The state responsibility in the context of arms trade with human rights violating countries

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Introduction

In the history of mankind, warfare and armed conflicts are such events, which are more violent and destructive than they need to be.[1] There have been attempts with regard to both human rights law and humanitarian law to provide protection for civilians during such events.[2] After the Second World War, the Universal Declaration of Human Rights and the Geneva Conventions, both mostly recognized as customary international law and most recently, the Arms Trade Treaty in 2013 accompanied by other human rights treaties offer a wide range of protection. One does not need to be a military expert to know what harm arms, from small firearms to missiles fired from aircraft or drone, projectiles fired from a tank, mortars etc., can cause to civilians. News of innocent civilians being collateral damage have become normality now a day and the Arms Trade Treaty could potentially save many lives and also protect against potential human rights violations through arms from various actors.

Seemingly, there is a close relationship between humanitarian law and human rights law.[3] Both are applicable during armed conflict, and in essence, both are deemed to offer protection for humans as far as possible.[4] However, in the current stage, it is nearly impossible to hold the state responsible for trading arms with countries which do not necessarily comply with obligations from the Arms Trade Treaty. The purpose of this paper is hence to create a theoretical concept that prohibits arms trade with human rights violating countries and consequently to answer the question of the extent to which states can be held responsible on humanitarian law grounds for arms trade with human rights violating countries.

To begin with, the relationship between international humanitarian law and human rights will be investigated. Subsequently, a discussion on an obligation will be conducted, which will constitute an internationally wrongful act that enables a claim under State Responsibility. The results will be summarized and presented in the conclusion.

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[1] Geoffrey Best, p.3, War & Law Since 1945, *Clarendon Press Oxford*, 1997
[2] Shane Darcy, p.3-7, Collective Responsibility and Accountability under International law, *Transnational Publisher*, 2007
[3] Lindsay Moir, p.193 The Law of Internal Armed Conflict, *Cambridge Studies in International and Comparative Law*, 2003
[4] IHL and human rights law, 29-10-2010 Overview, ICRC

The relationship between human rights and humanitarian law

In order to establish the relationship between international humanitarian law (IHL), arms trade and the human rights violating importers of various arms, it is vital to examine the relationship between human rights and humanitarian law.

The UN General Assembly released a resolution of human rights in armed conflict in 1968 for the twentieth anniversary of the Universal Declaration of Human rights with the title of "Respect for Human Rights in Armed Conflict".[5] Several other resolutions followed with emphasis on human rights during armed conflict, while approaching areas of humanitarian law.[6] With regard to the relationship between human rights law and humanitarian law, Robertson stated conclusively that the "international protection of human rights is the genus of which humanitarian law is a species."[7] However, not all the questions about the relationship of both are thus answered, especially those concerning the origin, scope of application and enforceability. Thus, despite the extensive discussion on the relationship between IHL and human rights[8], there is no unanimous opinion on the relationship between international human rights law and IHL.[9]

Besides the differences with regard to historical development, there are more differences between human rights and humanitarian law. Humanitarian law primarily regulates the relationship between states during an implementation of human rights diametric situation. It protects citizens and other members of the states, which have fallen in control of the opposing party and serves as a constant reminder that the compliance with certain humanitarian principles in an armed conflict would be an asset for both parties in that sense that individuals who are not or no longer participating in the hostilities can enjoy certain protection and the parties which are carrying out the conflict have a guideline to work with in the conduct of their conflict and avoid unnecessary collateral damages.[10] In addition, humanitarian law also threatens individuals with universal jurisdiction of the International Criminal Court, and unlike human rights law, compliance with humanitarian law is observed and guarded

[5] ICRC Treaties and State Parties of such Treaties, Respect for Human rights in Armed Conflicts. Resolution 2444 of the United Nations general Assembly, 19th December 1968.
[6] Andreas Götze, p. 23, Fragen der Anwendbarkeit des humanitären Völkerrechts unter besonderer Berücksichtigigung der sogenannten Nationalen Befreiungskriege, *Peter Lang*, 2002.
[7] Supra. note 5
[8] For extensive discussion on this topic, see Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004.
[9] Interaction between Humanitarian Law and Human Rights Law in Armed Conflicts, Rule of Law in Armed Conflict Project, Geneva Academy of International Humanitarian Law and Human Rights.
[10] Supra. note 5; See also: What is International Humanitarian Law, ICRC.

by the International Committee of the Red Cross (ICRC) and the institutions of the protecting powers.[11] The definition of the ICRC of humanitarian law states: "International humanitarian law is made up of all the international legal provisions, whether of written or customary law, ensuring respect for the individual in armed conflict. (…) International humanitarian law comprises of the "Law of Geneva", which aims to safeguard military personnel hors de combat and persons who do not take part in the hostilities, and the "law of the Hague", which determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of harming the enemy".[12] Human rights law, however, concerns the relationship between the state and its citizens during the non-violent peacetime.

While there are scholars such as Meyrowitz, who argues for a strict distinction between human rights and humanitarian law, others perceive an increasing overlap in both fields of law. Such overlapping results primarily from the remaining in force of a minimum standard of human rights in emergency and conflict situations. In addition, it is the result of the inclusion and application of humanitarian law on domestic conflict.[13] Thus, some suggest consolidating both the norms of human rights and humanitarian law under the term of international humanitarian law, while others prefer the status quo.[14] Research conducted by the ICRC shows important practical problems considering the possibility to enforce international humanitarian law. "In sum, although the practice of human rights bodies described above is still limited, it provides a welcome addition to the admittedly limited array of international means to enforce compliance with international humanitarian law by parties to armed conflicts."[15] This clearly demonstrates the practical and useful consequences of the convergence of human rights law and international humanitarian law.[16] Nevertheless, there is no sufficient evidence against the fact that both IHL and human rights are separate branches of law.

Accordingly, the situations concerning the interaction between IHL and human rights must be clarified. The ICJ concluded that there are three different facets of their interrelation: some rights are exclusively matter of IHL and others human rights, while some are regulated by both branches.[17] However there are

[11] Supra. note 5
[12] ICRC, „Fundamental rules of international humanitarian law applicable in armed conflicts". ICRC and the League of Red Cross Societies, 1978. April 2013.
[13] Shane Darcy, 25.
[14] Shane Darcy, 26.
[15] Hans-Joachim Heintze, p. 26, On the relationship between human rights law protection and international humanitarian law, *ICRC*, 2004.
[16] Supra. note 11.
[17] The Wall Advisory Opinion 2004, para. 106.

no clear specifications about what rules belong to which respective categories or how they would interact when they simultaneously apply.[18] Different theories are hence developed in this regard.

On one hand is the lex specialis approach that would regulate in accordance to the principle of lex specialis, where contradiction of the two appears. As IHL is specifically designed to be applied to armed conflict, it represents as the special rule that should prevail over the more general provisions of human rights.[19]

On the other hand it is the approach that can be referred to as complementary and harmonious. According to The Human Rights Committee, "in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive".[20] The committee did not use the term lex specialis to avoid the necessity to choose either one of the branches of law, but see them as two branches of law having the same object of protecting persons. Hence they should be interpreted in a way that they both compliment and reinforce each other.[21]

Regardless which theory is applicable, they both seem to support the conclusion that IHL and human rights law are two distinct branches of law and The Human Rights Committee seems to have adopted the complementary theory, which in general terms, also supports the conclusion that both bodies of law complement each other.[22] Moreover, the question of which one of this two bodies of law prevail should not be the decisive one, but rather which gives the best protection to achieve the common purpose: the protection of persons.[23] In addition, the relevant bodies do not deal with the question of the primacy of either body of law when they offer solution in a different manner are rather complementary, not

[18] Ilia Siatitsa and Maia Titberidze, "Human Rights in Armed Conflict From the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges", *ADH Research Paper*, 2011.
[19] The Wall Advisory Opinion 2004; Interaction between Humanitarian Law and Human Rights Law in Armed Conflicts, Rule of Law in Armed Conflict Project, *Geneva Academy of International Humanitarian Law and Human Rights*.
[20] UN Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev. 1 /Add. 13 26. May 2004.
[21] ibid.; See also: Hans-Joachim Heintze, p. 791, On the relationship between human rights law protection and international humanitarian law, *IRRC* Vol. 86 Nr. 856, 2004.
[22] Noam Lubell, Parallel Application of International humanitarian Law and International Human Rights Law: an Examination of the Debate, 40 (2) Isr. LR 650 (2997); The Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant; UN Doc.CCPR/C/21/Rev.1/Add.13 (2004) para. 11.
[23] Ilia Siatitsa and Maia Titberidze

mutually exclusive.[24] Hence, the relationship between IHL and Human Rights Law in the scope of this article can be seen as complementary and non-exclusive.

In order to determine the complementariness of these two bodies of law it is necessary to investigate the potential conflict in the legal sources, which are applicable for a claim on state responsibility. Especially with regard to arms trade with human rights violating countries, which is a topic that can easily fall into the scope of both branches of law. Claims in light of both branches of law as legal bases and they may complement each other which increases the chance to succeed.

Subsequently, it is to investigate the possibility to hold a state responsible for violating rules of IHL.

State Responsibility and Arms Trade Treaty

In order to hold a state responsible for its action or injunction, it must have committed an internationally wrongful act[26]. According to Article 2 Responsibility of States for Internationally Wrongful Acts, this is the case if there is any act or injunction, which is a breach of an international law obligation and if this act of injunction can be attributed to the state.[27] Subsequently, investigation can be conducted based on the relevant treaties, customary international law and *Erga Omnes* characterizations, that create such obligations in regard to arms trade activities.

At a first glance, the Arms Trade Treaty[28] seems like a suitable legal instrument to begin with. As its name suggests, the Arms Trade Treaty regulates the trade of small arms as well as other arms such as battle tanks and combat aircrafts.[29] According to Article 6 of the Treaty, state parties are prohibited to authorize any transfer of conventional weapons, or their ammunition/munitions, parts or components, should the transfer violate their obligations from chapter VII UN Charter or those under international agreements, or if they had knowledge that arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks against civilians or other war crimes.[30] In addition, should Article 6 not be applicable, Article 7 will require the state parties to assess the potential that conventional arms or related items would undermine peace and security or be used to

[24] ibid; Such claims also appeared at least in CHR Resolutions on Protection of the human rights of civilians in armed conflicts, A/CHR/RES/61/63 2005, Prp 6, GA resoulution on Extrajudicial, summary or arbitrary executions, GA, A/RES/61/173 (2006) Prp 6.
[26] Article 1, Draft Articles on State Responsibility; ILC Commentary 2001, p. 32.
[27] Meinhard Schröder, p. 585, Völkerrecht, 4th edition, *Wolfgang Graf Vitzhum*, 2007.
[28] ATT in the following.
[29] Article 2 (1) ATT.
[30] Article 6 ATT; Meeting coverage 71st & 72nd Meetings, General Assembly.

commit or facilitate a serious violation of international humanitarian or human rights law, or acts constituting terrorism or transnational organized crimes.[31] As a signatory state, the treaty can, assuming it is entered into force, create an international obligation that the signatory state has to comply with and would result into a duty of reparation if such obligation were to be neglected, as put forth by the ICJ in the Spanish Zone of Morocco claim: responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.[32] In case of such unlawful acts or omissions, it is questionable whether the state is strictly responsible or that their fault or intention must be proven.[33] According to the principle of objective responsibility, the conditions of attribution of liability to a state are strict. In line with this theory, once an unlawful act that caused damage/injury is conducted by an agent of the state, the state will be responsible in international law to the state suffering the damage irrespective of good or bad faith.[34] In contrary thereto, the subjective responsibility concept emphasizes that an element of intentional or negligent conduct on the part of the person concerned is necessary before his state can be rendered liable for an injury caused.[35] The majority of relevant cases and academic opinion tends towards the strict liability.[36] It is thus adequate to follow the established prevailing opinion and consider strict liability in case of state responsibility.

As the interim result shows, arms trade with human rights violating countries falls within the scope of the ATT and constitutes an internationally wrongful act. Following the prevailing opinion, the state is strictly liable for such acts.

Remedy for such acts is usually defined in article 31(1) of the Draft Articles on State Responsibility, which states that a state is only under an obligation to make full reparation for injury "caused" by its internationally wrongful act.[37] However, there is no explicit explanation on the causal requirements in the commentary.[38] It claims that such a causal link is required based on "various terms used to describe the link which must exist between the wrongful act and the injury in order for the obligation of

[31] Article 7 ATT; Meeting coverage 71st &72nd Meetings, General Assembly.
[32] Great Britain v. Spain (1924); II RIAA, p. 615 (1924); See also Chorzów Factory case, II RIAA, p.641.
[33] Malcolm N. Shae, p. 569, International Law, 7th edition, *Cambridge University Press*, 2014.
[34] ibid.
[35] ibid.
[36] ibid; see also, the Neer Claim. IV RIAA, p. 60 (1926); Caire Claim, V RIAA, p. 516 (1929); Home Missionary Society Claim, VI RIAA, p. 42 (1920).
[37] Article 31 and commentary, §10, Draft Articles on State Responsibility.
[38] ibid.; see also: James Crawford, p.492, State Responsibility the Gerneral Part, *Cambridge University Press* 2013.

reparation to arise…".[39] Nevertheless, the causality is in fact a necessary but not a sufficient condition for reparation and the inquiry, therefore whether injury is too "remote" must also be taken into consideration.[40] The explicit exclusion's criteria are expressed in the, rather vague, terms of lack of "directness", "foreseeability" or "proximity".[41] Subsequently, the violation of ATT must be given, in order to enforce the rules according to the treaty, at the first place, which would therefore be causal for the injury and hence constitute the cause for compensation. However, the question of enforcement and monitoring in accordance to the ATT still remains because its violation must be first identified and addressed through national law before it can be used for a claim in conjunction with regulations on state responsibility.

The ATT itself, however, requires a signatory state to enforce it on the national level, to which the state parties "shall take appropriate measures to enforce national law and regulations that implement the provisions of this Treaty."[42] Such enforcement is not only monitored by state parties, but also by civil society.[43] States should take note of the "role played by non-governmental organizations and civil society to enhance cooperation, improve information exchange and transparency and assist states in implementing confidence-building measures in the field of responsible arms trade."[44] Despite the fact that the role of civil society in monitoring and promoting the implementation of an ATT could be significant,[45] two of the principles in regard to sovereignty might prove to be obstacles of such aspirational treaty: the treaty asserted that all UN member states have the inherent right of self-defense, including the right to buy, sell and transfer arms; it is as mentioned, enforced through national implementation not through UN organizations.[46] It is logical that such principles apply to the world's democracies. However, as a universal treaty, which should be signed by every member states of the UN, the treaty will on the one hand recognize states such as Syria to have the right to buy and sell arms and on the other hand require them to establish effective systems of import and export control that, like the

[39] ibid.
[40] Ibid.
[41] ibid.
[42] Art. 14 ATT.
[43] Preambles of ATT.
[44] Paragraph 9, Preamble to UN General Assembly Resolution 64/48.
[45] Stuart Casey-Maslen, Gilles Giacca, Tobias Vestner, Academy Briefing No. 3: The Arms Trade Treaty, Geneva Academy of International Humanitarian Law and Human Rights ,2013.
[46] Theodore R. Bromund, The Risks the Arms Trade Treaty poses to the Sovereignty of United States, 2012; see also: Preambles of ATT.

one of the Netherlands, considers human rights consequences of arms transfer.[47] On this point, it must be pointed out that the treaty is aspirational: if a state like Syria would genuinely want to establish such a system, the treaty would not be necessary.[48] The inherent dilemma in this regard is that the ATT will apply with more force to states that are law-abiding than the lawless and hence pretend to regulate the international arms trade, but it will have more in common with the UN's aspirational treaties on human rights, which repressive regimes use to deflect attention from their misdeeds by pointing to supposed violations of other democracies.[49] For the majority of the western democracies, such as the Netherlands, they have adopted adequate measures in regard to arms trade transparency.[50] However, the publishing of such reports is not always up-to-date.[51] Nevertheless, its report shows that the Netherlands have met all the requirements so far imposed by the ATT even before the ratification of it.[52] In line with the results from the reports of the Stockholm International Peace Research, the majority of the democracies, which have ratified the ATT are complying with the criteria set by the treaty, while looking at other repressive regimes this is less the case. Hence, the doubt expressed by Theodore Bromund that the ATT would be aspirational is not ill-founded.

In addition, ATT requires signatory states to report both their measures to implement the treaty within a year, as well as their import and export of conventional weapons covered by article 2 (1) of the treaty.[53] Yet, governments did not adopt any uniformed reporting templates for those key points.[54] Instead, states can choose the criteria to include for their own report card and thus, the reports will unlikely be comprehensive nor consistent. Moreover, with individual governments on their decisions on the selection of information to provide and how they provide it and hence, without an uniform format of reporting, monitoring arms trade of individual state becomes rather difficult and the comparison of reports and understanding of gap or necessity of implementation, or most importantly, the concentration of arms building cannot be achieved as was intended.[55] This defeats basically the purposes of the ATT as a set of rules for international arms trade.[56]

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[47] Theodore R. Bromund, The Risks the Arms Trade Treaty poses to the Sovereignty of United States, 2012; see also: Report Netherlands arms export policy, Stockholm International Peace Research Database, 2011.
[48] Theodore R. Bromund, The Risks the Arms Trade Treaty poses to the Sovereignty of United States, 2012.
[49] Ibid.
[50] Report Netherlands arms export policy, Stockholm International Peace Research Database, 2011.
[51] The newest available report on arms export in English is from 2011.
[52] Arms Control and Disarmament Documentary Survey, Stockholm International Peace Research Database.
[53] Article 13 (1) ATT.
[54] Rachel Stohl, A Year On, States aren't Enforcing The Landmark Arms Trade Treaty, *World Policy Review*, 2015.
[55] Ibid.
[56] See: preamble of the ATT.

Consequently, ATT might have its contribution in regulating international arms trade, with regard to repressive governments, still it lacks in efficacy.

Taking the previous finding into account, even if a violation of the national implementation of ATT is given, the enforcement depends on the national institution and is pursued through tort in conjunction with state liability instead of a combination with State Responsibility in the sense of international law. Hence, the violation of national implementation of ATT would not constitute an internationally wrongful act in the sense of Art. 2 of the Draft Articles on State Responsibility.

Moreover, considering the current situation that even the more transparent states with regard to arms trade such as Germany or the Netherlands, which do not even provide adequate information in time, states have yet to show the will to demonstrate that the treaty is more than just words on paper.

The concept of allowed, but with certain risk afflicted activity

Recalling what has been discussed above with regard to the notion that states can be held responsible for acts attributable to them seems to be generally accepted in academic literature[59]. Following this notion, the question of whether the attribution of risk-increasing activities should be included to state responsibility becomes essential to enable finding a solution for the presented problem. Thereby it should be considered that state responsibility explained in light of a legal evaluation of an actually allowed, but with certain risk of damage afflicted behavior could very well be a possibility.[60] Hence, the question arises whether such behavior falls under the normal justifying facts of the state responsibility because the damaging consequences can be qualified as a breach of international law, or whether it calls for an own system of responsibility.[61] However, the inclusion of such behavior might be contradictory to the classical concept of state responsibility.[62] Article 2 of the Draft Articles on State Responsibility states that an internationally wrongful act must fulfill the requirements of being attributable to the state under international law and constitute a breach of an international obligation of the state. Applying the notion to this definition, it is highly questionable whether there is or in what form of such an actually allowed, but with certain risk of damage afflicted behavior represents an international obligation.

[59] Hans-Joachim Heintze, p. 791
[60] Meinhard Schröder, p. 590, Völkerrecht, 4th edition, Wolfgang Graf Vitzhum, 2007
[61] Carcía- Amador, p.65, Yearbook oft he International Law Commission, 1960, volume II.
[62] Bedjaoui, p. 212, Responsibility of States: Fault and Strict Liability, EPIL IV, 2000.

In addition, in most cases it is difficult to prove any breach of duty of care of a state or to establish the causality of an act of the state.[63] Therefore, it is necessary to investigate whether there are existing special rules for such allowed, but with certain risks afflicted behavior before looking into the general rules of state responsibility. Examining the existing rules for such allowed, but with certain risk afflicted behavior, there is no existing treaty law on this matter and neither customary law that directly offer any foundation, especially taking the vain jurisprudences of international courts, the not convincing state practice, and the controversial approaches of the literature into consideration.[64] The prohibition of abusive exercise of rights raises the same issues.[65] ILC adopted the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities in 2001. However, the draft has not been adopted yet by the General Assembly.[66] Consequently, there are no existing special rules that regulate such behavior.

Nevertheless, despite the contradiction, which will be elaborated in the following, with the concept of state responsibility, it seems necessary to include this notion in international law. Moreover, according to Amnesty International, estimated 1500 people are killed in armed conflicts worldwide and "legal loopholes in the international laws governing the trade enable countries and corporations to sell guns, bullets and teargas to dictators and tyrants who have used them to kill and violently repress civilians."[67] In addition, many civil society groups and members of the NGO coalition such as Control Arms, Vision Gram International have stated that the ratified version of the ATT is weaker than the original proposal with loopholes that undermine the effectiveness of the treaty.[68] Moreover, the ratified treaty includes ambiguity that lowers the standards of control.[69] Hence, according to the report, the existing regulating measures are deemed to be insufficient.

Therefore, it seems necessary to take such notion into consideration and include it in international law in order to further develop applicability of state responsibility.

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[63] Rudolf, p. 535, Haftung für rechtmäßiges Verhalten im Völkerrecht, *FS Mühl*, 1981.
[64] Hans-Joachim Heintze, P. 544.
[65] Report of the International Law Commission, 53th Session, 2001; Harndt, völkerrechtliche Haftung für die schädliche Folgen nicht verbotenen Verhaltens, 1993.
[66] Pemmaraju Sreenivasa Rao, Articles on Prevention of Transboundary Harm from Hazardous Activities, *Audiovisual Library of International Law*, 2001.
[67] Weapons and Human Rights, Amnesty International, 2012.
[68] WHEN ARMS GET IN THE WRONG HANDS: Arms trade and the implication for upholding the Responsibility to Protect, International Coalition for the Responsibility to Protect, 2013.
[69] Ibid.

The obligation to refrain from allowed, but with certain risk afflicted behavior

Considering the circumstance that such obligation to refrain from allowed, but with certain risk afflicted behavior does not exist to date, it is necessary to find supporting theory with regard to the fundamental functions of IHL to establish a prohibition of such allowed, but with certain risk afflicted behavior. Especially with regard to arms trade with a human rights violating country, it seems suitable to fall back on the notion of the responsibility to protect, which has succeeded humanitarian intervention as the primary conceptual framework within which to consider international intervention to prevent mass atrocity crimes, which are limited to genocide, war crimes, crimes against humanity, and ethnic cleansing.[70] To begin with, it is essential to examine the content of theory and the relevant principles.

While humanitarian intervention is a military intervention, the norm of Responsibility to Protect is first and foremost a preventive measure that emphasizes state responsibility and the military intervention is hereby viewed as the last resort authorized by the Security Council.[71]

According to the results of the debate prior to the World Summit and at the 2009 General Assembly Debate, the international community does have responsibility to prevent the incitement of four specific crimes.[72] With it, the norm of responsibility to protect seems to correspond to the responsibility of preventing arms trade with human rights violating countries. In addition, it is a state's responsibility to protect its subjects from such crimes.[73] The norm operates on the basic principles that "state sovereignty implies responsibility, and the primary responsibility for protection of its people lies with the state itself" and in case a state is not willing to or not able to comply with such responsibility and obligation, the principle of non-intervention yields to the international, and collective responsibility to protect.[74] There are three subsequent elements of the norm: the responsibility to prevent, to react and to rebuild.[75] The priority in this regard is paid to prevention.[76] In connection to arms trade, it is to question, whether to refrain from arms trade with human rights violating countries or even arms trades that increases the possibility of human rights violation, as an obligation falls under the principle to prevent of the Responsibility to protect. Thereby, the reason for the ratification of ATT was mentioned

[70] Zifcak, p.504, 521, International Law, 3rd edition, *Oxford University Press*, 2010.
[71] Simon Adams, Lybia and the Responsibility to Protect, Global Centre for the Responsibility to Protect, *Occasional Paper Series*, 2012.
[72] P. 23, A/63/677, Implementing the Responsibility to Protect.
[73] Synopsis, XI, The Responsibility to Protect: Core Principles, The Responsibility to Protect, ICISS, Report of The International Commission on Intervention and State Sovereignty, 2001.
[74] Ibid.
[75] Ibid.
[76] Ibid.

above. In order to answer this question, it is to examine the scope of responsibility to prevent. Depending on the finding, the responsibility to prevent could include the obligation to refrain from activities mentioned above.

The commitment to prevent is undeniably part of the responsibility to protect and the prevention of deadly conflict is first and foremost the responsibility of the sovereign states.[77] As arms trade is a major cause of suffering,[78] its control would then fall into the collective responsibility to protect. For the prevention of conflicts, which would lead to such suffering, it is not just a national affair as a failure to prevent has international consequences and costs.[79] Although there is no universal agreement on the root that causes conflict, there is, nevertheless, recognition on underlying cause for armed conflict.[80] Arms trade is recognized as a major cause of human rights abuses.[81] Subsequently, it is to adhere to arms control and disarmament and non-proliferation regimes, which also includes arms trade with a high risk on causing human rights violations.[82] Although the regulation of arms trade with human rights violating countries falls under the responsibility to prevent, the question still remains if there is an obligation for sovereign states to refrain from such arms trades containing a high risk of violating human rights.

A norm that imposes an international obligation in general would require a source of some sort. The traditional starting point for a discussion of sources of international law is Article 38, ICJ Statute.[83] It should not be mistaken that Article 38 of the Statute is not an exhaustive list of the source of international law.[84] With regard to the question of whether the responsibility imposes the obligation to refrain from risk increasing activity towards human rights violation, the obligation might result from either a formal, or material or evidentiary source of international law.[85]

The Responsibility to Protect is not a legal binding framework, but rather a principle grounded in existing international law.[90] States have the obligation to respect and ensure respect for international

[77] The Responsibility to Prevent, p. 19, The Responsibility to Protect, ICISS, Report of The International Commission on Intervention and State Sovereignty, 2001.
[78] p. 1, Arms Availability and the Situation of Civilians in Armed Conflict, ICRC publication 1999.
[79] 3. The Responsibility to Prevent, p. 21.
[80] 3. The Responsibility to Prevent, p. 23.
[81] Anup Sarah, Arms Trade – a major cause of suffering, Global Issues, 2013.
[82] 3. The Responsibility to Prevent, p. 23.
[83] Martin Dixon, p.24, Textbook on International Law, 7th edition, *Oxford University Press*, 2013.
[84] Martin Dixon, p.25.
[85] Martin Dixon, p.26.
[90] P. 12, International Humanitarian Law and the Responsibility to Protect: A handbook, Australian Red Cross,

humanitarian law and the responsibility enumerated in the Geneva Conventions and additional Protocols.[91] Such an obligation constitutes the legal basis for Responsibility to Protect and shift the state's responsibility to the international community in case a state is unable or unwilling to perform adequately to ensure the realization of those obligation.[92] As discussed in the basic principles of Responsibility to Protect, in such case, it results in the international obligation to protect.[93]

Consequently, the Responsibility to Protect does constitute the obligation for sovereign states to refrain from those arms trades, which contain a certain risk of enabling human rights violations, which would infringe the obligation imposed indirectly by the responsibility to protect. In addition, the Responsibility to Protect can also provide a legal basis for the international institutions and community to assume responsibility or even require them to assume responsibility to effectively monitor arms trade activities.[94]

Conclusion

The question as to the manner in which states could be held responsible under IHL for trading arms with human rights violating countries entails not only theoretical, but also practical problems. As examined above, there is a lack of theoretical foundation or concepts, which can be used to effectively hold states responsible for arms trade with human rights violating countries. The concept, which was based on the Responsibility to Protect, of allowed, but with certain risk of damage afflicted activity as an internationally wrongful act because of the existence of the obligation to refrain from such activity, could provide a legal foundation to make a claim against states committing such activities. The difference between this notion and the ATT is that the state is to implement measures imposed by the ATT and there is a lack of international institutions that enforce effective remedy against states, which do not monitor the implemented measures sufficiently.

Consequently, the obligation results from the Responsibility to Protect that requires states to refrain from risk increasing activities that can constitute an internationally wrongful act if it is disregarded. With regard to the question of how states can be held responsible under IHL for arms trade with human rights violating countries the answer seems to be: by holding state parties responsible for neglecting their

[91] Ibid.
[92] Ibid.
[93] Synopsis, XI, The Responsibility to Protect: Core Principles, The Responsibility to Protect, ICISS, Report of The International Commission on Intervention and State Sovereignty, 2001.
[94] The Responsibility to Prevent, p. 17

obligation to refrain from certain risk increasing activity, which is actually allowed, but connected with an increased risk of human rights violation.