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INTERNATIONAL HUMANITARIAN LAW AND GENDER-BASED VIOLENCE IN THE CONTEXT OF THE ARMS TRADE TREATY

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The Arms Trade Treaty (ATT) requires States Parties to consider whether exported arms could be used to commit or facilitate serious acts of gender-based violence (GBV). The purpose of this working paper is to identify serious acts of GBV that amount to serious violations of international humanitarian law (IHL) so as to assist States in conducting the assessments required by Articles 6 and 7 of the Arms Trade Treaty (ATT).

Understanding gender and other diversity factors helps the International Committee of the Red Cross (ICRC) assess people's capabilities and needs, and address the humanitarian consequences of widespread availability and misuse of conventional arms. Against this background, the requirement in the ATT to consider the risk of exported arms being used to commit or facilitate serious acts of GBV or serious acts of violence against women and children is a commendable advance, representing the first time that a treaty links arms transfer decisions to the risk of GBV.

RISK ASSESSMENTS, SERIOUS VIOLATIONS OF IHL AND GENDER-BASED VIOLENCE

IHL is a set of rules that apply in times of armed conflict and that are intended to protect people who are not, or are no longer, taking part in the hostilities, such as civilians and wounded, sick and captured combatants. It also aims to limit suffering by imposing restrictions on the choice of means and methods of warfare.

Violations of IHL are serious – and constitute war crimes – if they endanger protected persons (such as civilians or wounded or captured combatants) or objects (such as civilian homes or infrastructure), or if they breach important values.¹

Article 6(3) of the ATT prohibits a State Party from authorizing any transfer of arms, ammunition, parts or components if, among other things, it knows that the items in question would be used to commit war crimes.² Article 7 states that, if a proposed export is not prohibited under Article 6, the State Party must assess the risk that the arms or other items “could be used to commit or facilitate” serious violations of IHL (Article 7(1)(b)(i)), including serious acts of GBV or serious acts of violence against women and children (Article 7(4)). The State Party must not authorize the export if, after completing its assessment and taking any risk-mitigation measures into account, it determines that there is an “overriding risk”.³

In other words, States Parties have two key duties under the ATT with respect to GBV. First, Article 6 obliges them to consider whether the transferred arms or other items would be used to commit war crimes, including acts of GBV that amount to war crimes. And second, Article 7 requires them to carry out a comprehensive assessment of the risk that exported arms or other items could be used to commit or facilitate serious acts of GBV.

¹ See ICRC, *Customary International Humanitarian Law Study*, explanation of Rule 156: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156, all web addresses accessed March 2019.

² This provision refers to “war crimes as defined by international agreements to which [the State Party] is a party”.

³ Some States Parties interpret the term “overriding” as “substantial” or “clear”, while others consider that an “overriding risk” would exist whenever any of the negative consequences listed in the treaty are more likely to materialize than not, even after mitigation measures are taken into consideration.

This working paper explains what serious acts of GBV amount to serious violations of IHL, in order to assist States in fulfilling these duties.

GENDER-BASED VIOLENCE AS A SERIOUS VIOLATION OF IHL

1. Definition of gender-based violence

While there is no universally accepted definition of “gender-based violence”, the term can be understood to refer to violence against persons, whether male or female, because of their sex and/or socially constructed gender roles.⁴ Likewise, there is no universally accepted definition of the term “gender”.⁵

Yet the obligation, under Article 7(4) of the ATT, to assess risk with regard to GBV remains intact no matter how the State Party in question defines these terms. Indeed, disparities in understandings of definition do not prevent States Parties from conducting the required risk assessments in line with their respective understandings of the term “gender”. Some or all of the indications in this working paper may assist in this regard, across a range of States Parties’ interpretation of the term “gender-based violence” in Article 7(4).

In the sections that follow, we provide examples of serious violations of IHL that involve violence against people because of their sex and/or socially constructed gender role.

2. Sexual violence

It is well-established in international law that rape and other forms of sexual violence – including (but not limited to) sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization – are serious violations of IHL constituting war crimes in both international and non-international armed conflict.⁶

In the ICRC’s view, these acts of sexual violence should be considered to constitute “serious acts of gender-based violence” under Article 7(4) of the ATT.⁷ A number of authorities have affirmed the understanding that acts of sexual violence are both serious violations of IHL and GBV.⁸ For the purpose of clarity, it bears

⁴ This is the definition of “gender-based crimes” given by the International Criminal Court’s (ICC) Office of the Prosecutor in its *Policy Paper on Sexual and Gender-Based Crimes*, The Hague, June 2014, p. 3: <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>. In line with its mandate, the Committee on the Elimination of Discrimination against Women (CEDAW) has also defined GBV against women: see CEDAW, General Recommendation 19, UN Doc. A/47/38, 1992, para. 6, as well as General Recommendation 35, updating General Recommendation 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 1. The Inter-Agency Standing Committee (IASC) has also defined GBV – see IASC, *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing risk, promoting resilience and aiding recovery*, 2015, p. 5.

⁵ Article 7(3) of the Rome Statute of the International Criminal Court (the ICC Statute) defines “gender” as referring to “the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.” Interpretations of this definition differ.

⁶ The ICC Statute establishes these acts of sexual violence as war crimes in Arts 8(2)(b)(xxii) and 8(2)(e)(vi). For a comprehensive overview of the international legal recognition of acts of sexual violence as war crimes, see G. Gaggioli, “Sexual violence in armed conflicts: A violation of international humanitarian and human rights law”, *International Review of the Red Cross* (IRRC), Vol. 96, No. 894, 2014, pp. 503–538, at pp. 526–530: <https://www.icrc.org/en/international-review/article/sexual-violence-armed-conflicts-violation-international-humanitarian>.

⁷ The ICRC’s view that GBV includes sexual violence is set out in C. Lindsey, *Women Facing War Study*, ICRC, Geneva, 2001, pp. 35–36, which states the understanding that GBV is an “overall term, including sexual violence and other types of gender-specific [violence that are] not necessarily sexually-based”: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0798_women_facing_war.pdf

⁸ For example, CEDAW has expressly identified these war crimes as forms of GBV in CEDAW, General Recommendation 35 on gender-based violence against women, updating General Recommendation 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 16. The UN Security Council, in Resolution 1325, identified rape and other forms of sexual violence occurring in situations of armed conflict as GBV and emphasized States’ responsibility to prosecute these war crimes: UN Security Council Resolution 1325, 31 October 2000, paras 10–11.

emphasizing that acts of sexual violence are gender-based, whether they are perpetrated against women, girls, men, or boys.⁹

Generally speaking, sexual violence has been understood to constitute a form of GBV because of the gender-specific causes, manners of perpetration, and/or impacts of these acts.¹⁰ In other words, sexual violence is a form of GBV because, among other reasons:

- **Forms of sexual violence are perpetrated differently against men and women.**¹¹ For example, acts of rape (vaginal or other), mutilation of reproductive organs (breasts, penile, or other), forced pregnancy or forced abortion, or forced perpetration of sexual violence may be directed against and utilized differently depending on whether the victim is male or female;¹²
- **Health consequences of sexual violence differ for men and women.** Unwanted pregnancy and obstetric fistula¹³ are experienced only by women, and acts of violence can affect men's and women's reproductive capabilities in different ways.
- **Causes of sexual violence differ based on gender.** Women may be targeted because of the symbolic power gained from violating the (varied and context-specific) notion of "honour" that society ascribes to them,¹⁴ or in connection with the reproductive roles of women within a community (though the symbolic importance of reproduction can affect men, too) with aim to destroy the identity of a group.¹⁵ Men, meanwhile, may be targeted as a way to humiliate or emasculate them, drawing on entrenched – including internalized – gender norms by which penetration and other forms of domination equate to being "feminized".¹⁶
- **The societal impact of – and the nature of the stigma associated with – sexual violence differs depending on the targeted gender.** Women may be ostracized from their community for their perceived loss of "chastity" or "value" as child-bearers, while men may face stigmas associated with (among others) connotations of subjugation (and corresponding "failure" to fulfill role of "protector") or homosexuality.¹⁷ These impacts in turn differentially impact the ability of survivors to seek support services after experiencing of violence.

⁹ The IASC has emphasized that although the term "gender-based violence" is often used interchangeably with the term "violence against women", men and boys may also be victims of GBV. See IASC, *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies*, September 2005, p. 4.

¹⁰ CEDAW, General Recommendation 35, updating General Recommendation 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 9.

¹¹ Indeed, more broadly, men, children, groups of detainees, or entire communities are subjected to distinct forms of sexual violence: P. Viseur Sellers, "(Re)considering Gender Jurisprudence", in F. Ni Aoláin *et al.* (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, 2018, pp. 211–224, at p. 212.

¹² For a discussion of the forms that sexual violence against men can take, see C. Dolan, "Victims who are men", in F. Ni Aoláin *et al.* (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, 2018, pp. 86–102, at pp. 93–95. See also International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Ranko Cesic*, Case No. IT-95-10/1-S, 2007.

¹³ On the consequences of wartime sexual violence for women's health, see P. DeLargy, "Sexual Violence and Women's Health in War", in *Women & Wars*, C. Cohn (ed.), Polity Press, Cambridge, 2013, pp. 54–79, at pp. 65–69.

¹⁴ A. Barrow, "UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law", *IRRC*, Vol. 92, No. 877, 2010, pp. 221–234.

¹⁵ See notably International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4, Judgment (Trial Chamber), 2 September 1998, paras 731–732.

¹⁶ C. Dolan, "Victims who are men", in F. Ni Aoláin *et al.* (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, 2018, pp. 86–102, at pp. 94–95. H. Durham and K. O'Byrne, "The dialogue of difference: gender perspectives on international humanitarian law", *IRRC*, Vol. 92, No. 877, 2010, pp. 31–52, at p. 48.

¹⁷ H. Durham and K. O'Byrne, "The dialogue of difference: gender perspectives on international humanitarian law", *IRRC*, Vol. 92, No. 877, 2010, pp. 31–52, at p. 48.

3. Other serious acts of gender-based violence

GBV need not be sexual in nature; it is broader than (but includes) sexual violence.¹⁸ Accordingly, serious violations of IHL other than acts of sexual violence may constitute GBV, even if the treaty text of IHL rules uses gender-neutral terms. In these cases, what distinguishes GBV from any other form of violence is not necessarily the type of act itself (for example, killing) but that it is “gender-specific” in that it is committed against an individual because of their sex and/or socially constructed gender role.¹⁹

Two (non-exhaustive) examples of GBV constituting a serious violation of IHL other than sexual violence are set out for illustrative purposes here.

i. Unlawful killings

IHL uses various terms to prohibit what may be referred to as “murder” in common parlance. For instance, the following such acts are serious violations of IHL constituting war crimes: wilful killing, directing attacks against civilians not taking a direct part in hostilities, and violence to life and person of those protected by Common Article 3 of the Geneva Conventions.²⁰

These serious violations of IHL may also constitute GBV in certain circumstances.²¹ For example, in some armed conflicts, military-age males are the victims of mass killings to prevent them from participating in hostilities.²² In some armed conflicts warring parties uphold conflicting norms regulating female behavior, resulting in the contesting of girls’ education and the targeting of girls for attending schools. In some armed conflicts, competing value systems of warring parties precipitate the targeting of individuals because of their sexual orientation (i.e. where this is seen as a representation of the value system of the opposing party). Where these acts are committed in the context of and in connection with an armed conflict, they are therefore both GBV and serious violations of IHL.

ii. Unlawful recruitment and use of children

Acts of unlawful recruitment and unlawful use of children in hostilities are serious violations of IHL constituting war crimes.²³

¹⁸ CEDAW, General Recommendation 35, updating General Recommendation 19, UN Doc. CEDAW/C/CG/35, 14 July 2017, para. 14; ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, The Hague, June 2014, para. 16: <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>

¹⁹ To be clear, such acts of GBV must occur in the context of and in connection with an armed conflict in order to be regulated by IHL. The issue of what constitutes a sufficient connection (often referred to as “nexus”) to armed conflict is discussed with regard to the rules on sexual violence in G. Gaggioli, “Sexual Violence in Armed Conflicts: A violation of IHL and human rights law”, *IRRC*, Vol. 96, No. 894, 2014, pp. 503–538, at 514–517.

²⁰ First Geneva Convention (1949), Art. 50; Second Geneva Convention (1949), Art. 51; Third Geneva Convention (1949), Art. 130; Fourth Geneva Convention (1949), Art. 147; Additional Protocol I (1977), Arts 11 and 85. ICC Statute, Arts 8(2)(a)(i), 8(2)(b)(i), 8(2)(c)(i) and 8(2)(e)(i).

²¹ CEDAW, General Recommendation 30, UN Doc. CEDAW/C/GC/30, 1 November 2013, para. 34; ICC Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, The Hague, June 2014, para. 35: <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>.

²² For further discussion of sex-selective massacres under IHL, see S. Sivakumaran, “How do the Additional Protocols address the issue of sexual and gender-based violence in armed conflict?”, in F. Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, San Remo, 2018, pp.109–115, at pp. 110–111. For a discussion of the ICTY’s Srebrenica jurisprudence addressing the sex-selective killing of men and forcible transfer of women, see P. Viseur Sellers, “(Re)considering Gender Jurisprudence”, in F. Ni Aoláin *et al.* (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, 2018, pp. 211–224, at pp. 217–220.

²³ The term “unlawful” is used here as a shorthand way of conveying the fact that the rules on the recruitment and use of children (e.g. the lawful age of recruitment) vary depending on the treaties to which a State is party. Regarding the criminalization of these acts, see the ICC Statute, Arts 8(2)(b)(xxvi) and (8)(2)(e)(vii); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), Art. 4(2).

Such serious violations of IHL may also constitute gender-based violence in certain circumstances, in particular depending on the roles for which girls and boys are recruited.²⁴ For example – and though not uniformly the case – some parties to a conflict may exclusively recruit boys as fighters, and some may exclusively recruit girls to fulfil more “domestic” roles involving cooking or cleaning (or indeed for conjugal and/or sexual purposes).²⁵ Where girls or boys are differentially and unlawfully recruited or used to fulfil specific gender-based roles within armed forces or armed groups – i.e. when boys are recruited “because they are boys” and girls are recruited “because they are girls” – this is a gender-based serious violation of IHL.

THE USE OF ARMS TO COMMIT OR FACILITATE SERIOUS ACTS OF GENDER-BASED VIOLENCE AMOUNTING TO SERIOUS VIOLATIONS OF IHL

The ATT requires States Parties to consider the risk that transferred arms or other items might be used “in the commission of” (Article 6), or that exported arms could be used “to commit or facilitate” (Article 7), serious violations of IHL (including serious acts of GBV). The connection between the arms other items being transferred and a subsequent serious IHL violation will differ from one set of circumstances to the next. However, it is not hard to foresee situations where a weapon could be used to commit²⁶ or facilitate a serious violation of IHL. Using a weapon to kill military-age males en masse is an example of a weapon being used to commit a serious IHL violation. Using a weapon to force someone into a place where they will be raped is an example of a weapon being used to facilitate a serious IHL violation, a concept that implies a degree of removal from the actual violation.

ASSESSING THE RISK

To help States party to the ATT uphold their commitment to make respect for IHL a key consideration in their arms transfer decisions, the ICRC has identified a series of indicators for assessing the risk that weapons or other items could be used to commit or facilitate serious violations of IHL, including acts of GBV. States Parties should consider, among other things:

- Whether the proposed recipient has complied with IHL and international human rights law in the past, and what steps it has taken to prevent, end or punish serious violations of the rules (including serious acts of GBV or serious acts of violence against women and children that amount to violations);
- What formal commitments the proposed recipient has made to abide by IHL and international human rights law, how it has enshrined those commitments in law and doctrine, and how they are reflected in training for its armed and security forces and other personnel;
- Whether the proposed recipient has sufficiently robust legal, judicial and administrative procedures to prevent, halt and punish violations of IHL and international human rights law.

More information about assessing the risk of serious violations of IHL, as well as a list of information sources relevant to these assessments, can be found in the ICRC’s *Arms Transfer Decisions: Applying International*

²⁴ This is recognized by the ICC Office of the Prosecutor in its *Policy Paper on Sexual and Gender-Based Crimes*, The Hague, June 2014, para. 35: <https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes--june-2014.pdf>. See also S. Sivakumaran, “How do the Additional Protocols address the issue of sexual and gender-based violence in armed conflict?”, in F. Pocar (ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, San Remo, 2018, pp.109–115, at pp. 110–112.

²⁵ C. Chinkin, “Gender and Armed Conflict”, in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, 2015, pp. 675–676.

²⁶ The ICRC considers that the phrases “in the commission of” (Art. 6(3)) and “to commit” (Art. 7(1)) have the same meaning.

Humanitarian Law and International Human Rights Law Criteria, Practical Guide (2016), available in Arabic, Chinese, English, French, Spanish and Russian.²⁷

²⁷ See ICRC, *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria, Practical Guide*, 2nd ed., 2016: <https://www.icrc.org/en/publication/0916-arms-transfer-decisions-applying-international-humanitarian-law-criteria>