

## CHAPTER 1.1

### ASSESSING THE RISK: THE LEGAL APPLICATION OF ARTICLE 7 OF THE ARMS TRADE TREATY

The ATT establishes a set of obligations concerning the international transfer of conventional arms and related items, to be implemented by all States Parties. Under Article 7 of the Treaty, exporting States Parties are required to undertake a thorough risk assessment, in cooperation with importing states, before authorising any transfer of conventional arms, ammunition, or parts and components covered under Articles 2, 3 and 4 of the Treaty. Such an assessment includes current and future risk, and involves legal, political and practical elements.

This chapter outlines the legal basis for the steps exporting States must undertake under Article 7. It focuses in particular on the sources of international law States Parties may draw on in their risk assessments and which will inform them whether the export under consideration meets the requisite conditions for authorisation or denial. In addition to the general international legal foundations, States Parties will also need to consider other relevant multilateral, regional or bilateral agreements to which they are a party, as well as any domestic requirements not covered in this paper. States will also need to undertake a political and practical analysis using the guidelines given in Chapter 1.2.

Once an exporting State Party has gathered the factual information related to each step of the risk assessment, it must then consider whether there exist any mitigating measures that it or the importing State could undertake to reduce the risks identified.

After identifying the risks the proposed export poses, and the effect of any potential mitigating measures on those risks, States Parties must then determine holistically whether there remains an 'overriding risk' of any of the negative consequences of the proposed export. Negative consequences resulting from the export, as listed in Article 7.1, include undermining peace and security, committing or facilitating a serious violation of international humanitarian or human rights law, or committing or facilitating an act constituting an offence under international conventions relating to terrorism or transnational organised crime, to which the exporting State is a party.<sup>1</sup> Risks of the commission or facilitation of serious acts of gender-based violence or violence against women and children must also be taken into account in this risk assessment.<sup>2</sup> While 'overriding risk' is not defined by the ATT, legal bases are emerging for the interpretation and application of Article 7.3. If an exporting State Party determines that an 'overriding risk' remains, the proposed export must not be authorised.



**IF AN EXPORTING STATE PARTY DETERMINES THAT AN 'OVERRIDING RISK' REMAINS, THE PROPOSED EXPORT MUST NOT BE AUTHORISED**

<sup>1</sup> | Arms Trade Treaty, Article 7(adopted 2 April 2013, entered into force 24 December 2014) \_UNTS\_(ATT) Art7(1)

<sup>2</sup> | Arms Trade Treaty, Article 7 (adopted 2 April 2013, entered into force 24 December 2014) \_UNTS\_(ATT) Art 7(4)

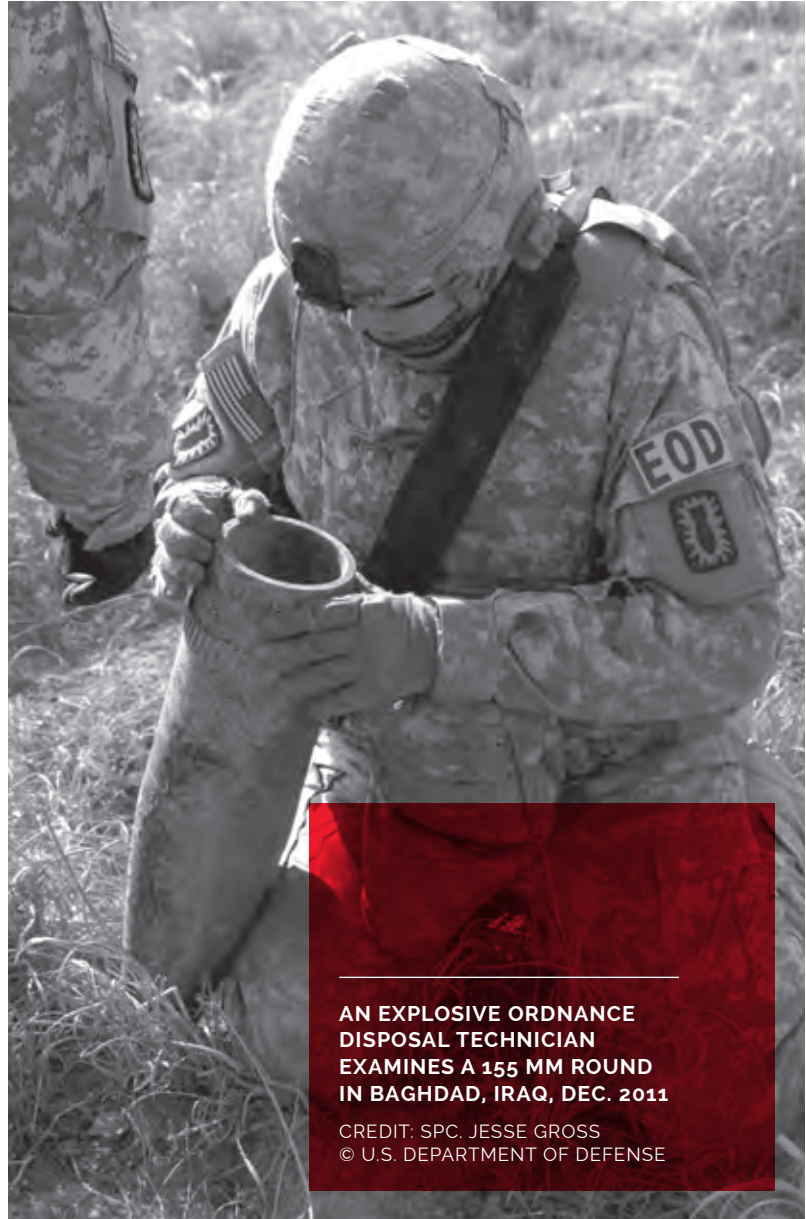
It is important to note that Article 7 contains additional requirements beyond the initial risk assessment, which are not covered in this chapter in detail. These are set out in Articles 7.5, 7.6 and 7.7, and relate to the detail and issuance of authorisations prior to export, the provision of information on request concerning the proposed export to the importing, transit or transshipment States, and the reassessment of any authorised export in consultation with the importing State should new information come to light.

#### PRELIMINARY STEP – ARTICLE 6

Before undertaking the evaluation that Article 7 requires, all States Parties, including exporting States, must first determine whether the export is prohibited under Article 6. If it is determined that the proposed export is not prohibited under Article 6, the exporting State must then apply the Article 7 risk assessment to the proposed export 'in an objective and non-discriminatory manner'.<sup>3</sup>

#### LEGAL ASPECTS OF THE ARTICLE 7 RISK ASSESSMENT: SIX STEPS

Before applying the Article 7 risk assessment to the proposed export, a State Party must first identify for each step of the risk assessment the relevant international agreements and customary international law, where appropriate. The following six-step procedure serves as a guide on which the exporting State can base its factual inquiry. It is the outcome of this factual inquiry that will allow the exporting State to determine the initial degree of risk at issue. See Chapter 1.2 for more detail on how to design and conduct the factual inquiry.



**AN EXPLOSIVE ORDNANCE  
DISPOSAL TECHNICIAN  
EXAMINES A 155 MM ROUND  
IN BAGHDAD, IRAQ, DEC. 2011**

CREDIT: SPC. JESSE GROSS  
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<sup>3</sup> | Arms Trade Treaty, (adopted 2 April 2013, entered into force 24 December 2014) \_UNTS\_(ATT) art 7.(1)



### STEP 1 – PEACE AND SECURITY

Article 7.1(a) requires an exporting State Party to 'assess the potential that the conventional arms or items:

(a) would contribute to or undermine peace and security..'

#### WHAT IS 'PEACE AND SECURITY'?

There are a number of meanings of 'peace and security' that could be applied to the Article 7 risk assessment at international, regional or national levels. One possible source for the meaning of the term is the United Nations (UN) Charter, as interpreted by the UN Security Council. The Security Council, which possesses 'primary responsibility' for the maintenance of international peace and security,<sup>4</sup> may take binding measures under Chapter VII of the UN Charter in relation to peace and security. Article 39 of the Charter requires the Security Council to determine the existence of any 'threat to the peace, breach of the peace, or act of aggression'. It must also identify any measures it may require or recommend 'to maintain or restore international peace and security'. Although Article 7.1(a) refers to 'peace and security' rather than to 'international peace and security', the preamble of the ATT makes reference to Article 26 of the UN Charter, which 'seeks to promote the establishment and maintenance of international peace and security'. While not limited to such a definition, the reference to Article 26 provides for the use of 'international peace and security' by the UN Security Council as one reference point for guidance as to the meaning of 'peace and security' in Article 7.1(a).

#### SOURCES OF INTERNATIONAL LAW CONCERNING PEACE AND SECURITY

Examples of 'threats to the peace' as identified by the Security Council include the proliferation of weapons of mass destruction,<sup>5</sup> the proliferation of small arms,<sup>6</sup> international terrorism,<sup>7</sup> piracy<sup>8</sup> and particular international and non-international armed conflicts.<sup>9</sup>

The Security Council's practice has developed to encompass not only state security but also human security, in the sense of the protection of individuals.<sup>10</sup> Based on Security Council practice to date, actual or potential violations of human rights will constitute a threat to the peace only when those violations are linked to a situation of armed conflict.<sup>11</sup> The World

<sup>4</sup> | Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI Art 24 <http://www.unwebsite.com/charter>

<sup>5</sup> | See, for example, UNSC Res 1540 (2004); UNSC Res 1718 (2006); UNSC Res 1737 (2006)

<sup>6</sup> | See, for example, UNSC Res 1540 (2004); UNSC Res 1718 (2006); UNSC Res 1737 (2006)

<sup>7</sup> | UNSC Res 1373 (2001); UNSC Res 1377 (2001)

<sup>8</sup> | Krisch, K. Article 39. in B Simma (ed), *The Charter of the United Nations A Commentary* (Oxford University Press 2012) p.1283

<sup>9</sup> | UNSC Res 713 (1991); UNSC Res 864 (1993); UNSC Res 1125 (1997); UNSC Res 1127 (1997). The application of Article 39 to non-international armed conflict was confirmed in statements made obiter dicta by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the Tadić case

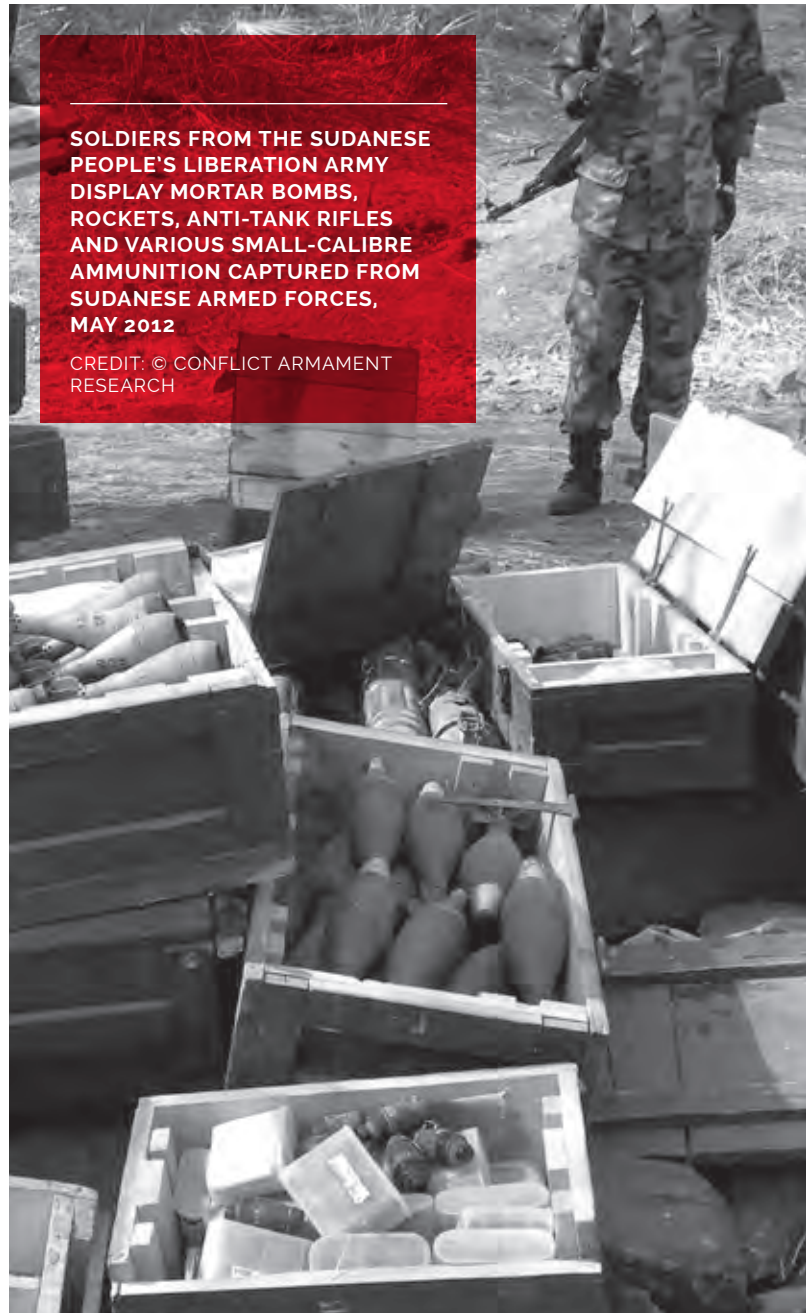
<sup>10</sup> | Krisch, K. Article 39. in B Simma (ed), *The Charter of the United Nations A Commentary* (Oxford University Press 2012) p.1284

<sup>11</sup> | Krisch, K. Article 39. in B Simma (ed), *The Charter of the United Nations A Commentary* (Oxford University Press 2012) p. 1287

Summit Outcome Document of 2005 on the Responsibility to Protect urged the Security Council to use its enforcement powers against acts of genocide and crimes against humanity. However, it has been stated that 'UN practice so far does not reflect a sufficiently broad consensus to extend the notion of a threat to the peace to grave violations of human rights as such, in the absence of the risk of armed conflict'.<sup>12</sup>

Designation of a particular armed conflict in a state or region as a threat to the peace could be a key factor in the Article 7 risk assessment. If the Security Council has called on states not to furnish weapons to parties involved in a particular armed conflict, while not formally imposing an arms embargo, an export of weapons to parties involved may 'undermine' peace and security under Article 7.1(a). The same conclusion may apply to the export of weapons to a party involved in an internal armed conflict – whether governmental or non-state forces – where the Security Council has called on all states to do nothing to escalate or exacerbate the violence.

International law provides little existing guidance as to when an arms transfer would 'contribute' to peace and security. Every situation needs to be assessed on its legal, political and practical merits, and it is difficult to identify broad categories that would automatically constitute a 'contribution' to peace and security. A situation that might 'contribute' to peace and security is one in which an export of conventional arms or items is used in support of UN peace-keeping efforts.



<sup>12</sup> | Ibid



## STEP 2 – INTERNATIONAL HUMANITARIAN LAW

Article 7.1(b)i requires an exporting State Party to 'assess the potential that the conventional arms or items:

- (b) could be used to:
  - (i) commit or facilitate a serious violation of international humanitarian law...

International humanitarian law (IHL) aims to regulate the conduct of hostilities and limit the effects of armed conflict. It seeks to strike a balance between the 'necessities of war' and the 'requirements of humanity',<sup>13</sup> primarily by protecting persons who are not, or are no longer, participating in hostilities, and by imposing limits on means and methods of warfare.

IHL generally applies only in situations of 'armed conflict' and imposes obligations on all parties to a conflict, be they a State or an organised non-state armed group. The rules that apply to international armed conflict are sometimes different from those that apply to non-international armed conflict, although many do overlap. The rules of IHL are found primarily in the four Geneva Conventions of 1949 and the Additional Protocols of 1977, as well as a number of further treaties that cover a range of issues including weapons, children and the environment.<sup>14</sup> Many IHL treaty provisions are considered to reflect customary IHL and are therefore binding on all parties to an armed conflict, often in both international and non-international conflict.<sup>15</sup>

### WHAT IS A 'SERIOUS VIOLATION' OF IHL?

A 'serious violation' of IHL includes war crimes as defined in treaties and in customary international law for both international and non-international armed conflict. There are a number of sources to which States Parties can refer for guidance on customary violations which are deemed 'serious'. Article 8 of the Rome Statute of the International Criminal Court sets out war crimes generally recognised as customary.<sup>16</sup> These include grave breaches of the Geneva Conventions and their Additional Protocols,<sup>17</sup> serious violations of Article 3 to all four Geneva Conventions, and other violations of IHL committed in both international and non-international armed conflict. The International Committee of the Red Cross (ICRC) has identified a number of additional war crimes that are considered customary, even though they are not included as war crimes in the Rome Statute.<sup>18</sup>

<sup>13</sup> | See: Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight (St. Petersburg Declaration of 1868) (entered into force 29 November/11 December 1868) <https://www.icrc.org/ihl/INTRO/130?OpenDocument>

<sup>14</sup> | For a full list of IHL instruments, see: <https://www.icrc.org/eng/resources/ihl-databases/index.jsp>

<sup>15</sup> | International customary legal obligations binding upon States are created when there is evidence of both (i) acts amounting to the settled practice of States; and (ii) a 'belief that this practice is rendered obligatory by the existence of a rule of law requiring it' (opinion juris). North Sea Continental Shelf cases, Judgment, ICJ Reports 1969, p. 44, para. 77. For more information on customary IHL, see ICRC Study on Customary IHL: <https://www.icrc.org/customary-ihl/eng/docs/home>

<sup>16</sup> | See: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 2010) 2187 UNTS 90 [http://www.icc-cpi.int/nr/rdonlyres/eagaeff7-5752-4f84-be94-0a655eb30e16/o/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/eagaeff7-5752-4f84-be94-0a655eb30e16/o/rome_statute_english.pdf)

<sup>17</sup> | Examples of grave breaches are violations of GC 1, Art 50; GC2, Art 51; GC3, Art 130; GC4, Art 147; AP1 Arts 8 and 11

<sup>18</sup> | See: International Committee of the Red Cross, Annex 3: Other war crimes according to State practice as reflected in ICRC Study on Customary International Humanitarian Law (2012) <https://www.icrc.org/eng/assets/files/2012/att-other-war-crimes-annex-3-icrc.pdf> and International Committee of the Red Cross, Rule 156. Serious violations of international humanitarian law constitute war crimes (2009) [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule156](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156)

Article 7.1(b)i refers to 'a serious violation'. Finding a risk of a single serious violation could more easily lead to the denial of an arms export authorisation than the higher threshold of finding a risk of multiple serious violations. However, a State Party may not consider isolated violations of IHL a sufficient basis for denying an arms export unless there is evidence of the danger of future multiple serious violations. At a minimum, Article 7.1(b)i covers cases in which there is a discernible pattern of violations or a failure to take appropriate steps to put an end to violations and prevent their recurrence.<sup>19</sup> Article 7.1(b)ii, discussed below, also refers to a single 'serious violation of international human rights law', and should be afforded similar consideration.

### POTENTIAL REFERENCE DOCUMENTATION

To assess the degree of risk, a State Party may look to the ICRC's Practical Guide on applying IHL to arms transfer decisions, which includes a range of risk indicators.<sup>20</sup> For further reference, similar indicators are also included in the User's Guide<sup>21</sup> accompanying the European Union's 2008 Common Position on Arms Exports.<sup>22</sup>

### STEP 3 – INTERNATIONAL HUMAN RIGHTS LAW

Article 7.1(b)ii requires an exporting State Party to 'assess the potential that the conventional arms or items:

- (b) could be used to:
- (ii) commit or facilitate a serious violation of international human rights law..'

International human rights law is found in treaties and in customary international law, and promotes and protects the human rights of individuals and groups. The international trade in conventional arms can affect a wide range of human rights protected under international agreements and customary international law. These include the rights to life; freedom from torture and other forms of cruel, inhuman or degrading treatment; liberty and security of person; freedom from slavery; freedom of thought, conscience and religion; freedom of assembly and of expression, as well as the rights to health, education, food and housing.<sup>23</sup>



<sup>19</sup> | See: ICRC's Practical Guide: <<http://www.icrc.org/eng/resources/documents/publication/p0916.htm> at pages 8-9) (NB. the ICRC is in the process of updating this Guide.) See also Amnesty International, *How to Apply Human Rights Standards to Arms Transfer Decisions* (London: Amnesty International Ltd, 2012), 67 [http://www.amnesty.org.uk/sites/default/files/how\\_to\\_apply\\_human\\_rights\\_standards\\_to\\_arms\\_transfer\\_decisions.pdf](http://www.amnesty.org.uk/sites/default/files/how_to_apply_human_rights_standards_to_arms_transfer_decisions.pdf)

<sup>20</sup> | Supra

<sup>21</sup> | Council of the European Union 9241/09 of 29 April 2009 User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>

<sup>22</sup> | Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] L 335/99 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:335:0099:0103:EN:PDF>

<sup>23</sup> | Bellal, A. 2014. *Arms Transfers and International Human Rights Law*. in "Weapons under International Human Rights Law". Casey-Maslen, S. [Ed.]. Cambridge University Press. 2014. pg 469

## SOURCES OF IHRL

The core human rights instruments include:<sup>24</sup>

- International Covenant on Civil and Political Rights and its Optional Protocol (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and its Optional Protocol (2002)
- Convention on the Rights of the Child (1989)
- Convention on the Elimination of All Forms of Racial Discrimination (1966)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
- Convention on the Rights of Persons with Disabilities (2006)
- International Convention for the Protection of All Persons from Enforced Disappearances (2006).

Although resolutions adopted by the UN General Assembly are not legally binding *per se*, they can in certain circumstances provide evidence of the existence of customary law. This is the case, for instance, with the Universal Declaration of Human Rights, adopted by way of General Assembly Resolution in 1948. Whether or not such resolutions are reflective of obligations under customary international law will depend on their content, such as the degree of precision of the norms and undertakings defined in them, and whether they are 'evidence of a general practice accepted as law'.<sup>25</sup>

Other examples of declarations adopted via UN General Assembly Resolution and which are considered reflective of customary international law include:

- Declaration on the Rights of Indigenous Peoples (2007)
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1998)
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
- Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (1988).

## WHAT IS A 'SERIOUS VIOLATION' OF IHRL?

In jurisprudence and in practice, IHRL invokes the following terms interchangeably: serious, gross, grave, flagrant, particularly serious and egregious. However, there are several relevant examples within the field of IHRL from which guidance on the definition and use of the term 'serious' can be drawn. The character or nature of a human rights violation is necessarily examined in determining whether such a violation is deemed 'serious'. Cherif Bassiouni, Independent Expert on the right to restitution,

<sup>24</sup> | See The Office of the High Commissioner for Human Rights, The Core International Human Rights Instruments and their monitoring bodies, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> for the list of core human rights instruments and their monitoring bodies. See also Amnesty International, Applying the Arms Trade Treaty to Ensure the Protection of Human Rights (London: Amnesty International Ltd, 2015), Annex A <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>

<sup>25</sup> | Statute of the International Court of Justice (26 1945), 59 Stat. 1055, 1060, USTS 993, Art 38

compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, stated: "The term 'grave violations of human rights' has been employed in the United Nations context not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity."<sup>26</sup>

'Massive', 'systematic' or 'widespread' violations – repeated actions that show large numbers or a pattern of violations – are also evidence of serious violations. Some definitions of serious violations do contain the element of scale, and some particular violations require one scale-related factor. For example, for an act to be a crime against humanity it must be part of a widespread or systematic attack. However, scale or pattern are not always seen as a requirement for the definition of a 'serious violation'. The distinct nature of a quantitative factor or pattern is indicated by the separation of this factor in numerous analyses of gross, grave or serious violations.<sup>27</sup>

In practice, the UN Security Council has used the terms 'grave' and 'serious' interchangeably,<sup>28</sup> and in the Human Rights Council's Universal Periodic Review process, references to human rights violations alternate between 'grave' and 'serious'. The following violations have been considered by States as 'serious':

- summary executions
- extrajudicial killings
- destruction of homes
- torture and cruel, inhuman and degrading treatment
- sexual and gender-based violence
- recruitment of child soldiers
- forced labour
- enforced disappearances
- arrest without warrant
- blockade
- retaliation for dissent
- attacks on human rights defenders and journalists
- excessive use of force during peaceful demonstrations.<sup>29</sup>

<sup>26</sup> | Report of the Independent Expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms by M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43, paragraph 85. See also Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report submitted by Theo van Boven, Special Rapporteur, UN doc. E/CN.4/Sub.2/1993/8, July 2, 1993, paras 8-13

<sup>27</sup> | See: UNGA Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women (adopted 6 October 1999; entered into force 22 December 2000) UN doc. A/RES/54/4, Article 8. See also, UNGA Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 December 2008; in force on 5 May 2013) UN doc. A/RES/63/117, Article 11(2)

<sup>28</sup> | See, for example, UNSC Res 2000 (27 July 2011) Extension of the mandate of the UN Operation in the Côte d'Ivoire (UNOCI), para. 7(g); UNSC Res 2062, (26 July 2012) Extension of the mandate of the UN Operation in Côte d'Ivoire (UNOCI), para. 12

<sup>29</sup> | See, for example, UPR, Report of the Working Group (the WG) on the UPR, Central African Republic, (4 June 2009.), UN doc. A/HRC/12/2, para. 23; UPR, Report of the WG on the UPR, Myanmar, (24 March 2011.) UN doc. A/HRC/17/9, para. 107.46; UPR, Report of the WG on the UPR, Nepal, (8 March 2011) UN doc. A/HRC/17/5; UPR, Report of the WG on the UPR, United States of America, (4 January 2011) UN doc. A/HRC/16/11; Report of the WG on the UPR, DR Congo, (4 January 2010.) UN doc. A/HRC/13/8, para. 77; UPR, Report of the WG on the UPR, Somalia, (11 July 2011.) UN doc. A/HRC/18/6, para. 97.60; UPR, Report of the WG on the UPR, Spain, (16 June 2010.) UN doc. A/HRC/15/6, para. 87.2; UPR, Report of the WG on the UPR, Sri Lanka, (5 June 2008.) UN doc. A/HRC/8/46; UPR, Report of the WG on the UPR, Venezuela, (7 December 2011.) UN doc. A/HRC/19/12, para. 96.25

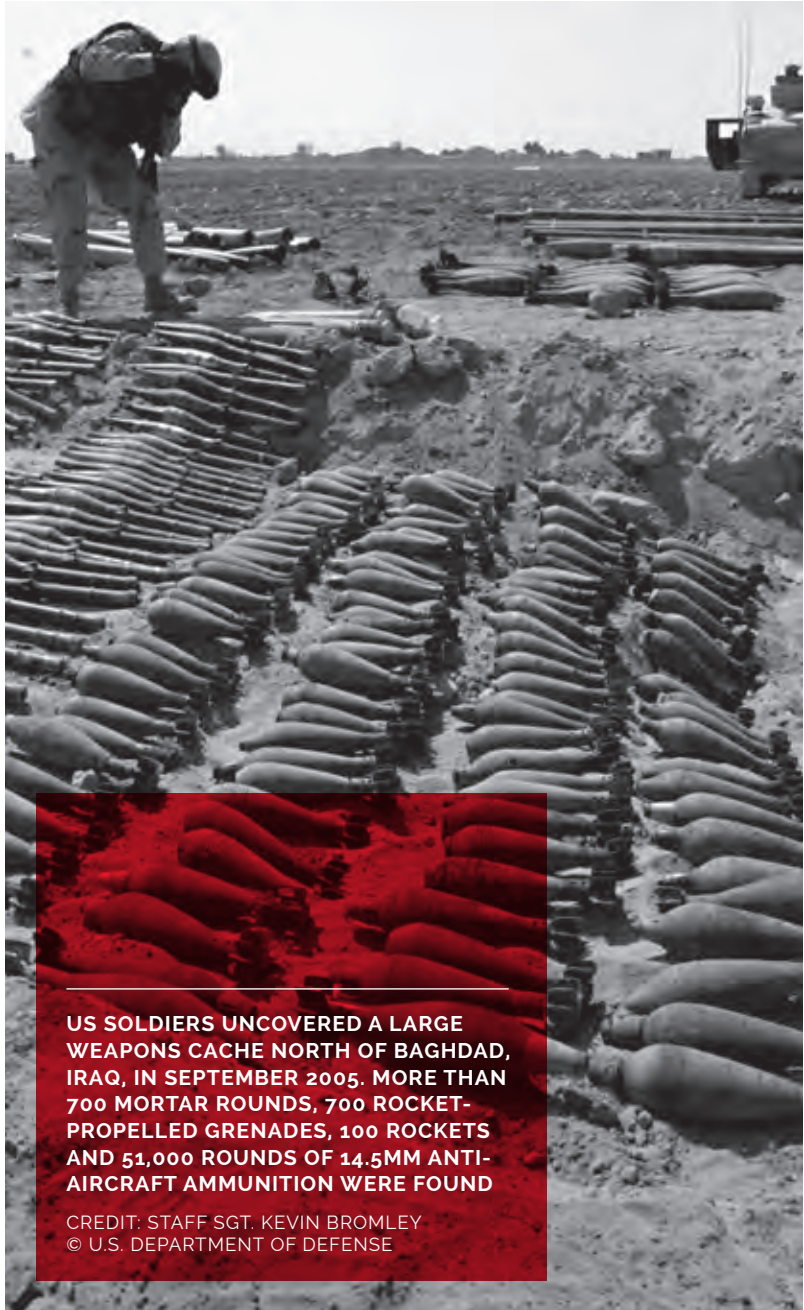


In its requirement that an assessment of the risk of 'serious violations of international human rights law' be undertaken, the ATT in Article 7 points towards the application of a standard of 'due diligence' imposed by many international agreements and instruments in the IHRL context.<sup>30</sup> Actions that cannot be attributed to the state may still give rise to state responsibility when it fails to exercise 'due diligence'.<sup>31</sup> For example, the Small Arms and Light Weapons (SALW) Principles rely on this standard of state involvement, in that 'States are bound to act with due diligence to protect human rights by reducing arms-related violence committed by private actors'.<sup>32</sup> The due diligence standard to protect the right to life from violence by small arms and light weapons also includes the responsibility 'to take steps to prevent reasonably foreseeable abuses by private actors'.<sup>33</sup>

#### POTENTIAL REFERENCE DOCUMENTATION

To assess the degree of risk, an exporting State Party should look to relevant documentation of the conditions within an importing State, including:

- Concluding Observations of UN Treaty bodies (for example, the Human Rights Committee, the Committee against Torture and the Committee of the Convention on the Elimination of All Forms of Discrimination against Women)
- Reports of Special Procedures of the Human Rights Council
- The Universal Periodic Review process undertaken by the Human Rights Council relating to the importing State
- The reports of any independent monitoring bodies for the promotion and protection of human rights relating to the importing State.



**US SOLDIERS UNCOVERED A LARGE WEAPONS CACHE NORTH OF BAGHDAD, IRAQ, IN SEPTEMBER 2005. MORE THAN 700 MORTAR ROUNDS, 700 ROCKET-PROPELLED GRENADES, 100 ROCKETS AND 51,000 ROUNDS OF 14.5MM ANTI-AIRCRAFT AMMUNITION WERE FOUND**

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<sup>30</sup> | See also Amnesty International, *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights* (London: Amnesty International Ltd, 2015), Annex A <<https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>>

<sup>31</sup> | See: Velásquez-Rodríguez case (Judgment of 29 July 1988.) Inter-Am.Ct.H.R. (Ser. C) No. 4, 172 (1988)

<sup>32</sup> | See: U.N. Economic and Social Council. Commission on Human Rights, 56th Session. Prevention of human rights violations committed with small arms and light weapons - Note by the Secretariat, (10) (a), (E/CN.4/Sub.2/2005/35), 2005, p.8

<sup>33</sup> | Jimenez Vaca v. Colombia, Comm'n No. 859/1999, 2.1-2.15, U.N. Doc. CCPR/C/74/D/859/1999 (Mar. 22, 2002); Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicar. v. USA.), 1986 I.C.J. 14, 130, 148 (Jun. 27, 1986).



#### STEP 4 – GENDER-BASED VIOLENCE AND VIOLENCE AGAINST WOMEN AND CHILDREN

The ATT is the first international treaty to specifically connect gender-based violence with the international transfer of arms.<sup>34</sup> As such, it will necessarily set critical precedents in this area. Article 7.4 requires that an exporting State Party 'in making this assessment, shall take into account the risk of the conventional arms...or items...being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children'.<sup>35</sup>

The inclusion of Article 7.4 in the ATT emphasises the importance of gender-based violence (GBV) and violence against women and children in the context of arms exports and armed violence. More often than not, the types of 'serious acts' contemplated in Article 7.4 constitute IHRL violations, or in some cases violations of IHL,<sup>36</sup> and are otherwise required to be considered under Article 7.1(b)i and ii. For this reason, the specific risk assessment concerning GBV and violence against women and children is most appropriately completed in connection with the risk assessment for serious violations of IHL and IHRL. However, 'serious acts' of GBV or violence against women and children under Article 7.4 need not amount to a violation of international law. 'Serious acts' that do not reach the level of 'serious violations' of international human rights or humanitarian law must still be considered as a part of the Article 7 risk assessment for every proposed export.<sup>37</sup>

#### WHAT ARE 'GENDER-BASED VIOLENCE' AND 'VIOLENCE AGAINST WOMEN AND CHILDREN'?

GBV affects women and girls, and men and boys, and is committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. It is also noted that '[g]ender-based crimes are not always manifested as a form of sexual violence... [and]... may include non-sexual attacks on women and girls, and men and boys, because of their gender'.<sup>38</sup> Accordingly, the separation, by gender, of people for the subsequent killing of males and subjugation of women would constitute GBV on both counts.

<sup>34</sup> | Dahle, A. Gender-Based Violence and the Arms Trade Treaty, Amnesty International, 9 December 2014) <http://blog.amnestyusa.org/women/gender-based-violence-and-the-arms-trade-treaty//>

<sup>35</sup> | Arms Trade Treaty, (adopted 02 April 2013, entered into force 24 December 2014) \_UNTS\_ (ATT) Art 7.(4)

<sup>36</sup> | See, for example, Article 27 of Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (12 August 1949) 6 U.S.T. 3316, 75 U.N.T.S. 135; Article 76(1) of Additional Protocol I, Article 4(2) of Additional Protocol II, and Article 14 of Geneva Convention III

<sup>37</sup> | 'Overwhelming majority of States in General Assembly say "yes" to Arms Trade Treaty to stave off irresponsible transfers that perpetuate conflict, human suffering', UN meetings coverage, 2 April 2013, Un doc. GA/11354, p. 27, 30 (referencing statements by Norway and Iceland on the application of Article 7.4)

<sup>38</sup> | Office of the Prosecutor of the International Criminal Court, Policy paper on Sexual and Gender-based Crime (June 2014) 3 <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

Acts of GBV are covered by international human rights conventions and their treaty bodies, such as the Committee against Torture (CAT)<sup>39</sup> and the Committee of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CEDAW Committee specifically links GBV to multiple serious human rights violations and applies the definition of GBV not only to acts of violence perpetrated by States Parties, but also to acts perpetrated by non-state actors. A State Party will violate CEDAW and other international human rights instruments if it fails in its obligation to take all appropriate measures to eliminate discrimination and prevent violence, investigate and punish offences of violence and provide reparation.<sup>40</sup>

Violence against women is defined by the CEDAW Committee as that which is 'directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty'.<sup>41</sup>

While children enjoy the full protection of IHL and IHRL, IHRL extends particular care to the child due to his or her vulnerability. This is reflected in specific provisions contained in the core human rights instruments, such as Article 24 of the International Covenant on Civil and Political Rights (ICCPR), and most clearly in the UN Convention on the Rights of the Child (CRC), which defines violence against children as 'all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'.<sup>42</sup>



<sup>39</sup> | Committee Against Torture, General Comment 2, UN Doc CAT/C/GC/2/CRP.1/Rev.4 (2007) [http://www1.umn.edu/humanrts/cat/general\\_comments/cat-gencom2.html](http://www1.umn.edu/humanrts/cat/general_comments/cat-gencom2.html)

<sup>40</sup> | Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 19, <http://www.un.org/womenwatch/daw/cedaw/>

<sup>41</sup> | Committee on the Elimination of Discrimination Against Women (CEDAW Committee) (adopted 18 December 1979, entered into force 3 September 1981), General Recommendation 19, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>

<sup>42</sup> | United Nations Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, General Comment 13 <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>



### SOURCES OF INTERNATIONAL LAW CONCERNING GENDER-BASED VIOLENCE AND VIOLENCE AGAINST CHILDREN

As mentioned, unlike Article 7.1(b), Article 7.4 does not require a 'serious act' of gender-based violence to reach the threshold of a violation of international law, serious or otherwise. However, because most 'serious acts' are likely also to be deemed violations of international law, relevant international legal sources include:

- core International Human Rights Treaties, specifically CAT, CEDAW and CRC<sup>43</sup>
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime
- Rome Statute of the International Criminal Court.<sup>44</sup>

### POTENTIAL REFERENCE DOCUMENTATION

To assess the degree of risk, an exporting State Party may look to relevant documentation of the conditions within an importing State concerning gender-based violence and violence against women and children. This includes:

- country-specific documentation of the CEDAW and the CRC
- Reports of the CEDAW Committee, CRC Committee and Human Rights Committee (monitoring the International Covenant on Civil and Political Rights), pursuant to relevant Optional Protocols allowing for individual complaints, as well as jurisprudence from the International Criminal Court and regional human rights systems.
- Thematic and country-specific UN reports of:
  - the Special Rapporteur on violence against women
  - the Special Rapporteur on the sale of children, child prostitution and child pornography
  - the Special Rapporteur on trafficking in persons, especially women and children
  - the Special Representative of the Secretary-General for Sexual Violence in Conflict.

<sup>43</sup> | See: *supra*

<sup>44</sup> | See: Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002, last amended 2010) 2187 UNTS 90, Article 7(1)(g), and Article 8(2)(b)(xxii) [http://www.icc-cpi.int/nr/rdonlyres/eagaeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/eagaeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)



## STEP 5 – TERRORISM

Article 7.1(b)iii requires an exporting State Party to 'assess the potential that the conventional arms or items:

- (a) could be used to:
  - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party'.

## SOURCES OF INTERNATIONAL LAW CONCERNING TERRORISM

Despite the lack of a common definition, terrorism is covered in a number of different international instruments<sup>45, 46</sup>, including:

- The Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970)
- Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)
- International Convention against the Taking of Hostages (1979)
- Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)
- Montreal Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988)
- Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)
- International Convention for the Suppression of Terrorist Bombings (1997)
- International Convention for the Suppression of the Financing of Terrorism (1999)
- International Convention for the Suppression of Acts of Nuclear Terrorism (2005)

## COMMITTING OR FACILITATING A TERRORISM OFFENCE

In most conventions or protocols dealing with terrorism, the export of arms would constitute 'facilitation' rather than a 'commission' of an act of terrorism. For example, the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) makes it an offence for any person on board an aircraft in flight to 'unlawfully, by force or threat thereof, or by any other form of intimidation, seize or exercise control of, that aircraft' or to attempt to do so.<sup>47</sup> The export of conventional arms used in such an offence would have the effect of facilitating, rather than directly committing, the offence.

An example of conventional arms or items being used to 'commit' an act of terrorism is found in the International Convention for the Suppression of Terrorist Bombings (1997), which prohibits the unlawful and intentional use of explosives and 'other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place.'<sup>48</sup>

<sup>45</sup> | Becker. T. *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart Publishing, 2006) p. 84-118

<sup>46</sup> | Saul. B. *Defining Terrorism in International Law* (Oxford University Press, 2006)

<sup>47</sup> | Convention for the Suppression of Unlawful Seizure of Aircraft (signed on 16 December 1970, entered into force 14 October 1971) 860 UNTS 106, Art 1

<sup>48</sup> | International Convention for the Suppression of Terrorist Bombings (signed 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256, Art 2

## POTENTIAL REFERENCE DOCUMENTATION

To assess the degree of risk, an exporting State Party may look to documentation concerning the recipient of an export of conventional arms or items, including:

- Reports of the UN Security Council's Counter-Terrorism Committee
- Evidence of breaches of relevant conventions and protocols relating to terrorism
- Evidence of domestic legislation implementing the provisions of relevant conventions and protocols relating to terrorism
- Relevant UN Security Council Resolutions, particularly the Council's counter-terrorism sanctions regime for al Qaida
- Reports of independent monitoring or fact-finding bodies relating to terrorism.

## STEP 6 – TRANSNATIONAL ORGANISED CRIME

Article 7.1(b)iv requires an exporting State Party to 'assess the potential that the conventional arms or items:

- (b) could be used to:
- (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organised crime to which the exporting State is a Party'.

## SOURCES OF INTERNATIONAL LAW RELATING TO TRANSNATIONAL ORGANISED CRIME

The United Nations Convention against Transnational Organised Crime (CTOC) defines transnational organised crime as 'serious crimes conducted by organised criminal groups where that serious crime is committed transnationally'.<sup>49</sup> Relevant obligations or criminal offences set out in CTOC include laundering the proceeds of crime, corruption and the obstruction of justice.<sup>50</sup>

The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (2001) (Firearms Protocol) also supplements CTOC and requires States Parties to criminalise the illicit manufacturing and trafficking of firearms. The Firearms Protocol only applies to offences which are transnational in nature and involve an organised criminal group. It does not apply to state-to-state transactions or cases which would prejudice the state's national security interests consistent with the UN Charter. Article 5 of the Firearms Protocol provides for states to criminalise the illicit manufacturing or trafficking of firearms, their parts and components and ammunition.

Other potential sources include:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000)
- Protocol against the Smuggling of Migrants by Land, Sea and Air (2000)
- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).

<sup>49</sup> | United Nations Convention against Transnational Organised Crime (adopted by UNGA Res 55/25 of 15 November 2000; entered into force 29 September 2003) 2225 UNTS 209, Art. 2(a) and 3(2)

<sup>50</sup> | United Nations Convention against Transnational Organised Crime (adopted by UNGA Res 55/25 of 15 November 2000; entered into force 29 September 2003) 2225 UNTS 209, Art. 6, 8 and 23

### COMMITTING OR FACILITATING A TRANSNATIONAL ORGANISED CRIME OFFENCE

The agreements above, considered broadly, use two approaches to criminalise certain acts. They either directly criminalise an act, or require States Parties to implement domestic legislation to criminalise an act (or both). Regardless of which approach is taken, these acts would be considered as 'constituting an offence' under a relevant agreement. Where an arms export is itself prohibited by the agreement, the export would be considered as a 'commission' of an act constituting an offence under a relevant agreement. More commonly, in the context of transnational organised crime, an export of such arms or items would 'facilitate' an act constituting an offence under a relevant agreement.

For example, under CTOC Article 6.1, a money-laundering offence may be committed or facilitated if the export from an ATT State Party were to be paid for from the proceeds of crime and the exporting State knew this. Likewise, exports to paramilitary groups who pay for arms from the proceeds of a criminal offence would constitute facilitation of a money-laundering offence.

Under the CTOC Trafficking Protocol, arms exports – especially small arms and light weapons – could facilitate trafficking in persons if the items fall into the hands of criminal groups which engage in such trafficking. Such arms exports – as well as their parts, components and ammunition – could also facilitate an offence covered by the CTOC Firearms Protocol if they could lead to the illicit manufacturing of weapons or trafficking in those weapons.



**A SNIPER DEPLOYED TO  
HMS SOUTHAMPTON ON  
COUNTERDRUG OPERATIONS**

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### POTENTIAL REFERENCE DOCUMENTATION

To assess the degree of risk, an exporting State Party may look to documentation concerning the recipient of an export of conventional arms or items, including:

- evidence of breaches by the importing State of relevant conventions and protocols relating to Transnational Organised Crime
- evidence of national legislation implementing the provisions of relevant conventions and protocols relating to Transnational Organised Crime
- relevant Security Council resolutions relating to organised crime.

### CONSIDERATION OF MITIGATION MEASURES

Once an exporting State Party has completed its factual inquiry based on these six steps and identified all the risks, as required by Article 7.1, in connection with the proposed export, Article 7.2 provides that '[t]he 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'.

In other words, Article 7.2 requires the exporting State Party to consider whether there are any mitigating measures that it or the importing State can undertake that would lower the risks identified. When considering appropriate and effective mitigation measures, it is important to draw a distinction between mitigation measures referred to in Article 7, which relates to violations such as those of IHL and IHRL, and mitigation measures referred to in Article 11, which relates to diversion. While both sets of measures are not in all cases mutually exclusive, States Parties should ensure that the purpose and effect of proposed mitigation measures reduce the specific risk under review. A more detailed assessment of the political and practical elements of identifying and implementing mitigation measures in relation to both Articles 7 and 11 can be found in Chapter 1.2.

### ASSESSING THE POTENTIAL CONSEQUENCES OF A PROPOSED EXPORT: APPLYING THE 'OVERRIDING RISK' TEST

Article 7.3 provides that 'if, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorise the export'.

That is, if, after conducting the risk assessment outlined in Article 7.1 and considering available mitigating measures outlined in Article 7.2, an exporting State Party determines that an 'overriding' risk of any of the negative consequences in Article 7.1 is present, it shall not authorise the export. How the State Party will assess the information collected from the factual inquiry and apply the 'overriding risk test' depends not only on its legal interpretation, but also on the political and practical realities faced by the exporting and importing States involved. Chapter 1.2 provides further insight into the political and practical aspects of applying Article 7.3 using a detailed hypothetical case study.



### INTERPRETING 'OVERRIDING RISK'

The ATT itself does not provide a definition of 'overriding', nor is 'overriding' an established concept in international law. The Oxford English Dictionary defines 'to override' as 'to be more pertinent than', and 'overriding' as 'more important than any other consideration'.<sup>51</sup>

Despite the lack of a definition or guidance in the ATT text as to how to directly interpret and apply 'overriding' in the context of Article 7.3, submitting an interpretive declaration upon ratification is one method used by States Parties to clarify their interpretation of the Treaty. Switzerland, Liechtenstein and New Zealand made interpretive declarations at the time of their ATT ratifications that provide guidance on how each of these States intends to apply Article 7.3.

New Zealand, in its interpretive declaration, states that it 'considers the effect of the term "overriding risk" in Article 7.3 is to require that it decline to authorise any export where it is determined that there is a substantial risk of any of the negative consequences in Article 7.1'.<sup>52</sup> Liechtenstein also declared that 'overriding risk' 'encompasses... an obligation not to authorise the export whenever the State Party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered'.<sup>53</sup> A threshold of risk that is 'substantial' or 'more likely to materialise than not' provides additional guidance on how States Parties might assess the magnitude of the risk before an export is authorised. There are also indications that the forthcoming EU Common Position User's Guide is likely to recommend a similar approach, using 'clear risk' as a threshold.<sup>54</sup>

Setting a specific magnitude or threshold to measure 'overriding risk', such as 'substantial risk' or 'clear risk' could allow for a more tangible and consistent application between States Parties. Others are exploring approaches to the application of Article 7.3 that seek to weigh the risk of negative consequences referenced in Article 7.1 against any lawful positive contributions to peace and security resulting from the proposed export. Under this interpretation, if the negative consequences 'override' or outweigh any such identified lawful contribution to peace and security, the export must not be authorised.<sup>55</sup>

<sup>51</sup> | See also Amnesty International, *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights* (London: Amnesty International Ltd, 2015), 19. <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>

<sup>52</sup> | Declaration made by New Zealand upon ratification of the Treaty, 2 September 2014: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>

<sup>53</sup> | Declaration made by Liechtenstein upon ratification of the Treaty, 16 December 2014: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>

<sup>54</sup> | Comments based on email communication with EU officials who have shared the 'Working Draft' of the forthcoming amended version of the Users Guide. [Forthcoming] EU, 2015. User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment. Brussels.

<sup>55</sup> | For example, Amnesty International describes the operation of Article 7(3) as follows: 'Ultimately, for an export to be authorized... the exporting State is first required to demonstrate in a clear and identifiable way that the export would make a positive contribution to peace and security in lawful manner. The exporting state must also demonstrate that any potential negative consequences identified in the risk assessment... will not be so grave and likely as to override that positive contribution.' Amnesty International, 2015. *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights*. London. Amnesty International Ltd. pgs19-20. <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>



**IMPRECISION IN THE LANGUAGE CAN BE REMEDIED THROUGH INTERPRETIVE DECLARATIONS AND BY THE PRACTICE OF STATES PARTIES IN THE TREATY'S FIRST YEARS**

**CONCLUSION**

Imprecision in language in Article 7.3 – and indeed Article 7 as a whole – can be remedied in some cases through interpretive declarations submitted by States at ratification, and certainly by the initial practice of States Parties in the first years that the Treaty is in force.<sup>56</sup> This provides a significant opportunity for early ratifiers to set the tone of the Treaty at the outset. The Conference of States Parties may also choose to take on an interpretive function in years to come.<sup>57</sup>

In the ATT's first years, the interpretation and application of Article 7 by all States Parties is particularly critical. In order to ensure a strong and robust implementation of the Treaty, States Parties must strive for consistency in interpretation, using the ATT's humanitarian object and purpose as a guide. While the legal analysis provided in this chapter is intended to serve as an initial framework within which States can begin to consider their obligations under Article 7, it is only over time that the true, practical implications of these legal interpretations will become clear.



**INDONESIAN PEACEKEEPERS  
GETTING READY TO LEAVE THEIR  
BASE FOR A PATROL NEAR TAYBE  
IN SOUTH LEBANON**

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<sup>56</sup> | Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 332, Art 31(3)(b)

<sup>57</sup> | Arms Trade Treaty, (adopted 2 April 2013, entered into force 24 December 2014) \_UNTS\_(ATT) Art 17.4(d)