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## Defeating the Object and Purpose of the Arms Trade Treaty: An Analysis of Recent U.S. Arms Sales to Saudi Arabia

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# DEFEATING THE OBJECT AND PURPOSE OF THE ARMS TRADE TREATY: AN ANALYSIS OF RECENT U.S. ARMS SALES TO SAUDI ARABIA

WILLIAM PONS\*

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## I. INTRODUCTION

“[The] easy accessibility of weapons, especially in the developing world, and the ineffective efforts to control [their] trade have contributed significantly to the devastating violence we see in the world today.”<sup>1</sup>

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1. Jonathan Grant, “*Merchant of Death*”: *The International Traffic in Arms*, ORIGINS CURRENT EVENTS IN HISTORICAL PERSPECTIVES (Dec. 2012), <http://origins.osu.edu/article/merchants-death-international-traffic-arms>.

The strong correlation between extreme violence and the availability of arms is one that States have long recognized and have sought to mitigate through regulation of the arms trade since at least as far back as the Roman Empire, if not further.<sup>2</sup>

In the early 20<sup>th</sup> century, the international community recognized that the private manufacture and trade of arms was a significant factor leading to the devastation of World War I and attempted to regulate the private arms trade through the Treaty of Versailles.<sup>3</sup> As a result, “most arms-producing States adopted national controls over arms exports, nationalized their arms industry[,] and instituted government-to-government sales as a norm.”<sup>4</sup> Unfortunately, in spite of the acknowledgment that the arms trade exacerbates conflicts, attempts to regulate the transfer of arms have only resulted in “a patchwork of regional instruments.”<sup>5</sup>

Even though regulated, the manufacture and sale of arms worldwide is a booming business.<sup>6</sup> Since 2011, the United States (U.S.) has held the position of top arms exporter with a 33% share of the global arms trade, followed by Russia in distant second with 25%.<sup>7</sup> Illustrating the rise in arms exports and the U.S.’ role as the top arms exporter, the Congressional Research Service (CRS) issued a report in 2012 finding

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2. Keith Krause & Mary K. MacDonald, *Regulating Arms Sales Through World War II*, in 2 ENCYCLOPEDIA OF ARMS CONTROL AND DISARMAMENT 707, 708 (Richard Dean Burns ed., 1993).

3. Treaty of Peace Between the Allied and Associated Powers and Germany, art. 8, ¶15, June 28, 1919 [hereinafter Treaty of Peace].

4. Maya Brehm, *Conventional Arms Transfers in Light of Humanitarian and Human Rights Law* (Feb. 2005) (unpublished LL.M Thesis, University Centre for International Humanitarian Law) (on file with PIR Center <http://www.pircenter.org/media/content/files/11/13639336240.pdf>).

5. Int’l Comm. of the Red Cross, *Understanding the Arms Trade Treaty from a Humanitarian Perspective* 11, ICRC Doc. 4252/002 (Sept. 2016) [hereinafter *Understanding the Arms Trade Treaty*], <https://shop.icrc.org/understanding-the-arms-trade-treaty-from-a-humanitarian-perspective-2820.html>.

6. See *International Arms Transfers*, STOCKHOLM INT’L PEACE RES. INST., <https://www.sipri.org/research/armament-and-disarmament/arms-transfers-and-military-spending/international-arms-transfers> (last visited Sept. 3, 2019).

7. *Top 10 Arms Exporters by Country, 2011–15, Per cent of Global Share*, STOCKHOLM INT’L PEACE RES. INST. (2016), [https://www.sipri.org/sites/default/files/styles/body\\_embedded/public/web\\_figure\\_1\\_1.png?itok=4TApBBde](https://www.sipri.org/sites/default/files/styles/body_embedded/public/web_figure_1_1.png?itok=4TApBBde) (last visited Sept. 3, 2019).

that of the \$85.3 billion in arms transfer agreements concluded worldwide in 2011, arms transfer agreements by the United States totaled “\$66.3 billion (77.7% of all such agreements).”<sup>8</sup> The report also found that the overall dollar value of the transfer agreements saw “an extraordinary increase from . . . 2010,” with the rise in arms transfers being attributed to purchases by the Persian Gulf states.<sup>9</sup> In particular, the report found that the “U.S. arms agreements with Saudi Arabia . . . represent, by far, the largest share of U.S. agreements with the world or the developing world in 2011.”<sup>10</sup>

In 2015, CRS issued another report on conventional arms transfers to developing nations citing “potentially significant updates to and revisions” of arms transfer trends in the years following the Cold War and the Persian Gulf War, finding that “today th[e principal motivation for arms sales] may be based as much, if not more, on economic considerations as those of foreign or national security policy.”<sup>11</sup> The report also found that although the global arms trade had slowed, the “United States led in arms transfer agreements worldwide, making agreements valued at \$36.2 billion (50.4% of all such agreements),” which was an increase of about \$10 billion from 2013.<sup>12</sup> Notably, “[t]he U.S. market share increased greatly as well, from roughly 38% in 2013 to 50% in 2014 . . . [with] larger valued arms transfer agreements . . . includ[ing] multiple agreements with Saudi Arabia.”<sup>13</sup>

The following year, CRS issued an additional report analyzing conventional arms transfers to developing nations from 2008 to 2015, finding that the United States “ranked first in value of all arms *deliveries* worldwide [in 2015] . . . [for] the eighth year in a row.”<sup>14</sup> As with the two previous reports, the U.S. conventional arms transfer agreements to

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8. RICHARD F. GRIMMETT & PAUL K. KERR, CONG. RESEARCH SERV., R42678, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2004–2011 3 (2012).

9. *Id.* at 7.

10. *Id.*

11. CATHERINE A. THEOHARY, CONG. RESEARCH SERV., R44320, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2007–2014 1–2 (2015).

12. *Id.* at 3.

13. *Id.* at 4, 7.

14. CATHERINE A. THEOHARY, CONG. RESEARCH SERV., R44716, CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 2008–2015 3 (2016).

developing countries were “valued at \$40.2 billion (50.29% of all such agreements),” demonstrating an increase of \$16 billion from 2014.<sup>15</sup> While this CRS report stated that “new arms sales have become more difficult to conclude in the face of economic factors” and limited growth in the overall international arms market, countries in the Near East and Asia continued to make major arms purchases from the United States.<sup>16</sup> As a result of these major purchases—the largest ones made by Saudi Arabia and Qatar—“the U.S. market share of the value of all [arms transfer agreements with developing nations increased to] 40.99% in 2015.”<sup>17</sup>

Taken all together, the United States delivered \$164.3 billion in conventional weapons, equipment, and training to 170 countries from 2002 to 2014.<sup>18</sup> However, unlike in the past, an international treaty now exists to regulate the international trade of conventional arms worldwide, supplanting the existing regional patchwork of agreements. On December 24, 2014, the Arms Trade Treaty (ATT) came into force, binding parties to the agreement to provide better national regulations on the sale and transfer of arms.<sup>19</sup> Although the United States did not ratify the ATT,<sup>20</sup> then-Secretary of State John Kerry signed the treaty on September 25, 2013.<sup>21</sup> The United States remained a signatory until July 18, 2019, when it submitted a letter to the United Nations (U.N.) formally stating it would no longer seek to ratify the ATT and will no longer be bound by the legal obligations of its signature.<sup>22</sup> While such a

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15. *Id.*

16. *Id.* at 4.

17. *Id.* at 7.

18. *Sec. Assistance Monitor, ARMS SALES DASHBOARD*, <https://securityassistance.org/content/arms-sales-dashboard>. (last visited Sept. 3, 2019).

19. Arms Trade Treaty, Sept. 25, 2013, 3012 U.N.T.S. 52373 [hereinafter ATT]. See Michelle Nichols, *U.N. Says Arms Trade Treaty to Enter into Force on December 24*, REUTERS (Sept. 25, 2014), <http://www.reuters.com/article/us-un-assembly-arms-treaty-idUSKCN0HK1WP20140925>.

20. Ramsey Cox, *Senate Votes 53–46 to Stop U.S. from Joining U.N. Arms Trade Treaty*, THE HILL (Mar. 23, 2013), <http://thehill.com/blogs/floor-action/senate/290001-senate-votes-to-stop-us-from-joining-un-arms-treaty>.

21. See John Kerry, Sec’y of State, U.S. Dep’t of State, Remarks at the Arms Trade Treaty Signing Ceremony (Sept. 25, 2013) (transcript available at <http://www.state.gov/secretary/remarks/2013/09/214717.htm>).

22. UNITED NATIONS, STATUS OF MULTILATERAL TREATIES DEPOSITED WITH THE

step eliminates the legal obligations of the United States moving forward, such an action does not proactively absolve the United States of its duty to have refrained, in good faith, from acts that would have defeated the object and purpose of the treaty while it was a signatory.<sup>23</sup> Therefore, regardless of the withdrawal of its signature, the U.S.' delivery of \$116.43 billion in conventional weapons, equipment, and training to 187 countries worldwide since 2014 must not have undermined the object and purpose of the ATT.<sup>24</sup>

To ensure compliance with its legal obligations as a signatory to the ATT from 2014 to 2019, the United States was required to properly assess the impacts of its arms transfers. The most significant such example during that time period is the \$15.9 billion in weapons that the United States delivered to Saudi Arabia, a country mired in the ongoing conflict in Yemen.<sup>25</sup> The war in Yemen has killed and injured an estimated 17,062 civilians between March 26, 2015 and August 9, 2018, with a "majority of [those] casualties . . . a result of airstrikes carried out by the Saudi-led Coalition."<sup>26</sup> A great deal of international and domestic criticism has been leveled on the tactics and indiscriminate attacks used by Saudi Arabia and in particular, on the U.S.' current and proposed arms sales to Saudi Arabia that enable those attacks.<sup>27</sup>

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SECRETARY-GENERAL,

[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-8&chapter=26&clang=\\_en#3](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=_en#3) (last visited Oct. 18, 2019).

23. See Paul Gragl & Malgosia Fitzmaurice, *The Legal Character of Article 18 of the Vienna Convention on the Law of Treaties*, 68 INT'L & COMP. L. Q. 699, 699-705 (July 2019); Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

24. See *Sec. Assistance Monitor*, *supra* note 18.

25. *Id.*

26. Spokesperson, U.N. Off. of the High Comm'r for Hum. Rts., Press briefing notes on Yemen civilian casualties (Aug. 10, 2018) [hereinafter Briefing notes on Yemen],

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23439&LangID=E>.

27. Oxfam, *\$1.15 billion arms sale threatens countless lives in war-torn Yemen* (Sept. 6, 2016), <https://www.oxfamamerica.org/explore/stories/115-billion-arms-sale-threatens-countless-lives-in-war-torn-yemen/>; Jeff Abramson, *Trump Touts Saudi Arms Sales*, ARMS CONTROL TODAY (Apr. 2018) [hereinafter Abramson, *Trump Touts Saudi Arms Sales*], <https://www.armscontrol.org/act/2018-04/news/trump-touts-saudi-arms-sales>; Helene Cooper, *State Dept. Approves \$670 Million Arms Deal with Saudi Arabia*,

While scholars have written about the humanitarian impact of providing weapons to Saudi Arabia and the legality under U.S. domestic law,<sup>28</sup> there has been no examination of whether the U.S. arms transfers undermine the object and purpose of the ATT in violation of customary international law.<sup>29</sup> As such, the first section of this paper will examine the obligations of signatories to treaties as set forth by Article 18(a) of the Vienna Convention on the Law of Treaties (VCLT) and identify the current international customary law interpretation as understood by the United States. The second section will identify the object and purpose of the ATT and determine the threshold for violating it. The third section will look at Saudi Arabia's involvement in the armed conflict in Yemen and the arms transfers by the United States from 2014 to 2019 as a case study, and will include an analysis of the U.S. response to the attacks carried out by the Saudi-led coalition. The final section will provide a conclusion as to whether the arms transfers by the United States effectively defeated the object and purpose of the ATT and what this means for future arms deals with countries involved in armed conflicts.

## II. THE VIENNA CONVENTION ON THE LAW OF TREATIES

With the “growing importance of treaties . . . [it is] increasingly evident

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N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/us/politics/us-arms-sales-saudi-arabia.html>; *US Announces \$1 Billion in Arms Sales to Saudi Arabia*, VOA NEWS (Mar. 22, 2018), <https://www.voanews.com/usa/us-announces-1-billion-arms-sales-saudi-arabia>; Rebecca Kheel, *State Department Clears \$1.3B Artillery Sale to Saudi Arabia*, THE HILL (Apr. 5, 2018), <http://thehill.com/policy/defense/381867-state-department-clears-13b-artillery-sale-to-saudi-arabia>.

28. See generally Michael Newton, *An Assessment of the Legality of Arms Sales to the Kingdom of Saudi Arabia in the Context of the Conflict in Yemen*, (Vanderbilt Univ. L. Research, Working Paper No. 17-26, 2017); Jeff Abramson, *Opponents Challenge Saudi Arms Sale*, ARMS CONTROL TODAY (July 2017) [hereinafter Abramson, *Opponents Challenge Saudi Arms Sale*], <https://www.armscontrol.org/act/2017-07/news/opponents-challenge-saudi-arms-sale>; Oona Hathaway et al., *The Legality of U.S. Arms Sales to Saudi Arabia for Use in Yemen*, JUSTSECURITY (Mar. 7, 2018) [hereinafter Hathaway et al., *Legality of U.S. Arms Sales*], <https://www.justsecurity.org/53449/u-s-arms-sales-saudi-arabia-yemen/>; Oona Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*, 10 HARV. NAT'L SEC. J. 1, 20-21 (2019) [hereinafter Hathaway et al., *Yemen: Is the U.S. Breaking the Law?*].

29. See ATT art. 1, *supra* note 19.

[that there is a] need for clear, well-defined and readily ascertainable rules of international law applicable to treaties.”<sup>30</sup> This was the statement made by President Nixon in 1971 in a message urging the U.S. Senate to provide advice and consent for the ratification of the Vienna Convention on the Law of Treaties (VCLT), which sought to codify those rules of international law applicable to treaties.<sup>31</sup> However, even with the urging of the President, the Senate decided against providing its advice and consent, thereby leaving the VCLT signed but unratified by the United States.<sup>32</sup>

Although only a signatory, the current U.S. position is that “many of the provisions of the Vienna Convention on the Law of Treaties [are considered to be] customary international law.”<sup>33</sup> This position was first enumerated by then-Secretary of State William Rogers in 1971 when he stated that while “not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.”<sup>34</sup> Additionally, the U.S. position on the legal posture of the VCLT directly tracks with the international consensus that “deem[s] at least certain provisions of the Vienna Convention reflective of customary international law, thereby binding on all states.”<sup>35</sup> Therefore, while not a State Party to the VCLT, the United States—via affirmative statement and international consensus—is legally bound by those treaty provisions determined to be customary international law.<sup>36</sup>

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30. Richard Nixon, *Vienna Convention on the Law of Treaties Transmitted to the Senate*, in 65 U.S. DEP’T OF STATE BULL. 684 (1971).

31. I. M. Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT’L & COMP. L. Q. 47, 48–49 (1970) (“It regulates in Part II the conclusion and entry into force of treaties (including reservations), in Part III, the observance, application and interpretation of treaties, in Part IV, the amendment and modification of treaties, in controversial Part V, the invalidity, termination and suspension of operation of treaties, Part VI, certain miscellaneous points, and in Part VII, the functions of depositaries and requirements as to notifications, corrections and registrations.”).

32. *See Is the United States a party to the Vienna Convention on the Law of Treaties?*, U.S. DEP’T OF STATE [hereinafter U.S. DEP’T OF STATE], <https://2009-2017.state.gov/s/1/treaty/faqs/70139.htm> (last visited Sept. 3, 2019).

33. *Id.*

34. Nixon, *supra* note 30, at 685.

35. Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT’L L. & ECON. 71, 75 (1991).

36. *See* Charme, *supra* note 35, at 75.

## A. ARTICLE 18

Article 18 of the VCLT is the codification of “a signatory’s interim obligation” to refrain from attempts to defeat the object and purpose of a treaty.<sup>37</sup> The text of Article 18 reads:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) *it has signed the treaty* or has exchanged instruments constituting the treaty subject ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.<sup>38</sup>

Although there is some contention regarding the nature of Article 18, it is generally accepted that “[b]oth conventional law and case law . . . establish the propriety of portraying the interim obligation to refrain from defeating the object and purpose of a treaty as customary law.”<sup>39</sup> Further supporting the assertion that Article 18 is customary international law is the statement by the International Law Commission (ILC) in its 1966 commentary affirming that an “obligation of good faith to refrain from acts calculated to frustrate the object of a treaty attaches to a State which has signed a treaty that is subject to ratification.”<sup>40</sup> Taken together, “provisions in treaties, judicial and arbitral decisions, diplomatic statements, and the conduct of the International Law Commission . . . compel, in the aggregate, the conclusion that article 18

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37. VCLT art. 18, *supra* note 23.

38. VCLT art. 18, *supra* note 23 (emphasis added).

39. See David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 569–70 (2010); Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L. J. 311, 314 (2007); Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 296 (2001); Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT'L & EUR. L. 311, 311–12 (1998); Charme, *supra* note 35, at 77–78.

40. *Report of the International Law Commission on the work of its eighteenth session*, [1966] 2 Y.B. Int'l L. Comm'n 169, 202, U.N. Doc. A/CN.4/SER.A/1966/Add.I [hereinafter *Report of International Law Commission*].

constituted the codification of the interim obligation . . . [and] indicate as well that this norm continues as a rule of customary international law.”<sup>41</sup> Therefore, Article 18 of the VCLT is binding on the United States in relation to every treaty it has signed but not ratified, including the ATT.

Yet determining the actual object and purpose of a particular treaty has created much confusion, spurred scholarship, and given rise to extensive international jurisprudence on the issue.<sup>42</sup> This is despite the fact that “interim obligations [are] recognized in virtually all systems of law, so that the principles stated in . . . [Article 18] w[ere] no[t an] innovation.”<sup>43</sup>

The phrase “object and purpose” can most clearly be defined as “an inherently abstract concept that refers broadly to a treaty’s goals.”<sup>44</sup> The importance of the interim obligation enumerated by Article 18 has been described as an attempt “to reconcile two competing concerns:” first, the ability of a State to review the treaty obligations under domestic procedures and second, a worry over the reliance on other States to act in accordance with the treaty.<sup>45</sup> Scholars have suggested a variety of methods for interpreting a treaty’s object and purpose that includes, for example, the essential elements test,<sup>46</sup> the impossible performance test,<sup>47</sup> the bad faith and manifest intent tests,<sup>48</sup> and the status quo/facilitation test.<sup>49</sup> Each of these methods rests on two basic assumptions: that the object and purpose of a treaty is not always clear and that the negative effect of undermining a treaty’s object and purpose will only manifest after the signatory State has ratified the treaty.<sup>50</sup> The ultimate goal behind these methods of interpretation seems to be to ensure that a signatory State does not gain an unfair advantage in relation to the regulations or

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41. Charme, *supra* note 35, at 85.

42. *See generally* Jonas & Saunders, *supra* note 39.

43. *Summary records of the first part of the seventeenth session*, [1965] 1 Y.B. Int’l L. Comm’n 87, 92 U.N. Doc. A/CN.4/SER.A/1965.

44. Jonas & Saunders, *supra* note 39, at 596–608.

45. *Id.* at 596.

46. *Id.*

47. *Id.* at 598.

48. *Id.* at 601–03.

49. Jonas & Saunders, *supra* note 39, at 603–04.

50. *See id.* at 596–604.

obligations prior to ratification.<sup>51</sup>

However, the two foundational assumptions and ultimate goal of the methods overlook the potential for a treaty to resolve the ambiguity and confusion itself by clearly stating its intended object and purpose. To avoid the possibility that a treaty's intended object and purpose is obfuscated by the self-serving interpretation of States, some modern treaties have included articles that more directly state the object and purpose of the treaty.<sup>52</sup> This potential evolution in treaty drafting is best highlighted by the ATT, which clearly states its object and purpose.<sup>53</sup> Therefore, the above-mentioned methods are not applicable to the issue of determining the scope of the object and purpose of the ATT in order to ascertain whether the United States potentially defeated it.<sup>54</sup>

### III. THE ARMS TRADE TREATY

The Arms Trade Treaty “is the first legally-binding instrument ever negotiated in the United Nations to establish common standards for the international transfer of conventional weapons.”<sup>55</sup> In 2006, the “fact that the international trade in bananas was more tightly regulated under international law than conventional arms” drew the attention of the international community and put in motion an effort to create international regulations for the sale and transfer of conventional arms.<sup>56</sup> Prompted by a strong civil society campaign, the nations of Argentina, Australia, Costa Rica, Finland, Japan, Kenya, and the United Kingdom sponsored “the first United Nations General Assembly resolution on an arms trade treaty in 2006.”<sup>57</sup> However, it was not until April 2, 2013 that the U.N. General Assembly voted “by overwhelming majority”<sup>58</sup> to

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51. *Id.* at 595-97.

52. Convention on the Rights of Persons with Disabilities art. 1, Dec. 13, 2006, 2515 U.N.T.S. 3.

53. ATT art. 1, *supra* note 19.

54. *Id.*

55. Permanent Rep. of Austl. to the U.N. in Geneva & Ambassador for Disarmament, Arms Trade Treaty 1 (2014) [hereinafter Ambassador for Disarmament], [http://legal.un.org/avl/pdf/ha/att/att\\_e.pdf](http://legal.un.org/avl/pdf/ha/att/att_e.pdf).

56. *Id.* at 2.

57. *Id.*

58. U.N. Off. for Disarmament Aff., *ATT Implementation Toolkit | Module 1 | Why Join the Arms Trade Treaty?* 2 [hereinafter *ATT Implementation Toolkit*], <https://unoda->

adopt the ATT, a treaty heralded as “a historic achievement for the United Nations and multilateralism.”<sup>59</sup>

On December 24, 2014, the ATT entered into force and it currently has 104 State Parties and an additional twenty-six signatory States.<sup>60</sup> The motivation behind the ATT is to stop the “[u]nregulated and irresponsible arms transfers [that] intensify and prolong conflict, lead to regional instability, facilitate human rights abuses . . . and hinder social and economic development.”<sup>61</sup> To accomplish this goal, State Parties are required to adopt national legislation that establishes controls and oversight of arms exports, as well as regulations that better manage the State’s arms stockpiles.<sup>62</sup> In particular, the scope of the ATT “includes *all* transfers, including the sale, loan, gift, or lease” of weapons, which include battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.<sup>63</sup> The ATT seeks to establish “controls over the *international* import, export and transfer of conventional arms . . . [because] it is easier for [these] weapons to be diverted from the legal trade into the illegal market, and into the hands of terrorists, drug traffickers and criminal cartels.”<sup>64</sup>

In providing the rationale for the necessity of the ATT, the U.N. Office for Disarmament Affairs (UNODA) stated that “global trade in nearly all categories of manufactured goods . . . is regulated by rules which bind exporters and importers to commonly agreed conduct . . . [and t]he global trade in conventional weapons should be no

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web.s3-accelerate.amazonaws.com/wp-content/uploads/2015/08/2015-08-21-Toolkit-Module-1.pdf (last visited Sept. 3, 2019).

59. Ambassador for Disarmament, *supra* note 55, at 2.

60. U.N. Off. for Disarmament Aff., *ATT Status of ratifications and accessions 1* [hereinafter *ATT Status of ratifications and accessions*], <https://s3.amazonaws.com/unoda-web/wp-content/uploads/2019/08/ATT-status-of-ratifications-and-accessions-August-2019.pdf> (last visited Sept. 15, 2019).

61. *ATT Implementation Toolkit*, *supra* note 58, at 2.

62. *Id.*

63. Knut Doermann & Louise Arimatsu, *Adoption of a Global Arms Trade Treaty: Challenges Ahead*, CHATHAM HOUSE 4 (Apr. 16, 2013) (emphasis added).

64. *Fact Sheets: Arms Trade Treaty Myths and Facts*, U.S. DEP’T OF STATE 1 (2012) [hereinafter MYTHS AND FACTS], <https://2009-2017.state.gov/documents/organization/194218.pdf>.

exception.”<sup>65</sup> It is important to note that UNODA also states that “[e]ach sovereign State determines its own laws and regulations for the manufacture, sale and possession of firearms by its citizens” and that the ATT’s goal is not “to ban any weapon category from being traded, but . . . to set regulations on the global, cross border trade in conventional weapons.”<sup>66</sup> By affirmative statement in the text itself, the ATT’s stated goal is to create international guidelines that will regulate the international arms trade to prevent diversion but still allow countries to manufacture, transfer, and acquire conventional arms.<sup>67</sup>

From the U.S. perspective, the ATT is meant to “establish a common international standard for the national regulation of the international trade in conventional arms.”<sup>68</sup> The benefits of the ATT have been identified as being able to improve “both U.S. national security and global security by reducing the risk that international transfers of conventional arms will be used to carry out the world’s worst crimes, including genocide, crimes against humanity, and war crimes.”<sup>69</sup> Additionally, the United States recognizes that the ATT allows for “the sovereign right of any State to regulate conventional arms within its own territory” and that “legitimate political, security, economic, and commercial purposes of the international trade in conventional arms” exist.<sup>70</sup> When the U.S. interpretation is compared to UNODA’s public statements regarding the objectives of the ATT, little if any difference exists between the U.S. understanding and the stated intent of the treaty.

<sup>71</sup>

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65. *Id.*

66. *Id.*

67. *See* ATT art. 1, *supra* note 19

68. Press Release, Office of the Spokesperson, U.S. Dep’t of State, The Arms Trade Treaty 1 (Sept. 25, 2013), <https://2009-2017.state.gov/r/pa/prs/ps/2013/09/214706.htm>.

69. *Id.*

70. *Id.*

71. While recent statements made by President Trump contradict this assertion, and recognizing that foreign policy is the provenance of the Executive, there have been no affirmative statements revoking the previous U.S. understanding as to the implications of the ATT to support a conclusion that a shift has occurred. *See* OFFICE OF THE SEC’Y OF DEF., DEF. TECH. SEC. ADMIN., ARMS TRANSFER POLICIES & TREATIES 1, <https://www.dtsa.mil/SitePages/promoting-engagement/arms-transfer-policies-and-treaties.aspx> (last visited Sept. 3, 2019).

## A. ARTICLE 1

Article 1 is a unique aspect of the ATT and is exceptionally important to the understanding of the treaty's object and purpose, because unlike most other treaties, Article 1 clearly states the object and purpose.<sup>72</sup> The text of Article 1 reads as follows:

The *object* of this Treaty is to:

Establish the highest possible common international standards for regulating or improving the regulation of the international trade of conventional arms;

Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

[F]or the *purpose* of:

Contributing to international and regional peace, security and stability;

Reducing human suffering;

Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.<sup>73</sup>

The existence of Article 1 thereby avoids the necessity of analyzing much of the scholarship relating to how the object and purpose of a treaty should be identified. Nevertheless, a question remains regarding whether the text of Article 1 establishes a standard sufficient to determine whether a specific State action is an attempt to defeat the object and purpose of the ATT.

## B. OBJECT AND PURPOSE OF THE ATT

An examination of Article 1 reveals that the ATT has at least two separate but interconnected object-and-purposes. The first can be described as regulation and cooperation, which seeks to have States

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72. ATT art. 1, *supra* note 19.

73. *Id.* (emphasis added).

create “the highest possible common international standards for regulation . . . for the purpose of . . . [p]romoting cooperation, transparency and responsible action by States Parties.”<sup>74</sup> The second can be identified as peace and stability, which seeks to “[p]revent and eradicate the illicit trade in conventional arms and prevent their diversion . . . for the purpose of contributing to international and regional peace, security and stability . . . [and] reducing human suffering.”<sup>75</sup> The International Committee of the Red Cross (ICRC) has suggested that at least one of the identifiable purposes of the ATT “is to reduce human suffering by establishing the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms.”<sup>76</sup> However, this restatement is somewhat lacking because it only considers the purpose in light of State Party obligations and does not consider that signatories to the ATT are only bound by an interim obligation. Since signatories are not yet legally bound by the treaty articles, they have no duty to create the necessary national regulations on international conventional arms transfers.

Of the two object-and-purposes found in the text of the ATT, only peace and stability enumerates obligations that signatories can be expected to uphold. Put more plainly, a signatory to the ATT cannot have a positive duty—the development of national standards to regulate the international trade of conventional arms—attach as part of its interim obligation.<sup>77</sup> Rather, the only obligation placed on signatory States is a negative one to refrain from actions that would undermine the object and purpose of the treaty.<sup>78</sup> The regulation and cooperation object-and-purpose in the ATT seems to be more of a practical goal of the treaty for those countries that have become State Parties because it requires States to take affirmative actions. The establishment of such a positive duty on a signatory State would significantly blur the line—or possibly eliminate

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74. *Id.*

75. ATT art. 1, *supra* note 19.

76. *See* DOERMANN & ARIMATSU, *supra* note 63, at 4.

77. *See* VCLT arts. 18, 19(c), *supra* note 23; *see also* Jonas & Saunders, *supra* note 23, at 573 (“Notably, both Articles 18 and 19(c) [of the Vienna Convention] create an object and purpose obligation in negative terms.”).

78. *See* VCLT arts. 18, 19(c), *supra* note 23; *see also* Jonas & Saunders, *supra* note 23, at 572.

the distinction—between signature and ratification.

Therefore, in light of the fact that the signing of a treaty can only impose a negative duty and not a positive one, the author suggests that the actual object and purpose of the ATT is to ensure “international and regional peace, security and stability . . . [by] reducing human suffering,” through the “[r]especting and ensuring [of] respect for international humanitarian law.”<sup>79</sup> This object and purpose takes language from both Article 1 and the Preamble of the ATT, which is reflective of the standard practice of examining “[the treaty’s] title and preamble as well as the context of the negotiations” in order to identify its object and purpose.<sup>80</sup> The rationale for the inclusion of the preambular language referencing international humanitarian law (IHL)<sup>81</sup> is to better understand the phrase ‘human suffering’ in the full context of the treaty as is required by the VCLT.<sup>82</sup>

It is also important to note that the concern over violations of IHL—as a result of the proliferation of weapons and the ease with which groups likely to commit such violations could obtain those weapons—was one of the primary catalysts in the creation of the ATT.<sup>83</sup> Also illustrating the consideration of IHL in the drafting of the ATT is the existence of Article 7, which “recognize[s] that a potential export could still cause serious humanitarian consequences” and requires State Parties to “refuse the export of arms based on a risk assessment” if it determined the weapons would likely be used to violate IHL.<sup>84</sup> Ultimately, the inclusion

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79. ATT pmb., art. 1, *supra* note 19.

80. STUART CASEY-MASLEN ET AL., GENEVA ACAD. OF INT’L HUMANITARIAN L. & HUM. RTS., ACADEMY BRIEFING NO. 3: THE ARMS TRADE TREATY (2013) 17 (2013) [hereinafter BRIEFING NO. 3].

81. *See generally* Int’l Comm. of the Red Cross, *What is International Humanitarian Law?* 1 (Dec. 2004), <https://www.icrc.org/en/download/file/4541/what-is-ihl-factsheet.pdf> (“International humanitarian law is a set of rules that seeks, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.”).

82. *See* VCLT art. 31(1), *supra* note 23 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

83. *See* Ambassador for Disarmament, *supra* note 58, at 1.

84. *Id.* at 5 (referencing Article 7 of the ATT).

of the reference to IHL from the Preamble is in accordance with the typical manner by which the object and purpose of a treaty is determined and tracks directly with the underlying purpose of the treaty. Taken together, Article 1 and the language of the Preamble establish an object and purpose as well as a sufficiently clear standard by which to assess whether the action of a signatory State is attempting to defeat it.<sup>85</sup>

### C. DEFEATING THE OBJECT AND PURPOSE THRESHOLD

While scholars agree that Article 18 of the VCLT creates an interim obligation for signatory States, “it remains unclear how to determine whether the interim obligation is being violated.”<sup>86</sup> This is because the object and purpose of a treaty is often hard to identify through the interpretation of the title, preamble, and context of negotiations.<sup>87</sup> However, Article 1 of the ATT makes that task easier as it “sets out in more general terms the goals and objectives of the treaty.”<sup>88</sup> While such goals and objectives may seem vague, “[i]t is important to note that . . . [a State’s] arms transfer does not occur in a legal vacuum.”<sup>89</sup> To defeat the object and purpose of the ATT, a State must take an action that would undermine international and regional peace, security, and stability while also causing human suffering through violations of IHL.

To more explicitly define the threshold for violating the object and purpose of the ATT, it is necessary to rely on the preambular language of “respecting and ensuring respect,”<sup>90</sup> which refers to the principles of necessity, distinction, proportionality, and humanity codified in the Geneva Conventions of 1949.<sup>91</sup> The obligation established by Common Article 1 of the Geneva Conventions, which the ATT Preamble references, requires High Contracting Parties to ensure that they

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85. See ATT pmb., arts. 1, 7, *supra* note 19.

86. Klabbers, *supra* note 39, at 283.

87. See Jonas & Saunders, *supra* note 39, at 566.

88. BRIEFING NO. 3, *supra* note 80, at 17.

89. *Understanding the Arms Trade Treaty*, *supra* note 5, at 12.

90. ATT pmb., *supra* note 19.

91. See Int'l Comm. of the Red Cross, *Article 1: Respect for the Convention*, in COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, 2D ED., ¶ 118 (Mar. 22, 2016) [hereinafter *Respect for the Convention*], <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

“themselves, their armed forces, other persons and groups acting on their behalf, and their populations as a whole” comply with IHL.<sup>92</sup> Additionally, the ICRC has stated that customary international law has formed requiring High Contracting Parties “not only [to] apply the provisions [of the Geneva Conventions to] themselves, but also do everything reasonably in their power to ensure that the provisions are respected universally.”<sup>93</sup> Therefore, for State action to breach the threshold for violating the object and purpose of the ATT, “there has to be a clear risk that the arms [transferred] will be used to commit serious violations of [international humanitarian] law.”<sup>94</sup> This commitment by States to ensure their arms transfers will not be used to violate IHL is a fairly common standard throughout the regional arms control agreements and is enumerated in Articles 6 and 7 of the ATT and as such is an appropriate threshold for determining if a State action defeats the object and purpose of the ATT.<sup>95</sup>

Since the goal of the use of military force by a State is to subdue the opposing force through death and destruction, attacks on enemy combatants and legitimate military targets cannot be considered contrary to the object and purpose of the ATT because they are actions permitted by IHL.<sup>96</sup> However, an attack directed against civilians who are not directly participating in hostilities, or against civilian infrastructure, is a violation of IHL and thus contrary to the object and purpose of the ATT.<sup>97</sup> Consequently, if an attack against civilians is found to have been facilitated by an arms transfer from another State—the attack was conducted using a weapon transferred or sold by State A to the offending State B—then that transfer of arms is considered an action defeating the

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92. *Id.*

93. *Id.* ¶ 119.

94. Int’l Comm. of the Red Cross, *Arms Transfer Decisions Applying International Humanitarian Law and International Human Rights Law Criteria: A Practical Guide*, ICRC Doc. 0916/002, 5 (Aug. 2016) [hereinafter *Practical Guide*], <https://shop.icrc.org/decisions-en-matiere-de-transferts-d-039-armes-application-des-criteres-fondes-sur-le-droit-international-humanitaire-2814.html>.

95. *See Practical Guide*, *supra* note 94, at 5–6.

96. *See generally* Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, INT’L COMM. OF THE RED CROSS 11–14 (2009), <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

97. *See id.* at 11.

object and purpose of the ATT. Accordingly, when conventional arms are transferred to a country engaged in an armed conflict, the transferring State must ensure that the “arms transfer decision . . . include[s] a consideration of whether the recipient is likely to respect [international humanitarian] law.”<sup>98</sup> In making this determination, the transferring State should focus on whether there are “past trends [of violations] . . . [and/or] recent violations [that] would . . . indicate a clear risk” exists.<sup>99</sup>

The above-stated obligation to ensure that an arms transfer decision took into consideration the potential for IHL violations is one that States have supported during three International Conferences of the Red Cross and Crescent that took place between 2003 and 2011.<sup>100</sup> This obligation has also been analogized to that of the principle of non-refoulement.<sup>101</sup> The analogy has been stated as:

If a government may not return or expel a person to a state in which his or her life or freedom will be at risk on grounds of race, religion, nationality, membership of a social group or political opinion, nor may it sanction the transfer of arms to a country in which the risk arises of serious violation of . . . [international] humanitarian law.<sup>102</sup>

Along these lines, the ICRC has suggested that “States that have signed the ATT must immediately review their arms transfer policies so as to avoid any transfers that would undermine the Treaty’s object and purpose.”<sup>103</sup> This assertion that a signatory State review its arms transfer policies should not be confused with the negative duty of the interim obligation.<sup>104</sup> Instead, the review proposed by the ICRC should be seen

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98. BRIEFING NO. 3, *supra* note 80, at 15; *Practical Guide*, *supra* note 94, at 4.

99. *Practical Guide*, *supra* note 94, at 11.

100. BRIEFING NO. 3, *supra* note 80, at 15.

101. See Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, U.N. HIGH COMM’R FOR REFUGEES 87, 97 (June 30, 2001), <http://www.unhcr.org/en-us/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html> (explaining that *non-refoulement* is a concept which prohibits States from returning a refugee or asylum seeker to territories in which there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion).

102. SUSAN MARK & ANDREW CLAPHAM, INT’L HUM. RTS. LEXICON 13 (2005).

103. *Understanding the Arms Trade Treaty*, *supra* note 5, at 15.

104. The suggestion of implementing a review of a signatory State’s arms transfers

as a mechanism by which signatory States can avoid breaching the threshold. In other words, the interim obligation only requires that signatory States not transfer arms to countries that might use them to commit violations of IHL. It does not require a formal review. However, the suggestion that signatory States to the ATT undertake such a review is a prudent way by which to ensure compliance with their interim obligation.

#### IV. SAUDI ARABIA CASE STUDY

On August 15, 2016, an airstrike by the Saudi-led coalition<sup>105</sup> targeted a hospital operated by Doctors Without Borders (MSF) in northern Yemen, killing at least fourteen people, including an MSF aid worker, and injuring at least twenty-four others.<sup>106</sup> In the aftermath of the airstrike, the fourth such attack against an MSF hospital in ten months, the humanitarian group announced it would be ending its operations in Yemen, driven in large part by the direct targeting of its hospitals.<sup>107</sup> This reality was in stark contrast to the fact that the United States, that month,

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was presented as a potentially helpful method by which to avoid actions that could defeat the object and purpose of the ATT and is not to be confused with a positive requirement on signatory States to implement Articles 6 and 7 of the ATT. Rather it should be seen as a manifestation of the negative duty of the interim obligation of signatory States.

105. For the purposes of this article, the reference to the Saudi-led coalition is meant to reflect an assumption that the action was carried out by Saudi Arabia given the fact that the coalition rarely attributes a specific air strike to one of its members. This assumption is based on the reality that Saudi Arabia has the third largest F-15 fleet in the world, the vast majority of air strikes are conducted by Saudi Arabia or the United Arab Emirates, and Saudi Arabia is the leader of the coalition. See Declan Walsh & Eric Schmitt, *Arms Sales to Saudis Leave American Fingerprints on Yemen's Carnage*, N.Y. TIMES (Dec. 25, 2018), [https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html?em\\_pos=medium&emc=edit\\_war\\_20181227&nl=&nl\\_art=7&nid=88782093mc%3Dedit\\_war\\_20181227&ref=headline&te=1](https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html?em_pos=medium&emc=edit_war_20181227&nl=&nl_art=7&nid=88782093mc%3Dedit_war_20181227&ref=headline&te=1); see also Gul Tuysuz & Steve Visser, *Airstrike Hits Yemen Hospital, Kills 14, Aid Group Says*, CNN (Aug. 16, 2016), <http://www.cnn.com/2016/08/15/middleeast/yemen-hospital-strike/>.

106. See Tuysuz & Visser, *supra* note 105.

107. See Rasha Mohamed & Rasha Abdul Rahim, *Yemen's Horror Exposes the Deadly Hypocrisy of Arms Exporters Including Britain and the U.S.*, INT'L BUS. TIMES (Aug. 26, 2016), <http://www.ibtimes.co.uk/yemens-horror-exposes-deadly-hypocrisy-arms-exporters-including-britain-us-1578164>.

was attending the second Conference of States Parties to the ATT, a treaty specifically meant to lessen human suffering and bring peace, security, and stability.<sup>108</sup>

The conflict in Yemen began in September 2014 between the forces loyal to President Abdrabbuh Mansour Hadi and the Houthi rebel movement.<sup>109</sup> In January 2015, the Houthi forces captured Yemen's capital of Sana'a forcing President Hadi to flee to Saudi Arabia and to invite foreign military intervention in an effort to prevent a complete takeover by the Houthi rebels.<sup>110</sup> In response, Saudi Arabia formed a coalition that has since been carrying out an extensive bombing campaign that has caused a significant number of civilian casualties and has correspondingly led to accusations that Saudi Arabia has committed war crimes.<sup>111</sup> The U.N. Security Council in 2016 noted that "a particularly worrisome escalation of [the Yemeni] conflict has been seen . . . [with] a sixfold increase in the number of children killed and maimed."<sup>112</sup> In a statement to the U.N. Human Rights Council in 2017, Zeid Ra'ad Al Hussein, the U.N. High Commissioner for Human Rights, stated that "the leading cause of civilian casualties, including of children" were airstrikes carried out by the Saudi-led coalition.<sup>113</sup> Of particular concern

108. *Id.*

109. See *Yemen Crisis: Who is Fighting Whom?*, BBC NEWS (Oct. 14, 2016), <http://www.bbc.com/news/world-middle-east-29319423>.

110. *Id.*; see *Dealing in Double Standards: How Arms Sales to Saudi Arabia are Causing Human Suffering in Yemen*, ATT MONITOR 2 (2016), [https://www.amnesty.org.uk/files/webfm/Documents/issues/att\\_monitor\\_case\\_study\\_2\\_-\\_saudi\\_arabia\\_-\\_final\\_version.pdf?4MD5MH6FuNH8AYULhXQj5Xvw5mHijPQZ](https://www.amnesty.org.uk/files/webfm/Documents/issues/att_monitor_case_study_2_-_saudi_arabia_-_final_version.pdf?4MD5MH6FuNH8AYULhXQj5Xvw5mHijPQZ) [hereinafter *Dealing in Double Standards*].

111. See *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, HUM. RTS. WATCH (Oct. 13, 2016), <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>; see also Rasha Mohamed & Rawan Shaif, *Saudi Arabia is Committing War Crimes in Yemen*, FOREIGN POL'Y (Mar. 25, 2016), <http://foreignpolicy.com/2016/03/25/civilian-casualties-war-crimes-saudi-arabia-yemen-war/>.

112. U.N. Secretary-General, *Children and Armed Conflict*, ¶ 6, U.N. Doc. A/70/836—S/2016/360 (Apr. 20, 2016).

113. Zeid Ra'ad Al Hussein, U.N. High Comm'r for Hum. Rts., *Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries*, Opening Statement to Human Rights Council 36th session (Sept. 11, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2204>

has been the indiscriminate manner in which the Saudi-led coalition has conducted airstrikes and how the coalition has failed to take all necessary precautions to prevent civilian harm, which has led to the targeting of schools, hospitals, and religious gatherings.<sup>114</sup> These are all serious violations of the IHL principles of distinction and proportionality.<sup>115</sup>

Even though the bombing of the MSF hospital occurred on the same day that other airstrikes targeted two schools in northern Yemen and killed at least fourteen children, only the international humanitarian aid organizations raised the alarm about the indiscriminate nature of the airstrikes.<sup>116</sup> However, on October 8, 2016, that all changed with an airstrike that targeted a funeral ceremony at a reception center in Sana'a where the Houthi-allied interior minister was mourning his deceased father.<sup>117</sup> The attack on the funeral was reported to have "killed at least 100 people and wounded more than 500, including children."<sup>118</sup> In addition to the first strike, it was reported that a second strike on the same funeral ceremony hit "a few minutes [later] . . . affecting people trying to enter the building to help survivors after the first bomb detonated."<sup>119</sup> This is a practice known as a 'double-tap'<sup>120</sup> and is a direct violation of IHL.<sup>121</sup>

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114. See U.N. High Comm'r for Hum. Rts., *Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014*, A/HRC/36/33, ¶ 28 (Sept. 13, 2017).

115. See *id.*

116. See Ghazi Balkiz et al., *Saudi-Led Coalition Denies Targeting Yemeni Schools that Killed 14 Children*, CNN (Aug. 15, 2016), <http://www.cnn.com/2016/08/15/middleeast/yemen-schools-bombing/index.html>.

117. See Mohammed Ghobari, *Attack on Mourners in Yemen Kills More than 140, Say Local Health Officials*, REUTERS (Oct. 8, 2016), <https://www.reuters.com/article/us-yemen-security-airstrike/attack-on-mourners-in-yemen-kills-more-than-140-say-local-health-officials-idUSKCN1280OR>; Shuaib Almosawa & Ben Hubbard, *A Roar and a Funeral, and Yemen's War is Altered*, N.Y. TIMES (Oct. 9, 2016), <http://www.nytimes.com/2016/10/10/world/middleeast/yemen-saudi-arabia-military.html>.

118. *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, *supra* note 111.

119. *Id.*

120. Chris Woods & Mushtaq Yusufzai, *Get the Data: The Return of Double-Tap Drone Strikes*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 1, 2013), <https://www.thebureauinvestigates.com/2013/08/01/get-the-data-the-return-of-double-tap-drone-strikes/>.

121. See Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3 (1), Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention

Notably, “[p]ictures taken from the ruined [reception center] building showed that it had been hit with at least one US-manufactured air-dropped FBUU-12 Paveway II 500-pound laser-guided bomb.”<sup>122</sup> This proof that a U.S.-manufactured bomb was used in the airstrike on the funeral tracks with other reports that American munitions have been found in the wreckage of other airstrikes “including one with laser-guidance equipment that was made in October 2015.”<sup>123</sup> Some of the other American-made munitions that have been identified include “at least one CBU-105, a cluster bomb[, found in the rubble of the Amran Cement Factory that was] manufactured by Textron Defense Systems of Rhode Island.”<sup>124</sup>

In the days following the bombing of the funeral, the Saudi Joint Incidents Assessment Team (JIAT) launched an investigation in response to the resulting international criticism.<sup>125</sup> The JIAT investigation found “that a party affiliated to the Yemeni Presidency of the General Chief of Staff wrongly passed information that there was a gathering of armed Houthi leaders in a known location in Sana’a, and insisted that the location be targeted immediately as a legitimate military

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(IV)] (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time in any place whatsoever with respect to the above-mentioned persons: (a) violence to the life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”).

122. *Yemen: Saudi-Led Funeral Attack Apparent War Crime*, *supra* note 111.

123. Ben Hubbard, *U.S. Fingerprints on Attacks Obliterating Yemen’s Economy*, N.Y. TIMES (Nov. 13, 2016), <https://www.nytimes.com/2016/11/14/world/middleeast/yemen-saudi-bombing-houthis-hunger.html>; *see also Yemen: U.S.-Made Bombs Used in Unlawful Airstrikes*, HUM. RTS. WATCH (Dec. 8, 2016), <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>.

124. Hubbard, *supra* note 123.

125. *See Saudi Coalition Attacked Yemen Funeral Based on Wrong Information: Investigation*, REUTERS (Oct. 15, 2016), <http://www.reuters.com/article/us-yemen-security-saudi-idUSKBN12F090>.

target.”<sup>126</sup> Ultimately, the JIAT investigation determined that the Air Operations Center in Yemen failed to obtain approval for the strike from Coalition command and did not follow the Coalition command precautionary measures “to ensure that the location [was] not a civilian one.”<sup>127</sup> In a statement, JIAT said it would take “appropriate action, in accordance with Coalition regulations . . . against those who caused the incident, and that compensation must be offered to the families of victims.”<sup>128</sup> The JIAT also provided assurances to the international community that it would conduct a review of its targeting practices, “rules of engagement (ROEs) and update their procedures to ensure adherence in future.”<sup>129</sup>

However, less than a month later, a Saudi-led coalition airstrike hit a prison, killing at least sixty people.<sup>130</sup> According to reports, “[m]any of those killed were inmates”<sup>131</sup> who “were serving jail terms for minor crimes or who were in pre-trial detention.”<sup>132</sup> The Saudi-led coalition has also destroyed “bridges, power stations, poultry farms, a key seaport and factories that produce yogurt, tea, tissues, ceramics, Coca-Cola, and potato chips” in what the United Nations has said is an “economic dimension of this war . . . [and] a tactic . . . to put pressure on the politics.”<sup>133</sup> The prisoners, like the funeral goers, civilian factories, and infrastructure, all have protected status under IHL and cannot lawfully be targeted during an armed conflict.<sup>134</sup>

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126. Press Release, Joint Incidents Assessment Team (JIAT), Great Hall Incident in Sana’a, (Oct. 15, 2016) (on file with Saudi Press Agency), <http://www.spa.gov.sa/viewstory.php?lang=en&newsid=1548647>.

127. *Id.*

128. *Id.*

129. *Id.*

130. See Sudarsan Raghavan, *Airstrikes Kill More than 40 and Wound Scores in Yemeni Port City*, WASH. POST (Oct. 31, 2016), [https://www.washingtonpost.com/world/airstrikes-kill-more-than-40-and-wound-scores-in-yemeni-port-city/2016/10/30/4666dbfd-afa3-4f8f-9542-7ad77664d4ee\\_story.html?postshare=4471477934006192&tid=ss\\_tw](https://www.washingtonpost.com/world/airstrikes-kill-more-than-40-and-wound-scores-in-yemeni-port-city/2016/10/30/4666dbfd-afa3-4f8f-9542-7ad77664d4ee_story.html?postshare=4471477934006192&tid=ss_tw).

131. *Id.*

132. Associated Press in Sana’a, *Yemen: Death Toll from Saudi-Led Airstrike on Prisons Rises to 58*, THE GUARDIAN (Oct. 30, 2016), <https://www.theguardian.com/world/2016/oct/30/yemen-death-toll-from-saudi-led-airstrike-on-prisons-rises-to-58>.

133. Hubbard, *supra* note 123.

134. See Geneva Convention (IV) art. 3(1), *supra* note 121.

This practice of targeting civilians and civilian objects by the Saudi-led coalition has continued unabated, as a panel of experts reported to the U.N Security Council in 2017, stating that “[i]n 8 of the 10 investigations, the [p]anel found no evidence that the air strikes targeted legitimate military objectives.”<sup>135</sup> The panel of experts went further by stating that they could say with almost complete certainty that the Saudi-led “coalition did not meet [IHL] requirements of proportionality and precautions in attack . . . [and concluded that] some of the attacks may amount to war crimes.”<sup>136</sup> In contrast, the JIAT in 2017 found their targeting of “homes, schools and clinics” to be justified and that errors in targeting only occurred three times in an investigation of fifteen airstrikes.<sup>137</sup> By and large the JIAT said the Saudi-led coalition “acted in accordance with [IHL] . . . absolv[ing] the coalition of responsibility for attacks on a Coca-Cola factory . . . and a centre for the blind.”<sup>138</sup> On August 9, 2018, the Saudi-led coalition carried out an airstrike on a school bus in northern Yemen that killed fifty-four people, forty-four of them children.<sup>139</sup> The reaction by the international community this time was swift with the ICRC tweeting that “[u]nder international humanitarian law, civilians must be protected during conflict.”<sup>140</sup> Despite the international condemnation, Col. Turki al-Maliki, spokesman for the Saud-led coalition, justified the airstrike “as a legitimate military operation . . . carried out in accordance with international humanitarian law,” because members of the Houthi rebels were in the bus.<sup>141</sup> In the

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135. Panel of Experts on Yemen, Letter dated Jan. 27, 2017 from the Panel of Experts on Yemen addressed to the President of the Security Council, S/2018/193 ¶ 127 (Jan. 31, 2017).

136. *Id.*

137. Stephen Kalin, *Saudi Coalition Investigates Own Air Strikes, Clears Itself*, REUTERS (Sept. 12, 2017), <https://www.reuters.com/article/us-yemen-security-investigation/saudi-coalition-investigates-own-air-strikes-clears-itself-idUSKCN1BN2O6>.

138. *Id.*

139. See Shuaib Almosawa et al., *44 Small Graves Stir Questions About U.S. Policy in Yemen*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/world/middleeast/saudi-yemen-bomb-bus-children.html>.

140. ICRC Yemen (@ICRC\_ye), TWITTER (Aug. 9, 2018, 12:38 AM), [https://twitter.com/icrc\\_ye/status/1027459027540893696?lang=en](https://twitter.com/icrc_ye/status/1027459027540893696?lang=en).

141. Stephen Snyder, *Civilians Say ‘Time to Say No for War’ After Dozens of Yemeni Children Die in School Bus Attack*, PRI (Aug. 11, 2018),

days following, munitions experts confirmed that the bomb used “was a 500-pound (227-kilogram) laser-guided MK 82 bomb made by Lockheed Martin,” similar to the munitions used in the attack on the funeral in 2016.<sup>142</sup> Additionally, it has been confirmed that U.S.-supplied munitions and weapons have been used by the Saudi-led coalition in attacks on hospitals, markets, homes, weddings, funerals, civilian infrastructure, and other civilian objects.<sup>143</sup>

While the United States does not conduct or assist in the targeting assessments for the Saudi-led coalition, “[h]undreds of American aviation mechanics and other specialists, working under Defense Department contracts, keep the Saudi F-15 fleet in the air.”<sup>144</sup> This fleet is now the “world’s third-largest fleet of F-15 jets, after the United States and Israel,” thanks to multi-billion dollar arms sales of aircraft and air-to-ground munitions from the United States to Saudi Arabia facilitated by the U.S. Department of Defense.<sup>145</sup>

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<https://www.pri.org/stories/2018-08-11/civilians-say-time-say-no-war-after-dozens-yemeni-children-die-school-bus-attack>; see generally Stephen Kalin & Ahmed Tolba, *Saudi-led coalition admits deadly Yemen strike on bus was unjustified*, REUTERS (Sept. 1, 2018), <https://www.reuters.com/article/us-yemen-security-saudi-strike/saudi-led-coalition-admits-deadly-yemen-strike-on-bus-was-unjustified-idUSKCN1LH3JO?il=0> (reporting that while a subsequent JIAT investigation of the airstrike found that the bombing was “unjustified and pledged to hold accountable anyone who contributed to the error,” such a investigation and finding is rare and likely occurred because of international pressure).

142. Nima Elbagir et al., *Bomb that Killed 40 Children in Yemen was Supplied by the U.S.*, CNN (Aug. 17, 2018), <https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html>.

143. See HUM. RTS. WATCH, *HIDING BEHIND THE COALITION: FAILURE TO CREDIBLY INVESTIGATE AND PROVIDE REDRESS FOR UNLAWFUL ATTACKS IN YEMEN* (2018).

144. Walsh & Schmitt, *supra* note 105.

145. *Id.*; see William D. Hartung & Derek Paulhus, *Arms Sales to Saudi Arabia: The Corporate Connection*, CTR. FOR INT’L POL’Y (Aug. 10, 2017), [https://docs.wixstatic.com/ugd/488e54\\_c56ac4bc8f3443f8941e994f629af385.pdf](https://docs.wixstatic.com/ugd/488e54_c56ac4bc8f3443f8941e994f629af385.pdf). See generally Jeffrey E. Stern, *From Arizona to Yemen: The Journey of an American Bomb*, N.Y. TIMES MAG. (Dec. 11, 2018), [https://www.nytimes.com/2018/12/11/magazine/war-yemen-american-bomb-strike.html?emc=edit\\_ck\\_20181214&nl=cooking&nlid=5133973520181214&te=](https://www.nytimes.com/2018/12/11/magazine/war-yemen-american-bomb-strike.html?emc=edit_ck_20181214&nl=cooking&nlid=5133973520181214&te=); Aaron Mehta, *Revealed: Trump’s \$110 Billion Weapons List for the Saudis*, DEFENSE NEWS (June 8, 2017), <https://www.defensenews.com/breaking-news/2017/06/08/revealed-trump-s-110-billion-weapons-list-for-the-saudis/>.

## A. THE U.S. RESPONSE

From the beginning of the conflict in Yemen, the United States has opposed the Houthi rebels and sought to support President Hadi.<sup>146</sup> When the Saudi-led coalition entered the Yemeni conflict in 2015, the United States began providing logistical support in the form of aerial refueling and limited intelligence support, though not with regard to specific targeting.<sup>147</sup> As the intensity of the conflict increased, so did the logistical support by the United States, such that by August 8, 2016, the U.S. Air Force “sorties in support of the Saudi-led coalition against Yemeni rebels [had] increased roughly 61 percent since AFCENT last provided data in February.”<sup>148</sup> In short, “[m]any of the [Saudi-led coalition] strikes are carried out by pilots trained by the United States, who fly American-made jets that are refueled in the air by American planes.”<sup>149</sup> Beyond logistical support, the United States also continued to seek approval for weapons sales and arms transfers to Saudi Arabia with the express knowledge that those defense articles would be “replenishing Saudi weaponry damaged or used up in Yemen.”<sup>150</sup>

Despite a brief ban on the sale of precision-guided munitions following the funeral hall attack, the provision of “defense articles and services, including air-to-air refueling; certain intelligence support; and military advice” continued unabated.<sup>151</sup> On March 22, 2018, the U.S.

146. See Bruce Riedel, *A Brief History of America's Troubled Relationship with Yemen*, BROOKINGS (Oct. 22, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/10/22/a-brief-history-of-americas-troubled-relationship-with-yemen/>.

147. See Andrew Tilghman, *U.S. Launches Aerial Refueling Mission in Yemen*, MILITARY TIMES (Apr. 8, 2015), <http://www.militarytimes.com/story/military/pentagon/2015/04/08/refueling-mission/25461213/>.

148. Oriana Pawlyk, *U.S. Air Force Refueling Missions over Yemen Grow by 60 Percent*, AIRFORCE TIMES (Aug. 8, 2016), <https://www.airforcetimes.com/story/military/2016/08/08/us-air-force-refueling-missions-over-yemen-grow-60-percent/88400838/>.

149. Hubbard, *supra* note 123.

150. William D. Hartung, *U.S. Arms Transfers to Saudi Arabia and the War in Yemen*, SECURITY ASSISTANCE MONITOR (Sept. 7, 2016), [http://securityassistance.org/fact\\_sheet/us-arms-transfers-saudi-arabia-and-war-yemen#\\_edn1](http://securityassistance.org/fact_sheet/us-arms-transfers-saudi-arabia-and-war-yemen#_edn1).

151. Letter from Department of Defense Acting General Counsel William Castle to Senate Majority Leader Mitchell “Mitch” McConnell and Senate Minority Leader Charles E. “Chuck” Schumer at 1 (Feb. 27, 2018),

State Department approved a new arms sale to Saudi Arabia totaling nearly \$1 billion that included “6,500 anti-tank missiles, as well as services and parts for Abram tanks, armored vehicles, helicopters, and other military equipment.”<sup>152</sup> Less than a month after the approval of that sale, the U.S. State Department approved another arms sale to Saudi Arabia for \$1.3 billion, including “180 155 mm M109A5/A6 medium self-propelled howitzer structures for conversion to 177 155 mm M109A6 Paladin medium self-propelled howitzer systems . . . [to] enhance Saudi Arabia’s ability to support its deployed forces [in Yemen] and defend its borders.”<sup>153</sup> These sales were approved even in the face of reports that the Saudi-led coalition airstrikes were continuing to target civilians and civilian objects.<sup>154</sup>

While the U.S. Senate has sought on two separate occasions to stop the sale of weapons to Saudi Arabia through bipartisan resolutions, citing the high number of civilian casualties and seeming disregard for the IHL principles of proportionality and distinction, neither attempt garnered enough support to prevent the sales.<sup>155</sup> Officials at the U.S. State Department who reviewed the pending arms sales shared the concerns

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<https://assets.documentcloud.org/documents/4390794/Acting-GC-Letter-to-Majority-Leader-Re-Sanders.pdf>.

152. Abramson, *supra* note 27.

153. Kheel, *supra* note 27.

154. See *Saudi Coalition Airstrikes Target Civilian Factories in Yemen: Unlawful Attacks Harm Economy, Show Need for Victim Compensation*, HUM. RTS. WATCH (July 11, 2016), <https://www.hrw.org/news/2016/07/11/saudi-coalition-airstrikes-target-civilian-factories-yemen> (reporting that Saudi-led coalition strikes have hit numerous factories, warehouses, and other civilian structures in Yemen killing 130 civilians and injuring 171 more); *Yemen: U.S. Bombs Used in Deadliest Market Strike: Coalition Allies Should Stop Selling Weapons to Saudi Arabia*, HUM. RTS. WATCH (Apr. 7, 2016), <https://www.hrw.org/news/2016/04/07/yemen-us-bombs-used-deadliest-market-strike> (stating that Saudi-led coalition strikes using U.S.-supplied bombs hit a market killing 97 civilians, including 25 children).

155. See Jeremy Herb & Seung Min Kim, *Senate Backs Tank Sales to Saudi Arabia*, POLITICO (Sept. 21, 2016), <https://www.politico.com/story/2016/09/senate-saudi-arabia-tank-sales-228479>; Elana Schor, *Senate Backs Weapons Sales to Saudi Arabia*, POLITICO (June 13, 2017), <https://www.politico.com/story/2017/06/13/saudi-arabia-weapons-sales-senate-approves-239505>; Letter from Ted W. Lieu (D-CA 33rd District) to Glenn A. Fine Acting Inspector General for the Department of Defense (Aug. 13, 2018), <https://lieu.house.gov/sites/lieu.house.gov/files/2018-08-13%20TWL%20Letter%20to%20DoD%20IG%20Fine%20-%20Yemen.pdf> (asserting that these disproportionate airstrikes violate international law).

of the U.S. Senate and were on record as being “skeptical of the Saudi military’s ability to target Houthi militants without killing civilians.”<sup>156</sup> Notably, “a State Department specialist on protecting civilians in conflict acknowledged Saudi strikes were going awry . . . [and that] State Department lawyers ‘had their hair on fire’ as reports of civilians casualties in Yemen multiplied.”<sup>157</sup> Behind the scenes, the United States emphasized to Saudi officials the need to use “the utmost diligence in the targeting process and to take all precautions to minimize civilian casualties and damage to civilian infrastructure.”<sup>158</sup>

Yet publicly, then-Secretary of Defense James Mattis stated that the United States has “not seen any callous disregard . . . [and t]he training that we have given [Saudi Arabia], we know has paid off,” even as reports circulated of Saudi-led airstrikes bombing a market and a school bus of children.<sup>159</sup> Indeed, the U.S. Department of Defense has opted to attach training programs for the Saudi military forces on “civilian casualty avoidance, the law of armed conflict, human rights command and control” as a part of recent arms sales in an attempt to limit the instances of civilian casualties.<sup>160</sup> Contrary, however, to the assertion that such trainings have “paid off,” a former Assistant Secretary of State opined that the “American efforts to advise the Saudis on how to protect civilians often came to naught” as the Saudis “were just not willing to listen” and continued to strike targets the United States had identified as civilian.<sup>161</sup> At the same time, the U.S. Department of Defense defended the actions of the Saudi-led coalition even as evidence continued to mount that U.S.-supplied bombs were and continued to be used by the Saudi-led coalition in various airstrikes targeting civilians and civilian

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156. Warren Strobel & Jonathan Landy, *Exclusive – As Saudis Bombed Yemen, U.S. Worried About Legal Blowback*, REUTERS (Oct. 10, 2016), <http://uk.reuters.com/article/uk-usa-saudi-yemen-exclusive-idUKKCN12A0BG>.

157. *Id.*

158. *Id.*

159. Luis Martinez, *Mattis: U.S. Support to Saudi Coalition in Yemen Not Unconditional*, ABC NEWS (Aug. 28, 2018), <https://abcnews.go.com/International/mattis-us-support-saudi-coalition-yemen-unconditional/story?id=57459659>; see Elbagir et al., *supra* note 142.

160. News Release, Defense Security Cooperation Agency, U.S. Dep’t of Defense (June 5, 2017), [https://www.dsca.mil/sites/default/files/mas/saudi\\_arabia\\_16-77.pdf](https://www.dsca.mil/sites/default/files/mas/saudi_arabia_16-77.pdf).

161. Walsh & Schmitt, *supra* note 105.

objects.<sup>162</sup> The response by the U.S. Department of Defense to such evidence was to declare that the United States “may never know if the munitions [used] was one that the US sold to [Saudi Arabia],” stating further that the United States would not investigate such airstrikes because “the Pentagon doesn’t ‘provide or vet the Saudi-led coalition targets.’”<sup>163</sup>

However, the reality seems to belie the suggestion that it was not possible for the United States to know whether the munitions used to target civilians and civilian objects were American-made.<sup>164</sup> As noted by the U.S. State Department’s former adviser on civilian harm, who worked with the Saudi-led coalition from 2015 to 2017, information detailing “every airstrike: warplane, target, munitions used and a brief description of the attack,” including whether the munitions used were U.S.-made, is maintained in a database that the American liaison officer in Riyadh had access to and from which spreadsheets of that data were often shared internally.<sup>165</sup> The existence of such a database was not disputed by U.S. Central Command which stated that “American officers only used coalition data to carry out their core mission: advising on civilian casualties, sharing intelligence on Houthi threats.”<sup>166</sup> Even without access to the military database, investigative reporting by news agencies and human rights organizations has been able to identify numerous instances where U.S.-made bombs were used in strikes on civilians and civilian objects since 2015.<sup>167</sup>

As reports of civilian casualties mounted, the U.S. Congress, although unable to prevent further arms sales, sought to make U.S. military support (i.e. refueling, intelligence, and military advice) conditional on certification by the Secretary of State that Saudi Arabia was “undertaking . . . demonstrable actions to reduce the risk of harm to

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162. HUM. RTS. WATCH, *supra* note 143.

163. Alex Ward, *The Pentagon Won't Check if U.S. Bombs Killed Kids in Yemen*, CNN *Did it for Them*, VOX (Aug. 20, 2018), <https://www.vox.com/2018/8/20/17760322/yemen-children-bomb-bus-pentagon>.

164. Stern, *supra* note 145.

165. Walsh & Schmitt, *supra* note 105.

166. *Id.*

167. See generally Nima Elbagir et al., *Exclusive Report: Made in America*, CNN (Sept. 2018), <https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/>.

civilians and civilian infrastructure resulting from military operations.”<sup>168</sup> On September 10, 2018, despite the multiplying reports of indiscriminate airstrikes and internal U.S. government frustration over the level of civilian harm, Secretary of State Michael Pompeo provided the required certification, an action that was quickly endorsed by then-Secretary of Defense James Mattis.<sup>169</sup> While the failure to certify would not have prevented the continued sale of arms to Saudi Arabia, the certification shows that U.S. agencies were unwilling to jeopardize a close, financially significant, relationship with Saudi Arabia over verifiable violations of IHL and potential war crimes.<sup>170</sup>

The compelling financial incentives of the relationship are demonstrated by the fact that when Saudi Arabia seeks to purchase arms and munitions from the United States, it prefers to use the U.S. Department of Defense’s Foreign Military Sales program (FMS) instead of purchasing directly from the manufacturers.<sup>171</sup> As part of the FMS, the “Pentagon handles the logistics and liaises with the private companies to fulfill the” FMS order,<sup>172</sup> while the U.S. State Department reviews and approves all FMS purchase orders and ensures the sales are in compliance with FMS’ objective of “strengthen[ing] the security of the U.S. and promot[ing] world peace.”<sup>173</sup> In exchange for its services, the U.S. Department of Defense charges the purchasing country a two

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168. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1290 (c)(1)(C)(2018).

169. Press Statement, Secretary of State Michael R. Pompeo, *Certification to Congress on Actions of Saudi Arabia and UAE in Yemen Under the NDAA* (Sept. 12, 2018), <https://www.state.gov/secretary/remarks/2018/09/285861.htm>; News Release, Secretary of Defense James N. Mattis, *Statement by Secretary of Defense James N. Mattis on Actions of Saudi Arabia and UAE in Yemen* (Sept. 12, 2018), <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1628689/statement-by-secretary-of-defense-james-n-mattis-on-actions-of-saudi-arabia-and/source/GovDelivery/#.W5kkKhZ8q11.twitter>.

170. See Dion Nissenbaum, *Top U.S. Diplomat Backed Continuing Support for Saudi War in Yemen Over Objections of Staff*, WALL STREET J. (Sept. 20, 2018), <https://www.wsj.com/articles/top-u-s-diplomat-backed-continuing-support-for-saudi-war-in-yemen-over-objections-of-staff-1537441200>.

171. Stern, *supra* note 145.

172. *Id.*

173. Defense Security Cooperation Agency, *Foreign Military Sales*, <https://www.dsca.mil/programs/foreign-military-sales-fms> (last visited Sept. 3, 2019).

percent administrative fee on the overall purchase price.<sup>174</sup> With \$15.9 billion worth of conventional weapons, equipment, and training delivered to Saudi Arabia as part of the FMS program since the start of the Yemeni conflict, there is little doubt that the United States had a vested financial interest in continuing to conclude arms sales with Saudi Arabia.<sup>175</sup>

## B. IMPLICATIONS OF THE ARMS SALES

The ultimate decision by the United States to approve arms sales to Saudi Arabia squarely marks those arms transfers as affirmative acts that reached the threshold for defeating the object and purpose of the ATT. While a signatory to the ATT, the United States had a duty to refrain from approving arms transfers that knowingly undermined “international and regional peace, security and stability” and that lead to “human suffering” through the undermining of “[r]espect[ . . . ] and ensuring respect for international humanitarian law.”<sup>176</sup> Considering that the United States was the single largest exporter of military equipment to Saudi Arabia from 2014 to 2018,<sup>177</sup> that there are multitudes of reports of indiscriminate attacks on civilians by the Saudi-led coalition in Yemen,<sup>178</sup> that reports have confirmed that bombs manufactured by the

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174. Defense Security Cooperation Agency, *DSCA to Reduce FMS Administrative Surcharge for Partners*, <https://www.dscamilitary.com/news-media/news-archive/dsca-reduce-fms-administrative-surcharge-partners>.

175. See *Sec. Assistance Monitor*, *supra* note 18.

176. ATT art. 1, *supra* note 19.

177. See *TIV of Arms Exports to Saudi Arabia 2014–2018*, STOCKHOLM INT’L PEACE RES. INST., <https://armstrade.sipri.org/armstrade/page/values.php> (last visited Oct. 7, 2019) (showing data that the United States is the largest exporter of arms to Saudi Arabia, with a SIPRI TIV value of 11,470 of the total 16,869); *Sources and Methods*, STOCKHOLM INT’L PEACE RES. INST., <https://www.sipri.org/databases/armstransfers/sources-and-methods/> (last visited Oct. 14, 2019) (“SIPRI TIV figures do not represent sales prices for arms transfers. They should therefore *not* be directly compared with gross domestic product (GDP), military expenditure, sales values or the financial value of export licenses in an attempt to measure the economic burden of arms imports or the economic benefits of exports. They are best used as the raw data for calculating trends in international arms transfers over periods of time, global percentages for suppliers and recipients, and percentages for the volume of transfers to or from particular states.”).

178. See generally “*What Military Target Was in My Brother’s House?*” *Unlawful Coalition Airstrikes in Yemen*, HUM. RTS. WATCH (2015),

United States were being used by the Saudi-led coalition to attack civilian targets,<sup>179</sup> and that it is common knowledge within the U.S. State Department that the Saudi military was not sufficiently capable of distinguishing military targets in an urban environment,<sup>180</sup> there is little question that U.S. arms sales to Saudi Arabia from 2014 through 2019 defeated the object and purpose of the ATT.

It bears mentioning that the United States has a policy in place that requires a review of all arms transfers.<sup>181</sup> Initially implemented via a classified directive in 1995, the U.S. Conventional Arms Transfer Policy was updated and made public on January 15, 2014 as Presidential Policy Directive 27 (PPD-27). PPD-27's stated purpose was to support arms "transfers that meet [the] legitimate security requirements of [U.S.] allies and partners in support of [U.S.] national security and foreign policy interests."<sup>182</sup> As part of accomplishing this stated purpose, "[a]ll arms transfer decisions will be guided by a set of criteria that maintains the *appropriate balance* between legitimate arms transfers to support U.S. national security . . . and the need for restraint against the transfer of arms that would . . . serve to facilitate human rights abuses or violations of international humanitarian law, or otherwise undermine international security."<sup>183</sup> Based on the language of PPD-27, and given that the directive was put in force soon after signature of the ATT, it would seem that the United States sought to establish a review mechanism—similar to the one previously mentioned<sup>184</sup>—that could potentially ensure that U.S. arms transfers did not reach the threshold for defeating the object and purpose of the ATT. Even with this review mechanism, however, arms transfers to Saudi Arabia continued unabated, demonstrating the

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[https://www.hrw.org/sites/default/files/report\\_pdf/yemen1115\\_4up.pdf](https://www.hrw.org/sites/default/files/report_pdf/yemen1115_4up.pdf).

179. See Strobel & Landy, *supra* note 156.

180. *Id.*

181. See Gregory M. Kauser, Deputy Sec'y, Bureau of Pol.-Mil. Aff., *Remarks to IISS: Conventional Arms Transfer Policy: Advancing American National Security Through Security Cooperation* (Apr. 23, 2014), <https://2009-2017.state.gov/t/pm/rls/rm/2014/225118.htm>.

182. Presidential Policy Directive/PPD-27, United States Conventional Arms Transfer Policy (Jan. 15, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>.

183. *Id.* (emphasis added).

184. See *supra* Part III.C.

failure of the policy and corresponding oversight mechanism to fulfill the U.S.' interim obligation as a signatory to the ATT.

On April 19, 2018, PPD-27 was replaced by a National Security Presidential Memorandum (NSPM) with the stated purpose of “better aligning [U.S.] policy regarding conventional arms transfers with [U.S.] national and *economic* security interests.”<sup>185</sup> The NSPM makes an unequivocal shift to considering the financial benefit as a major factor in approval of arms transfers by stating that the new policy changes will “bolster [the U.S.] economy; spur research and development; enhance the ability of the [U.S.] defense industrial base to create jobs; [and] increase [U.S.] competitiveness in key markets.”<sup>186</sup> While the NSPM maintains the requirement from PPD-27 that the United States consider whether an arms transfer “may be used to undermine international peace and security or contribute to abuses of human rights . . . [or] violations of international humanitarian law” and even to cancel the transfer authorization if it is known at the time “that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949,” there is little doubt that the financial incentives have become the driving force behind approval of arms transfers.<sup>187</sup> The view of arms transfers in purely economic terms is best illustrated by the statement in the NSPM that the U.S. government will actively seek to “increase trade opportunities for United States [defense] companies . . . [through] advocacy and trade promotion.”<sup>188</sup>

While the United States does, therefore, have a policy by which to ensure that its arms transfers are “consistent with the requirements of all [domestic laws] and international commitments and obligations,” the fact that transfers to Saudi Arabia occurred is sufficient to constitute an action that defeated the object and purpose of the ATT because of the documented disregard for IHL as evidenced by the high level of civilian

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185. Presidential Memoranda, National Security Presidential Memorandum Regarding U.S. Conventional Arms Transfer Policy (Apr. 19, 2018), <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy>.

186. *Id.*

187. *Id.*

188. *Id.*

harm.<sup>189</sup> The existence of a review mechanism cannot negate the liability of a State that violates the interim obligation. While a signatory to the ATT, the United States maintained a continuing negative duty to refrain from the transfer of arms to a country that has allegedly committed war crimes.<sup>190</sup>

## V. CONCLUSION

The interim obligation of signatory States to any treaty is to avoid taking action that seeks to defeat the treaty's object and purpose. How to identify the object and purpose of a treaty has been and will likely continue to be a topic of vigorous debate. In the case of the ATT, however, Article 1 and the Preamble establish in clear terms its object and purpose. Signatories to the ATT shall refrain from actions that undermine international and regional peace, security, and stability and that increase human suffering through violations of IHL. As such, the U.S.' decision to repeatedly follow through with the sale of arms to Saudi Arabia from 2014 through 2019 was clearly a violation of its interim obligation as a signatory to the ATT.

The reality that the United States violated its interim obligation as a signatory to the ATT should be seen as a wake-up call for arms exporting countries that have signed the treaty. While the U.S. share of the global arms market made it particularly vulnerable to taking actions that potentially reached the threshold for defeating the object and purpose of the ATT, there is no minimum quantity necessary to trigger a violation of a signatory's interim obligation. The only requirement for determining whether the arms sale triggers a violation is whether it would undermine international and regional peace, security, and stability while also causing human suffering through violations of IHL. Fundamentally, signatories to the ATT should include in their conventional arms transfer policy an explicit assessment of whether a transfer would defeat the object and purpose of the ATT—being particularly mindful of arms transfers to countries involved in an armed conflict.

Regardless of future actions taken to ensure compliance, it remains up to the State Parties to the ATT to enforce some admonishment or

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189. *Id.*

190. *Dealing in Double Standards*, *supra* note 110, at 5–7.

punishment on the United States for its violations of the interim obligation from 2014 to 2019. Without consequences—political, economic, or diplomatic—there is little practical use in having an identifiable object and purpose, even when that object and purpose is to reduce human suffering.

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