

The Arms Trade Treaty: An Interpretive Study

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Abstract

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In April 2013, the United Nations General Assembly adopted the Arms Trade Treaty (ATT) to control the virtually unregulated import, export, transit and brokering of conventional arms. The instrument, a combined effort of UN Member States and civil society organizations, was drafted to create the highest possible common international standards. Nevertheless, it was met with mixed reviews. Some called it a victory for the world's people and a powerful new tool, while others argued that it contains major loopholes or even that it represents a historic and momentous failure.

Taking on the presented praise and criticism, this study performs a critical jurisprudential analysis of the operational heart of the Treaty; the Articles regarding the scope, prohibitions and export of arms. To allow comparing how the different aspects of arms trade are regulated, the obligations of import, transit, trans-shipment States and States involved in brokering are also taken into account. Methodologically, this study relies upon the international rules concerning the interpretation of treaties as set forth in Articles 31–33 of the Vienna Convention on the Law of Treaties, brief analysis of which is the starting point of the study.

This study concludes that the Arms Trade Treaty contains major shortcomings: many supportive and autonomous weapon systems are excluded from its scope, ammunition and parts are not fully integrated, and most of the prohibitions just reaffirm pre-existing obligations. The Treaty sets rather a high threshold for not authorizing export, and the obligations of importing, transit, trans-shipment and brokering States are quite undemanding. Still, the ATT contains many novel and important elements, and it clearly has an operational heart: it covers a wider range of conventional arms than previous instruments, addresses the imperative to follow the resolutions of the UNSC and international agreements, and deals with the connection between arms, ammunition, international crimes, serious humanitarian law and human rights violations, terrorism-related offences and acts of transnational organized crime. To determine the total worth of the instrument, further studies will be required to evaluate its practical effects on the behaviour of States Parties.

Key words: arms trade treaty, arms trade, arms brokering, conventional arms, conventional weapons, disarmament, arms control, international crime, humanitarian law, human rights, treaty interpretation, law of treaties.

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Abbreviations

AI	Amnesty International
ATT	Arms Trade Treaty
CAAT	Campaign Against Arms Trade
CBM	Confidence Building Measure
CCM	Convention on Cluster Munitions
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons
CRS	Congressional Research Service
EU	European Union
EUC	End-User Certification
FMS	Foreign Military Sales
GAPW	Global Action to Prevent War
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (The First Geneva Convention)
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (The Second Geneva Convention)
GC III	Geneva Convention Relative to the Treatment of Prisoners of War (The Third Geneva Convention)
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War (The Fourth Geneva Convention)
GGE	Group of Governmental Experts
IANSAs	International Action Network on Small Arms
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICJ	International Court of Justice
ICRAC	International Committee for Robot Arms Control
ICRC	International Committee of the Red Cross

ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (Here referred to as the International Criminal Tribunal for Rwanda)
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (Here referred to as the International Criminal Tribunal for the former Yugoslavia)
ILC	International Law Commission
ITI	International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapon
MANPAD	Man-Portable Air-Defence System
MoU	Memorandum of Understanding
NGO	Non-governmental Organization
NRA	National Rifle Association of America
OED	Oxford English Dictionary
PoA	United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects
POW	Prisoner of War
SALW	Small Arms and Light Weapons
SIPRI	Stockholm International Peace Research Institute
UAV	Unmanned Aerial Vehicle
UK	United Kingdom
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNIDIR	United Nations Institute for Disarmament Research
UNODA	United Nations Office for Disarmament Affairs
UNROCA	United Nations Register of Conventional Arms

UNSC	United Nations Security Council
UNTC	United Nations Treaty Collection
UNTOC	United Nations Convention against Transnational Organized Crime
UNTS	United Nations Treaty Series
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WA	Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies
WCC	World Council of Churches
WILPF	Women's International League for Peace and Freedom

1. Introduction

1.1. An Influential Business

The international trade in arms and ammunition¹ is an influential business. Its significance, however, cannot be determined by staring at numbers. The sheer financial value of the industry has proved to be difficult to measure,² and figures alone can easily lead to misjudgement.

An authoritative source on arms trade, the Stockholm International Peace Research Institute (SIPRI), estimates that the total value of the global arms trade in 2011 was at least \$43 billion, based on data available from States.³ The annual report by the Congressional Research Service (CRS) of the USA claims that the value of all arms transfer agreements worldwide amounted to \$85.3 billion in 2011.⁴ News and non-governmental organizations (NGOs), on the other hand, keep referring to international arms trade as a \$70 billion business.⁵ These figures look big on their own, but they make the arms trade seem relatively unimportant if put against the world trade in fuels, agricultural products and, for example, office and telecom equipment. The given areas of trade amounted to about \$3.3 trillion, \$1.6 trillion and \$1.6 trillion, respectively, in 2012.⁶ Not even the sales of arms and military services by the world's 100 largest companies in the sector, which added up to \$395 billion in 2012,⁷ suggest that we should regard arms trade as a notable driver of the global economy.

Despite its relative financial triviality, the international trade in arms and ammunition has, for centuries, been a major factor in global politics. At least since the 'Military Revolution' of the 1500s, it has been tightly involved with legal, economic, technological, military and political changes; in

¹ This study and the figures and arguments presented here concern conventional weapons and ammunition. Conventional weapons, as defined by the *Department of Defense Dictionary of Military and Associated Terms*, p. 81, include all but nuclear, biological and chemical weapons. The reader is advised to note that the definition has been omitted from the newer versions of the dictionary.

² See Holtom and Bromley 2010. Of SIPRI's method, see Holtom, Bromley and Simmel 2012.

³ *The financial value of the global arms trade*, in fine.

⁴ Grimmett and Kerr 2012, p. 3.

⁵ See, e.g., Charbonneau 2013, para. 1; Krause-Jackson and Green 2013, para 1; MacFarquhar 2013, para. 19; Rayman 2013, para. 2; *UN Diplomats agree to conclude Arms Trade Treaty negotiations in 2013*, para. 2.

⁶ *International Trade Statistics 2013*, p. 59.

⁷ Perlo-Freeman and Wezeman 2014, p. 1.

short, power. The emergence of the State system and market economics, the technological advancements of the Industrial Revolution, and the rise of capitalism, not to mention the two devastating World Wars and the Cold War that followed; all of these were connected to changes in arms transfers and production in one way or another.⁸ The commercialization of war together with technological advancements helped States gain power;⁹ industrialism was put forward by increased military spending;¹⁰ and trading weapons to allies was an important tool of policy for the opposing nuclear superpowers.¹¹

In today's setting, the recent Civil War in Syria has seen both sides, the Syrian government and the opposition, receive weapons and supplies from foreign nations: the USA, Qatar and Saudi Arabia have shown more or less clandestine support for the rebel groups, while Russia and Iran have explicitly sided with the Government forces.¹² This policing by supply appears familiar enough, perhaps reminiscent of the proxy wars of the Cold War Era. However, during the past two decades, the reverse has also been on the rise in the form of arms embargos by the United Nations and the European Union.¹³ These embargoes, which are issued due to States' misbehaviour or shortcomings, as exemplified by the recent embargo on Central African Republic,¹⁴ display clearly how the arms trade is a vital aspect of international relations.

Thus, the importance of the trade lies in its *political effects* worldwide. The issue of arms trade has grave implications on the wider context of national and human security. Arms and ammunition seem to fuel—prolong and exacerbate—conflicts. More specifically, they, especially Small Arms and Light Weapons (SALW), are today linked to death, injury and trauma, human rights abuses, an increase in refugees and internally displaced people, weakened social structures, pressure on healthcare systems, malnutrition, lost educational opportunities, interference with humanitarian assistance, hindered peacekeeping, slowed economic development, impeded business opportunities, development of cultures of violence, terrorism, use of child soldiers, and even loss of tourism.

⁸ Krause 1992, p. 1.

⁹ See *ibid.*, pp. 36–53.

¹⁰ See *ibid.*, pp. 56–80.

¹¹ See *ibid.*, pp. 103–105 and 110–112 regarding the USA; 112–117 and 123–124 regarding the Soviet Union.

¹² Wezeman 2013.

¹³ See *SIPRI Arms Embargoes Database*.

¹⁴ See *United Nations Security Council Resolution 2127*, paras 54–55.

These appalling results are not caused only by illegal arms deals committed by certain unscrupulous groups and individuals, but also by the bulk of the arms trade which flows through legal channels.¹⁵

1.2. Limited Constraints

The aforementioned effects taken into account, it is noteworthy that the arms trade has faced little international regulation throughout its history. The reasons are manifold. Conventional arms are generally considered legitimate tools of national and personal defence and security.¹⁶ Arms production and trade are also closely linked to national interests, as governments have taken part in the industry by offering credit and using weapons deals as a tool of diplomacy.¹⁷ Furthermore, the permanent members of the UN Security Council, save for China, have always been major arms exporters, as far back as the data go.¹⁸ Due to unwillingness stemming these and other factors such as the sheer complexity of the issue, there have been many endeavours and political documents, but not a single all-encompassing treaty.¹⁹ In the sphere of public international law, the arms trade is currently regulated only by a few global instruments.

The first noteworthy instrument is the United Nations Register of Conventional Arms (UNROCA; hereinafter also ‘the Register’), established in in 1991 in the *United Nations General Assembly Resolution 46/36 L*, ‘*Transparency in armaments*’, or more accurately in its Annex, *Register of Conventional Arms*. For the Register, UN Member States are requested to provide data containing their figures on the import and export of arms, ranging from battle tanks to large calibre artillery and combat aircraft.²⁰ This makes the Register appear a tool of transparency. But, since it operates on a voluntary basis, there are no guarantees that all possible data are handed out, and the data produced are nevertheless unverified. Being a register, it cannot serve as a pre-transfer control measure, because the transactions have already taken place. Furthermore, a register itself does not imply that arms transfers to volatile areas should be limited, or that certain quantities of arms are excessive.

¹⁵ Stohl and Grillot 2009, pp. 117–137. See also, e.g., *The Impact of Poorly Regulated Arms Transfers on the Work of the United Nations*; *United Nations Security Council Resolution 2117*; Ray 2012a; Feinstein 2011, pp. 526–600; Gilby 2009, pp. 40–55; Amnesty International 2008, pp. 5–106; Nightingale 2008, pp. 4–18; Stohl, Schroeder and Smith 2007, pp. 22–37; Chanaa et al. 2004; Hartung 2001, pp. 79–84; Coupland et al. 2002; Muggah and Berman 2001.

¹⁶ Stohl and Grillot 2009, pp. 138–139.

¹⁷ *Ibid.*, pp. 16–17.

¹⁸ See *Top List TIV Tables*, years 1950–2013.

¹⁹ See Stohl and Grillot 2009, pp. 138–184.

²⁰ *Register of Conventional Arms*, para. 2(a).

The possibilities of the Register to affect arms trade and its global effects are thus very limited, even if all the requested data are provided.²¹

Another instrument, limited but concrete, is the legally binding 2001 Firearms Protocol,²² which was adopted to tackle the problematic SALWs. The Protocol comes from a different angle, as it supplements the *United Nations Convention against Transnational Organized Crime* (UNTOC), which sets the tone for the whole instrument. It does not concern the trade of firearms *per se*, but rather the business of ‘illicit manufacturing of and trafficking in firearms, their parts and components and ammunition’,²³ often dubbed as ‘gun running’. The Protocol criminalizes such activity, and also sets forth requirements for record-keeping and export, import and transit licensing,²⁴ setting a global standard in the area of action against transnational organized crime.²⁵

The initiative to curb the problems of the illicit small arms trade is strengthened by the United Nations Programme of Action (PoA).²⁶ While the Programme is not legally binding,²⁷ it is a comprehensive instrument. Under it, States, *inter alia*, pledged to enact and apply control measures at the national level, create regional networks, and cooperate with the UN.²⁸ The Programme calls for States to report on implementation,²⁹ and it is reviewed on a regular basis in biennial meetings and review conferences.³⁰ Although significant progress has been made, a number of factors, including lack of concrete benchmarks and numerical targets and insufficient acknowledgement of links between small arms and wider issues, have impeded the full implementation of the Programme.³¹ One

²¹ Goldblat 2002, p. 248.

²² *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*.

²³ Arts 2 and 4.

²⁴ Arts 5, 7 and 10, respectively.

²⁵ *Report of the Secretary-General on small arms (2008)*, para. 25.

²⁶ *United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects*.

²⁷ Stohl and Grillot 2009, p. 149.

²⁸ Section II, paras 2–23, 24–31 and 32, respectively.

²⁹ Section II, para. 33.

³⁰ For an analysis of the States’ reports during the first decade of implementation, see Parker and Green 2012. For information about the meetings and their outcomes, see *United Nations Programme of Action Implementation Support System: PoA-ISS, Meetings*.

³¹ *Report of the Secretary-General on small arms (2013)*, para. 49; *Report of the Secretary-General on small arms (2011)*, paras 69–70; *Report of the Secretary-General on small arms (2008)*, para. 30.

of the achievements of the PoA is the politically binding³² 2005 International Tracing Instrument (ITI),³³ which seeks to enable States to identify and trace illicit SALW.³⁴

Outside the auspices of the UN, *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* (WA) has been operating since the mid-1990s. The regime, according to the *Wassenaar Arrangement Basic Documents*, contributes to international security and stability ‘by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies’.³⁵ To this end, States are to meet on a regular basis and exchange information to ensure that transfers advance peace and security.³⁶ To prevent unauthorized transfers, States also have to control all items in the two lists that encompass a vast array of dual-use items and munitions.³⁷ In addition to this, States have subsequently agreed on several guidelines that focus on especially troublesome issues such as SALWs and man-portable air-defence systems (MANPADS).³⁸ Although all this makes for a broad scope, the WA is weak since it is not legally binding; ultimately, participating States may conduct transfers as they please.³⁹

Depending on implementation, all these instruments can be effective, but, in the end, their usefulness in controlling the arms trade as a whole is limited. The only binding instrument, the Firearms Protocol, concerns firearms, only a part of all the international trade in arms. Besides, along with the PoA, it focuses mostly on illicit activity, which is hard to measure and draws attention away from the bulk of the legal trade in conventional weapons.⁴⁰ The Wassenaar Arrangement, like the UN Register of Conventional Arms, is primarily a transparency and secondarily a control measure. Even though the former is clearly focused on export activities and exporting countries by its very name, it lacks the legal characteristics of a treaty, operating on the goodwill of States.

³² See *Report of the Open-ended Working Group to Negotiate an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, para. 26.

³³ *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapon*.

³⁴ Para. 1.

³⁵ Initial Elements, Section I, para. 1.

³⁶ Initial Elements, Section II, paras 1 and 2.

³⁷ Initial Elements, Section III, para. 1. See *Wassenaar Arrangement List of Dual-Use Goods and Technologies and Munitions List*.

³⁸ For a list, see Initial Elements, Section II, para. 7.

³⁹ Initial Elements, Section II, paras 2 and 3.

⁴⁰ See Stohl and Grillot 2009, pp. 92–116.

1.3. A New Hope?

Due to the unregulated environment of the international arms trade and the widespread political effects it has, the UN worked since 2006 to bring into life a legally binding instrument that would encompass the trade completely and that would establish the highest possible common international standards for the import, export and transfer of conventional arms.⁴¹ This was the process towards the *Arms Trade Treaty* (ATT; hereinafter also ‘the Treaty’), a treaty that was ultimately adopted on 2 April 2013 by a massive majority in the United Nations General Assembly. The Treaty, which has so far been signed by 77 and signed as well as ratified by 41 States,⁴² enters into force 90 days after 50 countries have ratified it.⁴³

Adoption of the ATT was a result of a campaign launched by civil society organizations. Major NGOs worked together from 2003 under a global alliance, the *Control Arms*, gathering a million signatures on a petition supporting a treaty.⁴⁴ High expectations were created by this active participation. In particular, Amnesty International (AI) and Oxfam set their own goals concerning the contents and strength of the Treaty, as displayed in numerous reports and briefing papers.⁴⁵ The efforts and expectations reached their high point during the second UN Conference on the Arms Trade Treaty, as reported by Reaching Critical Will in the ATT Monitor.⁴⁶ To the end of the Conference, NGOs were set to promote a strong treaty.⁴⁷

Most States gave support to the goals of the NGOs, being committed to negotiating a robust treaty.⁴⁸ At the same time, many States were intent on watering down the provisions of the upcoming

⁴¹ See *United Nations General Assembly Resolution 67/234*, ‘The arms trade treaty’; 64/48, ‘The arms trade treaty’; 63/240, ‘Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms’; 61/89, ‘Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms’.

⁴² *Status of the Arms Trade Treaty*.

⁴³ Art. 22.

⁴⁴ Finaud 2013, pp. 1–2.

⁴⁵ E.g., Whall, Ray and Kirkham 2013; Amnesty International 2012, 2011, 2010, 2008 and 2007; Butcher 2012; Murphy and Ray 2012; Ray 2012a, 2012b and 2012c; Goodman 2011; Silva 2011; Cairns 2009; Nightingale 2008.

⁴⁶ All issues are available via *Disarmament Fora*, Arms Trade Treaty.

⁴⁷ See Acheson 2013c.

⁴⁸ E.g., Acheson 2012b, para. 4.

Treaty. Especially the USA, consistently the largest or second largest exporter of arms,⁴⁹ only sought a treaty that would be on par with ‘current best practices’,⁵⁰ desiring to exclude ammunition from the Treaty, for example.⁵¹ Such ideas of legitimizing the current state of affairs were supported by many Western countries, like France.⁵² Questionable goals were also pursued by, for example, the Arab Group, which desired to facilitate the sale of arms to developing nations,⁵³ and China, which wanted the Treaty to just focus on the illegal trade and abuse of weapons.⁵⁴

These different viewpoints lead to the creation of a disputed document. UN Secretary-General Ban Ki-moon was among the first to praise the Treaty, describing it as ‘a victory for the world’s people’ and ‘a powerful new tool’.⁵⁵ Many States, in a declaration delivered after the adoption, stated that ‘a strong text’ had been produced.⁵⁶ Oxfam’s Head of Arms Control, Anna Macdonald called the adoption ‘an incredible moment’, commenting that ‘[t]he agreement ... sends a clear message to arms dealers who supply war lords and dictators that their time is up’ and that ‘communities living in fear ... can now hope for a safer future.’ Allison Pytlak, Campaign Manager of Control Arms, stated that ‘[a]t last, the murky world of arms dealing has come under the spotlight of the international community.’⁵⁷ Silva, an advisor at AI, argued that the ATT ‘shows remarkable progress.’⁵⁸

Among the critics of the Treaty were many States that had either abstained from voting or voted against the adoption, but also disappointed NGO representatives. Egypt, for example, criticized ‘the absence of definitions of important concepts essential to the implementation of the Treaty’.⁵⁹ Belarus stated that the Treaty risks leaving ‘a wide margin for subjective interpretations of the export criteria’.⁶⁰ Acheson, on behalf of Reaching Critical Will, marked that the Treaty ‘contains substan-

⁴⁹ See *Top List TIV Tables*, years 1950–2013. Of recent trends, see Wezeman and Wezeman 2014.

⁵⁰ Prizeman 2012, para. 1.

⁵¹ Acheson and Prizeman 2012, Ammunition, para. 1.

⁵² Acheson 2012b, para. 4.

⁵³ Ibid.

⁵⁴ Acheson and Prizeman 2012, Goals and objectives, para. 1.

⁵⁵ *United Nations Secretary-General Statement 14919*.

⁵⁶ *United Nations General Assembly Official Records of the 67th session, 71st plenary meeting*, p. 20.

⁵⁷ *States vote overwhelmingly for ground-breaking Arms Trade Treaty*.

⁵⁸ Silva 2013, heading.

⁵⁹ *United Nations General Assembly Official Records of the 67th session, 71st plenary meeting*, p. 14.

⁶⁰ Ibid., p.15

tial limitations and loopholes.’⁶¹ Glenn McDonald, working for the Small Arms Survey, daringly asked whether the ATT was even worth the paper.⁶² Wendela de Vries, co-ordinator of the Dutch Campaign Against Arms Trade, concluded that the Treaty would not make any difference whatsoever.⁶³ Finally, Kirk Jackson, under the Campaign Against Arms Trade (CAAT), went as far as to dub the Treaty ‘a historic and momentous failure’ that might be more harmful than useful.⁶⁴

In particular, controversy was caused by what has been called *the operational heart of the Treaty*: the scope, the prohibitions and the criteria concerning the export assessment of weapons.⁶⁵ Some argued that the scope contains several important gaps,⁶⁶ others that it may be stuck in the past altogether.⁶⁷ It was claimed that the prohibitions do not add much to the pre-existing international law,⁶⁸ and that the threshold for not authorizing export is ‘far too high’.⁶⁹

1.4. The Focus of This Study

This is where this study comes in. Taking on the presented praise and criticism, its purpose is to perform a critical jurisprudential analysis of the operational heart of the Treaty; the Articles concerning the scope, prohibitions and export of arms. It aims to assess what these Articles cover and forbid, drawing upon not only the text of the Treaty but also upon the comments, analyses and articles the Treaty has sparked, in particular the analysis by Stuart Casey-Maslen, Giles Giacca and Tobias Vestner in the *Academy Briefing No. 3: The Arms Trade Treaty*. In addition to the mentioned provisions, this study also takes into account the obligations the Treaty sets on import, transit and trans-shipment States as well as on States involved in brokering.

Thus, an analysis of the preamble, principles, object and purpose and the final provisions is excluded from the scope of this study. Furthermore, this study leaves aside the provisions that deal with the diversion of arms and the implementation and enforcement of the Treaty, which are only dis-

⁶¹ Acheson 2013d, para. 2.

⁶² McDonald 2013, heading.

⁶³ Vries 2013, heading.

⁶⁴ Jackson 2013, heading.

⁶⁵ See Prizeman 2013b.

⁶⁶ McDonald 2013, Key features of the text, para. 3.

⁶⁷ Brück and Holtom 2013.

⁶⁸ Libman 2013, chapter 6, para. 3.

⁶⁹ Jackson 2013, A weak treaty, section 1, heading.

cussed to the extent that they are referred to in the scope, prohibitions and export assessment. It must also be noted that this study is based only on the English version of the Treaty text.

The main reason behind the described focus lies in the pivotal role of the scope, prohibitions and export assessment on the worth of the Treaty; they are ‘crucial for determining how the ATT will function in practice.’⁷⁰ It is extremely important to determine exactly which arms and other items and activities fall within the Treaty; if important weapon systems or methods of trade are excluded, the Treaty will make little impact on the bulk of the arms trade. Prohibitions and export assessment, on the other hand, essentially determine where the line between the acceptable and unacceptable arms trade must be drawn. And finally, examining the obligations of other States involved in arms transfers allows comparing how the different aspects of arms trade are regulated and to explore how the export assessment is supplemented by other means. The English version of the Treaty text is used not only due to the consistently prominent role of the USA and the UK in the arms trade,⁷¹ but also because it is the version referred to in the preceding analyses of the Treaty.

The second reason behind the limitations is that the role of other provisions is mainly to support the operation of the aforementioned core provisions in practice. This applies especially to the preamble, principles and object and purpose to since they mainly just provide assistance in determining the meaning of the more essential elements of treaties.⁷² But, such is the case also with the provision on the diversion of arms, which deals with an unwanted off-product of arms trade, and the provisions on implementation and enforcement and the final provisions, which dictate how the more central Articles of the Treaty should be put into effect.

Examining the operational heart of the Treaty is a process of treaty interpretation. The starting point of the study will be to outline the international law regarding the interpretation of treaties and how this set of rules should be applied to the ATT. Only the rules which are currently relevant to the interpretation of the ATT will be discussed further. After outlining the practicalities of treaty interpretation, the analysis will focus on the subject Treaty, starting from the scope and moving toward the provisions on export, import, transit and brokering. Concluding remarks will be made at the end of the study.

⁷⁰ Prizeman 2013b, para. 7.

⁷¹ See *Top List TIV Tables*, years 1950–2013.

⁷² See subsection 2.2.2.

2. Interpretation of the Arms Trade Treaty

2.1. The Role of the Vienna Convention

To some extent, the interpretation of documents is an art, not an exact science.⁷³ Despite this understatement, according to Villiger, '[f]ive methods have traditionally played a role in the theory of interpretation'. According to the subjective method, the intentions of the drafters must be identified, whereas the textual approach 'concentrates on the treaty text'. The contextual method interprets the terms in their context, and the teleological method, on the other hand, 'concentrates on the object and purpose of a treaty'. The logical method, as the final one, 'favours rational techniques of reasoning and such abstract principles as *per analogiam, e contrario*' and so forth.⁷⁴

These methods have been set forth as binding rules under Articles 31–33 of the 1969 *Vienna Convention on the Law of Treaties* (VCLT; hereinafter also 'the Vienna Convention'). The Articles do not prescribe the process of interpretation itself; rather, they are an attempt to assess the value of the elements that must and can be taken into account in the process.⁷⁵ Article 31 sets the general rule of treaty interpretation, which precedes the supplementary means described in Article 32. Article 33 deals with situations where the treaty text has been authenticated in several languages.

The States Parties to the Vienna Convention⁷⁶ have to apply the interpretational rules to the Arms Trade Treaty, as do any courts or arbitrators when they settle disputes concerning States Parties to both these treaties. Regarding States that are not parties to the VCLT, and thus not legally bound by it, customary international law must be applied. There is no real distinction, however, since the interpretational rules of the Vienna Convention are the ones to follow in all cases. According to Watts, modern treaty law is authoritatively set forth in the VCLT.⁷⁷ Aust argues that the VCLT enjoys an especially authoritative status in the realm of Treaty law, and it is invariably relied upon,

⁷³ *Draft Articles on the Law of Treaties with commentaries*, p. 218, para. (4), in fine.

⁷⁴ Villiger 2009, pp. 421–422.

⁷⁵ Sinclair 1984, p. 117.

⁷⁶ See *Status of the Vienna Convention on the Law of Treaties*.

⁷⁷ Watts 2007, p. xxiii.

regardless of ratification.⁷⁸ Dörr states that the interpretational rules reflect customary international law, concerning the States that are not parties to the VCLT, too.⁷⁹

In light of this, the logical conclusion seems to be that the Arms Trade Treaty should be interpreted resorting first and foremost to the rules set forth in Articles 31–33 of the Vienna Convention. To specify the meaning of these rules, one must consult the International Law Commission’s (ILC) *Draft Articles on the Law of Treaties with commentaries* along with related jurisprudence.

2.2. The General Rule

2.2.1. Good Faith and the Ordinary Meaning of Terms

The one and only general rule of treaty interpretation is set forth in Article 31(1) of the Vienna Convention,⁸⁰ which reads:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The first principle under the paragraph is that the ATT must be interpreted in ‘good faith’. According to the ILC, the notion of good faith ‘flows directly from the rule *pacta sunt servanda* [agreements must be kept]’:⁸¹ effective adherence to treaties requires good faith. But what precisely constitutes good faith? According to Dörr, the bottom line seems to be that interpretations must be fundamentally reasonable,⁸² which is supported by Villiger: ‘good faith requires ... to act honestly, fairly and reasonably, and to refrain from taking unfair advantage.’⁸³ To Linderfalk, the heart of the matter is the interpreter’s choice: the interpretation is executed in good faith, if one chooses to understand a treaty provision in accordance with the rules of the Vienna Convention, and so that its meaning will not be left unclear or lead to manifestly absurd or unreasonable results.⁸⁴

⁷⁸ Aust 2007, pp. 12–13.

⁷⁹ Dörr 2012a, pp. 523–525.

⁸⁰ Aust 2007, p. 234.

⁸¹ *Draft Articles on the Law of Treaties with commentaries*, p. 221, para. (12).

⁸² Dörr 2012a, p. 548.

⁸³ Villiger 2009, p. 425.

⁸⁴ See Linderfalk 2007, p. 45.

The second principle is that the terms used in the Treaty should be given ‘the ordinary meaning’. This is because ‘the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them.’⁸⁵ ‘The ordinary meaning’, according to Linderfalk, refers to how the terms are understood in conventional language; their etymological origins need not be investigated. To understand a treaty, one must be familiar with the lexicon and the underlying system of the language used;⁸⁶ to quote Dörr, perform a ‘linguistic and grammatical analysis of the text of the treaty’.⁸⁷ Thus, in interpreting the English version of the ATT, one must resort to English lexicon and systematics.

Drawing upon the practice of international judicial bodies,⁸⁸ this study utilizes a dictionary to determine the ordinary meaning of words. The choice to adhere to the *Oxford English Dictionary* (OED) is based on its broad scope, widespread use and its authoritative status, as exemplified by the practice of the ICJ. In the case concerning *Oil Platforms*,⁸⁹ for example, the Court took recourse to the OED to argue that the word ‘commerce’ ‘has connotations that extend beyond mere purchase and sale’, including all involved transactions, arrangements and the like.⁹⁰ More recently, the dictionary was referred to in an explanation of vote regarding the *Bosnian Genocide case*⁹¹ as well as in a separate opinion concerning the order given in the border dispute between Costa Rica and Nicaragua.⁹² The OED has also seen use in the practice of international criminal courts: in at least *The Prosecutor v. Tihomir Blaškić*⁹³ and *The Prosecutor v. Jean-Pierre Bemba Gombo*,⁹⁴ different variants of the dictionary were consulted to clarify the ordinary meaning of some terms, indicating its viability for the purposes of interpreting international agreements and statutes.

⁸⁵ *Draft Articles on the Law of Treaties with commentaries*, p. 221, para. (12).

⁸⁶ Linderfalk 2007, p. 62.

⁸⁷ Dörr 2012a, p. 542.

⁸⁸ Ibid.

⁸⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*.

⁹⁰ Judgement on the Preliminary Objection, para. 45.

⁹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. See Declaration of Judge Keith, para. 3.

⁹² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. See Separate opinion of Judge Koroma, para. 7.

⁹³ See Trial Judgement, para. 280.

⁹⁴ See Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, paras 29, 362 and 413.

2.2.2. The Context and the Object and Purpose

2.2.2.1. The Context

As Villiger points out, a term may have several ordinary meanings which may change over time; there is some relativity to the concept.⁹⁵ To address this issue, the third principle of the general rule of interpretation sets forth that ‘the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose.’⁹⁶ What the context comprises is stated in Article 31(2) of the VCLT:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

If applied to the Arms Trade Treaty, the context shall merely comprise its text and preamble for now; there are no annexes, agreements or instruments currently related to the Treaty in the sense of the VCLT.⁹⁷ Linderfalk discusses the concept of ‘treaty text’ at length, pointing out that it includes non-textual representations, such as maps, tables and diagrams, as well; also, because a treaty is an agreement, it can be embodied in several instruments and yet be taken as a single treaty text.⁹⁸ This is not the case with the ATT, however: the Treaty is a single textual document.

The inclusion of the preamble in the context seems unproblematic: ‘That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment.’⁹⁹ The preamble of the ATT reads as follows:

The States Parties to this Treaty,

Guided by the purposes and principles of the Charter of the United Nations,

⁹⁵ Villiger 2009, p. 426.

⁹⁶ *Draft Articles on the Law of Treaties with commentaries*, p. 221, para. (12).

⁹⁷ Of related agreements and instruments, see generally Linderfalk 2007, pp. 138–151.

⁹⁸ *Ibid.*, pp. 103–104. This is quite in line with the definition of ‘treaty’ under Article 2(1)(a) of the VCLT.

⁹⁹ *Draft Articles on the Law of Treaties with commentaries*, p. 221, para. (13).

Recalling Article 26 of the Charter of the United Nations which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources,

Underlining the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts,

Recognizing the legitimate political, security, economic and commercial interests of States in the international trade in conventional arms,

Reaffirming the sovereign right of any State to regulate and control conventional arms exclusively within its territory, pursuant to its own legal or constitutional system,

Acknowledging that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

Recalling the United Nations Disarmament Commission Guidelines for international arms transfers in the context of General Assembly resolution 46/36H of 6 December 1991,

Noting the contribution made by the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, as well as the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons,

Recognizing the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms,

Bearing in mind that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict and armed violence,

Recognizing also the challenges faced by victims of armed conflict and their need for adequate care, rehabilitation and social and economic inclusion,

Emphasizing that nothing in this Treaty prevents States from maintaining and adopting additional effective measures to further the object and purpose of this Treaty,

Mindful of the legitimate trade and lawful ownership, and use of certain conventional arms for recreational, cultural, historical, and sporting activities, where such trade, ownership and use are permitted or protected by law,

Mindful also of the role regional organizations can play in assisting States Parties, upon request, in implementing this Treaty,

Recognizing the voluntary and active role that civil society, including non-governmental organizations, and industry can play in raising awareness of the object and purpose of this Treaty, and in supporting its implementation,

Acknowledging that regulation of the international trade in conventional arms and preventing their diversion should not hamper international cooperation and legitimate trade in materiel, equipment and technology for peaceful purposes,

Emphasizing the desirability of achieving universal adherence to this Treaty

Part of the preamble is a set of *principles*. This is not uncommon, though the ATT is novel to set them forth in the preambular part of the Treaty.¹⁰⁰ It could be asserted that the role of such principles is unsettled, but this seems overly dogmatic. Forming a part of the preamble, they should be understood as a part of the context. The principles are set forth as follows:

- The inherent right of all States to individual or collective self-defence as recognized in Article 51 of the Charter of the United Nations;
- The settlement of international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered in accordance with Article 2 (3) of the Charter of the United Nations;
- Refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations in accordance with Article 2 (4) of the Charter of the United Nations
- Non-intervention in matters which are essentially within the domestic jurisdiction of any State in accordance with Article 2 (7) of the Charter of the United Nations;
- Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accord-

¹⁰⁰ Casey-Maslen, Giacca and Vestner 2013, p. 13.

ance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights;

- The responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems;
- The respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms;
- Implementing this Treaty in a consistent, objective and non-discriminatory manner

In current literature, there is a lot of discussion about the role of the context in the interpretation of treaties. Aust states that '[a]ny term can be fully understood only by considering the context in which it is employed.'¹⁰¹ Dörr argues that 'the systematic structure of a treaty' is as important as the 'ordinary linguistic meaning of the words' because 'words obtain their meaning from the context in which they are used.'¹⁰² Linderfalk asserts that the context should serve as a necessary supplement to the ordinary meaning. If a treaty provision is vague, the context will make the text more precise; if it is ambiguous, the context will help to find out which meaning is correct.¹⁰³

2.2.2.2. The Object and Purpose

The second half of the final principle dictates that the ordinary meaning must be sought in the light of the object and purpose of the treaty under interpretation. According to Villiger, '[c]onsideration of a treaty's object and purpose together with good faith will ensure the effectiveness of its terms';¹⁰⁴ that they will 'enable the treaty to have appropriate effects'.¹⁰⁵ The representation of the object and purpose varies from treaty to treaty; at times, they are enumerated in the preamble, and

¹⁰¹ Aust 2007, p. 235.

¹⁰² Dörr 2012a, p. 543.

¹⁰³ Linderfalk 2007, p. 102.

¹⁰⁴ Villiger 2009, p. 428.

¹⁰⁵ *Draft Articles on the Law of Treaties with commentaries*, p. 219, para. (6).

in some cases they have to be inferred from other parts of the treaty.¹⁰⁶ In the ATT, they are explicitly stated in Article 1:

The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

Pursuant to the wording of the Vienna Convention, the object and purpose are to be used quite similar to the context. This gains support from Linderfalk, who states that they are not taken as independent means of interpretation, but always as supplements related to the ordinary meaning of the terms; they may be used to specify and clarify vague and ambiguous provisions.¹⁰⁷ Dörr suggests that the terms of a treaty should be interpreted so that the latter's aims are advanced¹⁰⁸ without surpassing the ordinary meaning of the treaty text;¹⁰⁹ a view endorsed by Villiger who points to the limits set by the treaty text.¹¹⁰ According to Aust, the object and purpose play a lesser role than 'the search for the ordinary meaning of the words in their context'.¹¹¹

Since there is some contention about the function of the context on one hand and the object and purpose on the other, applying the final principle to the ATT may lead to problematic results. What seems to be clear from the wording of the Vienna Convention and the related jurisprudence is that none of the concepts should *independently* affect the interpretation of a treaty or justify interpretations that go beyond conventional language. But, ignoring them is as bad as misusing them; pedan-

¹⁰⁶ Dörr 2012a, p. 546.

¹⁰⁷ Linderfalk 2007, p. 203.

¹⁰⁸ Dörr 2012a, p. 545.

¹⁰⁹ *Ibid.*, p. 547.

¹¹⁰ Villiger 2009, p. 428.

¹¹¹ Aust 2007, p. 235.

tic recourse to the ordinary meaning of words can easily distort the interpretation process. As the ILC has pointed out, taking the context and the object and purpose into account represents common sense and good faith.¹¹²

2.2.3. Relevant Rules of International Law and the Special Meaning of Terms

Article 31(3) of the VCLT describes the interpretative means which may be used in addition to the context:

3. There shall be taken into account, together with the context:
 - (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) Any relevant rules of international law applicable in the relations between the parties.

Because there are no such subsequent agreements concerning the Arms Trade Treaty nor has it generated any practice as of yet, the first two interpretative means are currently useless.¹¹³ The third provision, on the other hand, is relevant since it means ‘that a treaty must be interpreted also in the wider context of general international law.’¹¹⁴ This wider context should not comprise the whole of international law, but ‘any relevant rules’ which are also ‘applicable in the relations between the parties’.

Dörr takes an admissive approach to the question of relevancy, stating that the word ‘refers to all recognized sources of international law ... which can in principle be of assistance in the process of interpretation.’¹¹⁵ This encompasses at least other treaties, resolutions by the United Nations Security Council (UNSC) and customary international law, but even general principles of law and non-binding documents.¹¹⁶ Relevancy is a ‘rather vague condition’ since ‘it is fairly obvious when those rules relate to the same subject matter as the treaty provision under interpretation.’¹¹⁷ Villiger shares

¹¹² *Draft Articles on the Law of Treaties with commentaries*, p. 221, para. (12).

¹¹³ Of subsequent agreements and practice, see generally Linderfalk 2007, pp. 161–177.

¹¹⁴ Aust 2007, p. 243

¹¹⁵ Dörr 2012a, p. 561.

¹¹⁶ *Ibid.*, pp. 562–564.

¹¹⁷ *Ibid.*, p. 565.

these thoughts, stating even that the ‘rules need have no particular relationship with the treaty other than assisting in the interpretation of its terms.’ They are relevant if they ‘concern the subject-matter of the treaty term at issue.’¹¹⁸ Linderfalk concurs that the wording ‘can only be understood as a reference to any rule of international law, whatever the source.’ To him, a rule is relevant ‘if (and only if) it governs the state of affairs, in relation to which the interpreted treaty is examined.’¹¹⁹

The latter part of subparagraph (c) calls for applicability between parties. According to Villiger, thus, it is clear that ‘non-binding rules cannot be relied upon.’¹²⁰ On another note, if an external ‘relevant rule of international law’ is used in the interpretation, one might ask which States must be party to that external rule; all the States Parties to the treaty under interpretation, or perhaps only those who have a dispute over the treaty? According to Linderfalk, all States Parties to the treaty under interpretation must also be parties to the relevant rule of international law, if that rule is to be used in the interpretation process.¹²¹ Dörr agrees on this point, stating that ‘it would be incongruous to allow the interpretation of a treaty to be affected by rules of international law that are not applicable between all the parties to the treaty’. He asserts that the condition of applicability is met if the States Parties are legally bound by the relevant rules.¹²² Another issue is the ‘temporal element’ as already discussed in the ILC Commentaries:¹²³ should the relevant rules be applicable when the treaty is concluded or when it is being interpreted? Both Dörr and Linderfalk arrive at the conclusion that this must depend on the nature of the terms used.¹²⁴

Thus, when using other rules of international law to interpret the provisions of the Arms Trade Treaty, two things must be taken into consideration. Firstly, these rules of international law must govern the same matter as the interpreted Treaty provision does or, at least, relate to the same subject matter. *Prima facie*, this opens the door for relying on related customary international law and fundamental documents such as the *Charter of the United Nations* (hereinafter ‘the UN Charter’)

¹¹⁸ Villiger 2009, pp. 432–433 (referring to *Certain Questions of Mutual Assistance in Criminal Matters*, Judgement, para. 112.)

¹¹⁹ Linderfalk 2007, p. 178.

¹²⁰ Villiger 2009, p. 433.

¹²¹ *Ibid.*

¹²² Dörr 2012a, pp. 566–567.

¹²³ *Draft Articles on the Law of Treaties with commentaries*, p. 222, para. (16).

¹²⁴ Dörr 2012a, p. 568; Villiger 2009, p. 433; Linderfalk 2007, p. 182.

and, moreover, the arms control instruments that are currently in force.¹²⁵ There are also provisions in the Treaty which are clearly related to instruments of international criminal law. The use of these, though, may be limited by the fact that the rules set forth in them must legally bind all the States Parties to the ATT at the time of the interpretation. Whichever rules are resorted to will depend entirely on the interpretational needs.

Finally, the fourth paragraph of the general rule of interpretation reads as follows:

4. A special meaning shall be given to a term if it is established that the parties so intended.

This, as Dörr puts it, is ‘an exception to para[graph] 1 for cases where the parties have agreed, even implicitly, to replace the ordinary meaning of a term’.¹²⁶ A special meaning might just be ‘the ordinary meaning in the particular context’,¹²⁷ but a meaning can also be ‘special’ if the States Parties use a term in a way that differs from the common meaning.¹²⁸ Villiger points out that ‘[s]pecial meanings are often found in technical or historical contexts or in specialised treaties.’¹²⁹ According to Dörr, proof that a special meaning was intended can be found in explicit definitions elsewhere in a treaty, the preparatory work¹³⁰ and the practice of the States Parties.

The necessity of the provision was questionable to begin with, since it was claimed that the ‘special use of the term normally appears from the context’. On the other hand, the provision was deemed useful as it would ‘emphasize that the burden of proof lies on the party invoking the special meaning of the term.’¹³¹ Regardless of the relevancy of the provision, the starting point for the terms in the ATT is, then, the ordinary meaning, which can be overruled by a special meaning if there is sufficient proof to support such a claim.

¹²⁵ See section 1.2.

¹²⁶ Dörr 2012a, p. 568.

¹²⁷ *Draft Articles on the Law of Treaties with commentaries*, p. 222, para. (17).

¹²⁸ Dörr 2012a, p. 569.

¹²⁹ Villiger 2009, p. 435.

¹³⁰ See section 2.3.

¹³¹ *Draft Articles on the Law of Treaties with commentaries*, p. 222, para. (17).

2.3. Supplementary Means of Interpretation

Article 32 of the Vienna Convention allows interpreters to resort to certain non-binding elements outside the scope of the general rule. It reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

The first allowed resource is the preparatory work of a treaty (*travaux préparatoires*, or simply *travaux*). There is no recognized definition,¹³² but generally the *travaux* includes the drafts of the treaty, conference records, explanatory statements by experts, uncontested interpretative statements by the chairman of a drafting committee and ILC commentaries.¹³³ Linderfalk discusses the concept in great detail, concluding that the *travaux* refers to ‘all those representations produced in the preparation for the establishing of the treaty as definite.’¹³⁴ According to Dörr, for the *travaux* to affect the interpretation of a treaty, it must at least be objectively assessable, illuminate a common understanding between the negotiating parties, relate directly to the treaty under consideration and distinguish itself from the context in the sense of Article 31(2).¹³⁵ The material that does not meet these criteria can naturally be used for other purposes, such as pointing out the flaws in a treaty.

All the mentioned preparatory documents may also offer a closer view of the ‘circumstances of the conclusion’. This concept, according to Linderfalk, refers to any state of affairs that at ‘the point in time when the treaty was established as definite’¹³⁶ ‘at least partly caused the conclusion of the treaty’.¹³⁷ The circumstances must exclude the context and the *travaux* of a treaty, if the rules set forth in Articles 31 and 32 are taken as a coherent system.¹³⁸ Thus, to paraphrase Dörr, the provision simply refers to the factual background of the treaty and the economic, political and social condi-

¹³² Dörr 2012b, p. 574.

¹³³ Aust 2007, p. 246. See also Villiger 2009, p. 445.

¹³⁴ Linderfalk 2007, p. 245, in fine.

¹³⁵ Dörr 2012b, pp. 574–578.

¹³⁶ Linderfalk 2007, p. 247.

¹³⁷ *Ibid.*, p. 249.

¹³⁸ *Ibid.*

tions of States Parties.¹³⁹ These views gain support from Villiger who makes a reference to ‘the political, social and cultural factors—the *milieu*—surrounding the treaty’s conclusion.’¹⁴⁰

Article 32 does not exhaustively list all acceptable supplementary means of interpretation, as the word ‘including’ dictates. Linderfalk asserts that there are two fundamentally different categories of other supplementary means.¹⁴¹ First, he vouches for three material sources: unilateral representations by States (the ‘ratification work’), other instruments with identical subject matter (‘treaties in *pari materia*’) and some uses of the context that are not allowed under Article 31.¹⁴² Then, he lists quite a few general principles of interpretation which may be resorted to.¹⁴³ The use of material sources is supported by Dörr and the use of principles by Aust, whereas Villiger points to both, referring to a multitude of sources.¹⁴⁴

There appears to be quite a few other supplementary means on which an interpreter can rely, and the process towards the Arms Trade Treaty was well documented. Most of the *travaux* are listed in the *Documents* related to the UN Conference on the Arms Trade Treaty, including the drafts of the treaty text, conference reports and resolutions of the United Nations General Assembly (UNGA), along with compilations of the views of UN Member States. *United Nations General Assembly Official Records* are also available, documenting the views of States right before and after the adoption of the Treaty. These are supplied by, for example, the chairman’s and facilitators’ papers which can be accessed through Reaching Critical Will’s compilation entitled the *Disarmament Fora*.

The usefulness of the *travaux* is nevertheless limited. Most of the preparatory work related to the ATT does not portray information that could assist in clarifying the contents of the Treaty; this goes for the drafts, the reports and the resolutions alike. Not many are uncontested either. Besides, as Aust tells us, the *travaux* need to be used with care: ‘Their investigation is time-consuming, their usefulness often being marginal and very seldom decisive.’¹⁴⁵ Similar conclusions are made regard-

¹³⁹ Dörr 2012b, pp. 578–580.

¹⁴⁰ Villiger 2009, p. 445.

¹⁴¹ Linderfalk 2007, p. 235.

¹⁴² *Ibid.*, pp. 249–265

¹⁴³ *Ibid.*, pp. 279–319.

¹⁴⁴ Dörr 2012b, pp. 580–581; Villiger 2009, pp. 445–446; Aust 2007, pp. 248–249.

¹⁴⁵ *Ibid.*, p. 247.

ing other supplementary means, which are ‘no more than aids to interpretation’ and ‘might well produce wrong results if followed slavishly.’¹⁴⁶

This view is supported by Article 32 of the VCLT, which allows the use of any supplementary resource only in two cases: to confirm the meaning resulting from the application of the general rule or to determine the meaning when the interpretation resulting from the general rule either leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.¹⁴⁷ Thus, the preparatory work should not play a notable role in the interpretation of the Arms Trade Treaty, not as long as the general rule produces clear and reasonable results.

2.4. The Provision on Treaties in More Than One Language

Article 33 of the Vienna Convention deals with the interpretation of treaties that have been authenticated in several languages:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Pursuant to Article 28 of the Arms Trade Treaty, the Arabic, Chinese, English, French, Russian and Spanish texts of the Treaty are equally authentic, and there is no provision regarding the prevalence of a particular text. Thus, all the mentioned versions are equally authoritative, and the terms are presumed to have the same meaning in each version. As explained above,¹⁴⁸ this study analyses the English text of the ATT, which leaves out the comparative linguistic element of interpretation: the

¹⁴⁶ Ibid., p. 249.

¹⁴⁷ Of this in detail, see Dörr 2012b, pp. 582–585; Linderfalk 2007, pp. 321–353.

¹⁴⁸ See section 1.4.

problems related to the differences between the authentic texts and the rules regarding these contradictions are not taken into account.

3. Scope

3.1. Arms Covered by the Treaty

3.1.1. Eight Categories

To begin the analysis of the operational heart of the Arms Trade Treaty, the first concept to discuss is the scope. Essentially, the scope of the Treaty comprises not one but three items: Articles 2, 3 and 4. Article 2 sets forth which arms and activities are covered by the Treaty, whereas Articles 3 and 4 determine what sort of control measures should be applied to ammunition/munitions and parts and components. The first paragraph of Article 2 enumerates the eight categories of conventional arms covered by the Treaty as follows:

1. This Treaty shall apply to all conventional arms within the following categories:
 - (a) Battle tanks;
 - (b) Armoured combat vehicles;
 - (c) Large-calibre artillery systems;
 - (d) Combat aircraft;
 - (e) Attack helicopters;
 - (f) Warships;
 - (g) Missiles and missile launchers; and
 - (h) Small arms and light weapons.

Since the Treaty does not define the listed categories of arms, States Parties will be bound to use national definitions. However, States cannot freely define the categories. Pursuant to Article 5(3) of the Treaty, '[n]ational definitions of any of the categories covered under Article 2 (1) (a)-(g) shall not cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of this Treaty.' Regarding SALW, 'national definitions shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force

of this Treaty.’ Thus, the categories must be defined using the mentioned instruments, bearing in mind that they only represent the minimum coverage (‘shall not cover less than...’).¹⁴⁹

3.1.2. The Descriptions in the United Nations Register of Conventional Arms

There is some future uncertainty related to the descriptions used in the UNROCA: national definitions must be in accordance with them as they will be *at the time of entry into force of the ATT*. This is likely a reference to the founding of the Register, when States decided, ‘with a view to future expansion, to keep the scope ... under review’.¹⁵⁰ Indeed, the descriptions found in the 1991 *Register of Conventional Arms* are not precisely the same as the current ones, and possible further changes to them before the entry into force of the ATT will have to be taken notice of. Changes are initiated by the UN General Assembly, which, on a three year basis, requests the Secretary General to set up a Group of Governmental Experts (GGE).¹⁵¹ The GGE may make recommendations (most recently in 2013¹⁵²), which the General Assembly may adopt in resolutions.¹⁵³

This study relies on descriptions provided by an up-to-date UN website entitled *The Global Reported Arms Trade: The UN Register of Conventional Arms*. To evaluate the coverage of the current descriptions, a non-military expert has to rely on the latest GGE report; the discussions in it should give an idea about how the categories could be amended. Further ideas may be provided by the critics of the Treaty as well as the *travaux* of the ATT, namely the First Preparatory Committee’s (the First PrepCom) *Facilitator’s Summary for Scope*, in which adopting broadened UNROCA descriptions was discussed.

As of now, the Register defines the first category, battle tanks, as ‘[t]racked or wheeled self-propelled armoured fighting vehicles with high cross-country mobility and a high-level of self-protection, weighing 16.5 metric tons unladen weight, with a high muzzle velocity direct fire main gun of at least 75 millimetres calibre.’ The GGE of 2013 (hereinafter also ‘the Group’) did not con-

¹⁴⁹ See Casey-Maslen, Giacca and Vestner 2013, p. 18.

¹⁵⁰ *United Nations General Assembly Resolution 46/36 L*, ‘Transparency in armaments’, para. 11.

¹⁵¹ See, e.g., *United Nations General Assembly Resolution 66/39*, ‘Transparency in armaments’, para. 5(b).

¹⁵² See *Continuing operation of the United Nations Register of Conventional Arms and its further development*.

¹⁵³ See, e.g., *United Nations General Assembly Resolution 64/54*, ‘Transparency in armaments’, para. 2.

sider amending this category¹⁵⁴ and the *Facilitator's Summary for Scope* does not discuss the matter at all, which may be taken as a sign that there is a consensus on the description of battle tanks.¹⁵⁵

Regarding armoured combat vehicles, on the other hand, the Group of 2013 was faced with a proposal. The current UNROCA description includes '[t]racked, semi-tracked or wheeled self-propelled vehicles, with armoured protection and cross-country capability, either: (a) designed and equipped to transport a squad of four or more infantrymen, or (b) armed with an integral or organic weapon of at least 12.5 millimetres calibre or a missile launcher.' An expansion was suggested, covering

- (a) armoured recovery vehicles, tank transporters, amphibious and deep water fording vehicles and armoured bridge-launching vehicles; and (b) tracked, semi-tracked or wheeled self-propelled vehicles, with armoured protection and cross-country capability specially designed, or modified and equipped: (i) with organic technical means for observation, reconnaissance, target indication, and designed to perform reconnaissance missions; or (ii) with integral organic technical means for command of troops; or (iii) with integral organic electronic and technical means designed for electronic warfare.¹⁵⁶

Similar expansions were described on the third and fourth page of the *Facilitator's Summary for Scope*. Thus, it is obvious that the current description does not cover most types of armoured combat vehicles. Vehicles designed for electronic warfare (EW) have so far not been included, which appears odd considering the importance of EW in modern combat.¹⁵⁷ Despite the proposal, the Group did not make any recommendations to expand this category.

The third category concerns large-calibre artillery systems: 'Guns, howitzers, artillery pieces, combining the characteristics of a gun or a howitzer, mortars or multiple-launch rocket systems, capable of engaging surface targets by delivering primarily indirect fire, with a calibre of 75 millimetres and above.' The First PrepCom discussed including gun-carriers designed for towing artillery as well as

¹⁵⁴ *Continuing operation of the United Nations Register of Conventional Arms and its further development*, para. 42.

¹⁵⁵ This is not to say that the description is perfect as it is, though. See subsection 3.1.4.

¹⁵⁶ *Continuing operation of the United Nations Register of Conventional Arms and its further development*, para. 43.

¹⁵⁷ See *Electronic Warfare*, p. vii.

direct fire artillery such as anti-tank guns in the ATT.¹⁵⁸ The only change the most recent GGE contemplated here was lowering the calibre,¹⁵⁹ but no changes were recommended.

Combat aircraft, according to the UNROCA, are

(a) Manned fixed-wing or variable-geometry wing aircraft designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction, including versions of these aircraft which perform specialized electronic warfare, suppression of air defence or reconnaissance missions;

(b) Unmanned fixed-wing or variable-geometry wing aircraft, designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction.

Attack helicopters, on the other hand, are described as

(a) Manned rotary-wing aircraft, designed, equipped or modified to engage targets by employing guided or unguided anti-armour, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons, including versions of these aircraft which perform specialized reconnaissance or electronic warfare missions;

(b) Unmanned rotary-wing aircraft, designed, equipped or modified to engage targets by employing guided or unguided anti-armour, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons.

The newfound inclusion of unmanned aerial vehicles (UAVs, or drones) is based on the recommendations of the latest GGE, which were endorsed in a resolution by the UNGA.¹⁶⁰ The GGE noted that the 2006 and 2009 Groups had concluded that the pre-existing categories already covered UAVs, but wanted to clarify the issue nevertheless by updating the descriptions and recommending that Member States report UAVs accordingly.¹⁶¹

Although the new descriptions are a worthy update, the category of combat aircraft still explicitly excludes ‘primary trainer aircraft, unless designed, equipped or modified as described above.’

¹⁵⁸ *Facilitator’s Summary for Scope*, pp. 3–4.

¹⁵⁹ *Continuing operation of the United Nations Register of Conventional Arms and its further development*, para. 44.

¹⁶⁰ *United Nations General Assembly Resolution 68/43, ‘Transparency in armaments’*, paras 2–3.

¹⁶¹ See *Continuing operation of the United Nations Register of Conventional Arms and its further development*, paras 45–46 and 69.

Equally excluded are unmanned aircraft that perform specialized EW, suppression of air defence or reconnaissance missions; regarding attack helicopters, unmanned reconnaissance and EW helicopters are left out. Pursuant to the discussions of the First PrepCom, command aircraft and helicopters as well as mine laying helicopters also do not fall within the descriptions.¹⁶²

The UNROCA describes warships as '[v]essels or submarines armed and equipped for military use with a standard displacement of 500 metric tons or above, and those with a standard displacement of less than 500 metric tons, equipped for launching missiles with a range of at least 25 kilometres or torpedoes with similar range.' Here, changes to expand the description were suggested as well. There were proposals to reduce the standard displacement to 150 metric tons or more, and to remove the reference to the range for missiles and torpedoes, or to remove the range for torpedoes entirely.¹⁶³ No agreement was reached upon these initiatives, so the categories remained the same.

The seventh and final category, regarding which the ATT relies on descriptions in the UNROCA, is entitled 'missiles and missile launchers'. This group is divided into two subcategories:

- (a) Guided or unguided rockets, ballistic or cruise missiles capable of delivering a warhead or weapon of destruction to a range of at least 25 kilometres, and means designed or modified specifically for launching such missiles or rockets, if not covered in the previous categories I through VI. For the purposes of the Register, this sub-category includes remotely piloted vehicles with the characteristics for missiles as defined above but does not include ground-to-air missiles;
- (b) Man-Portable Air-Defence Systems (MANPADS)

The GGE reviewed proposals amending this category by lowering or eliminating 'the range threshold for missiles' and including 'surface-to-air missiles and missile launchers'.¹⁶⁴ This did not lead to any recommendations, however. The First PrepCom discussed including missiles of all ranges as well as ground-to-air missiles other than MANPADS in the scope of the ATT.¹⁶⁵

¹⁶² *Facilitator's Summary for Scope*, pp. 3–4.

¹⁶³ *Continuing operation of the United Nations Register of Conventional Arms and its further development*, para. 48.

¹⁶⁴ *Ibid.*, para. 49.

¹⁶⁵ *Facilitator's Summary for Scope*, pp. 3–4.

3.1.3. The Descriptions of Small Arms and Light Weapons in Relevant Instruments

Regarding small arms and light weapons, the scope—via Article 5(3)—refers to ‘descriptions used in relevant United Nations instruments at the time of entry into force of [the] Treaty.’ While nothing prevents States from creating new instruments to regulate SALW, the current analysis, according to the *Academy Briefing*, should be based on the Firearms Protocol and the International Tracing Instrument (ITI).¹⁶⁶ The wording seems to imply that States Parties must adhere to these descriptions whether they have ratified the instruments or not.

The Firearms Protocol does not use the term ‘small arms’. The concept of ‘firearm’ seems related, though, as it means ‘any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas.’¹⁶⁷ This covers all standard handguns, rifles and machine guns, whether automatic or semi-automatic; antique firearms and their replicas that date back to before 1899 are not included. The focus is on the process of firing, the type of weapons and the projectiles, not so much on the outcome of the use. This means that some weapons are inevitably left out.¹⁶⁸

Article 4 of the International Tracing Instrument defines SALW as ‘any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive’. Antique small arms and light weapons and their replicas that date back to before 1899 are excluded from this definition, too. Besides defining SALW, Article 4 also seeks to specify the meaning of the concepts:

- (a) “Small arms” are, broadly speaking, weapons designed for individual use. They include revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns;
- (b) “Light weapons” are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres.

¹⁶⁶ Casey-Maslen, Giacca and Vestner 2013, p. 19.

¹⁶⁷ Art. 3(a).

¹⁶⁸ Casey-Maslen, Giacca and Vestner 2013, p. 19.

Article 5(3) of the ATT does not state which description should serve as the primary one; the one in the Firearms Protocol or the one in the ITI. The former hails from a legally binding document, the latter from a politically binding one, which would give preference to the former. On the other hand, the former concerns firearms, which creates some uncertainty about non-firearm light weapons such as grenade launchers. The specified definition under the ITI is more lengthy and informative, but this might mean that there are more contentious details (such as the calibres) that lead to disagreements. The Firearms Protocol concerns non-lethal weapons, the ITI does not. All in all, however, the descriptions are very similar. Bearing this in mind, they could very well be read together; the former offers a good starting point which the latter supplements.

3.1.4. The Coverage of the Descriptions

Some commentators have described the scope of the Treaty as broad,¹⁶⁹ others as narrow¹⁷⁰ or even extremely limited.¹⁷¹ This dissonance is mostly a matter of perspective. By looking at the eight categories and the detailed descriptions, it is obvious that the scope covers most of the current conventional arms, though it does not directly describe them. A favourable reading is supported also by the twelfth preambular paragraph of the Treaty, which emphasizes that nothing in the Treaty prevents States Parties from adopting additional effective measures such as more inclusive definitions. In addition, the already mentioned Article 5(3) encourages States to apply the Treaty to the broadest range of conventional arms, which States will likely do if they act in good faith.¹⁷²

From another perspective, though, these encouraging provisions imply that the Treaty acknowledges its limitations.¹⁷³ The 2012 *Draft of the Arms Trade Treaty* listed the eight categories only as a minimum,¹⁷⁴ explicitly allowing States to apply the Treaty to other arms. The GGE and the First PrepCom discussed several additions, which makes it clear that many types of conventional arms do not fall within the descriptions. In general, the UNROCA categories seem to focus on offensive systems, excluding transport, refuelling, command and control systems.¹⁷⁵ Besides, it has been

¹⁶⁹ Casey-Maslen, Giacca and Vestner 2013, p. 18; Doermann and Arimatsu 2013, p. 4.

¹⁷⁰ Libman 2013, Which "arms" are included in the treaty?, para. 8.

¹⁷¹ Silva 2013, para. 14.

¹⁷² Ibid.

¹⁷³ Damián 2013, Second weakness: the list of weapons, para 2.

¹⁷⁴ Art. 2(A)(1).

¹⁷⁵ McDonald 2013, Key features of the text, para. 3.

pointed out that the scope does not cover military technology or radar and communication systems.¹⁷⁶ The reasons for this are partly explained in the 16th preambular paragraph, acknowledging that regulation should not hamper the legitimate trade in material and technology for peaceful purposes. This does not alleviate the fact that military designs can be sold to other countries via licensed production agreements, thereby avoiding export controls set forth in the Treaty.¹⁷⁷

The whole decision to adhere to the UNROCA and SALW descriptions at the time of entry into force of the Treaty has also been criticized. Military technologies are in a constant change, so they ‘cannot be captured by one set of definitions ... set stone in 2013.’¹⁷⁸ In a working paper by the International Committee for Robot Arms Control (ICRAC), it was pointed out that the Treaty does not take into account all unmanned and autonomous weapon systems. For example, the iRobot 710 Warrior, a ‘remote-control ground robotic system’, does not fall within the UNROCA description of battle tanks or armoured combat vehicles, simply because it does not have the weight of a tank nor is it designed to transport infantrymen or fire a gun of at least 75 millimetres calibre. Remote controlled and unmanned maritime surface vessels, although armed, might not fall within the category of warships since they are so small. The Switchblade, a controllable miniature aerial drone launched from a mortar tube, may be regarded as ammunition instead of a weapon. 3D printing, on the other hand, may pose challenges to small arms control.¹⁷⁹

Visions of robotic weapons being used *en masse* in a conflict seem rather futuristic. Regardless, the arms industry is being transformed by the growing capabilities of robotics, information and communications technology, which may lead to destabilizing results.¹⁸⁰ Unmanned technology can also easily blur the distinctions between civilian and military applications; systems that can be sold separately from the actual weaponry may not fall within the scope of the Treaty.¹⁸¹ Through these developments, the categories used in the ATT may become irreparably outdated, since nothing obliges States Parties to amend them in the future. Whether the lack of future proofing will prove to be the

¹⁷⁶ Libman 2013, Which "arms" are included in the treaty?, paras 5–6.

¹⁷⁷ See Jackson 2013, A weak treaty, section 4, para. 3.

¹⁷⁸ Brück and Holtom 2013, para. 1 (prior to the adoption of the final text).

¹⁷⁹ Bolton and Zwijnenburg 2013, pp. 2–4.

¹⁸⁰ *Ibid.*, p. 1.

¹⁸¹ *Ibid.*, p. 2.

demise of the Treaty or not, depends ultimately on the interpretation and implementation by States Parties in the years to come, and thus, remains to be seen.¹⁸²

Finally, the National Rifle Association of America (NRA) has criticized the scope of the ATT from another standpoint. The first issue for the organization has been the plausible conflict that the Treaty might have with the right of the people to keep and bear arms,¹⁸³ which is guaranteed in certain States.¹⁸⁴ This claim is without much support, at least from the perspective of the USA.¹⁸⁵ Since the ATT deals with international matters, a domestic right to bear arms—whether founded upon constitutional rights or common legislation—is not likely to be infringed, unless it is taken as a limitless right to import arms. Another problem for the NRA has been the inclusion of weapons used for ‘civilian’ purposes. This issue seems absurd, as drawing a line between ‘civilian’ and ‘military’ weapons seems impossible and would most likely cause an exploitable loophole.¹⁸⁶

3.2. Activities Covered by the Treaty

3.2.1. Export and Import

The second paragraph of Article 2 lays down which activities the ATT concerns:

2. For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as “transfer”.

As already set forth in the object and the fifth preambular paragraph, the Treaty only concerns international trade; trade ‘existing, constituted, or carried on between different nations’.¹⁸⁷ Though just for the purposes of the ATT, the explicit goal here is to put many types of activity under one umbrella term, the ‘transfer’. There are advantages to this. All the activity can simply be referred to with one keyword, and there is less uncertainty regarding the scope of the Treaty. Had the Treaty simply referred to ‘trade’, it would have left too much leeway for States to determine which acts fall within its ambit; now, trade is deemed to comprise export, import, transit, trans-shipment and bro-

¹⁸² See *ibid.*, pp. 4–5.

¹⁸³ See *Wayne LaPierre Fights for the Second Amendment Before the United Nations*.

¹⁸⁴ In the USA, the right is based on *The Constitution of the United States*, Amendment II.

¹⁸⁵ See *White Paper on the Proposed Arms Trade Treaty and the Second Amendment*.

¹⁸⁶ See Finn 2013, para. 9.

¹⁸⁷ *Oxford English Dictionary Online*, ‘international, *adj.* and *n.*’, meaning A.a.

kering. However, since the definitions of these might still cause disagreements, their meaning must be sought pursuant to the general interpretation rule set forth in the Vienna Convention.

In common language, export and import can mean at least two things: they can refer to that which is exported or imported or the action of exporting or importing.¹⁸⁸ In the case of Article 2(2) the latter is clearly the choice of the drafters, since the terms are referred to as activities. For consistency, this must also be assumed to apply for the rest of the Treaty, unless something in a provision clearly indicates that reference is made to a single export or import article. Thus, the general rule must be that export means sending arms out from one country to another and import means bringing arms in or causing them to be brought in from a foreign country.¹⁸⁹

This ordinary meaning of the terms is rather all-encompassing: it covers commercial transactions, leasing, gifts, loans and aid; the arms simply have to cross the border. Despite this, many have criticized Article 2(2) for not expressly including gifts and loans as opposed to commercial transactions.¹⁹⁰ This criticism overlooks the fact that there is nothing in the context or the object and purpose that would support a narrow reading, quite the opposite. Articles 7 and 8, which especially deal with export and import, do not specify the concepts any further. Besides, for example, it would seem to be in line with contributing to peace, security and stability—one of the purposes of the Treaty under Article 1—to make sure that gifts and loans will not be excluded from the prohibitions and the assessment the Treaty calls for.

In the light of this, it seems misleading to claim that ‘the final text only covers arms sales’,¹⁹¹ or to suggest that States could abuse the provision’s use of the word ‘trade’ to ignore applying the Treaty to gifts.¹⁹² If anything, that particular word is discarded in the Article as too imprecise by further specifying it to comprise export, import, and so forth, and by replacing it with a more fitting term, ‘transfer’. Therefore, instead of hanging on to the term ‘trade’, the focus should be on how the concepts of export, import, transit and trans-shipment will be interpreted. As argued above, they should comprise leasing, gifts and loans, but it is realistic to assert that the matter is currently unsettled and

¹⁸⁸ See *ibid.*, ‘export, *n.*’, meanings 1 and 2; ‘import, *n.*’, meanings II.3.a and II.4.a.

¹⁸⁹ See *ibid.*, ‘export, *v.*’, meaning 2.a; ‘import, *v.*’, meaning I.2.

¹⁹⁰ MacFarquhar 2013, *in fine*; McDonald 2013, Key features of the text, para. 3, *in fine*; Press 2013, para. 18; Prizeman 2013a, p. 3.

¹⁹¹ Jackson 2013, A weak treaty, section 4, para. 2.

¹⁹² McDonald 2013, A world remade?, para 2, *in fine*.

should be clarified by States Parties.¹⁹³ In any case, it is clear that in good faith, the scope cannot be circumvented by frivolously labelling all transactions as gifts.¹⁹⁴

3.2.2. Transit, Trans-shipment and Brokering

The concepts of transit and trans-shipment are left rather undetailed too, as relevant instruments contain no hints about their exact meaning. Pursuant to common language, transit occurs when weapons are passed or carried from one place to another, and trans-shipment when they are changed from one ship or other conveyance to another.¹⁹⁵ Transit or trans-shipment do not, however, occur when an exporting or importing State moves export articles or changes them from one vessel to another on its own territory. In the context of Article 9 of the Treaty, these terms only concern States whose territory the arms move through while on their way from the exporting to the destination country;¹⁹⁶ they refer to third party States.

There is no special meaning set forth for brokering in the Arms Trade Treaty or any other viable source. To illustrate the term, the 2007 UN GGE report on illicit brokering in SALW describes a broker ‘as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction ... in return for some form of benefit, whether financial or otherwise.’¹⁹⁷ Pursuant to the ninth paragraph of the report, a broker can work in quite a few ways:

- (a) Serve as a finder of business opportunities to one or more parties;
- (b) Put relevant parties in contact;
- (c) Assist parties in proposing, arranging or facilitating agreements or possible contracts between them;
- (d) Assist parties in obtaining the necessary documentation;
- (e) Assist parties in arranging the necessary payments.

Such non-binding descriptions, however, should not be used to interpret the term. In accordance with the general rule of interpretation, brokering simply means ‘[a]cting as a broker’; a middleman negotiating arms bargains between different companies or individuals.¹⁹⁸ This description does not

¹⁹³ See Casey-Maslen, Giacca and Vestner 2013, p. 20.

¹⁹⁴ Casey-Maslen 2013, para. 5.

¹⁹⁵ *Oxford English Dictionary Online*, ‘transit, *n.*’, meaning 1.c.(a); ‘tran’shipment | trans-‘shipment, *n.*’

¹⁹⁶ See section 6.2.

¹⁹⁷ *The illicit trade in small arms and light weapons in all its aspects*, para. 8.

¹⁹⁸ *Oxford English Dictionary Online*, ‘brokering, *n.*’; ‘broker, *n.*’, meaning II.3a.

limit brokering activities to individuals; companies can broker arms deals, too. Acting as a middleman, as the ordinary meaning suggests, should cover all sorts of brokering activities if the Treaty is interpreted in good faith and in the light of contributing to peace, security and stability.

3.2.3. Activities Not Covered by the Treaty

Regarding the question about which transfers the Treaty will *not* be applied to, Article 2(3) states:

3. This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party's ownership.

The reasoning behind this provision seems to guarantee the sovereignty of States Parties to control their arms during international operations. It suggests that international movements in which the right to use or ownership is not given away should not fall within the scope of the ATT; a State Party should be allowed to move around its own weapons for its own use by itself or with the help of a third party ('on behalf of') without having to consider the prohibitions under Article 6 or conduct export assessments under Article 7. Like has been pointed out, 'if a state sends arms abroad to its own forces, no transfers occurs'. Naturally, if the ownership 'is then passed on to another state, this act would constitute a transfer.'¹⁹⁹

The provision was criticized by, for example, Iran in its statement after the adoption of the Treaty. What the country wanted was to prohibit transfers to 'aggressors and foreign occupiers' and also movements of arms by such countries for their own use. Iran asserted that such arms as exempted under Article 2(3) 'have been used ... to commit aggression and occupation, causing human losses and destruction of the economic infrastructure'.²⁰⁰

This criticism is valid in the sense that the wrongs listed in the Arms Trade Treaty²⁰¹ are not the only breaches of international law which arms may contribute to. However, obliging States to scrutinize their movements of arms for their own purposes would be rather odd if the rest of the Treaty is taken into account, and regardless superfluous in terms of general international law. Should States, for example, in accordance with Article 6(3) assess their own knowledge that they would

¹⁹⁹ Casey-Maslen, Giacca and Vestner 2013, p. 20.

²⁰⁰ *United Nations General Assembly Official Records of the 67th session, 71st plenary meeting*, p. 18.

²⁰¹ See chapters 4 and 5.

themselves use their own arms to commit a genocide or any other international crimes? Pursuant to Article 2(4) of the UN Charter, all States are already under the obligation to ‘refrain in their international relations from the threat or use of force’. Whether States actually follow the provision or not is of course another matter, but the obligation it creates could hardly be any clearer.

3.3. Ammunition/Munitions, and Parts and Components

3.3.1. Definition and Control Measures

Articles 3 and 4 of the Arms Trade Treaty concern items that are vital to the operation of arms. They state:

Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions.

Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2(1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.

There is no definition of ammunition or munitions in the Treaty or international law, and different States understand the terms differently.²⁰² Ordinarily, ammunition refers to ‘articles used in charging guns and ordnance, as powder, shot, shell; and by extension, offensive missiles generally.’ Munition(s), on the other hand, means ‘[m]ilitary equipment of any kind, as weaponry, ammunition, stores, etc.’²⁰³ The Firearms Protocol supports this line of interpretation, though it concerns firearms ammunition only.²⁰⁴ According to the *Academy Briefing*, two terms were used just ‘to ensure that the terms have broad reference.’²⁰⁵ Indeed, the difference between them bears little or no significance, since the Treaty does not concern all kinds of military equipment; only such that is fired,

²⁰² Casey-Maslen, Giacca and Vestner 2013, p. 21.

²⁰³ *Oxford English Dictionary Online*, ‘ammunition, *n.*’, meaning 1; ‘munition, *n.*’, meaning 4.a.

²⁰⁴ See Art. 3(c).

²⁰⁵ Casey-Maslen, Giacca and Vestner 2013, p. 21.

launched or delivered by the arms within the scope of Article 2(1). This seems to leave out hand grenades and landmines,²⁰⁶ for example, which some have deemed a gap.²⁰⁷

Regarding parts and components, too, the ordinary meaning of the terms is a viable starting point. In the context of arms, a part likely means a piece of a weapon which together with others makes up the whole; component has a similar meaning, referring to '[a] constituent element or part' of a weapon.²⁰⁸ The Firearms Protocol supports these definitions, too, as it refers to 'any element or replacement element specifically designed for a firearm and essential to its operation'.²⁰⁹ The decision to mention both parts and components provides clarity, but overall there appears to be little or no difference between the concepts. In the light of the described similarities, the items under Articles 3 and 4 will hereinafter be simply referred to as ammunition and parts, respectively.

Articles 3 and 4 concern export, which, as defined above, means sending out items from one country to another.²¹⁰ To regulate this activity, the primary obligation of States Parties is to establish and maintain a national control system; a clear reference to Article 5 which concerns the general implementation of the Treaty. Pursuant to common language, the provision most likely suggests a permanently instituted and kept up set of rules and authorities that directs and regulates a matter within the sphere of the whole State and is controlled by the State;²¹¹ an ambiguous phrase which is likely to cause a lot of diversity and perhaps dissonance between States. Because there are no specifications, almost any kind of a control system a State wants to use and deems fitting will comply with the standards of the Article. As the *Academy Briefing* points out, 'each state party has considerable latitude regarding its form, structure, and legislative underpinning'.²¹² The obvious and only standard is that the system must enable the State to regulate the export of ammunition and parts.

This shortcoming has been duly noted by at least one commentator. Vries points out that the control systems envisioned in the ATT already exist in 'most of the dominant arms exporting countries',

²⁰⁶ Ibid.

²⁰⁷ McDonald 2013, Key features of the text, para. 3.

²⁰⁸ *Oxford English Dictionary Online*, 'part, *n.*¹', meaning I.3.a; 'component, *adj.* and *n.*', meaning B.2.a.

²⁰⁹ See Art. 3(b).

²¹⁰ *Oxford English Dictionary Online*, 'export, *v.*', meaning 2.a. See subsection 3.2.1.

²¹¹ Ibid., 'establish, *v.*', meaning 2.a; 'maintain, *v.*', meaning II.7.a; 'system, *n.*', meaning I.1.a; 'control, *n.*', meaning 1.a; 'national, *adj.* and *n.*', meanings A.1.a and A.1.d.

²¹² Casey-Maslen, Giacca and Vestner 2013, p. 22 (regarding general implementation).

including the US and the EU (though not a country). According to the writer, arms continue to be exported to questionable destinations despite the existence of such systems, because the system is always dependent on the exporter's foreign policy.²¹³ Although mistakenly presenting national control systems as 'the big achievement of the ATT', the writer's criticism is to the point: it is very hard to see national systems as an improvement from the status quo, since they do not necessarily contain stringent measures. Due to the lack of specifications, it is also very difficult to estimate what sort of effects each national control system will have on the export of ammunition and parts.

3.3.2. The Export of Parts and the Scope of the Articles

Pursuant to Article 4, the export of parts must be in a form that provides the capability to assemble the conventional arms covered under Article 2(1). In other words, it is sufficient for the provision to apply that the export allows the importer to assemble the arms; they need not be preassembled. In the light of this, a State obviously cannot avoid its obligations by splitting parts into several shipments on purpose; as the general rule insists, the Treaty must be interpreted in good faith.²¹⁴

According to some, however, the provision 'could be read as covering only shipments that include all of the parts and components required for the complete assembly of a conventional arm'.²¹⁵ Indeed, the Article seems to speak of a single 'export' and 'a form that provides capability'. But, as has been pointed out above,²¹⁶ instead of referring to a particular export article, the word 'export' in the ATT primarily refers to export activity in general. Thus, it is likely that the export activity, not a single export article, must be in such a form. In addition, whether a form provides capability or not always depends on the resources that the importer holds: if the importer has already acquired most of the parts from a third country, then supplying it the missing parts will provide it with the capability to assemble the arms completely. Naturally, without intelligence it is very difficult to know whether an importer is capable of such an assembly.

Although dual-use goods are not generally covered by the Treaty, the described logic should apply to export that consists of purely military parts as well as dual-use parts; parts that have both military and civilian applications. For instance, a State may first acquire gun or missile systems from one

²¹³ Vries 2013, chapter 2, para. 1.

²¹⁴ Casey-Maslen, Giacca and Vestner 2013, p. 21.

²¹⁵ McDonald 2013, Key features of the text, para. 3, in fine.

²¹⁶ See subsection 3.2.1.

State and then helicopters from another.²¹⁷ Whereas selling helicopters for peaceful purposes would not normally fall within the ambit of the Treaty, in this case it could be read as export in a form that provides the capability to assemble attack helicopters as defined in the UNROCA. Here, too, intelligence is necessary to determine how the goods are going to be used.

The decision not to exclude dual-use parts from the scope of the Treaty, resulting in the possibility of their inclusion, was criticized prior to the adoption of the Treaty by Cuba, for example. According to the country, the Treaty could become a system for controlling the transfer of civilian technology, equipment and parts, especially to developing countries.²¹⁸ While this is true in principle, the alternative does not seem too appealing either: allowing States to trade dual-use parts without any scrutiny limits the possibilities of the Treaty to control all arms transfers.

As mentioned above, some major arms exporters were reluctant to include ammunition in the Treaty,²¹⁹ a few of them claiming that licensing, authorizing and keeping a record of ammunition transfers are an impossible task and that including ammunition will do little to achieve the goals of the Treaty.²²⁰ As a result, against the wishes of the majority of States, ammunition and parts were not fully integrated in the scope of the Treaty;²²¹ besides prohibitions under Article 6, only their export must be controlled, which includes establishing national control systems under the Articles at hand and conducting export assessments under Article 7.

The problem with this is that the provisions concerning import, transit and brokering as well as some regarding implementation do not apply to ammunition and parts. As one commentator put it, ‘ammunition and parts ... have one foot inside and another outside of the Treaty.’²²² According to another, the provision allows ‘arms dealers ... to avoid key regulations by trading in “knock-down” kits – kits of parts for assembly in the destination country – instead of whole weapons.’; a ‘huge loophole’, since ammunition plays a ‘key role’ in sustaining conflict.²²³

²¹⁷ See *The Business of War: SOFEX*, at 10:37 and 11:05.

²¹⁸ *United Nations General Assembly Official Records of the 67th session, 71st plenary meeting*, p. 7.

²¹⁹ See subsection 1.3.

²²⁰ See Acheson 2012a, paras 2 and 4.

²²¹ See Acheson 2013b, Scope, para. 3.

²²² McDonald 2013, Key features of the text, para. 3.

²²³ Jackson 2013, A weak treaty, section 3, para. 3 (referring in part to Murphy and Ray 2012).

This criticism is a little exaggerated but mostly to the point. To begin with, ammunition and spare parts are crucial to the operation of any weaponry; it makes little sense to set different standards for them.²²⁴ This has been the argument of the NGOs throughout the negotiations of the Treaty, as they have promoted the inclusion of both items: by sheer logic, weapons cannot be maintained without parts²²⁵ and wars cannot be waged without ammunition.²²⁶ It is even possible to argue that the regulation of trade in ammunition is more important than that of arms, as the former have a shorter lifespan and, so, have to be acquired more frequently and in larger quantities. In this sense, it seems absurd to assert that excluding ammunition has no bearing on the object and purpose of the ATT. The claims that regulating ammunition is impossible also seem to be without much support.²²⁷

Regardless, one must keep in mind that ammunition and parts do fall within the ambit of Articles 6 and 7, which together with scope make up the operational heart of the Treaty. Articles 3 and 4 also emphasize the responsibilities of exporting States, which can be seen as a proactive approach to the problems related to the trade in ammunition and parts. While this means fewer obligations for importing, transit and trans-shipment States, they are still under the crucial obligation to apply the prohibitions under Article 6 to all items.

4. Prohibitions

4.1. Common Elements

The prohibitions under Article 6 of the Arms Trade Treaty are perhaps its most vital provisions. The Article reads as follows:

1. A State Party shall not authorize any transfer of conventional arms, covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international

²²⁴ See Eagles 2013, para. 3.

²²⁵ Butcher 2012, p. 2.

²²⁶ Murphy and Ray 2012, p. 2.

²²⁷ See Acheson 2012a, paras 3–4.

obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

There is not much ambiguity in the basic form of all 3 paragraphs of the Article. In all cases, States Parties are simply forbidden to authorize transfers in the enumerated situations: they ‘shall not authorize’. All provisions concern all arms, ammunition and parts (in this chapter, simply ‘arms’) that are under the scope of the Treaty as set forth in Articles 2(1), 3 and 4. To authorize, according to the ordinary meaning of the terms, is ‘to give official permission for or formal approval to’ the transfer of the arms in question; to violate is to ‘break, infringe, or contravene’.²²⁸

The activities that fall under the term ‘transfer’ are set forth in Article 2(2). This means that all prohibitions concern exporting and importing States as well as all transit and trans-shipment States, which suggests a wide coverage: even third party States must be aware of the arms that pass through their territory and prohibit transfers that would breach their obligations under Article 6.

4.2. Violation of Measures Adopted by the United Nations Security Council

Under the first paragraph of Article 6, a State Party must not authorize a transfer that ‘would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations’. There is not much ambiguity in the meaning of this prohibition: it stands to affirm that States, when authorizing arms transfers, have to follow legal constraint, or legally binding acts or courses of action which stem from plans or courses of action²²⁹ adopted by the UNSC. Not all statements of the UNSC establish a prohibition to arms transfers, though; only such that follow from Chapter VII of the UN Charter do.

But what sort of measures can the UNSC adopt under the given chapter? As an obvious example, the Article mentions arms embargoes. Embargoes, generally defined as ‘suspension[s] of com-

²²⁸ *Oxford English Dictionary Online*, ‘authorize, v.’, meaning 3.a; ‘violate, v.’, meaning 2.a;

²²⁹ *Ibid.*, ‘obligation, n.’, meanings 3.a and 3.b; ‘measure, n.’, meaning IV.19.a;

merce’,²³⁰ stem from Article 41 of the UN Charter, which allows the UNSC to employ measures not involving the use of armed forces to give effect to its decisions, including ‘complete or partial interruption of economic relations’. Thus, as the *Academy Briefing* points out, arms embargoes represent ‘a complete or partial interruption of economic relations with respect to the transfer of weapons.’²³¹ There are currently around a dozen UN arms embargoes in force,²³² of which the most recent, as mentioned above, concerns the Central African Republic.²³³

Other measures adopted by the UNSC can also create obligations that arms transfers may breach. First of all, Article 41 is not limited to embargoes; pursuant to another example given in the Article, the measures may include ‘the severance of diplomatic relations.’ Furthermore, the Security Council may employ any measures it wants: it can, for example, create demilitarized zones or demand a State to give up certain types of weapons.²³⁴ It is also possible that the UNSC decides to use force in accordance with Article 42, including the establishment blockades, if it considers that non-forceful measures would be inadequate or have proved to be inadequate. In addition, Article 40 of the UN Charter allows the UNSC to call upon ‘the parties concerned’ to comply with provisional measures, e.g., ceasefires and withdrawal of troops from foreign territory, which are taken to prevent a peace-threatening situation from escalating.²³⁵ Measures pursuant to the last Article must, however, ‘be without prejudice to the rights, claims, or position of the parties concerned.’

If measures in accordance with Article 41 are adopted, no State may, for example, be allowed trade weapons with the State with which diplomatic relations must be cut off, or transfer weapons to the established demilitarized zone; if a certain State has been forced to give up certain arms, no such arms may be transferred to that State. In the situations where the UNSC decides to use force pursuant to Article 42, States may be prohibited from transferring arms past an established blockade or in a manner that works against the UN operation.²³⁶ And finally, if the UNSC orders States to with-

²³⁰ Ibid., ‘embargo, *n.*’, meaning 2.

²³¹ Casey-Maslen, Giacca and Vestner 2013, p. 23.

²³² See *SIPRI Arms Embargoes Database*.

²³³ See *United Nations Security Council Resolution 2127*, paras. 54–55.

²³⁴ Shaw 2008, pp. 1248–1249.

²³⁵ Ibid., p. 1241.

²³⁶ Given the practice of the UNSC, it is likely that in such a case an arms embargo or other non-forceful measures have already been employed. See *ibid.*, pp. 1241–1267.

draw troops from a certain area as a provisional measure under Article 40, a concerned party that imports weapons to contested areas could be seen as violating its obligations.

The prohibition under Article 6(1) appears useful. But in the end, as has been pointed out, it is rather superfluous: it simply reiterates an obligation that already exists.²³⁷ This is because the Member States of the United Nations have to accept and carry out the decisions of the UNSC anyway—with or without the existence of the ATT—pursuant to Article 25 of the UN Charter. This obligation is affirmed in Article 48 regarding the maintenance of international peace and security: ‘The action required to carry out the decisions of the Security Council ... shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.’ Thus, the prohibition introduced in the ATT does not add much, if anything, to the States Parties’ burden.²³⁸ As a final note, it falls beyond the scope of this study to discuss the positive and negative aspects of the UNSC process in which the described measures are adopted; suffice it to say that the process suffers from certain constraints,²³⁹ especially the veto power wielded by all the permanent members.²⁴⁰

4.3. Violation of Relevant International Obligations

The second paragraph of Article 6 prohibits a State Party from authorizing a transfer that ‘would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.’ This prohibition appears quite as straightforward as the first one: when authorizing arms transfers, States must take into account such relevant international obligations that they have under the agreements to which they are Parties. Thus, States must follow such legal constraint, or acts or courses of action which they are legally bound to and which also have a bearing on or are connected with the matter in hand.²⁴¹

That the obligations must be relevant seems rather a familiar requirement. As discussed previously, Article 31(3) of the VCLT allows using ‘any relevant rules of international law applicable in the

²³⁷ Casey-Maslen, Giacca and Vestner 2013, p. 23.

²³⁸ Libman 2013, What does the Treaty forbid?, para. 3.

²³⁹ Damián 2013, First weakness: the lack of specificity, para. 6.

²⁴⁰ See *Charter of the United Nations*, Art. 27(3).

²⁴¹ See *Oxford English Dictionary Online*, ‘obligation, *n.*’, meanings 3.a and 3.b; ‘relevant, *adj.*’, meaning 2.a.

relations between the parties' in the interpretation of treaties.²⁴² Here, too, the relevancy of an international obligation depends on its connection to the subject matter: it must pertain to the situation surrounding an arms transfer. And as is the case with treaty interpretation, the condition is rather vague. All sorts of obligations can be related to the acceptability of an arms transfer, which, of course, greatly increases the potential of the provision.

The first limitation to this is that the obligations cannot stem from customary international law, since they must be included in the international agreements to which the transfer-authorizing State is a Party. As has been noted, 'prohibitions under customary international law ... continue to apply independently of the ATT.'²⁴³ Despite this exclusion, the prohibition under Article 6(2) seems quite broad: there must be quite a few instruments whose provisions an arms transfer could breach.

Obviously, the term 'international agreement' covers all treaties as defined under Article 2(1)(a) of the *Vienna Convention on the Law of Treaties*: 'international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. This wording implies, though, that there are other international agreements besides treaties; a view that gains support from Article 102 of the UN Charter which requires Member States to submit 'every treaty and every international agreement' to registration. Indeed, according to an early resolution by the United Nations General Assembly, the concept of 'international agreement' refers to instruments irrespective of their form and descriptive name.²⁴⁴ Furthermore, when registering instruments under Article 102 of the UN Charter, the UN Secretariat regards 'a wide variety of instruments'.²⁴⁵

Article 6(2), however, should not be read as taking into account non-binding or so-called soft law instruments; these should not be regarded as international agreements in the customary sense of the word. According to practice of the Secretariat, other international agreements besides treaties rather include 'unilateral commitments, such as declarations by new Member States of the UN accepting the obligations of the UN charter, declarations of acceptance of the compulsory jurisdiction of the

²⁴² See subsection 2.2.3.

²⁴³ Casey-Maslen, Giacca and Vestner 2013, p. 24.

²⁴⁴ See *United Nations General Assembly Resolution 97(I), 'Registration and Publication of Treaties and International Agreements: Regulations to Give Effect to Article 102 of the Charter of the United Nations'*, Art. 1(1).

²⁴⁵ *Definition of key terms used in the UN Treaty Collection*, Introduction, para. 5.

International Court of Justice ... and certain unilateral declarations that create binding obligations between the declaring nation and other nations.’²⁴⁶ As Shaw has pointed out, ‘international agreements ... create rules binding upon the signatories’; they are ‘written agreements whereby the states participating bind themselves legally’.²⁴⁷

It must also be noted that under the prohibition an instrument may only be taken into account if it is an agreement to which a State is a ‘Party’ in some way. Pursuant to common language, a party refers to ‘[a]ny of the groups of people constituting a side in a formal proceeding’ or simply someone ‘who is concerned in an action or affair; a participant’.²⁴⁸ In this sense, e.g., ‘the States participating in the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects’²⁴⁹ could be called Parties to the UN Programme of Action on Small Arms.

But, these broad descriptions are unacceptable since they clearly conflict with the customary use of the term ‘party’ in the realm of treaty law. In the authoritative UN publication *Multilateral Treaties Deposited with the Secretary-General*, the word refers to both ‘Contracting States’ and actual ‘Parties’, of which the latter means States (and other viable entities) that have expressed their consent to be bound by a treaty and for whom that treaty is in force.²⁵⁰ This view is codified in Article 2(1)(g) of the VCLT, which defines party as ‘a State which has consented to be bound by the treaty and for which the treaty is in force’. Although the VCLT defines the term only for its own purposes, it must be taken into account since its provisions enjoy an authoritative status in treaty law.²⁵¹

The fact that non-binding instruments cannot be regarded as international agreements with parties is perhaps regrettable, as Article 6(2) points to instruments that relate ‘to the transfer of, or illicit trafficking in, conventional arms’; a reference to the pre-existing constraints on the arms trade which are currently mostly political by nature.²⁵² For example, pursuant to the already mentioned UN Programme of Action, States have a politically binding but certainly transfer-relevant obligation ‘[t]o assess applications for export authorizations according to strict national regulations and procedures’

²⁴⁶ Ibid.

²⁴⁷ Shaw 2008, p. 6 and 93.

²⁴⁸ *Oxford English Dictionary Online*, ‘party, n.’, meanings II.6.a and II.7.a.

²⁴⁹ PoA, Section I, para. 1.

²⁵⁰ *Definition of key terms used in the UN Treaty Collection*, Signatories and Parties.

²⁵¹ See section 2.1.

²⁵² See section 1.2.

as well as make every effort in accordance with national laws and practices to notify the original exporting State before retransferring weapons.²⁵³ These obligations are of political nature and cannot constitute a prohibition in accordance with Article 6(2).

The status of obligations stemming from binding instruments is solid, though. Under the 2001 Firearms Protocol, States must, inter alia, criminalize illicit trafficking in firearms, their parts and components and ammunition.²⁵⁴ Pursuant to Article 3(e), trafficking is illicit if it is not authorized by any of the States Parties or if it concerns firearms not marked in accordance with Article 8 of the Protocol. Of these two, the first cannot constitute a prohibition under the ATT, since States can always deem their own trafficking activities legal by authorizing them.²⁵⁵ The marking of firearms, however, is an obligation which cannot be circumvented in a similar manner. Thus, transferring unmarked firearms is a violation which could breach the prohibition under Article 6(2) of the ATT.

Besides the described arms trade agreements, international humanitarian law and disarmament treaties are also related to the issue.²⁵⁶ In terms of conventional weapons, they include at least the CCW²⁵⁷ with its various protocols which, e.g., ban non-detectable fragments, some mines, booby-traps and other devices, incendiary weapons and blinding laser weapons.²⁵⁸ The CCM²⁵⁹ and the Ottawa Treaty,²⁶⁰ which ban cluster munitions and anti-personnel mines, respectively,²⁶¹ also fall into the category. When considering the obligations rising from these instruments, it must be kept in mind which arms the ATT applies to; if the arms fall outside the scope, as for example land mines do, the prohibition under Article 6(2) does not apply.²⁶²

²⁵³ Section II, paras 11 and 13.

²⁵⁴ Art. 5(1)(b).

²⁵⁵ See Brandes 2013, p. 411.

²⁵⁶ See Casey-Maslen, Giacca and Vestner 2013, p. 24; Marsh 2013, para. 4.

²⁵⁷ *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.*

²⁵⁸ See *Protocol on Non-Detectable Fragments; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons; Protocol on Blinding Laser Weapons; Protocol on Explosive Remnants of War.*

²⁵⁹ *Convention on Cluster Munitions.*

²⁶⁰ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.*

²⁶¹ See Art. 1 of both of the conventions.

²⁶² See Brandes 2013, p. 410; Casey-Maslen, Giacca and Vestner 2013, p. 24.

Obligations set forth in the mentioned arms-related conventions are certainly not the only relevant ones that arms transfers may violate. After all, Article 6(2) forbids States from breaching *any* agreements that they are parties to, which means it could be read as prohibiting the violation of human rights treaties, for example. According to the *Academy Briefing*, this would seem to be consistent with the 5th and 6th preambular principles,²⁶³ which ensure the respect for human rights and affirm the responsibility of all States to effectively regulate the arms trade in accordance with their international obligations. As one author has remarked, arms trade potentially affects quite a few human rights protected by international treaties, including the right to life, the right to freedom from torture, as well as the rights to liberty and security of person,²⁶⁴ to name some. But, as has also been pointed out, no human rights treaty explicitly prohibits transferring conventional arms.²⁶⁵

Regardless of the broadness of the prohibition, its actual worth is perhaps as questionable as that of the first. After all, it simply ‘reflects existing international law’,²⁶⁶ hardly going beyond the already well-established principle of *pacta sunt servanda*²⁶⁷ as stated under Article 26 of the VCLT: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Article 6(2) does not really create a new prohibition on arms transfers;²⁶⁸ regardless of the provision at hand, States are bound not to violate the international agreements to which they are parties, whatever the means of violation happen to be. There is nothing new here, except a decisive and useful affirmation of an existing rule which could strengthen the obedience of all international law in the sphere of the global trade in arms.

4.4. Use in the Commission of Certain International Crimes

4.4.1. Knowledge of Commission at the Time of Authorization

Finally, Article 6(3) prohibits a State from authorizing a transfer of arms ‘if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civil-

²⁶³ Ibid.

²⁶⁴ Bellal 2014, p. 469.

²⁶⁵ Brandes 2013, p. 411.

²⁶⁶ Silva 2013, para. 12.

²⁶⁷ Libman 2013, What does the treaty forbid?, para. 3, in fine.

²⁶⁸ Brandes 2013, p. 410.

ian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.’ This prohibition has been called one of the cornerstones of the Treaty,²⁶⁹ which is not altogether surprising. Compared to the first two prohibitions, it introduces novel elements to public international law. This time, the standard is that a State Party must know at the time of authorization that the arms that are to be transferred would be used to commit one or several of the crimes listed in the provision. In other words, a State must know of the existence of a causal link between an arms transfer and a forthcoming crime.

Although a comprehensive analysis of the offences is beyond the scope of this study, some general characterizations based on international agreements and customary law will be made to determine which anticipated acts trigger the prohibition.²⁷⁰ The up-to-date Statutes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), and the Rome Statute, the founding document of the International Criminal Court (ICC; hereinafter also ‘the Court’)²⁷¹ will also be taken into account along with analyses conducted in relevant jurisprudence.

Prior to the offences, there are three points of interest. First, the concept of the commission, committing²⁷² of crime deserves some attention. In common language, to commit is to do something, especially something wrong or reprehensible, or to be guilty of, for example, a crime or an offence.²⁷³ In international criminal law, committing primarily refers to the physical perpetration of a crime but sometimes also to culpable omissions; failure to act in accordance with obligations. Commission also occurs when two or more people work together to bring about the crime, or when an unwitting person (or even a witting one) is used in perpetration. In some cases, distinguishing joint commission from other forms of participation, such as aiding and abetting, can be controversial. Further problems of distinction have been caused by the need to attribute criminal liability to several people involved in a so-called joint criminal enterprise or conspiracy. Determining whether

²⁶⁹ Libman 2013, What does the treaty forbid?, para. 5.

²⁷⁰ For a more detailed analysis of the offences, see, e.g., Bantekas 2010; Cassese 2008; Cryer et al. 2007; Werle 2005.

²⁷¹ *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia; Statute of the International Criminal Tribunal for Rwanda; Rome Statute of the International Criminal Court.*

²⁷² *Oxford English Dictionary Online*, ‘commission, *n.*¹’, meaning 12.a.

²⁷³ *Ibid.*, ‘commit, *v.*’, meaning III.6.a.

a person can be seen as the actual perpetrator depends, at least, on the factual circumstances of the crime and the elements of conduct that constitute a particular offence.²⁷⁴

Second, the wording ‘time of authorization’ is somewhat problematic. It was pointed out by South Africa during the negotiations of the Treaty that ‘time of transfer’ would be more fitting, ‘as the situation can change in the meantime.’²⁷⁵ This criticism is valid, especially if there is a lot of time between the authorization and the transfer. Gaps can be caused in different States for different reasons; in some States, they can be caused by overly careful consideration, whereas in others by arbitrary bureaucracy. Although the choice of wording is possibly a poor one, it leaves the reader no doubt: it can only refer to the moment when the decision to grant or deny authorization to the arms transfer is made.

A more complicated standard is the ‘knowledge’ of the fact that the arms ‘would be used’ in a crime mentioned in the paragraph. This is not specified in the Treaty. Pursuant to common language in the context of Article 6(3), the ordinary meaning of knowledge is ‘[t]he fact or state of knowing that something is the case; the condition of being aware or cognizant of a fact, state of affairs, etc.’²⁷⁶ But this hardly answers the actual issue about the level of knowledge that is required: how much and what is necessary to constitute a state of knowing?

The provision seems to imply that a State can only be either absolutely unknowing or certain about the use of their arms exports. According to assurances made to Russia prior to the adoption of the Treaty, the standard is ‘broader concept than “to be informed of”’, indicating ‘full conviction ... based on all aggregated data.’²⁷⁷ Had another standard been used, such as ‘knowledge that the arms will likely be used’, or ‘believes that the arms would be used’, the bar would have explicitly been set lower. However, it is surely not the case that a State will be expected to have *perfect* knowledge. Since the realm of politics is complicated and beyond the control of a few actors, can arms transfers ever be fully certain?

The context, that is the preamble and other parts of the Treaty, and the object and purpose offer no help in interpreting the standard. Pursuant to the ninth and tenth preambular paragraph, States rec-

²⁷⁴ See Bantekas 2010, pp. 51–66; Cryer et al. 2007, pp. 302–309; Werle 2005, pp. 120–124.

²⁷⁵ Acheson 2013b, Prohibitions, para. 6.

²⁷⁶ *Oxford English Dictionary Online*, ‘knowledge, *n.*’, meaning 5.a.

²⁷⁷ *United Nations General Assembly Official Records of the 67th session, 71st plenary meeting*, p. 10.

ognize the consequences of the illicit and unregulated arms trade as well as bear in mind the adverse effects of armed conflict on civilians. These paragraphs suggest that States admit that, in general, arms can lead to the commission of international crimes. But, it is quite a leap to use such recognitions to interpret the provision at hand in any way.²⁷⁸

In accordance with the general rule of interpretation, any relevant rules of international law that are applicable between States Parties must be consulted. The *Academy Briefing's* reference to the Rome Statute,²⁷⁹ also cited as possible by another author,²⁸⁰ seems fitting because Article 6(3) concerns crimes that are quite similar than those over which the ICC has jurisdiction. Under Article 30(3) of the Rome Statute, knowledge means ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events.’

But if the Rome Statute is to be used in the interpretation of the concept of knowledge, it must legally bind all the States Parties to the ATT at the time of interpretation.²⁸¹ This is not set in stone, as currently the Rome Statute has been ratified in only 122 States²⁸² out of the 193 Member States of the United Nations.²⁸³ The problem of ratifications could be alleviated if the provision setting the standard of knowledge reflected customary international law. But, according to Cassese, the provision on *mens rea*—the mental element, including the concept of knowledge—as set forth in Article 30 of the Statute, does *not* represent customary rules of international law.²⁸⁴ Thus, the chances of applying the Rome Statute look slim, and other sources should be consulted.

Unfortunately, it appears a discouraging task to define the mental element of international crimes. Although since the Nuremberg trials international criminal lawyers have charged, prosecuted and convicted individuals based on some law on *mens rea*, a consolidated law has not formed. The legal praxis of the ICTR and ICTY offers ‘no clear interpretation’, but instead, ‘much confusion’.²⁸⁵

²⁷⁸ It must also be kept in mind that the legitimate interests of States in arms trade are equally recognized in the fourth preambular paragraph.

²⁷⁹ Casey-Maslen, Giacca and Vestner 2013, p. 24, footnote 86.

²⁸⁰ Brandes 2013, p. 412.

²⁸¹ See subsection 2.2.3.

²⁸² *Status of the Rome Statute of the International Criminal Court*.

²⁸³ *What are Member States?* See also *Member States of the United Nations*.

²⁸⁴ Cassese 2008, p. 60.

²⁸⁵ Marchuk 2014, pp. 115–116.

Thus, despite the concept of knowledge which the ATT seems to employ ‘has been lengthily construed in the jurisprudence of international criminal courts and tribunals’,²⁸⁶ there simply is no customary rule to determine its standard in this context.

The overall applicability of international criminal law must be questioned, too. It is not clear that the standard of knowledge used in determining whether a person has committed an international crime should be the same when determining whether a State Party has violated a treaty. After all, the ICC and the ad hoc tribunals have used and still use the standard to determine *criminal* responsibility. A State knowing about the use of its arms export is quite different from a person, for example, being aware about the civilian status of persons. Indeed, there is nothing apart from convenience and close relation to the crimes listed in the prohibition to suggest that international criminal law, and none other, is to be consulted when setting this particular standard.

For these reasons, the concept of knowledge may very well be determined by taking into account other sources. In particular, these may include the 2001 ILC *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (hereinafter ‘the Draft Articles’), which also utilize the term. The Draft Articles have seen explicit and implicit use in the hands of tribunals and even the International Court of Justice (ICJ),²⁸⁷ which makes their applicability a serious possibility despite their controversial nature as non-treaty restatements of the customary international law.²⁸⁸

Article 16(a) of the Draft Articles attributes international responsibility to ‘[a] State which aids or assists another State in the commission of an internationally wrongful act’, if ‘that State does so with knowledge of the circumstances of the ... act’. The thematic connection of this provision to the one in the ATT is remarkable, for supporting wrongs is precisely what the Treaty prohibits. The commentary, however, omits any extensive speculations regarding the level of knowledge that is necessary. It states that ‘[a] state is not responsible ... unless the relevant State organ intended ... to

²⁸⁶ Ibid., p. 123.

²⁸⁷ See Olleson 2007.

²⁸⁸ See Caron 2002.

facilitate the occurrence of the wrongful conduct.’²⁸⁹ In this view, a State would have to share the intent of the wrongdoer at least partially, which sets the bar rather high.

Furthermore, ‘[a] State providing material or financial assistance or aid to another State does not normally assume the risk that its assistance or aid may be used to carry out an internationally wrongful act.’²⁹⁰ This phrase seems akin to the Rome Statute, in which ‘the ordinary course of events’ is the determinant factor. Applied to the ATT, it would mean that transferred arms are not normally assumed to be used in international crimes. Perhaps this is a realistic assumption, but since it stems from the commentaries only, it is not safe to assume that such a standard would be used in the context of the ATT.

Of course, case law can play a role in interpreting the term ‘knowledge’. As early as in 1949 the ICJ had to, as a vital part of the famous *Corfu Channel case*, examine whether the State of Albania had knowledge of minelaying in her territorial waters. In that case, the existence of knowledge was based, overall, on Albania’s close watch over the waters of the channel and the implausibility of not seeing the minelaying operation.²⁹¹ In the somewhat more related *Bosnian Genocide case*,²⁹² responsibility was set to incur if ‘the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.’²⁹³ Awareness (knowledge) existed, as authorities ‘could hardly have been unaware ... once the VRS [Bosnian Serb Army] forces had decided to occupy the Srebrenica enclave.’²⁹⁴ The ICJ concluded: ‘for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State ... definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it manifestly refrained from using them.’²⁹⁵

Drawing upon these illustrative examples of case law, two notions stand out. First, the existence of knowledge depends on how a State monitors the use of arms transfers; how aware is it? Second, it

²⁸⁹ The Draft Articles, p. 66, para. (5).

²⁹⁰ *Ibid.*, para. (4).

²⁹¹ See Judgement, pp. 18–22.

²⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

²⁹³ Judgement, para. 432, in fine.

²⁹⁴ Judgement, para. 436.

²⁹⁵ Judgement, para. 438, in fine.

also seems to depend on how a State could or should monitor the use of arms transfers; how aware could or should it be? The former is an obvious starting point, whilst the latter suggests that wilful ignorance or lack of action to discover the facts or prevent an arms transfer may constitute responsibility. Defining the precise standard of ‘knowledge’ may be impossible because, as the case law shows, it is closely related to the factual circumstances of each situation. In one case, certain facts can prove that a State knew; in another, other facts may prove that a State did not. Thus, apart from the described general observations, one is forced to leave aside the concept of knowledge for now.

4.4.2. Genocide

The first crime which the prohibition under Article 6(3) refers to is genocide.²⁹⁶ In common language, genocide refers to ‘[t]he deliberate and systematic extermination of an ethnic or national group.’²⁹⁷ A more specific characterization, however, can be attained by resorting to relevant and applicable rules of international law. The definition to consider here is the one found in Article II of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention), wording of which has been repeated *verbatim* in the Statutes of both the ad hoc tribunals and the ICC.²⁹⁸ This being the case, it seems well established that the given definition represents customary international law.²⁹⁹ It reads as follows:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious 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 its 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.

²⁹⁶ Of genocides, see generally Jones 2006.

²⁹⁷ *Oxford English Dictionary Online*, ‘genocide, *n.*’

²⁹⁸ See the ICTY Statute, Art. 4(2); ICTR Statute, Art. 2(2); Rome Statute, Art. 6.

²⁹⁹ See Schabas 2009, pp. 4–6; Cassese 2008, p. 57; Werle 2005, p. 191.

This definition of genocide is exhaustive and rather specific. Exactly four groups can be the target of genocide, and there are five different acts that can constitute the crime.³⁰⁰ The perpetrator must also have an intention to destroy the group in whole or in part; thus, genocide is a crime of specific intent, *dolus specialis*.³⁰¹

The definition does not require intent to destroy each and every member of the group, just a part of it. Even if many members of the target group are left unharmed, a genocidal intent can exist.³⁰² The actual proving of such intent can be a burdensome process, requiring the examination of any genocidal plans, the commission of the crime and the desiderata of the accused; a combination that demonstrates the context of cruelties against a certain group. While the general international criminal law does not require the existence of explicit genocidal plans, such as documents, these can be used to support claims about the intent of the alleged perpetrator.³⁰³

4.4.3. Crimes against Humanity

Second, the prohibition mentions crimes against humanity.³⁰⁴ Taking into account the specific nature of the concept,³⁰⁵ common language should be set aside and, instead, relevant and applicable rules of international law consulted. Unfortunately, while there is a generally accepted, customary definition of genocide, crimes against humanity have been defined in several instruments somewhat inconsistently.³⁰⁶ To get a coherent view about the scope and definition of the crime, one must search for common elements in relevant provisions: Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the Rome Statute.

The basic feature of all definitions of crimes against humanity is that the crime consists of at least any the following acts against a civilian population:

³⁰⁰ Of these groups and acts in detail, see Schabas 2009, pp. 117–171 and 178–206. See also Bantekas 2010, pp. 212–217; Cryer et al. 2007, pp. 169–177; Werle 2005, pp. 193–203.

³⁰¹ Schabas 2009, p. 260. See also Bantekas 2010, p. 207; Cryer et al. 2007, p.179; Werle 2005, p. 207.

³⁰² See Schabas 2009, pp. 273–286. See also Bantekas 2010, pp. 207–208; Cryer et al. 2007, pp. 180–181; Werle 2005, pp. 209–210.

³⁰³ See Schabas 2009, pp. 264–267. See also Bantekas 2010, pp. 208–211; Cryer et al. 2007, pp. 183–185; Werle 2005, p. 622.

³⁰⁴ Of crimes against humanity, see generally Robertson 2013.

³⁰⁵ See, e.g., Bantekas 2010, pp. 185–188.

³⁰⁶ Cryer et al. 2007, p. 187.

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

Thus, there are numerous acts that can constitute crimes against humanity.³⁰⁷ The common feature is that these acts must be committed against ‘any civilian population’. The current opinion is that this means *all* civilian populations. Thus, the law does not just protect enemy nationals but citizens from their own State, too.³⁰⁸ According to customary international law, the civilian population comprises all civilians, and civilians are persons who are not members of the armed forces;³⁰⁹ a definition that mainly stems from the 1977 First Geneva Protocol (hereinafter also ‘Protocol I’).³¹⁰ In the practice of the ICTY and ICTR, though, civilians have been defined more broadly as people who are not taking any part in the hostilities, which includes members of armed forces who have laid down their arms or have been placed *hors de combat* by, for example, wounds or detention.³¹¹

It must be noted that a person loses his/her civilian status by taking a direct part in hostilities. If there is doubt whether a person is a civilian, a careful assessment has to be made, rather than assuming that the person either is or is not a civilian. Direct participation in hostilities can be hard to ascertain; it depends on a case-by-case analysis.³¹² According to the practice of the ICTY, for exam-

³⁰⁷ The ICC Statute contains some additional acts. Of all acts in detail, see Bassiouni 2011, pp. 359–452; Bantekas 2010, pp. 190–196; Cryer et al. 2007, pp. 200–219; Werle 2005, pp. 231–265.

³⁰⁸ Bassiouni 2011, p. 169; Bantekas 2010, p. 199; Cryer et al. 2007, p. 192; Werle 2005, pp. 221–222.

³⁰⁹ Henckaerts and Doswald-Beck 2005a, pp. 17–19; 2005b, pp. 705–753.

³¹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*. See Art. 50(2) and (1).

³¹¹ *The Prosecutor versus Jean-Paul Akayesu*, Trial Judgement, para. 582; *The Prosecutor v. Tihomir Blaškić*, Trial Judgement, para. 214.

³¹² Henckaerts and Doswald-Beck 2005a, pp. 19–24; 2005b, pp. 107–133.

ple, a person takes directly part by committing ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel or [material] of the enemy armed forces.’³¹³

There has been contention about whether the victims of crimes against humanity must be purely civilian populations. One author has been of the opinion that under customary international law the target of the crime can also be active combatants.³¹⁴ This stance does not appear to be in line with the very definition of the offence or the major rulings of all the international tribunals; a more suitable context for crimes against combatants seems to be the law of war, *jus in bello*.³¹⁵

Besides the aforementioned common elements, the definitions vary. First, Article 5 of the ICTY Statute calls for a nexus to armed conflict; the crimes must be ‘committed in armed conflict’. This requirement, however, has been trumped by the newer Statutes as well as the legal praxis of the ICTY. It seems well established that a connection to an armed conflict is not necessary: crimes against humanity can be committed during both wartime and peace. Discriminatory animus, which the ICTR Statute insists on (‘on national, political, ethnic, racial or religious grounds’), is not a customary requirement either, at least not outside the sphere of the ICTR.³¹⁶ Whereas the ICTY Statute does not suggest that the crimes must be related to other offences, the ICTR and Rome Statutes demand that the crimes are committed ‘as part of a widespread or systematic attack’. In this case, too, the latter standing is the prevailing one: the nexus to a widespread and systematic attack has become a customary part of the definition of crimes against humanity.³¹⁷

The precise meaning of widespread and systematic can be illustrated by, for example, the practice of the ICTR. In that, the former was deemed to mean ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’, whereas the latter was defined as ‘thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.’ The concept of ‘attack’ is not

³¹³ *Prosecutor v. Stanislav Galić*, Trial Judgement and Opinion, para. 48 (citing Pilloud et al. 1987, para. 1944).

³¹⁴ Cassese 2008, pp. 122–123.

³¹⁵ See Bantekas 2010, p. 199; Cryer et al. 2007, p. 193.

³¹⁶ An obvious exception of this is the crime of persecution.

³¹⁷ See Bantekas 2010, pp. 189–190; Cryer et al. 2007, pp. 191–192 and 194; Werle 2005, pp. 218–219 and 229.

the same as that in the law of war but '[may be] defined as [an] unlawful act of the kind ... like murder, extermination, enslavement, etc. An attack may also be non-violent in nature'.³¹⁸

4.4.4. War Crimes

4.4.4.1. Definition and Types Covered

Knowledge of the commission of certain war crimes is the third item that prohibits an arms transfer. Pursuant to common language, a war crime is 'an offence against the rules of war'.³¹⁹ The rules of war have traditionally been split in two: the protection of the victims of armed conflict ('Geneva law'), and the regulation of the means and methods of warfare ('Hague law').³²⁰ For several decades, this distinction has been without much meaning, as the two branches of law have come together under the single system of international humanitarian law.³²¹ Thus, under current customary international law war crimes are offences or, more specifically, *serious violations* against this system. This specification stems from relevant and applicable rules of international law; international instruments, State practice, and the practice of international tribunals.³²²

In general, war crimes do not require widespread or systematic commission; a single act can be regarded as one.³²³ However, unlike crimes against humanity, they have to be linked to an armed conflict.³²⁴ Pursuant to the 'by-now classic definition'³²⁵ in *Prosecutor v. Duško Tadić a/k/a "Dule"*, 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.'³²⁶ The definition requires either a resort to armed force or protracted armed violence; there is no need for an aggressor to meet resistance. According to the definition, an armed conflict can be either international or internal, and it can exist between governmental forces or other organized armed groups.

³¹⁸ *The Prosecutor versus Jean-Paul Akayesu*, Trial Judgement, paras 580–581.

³¹⁹ *Oxford English Dictionary Online*, 'war, n.¹', C4, 'war crime'.

³²⁰ Bantekas 2010, p. 137.

³²¹ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para. 75.

³²² See Henckaerts and Doswald-Beck 2005a, pp. 568–603; 2005b, pp. 3854–3883.

³²³ Schabas 2011, p. 127; Cryer et al. 2007, p. 221; Henckaerts and Doswald-Beck 2005a, p. 573.

³²⁴ Bantekas 2010, pp. 138–139; Cryer et al. 2007, p. 232 and 238; Werle 2005, p. 286.

³²⁵ Bantekas 2010, p. 139. See also Schabas 2011, p. 129; Werle 2005, pp. 286–287.

³²⁶ Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

As noted in the *Academy Briefing*, the prohibition under Article 6(3) of the ATT does not cover all war crimes but three specific types: those that constitute grave breaches of the four 1949 Geneva Conventions (hereinafter, ‘the Geneva Conventions’ or GC I, GC II, GC III and GC IV),³²⁷ attacks directed against civilian objects or civilians protected as such, and other war crimes as defined by international agreements to which a State is a party.³²⁸ While the prohibition is limited in such a way, overall virtually all war crimes fall within its ambit.

When relying on customary international law and different instruments regarding war crimes, one particular notion can create confusion. Some war crimes are only punishable when committed during an international conflict. Some, however, can constitute international responsibility in internal conflicts, too. Different sets of rules regulate these two situations. Furthermore, there are many instruments from which the descriptions of war crimes draw upon. Because of this, care must be used when determining the existence of the prohibition under Article 6(3) in a particular situation.

4.4.4.2. Grave Breaches of the 1949 Geneva Conventions

Several different acts during an armed conflict can be regarded as a grave breach.³²⁹ In the ATT, a prohibition arises only if an act is a grave breach in the sense of the Geneva Conventions; the definitions of grave breaches must rely on these instruments. The distinct feature of grave breaches under the Geneva Conventions, as seen below, is that they have to target certain protected persons or property; also, they can only be committed during international conflicts.³³⁰

The first two Geneva Conventions, as titled, aim to protect the wounded, sick and shipwrecked members of armed forces. A grave breach means committing certain acts against these protected persons and the property which can be used to protect them:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or in-

³²⁷ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (First Geneva Convention; GC I); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Second Geneva Convention; GC II); *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention; GC III); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention; GC IV).

³²⁸ Casey-Maslen, Giacca and Vestner 2013, p. 25.

³²⁹ Of these acts in detail, see, e.g., Bantekas 2010, pp. 143–149, 150–153 and 154–155.

³³⁰ See Common Article 2 to the Geneva Conventions.

human treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.³³¹

The Third Geneva Convention, on the other hand, concerns the treatment of prisoners of war (POWs). A grave breach is defined quite similarly to the first two Conventions, with the exception that the prohibition does not concern property:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.³³²

Finally, the Fourth Geneva Convention relates to the protection of civilians during wartime. This provision is somewhat broader than the aforementioned:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.³³³

4.4.4.3. Attacks Directed against Civilian Objects or Civilians

The second war crime Article 6(3) mentions is sometimes known as the targeting crime. This crime violates the protection of civilians and civilian objects, which rests on three rules: civilian personnel and objects must be separated from military ones, they must never be the target of an attack, and attacks may only be directed against combatants and military objects.³³⁴ In common language, an attack means ‘[t]he act of falling upon with force or arms, of commencing battle; an offensive oper-

³³¹ GC I, Art. 50; GC II, Art. 51.

³³² Art. 130.

³³³ Art. 147.

³³⁴ Henckaerts and Doswald-Beck 2005a, pp. 3–8 and 25–29; 2005b, pp. 3–66 and 134–180.

ation’, whereas civilian refers to something that is ‘not in or of the armed forces; non-military.’ To direct is either to cause something to move or point to or towards a place, or to regulate the course of something, or to guide with advice, or to give authoritative instructions to do something.³³⁵ These concepts can be specified by resorting to relevant and applicable rules of international law. The customary law regarding targeting crimes appears to be largely based on the First Geneva Protocol, which concerns international conflicts,³³⁶ and the Second Geneva Protocol (hereinafter also ‘Protocol II’),³³⁷ which concerns non-international conflicts,³³⁸ as supported by State practice.³³⁹

In the terminology of Protocol I, an attack consists of acts of violence against an adversary, whether in offence or defence, whatever territory they are conducted in. This equally includes land, air and sea warfare, as long as it may affect civilians.³⁴⁰ Civilian objects are ones that are not military objectives, which ‘by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’³⁴¹ As stated above, a civilian population consists of civilians; persons who are not members of armed forces. Just as with crimes against humanity, civilian status and the protection it entails are lost by taking a direct part in hostilities.³⁴²

If such a broad definition of an attack is followed, it is obvious that intentionally committing acts of violence, such as killing and purposeful harming, fall within its scope. But reprisals against civilian population and objects could constitute an attack, too. Belligerent reprisals, which are enforcement measures ‘in reaction to unlawful acts of an adversary’,³⁴³ are subject to stringent conditions and outright prohibited against protected persons and objects in both international and non-international conflicts.³⁴⁴ Starving civilians or attacking, destroying, removing or rendering useless objects that

³³⁵ *Oxford English Dictionary Online*, ‘attack, *n.*’, meaning 1.a; ‘civilian, *n.* and *adj.*’, meaning B.2; ‘direct, *v.*’, meanings 4.a, 5.a and 6.a.

³³⁶ See Art. 1(3).

³³⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*.

³³⁸ See Art. 1(1).

³³⁹ See Henckaerts and Doswald-Beck 2005a, pp. 3–76; 2005b, pp. 3–450.

³⁴⁰ Art. 49(1)–(3).

³⁴¹ Art. 52(2).

³⁴² See subsection 4.4.3.

³⁴³ Henckaerts and Doswald-Beck 2005a, p. 513.

³⁴⁴ *Ibid.*, pp. 513–529; 2005b, pp. 3302–3506.

are ‘indispensable to the survival of the civilian population’ are also prohibited under customary international law,³⁴⁵ and may very well be considered an attack.

Whether indiscriminate attacks, also forbidden under customary international law, fall within the definition is not so clear. These include attacks that are not directed at a specific military objective or which employ a method or means of combat which cannot be directed at military objectives or whose effects cannot be limited as required by international humanitarian law.³⁴⁶ Indiscrimination is closely connected to lack of proportionality in an attack, which means ‘[l]aunching an attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct military advantage anticipated’. Lack of proportionality is equally prohibited under customary international law.³⁴⁷

The question is whether such indiscrimination or such a lack of proportion—taking risks—would constitute an attack *directed against* civilians and, if known by any concerned State, prohibit an arms transfer. *Prima facie*, such interpretation would seem to go beyond the ordinary meaning of the phrase. However, in the practice of the ICTY, it has been deemed that ‘indiscriminate attacks ... may qualify as direct attacks against civilians.’³⁴⁸ Furthermore, according to customary law, the definition of an indiscriminate attack is merely ‘an implementation of the principle of distinction [between civilian and military personnel and objectives]’.³⁴⁹ This suggests that indiscrimination or needless risk taking could fall within the ambit of the provision.

4.4.4.4. Other War Crimes

Finally, the ATT prohibits a State from authorizing the transfers of arms that would be used in ‘other war crimes as defined by international agreements to which it is a Party.’ This provision covers all possible war crimes besides grave breaches and targeting crimes, depending entirely on the commitments of the authorizing State. The only two conditions are that they must be war crimes, serious violations of international humanitarian law,³⁵⁰ and they must be defined in the international

³⁴⁵ Henckaerts and Doswald-Beck 2005a, pp. 186–193; 2005b, pp. 1123–1174.

³⁴⁶ Henckaerts and Doswald-Beck 2005a, pp. 37–43; 2005b, pp. 247–276.

³⁴⁷ Henckaerts and Doswald-Beck 2005a, pp. 46–50; 2005b, pp. 297–335.

³⁴⁸ *Prosecutor v. Stanislav Galić*, Trial Judgement and Opinion, para. 57.

³⁴⁹ Henckaerts and Doswald-Beck 2005a, p. 43.

³⁵⁰ Of the definition, see subsection 4.4.4.1.

agreements to which the State in question is a Party. Unlike with targeting times, the wording clearly dictates that customary law cannot serve as a source for war crimes in the context of the Treaty. The Statutes of the ad hoc tribunals, which are based on UNSC resolutions, cannot be relied upon either. As the commitments vary State by State, there are several key instruments to consider. The presentation below should not be taken as exhaustive, since nothing in the provision suggests that forthcoming commitments should not be taken into account.

The States Parties to the Rome Statute (in this subsection ‘the Statute’) have to consider a wide range of war crimes. Most of the war crimes listed in the Statute concern international conflicts only. They are enumerated in Article 8(2)(b) of the Statute as ‘[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law’. Some of the war crimes, according to Article 8(2)(c)–(f), are equally applicable to non-international conflicts.

Many of the listed crimes present, in a more elaborate way, the forbidden nature of targeting civilians. For example, the Statute mentions attacks against humanitarian assistance or peacekeeping missions; attacks in the knowledge that they will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment; attacking or bombarding towns or buildings which are undefended and not military objectives; attacks against buildings dedicated to religion, education, art, science or historic monuments, hospitals; and pillaging a town or place.³⁵¹

Other war crimes under the Statute concern the treatment of the enemy: killing or wounding a combatant who has surrendered at discretion; killing or wounding treacherously; declaring that no quarter will be given; destroying or seizing the enemy’s property unless demanded by the necessities of war; declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; compelling the nationals of the hostile party to take part in war directed against their own country; subjecting persons to physical mutilation or to medical or scientific experiments which are not justified by treatment and which cause death or seriously endanger

³⁵¹ Art. 8(2)(b), subparas (iii)–(v), (ix) and (xvi), respectively.

health; committing outrages upon personal dignity, rape, enforced prostitution or other sexual violence; and using starvation of civilians as a method of warfare.³⁵²

War crimes also include more tactical and technical infractions such as making improper use of a flag or truce, resulting in death or serious personal injury; utilizing the presence of a civilian or other protected person to render certain areas or forces immune; employing forbidden weapons, for example poison or poisoned weapons, asphyxiating, poisonous or other gases, or expanding or flattening bullets; employing other weapons, projectiles and methods which are of a nature to cause superfluous injury or unnecessary suffering, or which are indiscriminate, provided that these are annexed to the Statute. Recruiting child soldiers falls within the ambit of the Statute, too.³⁵³

Naturally, the Rome Statute only applies to its States Parties. For other States, and for other possible war crimes that are not included in the Statute, other instruments have to be considered. Outside the Statute, the first item to take into account is the general Hague law; the acceptable means and methods of warfare in international conflicts. This law stems mainly from the 1899 Hague Convention II³⁵⁴ and the 1907 Hague Convention IV³⁵⁵ under the Annexes of which, e.g., killing a surrendered enemy, the use of certain weapons, and the attacking on undefended dwellings is forbidden.³⁵⁶ But, Hague law also consists of instruments which prohibit the use of expanding bullets, gases, and chemical and biological weapons.³⁵⁷ The ban on the latter has been affirmed in two disarmament treaties, the CWC and the BWC.³⁵⁸

The second item to consider is ‘Geneva law’, under which the concept of grave breaches is supplemented by other prohibitions. Already in the universally ratified four Geneva Conventions, it is hinted that other infractions can also be deemed as war crimes. These other ‘non-grave breaches’ are elaborated in the Common Article 3 to the Conventions, which deals with both international and

³⁵² Art. 8(2)(b), subparas (vi), (xi)–(xv), (x), (xxi), (xxii) and (xxv), respectively.

³⁵³ Art. 8(2)(b), subparas (vii), (xxiii), (xvii)–(xx) and (xxvi), respectively.

³⁵⁴ *Convention with Respect to the Laws and Customs of War on Land*.

³⁵⁵ *Convention Respecting the Laws and Customs of War on Land*.

³⁵⁶ *Regulations Respecting the Laws and Customs of War on Land*, Arts 23 and 25.

³⁵⁷ *Declaration (IV, 3) Concerning Expanding Bullets; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare*.

³⁵⁸ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Art. 1; *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Art. 1.

internal conflicts. The Article prohibits acts such as violence, cruel treatment, taking of hostages, and degrading treatment towards persons who are not taking an active part in the hostilities. It was held unfortunate by some that a specific reference to the Article was omitted,³⁵⁹ unlike under Article 3(3) of the *Draft of the Arms Trade Treaty*. Such a remark would have made things more transparent, but as the Article currently stands, there is nothing to prevent their inclusion as long as they are considered war crimes.³⁶⁰

Both the described laws are extensively reaffirmed in the widely ratified³⁶¹ First Geneva Protocol. The Protocol, for example, forbids the employment of weapons to cause superfluous injury or unnecessary suffering; the deliberate misuse of flags or military emblems of the adverse party; the denial of quarter; and attacking enemies that have been rendered unable to combat.³⁶² It also protects the wounded, sick and shipwrecked, POWs, and civilians.³⁶³ In addition to reaffirming pre-existing obligations, the Protocol for instance outlaws indiscriminate attacks and attacks on dangerous installations, and provides special protection for women, children, medical personnel and journalists.³⁶⁴ The prohibitions are supplemented by Article 85, which regards certain violations of the Protocol as grave breaches.

As has been pointed out above, Protocol I only concerns international conflicts. Besides the aforementioned Common Article 3 to the Geneva Conventions, Protocol II has to be consulted when defining war crimes in non-international conflicts.³⁶⁵ As new prohibitions compared to the Common Article, Protocol II forbids collective punishments, acts of terrorism, certain sexual crimes, pillage, and also threats to commit any of such acts. Furthermore, the protection of the main victims of war, such as children, the wounded, the sick, and the civilian population, as well as medical per-

³⁵⁹ See Doermann and Arimatsu 2013, p. 5.

³⁶⁰ Indeed, in a statement after the adoption of the Treaty, Switzerland was ‘pleased to see’ that they are covered. See Seger 2013, p. 2, para. 3.

³⁶¹ See ‘State parties’ in *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*.

³⁶² Arts 35 and 38–41.

³⁶³ E.g., Arts 10–12, 15, 45 and 51.

³⁶⁴ Arts 51(4), 56(1), 77(2) and 76–79.

³⁶⁵ See Art. 1(1); subsection 4.4.4.3.

sonnel and units, has been enhanced. Similar to Protocol I, dangerous installations and cultural objects are deemed forbidden targets.³⁶⁶

Drawing upon this brief analysis, it is clear that the Rome Statute is the most all-encompassing instrument in the sphere of war crimes. However, it does not contain many war crimes that could not be more or less extracted from other instruments. This is because the Statute was drafted utilizing the latter, pre-existing sources, adhering to customary law. Instead of legislating new offences, the Statute mainly concretized definitions that already existed.³⁶⁷ Thus, at least theoretically speaking, the coverage is wide regardless of the commitments of the States Parties. Nevertheless, in all evaluations to be made based on the risk of ‘other war crimes’, the starting point will be the international agreements of the States Parties involved in a transfer.

5. Export Assessment

5.1. General Observations

It has been noted that the prohibitions under Article 6 do not concern all possible injustices to which arms transfers may lead to. It is possible that, for at least this reason, the control system of the Treaty was extended to take into account some other risks as well.³⁶⁸ Pursuant to Article 7, exporting States are required to make an assessment as follows:

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to;
- (i) commit or facilitate a serious violation of international humanitarian law;

³⁶⁶ See Arts 2–17.

³⁶⁷ See Schabas 2011, p. 125; Cryer et al. 2007, pp. 241–242.

³⁶⁸ See Libman 2013, What does the treaty forbid?, para. 6.

- (ii) commit or facilitate a serious violation of international human rights law;
- (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; or
- (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

There are some general observations to be made prior to examining the criteria of assessing the export of arms. First, unlike with Article 6 which covers all different transfers, the act under question must be export; sending arms out from one country to another.³⁶⁹ Second, *all* export activity must ultimately be assessed: first, prohibitions in accordance with Article 6 have to be considered and, if no prohibition exists, an assessment according to Article 7 has to be conducted. Third, the whole scope of the Treaty is taken into account, as the export of arms as well as ammunition and parts has to be assessed equally. Fourth, similar to Article 6(3), the wording calls for a causal link between the arms that are about to be transferred and a particular result.

The assessment must be carried out before the authorization, under the jurisdiction of the exporting State and pursuant to, in accordance with³⁷⁰ its national control system. The choice regarding the time of assessment is the same as under Article 6 and, thus, equally unambiguous but problematic; situations can change before the actual export.³⁷¹ Regarding the jurisdiction of States, it is rather obvious that exporting States must only assess export activity within their own jurisdiction, their ‘power of declaring and administering law or justice’;³⁷² in most cases, States only have supremacy over their internal affairs and must not intervene in the domestic matters of other countries.³⁷³ Finally, by the reference to national control systems, the assessment is put in the context of Article 5, which obliges each State to establish and maintain such a system as the main part of the implementation of the Treaty.

Just like with ammunition and parts, it is difficult to estimate what sort of effects each national control system will have on the export assessment, since there are no specifications. Almost any control system that a State wants to use will comply with the standards and can have a bearing on the mat-

³⁶⁹ See *Oxford English Dictionary Online*, ‘export, v.’, meaning 2.a. See also subsection 3.2.1.

³⁷⁰ *Ibid.*, ‘pursuant, n., adj., and adv.’, meaning C.

³⁷¹ See subsection 4.4.1.

³⁷² *Oxford English Dictionary Online*, ‘jurisdiction, n.’, meaning 1.

³⁷³ Shaw 2008, pp. 647–649.

ter at hand.³⁷⁴ Naturally, if the Treaty is to be interpreted in good faith, a national control system cannot contradict its provisions through substantive regulation: for example, human rights violations must always be taken account in the export assessment. It seems more in line with the Treaty that national systems should focus on the procedural side of the export assessment.

Objectivity and non-discrimination are the criteria to follow when the assessment is made. The likely reasoning behind these standards is that politics should not lead to arbitrary decisions regarding arms exports.³⁷⁵ Here, although we are dealing with States instead of persons, objective likely means the same as impartial; that judgement is ‘not influenced by personal feelings or opinions in considering and representing facts’. This is supplemented by non-discrimination, which means that prejudicial distinctions in the assessment should not be made on arbitrary grounds.³⁷⁶

These obligations have several applications. States must follow them when deciding on where the arms may be exported to, but also when assessing the export of different arms manufacturing companies. Both other States and non-state actors must be treated impartially. This sets the bar somewhat high, if one takes into account the politically infused nature of the industry: in a world where major arms exporting States like to ‘play favourites’ and affect global politics by trading weapons and ammunition, such obligations seem almost hypocritical.³⁷⁷ Regarding developing nations, too, the bar may be set rather high: if States employ arbitrary export policies or have problems of corruption, the hope for objectivity towards different enterprises will inevitably be lost.

Thus, objectivity and non-discrimination are an ambitious goal³⁷⁸ which could greatly increase the potential of the Treaty. Although States will always consider political factors,³⁷⁹ ridding the international arms trade of arbitrary decisions would play an important part in strengthening the rule of law. Article 7(1) clearly obliges States Parties: they ‘shall’ assess objectively and in a non-discriminatory manner. If a State fails or refuses to comply and another State wishes to challenge the decision(s) of that State, the non-compliance to the provision may result in action.

³⁷⁴ See subsection 3.3.1.

³⁷⁵ See Casey-Maslen, Giacca and Vestner 2013, p. 15 (regarding the eighth preambular principle).

³⁷⁶ *Oxford English Dictionary Online*, ‘objective, *adj.* and *n.*’, meaning A.8.a; ‘non-discriminatory, *adj.*’

³⁷⁷ See section 1.1.

³⁷⁸ See Casey-Maslen, Giacca and Vestner 2013, p. 15 (regarding the eighth preambular principle).

³⁷⁹ *Ibid.*

Finally, States must take heed of all ‘relevant factors’. As mentioned previously, something is relevant if it has a bearing on or is connected with the matter in hand; a factor is generally ‘a circumstance, fact, or influence which tends to produce a result.’³⁸⁰ Information—knowledge, intelligence or news³⁸¹—provided by the importing State in accordance with Article 8 (1)³⁸² is given as an example of a relevant factor, but ultimately, a relevant factor is simply any circumstance or fact which can affect the export assessment. Relevancy is a rather loose criterion, because all sorts of information and factual circumstances can have a bearing on the acceptability of an arms export.³⁸³ According to the *Academy Briefing*, relevant factors might include ‘the type and quantity of weapons to be exported; their normal and reasonably foreseeable uses; the general situation in the country of final destination and its surrounding region; the intended end-user; actors involved in the export; and the intended route of the export.’³⁸⁴

In comparison with the Firearms Protocol, the export assessment under the ATT introduces novel elements. Under Article 10(2) of the former, the obligations of exporting States are rather minimal; they only have to verify that the importing States have authorized the import and that the transit States have no objections. The UN Programme of Action contains regulation more similar to the Treaty, requiring States to assess export applications ‘according to strict national regulations and procedures’ which must be ‘consistent with the existing responsibilities of States under relevant international law’.³⁸⁵

But not even this comes close to the export assessment set forth in the Treaty, since there is no direct obligation to consider the concrete effects of the exported weapons. The ATT also calls for objectivity and taking into account all relevant factors, neither of which is required under the Firearms Protocol or the PoA. Another notable factor setting the ATT apart from its predecessors is its focus on exporting States; whereas the Protocol and the PoA often put all States under the same obligations, the ATT clearly sets the most stringent and elaborate rules on exporting States. It is

³⁸⁰ *Oxford English Dictionary Online*, ‘relevant, *adj.*’, meaning 2.a; ‘factor, *n.*’, meaning II.7.a.

³⁸¹ *Ibid.*, ‘information, *n.*’, meaning I.2.a.

³⁸² See subsection 6.1.1.

³⁸³ See section 4.3. and subsection 2.2.3.

³⁸⁴ Casey-Maslen, Giacca and Vestner 2013, p. 26.

³⁸⁵ Section II, para. 11.

therefore no wonder that the assessment procedure has been called rigorous.³⁸⁶ The provisions concerning other States, as will be seen below, are much more lenient and less detailed.

5.2. Contributing to or Undermining Peace and Security

Part of the purpose of the ATT is to contribute to international and regional peace and security. Thus, under Article 7(1)(a) States are required to evaluate the potential of the arms export to contribute to or undermine peace and security. According to common language, to contribute is to do a part in bringing about; to undermine is to weaken, destroy or ruin.³⁸⁷ What the Treaty means exactly by ‘peace and security’ is less clear, since they are controversial concepts that have vast significance outside the sphere of arms trade. There is no consensus on their meaning,³⁸⁸ and although peace may be measured in one way or another,³⁸⁹ such studies are not viable for the purposes of interpretation of treaties under the rules of the VCLT. Thus, pursuant to the general rule, the ordinary meaning in the context and in the light of the object and purpose must be sought.

In common language, peace can mean many things. In the light of the provision, it may mean freedom from civil unrest or disorder or quarrels between individuals, or the absence of war or hostilities. Security on the other hand refers, *inter alia*, to freedom from care, anxiety or apprehension, the state or condition of being protected from danger, or the safety of a State against a threat.³⁹⁰ These simple definitions are a starting point, but they do not necessarily alleviate the vulnerability of the concepts to subjective *ad hoc* interpretations that justify questionable ends. For example, a State could authorize arms transfers to an oppressing regime that keeps the importing country peaceful and secure at the expense of the human rights of its inhabitants. To gain a comprehensive understanding about peace and security, one should look at the practical use and meaning of the concepts in the context of the Treaty and in light of relevant and applicable rules of international law.

³⁸⁶ Silva 2012, para. 13.

³⁸⁷ *Oxford English Dictionary Online*, ‘contribute, v.’, meaning 5.b; ‘undermine, v.’, meaning 7.a.

³⁸⁸ Barash and Webel 2009, pp. 4–11 (peace); Robinson 2008, pp. 1–9 (security).

³⁸⁹ See, e.g., *Global Peace Index 2014*.

³⁹⁰ *Oxford English Dictionary Online*, ‘peace, n.’, meanings I.1.a, I.2 and I.6.a; ‘security, n.’, meanings I.1.a, I.2.a and I.2.b.

As stated in the sixth preambular paragraph of the ATT, peace and security are the first pillar of the United Nations system and one of the foundations for collective security.³⁹¹ Indeed, peace and security obviously draw upon Article 1 of the UN Charter, where maintaining international peace and security is listed as the first purpose of the UN. To this end, the General Assembly may consider general principles of co-operation, whereas the Security Council may take more concrete measures, including the ones set forth in Chapter VII of the Charter.³⁹²

This suggests that the concepts of peace and security should not be interpreted liberally but as a part of the UN system of collective security; their meaning in each particular case should be determined in accordance with the activity of the UN. Resolutions made by the UN General Assembly and Security Council offer examples of undertakings that contribute to peace and security as well as factors that undermine them. If collective security, as defined in the practice of the UN, dictates the meaning of peace and security, States should not be able to interpret the concepts in bad faith.

In the pursuit of collective security by the UN, arms have mostly been seen as undermining the peace and security of unstable countries. For example, in 1992 the UNSC decided that, ‘for the purposes of establishing peace and security in Somalia’, all States must implement a complete arms embargo on the country.³⁹³ In 2013, it deemed that, inter alia, the ‘total breakdown in law and order’ and ‘widespread human rights violations’ in the Central African Republic constituted a threat to peace and security,³⁹⁴ also justifying an arms embargo.³⁹⁵ In addition, the UNSC has welcomed efforts by States ‘in addressing the illicit transfer, destabilizing accumulation and misuse of small arms and light weapons’ and reaffirmed ‘its decision that States shall eliminate the supply of weapons ... to terrorists’.³⁹⁶

On the other hand, there are examples of the opposite. The given arms embargo on Somalia has recently been partly lifted until 25 October 2014 under two successive resolutions by the UNSC. Under the resolutions, it has been deemed that weapons, ammunition, military equipment, advice, assistance and training would actually provide security for the Somali people. Of course, the ex-

³⁹¹ The other two pillars, according to the paragraph, are development and human rights.

³⁹² Arts 11(1) and 24(1).

³⁹³ *United Nations Security Council Resolution 733*, para. 5.

³⁹⁴ *United Nations Security Council Resolution 2127*, p. 1 and 3.

³⁹⁵ *Ibid.*, paras 54–55.

³⁹⁶ *United Nations Security Council Resolution 2117*, paras 1 and 9.

emption only applies to arms that, via legal channels, end up in the right hands; the Security Forces of the Federal Government of Somalia.³⁹⁷

With these recent examples in mind, it may be difficult to ascertain when arms export contributes to and when it undermines peace and security. On one hand, it seems clear that exporting arms to unstable countries exacerbates the situation, building threat to international peace and security. On the other hand, providing weapons to a certain government group may be seen as improving the security of a country. Unless the UN takes action and defines which actions contribute to and which undermine collective security in a particular situation, exporting States have a large amount of discretion. Given the recent history of the global trade in arms,³⁹⁸ States will likely be tempted to decide that their export will have an effect that justifies the authorization.

5.3. The Risk of Committing or Facilitating Certain Unlawful Acts

5.3.1. Common Elements

The second assessment, as set forth in Article 7(1)(b), concerns the potential whether the exported conventional arms could be used for certain unlawful acts. The word ‘could’ which the Article employs generally expresses possibility.³⁹⁹ The *Academy Briefing* finds the formulation a bit strange, because any weapon could be used to violate international law; it might have been better to require States to ‘assess the likelihood of a weapon being so used.’⁴⁰⁰ This comment perhaps springs from a hasty reading, as States will indeed be required to assess the likelihood; the *potential*. Regardless, the relevant standard is not set here. The decision concerning the authorization of export will be based on Article 7(3), which sets the threshold at ‘an overriding risk’.⁴⁰¹

First, States must assess the potential that the arms could be used to commit, to perpetrate the acts listed in Article 7(1). The commission of an act can occur through various means, as seen above.⁴⁰² Second, States must also assess the potential that the arms could be used to facilitate such acts. Fa-

³⁹⁷ *United Nations Security Council Resolution 2142*, para. 2; *2111*, para. 6.

³⁹⁸ See section 1.1.

³⁹⁹ *Oxford English Dictionary Online*, ‘could, v.’; ‘can, v.¹’, meaning II.6.a.

⁴⁰⁰ Casey-Maslen, Giacca and Vestner 2013, p. 26, in fine.

⁴⁰¹ See section 5.5.

⁴⁰² See subsection 4.4.1.

cilitation ordinarily means making something easy or easier, assisting in bringing about a particular result or enabling a person to do something more easily.⁴⁰³ But, as the term has not seen much use in instruments of international criminal law, it is unclear which acts fall into its ambit. How can arms be used to facilitate serious offences and violations of international law? For illustrative purposes, a starting point could be Article 25(3)(c) of the Rome Statute, which attributes criminal responsibility to a person who, '[f]or the purpose of facilitating the commission of ... a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission'.

It is rather obvious that arms can be used to aid and abet violations. According to the practice of the ICTY, aiding and abetting 'consists of practical assistance, encouragement, or moral support which has a substantial effect upon the perpetration of the crime'.⁴⁰⁴ Providing weapons to the perpetrator can be deemed as practical assistance which substantially affects the commission of the crime, at least if the accused knew of the perpetrator's intentions.⁴⁰⁵ This is an example of active participation. However, in some cases, omissions may also constitute aiding and abetting.⁴⁰⁶ In these types of situations, arms could be used to permit and sanctify the violations that take place.⁴⁰⁷

Aiding and abetting is closely related to instigation, or, in the language of the Rome Statute, soliciting and inducing.⁴⁰⁸ Instigating, according to the practice of the ICTR, 'involves prompting another to commit an offence'.⁴⁰⁹ Pursuant to ICTY, this covers 'both acts and omissions'.⁴¹⁰ Quite similar to the example concerning aiding and abetting, providing arms or a permissive environment with arms can instigate violations. For the purposes of the export assessment, drawing the line between aiding and abetting on one hand and instigation on the other is perhaps an unnecessary task.

⁴⁰³ *Oxford English Dictionary Online*, 'facilitate, v.', meanings 1.a and 2.

⁴⁰⁴ *Prosecutor v. Anto Furundžija*, Trial Judgement, para. 249.

⁴⁰⁵ See *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Appeals Chamber Judgement, para. 530.

⁴⁰⁶ Bantekas 2010, p. 68. See also Cryer et al. 2007, pp. 310–311.

⁴⁰⁷ See, e.g., *Prosecutor v. Mitar Vasiljević*, Appeals Chamber Judgement, para. 134.

⁴⁰⁸ Of the similarity between these terms, see Werle 2005, p. 125.

⁴⁰⁹ *The Prosecutor versus Jean-Paul Akayesu*, Trial Judgement, para. 482.

⁴¹⁰ *The Prosecutor v. Tihomir Blaškić*, Trial Judgement, para. 280.

Of course, arms can also be used to order⁴¹¹ subordinates to commit violations. The well-known principle is that the orders of a superior must generally be followed, and, if necessary, obedience is secured with arms. To call this facilitation, though, seems to miss the point: the person giving orders, by acting through another, is perhaps more akin to the actual perpetrator of the offence rather than to a facilitator.⁴¹² Assessing the potential of arms being used in ordering is thus quite the same as assessing the potential of them being used in the commission of crimes.

Generally, planning and preparation can be regarded as facilitating the commission of a crime; they make it easier. Since planning according to the practice of the ICTY occurs when ‘persons design ... criminal conduct constituting ... statutory crimes that are later perpetrated’,⁴¹³ it can include both mental and physical activity. For instance, planning may mean that arms are to be purchased and then moved into position for the commission of the actual crime. It is within reason to assert that States should consider this risk and take it into account when assessing their arms export.

5.3.2. A Serious Violation of International Humanitarian Law

The first potential misuse of arms export is that the weapons are used in a serious violation of international humanitarian law. Pursuant to the general rule of interpretation, in common language, a serious violation is a weighty, grave, important or significant infringement or breach, or one that is of great consequence.⁴¹⁴ In the context of the Treaty, particularly the fifth principle, international humanitarian law is set forth in the Geneva Conventions of 1949, but only ‘inter alia’; other sources may also be consulted to determine the full contents of the term.

While these definitions offer a starting point, the relevant rules of international law point to a more specific meaning. As mentioned above, according to customary international law, serious violations of international humanitarian law simply refer to all war crimes, and vice versa.⁴¹⁵ In an explanatory note provided by the ICRC during the negotiations of the Treaty, this idea was repeated to the extent that the terms are interchangeable.⁴¹⁶ Due to this, the export assessment clearly overlaps the

⁴¹¹ See generally Bantekas 2010, pp. 70–72; Cryer et al. 2007, pp. 312–314; Werle 2005, pp. 124–125.

⁴¹² See Ambos 2008, p. 491.

⁴¹³ *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeals Chamber Judgement, para. 26.

⁴¹⁴ *Oxford English Dictionary Online*, ‘serious, *adj.*², *n.*, and *adv.*’, meaning A.3.a; ‘violation, *n.*’, meaning 1.a.

⁴¹⁵ Henckaerts and Doswald-Beck 2005a, pp. 568–603; 2005b, pp. 3854–3883. See subsection 4.4.4.1.

⁴¹⁶ *What are “serious violations of international humanitarian law”?*, para. 1.

third prohibition,⁴¹⁷ although with one significant difference. Under Article 6(3), States must only take into account war crimes as set forth in the agreements to which they are Parties; during the export assessment, they must also consider war crimes under customary international law.⁴¹⁸

The ICRC concluded that these include the grave breaches under the 1949 Geneva Conventions, additional grave breaches as set forth in Protocol I to the Conventions, war crimes as defined in Article 8 of the Rome Statute, and other war crimes in customary international humanitarian law.⁴¹⁹ The inclusion of the 1949 grave breaches gains support from the ordinary meaning of the terms in the context of the fifth principle, as well as customary international law.⁴²⁰ Pursuant to customary rules, it is also likely that grave breaches under Protocol I along with other war crimes in international conflicts, such as those enumerated in the Rome Statute, can be viewed as such violations.⁴²¹

According to the note by the ICRC, serious violations can equally occur in non-international armed conflicts.⁴²² It is noteworthy that the ICRC made no explicit reference to non-grave breaches, as set forth in the Common Article 3 to the Geneva Conventions, or to Protocol II, which both apply to non-international conflicts. Regardless, under customary international law, these can amount to serious violations of international humanitarian law.⁴²³ The related crimes in both types of conflict are discussed above.⁴²⁴

5.3.3. A Serious Violation of International Human Rights Law

Unlike a serious violation of international humanitarian law, a serious violation of international human rights law is not a direct reference to war crimes; it requires infringing or breaching human rights.⁴²⁵ It is rather easy to determine what human rights law consists of in the context of the Treaty: pursuant to the fifth preambular principle, it is set forth, *inter alia*, in the UN Charter and the

⁴¹⁷ Casey-Maslen, Giacca and Vestner 2013, p. 26, *in fine*.

⁴¹⁸ See Brandes 2013, p. 417; Casey-Maslen, Giacca and Vestner 2013, p. 27.

⁴¹⁹ Para. 5.

⁴²⁰ See Henckaerts and Doswald-Beck 2005a, p. 574.

⁴²¹ See *ibid.*, pp. 575–590.

⁴²² Para. 1.

⁴²³ See Henckaerts and Doswald-Beck 2005a, pp. 590–603.

⁴²⁴ See subsection 4.4.4.4.

⁴²⁵ See *Oxford English Dictionary Online*, ‘violation, *n.*’, meaning 1.a.

Universal Declaration of Human Rights. According to a related article, of all human rights primarily the following can be concerned by the international trade in arms:

- the right to life (covering, for example, assassinations or other forms of murder, enforced disappearance, as well as genocide);
- the right to freedom from torture and other forms of cruel, inhuman, or degrading treatment;
- the rights to liberty and security of person;
- the right to freedom from slavery;
- the right to freedom of thought, conscience, and religion;
- the right to recognition as a person before the law;
- the right to protest (which brings together a number of different rights under a single ‘umbrella’ right such as the rights to freedom of assembly and of expression); and, potentially,
- the rights to health, education, food, and housing.⁴²⁶

It is more problematic to assess what constitutes a serious violation of the mentioned rights. According to the *Academy Briefing*, there is no consensus on what the phrase means,⁴²⁷ and at least one critic has asserted that the whole distinction between serious and non-serious violations is unreasonable.⁴²⁸ These uncertainties mean that one should consult common language which, as seen above, defines serious as weighty, grave, important, significant or of great consequence.⁴²⁹ But, as these elaborations of seriousness are rather vague, and since there are no relevant rules of international law to answer the question or even to define when a violation has occurred, nothing decisive can be said about the standard. Whether violations of human rights are serious or not requires analysing situations case by case.⁴³⁰

A major question is whether the seriousness of a violation refers ‘to the nature of the *right* being violated ... or to the nature of the *violation*’. For example, torturing a single person could be regarded as serious, but widespread commission of less heinous acts could also be seen as serious. According to the author posing the question, the qualifier can refer to both.⁴³¹ This view gains support from another author who has claimed that in the UN application of international human rights

⁴²⁶ Bellal 2014, p. 469. See *Universal Declaration of Human Rights*, Arts 3–6, 18–20, 25 and 26.

⁴²⁷ Casey-Maslen, Giacca and Vestner 2013, p. 27.

⁴²⁸ See Pace 2013, para. 8, in fine.

⁴²⁹ *Oxford English Dictionary Online*, ‘serious, *adj.*², *n.*, and *adv.*’, meaning A.3.a.

⁴³⁰ Brandes 2013, p. 419.

⁴³¹ Bellal 2014, p. 470.

law, seriousness is ‘generally assessed by the nature of the right violated and the scale or pervasiveness of the violation.’⁴³² From this perspective, for example murder, rape, forced displacement, attacks against civilian population,⁴³³ and other violations of physical security, freedoms of expression, association and religion, in addition to economic, social and cultural discrimination⁴³⁴ are serious violations. The widespread use of excessive force by law enforcement officials, the use of torture to extract confessions, the ill-treatment of detainees in police custody and extrajudicial executions have also been deemed gross violations.⁴³⁵

As the *Academy Briefing* notes, ‘[i]t seems clear that acts that violate human rights that are *jus cogens* (peremptory norms of international law) constitute serious violations’. There is no consensus on which violations belong to this category, but it is safe to assume that at least torture, slavery, enforced disappearance and arbitrary deprivation of life do.⁴³⁶ According to one author, since ‘life may lawfully be taken under certain factual circumstances ... only specific forms of interference with human life fall within the scope of *jus cogens*’.⁴³⁷ At the same time, ‘rights that are not *jus cogens* ... might need to be violated grossly or systematically.’ These may include the right to assemble peacefully, the rights to health and education and the rights to liberty and security.⁴³⁸

The issue seems to be linked to the concepts of genocide and crimes against humanity, which evolved to ‘protect persons from gross human rights abuses’.⁴³⁹ Indeed, one author has claimed that genocide, crimes against humanity and war crimes, along with extrajudicial execution, disappearances, torture, sexual violence, and arbitrary arrests and detention are all ‘serious violations of fundamental human rights protected by international humanitarian law and ... human rights law.’⁴⁴⁰ Therefore, the concept of seriously violating human rights law may exceed its humanitarian law counterpart by, at least, including a wider array of acts and not requiring a nexus to armed conflict.

⁴³² Silva 2009, p. 31.

⁴³³ *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant* (Sudan), para. 9.

⁴³⁴ *Prevention of Racial Discrimination, Including Early Warning Measures and Urgent Action Procedures*, para. 2.

⁴³⁵ *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant* (Brazil), para. 12.

⁴³⁶ Casey-Maslen, Giacca and Vestner 2013, pp 27–28.

⁴³⁷ Tomuschat 2008, p. 38.

⁴³⁸ Casey-Maslen, Giacca and Vestner 2013, p. 28.

⁴³⁹ Cryer et al. 2007, p. 1.

⁴⁴⁰ Bassiouni 2011, p. 735 (referring, e.g., to Bassiouni 2010 and 1996, and Meron 1991).

This view of human rights law as the more extensive regime gains support from the practice of the ICJ as well.⁴⁴¹

5.3.4. An Act Constituting a Terrorism-related Offence

The third likely misuse of arms export which the ATT takes into account is ‘offences under international conventions or protocols relating to terrorism to which the exporting State is a Party’. Similar to the concepts of ‘violating relevant international obligations under international agreements to which it is a Party’ and ‘other war crimes as defined by international agreements to which it is a Party’ utilized in Article 6, only the international commitments of a State dictate which obligations it must consider. But, to determine which conventions or protocols may possibly come into question, one must determine which of them relate to, have some connection with⁴⁴² terrorism.

It is obvious that conventions with the word ‘terrorism’ as a part of their title relate to terrorism. The earliest of such conventions is the 1997 *International Convention for the Suppression of Terrorist Bombings*. According to the Convention, a person commits an offence by unlawfully and intentionally delivering, placing, discharging or detonating an explosive or other lethal device. The act must be committed in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, and the offender must intend to cause death or serious bodily injury or extensive destruction resulting in major economic loss. The Convention also defines as offences attempts, participation, and organizing or directing or contributing to the commission of the described offence.⁴⁴³ It must be noted that the Convention does not apply to non-international offences, to activities of armed forces during armed conflicts or to activities undertaken by military forces of a State as a part of their official duties.⁴⁴⁴

The second instrument to consider is the 1999 *International Convention for the Suppression of the Financing of Terrorism*. Pursuant to that Convention, a person commits an offence, inter alia, by providing or collecting funds with the intention that they should be used or in the knowledge that they are to be used to carry out offences as defined in other terrorism-related instruments, or to

⁴⁴¹ Quénivet 2008, pp. 7–12. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, para. 106; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para. 25.

⁴⁴² *Oxford English Dictionary Online*, ‘relate, v.’, meaning 6.a.

⁴⁴³ Art. 2(1)–(3).

⁴⁴⁴ Arts 3 and 19(2).

cause death or serious bodily injury to persons not taking an active part in an armed conflict. Similar to the previous Convention, it is an offence to attempt, participate, organize or direct or contribute to the commission of the described offence.⁴⁴⁵

The final explicitly terrorism-related Convention is the 2005 *International Convention for the Suppression of Acts of Nuclear Terrorism*. An offence is committed if a person unlawfully and intentionally, inter alia, either possesses or uses radioactive material or a device, or uses or damages a nuclear facility with the intent to cause death, serious bodily injury or substantial damage to property or environment. Credible threats, attempts, participation, organizing, directing or other contributions to the commission of such an offence are offences under this Convention, too.⁴⁴⁶

There are, of course, terrorism-related instruments which do not employ the word ‘terrorism’ anywhere in the treaty text. The problem with using these instruments is that terrorism has proved very difficult to define,⁴⁴⁷ which might cause disagreements between States about which instruments are terrorism-related in the sense of Article 7(1) of the Treaty. In common language, terrorism means ‘unofficial or unauthorized use of violence and intimidation in the pursuit of political aims’ used by a government or ruling group, or a clandestine or expatriate organization.⁴⁴⁸

Overall, it can be challenging to assess which instruments meet this criterion. For illustrative purposes, an authoritative source to consult on the question is the United Nations Treaty Collection (UNTC), which categorizes several conventions under the heading *Text and Status of the United Nations Conventions on Terrorism*. Under the conventions listed by the UNTC, it is, inter alia, an offence to attack diplomats and other protected persons,⁴⁴⁹ take hostages⁴⁵⁰ or jeopardize the safety of, hijack, damage or destroy a civil aircraft,⁴⁵¹ an airport facility⁴⁵² or a maritime vessel.⁴⁵³ Some

⁴⁴⁵ Art. 2(1), (4) and (5).

⁴⁴⁶ Art. 2(1)–(4).

⁴⁴⁷ See Saul 2006.

⁴⁴⁸ *Oxford English Dictionary Online*, ‘terrorism, n.’, meaning 2.a.

⁴⁴⁹ *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, Art. 2.

⁴⁵⁰ *International Convention Against the Taking of Hostages*, Art. 1.

⁴⁵¹ *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, Art. 1; *Convention for the Suppression of Unlawful Seizure of Aircraft*, Art. 1; the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Art. 1.

of these offences have recently been reaffirmed and their scope extended.⁴⁵⁴ Under some of these conventions, credible threats, attempts, participation, organizing, directing or other contributions to the commission are offences as well. The inclusion of these instruments as terrorism-related is supported by at least one author.⁴⁵⁵

5.3.5. An Act of Transnational Organized Crime

The fourth potential wrong which the export of conventional arms may advance is ‘an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.’ This, as has been noted, appears to be a reference to the 2000 *United Nations Convention against Transnational Organized Crime* (UNTOC).⁴⁵⁶

Under the UNTOC, it is an offence to participate in an organized criminal group or to organize, direct, aid, abet, facilitate or counsel the commission of a serious crime involving such a group. The UNTOC also criminalizes money laundering, that is, the conversion or transfer of property for the purpose of concealing or disguising its illicit origin. Furthermore, bribing an official or accepting a bribe, as well as obstruction of justice also amount to an offence.⁴⁵⁷

The UNTOC is supplemented by several protocols. Of these, the Firearms Protocol, as discussed above, sets forth as offence the illicit manufacturing and trafficking in firearms.⁴⁵⁸ Under the Trafficking Protocol,⁴⁵⁹ it is, inter alia, an offence to recruit, transport, transfer, harbour or receipt of persons by means of coercion, abduction, fraud, deception, or by bribing that person’s guardian, for

⁴⁵² *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.*

⁴⁵³ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.*

⁴⁵⁴ See *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft.*

⁴⁵⁵ Brandes 2013, pp. 419–420.

⁴⁵⁶ See *ibid.*, p. 420; Casey-Maslen, Giacca and Vestner 2013, p. 29.

⁴⁵⁷ Arts 5, 6, 8 and 23.

⁴⁵⁸ Art. 5. See subsection 1.2.

⁴⁵⁹ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime.*

the purpose of exploitation. In these situations, the consent of a victim is deemed irrelevant. Participation, organizing or directing also constitutes an offence.⁴⁶⁰

According to the Smuggling Protocol,⁴⁶¹ an offence occurs *inter alia* when a person, for a material benefit, procures the illegal entry of a person into a State Party of which the person is not a national or permanent resident. It is also an offence to produce, procure, provide or possess fraudulent travel or identity documents for such a purpose. Attempts, participation, organizing and directing are equally punishable. Furthermore, the Protocol criminalizes enabling an illegal resident to remain in a State.⁴⁶²

5.4. Measures to Mitigate Risks

Pursuant to the second paragraph of Article 7,

2. 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 provision suggests that an exporting State cannot ignore the possibility of undertaking measures—taking upon oneself plans or courses of action⁴⁶³—to mitigate risks that it deems to exist on the basis of the assessment. If the concerned States can agree on risk reducing measures, export may be possible although the risks have seemed too high at first.

The first example of such means of risk reduction is confidence-building measures (CBMs).⁴⁶⁴ In the field of conventional arms, CBMs mainly consist of information exchange, observation, verification and military constraint. These allow States to gain knowledge about national military capabilities, monitor each other's facilities and activities and limit the capacity for offensive attacks. Confidence building may also include participation in and implementation of international arms

⁴⁶⁰ Arts 3 and 5.

⁴⁶¹ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime*.

⁴⁶² Arts 3 and 6.

⁴⁶³ *Oxford English Dictionary Online*, 'undertake, v.', meaning 4.a; 'measure, n.', meaning IV.19.a.

⁴⁶⁴ See generally, e.g., *Encyclopædia Britannica Online*, 'Confidence building measures'.

control and disarmament treaties. CBMs can be applied globally, regionally, bilaterally or even unilaterally.⁴⁶⁵

Second, the provision refers to jointly developed and agreed programmes by exporting and importing States. In common language, they mean plans or schemes which have been arranged or settled in conjunction, combination or concert by mutual consent.⁴⁶⁶ Thus, the phrase is not a reference to unilateral export control programs such as the Foreign Military Sales (FMS) program which simply exist to deem which countries are considered eligible to purchase defence articles.⁴⁶⁷ Although such programs might operate on the basis of ‘participation’, they are not jointly developed, which suggests that the provision more likely refers to defence co-operation agreements and programs.⁴⁶⁸ The latter type of agreements, as exemplified by recent arrangements between France and the UK,⁴⁶⁹ Indonesia and Saudi Arabia,⁴⁷⁰ and China and Pakistan,⁴⁷¹ range from joint development or purchase of weapon systems to concerted military education and training. They may also include exchange of intelligence and technology.

These are, of course, just examples. The provision compels exporting States to consider whatever means possible to alleviate the risks of export. In the words of the *Academy Briefing*, they may include ‘end-user certificates that confirm that transferred items will not be re-exported without the agreement of the exporting state or used in a manner other than that described in the certificate; post-delivery and post-shipment verifications by the exporting state; capacity building, for example to improve the physical security and stockpile management of exported arms; and training in human rights and international humanitarian law.’⁴⁷² Thus, risk mitigation measures take the form of due

⁴⁶⁵ *Information on confidence-building measures in the field of conventional arms*, pp. 4–5.

⁴⁶⁶ *Oxford English Dictionary Online*, ‘programme | program, *n.*’, meaning 4; ‘agreed, *adj.*’, meaning 3.a; ‘jointly, *adv.*’, meaning 3.

⁴⁶⁷ See *Foreign Military Sales: Frequently Asked Questions*.

⁴⁶⁸ This view gains support from Article 26 which legitimizes the existence of such agreements under the ATT.

⁴⁶⁹ *UK and France agree on closer defence*.

⁴⁷⁰ Panda 2014.

⁴⁷¹ Fazl-e-Haider 2013.

⁴⁷² Casey-Maslen, Giacca and Vestner 2013, p. 29. See also Brandes 2013, p. 420.

diligence—a standard of care applied to all transactions—as well as reduce specific risks by, for example, improving the conditions to which the exported arms are subjected to.⁴⁷³

The potential of any measures to mitigate risks has to be assessed case by case. An access to verified knowledge about the end use of exported arms, as a confidence building measure, is certain to alleviate the risk that the arms will be used for wrongs. Participation in international agreements and the use of end-user certificates are likely to have a similar effect. However, as has been noted, the practical effects of some risk mitigating measures are not immediate;⁴⁷⁴ for example, improving the physical security of exported arms may require time and plenty of investments in materials and in the training of security personnel.

Defence co-operation agreements are subject to even more scrutiny; arguably, not all programmes reduce the risk that arms could be used to commit wrongs. Some do not concern arms exports and imports at all, and others might even increase risks. For example, the alleged Memorandum of Understanding (MoU) between Burma and North Korea in 2009 was viewed as a security threat to the region, not something that enhances stability.⁴⁷⁵ Britain, on the other hand, has been criticized for its co-operation with Saudi Arabia, a country known for its human rights abuses.⁴⁷⁶

5.5. An Overriding Risk

5.5.1. The Meaning of the Concept

The third paragraph of Article 7 lays out when arms export is forbidden under the Treaty:

3. 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 authorize the export.

According to this provision, the export must not be authorized if the exporting State determines that there is an overriding risk of any of the aforementioned negative consequences; that peace would be undermined, or that the weapons could be used for the wrongs enumerated in the Article. The key

⁴⁷³ See Casey-Maslen, Giacca and Vestner 2013, p. 29.

⁴⁷⁴ Ibid.

⁴⁷⁵ See Zaw 2009.

⁴⁷⁶ See Smith 2014.

word here is ‘overriding’, which, according to common language, means that the risk is ‘[a]ble to overrule or supersede another authority; taking precedence over all other subjects, considerations, etc.; predominant, primary.’⁴⁷⁷

There are no relevant rules of international law in international agreements or case law to support or discredit this interpretation. This does not mean, however, that each country can make its own subjective judgement about the existence of an overriding risk, as one critic has asserted.⁴⁷⁸ For example, already after the adoption of the Treaty, some States were planning to interpret the term to mean the same as ‘substantial’⁴⁷⁹—perhaps drawing upon the failure, despite the preference of the vast majority of States, to set the threshold at a ‘substantial’ risk.⁴⁸⁰ As substantial simply means that the risk is of ample or considerable size,⁴⁸¹ this interpretation should be discarded as contradicting the ordinary meaning of the word.

One critic has asserted that the concept is open to interpretation: it could ‘mean that arms exports should only be stopped in extreme or exceptional circumstances, or that a state could decide that the risk of abuse was not enough to “override” the perceived benefits of the arms export.’⁴⁸² Of these two views, the latter represents a better understanding of the concept. As put quite accurately in the *Academy Briefing*, the standard ‘implies that a national control authority must balance the predictable positive and negative consequences of arms exports’, unless, of course, the export activity is already prohibited under Article 6. This suggests that sometimes the possible misuses of exported arms may be outweighed by their expected positive effects, especially if relevant risk mitigation measures are available.⁴⁸³

But what are the possible positive effects, the other considerations which the negative consequences of arms export must override? During the final negotiations of the Treaty, the US delegation argued that considerations of peace and security could outweigh some of the other risks.⁴⁸⁴ In addition to

⁴⁷⁷ *Oxford English Dictionary Online*, ‘overriding, *adj.*’, meaning 1.

⁴⁷⁸ Pace 2013, para. 8.

⁴⁷⁹ Doermann and Arimatsu 2013, p. 5.

⁴⁸⁰ See Acheson 2013a, “Overriding risk”, para. 2.

⁴⁸¹ *Oxford English Dictionary Online*, ‘substantial, *adj.*, *n.*, and *adv.*’, meaning A.I.3.

⁴⁸² Jackson 2013, A weak treaty, section 1, para. 1.

⁴⁸³ Casey-Maslen, Giacca and Vestner 2013, p. 30.

⁴⁸⁴ Acheson 2013a, “Overriding risk”, para. 4.

this, it might be possible to assist ‘people to defend themselves against genocide or crimes against humanity, or to exercise their right to self-determination when attacked by an oppressive state’.⁴⁸⁵ According to one commentator, the right to self-defence or regional stability or the need to protect a strategic partnership may override the risks;⁴⁸⁶ according to another, any other concern, whether political economic or otherwise, may override the risks.⁴⁸⁷

Peace and security are one of the legitimate purposes of the Treaty.⁴⁸⁸ However, peace and security can only override other risks when these interests truly conflict; if the exporting State, pursuant to Article 7(1)(a), deems that the export would contribute to peace and security although there are risks pursuant to Article 7(1)(b). It is equally true that defence against genocide and crimes against humanity can be read as a part of the respect for international humanitarian law and human rights as promoted by the fifth principle of the Treaty. These are examples of other considerations which the ATT deems legitimate.

But, the Treaty also acknowledges the legitimate interests of States in the international trade in conventional arms as well as co-operation and trade in material, equipment and technology for peaceful purposes.⁴⁸⁹ Affirming at least some of the aforementioned claims, the right to individual or collective self-defence, the interests to acquire conventional arms for self-defence and peacekeeping, and not intervening in essentially domestic matters are also something that the Treaty promotes.⁴⁹⁰ The right to self-determination, as suggested by the *Briefing*, is not something the Treaty actively touts, as it is not explicitly mentioned anywhere in the text.⁴⁹¹

5.5.2. A Major Loophole?

As one commentator has hinted, there is a danger that the concept of overriding risk will turn out to be a major loophole.⁴⁹² For example, during the negotiations Liechtenstein argued that even if there

⁴⁸⁵ Casey-Maslen, Giacca and Vestner 2013, p. 30.

⁴⁸⁶ Jackson 2013, A weak treaty, section 1, para. 2.

⁴⁸⁷ Prizeman 2013a, p. 3.

⁴⁸⁸ See Art. 1.

⁴⁸⁹ The fourth and sixteenth preambular paragraph.

⁴⁹⁰ The first, the seventh and the fourth principle.

⁴⁹¹ The right to self-determination is only referred to in the first preambular paragraph, which states that the Treaty is guided by the purposes and principles of the UN Charter.

⁴⁹² Clapham 2013, p. 4.

is a 90 percent chance that a wrong will be committed, a State may claim that other considerations have not been overridden.⁴⁹³ Unfortunately, it is possible that States Parties, to authorize more arms exports, will be tempted to override humanitarian and human rights aspects in favour of other considerations in all cases. As has been noted, States may argue that the specific weapon export will not be used to violate human rights; that there is currently no ongoing conflict; or that the security needs of the importer are legitimate.⁴⁹⁴ States might even deem that *all* arms exports also have positive effects, which is right in principle, although just from the arms bearers' point of view.

Particularly, a limited or mistaken view of the concepts of peace and security may water down the provision. States may view the contributions of arms transfers to their idea of peace and security as more important than a very high risk that the arms would be used in violating international law.⁴⁹⁵ For instance, a State could justify export to help a government end a civil war, although the latter systematically violates human rights.⁴⁹⁶ The heart of the matter is whether peace and security can be seen as something separate from the risks under Article 7(1). According to the representatives of at least one NGO, this cannot be the case; peace and security cannot trump the respect for human rights and international law, since the latter are fundamental to the former.⁴⁹⁷ According to the general rule of treaty interpretation, as seen above, the concepts of peace and security should rather be read in line with the collective security system of the UN than understood in their common meaning. But as stated, the terms may well be subject to *ad hoc* interpretations.⁴⁹⁸

Reasoning that there is no overriding risk of a violation can seem consequentialist, with the end justifying the means. To put it bluntly, such consequentialism 'flies in the face of the theory and practice of human rights.'⁴⁹⁹ In the terms of the VCLT, if interpretations of the standard lead to manifestly absurd or unreasonable results, they do not represent good faith.⁵⁰⁰ Applying this rule to the provision at hand can be difficult, as the absurdity of reasoning varies case by case and is always in the eye of the beholder. Regardless, it is a task that States Parties must undertake, since

⁴⁹³ Acheson 2013a, "Overriding risk", para. 2.

⁴⁹⁴ Vries 2013, chapter 2, para. 2.

⁴⁹⁵ Brandes 2013, p. 421.

⁴⁹⁶ McDonald 2013, A world remade?, para. 2.

⁴⁹⁷ Acheson 2013a, "Overriding risk", para. 4.

⁴⁹⁸ See section 5.2.

⁴⁹⁹ Clapham 2013, p. 4.

⁵⁰⁰ See subsection 2.2.1.

determining when other factors trump the enumerated risks will be the touchstone of the export control under the Treaty. Unless States are willing to recognize how the allegedly positive effects can violate human rights and peace and security in the comprehensive sense, the situation in which an overriding risk does exist might turn out to be one in a thousand.

5.6. Protection of Women and Children

Already under the UN Programme of Action regarding SALW, States agreed to address the special needs of children affected by armed conflict.⁵⁰¹ Article 7(4) continues this tradition and adds new elements:

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 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

In the export assessment, States Parties must also take into consideration the risk that the exported arms will be used to commit weighty, grave, important, significant or greatly consequential acts of physical force used to inflict injury or damage against women and children. The provision also takes into account the risk of such violence that is based on the victim being either male or female.⁵⁰² Pursuant to common language, commission refers to the perpetration of the described acts; facilitation, on the other hand, means making them easy or easier, assisting in bringing about such a result or enabling a person to do them more easily.⁵⁰³

There are no binding rules of international law to discredit these descriptions; for example, the *Convention on the Elimination of All Forms of Discrimination against Women* only defines *discrimination* against women. In terms of soft law, the *General Recommendation No. 19: Violence against women* to the mentioned Convention describes gender-based violence as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately.’⁵⁰⁴ On the other hand, the Inter-Agency Standing Committee’s (IASC) *Guidelines for Gender-based Violence Inter-*

⁵⁰¹ Section II, para. 22.

⁵⁰² *Oxford English Dictionary Online*, ‘serious, *adj.*², *n.*, and *adv.*’, meaning A.3.a; ‘violence, *n.*’, meaning 1.a; ‘gender, *n.*’, meaning 3.a and C2.c, ‘gender-based’.

⁵⁰³ *Ibid.*, ‘commit, *v.*’, meaning III.6.a; ‘facilitate, *v.*’, meanings 1.a and 2.

⁵⁰⁴ Para. 6.

ventions in Humanitarian Settings refer to gender-based violence as ‘an umbrella term for any harmful act ... that is based on socially ascribed (gender) differences between males and females.’⁵⁰⁵ In the light of these differences, the exact meaning of the phrase is left ambiguous.

Essentially, the fourth paragraph of Article 7 continues laying out the risks which must be taken into consideration in the export assessment pursuant to the first paragraph. But, considering the risks regarding gender-based violence and violence towards women and children is actually not part of the mandatory, binding assessment which culminates in paragraph 3; they must merely be taken into account. This lack of enforceability is due to the chronological inconsistency of the provisions: if the risks under paragraph 4 were desired to have a decisive effect on the assessment, they would have been included in paragraph 1. As has been pointed out, States Parties are ultimately not obliged to deny authorization or consider measures to mitigate these risks even if they are deemed to be overriding. Naturally, the risks under paragraph 4 may indirectly affect the acceptability of export as risks of serious violations or other criminal acts as set forth in paragraph 1.⁵⁰⁶

5.7. The Details and Issuance of Authorizations

According to the fifth paragraph of Article 7,

5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

This sets two practical requirements for all export authorizations under Article 7: they should be detailed and issued prior to the export. The latter requirement seems rather obvious, since, after all, the assessment leading to the authorization must be conducted prior to the export; unassessed export would of course violate the Treaty.⁵⁰⁷ The precise meaning of the former, however, is less clear.

According to the ordinary meaning of the phrase, a detailed authorization is one ‘[r]elated, stated or described circumstantially; abounding in details’.⁵⁰⁸ This interpretation leaves a lot to desire, as it remains uncertain which particular details are sufficient to cross the threshold of a detailed authori-

⁵⁰⁵ P. 7.

⁵⁰⁶ See Brandes 2013, pp. 421–422; Casey-Maslen, Giacca and Vestner 2013, p. 30.

⁵⁰⁷ *Ibid.*, p. 31.

⁵⁰⁸ *Oxford English Dictionary Online*, ‘detailed, *adj.*’, meaning a.

zation. Presumably, they should include the export articles, the recipient and the time the export will take place. An authorization should also clearly set forth the rights of the agents involved in the export and empower foreign authorities to exercise subsequent control. Commonly, export authorizations include ‘the type, quantity, price and weight of the exported items; the production site of the exporter; the state of final destination, including the address of the importer; an indication of temporal validity; and the seal and address of the issuing national control authority.’⁵⁰⁹

It must be noted that States are not ultimately obliged to ensure that their authorizations are detailed and issued prior to the export. They are obliged to take measures, plans or courses of action,⁵¹⁰ to make sure that such is the case. This wording, used in several provisions of the Treaty, represents an emphasis on national sovereignty and waters down the obligation greatly, having an effect on the responsibility of States Parties: if the provision is actionable, States may only be held responsible for failing to take such ensuring measures that are demanded of them, not for failing to issue detailed and timely authorizations. The provision does not tell which measures are sufficient, but rather lets States Parties decide for themselves.

In this regard, the ATT clearly falls short of the standard set forth in the Firearms Protocol, which requires that an export licence or authorization ‘at a minimum, shall include the place and date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the firearms, their parts and components and ammunition and, whenever there is transit, the countries of transit.’⁵¹¹ Not only does the Protocol set States Parties a direct obligation to issue authorizations, but it also states which information must be included in them. Furthermore, the Protocol explicitly only sets the ‘minimum’ standard, encouraging States to include other information as well. Compared to this, the obligation under Article 7(5) is both vague and lenient. It is still an improvement over the United Nations Programme of Action, though, since that instrument sets forth no standard regarding the details and issuance of authorizations.

⁵⁰⁹ Casey-Maslen, Giacca and Vestner 2013, p. 31.

⁵¹⁰ *Oxford English Dictionary Online*, ‘measure, *n.*’, meaning IV.19.a.

⁵¹¹ Art. 10(3).

5.8. Transparency

The sixth paragraph of Article 7 puts exporting States under an obligation to make available information about its authorizations:

6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

The first term of the provision is that the obligation only concerns appropriate knowledge, intelligence or news⁵¹² about the authorization in question. There is some ambiguity to the phrase ‘in question’: it may refer to an authorization that is either in dispute and undecided or one that merely is the subject of discourse here, one that is being discussed or referred to under Article 7.⁵¹³ Thus, it is possible that the obligation to provide information concerns not only completed authorizations but also such that the arms export authorities are still considering.

Information is appropriate if it is specially fitted, suitable or proper;⁵¹⁴ a condition that seems quite unspecific, since nothing indicates to whose needs the appropriateness refers to. Surely exporting, importing, transit and trans-shipment States all have differing views on what information is suitable. Taking into account that the exporting State Party is responsible for making the information available, it is likely that that State also gets to decide on the matter. According to the *Academy Briefing*, (appropriate) information may include a copy of the export authorization and information on actors involved in the export, intended transfer routes, the execution of the export and planned risk mitigation measures.⁵¹⁵

The information provided by exporting States need not be freely available for all States. States that are not involved in a certain transfer have no right to know the details of the authorization; information must only be provided to the importing or a transit or trans-shipment State Party and only when such a State makes a request. This is, of course, a major limitation to the transparency of the Treaty, since it disallows the international community to monitor the authorizations made by the

⁵¹² *Oxford English Dictionary Online*, ‘information, *n.*’, meaning I.2.a.

⁵¹³ *Ibid.*, ‘question, *n.*’, P2.b.(a) and P2.b.(b).

⁵¹⁴ *Ibid.*, ‘appropriate, *adj.* and *n.*’, meaning 5.

⁵¹⁵ Casey-Maslen, Giacca and Vestner 2013, p. 31.

States Parties. On the other hand, it ensures the interests of States in privacy regarding sensitive information.

The final condition is that making information available is subject to the national laws, practices and policies of the exporting State; under the control of, or dependent or conditional upon its rules, established legal procedures, or adopted principles or courses of action.⁵¹⁶ This means first that the whole information sharing process must follow national procedures, which implies that the possibilities of procuring timely and reliable documents will vary between different States. But, the provision may also be interpreted so that an exporting State may deem certain information classified and not hand it out; if a national law or practice dictates that some facts cannot be provided to other States, the exporting State has no obligation. This seems to conflict with Article 27 of the VCLT, which states that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' But since the Treaty clearly subjects the obligation to internal law, States cannot fail in this regard unless there is absolutely no justification to not provide the data.

Indeed, as stated in the *Academy Briefing*, Article 7(6) explicitly allows exporting States to limit the information they provide to protect their interests of security and commerce.⁵¹⁷ As a result, it may be impossible to determine whether decisions are objective and non-discriminatory or even follow the rules of the national control systems. The main reasoning behind the Article, however, is not the promotion of secrecy but acknowledging that the information provided by exporting States is vital to establishing 'effective control of the arms trade'.⁵¹⁸ In addition, the provision serves the practical interests of importing States: if an exporting State refuses to grant authorization, the recipient of the arms will want to know the justification for such a decision.

Article 7(6) is more stringent than some of the other provisions of the ATT, since States are not just required to 'take measures'; they are under a direct obligation. The provision is also quite different from those set forth in pre-existing instruments. The UN Programme of Action does not regulate the matter, and the Firearms Protocol simply requires States Parties to exchange relevant case-specific

⁵¹⁶ *Oxford English Dictionary Online*, 'subject, *adj.* and *adv.*', meanings A.I.1a and A.II.8; 'law, *n.*¹', meaning I.2.a; 'practice, *n.*', meaning 3.c; 'policy, *n.*¹', meaning I.4.

⁵¹⁷ Casey-Maslen, Giacca and Vestner 2013, p. 31.

⁵¹⁸ *Ibid.*

information consistent with their respective domestic legal and administrative systems.⁵¹⁹ Whereas Article 7(6) is clearly linked to export assessment and authorization, the obligation under the Protocol concerns producers, dealers, importers and exporters alike.⁵²⁰

The only possible loophole in Article 7(6) is the use of national practices in bad faith. Since not all of them need to be based on legislation or even decisions made previously by officials, an exporting State likely will likely have plenty of leeway in deciding what information it wants to share with others. When interpreting the provision, it must be kept in mind that, pursuant to Article 1, one of the purposes of the Treaty is to promote co-operation and transparency by States Parties, thereby building confidence among them.

Furthermore, providing no information about the reasons for authorizing or not authorizing goes against the context of the Treaty; both the respect for the legitimate interests of States to acquire arms⁵²¹ as well as the standards of objectivity and non-discrimination in the implementation of the Treaty.⁵²² These arguments suggest that the right to withhold information, if such is deemed to exist, should not be used arbitrarily. Comparisons between authorizations made regarding different States may be difficult, because Article 7(6) does not oblige exporting States to provide information about other authorizations than the one in question. Regardless, States should at least be let known which risks are preventing them from importing arms.

5.9. Post-Authorization Reassessment

As mentioned in the *Academy* Briefing, export authorizations are valid for a certain period of time, usually up to several years.⁵²³ To tackle this issue, the last paragraph of Article 7 states:

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

⁵¹⁹ Art. 12(1).

⁵²⁰ Ibid.

⁵²¹ The seventh preambular principle.

⁵²² The eighth preambular principle and Art. 5(1).

⁵²³ Casey-Maslen, Giacca and Vestner 2013, p. 31.

This provision sets forth how States should proceed if the circumstances surrounding the export of arms take a turn after an authorization has been granted. In such cases, the exporting State Party is encouraged to reassess the authorization after consultations with the importing State. The obligation only arises if the exporting State becomes aware of new relevant information; knowledge, intelligence or news that is both previously unknown and has a bearing on or is connected with the export assessment.⁵²⁴ A piece of information is quite likely relevant if it shows that the situation in the State of destination or its surrounding region has changed or created newfound risks.⁵²⁵

Under the provision, an exporting State is not directly obliged to reassess the authorization or consult the importing State. They are only encouraged to do so; in the case of consulting, if it is deemed appropriate—suitable or proper.⁵²⁶ As noted by some States during the negotiations of the Treaty, this clearly dilutes the provision: setting forth a binding obligation would have ensured that exporting States revoke authorizations that are based on old information.⁵²⁷ Of course, after an authorization expires a new assessment has to be conducted regardless.

An interesting question is how the duty to conduct a post-authorization reassessment relates to the prohibitions set forth in Article 6. What if a State has authorized the export activity before, for example, the UNSC adopts an arms embargo against the importing State? Although Article 6 does not regulate these situations, it is clear that States must follow a resolution of the UNSC immediately, unless otherwise specified in the resolution. Same applies to relevant international obligations under an international agreement, which, in accordance with Article 26 of the VCLT, must be followed as soon as the agreement in question enters into force. In addition, pursuant to Article 18 of the VCLT, already after signing a treaty or otherwise having expressed the consent to be bound by a treaty, a State must refrain from acts which would defeat its object and purpose.

The same does not appear to apply to the prohibition under Article 6(3). If a State has already granted an authorization, it is not required to prohibit the transfer even if it was certain that the arms would be used to commit a genocide, for instance, unless the authorization breaches its other obli-

⁵²⁴ *Oxford English Dictionary Online*, ‘information, *n.*’, meaning I.2.a; ‘new, *adj.* and *n.*’, meaning A.I.2.a; ‘relevant, *adj.*’, meaning 2.a.

⁵²⁵ See Casey-Maslen, Giacca and Vestner 2013, p. 31.

⁵²⁶ *Oxford English Dictionary Online*, ‘appropriate, *adj.* and *n.*’, meaning 5.

⁵²⁷ See Acheson 2013b, Export assessment, in fine.

gations under international law. Under the ATT, if new relevant information turns up, a State is only encouraged to reassess its authorization. Furthermore, this obligation only concerns the exporting State: no other concerned State is encouraged to do anything. Given the graveness of genocides, crimes against humanity and war crimes, however, it seems quite likely that responsible States, regardless of their involvement in the transfer, will revoke any authorizations that advance the certain occurrence of such offences.

6. Regulation of Import, Transit, Trans-shipment and Brokering

6.1. Import

6.1.1. Appropriate and Relevant Information

Article 8 of the ATT regulates the import of arms; the act of bringing arms in or causing them to be brought in from a foreign country.⁵²⁸ Import controls are important since they inform governments about proposed arms shipments, allowing officials to scrutinize the activities that take place under their authority, subjecting the imports to inspections. Import controls can also reinforce the responsibility of States to exercise control over the arms in their territory. In addition, they can help to assure export authorities that there are no risks involved in the transfer.⁵²⁹ On the other hand, as will be seen below, there are some problems related to the last line of thought.

When reading the obligations of importing States under Article 8, it must be kept in mind is that the Article only concerns weapons within the scope of the Treaty as set forth in Article 2; importing States have no obligations regarding ammunition and parts, other than those stemming from prohibitions under Article 6.

The first paragraph of Article 8 states:

1. Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7. Such measures may include end use or end user documentation.

⁵²⁸ *Oxford English Dictionary Online*, 'import, v.', meaning I.2. See subsection 3.2.

⁵²⁹ See Bromley and Holtom 2011, p. 2.

This transparency-related provision is quite similar to the one concerning exporting States under Article 7(6).⁵³⁰ In this case, too, the centre of the issue is the exchange of information; knowledge, intelligence or news.⁵³¹ However, an importing State, unlike an exporting one, is not directly required to provide appropriate information; it must only take measures to ensure that it provides appropriate and relevant information by itself, or that the non-state importer of arms does.

Ensuring measures may include anything an importing State deems fit. In the Article, documentation concerning the end use or end user of the arms is given as an example. Although there are no relevant international definitions, the phrase likely refers to '[t]he accumulation, classification, and dissemination of information' about the final specific use to which the arms will be put⁵³² or the final user of the arms. Documentation may especially include an end-user certificate (EUC), 'a document issued by or on behalf of the end-user that identifies, at a minimum, the material to be transferred, the destination country and the end-user.' Furthermore, it may contain 'assurances regarding the ... potential re-transfer of the goods'.⁵³³ As stated in the *Academy Briefing*, mentioning end-use documentation 'could be a step towards universalizing their acceptance', since sometimes importing States refuse to commit to such measures.⁵³⁴

The obligation to take measures, which is set forth several times in the Treaty, means that States may only be held responsible for failing to take measures that would ensure the providing of information, not for failing to actually provide information. This makes it difficult for the international community to ascertain when a particular importing State has breached its obligations by hiding relevant information about, for example, its human rights conditions.

Only appropriate and relevant information must be provided. This, as seen above, means that the information must be specially fitted, suitable or proper, as well as have a bearing on or be connected with the matter in hand.⁵³⁵ As also seen above, the conditions of appropriateness and relevancy are quite vague; States likely have different views on what information is suitable, and all sorts of in-

⁵³⁰ See section 5.8.

⁵³¹ *Oxford English Dictionary Online*, 'information, *n.*', meaning 1.2.a.

⁵³² *Ibid.*, 'documentation, *n.*', meaning 3.b; 'end, *n.*', C2, 'end-use'.

⁵³³ Bromley and Griffiths 2010, p. 2. See generally also McDonald et al. 2008.

⁵³⁴ Casey-Maslen, Giacca and Vestner 2013, p. 31.

⁵³⁵ *Oxford English Dictionary Online*, 'appropriate, *adj.* and *n.*', meaning 5; 'relevant, *adj.*', meaning 2.a.

formation may be relevant.⁵³⁶ In this case, it is rather safe to assume that the importing State may decide what information is deemed appropriate, since it is the one responsible for providing the information. The information could, e.g., include general facts about the situation in the importing country or its surrounding region, and, at least, information about how and by whom the weapons will be used.⁵³⁷

Like under Article 7(6), information must only be provided upon request, and States do not have to make the information available to all States Parties. Importing States, though, only have obligations towards exporting States Parties; they are under no obligation to take measures to ensure that transit States, for example, are informed. This is an unfortunate detail, since all concerned States need information to decide whether a transfer should be prohibited pursuant to Article 6.

The information has to be provided in accordance with⁵³⁸ the national laws of the importing State. If a State has no such national laws it may possibly seek to interpret the provision in bad faith, stating that it does not have an obligation to provide information.⁵³⁹ But, a more sensible interpretation is that the obligation exists regardless; it must simply follow the national procedures in which the information is provided, taking into account limitations if such happen to exist. One likely reason for the addition is to allow importing States to conceal classified information in order to protect their interests of commerce and security, as exporting States are allowed to do under Article 7(6). Importing States, though, must find the grounds for procedures or secrecy in written legislation, whereas the obligation of exporting States is subject not only to national laws, but also practices or policies. The former, then, will certainly find it harder to argue for withholding important details. As is the case with Article 7(6), the consequence of allowing national laws to effect the obligation is that the chances of acquiring timely and reliable documents will differ between various States.

The purpose of the provision is explicit: ‘to assist the exporting State Party in conducting its national export assessment’. Indeed, the system of the Treaty is clearly interconnected since the obligations of States Parties complement each other; importing States must make sure that their officials or non-state importers under their jurisdiction provide information so that exporters may obtain au-

⁵³⁶ See section 4.3. and subsection 2.2.3.

⁵³⁷ Casey- Maslen, Giacca and Vestner 2013, p. 31.

⁵³⁸ *Oxford English Dictionary Online*, ‘pursuant, *n.*, *adj.*, and *adv.*’, meaning C.

⁵³⁹ See Gao 2013, para. 12 (regarding the provision on brokering).

thorizations. This differs quite starkly from previous instruments, such as the Firearms Protocol, under which importing States must inform the exporting State Party that they have received the dispatched shipment and exchange relevant case-specific information in accordance with their domestic legal and administrative systems on matters such as producers, dealers, importers and exporters.⁵⁴⁰ The differences mainly stem from the focus of the ATT on the obligation to conduct a comprehensive export assessment: there is no such obligation under the Firearms Protocol, which means that the corresponding obligations of importing States are more general in nature.

It is questionable whether the transparency-related obligations of importing States can fulfil the needs of exporting States under the Treaty. All in all, Article 8(1) is vague and permissive: it does not directly require States to give out information, and the nature of the information is up to the States concerned. Of course, it is always in the interest of both the importing and exporting State to legitimize the transfer, so the former will likely want to co-operate to its best ability, and the latter is expected to make necessary requests.⁵⁴¹ But, this may mean that truthful information will not be provided; there is a risk that both parties to certain transfer activity will engage in a kind of *folie à deux*, where the importer provides misleading information to acquire the arms, and the exporter accepts whatever information it receives to boost its export volume. States may well be tempted to distort the facts in favour of advantageous arms deals.

6.1.2. Measures That Allow the Regulation of Imports

The second paragraph of Article 8 sets forth how importing States must take part in the regulation of arms transfers:

2. Each importing State Party shall take measures that will allow it to regulate, where necessary, imports under its jurisdiction of conventional arms covered under Article 2 (1). Such measures may include import systems.

Under the provision, importing States Parties have to take measures that will permit or enable them to regulate imports where it needs to be done; where the circumstances so require.⁵⁴² According to the *Academy Briefing*, '[m]easures to "regulate" imports are not necessarily as stringent as measures

⁵⁴⁰ Arts 10(4) and 12(1).

⁵⁴¹ See Casey-Maslen, Giacca and Vestner 2013, p. 31.

⁵⁴² *Oxford English Dictionary Online*, 'allow, v.', meaning IV.10.b; 'necessary, *adj.* and *n.*', meaning A.I.4.

to “control” imports.’⁵⁴³ Pursuant to the ordinary meaning of the word, though, there is no difference: to regulate imports is to control, govern, or direct them, especially by means of regulations or restrictions.⁵⁴⁴ Naturally, States are only required to regulate imports within their own jurisdiction, their ‘power of declaring and administering law or justice’.⁵⁴⁵

The provision is not very specific in determining which measures are appropriate. As an example, import systems are mentioned. This reference seems rather superfluous, as an import system simply means a connected set of things or an organized scheme concerning the import of arms.⁵⁴⁶ Of course, the example could be read as an explicit permission to establish and sustain permanent and comprehensive solutions, as opposed to *ad hoc* measures, to address the import of conventional weapons. Measures and a system of measures likely include legislation and one or several authorities that execute the authorization procedures regarding arms import in that particular State. Naturally, import control measures may be linked to the risk mitigating measures envisioned under Article 7(2), including for example licensing, end-user certificates and record keeping.⁵⁴⁷

The obligation of importing States under Article 8(2) is not very stringent. There are no criteria to say when certain import activity should not be authorized. Furthermore, not all imports must even be regulated, and not in all cases. As has been noted, the provision leaves importing States Parties a margin of discretion.⁵⁴⁸ In other words, they may themselves consider when to remain passive and when to intervene in a particular situation: ‘a state party remains free not to control imports if its national legislation guarantees, at minimum, that the state authorities know who holds which arms and are able to prevent diversion.’⁵⁴⁹ Whether it is necessary to take action or not, is up to the authorities of the importing State.

Importing States do not have to conduct a risk assessment similar to that set forth in Article 7(1), even though they clearly have a better view of the possible misuses weapons may face on their territory. Perhaps the Treaty assumes that importing States would not authorize such risky transfers an-

⁵⁴³ Casey-Maslen, Giacca and Vestner 2013, p. 32.

⁵⁴⁴ *Oxford English Dictionary Online*, ‘regulate, v.’, meaning 1.a.

⁵⁴⁵ *Ibid.*, ‘jurisdiction, n.’, meaning 1. See section 5.1.

⁵⁴⁶ *Ibid.*, ‘system, n.’, meanings I.1.a and II.9.a.

⁵⁴⁷ See Bromley and Holtom 2011, pp. 5–8.

⁵⁴⁸ Brandes 2013, p. 422; Casey-Maslen, Giacca and Vestner 2013, p. 32.

⁵⁴⁹ *Ibid.*

yway. This assumption, however, misses the fact that States may simply be unwilling to control import activity within their jurisdiction; a problem which could be tackled with a strict obligation to assess risks. It seems problematic that an importing State cannot be held liable under the ATT for not preventing or even regulating arms transfers that could clearly lead to misuses.

Overall, Article 8(2) pales in comparison with its counterparts set forth in the Firearms Protocol and the UN Programme of Action. Whereas the ATT only gives import systems as an example, both of the latter oblige importing States to establish such a system which must also be effective and include licensing or authorization procedures.⁵⁵⁰ Whereas the whole concept of import authorization has been excluded from the ATT, the Protocol sets specific standards regarding the information which an authorization or a licence must include at minimum.⁵⁵¹

Taking these elaborations and comparisons into account, the aim of the provision seems mostly to put forth improvements in the capabilities of the States Parties to regulate imports when they desire to do so, and when the circumstances call for it. The reasoning behind this laxness is the focus of the Treaty on exporting States.⁵⁵² But, it also stems from the realities of the international arms trade. The authorities of exporting States ‘often also assume control over imports, using general licences or a simple registration of importers, and criteria such as internal security concerns, to make assessments.’⁵⁵³ Like in the process of exchanging information, exporting and importing States may engage in a kind of *folie à deux*; in this case the former, though lacking first-hand information, takes control over the assessment to boost export volume, while the latter omits regulating the situation to obtain the weapons.

6.1.3. Requesting Information from the Exporting State Party

The third and final paragraph of Article 8 reads as follows:

3. Each importing State Party may request information from the exporting State Party concerning any pending or actual export authorizations where the importing State Party is the country of final destination.

⁵⁵⁰ The Firearms Protocol, Art. 10(1); PoA, Section II, para. 11.

⁵⁵¹ Art. 10(3).

⁵⁵² See section 5.1.

⁵⁵³ Casey-Maslen, Giacca and Vestner 2013, p. 32.

Under the paragraph, an importing State may request information—knowledge, intelligence or news⁵⁵⁴—that concerns any pending or actual export authorization; relates or refers to an authorization that is either awaiting decision or has already been carried out.⁵⁵⁵ According to the *Academy Briefing*, this should be read together with Article 7(6), under which the exporting State must make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties.⁵⁵⁶

Indeed, the interplay between these two Articles is quite obvious: each importing State has a right to request information, and the exporting State must provide that information. It must be kept in mind, though, that only the country of final destination has a right to request information under Article 8(3). Furthermore, whereas Article 7(6) merely requires exporting States to make available information that is ‘appropriate’, Article 8(3) allows importing States to request all kinds of information—the only qualifier is that it must concern an authorization.

This slight inconsistency is only logical, given that importing States just have a right to request, whereas exporting States are obliged to provide. The rationale behind the provisions is the same, as they both aim to strengthen the control over the international trade in arms through means of transparency. The practical interests of importing States, which are also taken into account under Article 7(6), are the centrepiece of Article 8(3). If an exporting State Party does not authorize certain activity, the recipient of arms most likely wants to find out the reasoning behind such a decision.⁵⁵⁷

6.2. Transit and Trans-shipment

As stated above, transit and trans-shipment refer to situations where weapons are passed or carried ‘from one place to another’ or where they are changed ‘from one ship or other conveyance to another.’⁵⁵⁸ The prohibitions of the Treaty, pursuant to Article 6, concern transit and trans-shipment States, but these States also have an additional obligation under Article 9. The latter Article, which only concerns weapons, not ammunition and parts, reads:

⁵⁵⁴ *Oxford English Dictionary Online*, ‘information, *n.*’, meaning I.2.a.

⁵⁵⁵ *Ibid.*, ‘concern, *v.*’, meaning II.2.a; ‘pending, *prep.* and *adj.*¹’, meaning B; ‘actual, *adj.* and *n.*’, meaning A.2.a.

⁵⁵⁶ Casey-Maslen, Giacca and Vestner 2013, p. 32.

⁵⁵⁷ See section 5.8.

⁵⁵⁸ *Oxford English Dictionary Online*, ‘transit, *n.*’, meaning 1.c.(a); ‘tran’shipment | trans-‘shipment, *n.*’ See subsection 3.2.2.

Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law.

Transit and trans-shipment States (hereinafter ‘transit States’), like exporting and importing States, are only concerned with activities under their own jurisdiction; their ‘power of declaring and administering law or justice’.⁵⁵⁹ In other aspects, their special obligations are quite diluted in comparison with that of other parties to arms transfers. First, they are only required to take appropriate measures—specially fitted, suitable or proper plans or courses of action—to control, govern or direct transit and trans-shipment activities, especially by means of regulations or restrictions.⁵⁶⁰ Second, the regulation only has to concern situations where it is necessary and feasible; where it needs to be done, perhaps required by the circumstances, and where it is capable of being done, accomplished or carried out.⁵⁶¹

Necessity, according to the *Academy Briefing*, means that transit States may sometimes conclude that particular transit activity does not need specific regulation. For example, it might already be covered by national import and export regulations. Feasibility, on the other hand, ‘highlights that many states face practical ... difficulties in exercising effective control over all their territory’. The difficulties may be logistical and commercial, caused by for example long unguarded land borders or a large territorial sea. Such a large volume of goods is transferred by sea all the time that States often simply cannot monitor all transfers due to lack of information and proper vessels; transfers by air, on the other hand, might be hard to regulate effectively unless planes can be forced to land.⁵⁶² Difficulties may also be financial, political or cultural, as a State may lack funds or trained personnel or struggle with corruption among officials. Such issues may make it impossible to exercise rigorous control over arms transfers that pass through the State, whatever the length of its borders.

Article 9 implies that the definition of transit and trans-shipment refers to activities that occur through the territory of a State Party. In common language, territory means ‘[t]he extent of the land belonging to or under the jurisdiction of a ruler, state, or group of people.’⁵⁶³ Under customary in-

⁵⁵⁹ Ibid., ‘jurisdiction, *n.*’, meaning 1. See section 5.1. and subsection 6.1.2.

⁵⁶⁰ See *ibid.*, ‘appropriate, *adj.* and *n.*’, meaning 5; ‘measure, *n.*’, meaning IV.19.a; ‘regulate, *v.*’, meaning 1.a.

⁵⁶¹ See *ibid.*, ‘necessary, *adj.* and *n.*’, meaning A.I.4; ‘feasible, *adj.*’, meaning 1.

⁵⁶² Casey-Maslen, Giacca and Vestner 2013, p. 32.

⁵⁶³ *Oxford English Dictionary Online*, ‘territory, *n.*¹’, meaning 1.b.

international law, the concept is defined more specifically, comprising the land, internal waters, territorial sea and the airspace of a State; areas which are under its territorial sovereignty.⁵⁶⁴

National law stemming from the sovereignty of States, however, is not the only source to follow when regulating the transit of arms. Pursuant to Article 9, appropriate measures must be taken in accordance with relevant international law, which means that international law can affect the minimum level of regulation exercised by States as well as limit their right to exercise territorial sovereignty. The loose criterion of relevancy is repeated here, meaning that the law must have a bearing on or be connected with the matter at hand.⁵⁶⁵ Thus, all customary rules and instruments of international law which have a bearing on the transit of conventional arms must be taken into account.

Through the territorial sea, pursuant to the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS), ships of all States enjoy the right of innocent passage. This means continuous and expeditious navigation without harming the peace, good order or security of the coastal State.⁵⁶⁶ The right also concerns waters which have been enclosed as internal as a result of the establishment of a straight baseline.⁵⁶⁷ It must be kept in mind that while a coastal State must not hamper the right of foreign ships to innocent passage, it nevertheless may adopt laws and regulations that relate to, for example, the prevention of infringement of its customs laws and regulations.⁵⁶⁸

There is no right of innocent passage through the airspace of transit States. Under Article 1 of the 1944 *Convention on International Civil Aviation* (Chicago Convention), States have ‘complete and exclusive sovereignty’ over the airspace above their territory. Nevertheless, civil aircraft not engaged in scheduled international air services have the right to make flights in transit across State territory and also make stops for non-traffic purposes without obtaining prior permission. This right is subject to the right of the State flown over to require landing.⁵⁶⁹

The transit regulation under Article 9 is lax compared to the standard set forth regarding small arms and light weapons in the Firearms Protocol and the UN Programme of Action. The former requires

⁵⁶⁴ Aust 2005, p. 33.

⁵⁶⁵ *Oxford English Dictionary Online*, ‘relevant, *adj.*’, meaning 2.a. See section 4.3. and subsection 2.2.3.

⁵⁶⁶ Arts 17–19.

⁵⁶⁷ Art. 8.

⁵⁶⁸ Arts 24 and 21.

⁵⁶⁹ Arts 1 and 5.

States to establish an effective system of measures on international transit; an obligation which concerns not only firearms but also their parts, components and ammunition.⁵⁷⁰ The latter requires States to draft and implement adequate laws, regulations and administrative procedures to ensure effective control over the transit of SALW.⁵⁷¹ These must include ‘the use of authenticated under-user certificates and effective legal and enforcement measures’,⁵⁷² which is quite stringent and specific in comparison with having to merely take measures to regulate where necessary and feasible. Nevertheless, it must be remembered that the rules set forth in the PoA are not binding, and that both of the mentioned instruments only concern a small part of all conventional arms.

As has been noted, Article 9 leaves the regulation of transit activities to a great extent to the States Parties’ discretion,⁵⁷³ reflecting ‘the principle that exporting states are primarily responsible for the assessment of arms transfers’.⁵⁷⁴ There is a strong emphasis on the sovereignty of transit States to take whatever measures they deem appropriate whenever they desire to regulate arms transfers that pass through their territory. Apart from the prohibitions stemming from Article 6, the obligations of transit States under the ATT could be described as voluntary. At best, they encourage transit States to play a bigger role in the transfer of arms; at worst, they legitimize turning a blind eye to such arms trade that leads to adverse effects in importing States.

6.3. Brokering

As already mentioned regarding Article 2(2), brokering simply means ‘[a]cting as a broker’; a middleman negotiating arms bargains between different companies or individuals.⁵⁷⁵ Brokering activities fall within the ambit of the prohibitions as set forth in Article 6, but they are also dealt with under Article 10:

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). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.

⁵⁷⁰ Art. 10(1).

⁵⁷¹ Section II, para. 12.

⁵⁷² Ibid.

⁵⁷³ Brandes 2013, pp. 422–423.

⁵⁷⁴ Casey-Maslen, Giacca and Vestner 2013, p. 32.

⁵⁷⁵ *Oxford English Dictionary Online*, ‘brokering, *n.*’; ‘broker, *n.*’, meaning II.3.a. See subsection 3.2.3.

The provision on brokering follows the pattern of those before it, especially Article 9. Quite similarly, States Parties are only concerned with brokering under their jurisdiction.⁵⁷⁶ They are also under the diluted obligation not to directly regulate, but to take plans or courses of action to control, govern, or direct brokering, especially by means of regulations or restrictions.⁵⁷⁷ Only the brokering of weapons must be tackled, as ammunition and parts do not fall within the scope of the provision. In comparison with Articles 8(2) and 9, though, measures must always be taken, not just when it is deemed necessary and feasible, or just necessary. This leaves States Parties less chance to argue that certain practical difficulties prevent them from taking measures to regulate brokering.

Taking measures to regulate brokering has to be done pursuant to the national laws, rules⁵⁷⁸ of the State in question. Like under Article 8(1), this phrase could be interpreted in bad faith, claiming that if no national laws exist on brokering there is no obligation to take any measures.⁵⁷⁹ However, a more well-founded interpretation is that the whole regulation process must be conducted in accordance with national laws.⁵⁸⁰ The provision allows both substantive and procedural legislation of each State Party to affect how brokering is dealt with in that State, but nothing necessitates that there actually is such legislation; as a matter of fact, part of the obligation to take measures could include drafting new laws. Taking into account national laws creates flexibility, but it also means that the quality of measures may vary greatly between different States. Furthermore, if a State Party has already taken legislative measures to regulate brokering, it does not necessarily have to do ‘anything more than what it is already doing’;⁵⁸¹ an issue which stems not from the reference to national laws but from the general laxness of the provision.

Article 10 does not oblige States to take certain measures, but these ‘may include’ compulsory registration of brokers or the obtainment of written authorization before engaging in brokering. As has been pointed out, utilizing such measures ‘leads to general oversight of persons and entities engaged in brokering and ... control over who may engage in relevant activities’, at least if brokers are

⁵⁷⁶ See section 5.1.

⁵⁷⁷ *Oxford English Dictionary Online*, ‘measure, *n.*’, meaning IV.19.a; ‘regulate, *v.*’, meaning 1.a.

⁵⁷⁸ *Ibid.*, ‘law, *n.*¹’, meaning I.2.a.

⁵⁷⁹ See Gao 2013, paras 11–12.

⁵⁸⁰ Here, the reference to national laws does not aim to protect interests of commerce and security, since brokering States have no obligation to provide information.

⁵⁸¹ McDonald 2013, Key features of the text, para. 4.

evaluated in the registration process. Authorization also works as a basis for determining the legality and illegality of a broker's activities.⁵⁸² Of course, nothing prevents States from taking more stringent measures within the ambit of the provision, such as subjecting brokers to rigorous criteria and regular audits, or even criminalizing brokering. Practically, though, it is very difficult to prevent brokering altogether.⁵⁸³

All in all, Article 10 sets a rather low standard for States to control brokering; arguably one lower than that set forth in the United Nations Programme of Action.⁵⁸⁴ The PoA requires States '[t]o develop adequate national legislation or administrative procedures regulating the activities of those engage in brokering', which 'should include' certain registration and licensing procedures as well as appropriate penalties for illicit brokering.⁵⁸⁵ This standard is certainly more detailed and concrete than that set forth in the ATT,⁵⁸⁶ although it must always be kept in mind that the PoA is a non-binding instrument⁵⁸⁷ and only deals with SALW.

The Firearms Protocol, on the other hand, is a legally binding instrument. Under Article 15, it obliges States Parties to 'consider establishing a system for regulating ... brokering', which 'could include' certain registration and licensing procedures and transparency. This standard is also more specific than the one under the ATT, but on the other hand, it is far less stringent: States must merely consider, having no obligations whatsoever to even regulate brokering. Thus, while the brokering controls under the Treaty are certainly quite low, they represent a higher standard than that set forth in the only preceding binding instrument.

7. Conclusions

7.1. Wide Coverage and Future Uncertainties

The purpose of this study was to perform a critical jurisprudential analysis of the operational heart of the Arms Trade Treaty, a debated instrument of arms control adopted on the 2nd of April 2013.

⁵⁸² Casey-Maslen, Giacca and Vestner 2013, p. 33.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Section II, para. 14.

⁵⁸⁶ Brandes 2013, p. 423.

⁵⁸⁷ Ibid.; Casey-Maslen, Giacca and Vestner 2013, p. 33.

Taking on the praise and criticism the Treaty has faced, the aim was to objectively assess the scope of the Treaty, the contents of the provisions on prohibitions and export as well as the obligations of States other than exporting ones. The analysis sought to utilize the generally accepted methods of treaty interpretation as set forth in the Vienna Convention of the Law of Treaties, searching for the ordinary meaning of the terms in their context and in the light of the object and purpose of the Treaty. Relevant rules of international law were also consulted in an attempt to clarify the meaning of the concepts that had been established in other instruments or court cases.

The coverage of the scope under Article 2 appears wide in comparison with pre-existing international instruments of arms control. Whereas previously the focus has been on small arms and light weapons as regulated by the Firearms Protocol and the UN Programme of Action, the ATT seeks to encompass all current conventional weapons: battle tanks, armoured vehicles, artillery systems, combat aircraft and helicopters, naval vessels, missile launchers as well as the already mentioned SALW. In comparison with the Wassenaar Arrangement which also concerns all conventional arms, the ATT is a legally binding document, not a loose intergovernmental system based on information exchange. It must also be kept in mind the Treaty encourages States to apply the Treaty to the broadest range of conventional arms, including weapon systems outside Article 2(1).

On the other hand, the critics are right to assert that there are many loopholes in the seemingly wide scope. Although the decision to adhere to relevant UN instruments regarding SALW does not appear problematic, the reference to categories used in the United Nations Register of Conventional Arms regarding major weapons does. The categories emphasize offensive systems, leaving out many important types of defensive and supportive weaponry which are currently in extensive use. This includes at least transport, refuelling, command, control and electronic warfare systems. In particular, the coverage of armoured combat vehicles is very limited due to requirements concerning personnel and weaponry. The descriptions also set forth certain spatial limitations, meaning that the largest artillery systems or smallest warships might be left unregulated.

Regarding newfound and upcoming unmanned and autonomous weapons, the Treaty clearly falls short. While UAVs have recently been included, it is very questionable whether States Parties will apply the Treaty to remote controlled robotic tanks and maritime surface vessels. While such weapons seem futuristic at the moment, this may not be the case after several decades; a development which could render the ATT, if not updated, an outdated instrument. The budding idea of merging

robotics with weapons is unfortunately something the Treaty is not really prepared to face, and significant changes will have to be made if visions of robotic arms systems come true.

An important drawback of the Treaty is the fact that ammunition/munitions as well as parts and components, regulated under Articles 3 and 4, do not completely fall within its ambit. As explained above, the provisions concerning import, transit and brokering do not apply to ammunition and parts. The prohibitions and export assessment—the centrepieces of the Treaty—still do, however, which means that the loophole is not as huge as some may think. Furthermore, if read in good faith and consistently, Articles 3 and 4 leave no room for States to bypass the provisions of the Treaty by trading weapons in pieces and/or separate shipments.

Another part of the scope is the activities which the ATT concerns. In this regard, the Treaty clearly displays wide coverage, taking into account all States that might be involved in arms transfers; exporting, importing and transit States as well as States under whose jurisdiction brokering takes place. An unfortunate detail is the lack of definitions of these concepts, which may create interpretational disagreements. Pursuant to common language, financial and non-financial transactions are equally covered, but as the critics claim, reality might prove otherwise. It must be kept in mind that international movements in which the right to use or ownership is not given away do not fall within the scope of the Treaty; States may move around weapons for their own use without subjecting themselves to self-assessment or regulating measures.

7.2. Pre-Existing and Novel Prohibitions

At the core of the Arms Trade Treaty are the imperative prohibitions set forth in Article 6: States Parties shall not authorize such transfers of arms, ammunition and parts that would violate their obligations under measures adopted by the United Nations Security Council or their relevant international obligations under international agreements to which they are Parties. Furthermore, States shall not authorize arms transfers if they have knowledge at the time of authorization that the arms or items would be used in the commission of certain international crimes. These prohibitions have extensive coverage, since they concern not only exporting States but all States which are involved in the transfers one way or another; all States must be aware of their international obligations.

Although taking an unconditional stand against the arms trade that is contrary to international law, Article 6 sets forth rather few grounds for not authorizing arms transfers; while the prohibitions

certainly represent the core of international law, there are many more wrongs which arms can be used to commit. Furthermore, although the first two prohibitions are technically new in comparison with older instruments, they mainly just reaffirm pre-existing obligations. States are, as it is, under an obligation not to violate resolutions made by the UNSC or the Treaties to which they are Parties. This follows from the fundamental legal principle of *pacta sunt servanda*. Thus, the first two prohibitions do not add much (if anything) to the States Parties' burden.

The third prohibition differs from the first two in this aspect, since it introduces a novel element to international arms control. Drawing upon the prohibitions set forth in international criminal law, the provision requires States to assess the causal link their arms transfers may have with genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks directed against civilians, or other war crimes as defined in international agreements to which the States are Parties to.

The last type of crime may cause some inconsistencies, since not all States might have to take into account all war crimes. But, the true touchstone of the Article will be determining when States have—and when they have no—knowledge that the arms would be used in the commission of the crimes. In this process, the international law concerning the responsibility of States is likely the most viable source. Still, defining the precise standard of 'knowledge' may be impossible, because it is closely related to the factual circumstances of each situation. It is likely that one must assess both the actual awareness of States and the level of awareness that is expected from them.

7.3. A High Threshold

The ATT also takes into account situations where the transfer of arms, ammunition or parts is not forbidden pursuant to the prohibitions under Article 6. In such cases, the exporting State must conduct an assessment in accordance with Article 7; a 'residual' approach which likely stems from the desire to close the gaps of the prohibitions by extending the responsibilities of those States which have the best chances of controlling arms transfers. By this, the ATT clearly differs from the Firearms Protocol and the UN Programme of Action which generally make fewer distinctions between exporters, importers and other parties concerned.

The first purpose of the assessment is to force States to consider whether their export activity would contribute to or undermine peace and security. When read on their own, these concepts are clearly open to subjective interpretations, allowing States to deem their own export as the one promoting

peace or at least security. This study suggests a more contextual approach, viewing the concepts as a part of the UN system of collective security. Since the praxis of the UN contains examples of arms being used both to contribute to and undermine peace and security, the likely effects should be assessed based on UN resolutions case by case. Drawing upon the general trend of the resolutions to create arms embargoes against States in disorder, it is rather safe to assert that, in general, exporting arms to unstable countries builds threat to international peace and security.

The second assessment considers the potential that the exported arms or items could be used to commit or facilitate serious violations of international humanitarian law, serious violations of international human rights law, acts constituting terrorism-related offences or acts of transnational organized crime. This provisions displays a comprehensive approach to the prevention of international criminal activity, since exporting States must take into account both the risk of committing as well as aiding and abetting, instigation and planning and preparation of a multitude of offences; war crimes, human rights violations, terrorist bombings and financing, aviation crimes and participation in an organized criminal group as well as many crimes which such groups are prone to commit.

If either of the two assessments leads an exporting State Party to determine that there is an overriding risk of a negative consequence, the export must not be authorized. This creates rather a high threshold of not authorizing export, as the risk must take precedence over those interests which are deemed legitimate by the Treaty—and there are many such interests. The critics are right to claim that setting the bar at a substantial risk would have made the provision more predictable, since the current phrasing may very well turn out to be a major loophole. This is exacerbated by the fact that States must consider risk mitigating measures which may create a false sense of security instead of improving the States' control over export activities. There is a danger that States will be tempted to override the negative consequences with any imaginable arguments, especially with *ad hoc* views of peace and security.

The assessment must be conducted objectively and without discrimination. The troubling part is that there might be no way of knowing these standards are adhered to, since exporting States Parties may withhold classified information from importing States on the grounds of national legislation or policies. Protection of women and children seems to be part of the assessment, but this is a smokescreen; while such considerations are mandatory, they are not binding. Another worrying detail about the export assessment is the lack of a binding post-authorization obligation to reassess

the export if new relevant information becomes available. The decision to only encourage exporting States to reassess may lead to odd consequences: a State or a non-state group may legitimately acquire arms from the exporter based on old information while another may purchase none since the new assessment displays an overriding risk.

These shortcomings are to be taken seriously, since Article 7 is one of the most central elements of the Treaty. In particular, the practices of States in the interpretation of an ‘overriding risk’ might make or break the whole instrument or at least significantly increase or reduce its worth. As the provision currently stands, it contains risks but also has potential to influence the arms industry and government officials which ultimately put the Treaty into effect; it concerns all export decisions and takes into account many risks associated with arms and related items. Fundamentally, Article 7 represents a novel and promising approach to arms control, creating a useful framework procedure and rightly targeting exporting States which usually play the biggest role in the trade.

7.4. Diluted Obligations

Besides prohibitions set forth under Article 6, the ATT also contains specific Articles regarding the import, transit, trans-shipment and brokering of arms. However, these obligations are diluted in comparison with those of exporters and even those set forth in the Firearms Protocol and the UN Programme of Action on SALW. To begin with, States other than exporting ones are not required to control ammunition and parts, only arms. Furthermore, they need not conduct any sort of an evaluation prior to authorizing a transfer or to even control all transfers; to generalize slightly, they must merely take measures to regulate the activity under their jurisdiction.

Practically, this could mean that States must at least establish some sort of legislation or procedures that allow them to assess arms transfers which take place within their borders; even the most minimalistic measures must enable States to consider whether a transfer triggers one of the prohibitions under the Treaty. But, ultimately the provisions give plenty of room to decide whether to take action or not; importing States must only take measures where necessary and transit States only where necessary and feasible, whereas States involved in brokering may allow national legislation to affect their measures. This represents leniency which might rather easily absolve States from all responsibility other than such that follows from export activity.

The fact that relevant and appropriate information provided by importing States is vital to the export assessment has been explicitly noted in the Treaty, which is an important addition. But, the fact that such information is also vital to assessing the existence of a prohibition under Article 6(3) has been forgotten. The provision on transparency unfortunately also follows the described permissive approach, requiring importing States only to take measures to ensure that the information is provided, which makes it difficult for the international community to ascertain whether hiding relevant information constitutes a breach of the Treaty. This is not the only issue with the provision: national laws are allowed to affect the information sharing process, which may promote secrecy and non-compliance. There is also a major risk that exporting and importing States will co-operate in bad faith, providing and accepting misleading information to legitimize transfers although knowing that the arms will be used for malevolent purposes.

7.5. An Operational Heart? The Final Word

The most central provisions of the Arms Trade Treaty were met with both praise and criticism among the press, the UN and the NGOs as well as the academia. As outlined in the introduction, this study aimed to take these different views into account to produce a critical analysis of the heart of the instrument; to utilize mixed reviews as a catalyst to consider how it might be interpreted. While this method has proved useful, it has perhaps inevitably emphasized the shortcomings and negative aspects of the Treaty text and overlooked its novelty and possibilities. The staunchest critics may often also be the loudest, which can easily distort the big picture.

After all, the scope, prohibitions and export assessment are something newfound in the whole sphere of arms control. As described in section 1.2., the arms industry has so far faced extremely limited constraints which have either focused only on a small fraction of the total arms trade or set forth voluntary reporting measures. The ATT changes this, encompassing a major part of current weaponry and creating binding procedures for States to follow. Although there are shortcomings that may rightly be criticized, the achievements of the Treaty should not be taken for granted.

The Treaty leaves many specific questions unanswered, but it clearly does have an operational heart: it addresses the imperative to follow the resolutions of the UN and binding treaties, and acknowledges and deals with the connection between arms, ammunition and international crimes, serious humanitarian law and human rights violations, terrorism-related offences and acts of trans-

national organized crime. Through this, the Treaty not only draws the line between the acceptable and unacceptable purposes of weapons but also enforces the distinction by compelling States to assess their own export behaviour as well as take measures regarding import, transit and brokering.

As an increasing number of States are ratifying the Arms Trade Treaty, the following years may prove to be interesting times for arms control around the world. With the international community as a witness, the practical effectiveness of the Treaty will be tested. When the attention shifts towards implementation and enforcement, further studies will be necessary to analyse the related provisions and how they are put into effect in the States Parties to the Treaty. Only research based on actual interpretation and implementation by States can determine the true worth of the Treaty—and still, many future uncertainties remain for the decades to come in the form of newfound weaponry and possible shifts in the global trade framework.