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POST-CONFLICT CONSTITUTIONS
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THE ARMS TRADE TREATY: KEY PRINCIPLES LIMITING TRADE TO HUMAN RIGHTS VIOLATING STATES

Legal Memorandum

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THE ARMS TRADE TREATY: KEY PRINCIPLES LIMITING TRADE TO HUMAN RIGHTS VIOLATING STATES

Executive Summary

This memorandum analyzes the primary international treaty regulating international arms trade: the Arms Trade Treaty (ATT). The ATT is the first multilateral and legally binding agreement that explicitly connects international arms trade regulation with the prevention of human rights violations. The memorandum focuses on the Treaty's safeguards against arm trades that could lead to crimes or human rights abuses in the destination state. The ATT provides that states may not export arms in certain circumstances, such as when the arms could be used in the commission of or to facilitate human rights abuses or international crimes. The ATT obliges states parties to implement and enforce its provisions throughout their jurisdiction.

The key provisions in the ATT for limiting trade are Articles 6 and 7. Article 6 prohibits the export of conventional arms, ammunitions and components if, for example, it violates measures adopted under Chapter VII of the UN Charter, or if at the time of the export authorization, the exporting state has knowledge that the arms would be used in the commission of international crimes. Article 7 requires states parties to consider a number of factors when authorizing an export, including whether it would undermine peace and security or contribution to violations of international human rights and humanitarian law. While uncertainties remain regarding how these provisions are operationalized, and states retain discretion under the Treaty, they are important provisions to challenge arms exports to human rights violating states.

The memorandum also analyzes the relationship of the ATT to the European Union (EU) Common Position on arms trade. This is relevant for states like the Netherlands who are a party to both the EU and the ATT. Both the ATT and the Common Position are simultaneously applicable, since neither limits the application of other treaties or obligations. The Common Position also contains provisions protecting human rights and humanitarian law, and member states may not export arms if there is a risk that the arms will be used towards repression or human rights violations.

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THE ARMS TRADE TREATY: KEY PRINCIPLES LIMITING TRADE TO HUMAN RIGHTS VIOLATING STATES

Statement of Purpose

This memorandum analyzes the primary international legal instrument regulating the trade of conventional arms, specifically in circumstances where they may be used in human rights violations or crimes. At the international level, the key instrument is the recently negotiated Arms Trade Treaty (ATT), which entered into force in 2014. The memorandum provides information under this treaty on what arms it applies to, when arms can legally be traded, and how trade can be limited in circumstances where the arms may be used in the commission of or to facilitate rights violations or crimes. The purpose of the memorandum is to elaborate the framework under this treaty for arms trade regulation and to identify grounds for contesting exports to certain states.

Introduction

The global trade in conventional arms is as old as the history of war, and plays a major role in global politics.¹ Arms trade can be both legal and illegal. A persistent issue regarding legal arms trade, especially the trade of small arms and light weapons, is that it can nevertheless contribute to human rights abuses and violations of humanitarian law.² In 2010, the UN General Assembly called upon states to address the problem of unregulated arms trade. It called for a Conference to draft a legally binding instrument establishing international standards for the trade in conventional arms.³ This conference led to the adoption of the ATT. The Treaty entered into force on 24 December 2014, and to date 130 states are signatories, and 67 are parties - including the Netherlands.⁴

The ATT is the first multilateral and legally binding agreement that explicitly connects the international arms trade to human rights protection.⁵ The object of the treaty is to prevent and eradicate the illicit trade in conventional arms, and to prevent their diversion.⁶ The treaty falls under the scope of Article

¹ Sophie Brinkel, *Arms Trade Treaty: A Historical Breakthrough?*, PEACE PALACE LIBRARY, (2014), available at <http://www.peacepalacelibrary.nl/2014/12/arms-trade-treaty-a-historic-breakthrough/?lang=fr>.

² Sophie Brinkel, *Arms Trade Treaty: A Historical Breakthrough?*, PEACE PALACE LIBRARY, (2014), available at <http://www.peacepalacelibrary.nl/2014/12/arms-trade-treaty-a-historic-breakthrough/?lang=fr>.

³ United Nations General Assembly resolution 64/48, U.N. Doc A/Res/64/48 (January 12 2010) available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede051211unres/_sede051211unres_en.pdf.

⁴ United Nations Office for Disarmament Affairs, *Treaties Database, Status of the Arms Trade Treaty*, available at <http://disarmament.un.org/treaties/t/att>.

⁵ Ian Williams, *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASSOCIATION, (July, 19th 2013), available at https://www.armscontrol.org/factsheets/arms_trade_treaty.

⁶ *The Arms Trade Treaty*, Art. 1 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

26 of the UN Charter and connects peace and security to development and human rights protection.⁷ Its purpose is to contribute to peace, security and stability by reducing human suffering and promoting cooperation between state parties in matters of arms trade regulation.⁸

This memorandum addresses the international regulation of arms trade set out in the ATT, and specifically its ability to limit or prohibit trade when the arms may be used in international crimes. This memorandum first sets out the basic provisions of the ATT in section 1.1, and then details its substantive legal obligations in section 1.2. This includes the requirement for states parties to: regulate arms import, transit and brokering in their jurisdiction; assess the legality of an authorization of arms export; and prohibit arms transfer in certain circumstances. Sections 1.3 and 1.4 of the memorandum focus on the ATT's provisions regarding prohibiting exports that will be used in the commission of international crimes, and assessing when to authorize an export or not.

The memorandum also considers in section 2 the instrument relevant for arms trade regulation within the framework of the European Union (EU). At the EU level, the key instrument is the European Council Common Position on arms trade. As a member state to the EU, the Netherlands is also legally bound by this Common Position. The memorandum compares in section 2.2 the international and the EU frameworks to assess their compatibility regarding limiting arms exports to human rights violating states.

1. Arms Trade Treaty

1.1. ATT Basic Provisions

This first section 1.1 of the memorandum covers the basic provisions of the ATT. Specifically, it sets out the treaty's scope of application, and also its implementation and enforcement mechanisms. The ATT obliges states to establish and maintain domestic control systems regulating the transfer of arms and to designate a competent authority to ensure the effectiveness of the system. States are responsible for the national implementation of the Treaty, and are also jointly responsible for its enforcement. Finally, this section 1.1 also briefly covers the relationship of the ATT to other international agreements.

⁷ *The Arms Trade Treaty*, Preamble (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁸ *The Arms Trade Treaty*, Art. 1 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

1.1.1. *ATT Scope of Application*

The ATT regulates trade in conventional arms.⁹ It covers eight categories of arms under Article 2(1), in that it applies to the seven categories defined by the UN Register of conventional arms,¹⁰ and also to small arms and light weapons (SALW). The addition of SALW to the seven UN categories is an important addition, with SALW usually falling outside the scope of most international agreements.¹¹ As such, the treaty covers battle tanks, armored combat vehicles, large-caliber artillery system, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. Article 5(3) specifies that national definitions of any of the eight categories in Article 2(1) have to be at least as restrictive as the descriptions of UN Register or those of relevant UN instruments at the time of entry into force of the treaty.¹²

Importantly, the ATT is not an arms control treaty, as it does not restrict the type of armaments that state parties may possess or trade.¹³ The treaty relates to the narrow notion of ‘trade’ rather than the broader one of ‘transfer’, which raises questions as to the precise scope and application of the treaty.¹⁴ Nevertheless, Article 2(2) specifies that within the meaning of the provisions of the treaty, the terms ‘trade’ and ‘transfer’ both refer to the export, import, transit, trans-shipment and brokering of arms.¹⁵ The ATT does not define those terms, but they can be interpreted as follows:¹⁶

- Export relates to the sending of weapons abroad;
- Import refers to the reception of arms from abroad;
- Transit covers the temporary passage of arms across the territory of a state, the destination of which is another state;

⁹ *The Arms Trade Treaty*, Art. 2(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁰ Ian Williams, *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASSOCIATION, (July, 19th 2013), available at https://www.armscontrol.org/factsheets/arms_trade_treaty.

¹¹ Marlitt Brandes, *All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 401, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹² *The Arms Trade Treaty*, Art. 5(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹³ Ian Williams, *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASSOCIATION, (July, 19th 2013), available at https://www.armscontrol.org/factsheets/arms_trade_treaty.

¹⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p.7 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p.20 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p.20 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

- Trans-shipment is the transfer of a shipment from one vessel to another during transit;
- Brokering generally refers to the activities of a person serving as an intermediary between two parties who facilitates a transaction (usually involving remuneration) in conventional arms.

Article 2(3) specifies that the ATT does not cover the movement of conventional weapons on behalf of a state party for its use and of its ownership.¹⁷ As such, the treaty applies to arms changing ownership between states, and not the movement of one states' arms.

1.1.2. ATT Implementation and Enforcement Mechanisms

The objective of the ATT is to increase transparency in arms transfer by fixing common standards for regulating international arms trade. States parties are responsible for the ATT's enforcement and for upholding these standards set. The ATT requires state parties to implement the treaty in a consistent, objective and non-discriminatory manner. The ATT obliges states to establish and maintain domestic control systems regulating the transfer of conventional weapons.¹⁸ To ensure that the approval processes for exporting arms are as transparent as possible, the ATT requires states parties to designate a competent authority to ensure the effectiveness of the system.¹⁹ These treaty obligations regarding implementation and enforcement are discussed below.

Consistent, Objective and Non-Discriminatory Implementation

Article 5 of the ATT sets out the standards for the treaty's implementation. Article 5(1) requires state parties to implement the treaty in a consistent, objective and non-discriminatory manner, while bearing in mind the principles in the ATT's preamble.²⁰ These principles relate to those enshrined in Article 2 of the UN Charter, as well as the right to self-defense, and respect for human rights and humanitarian law.²¹ The treaty should be effectively implemented through decision-making processes free from political

¹⁷ *The Arms Trade Treaty*, Art. 2(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁸ *The Arms Trade Treaty*, Art. 5 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁹ *The Arms Trade Treaty*, Art. 5 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁰ *The Arms Trade Treaty*, Art. 5(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²¹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, pp. 13-15 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

considerations.²² However, the ATT does not provide benchmarks to measure the compliance of decision-making procedures with Article 5(1). Although the ATT lists specific prohibitions on transfer²³ and provides a framework to assess the authorization of export,²⁴ the Article 5(1) standards remain vaguely defined and of imprecise scope.²⁵

Establishment of a National Control System and National Control List

Article 5(2) of the ATT requires state parties to establish and maintain a national control system and a national control list to implement the treaty provisions.²⁶ This control system plays an important role in ensuring the effective implementation of the prohibitions and framework laid out in Articles 6 and 7 of the ATT, which are addressed below.²⁷ However, the state party has the discretion to choose the manner it arranges the national control system and list. This discretion could lead to substantial variances in implementation. As the treaty is still very young, there are numerous questions still surrounding its implementation. Three issues regarding implementation are discussed below.

First, the ATT does not set out the form, structure and legislative underpinnings that the control system has to follow.²⁸ The only requirement is that the control list applies to the broadest range of conventional arms possible. According to Article 5(3), the control list has to adopt at least the descriptions/definitions of conventional weapons in the UN register of convention arms and other relevant UN instruments.²⁹ State parties also have to provide the national control list to the Secretariat established under Article 18 of the ATT, the mission of which is to assist states in implementing the treaty.³⁰

²² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 15 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

²³ *The Arms Trade Treaty*, Art. 6 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁴ *The Arms Trade Treaty*, Art. 7 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 21 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

²⁶ *The Arms Trade Treaty*, Art. 5(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁷ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 22 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

²⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 22 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

²⁹ *The Arms Trade Treaty*, Art. 5(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

³⁰ *The Arms Trade Treaty*, Art. 5(4) and Art. 18 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

Second, Article 5(5) of the ATT requires state parties to take the necessary measures and designate the competent authorities to ensure the transparent and effective implementation of its domestic control system.³¹ ‘Necessary measures’ refers to the adoption of legislation, creation of administrative structures, and provision of resources necessary in relation to the situation of a state involved in arms transfer.³² The Geneva Academy³³ ATT briefing clarifies that a ‘competent authority’ generally is a governmental agency in the form of an inter-ministerial body or an agency independent from the executive.³⁴ The main function of such an authority is to assess and verify the states overall compliance with the treaty obligations.³⁵ The ATT does not straightforwardly define the meaning of ‘transparent and effective’ - nor does it specify who should deem the system transparent (ie. governments, industries, citizens, international organizations).³⁶

Third, under Article 5(6) of the ATT, each state party has to facilitate the exchange of information regarding their implementation of the ATT. This should be done by the state by designating national contact points and identifying them to the Secretariat as established under Article 18 ATT.³⁷ This should facilitate communication between member states and also may contribute to the development of best practices.

Record Keeping and Reporting

As noted earlier, the ATT creates an obligation on states for reporting and record keeping. Article 12 of the ATT requires state parties to maintain national records of the issuance of export authorizations or actual exports of arms listed in Article 2(1) of the ATT.³⁸ State parties must keep their records for a

³¹ *The Arms Trade Treaty*, Art. 5(5) and Art. 18 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

³² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 22 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

³³ The Geneva Academy of International Humanitarian Law and Human Rights is an institution that aims to provide instruction of a high academic standard, in French and in English, conduct and promote scientific research, organize training courses and expert meetings and provide legal expertise in the branches of international law relating to situations of armed conflicts. In 2013, it published a comprehensive report on the ATT. *Information available at* <http://www.geneva-academy.ch/>.

³⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 23 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

³⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 23 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

³⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 22 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

³⁷ *The Arms Trade Treaty*, Art. 5(6) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

³⁸ *The Arms Trade Treaty*, Art. 12(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

minimum of ten years.³⁹ Article 12(3) encourages state parties to include in the records the quantity, value, model, authorized international transfers, the arms actually transferred, and the details of exporting states, importing states, transit states and end users.⁴⁰

Importantly, there are four limitations to the obligation of record keeping. First, Article 12(1) specifies that a state party has to maintain such records ‘pursuant to its national laws and regulations’, thereby restraining the reach of Article 12.⁴¹ Second, Article 12 only refers to conventional arms listed in Article 2(1), thereby potentially excluding certain items from record keeping.⁴² Third, the obligation does not extend to imports or transits – with Article 12(2) only encouraging state parties to maintain such records of arms transferred into or transiting through its territory.⁴³ Fourth, state parties are free to choose the format and content of the record keeping.

Article 13 requires state parties to make an initial report to the ATT Secretariat on the implementation measures taken within the first year after entry into force of the treaty, and then on an annual basis. This report is to include domestic laws, domestic control lists and other regulations and administrative measures that the state has undertaken.⁴⁴ State parties can (but are not obliged to) include information as to effective measures that were implemented to address diversion.⁴⁵ The ATT only requires state parties to annually report on authorized exports or actual exports and imports of arms listed in Article 2(1).⁴⁶ Therefore, Article 13(3) does not require states to report on other transfers, such as ammunition and components. Finally, state parties are not obliged to report on information that is commercially sensitive or that relates to national security matters.⁴⁷ The lack of a precise definition of what would constitute commercially sensitive information or national security matters

³⁹ *The Arms Trade Treaty*, Art. 12(4) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁴⁰ *The Arms Trade Treaty*, Art. 12(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁴¹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 35 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁴² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 35 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁴³ *The Arms Trade Treaty*, Art. 12(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁴⁴ *The Arms Trade Treaty*, Art. 13(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁴⁵ *The Arms Trade Treaty*, Art. 13(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁴⁶ *The Arms Trade Treaty*, Art. 13(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁴⁷ *The Arms Trade Treaty*, Art. 13(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

leaves room for various interpretations and reports.⁴⁸ State parties are not obliged to make the reports under Articles 12 and 13 of the ATT public.⁴⁹

Enforcement of the ATT

Article 14 of the treaty requires state parties to take appropriate measures to enforce in domestic laws and regulations the ATT provisions. Under Article 14, state parties are legally responsible for the implementation of the treaty within their territory and jurisdiction, and thus are responsible for the overall effectiveness of the ATT.⁵⁰ To facilitate effective implementation, the ATT in Article 16 provides for assistance to states in implementing treaty obligations. It stipulates that any state party is entitled to request, offer, or receive assistance bilaterally or through a variety of organizations - governmental or otherwise.⁵¹ State parties are obliged to establish a voluntary trust fund to provide for such international assistance.⁵²

The enforcement provision of the ATT - Article 5 - indicates that state parties can be held accountable for the failure to exercise due diligence in supervising or taking effective action in implementing the treaty.⁵³ Hence, the ATT engages the responsibility of the state for violations regardless of whether a state agent is involved.⁵⁴ Under Article 17 of the ATT, the Conference of State Parties, which will meet no later than one year following the entry into force of the ATT, reviews the implementation of the treaty.⁵⁵

Relationship with other international agreements

Article 26 sets out the relationship of the ATT with other international agreements. The Article permits the trade of conventional arms under existing

⁴⁸ Marlitt, Brandes, *All's Well That Ends Well* or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 426, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

⁴⁹ Marlitt, Brandes, *All's Well That Ends Well* or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, pp. 425-426, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

⁵⁰ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 36 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁵¹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 38 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁵² *The Arms Trade Treaty*, Art. 16 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁵³ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 37 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁵⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 36 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁵⁵ *The Arms Trade Treaty*, Art. 17 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

or future agreements provided that the obligations established are consistent with the ATT. The concluding of future agreements that contravene or undermine provisions of the ATT would still engage the responsibility of the state party to the ATT.⁵⁶ In addition, state parties cannot challenge the implementation of ATT provisions by raising other conflicting international obligations.⁵⁷ Conversely, Article 26(2) provides that state parties are not allowed to cite the ATT as a ground for voiding defense cooperation agreements concluded between state parties to the treaty.⁵⁸ State parties have to understand Article 26(2) as clarifying that the “ATT does not automatically void State parties’ conflicting defense cooperation agreements.”⁵⁹

1.2. ATT Substantive Obligations

There are numerous substantive obligations in the ATT regulating the circumstances and conditions of arms trade. The ATT requires states parties to regulate arms import, transit and brokering in their jurisdiction; provides a framework to assess the legality of an authorization of arms export; and sets out provisions prohibiting arms transfer in certain circumstances.⁶⁰ These obligations are discussed below in section 1.2.

1.2.1. Prohibitions of Transfer

Article 6 of the ATT prohibits the export of conventional arms, ammunitions and components under three grounds: (1) if it violates measures adopted under Chapter VII of the UN Charter;⁶¹ (2) if it violates relevant obligations under international agreements to which the state is a party;⁶² and (3) if at the time of the authorization, the exporting state has knowledge that the arms would be used in the commission of international crimes. The relevant crimes are: genocide; crimes against humanity; grave breaches of the 1949 Geneva Conventions and attacks directed against civilian objects or civilians

⁵⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 44 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁵⁷ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 427, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

⁵⁸ *The Arms Trade Treaty*, Art. 26(2) (June 3 2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁵⁹ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 428, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

⁶⁰ *The Arms Trade Treaty*, Articles 8 to 10 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁶¹ *The Arms Trade Treaty*, Art. 6(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

⁶² *The Arms Trade Treaty*, Art. 6(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

protected as such; and other war crimes as defined by international agreements to which the state is a party.⁶³

Commentators consider Article 6 to be the heart of the ATT.⁶⁴ Indeed, it reinforces the responsibility of states to abide by their international obligations, arising both from the UN Charter and from other relevant instruments in transferring conventional weapons to other states.⁶⁵ Article 6(3) broadens the standards of responsibility in matters of arms export, this provision forbidding state parties to authorize an export where the exporting state has knowledge of the risk for the arms to be used in the commission of the above-mentioned crimes. This element is key to the present memorandum and will be revisited in detail and in section 1.3 below.

1.2.2. *Export Assessment*

Although, Article 6 allows for the export of arms, state parties must assess the risk potential of arms prior to the authorization of export. Article 7 provides that the exporting state has to assess, in an objective and non-discriminatory manner, the potential for the arms to be used in a manner contributing to or undermining peace and security.⁶⁶ The exporting state also assesses whether there is a risk that the arms could be used to commit or facilitate serious violations of international humanitarian law and human rights, or to facilitate acts constituting an offence under international conventions or protocols relating to transnational organized crimes.⁶⁷ Once the state has assessed these possibilities, it considers whether it can take measures to mitigate the risk.⁶⁸ If the risk is overriding, the exporting state may not authorize the export.⁶⁹ Even if the state becomes aware of such risk after granting the export authorization, the ATT encourages the state to reassess the export.⁷⁰ This element is also key to the present memorandum and will be revisited in detail and in section 1.4 below.

⁶³ *The Arms Trade Treaty*, Art. 6(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

⁶⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p.23 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁶⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, pp.23-24 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁶⁶ *The Arms Trade Treaty*, Art. 7(1)(a) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

⁶⁷ *The Arms Trade Treaty*, Art. 7(1)(b) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

⁶⁸ *The Arms Trade Treaty*, Art. 7(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

⁶⁹ *The Arms Trade Treaty*, Art. 7(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

⁷⁰ *The Arms Trade Treaty*, Art. 7(7) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

1.2.3. Import

Article 8(1) of the ATT requires the importing state, pursuant to its domestic laws, to take measures to ensure that appropriate and relevant information is provided to the exporting state party upon request.⁷¹ Hence, Article 8 imposes obligations on the importing states that are complementary to those of exporting states under Article 7.⁷²

Article 8(2) requires state parties to “take measures that allow it to regulate where necessary the import under its jurisdiction of conventional arms under Article 2(1). The measures may include import systems.”⁷³ This provision is not as demanding as it reads. First, measures of regulations are not as strict as measures of control.⁷⁴ Second, the addition of ‘where necessary’ implies a margin of discretion for the executive authority to decide what is at minimum necessary in the regulation of import.⁷⁵ Third, the provision only applies to the conventional arms listed in Article 2(1) and not to ammunitions or components. Fourth, the establishment of an import system is not an obligation. The terminology (‘may’) further implies a limited exception to the obligation of establishing a domestic control system under Article 5(2).⁷⁶

Article 8(3) of the ATT specifies that an importing state can request from the exporting state information as regard pending or actual export authorizations.⁷⁷ This paragraph complements Article 7(6) that requires exporting states to make available appropriate information on the authorization, upon request, to the importing state.⁷⁸

⁷¹ *The Arms Trade Treaty*, Art. 8(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁷² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 31 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁷³ *The Arms Trade Treaty*, Art. 8(2) (June 3 2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁷⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁷⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁷⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁷⁷ *The Arms Trade Treaty*, Art. 8(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁷⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

1.2.4. *Transit and Trans-shipment*

Pursuant to Article 9 of the ATT, state parties have to take appropriate measures to regulate where necessary and feasible the transit and trans-shipment of conventional arms listed in Article 2(1). Although it does not apply to ammunitions and components,⁷⁹ this provision highlights the responsibility of transitory states to regulate trade.⁸⁰ The reference to ‘necessity’ indicates that state parties have a margin of appreciation to define the measures that are needed in regulating transit.⁸¹ The notion of feasibility recognizes the logistical challenges or lack of effective control a state can have on movements of conventional arms within its territory.⁸² In regulating transit, state parties also have to respect international obligations such as the right of innocent passage under the Law of the Sea or the International Civil Aviation.⁸³

1.2.5. *Brokering*

Article 10 of the ATT stipulates that “each state party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2(1).”⁸⁴ There are two limitations on the restriction of brokering. First, the expression ‘pursuant to national laws’ allows a wide margin of appreciation as to the control of brokering activities. As the ATT does not define brokering, the definition of brokering that applies is the one recognized by the domestic legislation of the state parties where the brokering activities take place. Second, Article 10 provides lower standards for the regulation of brokering to those present in some existing non-binding instruments, such as point 14 of the UN Programme of Action on Small Arms.⁸⁵

⁷⁹ Stuart Casey-Maslen, *The Arms Trade Treaty*, Art. 9 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁸⁰ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁸¹ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 423, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

⁸² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁸³ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 32 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁸⁴ *The Arms Trade Treaty*, Art. 10 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁸⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 33 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

1.2.6. Diversion

Article 11(1) of the ATT sets out the obligation on state-parties to prevent diversion of conventional arms. It provides that “each state party involved in the transfer of conventional arms covered under Article 2(1) shall take measures to prevent their diversion.”⁸⁶ There is no official international legal definition of diversion. Diversion can amount to “a breakdown in the transfer control chain such that, either before or after arriving at their intended destination, exported weapons are transferred to unauthorized end-users or used in violation of commitments made by end-users prior to export.”⁸⁷ Preventing the diversion of conventional arms is an objective of the ATT. Article 11 recognizes that each state party involved either in export, import, transit or brokering may face diversion of conventional weapons, and thus are in charge of preventing it.⁸⁸

Article 11(2) requires exporting state parties to prevent diversion through their domestic control system by assessing the risk of diversion prior to authorization. Thus, the prevention of diversion is a relevant factor for a state party to consider in assessing whether to export under the framework of Article 7.⁸⁹ Article 11(3) also requires that the exporting and importing states jointly develop mitigating measures through cooperation and the exchange of information. Article 11(3) limits the scope of such an obligation to cooperate in that it requires the adoption of mitigating measures only where appropriate, feasible and pursuant to domestic laws - leaving a margin of appreciation to the states.⁹⁰

The Geneva Academy exemplifies measures that states may adopt to prevent diversion.⁹¹ First, an importing state can implement end-use and end-users certifications that provide assurance to the exporting state that it will not re-transfer the conventional arms without the agreement of the exporting

⁸⁶ *The Arms Trade Treaty*, Art. 11(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁸⁷ Marlitt, Brandes, *All's Well That Ends Well* or “*Much Ado About Nothing*”? : A Commentary on the Arms Trade Treaty, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 423, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

⁸⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 33 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

⁸⁹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 34 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁹⁰ *The Arms Trade Treaty*, Art. 11(3) (June 3 2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁹¹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 34 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

states.⁹² Second, post-delivery verifications, whereby the exporting state checks whether the exported items have reached their intended final destination, is a mitigating measure that requires full cooperation from the importing state.⁹³

Pursuant to Article 11(4) of the ATT, any state party that detects a diversion in arms transfer “shall take appropriate measures pursuant to its national laws and in accordance with international law, to address such diversion. Such measures may include alerting potentially affected state parties, examining diverted shipments (...), and taking follow-up measures through investigation and law enforcement.”⁹⁴ Moreover, state parties are encouraged to exchange information and discuss best practices on effective measures of prevention, and to report on measures taken.⁹⁵

1.3. ATT Prohibitions on Transfer

As noted in section 1.2 above, Article 6 of the ATT prohibits the exportation of conventional arms, ammunitions and components on three, non-cumulative, grounds: (1) if the transfer violates measures adopted under Chapter VII of the UN Charter;⁹⁶ (2) if it violates relevant obligations under international agreements to which the state is a party;⁹⁷ and (3) if at the time of the authorization, the exporting state has knowledge that the arms would be used in the commission of international crimes. This provision on the prohibition of arms transfer is key to the present memorandum. In fact it is highly regarded generally, with Article 6 being referred to as the heart of the ATT. It is therefore discussed in detail in this section. This section first addresses the three limitations on transfer set out in Article 6. It then addresses the relevant international crimes for Article 6(3).

⁹² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 34 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁹³ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 34 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

⁹⁴ *The Arms Trade Treaty*, Art. 11(4) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁹⁵ *The Arms Trade Treaty*, Art. 11(5) and (6) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁹⁶ *The Arms Trade Treaty*, Art. 6(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁹⁷ *The Arms Trade Treaty*, Art. 6(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

1.3.1. *Transfer that Violates UN Security Council Measures*

Article 6(1) prohibits arms transfer that contravenes a measure adopted by the UN Security Council under Chapter VII of the UN Charter.⁹⁸ As of 1 May 2015, around 15 arms embargoes under UN Charter Chapter VII were in force.⁹⁹ These include embargoes on the Central African Republic, Yemen, and the non-governmental forces in Liberia. Article 6(1) reiterates the obligation under Article 25 of the UN Charter that binds members of the UN to carry out decisions of the UN Security Council.¹⁰⁰ For instance, UN Security Council resolutions that require an arms embargo under Chapter VII prevents UN member states from transferring conventional arms to the area listed in the resolution. In this way, any state that contravenes such a Security Council measure also violates the UN Charter and the ATT.

1.3.2. *Transfer that Violates International Agreements*

Article 6(2) of the ATT prohibits arms transfer that violates existing state parties' obligations arising from international agreements.¹⁰¹ Article 6(2) refers in particular to the agreements relating to the transfer of or illicit trafficking in conventional arms.¹⁰² International agreements relevant to the matter of arms transfer usually concern international humanitarian law and disarmament treaties. If an international agreement prohibits the transfer of conventional arms, ammunitions or components covered by the ATT, a transferring state party would violate both the ATT and the international agreement. However, instances of such prohibitions or limitations of transfer in international treaties usually concern anti-personnel mines or blinding laser weapons that do not fall within the ATT's scope.¹⁰³

The use of the expression 'in particular' does not exclude general international and regional instruments.¹⁰⁴ Thus, Article 6(2) is broad enough to

⁹⁸ *The Arms Trade Treaty*, Art. 6(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

⁹⁹ *Arms Embargoes Database*, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, available at <http://www.sipri.org/databases/embargoes>.

¹⁰⁰ Marlitt, Brandes, *All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 410, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁰¹ *The Arms Trade Treaty*, Art. 6(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁰² *The Arms Trade Treaty*, Art. 6(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁰³ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 24 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁰⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 24 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

include human rights treaties as well.¹⁰⁵ This provision refers to international agreements and does not as such consider prohibitions under customary international law, which however continue to apply next to the ATT.¹⁰⁶

1.3.3. *Transfer with Knowledge of International Crimes Commission*

Article 6(3) of the ATT requires an exporting state not to authorize export of arms listed in Article 2(1), as well as ammunitions and components covered by Articles 3 or 4, where it has the knowledge that the arms or items would be used in the commission of international crimes.¹⁰⁷ While crucial, this provision raises a number of limitations regarding its scope of application. First, the ATT does not define ‘knowledge’, and second, the timeframe of the provision does not bind state parties if they acquire knowledge of above-mentioned crimes *after* granting the authorization of export. This diminishes somewhat the protections offered in the ATT. These issues are discussed below.

Definition of Knowledge

The ATT does not define what knowledge entails, and there is no customary rule as to a general definition.¹⁰⁸ It is thus challenging to determine how the drafters of the ATT understood the notion. The definition of knowledge has been expanded in international criminal law, which may provide some guidance applicable to the ATT.

In international criminal law, there are three different ways to interpret the notion ‘knowledge’.¹⁰⁹ First, knowledge can be construed as part of intent, where the perpetrator has the ‘conscious objective’ to cause harm, and the knowledge that the consequence is virtually certain to occur because of their conduct.¹¹⁰ Second, the notion can come close to the one of recklessness where knowledge arises when one is aware that one’s action is likely to lead to a harmful result, and the taking of the likely risk of causing this result.¹¹¹ In this instance, there is no conscious objective to cause the harmful result and the likelihood of the harmful result is not as certain as in the element of intent.

¹⁰⁵ Marlitt, Brandes, *All’s Well That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 411, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁰⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 24 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁰⁷ *The Arms Trade Treaty*, Art. 6(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁰⁸ Antonio Cassese et al., *CASSESE’S INTERNATIONAL CRIMINAL LAW*, p. 39 (2013).

¹⁰⁹ Antonio Cassese et al., *CASSESE’S INTERNATIONAL CRIMINAL LAW*, p. 49 (2013).

¹¹⁰ Mahamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, Vol. 19, CRIMINAL LAW FORUM, pp. 473-518, p. 479 (2008) available at <http://link.springer.com/article/10.1007%2Fs10609-008-9085-6>.

¹¹¹ Antonio Cassese et al., *CASSESE’S INTERNATIONAL CRIMINAL LAW*, p. 50 (2013).

Third, the notion of knowledge can amount to a mental element of its own.¹¹² It then mainly relates to the knowledge of the circumstances of a crime.¹¹³ For example, the definition of crimes against humanity requires the defendant to know of the widespread or systemic nature of attacks against a civilian population.¹¹⁴

As regard the ATT, Article 6(3) refers to knowledge in relation to the consequence of the exportation of conventional arms, and not the circumstances of the crimes these arms would be used to commit. The responsibility of the exporting state differs from the liability of the perpetrators of the crimes these arms would be used to commit. Therefore, the notion of knowledge under the ATT does not amount to a mental element of the crime of its own. However, the question of whether the notion of knowledge in the ATT could be construed as part of intent or subjective recklessness remains.

States parties to the ATT did not likely understand knowledge in the sense that the exporting state had to foresee and desire the occurrence of the aforementioned crimes.¹¹⁵ Article 3(3) of the 2012 draft ATT aimed to prohibit exports ‘for the purpose of’ facilitating the commission of above-mentioned acts.¹¹⁶ This formulation reflects the common law understanding of intent,¹¹⁷ which construes intent as the ‘conscious objective’ to cause the consequence coupled with the knowledge that the consequence is virtually certain to occur because of the conduct.¹¹⁸ Under the Rome Statute, such understanding of the 2012 draft comes closer to the notion of aiding and abetting a crime. Under the law of state responsibility, this formulation relates to the responsibility of state arising from aiding and assisting an international wrongful act.¹¹⁹ The International Law Commission understands knowledge as the awareness of the assisting state that the assisted state intends to use the aid and assistance in the

¹¹² Antonio Cassese et al., CASSESE’S INTERNATIONAL CRIMINAL LAW, p. 52 (2013).

¹¹³ Mahamed Elewa Badar, *The Mental Element in the Rome State of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, Vol. 19, CRIMINAL LAW FORUM, pp. 473-518, p. 495 (2008) available at <http://link.springer.com/article/10.1007%2Fs10609-008-9085-6>.

¹¹⁴ Antonio Cassese et al., CASSESE’S INTERNATIONAL CRIMINAL LAW, p. 52 (2013).

¹¹⁵ Mahamed Elewa Badar, *The Mental Element in the Rome State of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, Vol. 19, CRIMINAL LAW FORUM, pp. 473-518, p. 482 (2008) available at <http://link.springer.com/article/10.1007%2Fs10609-008-9085-6>.

¹¹⁶ Marlitt, Brandes, *All’s Well That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 412, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹¹⁷ Stuart Casey-Maslen, *Academy Briefing No. 2, The Draft Arms Trade treaty*, GENEVA ACADEMY, p. 25 (October 2012), available at http://www.geneva-academy.ch/docs/publications/ATTbriefing2_WEB.pdf.

¹¹⁸ Mahamed Elewa Badar, *The Mental Element in the Rome State of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, Vol. 19, CRIMINAL LAW FORUM, pp. 473-518, p. 479 (2008).

¹¹⁹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Article 16, p. 65, delivered to the General Assembly, U.N. Doc A/56/10. (2001) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

commission of a wrongful act.¹²⁰ The assisting state engages its responsibility where it intends to facilitate the wrongful conduct, provided such conduct is unlawful under its own international obligations.¹²¹

For the purposes of the ATT, this formulation would lack practical effect as it is unlikely for any state to frame a transfer in those terms.¹²² Article 6(3) of the ATT provides for a higher threshold to engage state responsibility, as it arguably contemplates knowledge as ‘the conscious taking of an unjustifiable risk’.¹²³ This understanding is more likely as the use of the term ‘would be used’ rather than ‘could be used’ implies a stronger knowledge than the one demanded by culpable negligence.¹²⁴ In any case, the question of the definition of ‘knowledge’ for the ATT’s purposes remains unresolved and subject to debate.

Time of Authorization

Article 6(3) of the ATT requires an exporting state not to authorize export of arms where it has the knowledge that the arms or items would be used in the commission of international crimes. As such the ATT requires the state party to have this knowledge *at the time* of the authorization in order to deny the export.¹²⁵ However, the timeframe of the provision does not bind state parties if they acquire knowledge of crimes *after* granting the authorization of export. Therefore, if the authorizing authority becomes aware at a later stage that the receiving state intends to use the arms in the commission of the listed crimes, Article 6(3) does not oblige the state to withdraw the authorization. The ATT under Article 7(7) only *encourages* the exporting state at this stage to reassess the authorization when in possession of new information.¹²⁶ This diminishes the protections offered in the ATT and also creates uncertainty regarding what a state can do after learning of such crimes.

¹²⁰ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Commentary Article 16, paragraph 4, p. 66, *delivered to the General Assembly*, U.N. Doc A/56/10. (2001) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹²¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Commentary Article 16, paragraph 3, p. 66, *delivered to the General Assembly*, U.N. Doc A/56/10. (2001) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹²² Stuart Casey-Maslen, *Academy Briefing No. 2, The Draft Arms Trade treaty*, GENEVA ACADEMY, p. 25 (October 2012), available at http://www.geneva-academy.ch/docs/publications/ATTbriefing2_WEB.pdf.

¹²³ Mahamed Elewa Badar, *The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective*, Vol. 19, CRIMINAL LAW FORUM, pp. 473-518, p. 488 (2008) available at <http://link.springer.com/article/10.1007%2Fs10609-008-9085-6>.

¹²⁴ Antonio Cassese et al., CASSESE’S INTERNATIONAL CRIMINAL LAW, p. 42 (2013).

¹²⁵ *The Arms Trade Treaty*, Art. 6(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹²⁶ *The Arms Trade Treaty*, Art. 7(7) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

International Crimes

The relevant crimes for Article 6(3) are: genocide; crimes against humanity; grave breaches of the Geneva Conventions and attacks directed against civilian objects or civilians protected as such; and other war crimes as defined by international agreements to which the state is a party.¹²⁷ These are elaborated upon below in turn.

The UN General Assembly recognised genocide as a crime under international law in 1946 before formally prohibiting it in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹²⁸ In 1951, the International Court of Justice recognised the prohibition of the crime of genocide as a general principle of law,¹²⁹ which has attained the status of *jus cogens*.¹³⁰ This means the prohibition on genocide is a peremptory norm of international law that the international community of states as a whole has accepted and from which there can be no derogation.¹³¹ Therefore, the prohibition of the crime of genocide as defined in the Genocide Convention is binding on all states, regardless of the existence of conventional obligation.¹³²

The Genocide Convention contains a definition of genocide, which therefore applies also to the ATT. Article 2 of the Convention reads:

In the present Convention, genocide means any of the following acts with intent to destroy, in whole or in part, a national ethnical, racial or religion group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about the physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

¹²⁷ *The Arms Trade Treaty*, Art. 6(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹²⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 24 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹²⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, 1951, I.C.J., p. 23 (Mai 28) available at <http://www.icj-cij.org/docket/files/12/4283.pdf>

¹³⁰ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 24 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹³¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Commentary Article 40, paragraph 2, p. 112, delivered to the General Assembly, U.N. Doc A/56/10. (2001) available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

¹³² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, 1951, I.C.J., p. 23 (Mai 28) available at <http://www.icj-cij.org/docket/files/12/4283.pdf>

Crimes against humanity are offences that constitute a serious attack on human dignity as part of a widespread or systemic attack against a civilian population.¹³³ The underlying offences of crimes against humanity include - but are not limited to - murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture and sexual violence.¹³⁴ As for genocide, crimes against humanity may take place in times of peace as well as war.¹³⁵ Of note, Article 6 does not prohibit a transfer of arms where the state knows that the arms or items would be used to commit human rights violations.¹³⁶ As regard the explicit prohibition of Article 6, human rights treaties are only relevant under its paragraph 2, when the transfer would amount to a violation of obligations arising from those treaties.

War crimes are serious violations of international humanitarian law, which means they are limited to situations armed conflict (both international or non-international conflicts).¹³⁷ Of note, Article 6 does not prohibit the transfer of conventional arms to non-state actors.¹³⁸ Article 6(3) of the ATT relates to three types of war crimes: grave breaches of the Geneva Conventions (1949); attacks directed against civilian objects or civilians protected as such; and other war crimes as defined by international agreements to which the state is a party. These are elaborated upon below.

Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention define grave breaches of humanitarian law.¹³⁹ They read as follows:¹⁴⁰

The following acts, if committed against persons or property protected by the Conventions, constitute grave breaches of humanitarian law:

- Willful killing;
- Torture or inhumane treatment, including biological experiments;

¹³³ Antonio Cassese et al., CASSESE'S INTERNATIONAL CRIMINAL LAW, pp.90-91 (2013).

¹³⁴ Antonio Cassese et al., CASSESE'S INTERNATIONAL CRIMINAL LAW, pp.94-98 (2013).

¹³⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 25 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹³⁶ Marlitt, Brandes, *All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 415, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹³⁷ Antonio Cassese et al., CASSESE'S INTERNATIONAL CRIMINAL LAW, p.65 (2013).

¹³⁸ Marlitt, Brandes, *All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 415, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹³⁹ *How 'grave breaches' are defined in the Geneva Conventions and Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (June 4 2004) available at <https://www.icrc.org/eng/resources/documents/misc/5zmgf9.htm>.

¹⁴⁰ *How 'grave breaches' are defined in the Geneva Conventions and Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (June 4 2004) available at <https://www.icrc.org/eng/resources/documents/misc/5zmgf9.htm>.

- Willfully causing great suffering or serious injury to body or health;
- Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- Compelling a prisoner of war to serve in the forces of the hostile Power;
- Willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the third Geneva Convention;
- Unlawful deportation or transfer or unlawful confinement of a protected person;
- Compelling a protected person to serve in the forces of a hostile Power;
- Willfully depriving a protected person of the rights of fair and regular trial prescribed in the fourth Geneva Convention; and
- Taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

The term ‘attacks directed against civilian objects or civilians protected as such’ in Article 6(3) of the ATT relates to Article 51(2) of the 1977 Additional Protocol I that prescribes “the civilian population as such, as well as individual civilians, shall not be the object of attack”.¹⁴¹ The use of the expression ‘protected as such’ informs that the provision excludes civilians who take part directly in hostilities. Article 6(3) ATT extends the protection to civilian objects as well.¹⁴²

Article 6(3) also covers war crimes as defined by international agreements to which the exporting state is a party.¹⁴³ For example, state parties to the Rome Statute also have to consider the acts defined under Article 8 of the Rome Statute. This includes ‘serious violations of the laws and customs applicable in international armed conflict and in armed conflict not of an international character’, which Article 6(3) of the ATT does not directly include.

1.4. ATT Export Assessment

As noted in section 1.2 above, Article 7 of the ATT provides that the exporting state has to assess, in an objective and non-discriminatory manner, the potential for the arms to be used in a manner contributing to or undermining peace and security.¹⁴⁴ Article 7(1) and 7(4) provide the criteria and factors to assess the potential implications of authorizing arms export. Articles 7(2) and

¹⁴¹ *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of victims of International Armed Conflicts*, Art. 51 (1977) available at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/470>

¹⁴² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 25 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁴³ *The Arms Trade Treaty*, Art. 6(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁴⁴ *The Arms Trade Treaty*, Art. 7(1)(a) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

7(3) provide guidelines to follow when taking the export authorization decision. As the arms export assessment is key to limiting arms trade to human rights violating states, it is discussed in detail in this section 1.4. The section analyses first the framework of the export assessment, then briefly addresses risk mitigating measures, and finally covers the decision taken on export authorization.

1.4.1. Framework of the Export Assessment

Article 7 of the ATT provides a framework for states parties to assess the implications of exporting arms to a particular state or region, provided the transfer is legal under Article 6.¹⁴⁵ This framework requires states parties to consider a number of factors when determining whether an export to a certain state can be authorized or not. Article 7(1) and (4) stipulate respectively:

- 1) If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of the conventional arms or items (...) shall in an objective and non-discriminatory manner, taking into account relevant factors (...) assess the potential that the conventional arms or items
 - a) would contribute to or undermine peace and security;
 - b) could be used to commit or facilitate:
 - i) a serious violation of international humanitarian law,
 - ii) a serious violation of international human rights law,
 - iii) an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party,
 - iv) an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

- 4) The exporting State party, in making this assessment shall take into account the risk of the conventional arms covered under Article 2(1) or of the items covered under Article 3 and Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

This section 1.4.1 covers these factors set out above in turn.

Objective and Non-Discriminatory Assessment

The ATT does not provide standards or criteria for determining what amounts to an ‘objective and non-discriminatory’ assessment for the purposes of Article 7(1). This lack of precision grants latitude for states to conduct their own export assessment as they determine. State parties can refer to UN Documents, regional instruments or other types of guidelines that provide

¹⁴⁵ *The Arms Trade Treaty*, Art. 7(1) (3 2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

comprehensive criteria to make the final assessment of export.¹⁴⁶ For instance, the state can take into account:

- The type and quantity of weapons;
- The reasonably foreseeable uses and users;
- The general situation in the country of final destination and its surrounding region;
- The actors involved in the export;
- The intended route of export; and
- The information provided by the importing state in accordance to Article 8 of the ATT.¹⁴⁷

Moreover, the state party has to establish a causal link between the export and the commission of a violation or crime pursuant to Article 7(1)(b).¹⁴⁸ This is to determine whether there is an overriding risk in the use of the arms exported in relation to Article 7(3).¹⁴⁹

Peace and Security

Article 7(1)(a) requires a state to consider the contribution to or the undermining of peace and security in assessing whether to authorize an export. This provision is contentious,¹⁵⁰ as what situations fall under the notion of ‘security’ is debatable, and different states may have different interpretations of what amounts to a security issue.¹⁵¹ Nonetheless, Article 25 of the UN Charter requires member states to ‘accept and carry out’ decisions of the UN Security Council. Therefore, if the Security Council determines the existence of a threat to peace under Article 39 of the Charter, a state has to acknowledge it in relation to the ATT. Further difficulty arises in determining whether, and to what extent, the conventional arms to be traded may contribute to or undermine peace and security. Article 7(1) allows some discretion in determining such potential. For

¹⁴⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 28 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁴⁷ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 26 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁴⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 28 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁴⁹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 28 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁵⁰ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 26 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁵¹ Ole Wæver, *Securitization and Desecuritization*, in ON SECURITY, pp. 46-86, (Romie D. Lipschutz, 1995)

example, a state may consider the potential contribution to peace overrides the risk of undermining peace and security.¹⁵²

Serious Violation of International Humanitarian Law

Article 7(1)(b)(i) of the ATT requires a state to consider whether the arms to be traded could be used to commit or facilitate a serious violation of international humanitarian law (IHL). Grave breaches of the Geneva Conventions, including violation of Common Article 3 and the additional protocols, are serious violations of IHL. War crimes as defined under Article 8 of the Rome Statute and in customary international law also are violations of IHL. The International Committee of the Red Cross has written extensively on the topic of IHL, and has noted that:

‘Serious violations of international humanitarian law’ are ‘war crimes’. The two terms are today interchangeable. They can take place in international or non-international armed conflicts. Violations are serious, and are war crimes, if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick), or objects (e.g. civilian objects or infrastructure), or if they breach important values.¹⁵³

Article 7(1) of the ATT provides for a broader interpretation of serious violations of IHL than does Article 6(3) of the ATT. Article 7(1) does not limit the notion of war crimes to those crimes ‘defined by international agreements’ ratified by the exporting state. Article 7(1)(b) also considers violations of *customary* international humanitarian law.¹⁵⁴ Moreover, Article 7(1) provides for a lower threshold than Article 6(3), as the mere potentiality for a causal link between the arms and the violations triggers the applicability of Article 7(1), while Article 6(3) requires the *knowledge* that the arms would be used to commit crimes.¹⁵⁵

¹⁵² Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 416, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁵³ *What are ‘Serious Violations of International Humanitarian Law’? Explanatory Note*, INTERNATIONAL COMMITTEE OF THE RED CROSS, available at https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CCcQFjAA&url=https%3A%2F%2Fwww.icrc.org%2Feng%2Fassets%2Ffiles%2F2012%2Fatt-what-are-serious-violations-of-ihl-icrc.pdf&ei=gulVVdSAK4HMygPn_IDwBg&usg=AFQjCNFgkRsPp1PBeA8sBWptCLfVSN0S_A&bvm=bv.93564037,d.bGQ.

¹⁵⁴ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 417, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁵⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 27 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

Serious Violation of Human Rights Law

Article 7(1)(b)(ii) of the ATT requires a state to consider whether the arms to be traded could be used to commit or facilitate a serious violation of international human rights law. While the ATT distinguishes human rights violations from serious violations, it does not define the notion of ‘serious’.¹⁵⁶ There is no universal agreement as to what amounts to a ‘serious violation’ of human rights.¹⁵⁷ Determining what constitutes a serious violation of human rights law under Article 7(1) ATT requires an assessment of which human rights conventional arms can potentially affect, and what amounts to a ‘serious violation’ of those rights. Conventional arms can affect the enjoyment of many, if not all, human rights.¹⁵⁸

There is no doubt that a violation of a norm of human rights that has reached the status of *jus cogens* is serious enough to reach the threshold of Article 7(1)(b)(ii). The rights relating to the existence and protection of human dignity are particularly relevant in matters of arms trade.¹⁵⁹ These core human rights are the right to life (arbitrary deprivation of life including assassinations, other forms of murder, enforced disappearance, and genocide), the right to freedom from torture and other forms of cruel, inhuman or degrading treatment, the rights to liberty and security of person, and the right to freedom from slavery. Other criteria can ground the ‘seriousness’ of violations of rights, such as the frequency of the violation, the number of victims, the nature of the breached obligation and the character of the violations may indicate the seriousness of a violation.¹⁶⁰ Gross and systemic violations of any human rights qualify as serious violations.¹⁶¹

¹⁵⁶ Takhmina Karimova, *Academy Briefing No. 6, What Amounts to ‘a serious violation of International Human Rights Law?’ an Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty*, GENEVA ACADEMY, p. 3 (August 2014), available at http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20breifs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf.

¹⁵⁷ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 417, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁵⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 27 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁵⁹ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 418, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁶⁰ Marlitt, Brandes, *All’s Wall That Ends Well” or “Much Ado About Nothing”?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 419, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁶¹ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 28 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

Terrorism and Transnational Organized Crimes

Articles 7(1)(iii) and (iv) of the ATT contemplate the offences of terrorism and transnational organized crime under international conventions and protocols. These Articles require a state to consider whether the arms to be traded could be used to commit or facilitate such offences under other international conventions. Many conventions cover this subject-matter, such as the Convention for the Suppression of Unlawful Seizure of Aircraft; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the International Convention for the Suppression of Terrorist Bombings; and the Convention Against transnational Organized Crimes and its protocols. These conventions may therefore be relevant for states to consider in making an export assessment.

Gender Based Violence and Violence against Children

Finally, Article 7(4) provides that state parties have to assess the risk of gender-based violence and violence against children when making an arms export authorization. Of note, Article 7(4) follows the provision setting out the authorization decision. Although Article 7(4) directly refers to the making of the assessment, this latter position may indicate that the drafters consider this factor of lesser importance.¹⁶² The extent to which gender-based violence may restrict exports may relate to whether the violence identified falls within the already considered categories in Article 7(1) - such as serious human rights violations or violations of IHL.

1.4.2. Risk Mitigating Measures

Once the considerations required under Article 7(1) have been made by the exporting state, Article 7(2) requires state parties to consider measures to *mitigate* any of the risks identified regarding violations of international law. Article 7(2) reads as follows:

The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence building measures or jointly developed and agreed programmes by the exporting and importing states.

This Article requires states to consider measures that may mitigate any risks identified in relation to exporting arms to a certain state. Many measures are available to the national control authorities that may mitigate risks in

¹⁶² Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 30 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

exporting.¹⁶³ The implementation of mitigating measures may provide the exporting and importing states with stronger arguments to justify an arms trade. Although an importing state may perceive these measures as an interference in its domestic affairs, such measures can be in the interest of both states.¹⁶⁴ Of note however, Article 7(2) does not require states to *act* on the mitigating measures they identify – only to consider them.¹⁶⁵ The ATT refers to confidence-building or jointly developed programmes between exporting and importing states as mitigating measures. For instance, end-user and end-use certifications define the final user and the end-use of imported arms. Their purpose is to confirm transfer and to verify that conventional arms are used in a manner consistent to the consent of the exporting state.¹⁶⁶

1.4.3. Overriding Risk and Decision of Export

After setting out the framework established by the ATT for the arms export assessment, and addressing risk mitigation measures, this part finally covers the decision taken on export authorization. Once the national control authorities have assessed potential risks for human rights and other violations involved in the export, and also considered potential mitigating measures, states are required to determine whether the risk is overriding. Article 7(3) of the ATT provides that if the exporting state party determines that there is an overriding risk of any of the negative consequences in Article 7(1), the state *shall* not authorize the export. This part below considers the meaning of ‘overriding risk’ and the final export authorization decision.

Overriding Risk

The use of the term ‘if’ in Article 7(3) grants discretion to the state party in defining what amounts to an overriding risk.¹⁶⁷ Moreover, the notion of ‘overriding’ implies a balance - the relative comparison of things. The term overriding is defined in English as ‘more important than’ or ‘more important

¹⁶³ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 29 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁶⁴ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 29 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁶⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 29 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁶⁶ Marlitt, Brandes, *All's Wall That Ends Well* or “Much Ado About Nothing”? : A Commentary on the Arms Trade Treaty, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 420, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁶⁷ Marlitt, Brandes, *All's Wall That Ends Well* or “Much Ado About Nothing”? : A Commentary on the Arms Trade Treaty, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 422, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

than any other considerations.’¹⁶⁸ The French version of the ATT translates ‘overriding’ into ‘prépondérant’, and the Spanish one into ‘preponderante’, which translates in English as ‘something that has more weight, more authority’.¹⁶⁹ In this context, the term ‘overriding risk’ raises questions as to whether the balance between the positive and negative implications of an arms export requires absolute or relative concepts in the determination of what is overriding.¹⁷⁰ Given how new the treaty is, it is yet to be determined how states operationalize this obligation and determination in practice.

According to Article 7(3), if the state determines that such an overriding risk exists, it shall not authorize the export.¹⁷¹ If no such overriding risk exists, it may authorize the export. The next part below details the decision to authorize the export.

Decision of Export: the Authorization

Pursuant to Article 7(5), a state party has to detail the authorization of export and issue it prior to the actual transfer of conventional arms or items.¹⁷² In this case, ‘to detail’ means that the authorization has to specify: the types and quantity of arms; the price and weight of arms; the production site of the exporter; when the export will take place; the state of final destination and authority to which the arms are exported; and finally the seal of the issuing national authority.¹⁷³ Article 7(6) requires state parties to make available the appropriate information regarding the authorization to the importing state and any transit states.¹⁷⁴ This provision ties the extent of information provided to that required by the national laws, practices and policies of the exporting state.¹⁷⁵

¹⁶⁸ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 30 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

¹⁶⁹ French definition, available at http://www.larousse.fr/dictionnaires/francais/pr%C3%A9pond%C3%A9rant_pr%C3%A9pond%C3%A9rante/63618.

¹⁷⁰ Marlitt, Brandes, *All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty*, Vol. 5, GOETTINGEN JOURNAL OF INTERNATIONAL LAW, pp.399-429, p. 422, (2013) available at http://www.gojil.eu/issues/52/52_article_brandes.pdf.

¹⁷¹ *The Arms Trade Treaty*, Art. 7(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁷² *The Arms Trade Treaty*, Art. 7(5) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁷³ Academy Briefing No. 3, *The Arms Trade Treaty*, GENEVA ACADEMY, p. 31 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁷⁴ *The Arms Trade Treaty*, Art. 7(6) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁷⁵ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 31 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

Export authorization has a determined period of validity, and exporting states sometimes renew them automatically.¹⁷⁶ Article 7(7) of the ATT encourages states to reassess the authorization once it becomes aware of new relevant information.¹⁷⁷ However, the provision does not oblige state parties to do so. Furthermore, even if an overriding risk materializes after the exporting state has granted authorization, it is entirely at the exporting state's discretion to disregard it. This can be considered a weakness of the ATT.

1.5. ATT Conclusion and Practical Application

On the basis of the above analysis, this section reflects on the application of the ATT and considers the legality of a hypothetical arms transfer from exporting state A to importing state B, a human rights' violating state. This section analyzes whether this situation would fall within the scope of the ATT's application, the general obligations on state A to effectively implement the ATT, and what obligations may constrain state A under Articles 6 and 7 of the ATT from authorizing the export.

1.5.1. *Applicability of the ATT*

In order for the ATT to apply to the situation of state A seeking to export arms to state B (which violates human rights), a number of cumulative conditions must be fulfilled:

- State A must be a party to the ATT;
- The movements of arms between state A and state B have to fall under the meaning of 'trade' or 'transfer', which includes export, import, transit, trans-shipment and brokering of arms; and
- The arms or items transferred between state A and state B must fall under Articles 2(1), 3 and/or 4, as defined in the UN Register of Conventional Arms or other relevant UN instruments.¹⁷⁸

In the present hypothetical, state A is a party to the ATT. State A exports conventional arms to state B. The arms are intended for the use of state B, and state A does not retain ownership of the arms after their delivery to state B.¹⁷⁹ As such, this exchange qualifies as an export that falls within the meaning of

¹⁷⁶ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 31 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

¹⁷⁷ *The Arms Trade Treaty*, Art. 7(7) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁷⁸ *The Arms Trade Treaty*, Art. 2(1) and Art. 5(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁷⁹ *The Arms Trade Treaty*, Art. 2(3) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

‘transfer’ defined in Article 2(2) of the ATT. The objects of the export are conventional arms or items covered under Articles 2(1), 3 and 4 of the ATT. As such, these conditions for the ATT to apply to the hypothetical transfer are met.

1.5.2. *Implementation of the ATT*

As state A is a party to the ATT it is required to, and is responsible for, the treaty’s implementation and enforcement. The general implementation of the ATT requires state parties to:

- Respect the principles enshrined in the ATT preamble;¹⁸⁰
- Implement the treaty with consistency, objectivity and non-discrimination;¹⁸¹
- Establish a national control system and a national control list;¹⁸²
- Designate a competent national authority;
- Maintain national records and issue annual reports;¹⁸³ and
- Take appropriate measures to enforce national laws and regulations that implement ATT provisions.¹⁸⁴

Article 5(1) requires states to implement the ATT while bearing in mind the principles enshrined in the preamble. Two relevant principles in the preamble are: the respect for international humanitarian law in accordance with the Geneva Conventions of 1949; and respect for human rights in accordance with the UN Charter and the Universal Declaration of Human Rights. In the present case, state A must establish a competent authority which functions transparently and effectively according to its national control system and in an objective, consistent and non-discriminatory manner - bearing in mind the respect for humanitarian and human rights law.¹⁸⁵ This authority will assess the proposed export from state A to state B, and decide on its authorization or not.

1.5.3. *Export Restrictions under Articles 6 and 7 of the ATT*

In taking their decision on export authorization, state A must consider Articles 6 and 7 of the ATT. These provisions require state A to prohibit

¹⁸⁰ *The Arms Trade Treaty*, Art. 5(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁸¹ *The Arms Trade Treaty*, Art. 5(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁸² *The Arms Trade Treaty*, Art. 5(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁸³ *The Arms Trade Treaty*, Art. 12 and Art. 13 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁸⁴ *The Arms Trade Treaty*, Art. 14 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

¹⁸⁵ *The Arms Trade Treaty*, Art. 5 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

transfers in certain circumstances. Article 6 of the ATT will prohibit the transfer in the following three situations:

- If the transfer violates a measure of the UN Security Council;
- If the transfer contravenes international obligations arising from other international agreements (such as human rights treaties) to which state A is a party; or
- If state A knows that state B commits any of the crimes set out in Article 6(3).

In the present hypothetical case, Article 6(3) will only apply if the UN Security Council has passed arms embargoes against state B, or any other decisions prohibiting export to a human rights violating country. Article 6(2) is only relevant if state A is a party to other international agreements prohibiting or sanctioning the export of arms to state B or human rights violating states. Article 6(3) will only apply if the human rights violations in state B amount to one of the listed prohibited crimes. For instance, torture as an element of crimes against humanity or as a grave breach of the Geneva Conventions would fall under the scope of Article 6(3). In this way, if at the time of authorization state A knows that the arms would be used by state B to commit torture, it may not authorize the export. However, if state A only learns about violations in state B after the authorization, it *may* reconsider but is not obliged to do so.

Under Article 7(1), state A must assess the possibility for the arms to be used by state B to commit or facilitate serious violations of human rights and humanitarian law. To do so, state A must analyze the potential link between the arms export and the human rights violations in state B. If state A establishes the possibility of such a causal link, it can consider possible mitigating measures, and determine whether the risk is ‘overriding’ or not. State A has discretion in determining the risk, considering mitigating measures, and whether the risk is ultimately overriding or not. If the risk is determined to be overriding, the export to state B must not be authorized. If it is not overriding, the export may be authorized. Engaging state A’s responsibility for a wrongful authorization would require a lack of objectivity and impartiality in the state’s assessment of the risk potential.

1.5.4. Application of ATT: Conclusion

This hypothetical demonstrates how the ATT may operate in practice. There are numerous advantages to the ATT and benefits in its ability to restrict arms trade to states where they will be used in or facilitate the commission of international crimes. As such, this Treaty is an important step by the international community with great potential to limit arms trade with the intention of preventing the commission of or contribution to international

crimes. However, exporting states retain certain discretion under the Treaty, and are required to make and balance important assessments that ultimately determine an export's authorization. As the Treaty is still relatively new, it is as yet uncertain how it will be implemented and enforced in practice, and how states parties will interpret and apply their obligations. This also presents an opportunity to engage with the system at an early stage in its implementation.

2. European Guidelines and the ATT

This section of the memorandum considers the instruments relevant for arms trade regulation within the framework of the European Union (EU). At this level, the key instrument is the European Council 2008 Common Position on arms trade. This Position prohibits export of armament from member states to receiving states that have a record of serious human rights violations. The Position requires member states to pay special attention to exports where there is a clear risk that the receiving state will use the military technology or equipment for internal repression. As can be seen, this Position covers the same subject matter as the ATT and, like the ATT, is also legally binding. For member states to both the ATT and the EU, such as the Netherlands, it is useful to consider both systems' regulation of arms trade and their compatibility.

This section of the memorandum first sets out the provisions of the EU Common Position including its implementation and substantive obligations, including in relation to prohibiting the trade of arms to human rights violating states. The memorandum also addresses the Council of the European Union User's Guide on Arms Exports, which provides guidelines on implementing the Common Position. The memorandum then considers the relationship between the Common Position and the ATT, and compares them in section 2.2 to assess their compatibility.

2.1. European Council on Arms Export

2.1.1. Council Common Position 2008/944/CFSP

The European Council Common Position of 2008 (Common Position), successor to the 1998 Code of Conduct on arms export,¹⁸⁶ establishes mechanisms for the cooperation and exchange of information between EU member states on arms trade.¹⁸⁷ The Common Position is legally binding, and

¹⁸⁶ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 1 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

¹⁸⁷ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 1 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

member states have to implement and apply the Position on the domestic level.¹⁸⁸ However, the member states may choose the manner in which they implement the Common Position's provisions.¹⁸⁹ Member states are responsible for all aspects of policy implementation.¹⁹⁰

Human Rights Considerations

Article 2 of the Common Position reiterates the eight criteria from the Code of Conduct, and specifies the situations in which member states may not export armaments.¹⁹¹ For instance, member states may not authorize export of armament where it is contrary to their international commitments or where there is a clear risk that the receiving states will use it for the purpose of repression or human rights abuses.¹⁹² Furthermore, the export of armament may not provoke or prolong an armed conflict or risk to destabilize regional peace, security and stability.¹⁹³

The second criterion in the Common Position for arms exports concerns respect for human rights and humanitarian law in the receiving state.¹⁹⁴ Member states cannot export arms, or have to pay special attention where there is a clear risk that the receiving state will use the military technology or equipment for internal repression. In addition, the Common Position prohibits arms export to receiving states that have a record of serious human rights violations, as established by competent organs of the UN, EU, or Council of Europe (CoE).¹⁹⁵ Under the Common Position member states have to consider the risk of arms diversion to another end-user, who will use it for internal repression.¹⁹⁶ Equally

¹⁸⁸ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 6 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

¹⁸⁹ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 6 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

¹⁹⁰ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 6 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

¹⁹¹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (8 December 20008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

¹⁹² *Code of Conduct on Arms Export*, EUROPEAN COUNCIL, p.3-4 (5, June 1998) available at <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>.

¹⁹³ *Code of Conduct on Arms Export*, EUROPEAN COUNCIL, p.4-5 (5, June 1998) available at <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>.

¹⁹⁴ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (2) (8 December 20008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

¹⁹⁵ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (2) (8 December 20008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

¹⁹⁶ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (2) (8 December 20008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

the Code requires member states not to export arms where there is a risk that a receiving state will transfer, divert, or re-export the arms to an undesirable end user.¹⁹⁷

Member states have to carefully consider a receiving state's attitude towards any relevant instruments of humanitarian law. If this assessment concludes that a tangible risk exists that the receiving state will use the military technology or equipment for serious violations of humanitarian law, the member state has to refrain from exporting the armament.¹⁹⁸ In addition, member states have to assess a receiving state's compliance with its international commitments, and especially those relating to the non-use of force and humanitarian law.¹⁹⁹

Member states may take into account their defense and security related interests, but still have to adhere to and consider the criteria for exports on human rights and regional peace, security, and stability.²⁰⁰ Furthermore, member states cannot let economic, social, commercial, and industrial interests influence the application of the eight criteria.²⁰¹ The Common Position also clarifies that its provisions do not affect the member states' right and ability to impose more restrictive domestic policies.²⁰² This means that states may choose to adopt national policies that are more protective of human rights than the standards set out in the Common Position.

Export Licenses and Reporting

Under Article 1 of the Common Position, member states have to include information in the export license applications as to the physical exports, brokering, transit and trans-shipment and any tangible transfers of software and technology by means such as electronic media, fax or telephones.²⁰³ Article 4

¹⁹⁷ *Code of Conduct on Arms Export*, EUROPEAN COUNCIL, p.7 (5, June 1998) available at <http://www.consilium.europa.eu/uedocs/cmsUpload/08675r2en8.pdf>.

¹⁹⁸ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (2) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

¹⁹⁹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (6) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁰⁰ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 2 (5) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁰¹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 10 (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁰² *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 3 (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁰³ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 1 (2) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

stipulates that member states have to circulate among the other member states the details of an application for export and an explanation for licenses denied.²⁰⁴ At all times, member states have to notify other member states when they deny, amend, or revoke a request for arms export.²⁰⁵ Member states should also forward these notifications – classified as restricted - to the European Council Secretariat.²⁰⁶ In a notification for denial, amendment, or revocation, the member state has to indicate on which of the eight criteria from the Common Position the decision is based.²⁰⁷ Sharing this information is vital to achieve the goal of harmonization or convergence of export control policies.²⁰⁸

Further, if one member state wishes to grant a license that another member state had denied in the previous three years, the two states have to consult on the reasons for denial.²⁰⁹ If the member state seeking to issue the license wants to pursue this course of action after consultation, it has to provide a detailed explanation of its reasoning.²¹⁰ The eight criteria and the consultation procedure set forth in Article 4 of the Common Position also apply to dual-use goods and certain technology.²¹¹

To facilitate transparency, member states also have to circulate annual reports²¹² on their exports of military equipment and technology, and their

²⁰⁴ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 4 (1) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁰⁵ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 8 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁰⁶ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 13 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁰⁷ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 10 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁰⁸ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 5 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁰⁹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 4 (1) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²¹⁰ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 4 (1) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²¹¹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 6 (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>; The technology this article refers to is outlined in Annex 1 of Regulation (EC) No 1334/2000, available at <http://www.sussex.ac.uk/Units/spru/hsp/documents/2000-0622%201334-2000.pdf>.

²¹² The web pages on which the member states publish their annual reports are available here: http://www.eas.europa.eu/non-proliferation-and-disarmament/arms-export-control/docs/table_e.pdf.

implementation of the Common Position.²¹³ The EU as a whole submits an annual EU report to the Council of Europe (CoE), and publishes it in the *Official Journal of the European Union*.²¹⁴ In addition, each member state that exported arms on the EU Common Military List has to publish a report on these exports.²¹⁵ State reports on the subject have increased since the establishment in 2008 of an obligation of transparency.²¹⁶ Bromley explains that although transparency has increased, the real impact on the decision-making process is difficult to measure.²¹⁷ For example, the UK Parliament recently urged the Government to exercise more caution in arms export, as the state had many outstanding export licenses with states on the human rights concern list.²¹⁸

2.1.2. User's Guide on Arms Export

In 2009, the Council of the European Union (CoEU) issued the User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment (User's Guide). The purpose of the User's Guide is to assist member states in applying the Common Position.²¹⁹ The User's Guide offers guidance on the interpretation of the eight criteria, and the implementation of the articles. The intended users are export-licensing officials.²²⁰

Assessment of Serious Human Rights Violations

The User's Guide discusses which key aspects member states consider in assessing the risk of serious violations. For instance, the guide provides that internal repression may include other practices such as torture and other cruel,

²¹³ The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, Article 8 (1) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²¹⁴ The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, Article 8 (2) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²¹⁵ The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, Article 8 (3) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²¹⁶ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 7 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

²¹⁷ Mark Bromley, *The Review of the EU Common Position on arms exports; prospects for strengthened controls*, EU NON-PROLIFERATION CONSORTIUM, 7 January 2012, at page 7 available at <http://www.sipri.org/research/disarmament/eu-consortium/publications/publications/non-proliferation-paper-7>.

²¹⁸ Kylie Maclellan, *UK lawmakers warn government over arms sales to authoritarian regimes*, REUTERS, March 19 2015, available at <http://www.reuters.com/article/2015/03/20/us-britain-politics-armsexports-idUSKBN0MG00920150320>.

²¹⁹ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 2 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>

²²⁰ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 2 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

inhuman and degrading treatment or punishment; summary or arbitrary executions; disappearances; arbitrary detentions; and other major violations of human rights.²²¹ In assessing whether there is a tangible risk, member states can take into account factors such as the current and past record of the proposed end-user concerning respect for human rights. Member states also have to assess who is the actual end-user of the exported armament. Even within one recipient state, the military equipment or technologies may go to the army or the police forces. Therefore, exporting states should establish which of these branches will receive and use the items, and how likely this particular branch is to engage in repression or human rights violations.²²²

To verify whether a receiving state complies with the obligations to respect human rights and humanitarian law, the User's Guide suggests that member states use a variety of information sources. This includes information from the competent organs of the EU and the CoEU, as these sources already contain relevant information from other accounts.²²³ The Guide notes that a case-by-case analysis for each export is preferable, and that the member state may gather relevant information from other sources such as diplomatic missions from member states, documentation from international organizations, and NGO reports.²²⁴ The User's Guide emphasizes the importance of relying on current and up-to-date information from reliable sources of information.²²⁵

The User's Guide also indicates the relevance of considering the policy line of the recipient state's government, and of assessing whether the recipient state has effective protection of human rights in the constitution and independent monitoring bodies.²²⁶ Furthermore, the assessment of a clear risk is best made on a case-by-case basis, and takes into account negative attention from the international community, particularly from the EU, from civil society, or the

²²¹ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 39 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²² Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 42 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²³ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 38 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²⁴ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 38 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²⁵ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 42 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²⁶ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 39 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

media.²²⁷ Historical events, current circumstances, and identifiable trends or future events, constitute valid sources of information for the assessment.²²⁸

Member states can also assess the attitude of the receiving state by paying attention to, for instance, the recipient state's commitment to respect and promote human rights and bring human rights violators to justice.²²⁹ Also of relevance may be the recipient state's cooperation with international and regional human rights mechanisms, such as UN treaty bodies, and the special procedures and implementation record of relevant international and regional human rights instruments in the national policy and practice.²³⁰ Member states cannot equate the fact that no repressions occurred in the recipient state for a lengthy time period to the absence of a clear risk of violations.²³¹

The User's Guide offers a possible interpretation on how to assess what constitutes a serious violation of human rights. The Guide notes that characteristics such as 'systematic' or 'widespread' can emphasize or underline the seriousness of a violation.²³² However, a serious violation is not necessarily widespread or systematic.²³³ Furthermore, member states can also look at information from competent organs from the UN, EU, or CoE.²³⁴ Member states themselves have the final responsibility to assess and declare the seriousness of the violations.²³⁵

²²⁷ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 41 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²⁸ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 41 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²²⁹ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 40 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³⁰ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 40 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³¹ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 42 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³² Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 41 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³³ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 41 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³⁴ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 41 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³⁵ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 41 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

The User's Guide emphasizes that the current situation in the receiving state is of particular importance in the finding of whether there exists a serious human rights violation. Indeed, the recipient state may have taken steps to improve the situation as a result of domestic or international pressure or a change in government. In assessing whether this is the case, member states can consider whether the recipient state has agreed to independent monitoring or investigations into the alleged repressive acts, or whether it responded to the findings of such monitoring and investigations.²³⁶ The member state can also consider whether the recipient state convincingly changed its policies and practices or if it implemented new programs aimed at reform.²³⁷

Respect for Humanitarian Law

In assessing whether a recipient state is respectful of humanitarian law, the User's Guide provides that member states can consider whether the recipient state has ratified the four Geneva Conventions of 1949 and their Additional Protocols of 1977, and other key treaties of international humanitarian law.²³⁸ Member states can also check if the recipient state is member to treaties containing express prohibitions on or limitations to the transfer of specific weapons.²³⁹ According to the Guide, member states can consider whether any actor for which the recipient state is responsible (such as the armed forces) has committed a violation of humanitarian law.²⁴⁰ In addition, member states can check whether the recipient has engaged in action to prevent or suppress such violations, and whether it co-operated with other states or international tribunals to support criminal proceedings relating to the violations.²⁴¹

According to the User's Guide, the assessment of a clear risk of violations of humanitarian law caused by the use of exported military technology or equipment has to take into account three aspects. First, the member state must inquire into the recipient state's past and current record of respect for

²³⁶ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 42 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³⁷ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 42 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²³⁸ Such key treaties may include for instance the Convention on the Rights of the Child, the Rome Statute, and the Hague Convention.

²³⁹ Such treaties may include for instance the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the Convention on the Prohibition on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

²⁴⁰ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 44 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴¹ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 44 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

humanitarian law.²⁴² Second, the exporting state has to assess the recipient state's intentions as previously expressed in formal commitments.²⁴³ Third, the assessment has to include the capacity of the recipient state to use the material or technology in a manner consistent with international humanitarian law.²⁴⁴

Finally, the recipient state cannot divert or transfer the exported material to another user with the possibility of violations for humanitarian law.²⁴⁵ As such, member states have to include the risk of diversion in their assessment. For instance, they can look at whether the intended end-user (i.e. which branch or institution) has a legitimate need for the requested export or if it is more likely that the material is for another branch of the security forces.²⁴⁶ Exporting states have to consider whether it is appropriate to issue a license for export if the materials are in fact destined for this other branch.²⁴⁷ Member states can also consider whether separate procurement channels exist for the different branches of the security forces.²⁴⁸

While the Common Position is legally binding, it may not provide sufficient enforcement mechanisms to ensure compliance. The Common Position requires member states to encourage to their best endeavors the other member states to enforce the eight criteria.²⁴⁹ Member states also have to annually circulate details on their exports and on the implementation of the Common Position.²⁵⁰ Together, the member states can assess the legality of

²⁴² Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 44 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴³ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 44 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴⁴ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 44 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴⁵ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 44 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴⁶ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 46 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴⁷ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 46 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴⁸ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 46 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁴⁹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 11 (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁵⁰ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 8 (1) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

such exports on the basis of Common Position.²⁵¹ However, the Common Position does not contemplate actual consequences would member states find that state A has violated its obligations. The User's Guide is also silent on potential proceedings or sanctions.

2.2. Comparing the ATT and EU Arms Trade Framework

The EU has been a strong supporter of the Arms Trade Treaty, and it played a leading role in the UN Conferences negotiating the ATT in 2012 and 2013.²⁵² Indeed, the achievement of a legally binding instrument on the trade in conventional arms was one of the EU's top foreign policy priorities.²⁵³ However, the EU itself cannot be a party to the ATT as the treaty is not open for signature from international or regional organizations.²⁵⁴ Hence, the Council authorized member states to ratify the ATT in the interests of the EU for matters falling in the exclusive competence of the EU.²⁵⁵

While both instruments relate to arms exports, the scope differs a little. For example, the list on which the EU bases its export assessment is wider than that of the ATT, as it details more specifically the list of military equipment that fall under its scope and also includes software and technologies.²⁵⁶ On the other hand, the ATT covers a wider range of arms transfers than the Common Position. The ATT considers trade as including export, import, transit, transshipment and brokering,²⁵⁷ whereas the Common Position is primarily designed to address exports in the stricter sense to EU member states.²⁵⁸

²⁵¹ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 9 (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

²⁵² *Fifteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment (2014/C 621/01)* available at http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/docs/15_annual_report_en.pdf.

²⁵³ *Fifteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment (2014/C 621/3)* available at http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/docs/15_annual_report_en.pdf.

²⁵⁴ *Fifteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment (2014/C 621/4)* available at http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/docs/15_annual_report_en.pdf.

²⁵⁵ *Fifteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment (2014/C 621/4)* available at http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/docs/15_annual_report_en.pdf.

²⁵⁶ *Fifteenth Annual Report According to Article 8(2) of Council Common Position 2008/944/CFSP Defining Common Rules Governing Control of Exports of Military Technology and Equipment (2014/C 621/7)* available at http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/docs/15_annual_report_en.pdf.

²⁵⁷ *The Arms Trade Treaty*, Art. 2(2) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁵⁸ *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

This section of the memorandum addresses the framework of the ATT in relation to the Common Position in matters of arms exports. It addresses the similarities and differences in the two instruments' scope of application, the implementation and enforcement of the obligations and prohibitions they contain, as well as the export assessments they require.

2.2.1. Implementation and Enforcement

Both the ATT and the Common Position are legally binding. EU member states have to implement the provisions of the Common Position in their national export control systems and have to ensure that their legislation and administrative rules comply with the obligations in the Common Position. The ATT is also legally binding and requires the consistent, objective and non-discriminatory implementation by state parties. The ATT and the Common Position both allow for the simultaneous implementation of their counter-part. Article 26(1) of the ATT stipulates that the implementation of the ATT shall not prejudice state parties' obligation under existing international agreements to which they are parties.²⁵⁹

As regard the ATT's enforcement mechanisms, Article 14 provides that state parties have to take measures to enforce domestic laws and regulations that implement the provisions of the ATT. To that extent, the state parties are legally responsible for the implementation of the treaty within their territory and jurisdiction.²⁶⁰ As for the Common Position, the EU adopted this instrument under the Common Foreign and Security Policy (CFSP). For CFSP matters, the European Council and the Council of Ministers have to unanimously define and implement the considered policy.²⁶¹ The Council has general supervisory power over the implementation of the CFSP, and thus the Common Position. Consequently, monitoring the implementation of the Common Position falls to the Council, and in particular the European External Service Action that deals with CFSP matters.

Both instruments contain reporting obligations. As regard the Common Position, EU member states have to prepare annual reports and the EU itself reports annually to the Council of Europe.²⁶² Similarly, states parties to the ATT also have to report annually to the Secretariat of the ATT, and keep national

²⁵⁹ *The Arms Trade Treaty*, Art. 26(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁶⁰ Stuart Casey-Maslen, *Academy Briefing No. 3, The Arms Trade Treaty*, GENEVA ACADEMY, p. 36 (June, 2013), available at [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf).

²⁶¹ Koen Lenaerts and Piet Van Nuffel, *EUROPEAN UNION LAW*, p. 715.

²⁶² *The Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, Article 8 (2) (8 December 2008) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>.

records of their export authorizations.²⁶³ However, contrary to the Common Position, the ATT does not require inter-state consultation when an export license to a receiving state has previously been denied by other states.

Although both the Common Position and the ATT contemplate similar principles or considerations, the Common Position is more stringent in defining the standards for implementation and enforcement of the EU framework for arms control. Furthermore, contrary to the User's Guide for the Common Position, there is no operating manual for the ATT's implementation.

2.2.2. *Export Assessments and Prohibitions*

Both instruments require the state parties to assess the potential impact of the arms export prior to granting export licenses/authorization. Both instruments acknowledge similar risks, and share some of the criteria that the exporting states have to assess. The Common Position's first criterion prevents member states from permitting an export if it violates UN or European Community measures. This criterion resembles the one in Articles 6(1) and 6(2) of the ATT, which prohibit a transfer when it violates a measure of the UN Security Council or another international obligation.

The fourth and fifth criteria of the Common Position refer to the risk of prolonged tensions or destabilizing regional peace and security. These are similar to the assessment under Article 7(1) of the ATT of whether an export could contribute to or undermine peace. The main difference in the criteria to be assessed under the Common Position and the ATT is that the EU framework allows less latitude for states to determine the impact of the export on peace and security. The Common Position restricts the assessment to the negative risk and does not extend it to the positive potential of an export on peace.

The possible use of arms in the commission of terrorist crimes also is a criterion in both instruments, as is the consideration of human rights and humanitarian law violations. Articles 7(2)(b)(iv) and 7(4) of the ATT respectively consider transnational organized crime and gender-based violence, two limitations that are not explicitly mentioned in the Common Position.²⁶⁴ However, EU member states are also subject to other EU and CoE human rights standards (such as the European Convention on Human Rights), which may cover such issues. Further, the Common Position can cover both circumstances of violations of human rights and humanitarian law as a limit on arms export.

²⁶³ *The Arms Trade Treaty*, Art. 12(1) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁶⁴ *The Arms Trade Treaty*, Art. 7(1) and 7(4) (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

Further, the ATT requires state parties to conduct the export assessment in an objective and non-discriminatory manner, taking into consideration the relevant factors.²⁶⁵ Yet, it does not specify the benchmarks to measure the objectivity of the assessment or the relevance of the factors considered. On the contrary, the User's Guide to the Common Position provides for best practices in the interpretation of the eight criteria and indicates what factors are relevant. The User's guide provides states with events or elements that could indicate whether the armament would be used to repress the population or commit human rights abuses.²⁶⁶ Similar to Article 11 of the ATT, the Common Position considers the risk of diversion as one of the elements in the assessment.²⁶⁷

The ATT and the Common Position also provide different requirements regarding the export decision. Although the decision authorizing an export and granting a license is the prerogative of the state under both instruments, the Common Position provides less latitude than the ATT. Under the ATT, only exports in cases falling under Article 6(3) or presenting an overriding risk under Article 7(3) are prohibited. The ATT encourages state parties to consider mitigating measures to overcome such risk, which implies the state party has a wide discretion in balancing the risk.

Regarding the Common Position, state parties are not to authorize an export when the risk is 'clear'. While the User's Guide does not define what constitutes a 'clear risk', it provides specific guidelines to member states. Moreover, the presence of a consultation mechanism enhances consistency in the member states' understanding of a 'clear' risk. In terms of the factors states may rely on in their assessment, EU member states have to consider the technical and economical capacities of the receiving state, as well as whether the export may affect the security of the European Community as a whole. The ATT does not explicitly contemplate these factors.

2.2.3. *Conclusion: EU Common Position on Arms Trade and the ATT*

In conclusion, the ATT and the Common Position intend the same results and provide frameworks that are similar and compatible with one another. Both instruments aim to increase consistency and transparency in arms transfer and export by setting common international and European standards. While

²⁶⁵ *The Arms Trade Treaty*, Art. 7(1) (3 2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

²⁶⁶ Council of the European Union, *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*, 39 (Apr. 29, 2009), available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>.

²⁶⁷ *The Arms Trade Treaty*, Art. 11 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

implementation and enforcement provisions differ in certain ways, the Position and the ATT are important complementary instruments to prevent arms export to human rights violating states.

While there are significant similarities, the differences between the ATT and the EU Common Position relate to the scope, the implementation mechanisms and the manner in which arms exports are assessed. As to the scope, the Common Position applies to a more extensive list of arms and equipment, whereas the ATT applies to more manners of transferring arms (i.e. also including brokering and trans-shipment). With regard to the implementation, most notably the EU created a User's Guide for the implementation of the Common Position, whereas the ATT does not have such an operating manual. The Common Position also requires greater consultation between states on whether to grant a license or not.

Despite these complex frameworks, EU member states still export arms to states with questionable human rights records. For instance, France was the biggest exporter of EU weapons to Saudi Arabia in 2015, and also exported armament to Egypt and the United Arab Emirates (UAE).²⁶⁸ Spain, Germany and Italy have exported weapons to Egypt. The UK, Germany, Spain, Sweden, and Switzerland delivered armaments to Saudi Arabia. The Czech Republic and Germany exported armaments to Iraq.²⁶⁹ Despite the obligation to report annually under the Common Position, the most recent domestic reports of EU member states are dated from 2013. The little information available deprives observers of up-to-date information regarding recipient states and types of exports, as well as insight into how states operationalize their obligations.²⁷⁰

Conclusion

The ATT is the first multilateral and legally binding agreement that explicitly connects the international arms trade to human rights protection.²⁷¹ Its purpose is to contribute to peace, security and stability by reducing human suffering and promote cooperation between the state parties in matters of arms trade regulation.²⁷² This memorandum addressed the international regulation of

²⁶⁸ *How arms imports are destabilizing the Middle East*, THE GUARDIAN, April 23, 2015, available at <http://www.theguardian.com/world/ng-interactive/2015/apr/23/middle-east-arms-trade-saudi-arabia-iran>

²⁶⁹ *How arms imports are destabilizing the Middle East*, THE GUARDIAN, April 23, 2015, available at <http://www.theguardian.com/world/ng-interactive/2015/apr/23/middle-east-arms-trade-saudi-arabia-iran>.

²⁷⁰ A database of the national reports is available at

http://www.sipri.org/research/armaments/transfers/transparency/national_reports/research/armaments/transfers/transparency/national_reports/sipri-national-reports-database.

²⁷¹ Ian Williams, *The Arms Trade Treaty at a Glance*, ARMS CONTROL ASSOCIATION, (July, 19th 2013), available at https://www.armscontrol.org/factsheets/arms_trade_treaty.

²⁷² *The Arms Trade Treaty*, Art. 1 (2013), available at <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>.

arms trade set out in the ATT, and specifically its ability to limit or prohibit trade when the arms may be used in international crimes. It also compared the ATT to the similar provisions of the EU's Common Position on arms trade. The purpose was to provide information under these instruments on how the arms trade can be limited or prohibited in circumstances where the arms may be used in human rights violations, and to identify grounds for challenging arms exports.

The memorandum sets out the ATT's basic provisions and detailed its substantive legal obligations in the first section. The memorandum focused on Articles 6 and 7, which prohibit arms exports that will be used in the commission of or to facilitate international crimes, and set out how to assess and authorize an export. Under Article 6, if the exporting state has knowledge at the time of authorization that the arms would be used in the commission of international crimes, the export of the arms cannot be authorized. Article 7 requires states parties to consider a number of factors when authorizing an export, including whether it would undermine peace and security, or would contribute to violations of international human rights and humanitarian law. While uncertainties remain regarding how these provisions will be implemented, and states retain discretion under the Treaty, they are important provisions in that they allow one to challenge arms exports to human rights violating states.

Section 2 of the memorandum set out the EU Common Position on arms trade. The Common Position sets out eight criteria and specifies the situations in which member states may not export arms. For instance, member states may not authorize exports where there is a clear risk that the receiving states will use the arms for the purpose of repression or human rights abuses. The memorandum compared the ATT and the Common Position to provide insight as to the differences and similarities. This is relevant for states like the Netherlands, which are a party to both the EU and the ATT. Further research on the domestic implementation of these two instruments in the Netherlands is necessary to determine how to challenge exports nationally.

There are numerous advantages to the ATT and benefits in its ability to restrict arms trade to states where they will be used in, or facilitate, the commission of international crimes. As such this Treaty is an important step by the international community and has great potential to limit arms trade that would contribute to international crimes. However, weaknesses and uncertainties persist. Given that the ATT only came into force in December 2014, it is as yet uncertain how it will be implemented and enforced, and how states parties will interpret and apply their obligations. However, this also presents an opportunity to engage with and develop the system at an early stage in its implementation.

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