda Genocide*, HAARETZ (Jan. 3, 2015), <https://www.haaretz.com/2015-01-03/ty-article/premium/the-israeli-guns-in-the-rwanda-genocide/0000017f-db06-df9c-a17f-ff1ef7130000>.

126. *Israel to Supply Air Defence System to the UAE*, AL JAZEERA (Sept. 23, 2022), <https://www.aljazeera.com/news/2022/9/23/israel-to-supply-air-defence-system-to-the-uae>.

127. *Israel Said to Agree to Sell Bahrain UAVs, Anti-Drone Systems*, TIMES ISR. (July 13, 2022), <https://www.timesofisrael.com/israel-said-to-agree-to-sell-bahrain-uavs-anti-drone-systems/>.

128. Pasha Magid & Andrea Prada Bianchi, *Israel Ramps Up Drone Sales to Morocco for Its Colonial War in Western Sahara*, INTERCEPT (July 1, 2023), <https://theintercept.com/2023/07/01/israel-drone-morocco/>.

129. Oded Yaron, *Revealed: Israel Supplies Philippines with Advanced Intelligence Planes*, HAARETZ (July 13, 2023), <https://www.haaretz.com/israel-news/security-aviation/2023-07-13/ty-article/highlight/revealed-israels-elbit-systems-supplies-philippines-with-advanced-intelligence-planes/00000189-4f15-d6c2-a189-5f75fb090000>.

130. Eitay Mack, *Israeli Complicity in Sri Lanka War Crimes Must Be Investigated*, AL JAZEERA (June 27, 2023), <https://www.aljazeera.com/opinions/2023/6/27/israeli-complicity-in-sri-lanka-war-crimes-must-be-investigated>.

131. Database of Israeli Military and Security Export, <https://www.dimse.info/> (last visited Oct. 4, 2023).

132. Catherine Amirfar, *Expert Q&A on What International Law Has to Say About Assistance to Russia's War Against Ukraine*, JUST SECURITY (May 2, 2023), <https://www.justsecurity.org/86102/expert-qa-on-what-international-law-has-to-say-about-assistance-to-russias-war-against-ukraine/>.

the International Law Commission (“ILC”).¹³³ This provision, according to scholar and human rights lawyer Catherine Amirfar, establishes “a standard for what is effectively State ‘complicity’ in international law.”¹³⁴ The International Court of Justice determined in the *Bosnian Genocide* case that Article 16 of the ASRIWA has attained the status of customary international law, binding on all states.¹³⁵ In full, Article 16 affirms that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State.¹³⁶

Under Article 16, an assisting State is not legally responsible for the underlying unlawful act but for the separate offense of facilitating the recipient State’s wrongful acts.¹³⁷ The assisting State, according to the ILC, “will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act.”¹³⁸

For an assisting State to incur liability under Article 16, three elements must be met: (1) the assisting State’s unlawful conduct; (2) there is a sufficient link between the assisting State’s support and the recipient State’s unlawful conduct; and (3) the recipient State’s conduct must have been wrongful had it been committed by the assisting State.

A. Knowledge

First, the assisting State must be aware of the recipient State’s unlawful conduct.¹³⁹ This condition—labeled by scholars as the “*mens rea*” element of Article 16—means that if an assisting state lacks the requisite knowledge of the recipient State’s unlawful acts, the assisting State will not be considered liable under international law.¹⁴⁰ The *type* of knowledge necessary to trigger the assisting State’s liability is somewhat unclear. An assisting State’s *actual* knowledge of the recipient State’s violations plainly satisfies the *mens rea* element of Article 16.¹⁴¹ Moreover, there is a consensus among scholars that the “knowledge element can be met by virtual certainty, on the part of the assisting

133. U.N. Int’l Law Comm’n, 53rd Sess., Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10 (2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [hereinafter Draft Articles on Responsibility].

134. Amirfar, *supra* note 132.

135. *Bosnia v. Serbia*, *supra* note 72.

136. Draft Articles on Responsibility, *supra* note 133.

137. Silke Zwijsen et al., *The Law of State Responsibility and the Arms Trade Treaty*, ARS AEQUI 151 (2020), <https://dspace.library.uu.nl/handle/1874/394557>.

138. Draft Articles on Responsibility, *supra* note 133.

139. *Id.*

140. Dua, *supra* note 74.

141. See Moynihan, *supra* note 12, at 13.

State, of the eventual possibility of unlawful use of its assistance.”¹⁴² A State’s actual knowledge or “virtual certainty” of the recipient State’s unlawful conduct is therefore sufficient to satisfy Article 16’s *mens rea* requirement.

However, the issue of whether an assisting State’s constructive knowledge can satisfy the *mens rea* element of Article 16 is disputed. Constructive knowledge means that a State *should* have known about the recipient State’s violations but failed to exercise due diligence. Proponents of a constructive knowledge standard argue that an assisting State’s lack of active oversight of its aid or assistance could render it complicit under Article 16.¹⁴³ However, most scholars reject the constructive knowledge interpretation.¹⁴⁴ A report by Chatham House, for example, concludes that the International Court of Justice’s language in the *Bosnia Genocide* case—that “at least” knowledge is required—implies that “a higher standard of knowledge [is required] than ‘should have known.’”¹⁴⁵

i. Proving knowledge

The availability and quality of evidence—in both the government’s possession and public sphere—is the determinative factor when analyzing an assisting State’s knowledge under Article 16.¹⁴⁶ If a recipient State’s violations of international law are sufficiently well known and widely publicized, a State’s knowledge can be inferred. Widely publicized violations of international law will hamper a State’s ability to claim that it lacked the requisite knowledge to terminate its aid or assistance. After reviewing the relevant legal frameworks and international court decisions related to a State’s knowledge and complicity, the Chatham report concludes that “a court may be reluctant to allow an assisting State to rely on ignorance when in today’s ‘information era’ significant amounts of data are potentially available to States, including in the form of reports from non-governmental organizations.”¹⁴⁷ Under Article 16, States are “expected to be knowledgeable of any number of reports of U.N. treaty bodies, special procedures,

142. *Id.*

143. André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, 31 EUR. J. INT’L L. 15 (2020), <https://academic.oup.com/ejil/article/31/1/15/5882075>; Dua, *supra* note 74.

144. See, e.g., Tina Drolec Sladojevic, *Military Aid as Complicity in International Crimes: Individual or State Responsibility?*, 70 PRAVNIK 643 (2015), <https://www.proquest.com/docview/1795668294?sourcetype=Scholarly%20Journals>; Marko Milanovic, *Intelligence Sharing in Multinational Military Operations and Complicity Under International Law*, 97 INT’L L. STUD. 1269 (2021), <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=2985&hx0026;context=ils>; Moynihan, *supra* note 12, at 13–14.

145. Moynihan, *supra* note 12, at 13.

146. *Id.*

147. *Id.* at 16.

country reports of other States and a plethora of reputable human rights organizations.”¹⁴⁸

Furthermore, scholars and international jurists are increasingly embracing the principle that an assisting State’s “willful blindness” does not absolve it of liability under Article 16.

According to the report by Chatham House:

[W]here the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a State cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence. . . . If a state has not made enquiries in the face of credible evidence of present or future illegality, it may be held to have turned a blind eye.¹⁴⁹

Professor Vaughan Lowe, former counsel for several cases before the International Court of Justice, endorsed this position, stating that States cannot “avoid responsibility by deliberately holding back from inquiring into clear indications that its aid would probably be employed in an unlawful manner.”¹⁵⁰ According to Human Rights Watch, Amnesty International, and Rights Watch UK, there is presently “strong support for a ‘willful blindness’ standard.”¹⁵¹ To note, the willful blindness standard differs from the widely disregarded constructive knowledge standard. A State is willfully blind when it refuses to terminate its aid or assistance toward widely known and well-established violations of international law. Under a constructive knowledge standard, on the other hand, the availability and quality of evidence are irrelevant.

While an assisting State’s official affirmation of the recipient State’s wrongful acts clearly satisfies the knowledge requirement, such an affirmation is not required. The International Court of Justice’s opinion in the *Bosnian Genocide* case demonstrates that an assisting State does not need to affirmatively declare that it is aware of the recipient’s unlawful conduct to establish knowledge under Article 16.¹⁵² In this case, the Court determined that Serbia was not complicit in the unlawful conduct of a Serbian-supported, non-State actor, since Bosnia did not establish that these unlawful acts were “brought to the attention of the Belgrade authorities.”¹⁵³ If the unlawful acts had been brought to the attention of Serbia, then the knowledge element would have been satisfied. Human Rights Watch, Amnesty International, and Rights Watch UK interpreted the Court’s

148. Theresa A. DiPerna, *Small Arms and Light Weapons: Complicity with a View toward Extended State Responsibility*, 20 FLA. J. INT’L L. 25, 67 (2008), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1515&context=fjil>.

149. Moynihan, *supra* note 12, at 15–16; Written Submissions on Behalf of Amnesty International, Human Rights Watch & Rights Watch (UK), *Queen v. Sec. of State for Business, Innovation, and Skills*, Claim No. CO/1306/2016 (U.K. 2016), https://www.rightsandsecurity.org/assets/downloads/CAAT_v_Secretary_of_State_Submission_1.pdf.

150. Vaughan Lowe QC, *Responsibility for the Conduct of Other States*, 58 JAPAN. J. INT’L L. 515, 1–15 (2002).

151. Written Submissions, *supra* note 149.

152. *Bosnia v. Serbia*, *supra* note 72.

153. *Id.*

holding to mean that the knowledge requirement can be met “without the need for any wide-ranging analysis or positive determination” by the assisting State that their aid or assistance was being used to commit unlawful acts. Rather, the publicly available “bare facts” of the recipient’s unlawful acts are sufficient.¹⁵⁴

ii. *Intent as a necessary element?*

Finally, there is “a tension between the text in Article 16 and the ILC Commentary,” according to scholar Harriet Moynihan, with the former requiring mere knowledge and the latter suggesting an additional element of actual intent.¹⁵⁵ While the text of Article 16 does not require “intent” to demonstrate State liability (instead concluding that assisting States must merely have “knowledge of the circumstances of the internationally wrongful act”), the ILC commentary proposes intent as a necessary element.¹⁵⁶ The commentary on Article 16 concludes that an assisting State is not “responsible for aid or assistance under Article 16 unless the relevant State organ *intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.*”¹⁵⁷

However, most scholars now understand the tension between Article 16 and the ILC Commentary as a “false dilemma.” First, many scholars conclude that the text of Article 16 is more authoritative than the ILC commentary, and therefore, no intent element exists.

Furthermore, there is now widespread recognition among scholars that “there is no practical difference between the two interpretations of Article 16.”¹⁵⁸ Under the modern, dominant interpretation of Article 16, sufficient knowledge can be enough to establish intent. If a State is aware of the likely outcome of its aid or assistance, it can be inferred that it intended such an outcome.¹⁵⁹ Indeed, according to Professor Vaughan Lowe, “as a matter of general legal principle States must be supposed to intend the foreseeable consequences of their acts.”¹⁶⁰ In her analysis of Article 16, Harriet Moynihan states that:

Intent’ in this context does not require the assisting state to desire that the unlawful conduct be committed. Nor does the assisting state have to be in common cause with the principal. Knowledge or virtual certainty that the recipient state will use

154. Written Submissions, *supra* note 149 (internal quotation marks omitted).

155. Moynihan, *supra* note 12.

156. Draft Articles on Responsibility, *supra* note 133.

157. *Id.* (emphasis added).

158. Kevin Jon Heller & Lena Trabucco, *The Legality of Weapons Transfers to Ukraine Under International Law*, 13 J. INT’L HUM. L. STUDS. 251 (2022), https://brill.com/view/journals/ihrs/13/2/article-p251_004.xml?language=en.

159. Marko Milanovic, *Ukraine Symposium – The Complicity of Iran in Russia’s Aggression and War Crimes in Ukraine*, LIEBER INST. WEST POINT (Oct. 19, 2022), <https://lieber.westpoint.edu/complicity-iran-russia-aggression-war-crimes-ukraine/>.

160. Oona A. Hathaway & Ryan Goodman, *Why China Giving Military Assistance to Russia Would Violate International Law*, JUST SECURITY (Mar. 17, 2022), <https://www.justsecurity.org/80709/why-china-giving-military-assistance-to-russia-would-violate-international-law/>.

the assistance unlawfully is capable of satisfying the intent element under Article 16, whatever the assisting state's desire or purpose.¹⁶¹

This view—that an assisting State's knowledge can impute intent for the purposes of Article 16—represents the scholarly “consensus,” according to Professor Suzanne Egan.¹⁶² Moreover, in his book, *State Complicity in International Law*, scholar Miles Jackson argues that “where a [S]tate provides assistance to another [S]tate with the actual knowledge that the aid will be used to commit a wrongful act, the [S]tate's intent that its aid facilitates that act may be inferred.”¹⁶³ Professor James Crawford, former Judge at the International Court of Justice, endorses this position. According to Crawford, “[i]f aid is given with certain or near-certain knowledge as to the outcome, intent may be imputed. It is thus wrong to suggest that the complicit State must be in common cause with the principal in order for ... Article 16 to apply.”¹⁶⁴

State practice further supports this position. According to Lowe, “[t]here is no persuasive evidence in State practice of a requirement that a State giving aid or assistance must not merely know of the manner in which it is to be used, but must, in addition, intend or desire that it should be so used.”¹⁶⁵

B. *Sufficient link to the Wrongful Conduct*

Under Article 16, the assisting State's aid or assistance must be “clearly linked to the subsequent wrongful conduct.”¹⁶⁶ According to ILC commentary, an assisting State's support need not be “essential” to incur liability. Rather, the assistance must have only “contributed significantly” to the recipient State's wrongful acts.¹⁶⁷ Beyond the requirement that the assistance must contribute significantly to the recipient State's wrongful acts, the ILC has not defined the exact level of assistance necessary to trigger liability under Article 16. After reviewing the complicity frameworks used by the International Court of Justice and International Criminal Court, scholar Helmut Aust proposed the following test:

In order to find responsibility of a complicit State, its support should have changed the situation for the main actor. It must have made it ‘substantially easier’ to commit the internationally wrongful act.¹⁶⁸

The causal link required to trigger Article 16 has both a minimum and maximum threshold; if the causal link is too attenuated and removed from the

161. Moynihan, *supra* note 12, at 20.

162. Suzanne Egan, *Mapping State Responsibility for Complicity in Extraordinary Rendition*, in EXTRAORDINARY RENDITION & HUM. RTS. (Suzanne Egan ed., 2018), https://link.springer.com/chapter/10.1007/978-3-030-04122-9_4#FPa1.

163. Miles Jackson, *COMPLICITY IN INTERNATIONAL LAW* 160 (2015).

164. Written Submissions, *supra* note 149.

165. Lowe, *supra* note 150.

166. Draft Articles on Responsibility, *supra* note 133.

167. *Id.*

168. HELMUT PHILIPP AUST, *COMPLICITY AND THE LAW OF STATE RESPONSIBILITY* 215 (2011).

recipient State's wrongful act, Article 16 is not implicated, but if an assisting State's actions rise above a certain threshold, the assisting State will be considered a "co-belligerent" rather than a simple facilitator. For example, scholars have concluded that Western States' military aid to Ukraine could trigger Article 16 if the weapons provided are used in the commission of war crimes. However, acts *beyond* military aid—such as the implementation of a no-fly zone—would require such active participation that the implementing States would be considered "co-belligerents."¹⁶⁹

In general, an assisting State's provision of aid, which frees up the recipient's resources and allows it to engage in wrongful acts, is too attenuated to create a link between the arms sale and the unlawful act for the purposes of Article 16. By way of example, a State that provides food aid to another State and incidentally allows the recipient State to divert its resources toward wrongful acts is not liable under Article 16. However, there is one exception: "if the assisting [S]tate *knows* that the resources will be diverted for illegal purposes, this in itself suggests the existence of a nexus between the assistance and the illegal act."¹⁷⁰

In sum, a supporting State's aid or assistance that significantly contributes to the recipient State's wrongful acts is sufficient to establish the nexus requirement under Article 16.

C. Wrongfulness of the act

The final requirement of Article 16 is that the wrongful act committed by the recipient State "would be internationally wrongful if committed" by the assisting State.¹⁷¹ Under this element, the assisting State must also be prohibited from committing the wrongful act that the recipient State is accused of committing.¹⁷² An assisting State cannot be "held independently liable for the breach of a bilateral treaty to which it was not itself a party."¹⁷³ However, every State can be held liable under Article 16 for aiding or assisting violations of customary international law, to which all States are bound. Therefore, the facilitation of a violation of customary international law definitionally satisfies the wrongful act element of Article 16.

1. Scope of Article 16

If these three elements, described *supra*, are met, Article 16 complicity for assisting another State's wrongful conduct can be established. States, scholars, and international courts have applied Article 16 to a wide array of assistance-related activities.

169. Heller & Trabucco, *supra* note 158.

170. Moynihan, *supra* note 12, at 10 (emphasis added).

171. Draft Articles on Responsibility, *supra* note 133, at 65.

172. Moynihan, *supra* note 12, at 10.

173. *Id.*

i. Article 16 and Arms Transfers

The most common application of Article 16 involves instances where one State provides arms and military aid to another State engaged in violations of international law. Scholars have written extensively on how American arms transfers to Saudi Arabia during the war in Yemen violated Article 16. According to Professor Oona Hathaway, there is little question that Saudi Arabia used American-origin weapons to commit serious violations of international humanitarian law.¹⁷⁴ Following the onset of the war in Yemen in 2015, the United States sold billions of dollars' worth of weapons to Saudi Arabia. Since those weapons were directly used in the commission of war crimes, the United States facilitated Saudi Arabia's internationally wrongful acts.¹⁷⁵ In this way, American aid was "clearly linked" to the wrongful acts of the recipient State, Saudi Arabia. Because such acts constituted violations of customary international law—to which the United States is also bound—the requirement in Article 16 that the unlawful acts of the recipient State would have been unlawful "had [they] been committed by the assisting [S]tate itself" is satisfied.¹⁷⁶ Finally, Hathaway argues that Saudi Arabia's violations of international law were well publicized and widely known, and therefore, the United States was "undoubtedly aware that there [were] numerous credible allegations of violations of international humanitarian law" made against Saudi Arabia.¹⁷⁷ This awareness satisfies the knowledge requirement of Article 16. Moreover, the United States' temporary suspension of military support to Saudi Arabia due to concerns over international human rights law violations further satisfies the knowledge requirement:

[T]he prior cessation of support and subsequent decision to seek assurances reveals that the United States was very much aware of credible allegations of IHL violations by the coalition to that point.¹⁷⁸

Similarly, scholars have roundly concluded that foreign arms sales to Russia following its invasion of Ukraine in February 2022 constitute a clear violation of international law under the principle of State responsibility. According to Professor Ryan Goodman, since Russia is flagrantly violating international law and China clearly has knowledge of this violation, "[i]t is near certain that the requirement of Article 16 would be met if China were to supply arms or other military assistance to Russia for operations in Ukraine."¹⁷⁹ Scholar Catherine Amirfar similarly argues that Iran's military assistance to Russia since the invasion of Ukraine likely violates international law under Article 16's principle of State complicity. According to Amirfar, if an intent requirement exists, then

174. Oona A. Hathaway et al., *State Responsibility for U.S. Support of the Saudi-Led Coalition in Yemen*, JUST SECURITY (Apr. 25, 2018), <https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/>.

175. *Id.*

176. Draft Articles on Responsibility, *supra* note 133, at 66.

177. Hathaway et al., *supra* note 160.

178. *Id.*

179. *Id.*

Iran “can be presumed to intend the foreseeable consequences of its assistance—namely, assisting Russia’s commission of these [international human rights law violations],” thus satisfying the knowledge requirement.¹⁸⁰

Professor Michael N. Schmitt likewise argued that Iran is clearly liable under Article 16 for violations of international law due to its arms sales to Russia. In Schmitt’s view, Iranian weapons have made a significant positive contribution to Russia’s successes in its invasion of Ukraine, and the Iranian weapons were transferred with the knowledge that they would be used for that very purpose.¹⁸¹ Regarding the *mens rea* element of Article 16, Schmitt stated that “it would be absurd to suggest there is a lack of intent (if intent is required) when the support’s very purpose (and highly visible use) is to enable operations that are barefaced international law violations.”¹⁸²

ii. Other Instances of “Aid and Assistance”

States, scholars, and courts have concluded that Article 16 applies to a broad array of “supportive” activities that are less direct even than arms sales and military assistance. Activities that implicate Article 16 include data and intelligence sharing, access to airspace and territory, financial support, logistical assistance, and provision of facilities.¹⁸³ According to Professor Jackson, so long as the selling State’s support furthers the recipient State’s wrongful act, “all kinds of aid and assistance fall within the [Article 16] rule.”¹⁸⁴ Professor Lowe concurs, stating that “whether material, legal, political, or otherwise, the aid or assistance generates responsibility insofar as it can be established that it facilitates or contributes to the commission of the internationally wrongful act by another entity.”¹⁸⁵ The decisive factor in determining the scope of Article 16, therefore, is not the specific *type* of aid given but rather the *connection* between the aid and the subsequent harm.

Participation in and facilitation of rendition, for example, can implicate Article 16. A 2009 report by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concluded that rendition can be sufficient for liability under Article 16:

180. Amirfar, *supra* note 132.

181. Michael N. Schmitt, *Ukraine Symposium – The Complicity of Iran in Russia’s Aggression and War Crimes in Ukraine*, LIEBER INST. WEST POINT (Sept. 12, 2023), <https://lieber.westpoint.edu/complicity-iran-russia-aggression-war-crimes-ukraine/>.

182. *Id.*

183. Draft Articles on Responsibility, *supra* note 133; Miles Jackson, *Complicity in International Law* (Oct. 2013) (unpublished D.Phil thesis, Univ. of Oxford), <https://ora.ox.ac.uk/objects/uuid:4f6db506-c5a7-43d6-af49-fec9ad2d7461/files/m7fe8f56dea581e5442d15b5a9e8af568>.

184. *Id.*

185. Vladislav Lanovoy, *Complicity in an Internationally Wrongful Act*, in *PRINCIPLES OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW* (André Nollkaemper & Ilias Plakokefalos eds., 2014).

[States] are responsible where they knowingly engage in, render aid to or assist in the commission of internationally wrongful acts, including violations of human rights.

Accordingly, grave human rights violations by States such as torture, enforced disappearances or arbitrary detention should therefore place serious constraints on policies of cooperation by States, including by their intelligence agencies, with States that are known to violate human rights.¹⁸⁶

Several European Court of Human Rights cases have affirmed that participation in rendition is sufficient for liability under Article 16. In the case of *Al Nashiri v. Poland*, the court held that the Polish government was complicit under Article 16 in allowing the CIA to use Polish territory for the purposes of torture.¹⁸⁷ The Court stated that:

[F]ailure to take effective measures to prevent such operations, in circumstances where the State authorities knew or ought to have known of the risk that they would be carried out, would breach the State's positive obligations under the Convention read in the light of Article 16 of the ILC Articles.¹⁸⁸

The European Court of Human Rights has similarly referenced Article 16's application to rendition in *El-Masri v The Former Yugoslav Republic of Macedonia* and *Husayn (Abu Zubaydah) v Poland*.¹⁸⁹

An assisting State's logistical support in facilitating a recipient State's unlawful acts similarly implicates Article 16. Following the US -led invasion of Iraq in 2003, the question of State complicity in the war received prominent public attention. The practice of neutral States allowing the United States to utilize their airspace, territory, and technical support in the administration of the war was highly controversial due to the contested legality of the invasion. The question of whether Article 16 could apply in this situation and others like it was brought before the Federal Administrative Court of Germany in a case where a conscientious objector to the Iraq War refused to produce software that the United States could use to wage war in Iraq.¹⁹⁰ The Court acquitted the conscientious objector and held that Germany's logistical support for the war—the legality itself of which the Court considered dubious—could implicate Article 16.¹⁹¹ In a sweeping decision, the Court held that Germany was “neither allowed to grant fly-over rights for military airplanes crossing federal territory on their way to or

186. H.R. Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 53, U.N. Doc. A/HRC/10/3 (Feb. 4, 2009).

187. *Al Nashiri v. Poland*, App. No. 28761/11, Judgment (July 24, 2014) (Fourth Section), <https://hudoc.echr.coe.int/eng?i=001-146044>.

188. *Id.*

189. *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, Judgment (Dec. 13, 2012) (Grand Chamber), <https://hudoc.echr.coe.int/eng?i=001-115621&%7B%22itemid%22%3A%5B%22001-115621%22%5D%7D>; *see also* *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, Judgment (July 24, 2014).

190. Daniel Bodansky & Ilja Baudisch, *Germany v. N.*, 100 AM. J. INT'L L. 911 (2006).

191. *Id.*

back from Iraq, nor to permit the transport of troops, weapons, or military supplies from German soil.”¹⁹²

Human rights organizations and scholars have similarly found that European support for the United States’ drone programs in Pakistan and Yemen likely implicates Article 16. A report by Amnesty International on European complicity in the United States’ drone operations concludes that Italy, the Netherlands, Germany, and the United Kingdom have provided extensive support to the United States in the form of intelligence and data sharing, access to airspace and territory, and technological support.¹⁹³ American drone operators stationed in Germany’s Ramstein Air Force Base and Italy’s Naval Air Station Sigonella have committed, in the opinion of Amnesty International, extrajudicial executions in violation of the Geneva Convention.¹⁹⁴ Alongside the use of their territory, these States have also provided crucial intelligence in support of American drone strikes, furthering their complicity.¹⁹⁵ This support, Amnesty International concludes, constitutes a significant contribution to the US drone program, satisfying the nexus requirement between the aid provided and the wrongful acts. Moreover, due to the publicly available information from human rights monitors and journalists, these States knew “that [their] assistance would be used in an unlawful drone strike,” satisfying the knowledge requirement.¹⁹⁶ Finally, since the wrongful acts in question are grave violations of the Geneva Convention—which is customary international law—the acts would have been wrongful if performed by the supporting States themselves. Therefore, the report concludes that Italian, Dutch, German, and British support triggers Article 16, and these States may be liable for facilitating the United States’ wrongful acts in Pakistan and Yemen.¹⁹⁷

Perhaps most applicable to the case at hand, the ILC commentary and subsequent scholarship clearly indicate that a supporting State incurs liability under Article 16 by “financing the [wrongful] activity in question.”¹⁹⁸ Indeed, a wealth of commentary and court decisions confirm that when a recipient State uses military aid for unlawful purposes, a supporting State may be complicit under Article 16. Even non-military economic aid can cause the assisting State to incur liability. In the mid-2000s, for example, Turkey began construction on the Ilisu Dam in Southeastern Turkey, near the Iraqi border.¹⁹⁹ To fund the project, Turkey received export credits from Austria, Switzerland, and Germany’s Export Credit

192. *Id.* (translation by the author).

193. *Deadly Assistance: The Role of European States in US Drone Strikes*, AMNESTY INT’L (2018), <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT3081512018ENGLISH.pdf>.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Draft Articles on Responsibility, *supra* note 133, at 66.

199. Corner House & Kurdish Human Rights Project, *Ilisu Dam Downstream Water Impacts and Iraq* 4 (Mar. 29, 2007), <http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/IlisuDownstream.pdf>.

Agencies.²⁰⁰ Since the construction of the dam had significant downstream effects on Iraq's water resources, Turkey was required to "consult and negotiate" with Iraq under both customary international law and Turkey's bilateral treaty obligations.²⁰¹ On behalf of the World Economy, Ecology, and Development Organization, James Crawford,²⁰² Laurence Boisson De Chazournes,²⁰³ Kate Cook,²⁰⁴ and Phillipe Sands²⁰⁵ drafted an opinion on the legality of the project, finding that Austria, Switzerland, and Germany should incur liability for Turkey's violations of international law due to their funding of the project.²⁰⁶ The authors concluded that these States' funding of the Ilisu Dam project "constitute[d] aid or assistance in the commission of an internationally wrongful act, namely the violation of rights of notification, consultation, and negotiation of a downstream riparian State."²⁰⁷ Several scholars consider this assessment authoritative.²⁰⁸

Crucially, under certain circumstances, economic aid not tied to any specific program or project can give rise to liability under Article 16. In "Complicity and the Law of State Responsibility," Professor Helmut Aust argues that "provision of funds pure and simple may constitute aid or assistance." If that aid is then used to commit internationally wrongful acts, the aid-providing State may incur liability.²⁰⁹ Recognizing that it may be difficult to demonstrate the requisite nexus between economic aid and wrongful acts, States cannot avoid liability under Article 16 "simply by resorting to cash flows instead of providing material aid in the traditional sense."²¹⁰ This view has been adopted by scholars such as Lukas Pirnay, who concluded that "granting a credit line to an oppressive regime" is enough to trigger Article 16.²¹¹ This suggests that an assisting State's provision of fungible funds—monies not tied to any specific program or request—can trigger liability if the recipient uses those funds for internationally wrongful acts, and the assisting State possesses the requisite knowledge.

200. *Id.*

201. *Id.*

202. Former Judge at the International Court of Justice.

203. Professor and former President of the European Society of International Law.

204. Barrister who served as counsel before the International Court of Justice.

205. Professor who served as counsel before the International Court of Justice.

206. Corner House & Kurdish Human Rights Project, *supra* note 199.

207. *Id.*

208. AUST, *supra* note 168, at 2; Moynihan, *supra* note 12, at 6.

209. AUST, *supra* note 168, at 210.

210. *Id.*

211. Lukas Pirnay, US Drone Strikes in Pakistan and Yemen – German Responsibility under Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 125 (May 31, 2022) (Inaugural Dissertation, Ludwig Maximilian University of Munich).

IV. ARTICLE 16 AND THE UNITED STATES' SUBSIDIZATION OF ISRAEL'S ARMS EXPORTS

As detailed in Section III, a State may incur liability under Article 16 if it facilitates or supports another State's violations of international law.²¹² The "aid or assistance" necessary to trigger Article 16 has been evaluated by States and scholars quite broadly to include arms transfers, intelligence sharing, logistical support, access to airspace and territory, financial assistance, and export credits. Indeed, "all kinds of aid and assistance fall within the rule,"²¹³ so long as it can be "established that [the aid] facilitates or contributes to the commission of the internationally wrongful act."²¹⁴ Given Israel's repeated and ongoing arms exports in violation of the Geneva Conventions and the United States' significant subsidization of Israel's arms industry, there is a *prima facie* case for the United States' liability under Article 16.

A. Knowledge

In order to incur liability under Article 16, a State must have "knowledge of the circumstances of the internationally wrongful act," which can be satisfied through actual knowledge, "virtual certainty," or "willful blindness."²¹⁵ There is convincing evidence that the United States had actual knowledge of Israel's past internationally wrongful acts, or at the very least acted with "willful blindness."

First, the American government is indisputably aware of its role in the subsidization of Israel's arms industry. The initial and original purpose of the OSP was to fund "the development and production of advanced weapon systems" in Israel.²¹⁶ Successive administrations, from Ronald Reagan to Barack Obama, have implemented and maintained the OSP financing policy, often memorializing the agreements through ten-year MOU.²¹⁷

Furthermore, there is a substantial amount of public information detailing Israel's arms exports to States engaged in gross violations of international humanitarian law.²¹⁸ From the 1980s to the present, Israeli arms exports to human rights-abusing States have been cataloged by the United Nations, human rights NGOs, scholars, and individual States, and have also been the subject of several

212. Amirfar, *supra* note 132.

213. Jackson, *supra* note 183.

214. Lanovoy, *supra* note 185.

215. Moynihan, *supra* note 12, at 13–15.

216. U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-751, ISRAEL U.S. MILITARY AID SPENT IN-COUNTRY (1991), <https://apps.dtic.mil/sti/pdfs/ADA242139.pdf>.

217. U.S. CONG. RSCH. SERV., U.S. FOREIGN AID TO ISRAEL, (2022), <https://crsreports.congress.gov/product/pdf/RL/RL33222/44>.

218. Harel, *supra* note 7.

high-profile cases before the Israeli Supreme Court. The New York Times,²¹⁹ The Washington Post,²²⁰ The Wall Street Journal,²²¹ and other prominent news outlets have also reported on these exports.²²² Israel's arms sales to Myanmar, Azerbaijan, and South Sudan were particularly well publicized and widely criticized.²²³

The wide reporting of these exports alone should be sufficient to satisfy the knowledge requirement under Article 16. To determine whether the requisite “*mens rea*” element of Article 16 has been met, “[S]tates can be expected to be knowledgeable of any number of reports of U.N. treaty bodies, special procedures, country reports of other States and a plethora of reputable HR organizations.”²²⁴ A State does not need to make any “positive determination” or official recognition of the acts in question, since the availability and quality of evidence is the determinative factor in the analysis of an assisting State’s knowledge under Article 16.²²⁵ As stated by Chatham House:

[W]here the evidence stems from credible and readily available sources, such as court judgments, reports from fact-finding commissions, or independent monitors on the ground, it is reasonable to maintain that a State cannot escape responsibility under Article 16 by deliberately avoiding knowledge of such evidence.

Given the widely available evidence of Israel’s practice of exporting arms to States engaged in violations of international law, the United States cannot maintain that it lacked knowledge of Israel’s unlawful acts.

Moreover, there is dispositive evidence that the United States was not only aware of Israel’s arms exports, but also closely monitored—and even exercised a degree of control over—these exports. In recognition of the substantial financial subsidization and technical assistance provided to Israel’s arms industry, including the presence of American-origin components in Israel’s indigenous weapons systems, the United States enjoys a “*de facto* veto power over Israeli

219. Thomas L. Friedman, *How Israel’s Economy Got Hooked on Selling Arms Abroad*, N.Y. TIMES (Dec. 7, 1986), <https://www.nytimes.com/1986/12/07/business/how-israel-s-economy-got-hooked-on-selling-arms-abroad.html>.

220. Scott Wilson, *Israel Set to End China Arms Deal Under U.S. Pressure*, WASH. POST (June 27, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/27/israel-set-to-end-china-arms-deal-under-us-pressure/72734d39-e37c-4ae7-a61f-2cca56516ae/>.

221. Dasl Yoon, *Ukraine’s Hunger for Howitzers Transforms an Arms Industry*, WALL ST. J. (Sept. 18, 2023), <https://www.wsj.com/world/ukraines-hunger-for-howitzers-transforms-an-arms-industry-a1b907c4>.

222. *Israel Reports Record \$12.5 Billion Defence Exports, 24% Of Them To Arab Partners*, REUTERS (June 13, 2023), <https://www.reuters.com/business/aerospace-defense/israel-reports-record-125-bln-defence-exports-24-them-arab-partners-2023-06-13/>.

223. *Israeli Weapons for War Criminals*, HAARETZ (Sept. 7, 2023), <https://www.haaretz.com/opinion/editorial/2023-09-07/ty-article-opinion/israeli-weapons-for-war-criminals/0000018a-6bb2-dfd9-ad9f-efb6e06f0000>; Yaron, *supra* note 6; *Israel Among 7 Nations Faulted In UN Report For Arming Myanmar Army*, TIMES OF ISR. (Aug. 5, 2019), <https://www.timesofisrael.com/israel-among-7-nations-faulted-in-un-report-for-arming-myanmar-army/>.

224. DiPerna, *supra* note 148.

225. Moynihan, *supra* note 12; Written Submissions, *supra* note 149.

third-party arms sales that the United States deems harmful to its national security interests.”²²⁶ The United States has exercised this de facto veto power several times in order to prevent Israeli arms transfers to States perceived as adversarial to American national security.

In 2004, for example, Israel signed an agreement to sell upgraded Harpy UAV drones (loitering munitions or “suicide drones”) to China. Citing national security concerns, the United States exercised its de facto veto power to pressure Israel to cancel the contract, and Israel complied.²²⁷ Yet, the United States did not exercise its de facto veto power just a few years later when Israel transferred Harpy UAV drones—those very same weapons—to Azerbaijan, which subsequently used the drones to commit grave violations of international humanitarian law against Armenians in Nagorno-Karabakh, as demonstrated in Section II.²²⁸

The United States similarly vetoed Israel’s proposed transfer of Kfir jets to Uruguay, but allowed Israel to sell the same jets to Colombia²²⁹ and Sri Lanka.²³⁰ Kfir jets were notorious during the Sri Lankan Civil War, where they were used to “deliberately [bomb] civilians and humanitarian sites and helped win the war at a heavy human cost.”²³¹ The United States also blocked Israeli arms sales to India, Venezuela, and Croatia, but did not veto transfers to Myanmar, South Sudan, Cameroon, or the overwhelming majority of the more than 100 countries that Israel has exported weapons to, even though many of those transfers included weapons not only subsidized by the United States, but also weapons containing American-origin components.²³²

The United States’ close monitoring of and significant degree of control over Israel’s arms exports greatly exceeds the knowledge threshold required by Article 16. The United States had the ability to terminate its aid and assistance to Israel after repeated violations of the Geneva Conventions, but chose not to. The United States cannot plead ignorance when it exercises this level of oversight and control over Israel’s arms exports and knows that States engaged in violations of international humanitarian law are actively using American-subsidized weapons.

Finally, the intent requirement, if one exists, would also clearly be satisfied by this degree of oversight and control. The dominant interpretation of Article 16

226. JEREMY M. SHARP, CONG. RSCH. SERV., RL33222, U.S. FOREIGN AID TO ISRAEL (2013), https://www.everycrsreport.com/files/20130411_RL33222_3831ef6fa0005618eed693ec05f19c58f979c1fd.pdf.

227. *Id.*

228. Tyler Rogoway, *Meet Israel’s ‘Suicide Squad’ of Self-Sacrificing Drones*, THE WARZONE (Sept. 29, 2021), <https://www.thedrive.com/the-war-zone/4760/meet-israels-suicide-squad-of-self-sacrificing-drones>.

229. José Higuera, *Colombia Relaunches Plan to Buy Fighter Jets*, DEFENSE NEWS (Sept. 19, 2022), <https://www.defensenews.com/global/the-americas/2022/09/19/colombia-relaunches-plan-to-buy-fighter-jets/>.

230. Mack, *supra* note 130.

231. *Id.*

232. Duncan Clarke, *Israel’s Unauthorized Arms Transfers*, 99 FOREIGN POL. 89 (1995).

is that knowledge or near certainty is enough to meet the intent requirement, as States are “presumed to intend the foreseeable consequences of [their] assistance.”²³³ Intent can therefore be presumed on the part of the United States due to its subsidization, oversight, and facilitation of Israel’s unlawful arms exports.

B. There is a Sufficient Link Between the United States’ Support and Israel’s Unlawful Exports

The United States’ subsidization of Israel’s arms industry is “clearly linked to the subsequent wrongful conduct,” namely, Israel’s exports of American-subsidized arms to States engaged in violations of international humanitarian law.²³⁴ Under Article 16, the aid or assistance must only have “contributed significantly” to the wrongful acts of the recipient State; it does not need to be “essential.” In this case, however, the United States’ aid and assistance to Israel exceeds the “contributed significantly” threshold and may meet the higher bar of being “essential.”

As demonstrated in Section I, American aid to Israel in the form of OSP funding was partly responsible for the development and growth of Israel’s arms industry and export capabilities. This was intentional: the initial purpose of the OSP was to fund Israel’s “development and production of advanced weapon systems.”²³⁵ The former American Ambassador to Israel affirmed that the privilege of using American FMF for domestic procurement has helped “build up and sustain Israel’s young defense industry.”²³⁶ Similarly, the former head of the Israeli Defense Forces Budget Division and Israeli negotiator for the 2018-2028 military aid package stated that OSP funding “provided a major stimulus for the Israeli defense industry, and [was] used to generate large-scale domestic demand for the industry.”²³⁷ Israel has, according to a Congressional Research Service report, “an active and growing indigenous arms industry, the development of which has been subsidized in part by United States support.”²³⁸

Furthermore, the US Government Accountability Office audited American military aid to Israel, and emphasized that the OSP funds were vital to upholding Israel’s massive defense industry:

Without [OSP funding], maintaining the same level of domestic defense expenditures would add to Israel’s deficit. This, in turn, could limit Israel’s capacity to invest additional resources in its own defense industries. . . . Offshore procurement funding has allowed Israel to maintain its defense industrial base, which promotes military self-sufficiency. Israel produces its own tanks, []patrol

233. Amirfar, *supra* note 132.

234. Draft Articles on Responsibility, *supra* note 133.

235. U.S. GOV’T ACCOUNTABILITY OFF., *Israel U.S. Military Aid Spent in-Country*, *supra* note 216, at 2.

236. Zimmerman, *supra* note 51, at 66.

237. *Id.*

238. U.S. FOREIGN AID TO ISRAEL, *supra* note 2.

boats, sophisticated avionics, remotely piloted vehicles, missiles, and many other systems.²³⁹

American subsidization allowed Israel to elevate its nascent defense industry from modest internal production to large-scale exports. In the 1970s, Israel's exports accounted for only 15-20% of its total weapons production. However, by the second half of the 1980s—after a significant increase in American financing—Israel's exports jumped to 60-80% of overall weapons production output. Scholars have attributed this shift in Israel's export capabilities to American OSP funding. The ability to spend billions of American dollars on domestic development allowed Israel's defense industry to “perform required economies of scale and to reorientate production towards exports.”²⁴⁰

Furthermore, under the Qualitative Military Edge policy, the United States also gives Israel substantial technical support for weapons production. Though the exact figures are not known, a substantial portion of indigenous Israeli weapons systems contain American components.²⁴¹ Indeed, Israel routinely exports weapons that have both been heavily subsidized by the United States and contain substantial American technology.²⁴² The United States' support has, therefore, been essential to Israel's arms exports.

The “aid or assistance” necessary to trigger Article 16 has been applied broadly to include, for example, arms transfers, intelligence sharing, logistical support, access to airspace and territory, export credits, and even generalized financial aid. However, some may argue that the link between the United States' subsidization of Israel's arms industry and Israel's subsequent unlawful exports is too removed and attenuated to implicate Article 16. The immediate result of American subsidization—funding the development and production of Israeli weapons systems—is not *per se* unlawful, and it could, therefore, be argued that Israel's subsequent exports were, at most, incidental to American funding. In contrast, arms sales can result in immediate, direct, and non-incidental violations of international humanitarian law. While this may seem persuasive at first blush, court decisions, scholarship, and State positions indicate that the link between American subsidization and Israeli exports would fall within the scope of Article 16.

Comparison to the Ilisu Dam controversy is instructive. The Export Credit Agencies of Germany, Austria, and Switzerland issued development credits to facilitate the construction of a Turkish Dam—which is clearly not an *ipso facto* internationally wrongful act. Rather, Germany, Austria, and Switzerland were found to be liable under Article 16 for Turkey's subsequent failure to “consult and negotiate” with Iraq in violation of international law.²⁴³ In other terms, the act of

239. U.S. GOV'T ACCOUNTABILITY OFF., ISRAEL U.S. MILITARY AID SPENT IN-COUNTRY, *supra* note 216, at 8–9.

240. Palavenis, *supra* note 4 at 976.

241. Zimmerman, *supra* note 51.

242. Clarke, *supra* note 232.

243. Corner House, Kurdish Human Rights Project, *supra* note 199.

financing a construction project was not *per se* unlawful, but the recipient State's subsequent unlawful conduct with the funds rendered the continued financing wrongful under Article 16. Here, the same reasoning should apply: the initial subsidization of Israel's arm industry was not unlawful, but continued subsidization—after decades of documented, publicized, and repeated Israeli exports in violation of the Geneva Conventions—should implicate Article 16.

Similarly, Germany's initial decision to allow the United States use of Ramstein Air Force Base did not itself violate international law. Germany did not incur liability under Article 16 until the United States began using Ramstein as a base for drone operators. It was at that point when Germany's *failure to terminate* American access to the base constituted a sufficient link between German support and American internationally wrongful acts.²⁴⁴ It can therefore be concluded that the United States' failure to terminate its subsidization of Israel's arms industry, once it became clear that these funds were essential to Israel's violations of the Geneva Conventions, is an equally sufficient link for the purposes of Article 16.

Furthermore, as demonstrated in the previous section, the United States has exercised significant control over Israel's arms exports. States are liable under Article 16 "to the extent that its own conduct has caused or contributed to the internationally wrongful act." Article 16 scholarship and jurisprudence demonstrates that States can incur liability through failing to prevent violations within their control. States exercise control over their airspace, territory, arms transfers, and intelligence, and a State incurs liability to the extent that it is able to terminate—or at least not participate in—the internationally wrongful acts of another State. The United States' choice to veto Israel's arms exports in some cases but not others, even where recipient States were engaged in serious violations of humanitarian law, is further evidence that there is a sufficiently strong nexus between American conduct and Israel's unlawful acts. Since the United States has the authority to prevent unlawful exports of American-subsidized weapons, it should incur liability under Article 16.

Finally, applying a "but for" causation test to Article 16 interpretation—which scholars have used in similar analyses—indicates that there is a sufficient link between American support and Israel's wrongful acts. Indeed, this test would result in an even more compelling case of State complicity under Article 16 than the other examples of aid and assistance fell squarely within Article 16 liability. For example, if mere access to Germany's airspace can generate liability on the part of the assisting State, then it would be unreasonable to suggest that direct subsidization of a major foreign arms exporter would not.

Though still considered "facilitation" of rendition or an unlawful use of force, an assisting State's airspace is typically not the "but for" cause or even a dispositive factor upon which a recipient State depends on to commit a wrongful act. For instance, if Germany refused access to American aircrafts transporting materials to Iraq, this would not terminate the United States' military operations. On the other hand, were it not for the United States' significant financial

244. Deadly Assistance, *supra* note 193, at 51–58.

subsidization of Israel's arms industry, Israel likely would not have become one of the world's largest arms producers and exporters. For the last thirty-five years, the United States has funded the development and production of weapons, and continued to do so even after it became clear that American-subsidized weapons were repeatedly exported by Israel in violation of the Geneva Conventions. Furthermore, unlike Germany, the United States has a de facto veto power over Israel's arms exports and had the power to block these unlawful weapons transfers. American aid and assistance can be considered the "but for" cause of Israel's massive defense exports. Using the normative test suggested by Aust, the United States' continuous OSP funding made it "substantially easier" for Israel to commit an internationally wrongful act, and it can therefore be established that the United States—at the very least—"contributed significantly" to Israel's wrongful acts.

C. Wrongful Act

Finally, a State only incurs liability under Article 16 if the recipient State's unlawful acts "would be internationally wrongful if committed" by the assisting State itself.²⁴⁵ Since Common Article 1 of the Geneva Conventions is customary international law and therefore binding on all States, there is no question that Israel's arms exports would be unlawful if committed by the United States. The United States has even recognized the wrongfulness of, and condemned arms transfers to many of the recipients of American-subsidized Israeli weapons. The United States called on the international community to cease weapons transfers to Myanmar, for example, declaring that the government "committed genocides and crimes against humanity against Rohingya."²⁴⁶ The United States similarly supported arms embargoes on Azerbaijan²⁴⁷ and South Sudan²⁴⁸—both recipients of American-subsidized Israeli weapons.

Since all three elements of Article 16 are satisfied, a persuasive case can be established that the United States should incur liability due to its subsidization of Israel's unlawful arms exports.

CONCLUSION

Over the last decade, international trade in conventional weapons has reached its peak since the end of the Cold War.²⁴⁹ Recognizing that the arms trade fuels

245. Draft Articles on Responsibility, *supra* note 133, at 5.

246. U.S. Dep't of State, Secretary Antony J. Blinken on the Genocide and Crimes Against Humanity in Burma (Mar. 21, 2022), <https://www.state.gov/secretary-antony-j-blinken-at-the-united-states-holocaust-memorial-museum/>.

247. Foreign Operations, Export Financing, And Related Programs Appropriations Act, 2002, Pub. L. No. 107-15, 115 Stat. 2118 (2002).

248. *South Sudan: Extension Of UN Arms Embargo Welcome News for Victims of Decade Long Conflict*, AMNESTY INT'L (May 30, 2023), <https://www.amnesty.org/en/latest/news/2023/05/south-sudan-extension-of-un-arms-embargo-welcome-news-for-victims-of-decade-long-conflict/>

249. International Arms Transfers, STOCKHOLM INT'L PEACE RESEARCH INST. (2022), <https://www.sipri.org/yearbook/2022/09>.

conflict, exacerbates poverty, and increases human suffering around the world, States and civil society actors alike have increasingly sought to regulate international weapons transfers via international agreements such as the Arms Trade Treaty.²⁵⁰ This push for increased regulation of conventional arms transfers is also reflected in the domestic policies of major arms exporting States.

In response to pressure from human rights organizations, the Biden Administration overhauled the United States Conventional Arms Transfer policy, establishing a heightened human rights standard for American weapons exports.²⁵¹ The purpose of this heightened standard is to “prevent arms transfers that risk facilitating or otherwise contributing to violations of human rights or international humanitarian law.”²⁵² This new emphasis on compliance with international law and preventing arms exports to States engaged in human rights violations has been hailed as a victory by human rights organizations.²⁵³ If followed, this heightened standard could decrease the extent of American weapons used to facilitate unlawful acts in foreign States.

However, despite this increased global and domestic attention on establishing legal frameworks designed to regulate the flow of conventional weapons, the issue of American subsidization of Israel’s arms exports has received minimal scrutiny. Though this issue is excluded from mechanisms such as the Arms Trade Treaty, this Article demonstrates that existing international law may provide a useful framework for establishing legal liability for the United States’ funding of Israel’s domestic arms industry.

American financing of Israel’s domestic arms industry has been central in the development of Israel’s status as a major arms exporting State. Through applying Common Article 1 of the Geneva Conventions and Article 16 of the Draft Articles on State Responsibility, a *prima facie* case can be made that United States can incur liability for its role in funding the development and procurement of Israeli weapons which are subsequently exported in violation of international law. Under this framework, the United States has responsibility not only for the unlawful uses of its own weapons, but also for the weapons it subsidizes.

250. Arms Trade Treaty, Apr. 2, 2013, 3013 U.N.T.S 269 (entered into force Dec. 24, 2014); *Why We Need A Global Arms Trade Treaty*, OXFAM INT’L, <https://www.oxfam.org/en/why-we-need-global-arms-trade-treaty> (last visited: Oct. 4, 2023).

251. Memorandum on United States Conventional Arms Transfer Policy, National Security Mechanism/NSM-18 (Feb. 23, 2023), <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/>.

252. *Id.*

253. Connor Echols, *New Biden Arms Sale Policy Puts Human Rights Abusers on Notice*, RESPONSIBLE STATECRAFT (Feb. 23, 2023), <https://responsiblestatecraft.org/2023/02/23/new-biden-arms-sale-policy-puts-human-rights-abusers-on-notice/>.