

Art.7 Export and Export Assessment

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(p. 244) Article 7. Export and Export Assessment

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;

(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 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.

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.

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.

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.

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.

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.

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.

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Overview

7.01 If a proposed export is not prohibited under Article 6,¹ the exporting state party must, before deciding whether or not to authorize any export of conventional arms, ammunition/munitions, or parts or components within the scope of the Arms Trade Treaty (ATT) (hereafter, arms or items), assess the potential that the export concerned would contribute to or undermine peace and security. Since this assessment is not confined to contributions or threats to *international* peace and security, it extends to what a state party considers a contribution or threat to its own peace and security (and presumably also those of the importing state). If, on balance, and despite any mitigating measures that can be undertaken, it assesses that the export of arms or items *would* undermine peace and security the request for authorization must be denied.

7.02 If, however, the exporting state party determines that the proposed export of arms or items would, overall,² contribute to peace and security, the exporting state party's assessment must then consider, in accordance with Article 7(1)(b), the potential that the arms or items *could* be used to commit or facilitate a serious violation (singular) of international humanitarian law or international human rights law or, as set out in a treaty to which the exporting state is party, an act of terrorism or transnational (p. 246) organized crime.³ The provision states that an exporting state shall refuse

authorization if its assessment concludes that, despite any mitigating measures that can be taken, the risk of any of the negative consequences listed in the ATT is 'overriding'. The use of this term is contentious and it has led to a lack of clarity as to the meaning of the provision.

7.03 Furthermore, the provision as a whole remains contentious since, read in concert with the remainder of Article 7, it appears to allow an export to be lawfully authorized if a state party determines, 'in an objective and non-discriminatory manner', that its effect on peace and security would be more positive than the risk of the negative consequences set out in Article 7(1)(b). The adjudging at national level of this balance could be seen as both a significant practical challenge and a potential weakness in the treaty, insofar as its purpose includes reducing human suffering.⁴

7.04 Factors to take into account in making an 'objective and non-discriminatory' assessment might include the nature, type, and quantity of weapons to be exported, their normal and reasonably foreseeable uses, the general situation in the state of final destination and its surrounding region, the intended end user, actors involved in the export, and the intended route of the export. The reference to Article 8(1) in paragraph 1 of Article 7 obliges national control authorities to take into account information provided by the importing state, thereby including the importing state in the assessment process and promoting an objective and non-discriminatory decision.

7.05 If an authorization is granted, the exporting state party must ensure that it is both 'detailed' and issued 'prior to the export'. It must also provide information about the authorization to the importing state party and to any transit or trans-shipment states parties. Should the exporting state party become 'aware' of 'new relevant information' after an export authorization has been granted (which would potentially have resulted in the authorization not being granted) it is 'encouraged', though not legally obligated, to 'reassess' the authorization. Any decision should normally involve consultation with the importing state.

7.06 As noted in the commentary on Article 2(2) above,⁵ whether 'export' in the ATT covers gifts or free loans was left deliberately ambiguous. On the basis of the duty to apply and implement a treaty in good faith, though,⁶ no state party can evade its obligations under the treaty by simply describing all its transfers of arms or items as 'gifts'. Further, it is clear that Article 7 sets out the conditions under which a state party is required to refuse to permit an *export* of arms or items only, and not their import, brokering, transit, or trans-shipment.

 References

Relationship to Other Provisions

7.07 Article 7, which forms the core of the treaty's export control regime along with the prohibitions on transfer set out in Article 6, has direct relevance for several other provisions in the ATT. As already noted, the article is only relevant if a proposed export has not already been prohibited under Article 6. It covers arms and items as defined in Articles 2 (p. 247) (conventional arms) and 3 (ammunition/munitions) (which are in turn further defined in Article 5(3)), and also applies to integral parts and components in accordance with Article 4. The assessment must take into account information provided by the importing state party in accordance with Article 8. Although neither Article 7 nor Article 11 (on diversion) cross-refers to the other provision, the need to consider the risk of diversion is implicit in the assessment of the potential the arms or items would contribute to or undermine peace and security and could be used in violation of a range of branches of international law.

7.08 Under paragraph 1 of Article 12 (record-keeping) each state party is required to maintain national records of either the authorizations it issues for export of conventional arms or the actual exports and then under Article 13 it must submit annually to the ATT Secretariat a report on such authorized or actual exports covering the preceding calendar year. Finally, Article 23 allows a state signing or adhering to the ATT to declare it will immediately apply Article 7 'provisionally' for the period until it formally becomes party to the treaty.

Preparatory Discussions and Negotiations

7.09 Termed variously 'criteria',⁷ 'parameters',⁸ or 'national assessment'⁹ in draft treaty texts, the title of the provision as adopted ('Export and Export Assessment') was first included as such in the President's Non-Paper of 22 March 2013 (as Article 7). In fact, the notion that the provision related to export and not to other transfer activities was consistent throughout the preparatory discussions and negotiations. There were three main issues to be resolved: the nature and process of the assessment; the criteria of the assessment; and the standard or threshold that required (or strongly encouraged) denial of authorization to export.

7.10 In his summary on parameters of 22 July 2010, the Facilitator appointed by the Chair of the preparatory committee meetings included the following conclusions:

- Some criteria will require assessment of the risk of an adverse impact as a result of the potential transfer, including the degree of risk and the extent of its impact. Proposals referred to a 'substantial' or a 'clear' risk. States noted that the level of risk would closely relate to the parameter in question.
- On information which could inform decisions, proposals included 'relevant information', use of objective sources, or 'discernible patterns of violations' by the relevant actors in a transaction.¹⁰

The Facilitator also described discussions in the first preparatory committee on specific parameters for determining the legality of a proposed export, which included the following:

- Consideration of the potential consequences of an arms transfer, such as adverse impact on internal, regional, and international stability, peace, and security; the provoking or (p. 248) exacerbating of existing tensions or conflict; and the contribution of the transfer to a destabilizing accumulation of arms.
- Consideration of the potential risk of diversion of the arms, including to illicit markets, unintended uses, or unauthorized end users or non-state actors, as well as the risk of re-export.
- Consideration of potential use of the transferred arms to commit breaches of international humanitarian law and human rights, noting that 'these principles are being considered in other fora'. Discussion also focused on whether and how such breaches could be assessed, for example, where they are 'serious and systematic'.
- Consideration of potential illegal use of the transferred arms, including in the commission of crimes against humanity, war crimes, genocide, ethnic cleansing, aggression, terrorist acts, organized crime, violent crime, gender-based crime, and drug-trafficking.
- Consideration of criteria relating to the 'receiving' state, including a potential adverse impact on its disarmament and other international obligations; sustainable economic and social development; defence and security needs; and its ability to employ the transferred arms in accordance with their intended end use.

7.11 A year later, the Chair's Draft Paper of July 2011, tabled during the third preparatory committee meeting, contained many of the elements that would subsequently form the core of Article 7. Under Part B of Section V ('Criteria') it was stipulated that a state party shall not authorize a transfer of conventional arms if there was a substantial risk that those arms would:

1. Be used in a manner that would seriously undermine peace and security or provoke, prolong, or aggravate internal, regional, sub-regional, or international instability.
2. Be used to commit/facilitate serious violations of international humanitarian law.
3. Be used to commit/facilitate serious violations of international human rights law.
4. Be used to commit/facilitate serious violations of international criminal law, including genocide, crimes against humanity, and war crimes.
5. Seriously impair poverty reduction and socio-economic development or seriously hamper the sustainable development of the recipient state.

6. Be diverted to unauthorized use or for use in a manner inconsistent with the principles, goals, and objectives of the treaty, taking into account the risk of corruption.
7. Be used in the commission of transnational organized crime as defined in the United Nations (UN) Convention Against Transnational Organized Crime.
8. Be used to support, encourage, or perpetrate terrorist acts.

Of these proposed criteria, only the fifth, relating to development, would not find its way in any form into the ATT.¹¹

7.12 The draft provision in Section V also required ‘competent national authorities’ of each state party to ‘make assessments ... on an objective and non-discriminatory basis, taking into account information on the nature of the arms to be transferred and risk assessment of the potential use of the weapon and the end-user’. While generally light on detail on the nature of the assessment and almost silent as to its process, this draft provision (p. 249) included one significant element that was not explicitly incorporated in the treaty as adopted, namely the ‘nature’ of the arms to be transferred.¹²

7.13 The draft text submitted to negotiating states by the President of the United Nations Conference on the Arms Trade Treaty on 3 July 2012 was a complex proposal. It reflected the text of the treaty as eventually adopted insofar as one article addressed prohibitions on transfer (Article 5) and a second (Article 6) addressed criteria for export. But draft Article 6 had a rather strangely constructed two-tier structure. The higher level of the hierarchy concerned ‘Potential violations of international law’. Where a state found a substantial risk that the arms to be exported ‘will’ be used to commit or facilitate a serious violation of international criminal, human rights, or humanitarian law (or diverted for the commission of such acts),¹³ there was an ‘overriding presumption against authorization’.¹⁴ If, nonetheless, export was authorized, the exporting state party was required to take ‘appropriate precautionary and preventive measures’ to mitigate the risk.

7.14 The lower tier of the hierarchy concerned ‘Potential consequences of export’. These were defined as: use that would seriously undermine peace and security, or provoke, prolong, or aggravate acts of aggression;¹⁵ use to commit or facilitate acts of transnational organized crime; diversion to unauthorized end users; where the export would be subject to corrupt practices; or where the exported arms would have severely adverse economic impacts within the recipient state that would significantly outweigh the security benefit of the export.¹⁶ According to that draft text, where a substantial risk of any of these ‘consequences’ exists, there shall be a ‘strong presumption’ against authorization.¹⁷

7.15 The bifurcated structure and the consequences for the proposed export set out in the 3 July 2012 draft treaty text changed markedly during the course of the four-week-long United Nations Conference on the Arms Trade Treaty. Indeed, both the tension in the balancing of level of risk and the resultant obligation when the threshold is reached shifted substantively. The July 2012 Draft Arms Trade Treaty, submitted to the Conference on 26 July as the putative ATT that President Moritán expected would be adopted, stipulated in draft Article 4 (‘National Assessment’) that:

1. ... each State Party shall assess whether the proposed export would contribute to or undermine peace and security.
2. ... the State Party shall assess whether the proposed export of conventional arms could:
 - a. be used to commit or facilitate a serious violation of international humanitarian law;
 - b. be used to commit or facilitate a serious violation of international human rights law; or
 - c. be used to commit or facilitate an act constituting an offense under international conventions and protocols relating to terrorism to which the transferring State is a Party.
5. If, after conducting the assessment called for in paragraph 1 and 2 of this article,

and after considering the mitigation measures provided for in paragraph 4 of this article, the State Party finds that there is an overriding risk of any of the consequences under paragraph 2 of this article, the State Party shall not authorize the export.

(p. 250) **7.16** Read in concert with the remainder of the draft provision, paragraph 1 appeared to allow a proposed export to be authorized on the basis that its effect on peace and security would be positive if that 'overrode' the risk of the exported arms or items being used to commit or facilitate a serious violation of international humanitarian or human rights law or certain terrorist acts. The draft paragraph does not mean that the arms themselves would need to be used in a way that contributed to peace and security per se, but could encompass, for instance, a delivery of arms that would equip a state facing an insurgency or a terrorist threat to defend itself, or to deter or ward off an external aggression.

7.17 The meaning of 'overriding' was both contested and contentious during the negotiations. Several states sought to replace it with the term previously employed, 'substantial', or a similar quantitative threshold. At least one influential state, however, wanted the possibility that the notion afforded to be able to provide arms to regimes under pressure or even, in certain cases, to armed non-state actors, the risk of misuse notwithstanding. The risk-mitigation measures in draft Article 4(4) expressly included 'confidence-building measures and jointly developed programmes by the exporting and importing States'. The content of this vague formulation would not be clarified in the ATT as ultimately adopted.

7.18 The July 2012 Draft Arms Trade Treaty did retain the notion of a bifurcated structure that had been part and parcel of the President's Discussion Paper of 3 July 2012, albeit in a different form. Paragraph 6 provided that:

Each State Party, when considering a proposed export of conventional arms under the scope of this Treaty, shall consider taking feasible measures, including joint actions with other States involved in the transfer, to avoid the arms:

- a. being diverted to the illicit market or for unauthorized end use;
- b. being used to commit or facilitate gender-based violence or violence against children;
- c. being used for transnational organized crime;
- d. becoming subject to corrupt practices; or
- e. adversely impacting the development of the importing State.

Thus, the extent of the obligation only required a state party to *consider* taking feasible measures. It could lawfully consider taking such measures and then decide that it did not wish to do so.

7.19 The 'legal scrub' performed by the President of the United Nations Final Conference on the Arms Trade Treaty¹⁸ made little substantive change to the text of the draft article. The one notable change was to clarify that it was the 'conventional arms to be exported' that would contribute to or undermine peace and security rather than just the 'export' as set out in the July 2012 Draft Arms Trade Treaty. This suggests that the nature of the arms is a factor to be taken into account in the assessment. It is not enough to determine that a state needs weapons to be able to defend itself (or others); there must be a definite contribution from the specific weapons proposed for export.

7.20 Efforts to remove the word 'overriding' from the draft treaty text persisted throughout the final diplomatic conference. In the President's final proposal to the Conference, however, the term remained, although in other respects the provision had changed substantively. The content of draft paragraph 6 cited above had disappeared, although only the (p. 251) explicit terms of sub-paragraphs (d) and (e) (corrupt practices and the adverse impact on the development of the importing state, respectively) had been removed from the treaty altogether.¹⁹ Sub-paragraph (a), on diversion, would be significantly expanded into a new provision, Article 11. Sub-paragraph (b), on gender-based violence, would be expanded in scope to cover violence against women. Somewhat bizarrely, however, while it would be part of the assessment, unless the assessment identified consequences that fell within other sub-paragraphs of Article 7(1)(b), it would not require

denial of authorization. Sub-paragraph (c), on transnational organized crime, would be raised in importance, becoming one such consequence that would require denial of authorization.

7.21 Finally, a new paragraph was inserted according to which, if, after an authorization has been granted, an exporting state party is 'encouraged' to reassess the authorization if it 'becomes aware of new relevant information'. Given the potential for a time delay between authorizations being granted and the arms or items actually being exported (which may be months or even a number of years), it is not unreasonable to expect a state party to conduct a reassessment. This is all the more relevant given the limitation in Article 6(3) to knowledge 'at the time of authorization' about impending use in the commission of genocide, crimes against humanity, or certain serious violations of the laws of war. Such violations of international law would fall within either (or in certain instances both) of the sub-paragraphs concerning a serious violation of international humanitarian law and a serious violation of international human rights law.

Commentary

Paragraph 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;
 - (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 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.

7.22 Paragraph 1 of Article 7 describes the nature, subject, and process of the export assessment that must be undertaken by each potentially exporting state party prior to its decision to grant or deny any request for authorization. It does not specify the form of the assessment, nor make explicit who should be involved in it.

(p. 252) If the export is not prohibited under Article 6

7.23 In earlier drafts of the ATT it was arguably implicit that an export assessment would only be undertaken if a proposed export was not already prohibited, on the basis it would violate a binding UN Security Council decision taken under Chapter VII; because it would violate a treaty obligation by the exporting state (e.g., disarmament treaties or the United Nations Charter); or because that state knew that the arms would be used to commit genocide, crimes against humanity, or certain serious violations of the law of war.²⁰ The final text of the paragraph makes it explicit that Article 7 will only be directly relevant once it has been established that a proposed export is not already prohibited by the terms of Article 6.

References

Each Exporting State Party

7.24 The obligations set out in Article 7 are incumbent on each exporting state party. They encompass exports of arms and items covered by the ATT (conventional arms, ammunition/munitions, and integral parts and components, as described and defined in Article 2 to 4 and the other instruments and mechanisms referred to in Article 5) whether by individuals or private corporations falling under its jurisdiction as well as by any state agents. As discussed elsewhere in this commentary, the term export certainly encompasses sale of arms or items; whether it also extends to gifts, loans, and leases is more contentious.²¹ It explicitly does not cover the international movement of conventional arms by, or on behalf of, a state party for its use provided that the arms remain under its ownership.²²

Prior to Authorization

7.25 As one would logically expect, the request for authorization and the subsequent assessment must all take place prior to the decision whether or not to grant or deny the request. Should this not be the sequence of events, and an authorization is granted before an Article 7-compliant assessment is made, this would render the export illicit under international law as well as, possibly, under domestic law.

Pursuant to the National Control System of the Exporting State

7.26 The phrase 'pursuant to' its national control system does not mean that all of the assessment and the assessment process is somehow subordinate to that state's system. Instead, it means that the *form* of the assessment can be determined nationally, at least to the extent that it complies with the provisions of Articles 5 and 7. As described in the commentary on Article 5,²³ the ATT does not articulate in detail the architecture or composition of the system for a state party's national control regime, only that it must have one and that the system must contain a national control list specifying which arms and items are to be regulated by that control regime. Implicitly, though, any effective national control system must require any individual or entity, whether private or public, to seek and receive authorization from it prior to transferring any arms or items on the national control list. The system must enable a state to be in a position to assess objectively each request and to make a principled and consistent decision based on the evidence.

(p. 253) An Objective and Non-Discriminatory Assessment

7.27 Principle 8 of the ATT already calls for the treaty to be implemented in a 'consistent, objective, and non-discriminatory' manner. As the commentary on that principle points out,²⁴ it is unrealistic to expect that states will not consider political factors when they take decisions on arms transfers. Indeed, states remain generally free to choose to whom they sell or transfer arms, and political allegiances may be expected to influence their decision-making. Nonetheless, the obligation to conduct an objective and non-discriminatory assessment requires that each state establish, and consistently apply, detailed guidelines for determining whether proposed arms transfers are lawful or unlawful under the ATT. Of course, these guidelines must comply with the criteria set out in Article 7 of the treaty.

The Duty to Take into Account Relevant Factors in the Assessment

7.28 Arguably, the duty to take into account 'relevant factors' in the export assessment is inherent in the notion of an objective assessment. However, the inclusion of the term is not harmful even though it is not explained what amount to relevant factors (and what would constitute *irrelevant* factors). Factors to take into account in the assessment might include the nature, type, and quantity of weapons to be exported; their normal and reasonably foreseeable uses; the general situation in the state of final destination and its surrounding region; the intended end user, including its record of compliance with international humanitarian law and international human rights law; actors involved in the export; and the intended route of the export.

Information Provided by the Importing State

7.29 Article 8(1) requires an importing state party to take measures to ensure that appropriate and relevant information is provided to the exporting state party to assist in the export assessment

under Article 7. Such measures may include end use or end user documentation. The information is to be provided upon request but pursuant to the importing state party's national laws, giving it the right to maintain certain information confidential, for instance on the basis of national security concerns. Article 7(1) does not explicitly limit the information to importing states that are party to the ATT, although the reference to the provision of information 'in accordance with Article 8(1)' would imply that this is the case. Thus, there is no international legal obligation on states not party to the ATT to provide information to the exporting state party²⁵ (although it may well be in its interest to do so voluntarily).

 References

7.30 The kind of information that the importing state should provide could include the following:

- The intended end use of the weapons (e.g. peacekeeping, border control, other domestic law enforcement, the conduct of hostilities in armed conflict, or domestic sale to private citizens)
- The intended end user within the state and their record of compliance with international humanitarian law (where relevant) and international human rights law (p. 254)
- The quality of training of the armed or security forces that are the intended end user of the arms or items
- Measures in place to prevent their diversion to the illicit market.

Assessing the Potential

7.31 The duty of assessment upon each exporting state party is to assess the potential of certain consequences arising. This assessment of 'something which is possible, as opposed to actual'²⁶ is a form of risk assessment, which is ordinarily explained as 'a systematic process of evaluating the potential risks that may be involved in a projected activity or undertaking'. Depending on the consequences, the assessment may be of the result of the mere delivery of the arms or items and/or their subsequent use. Thus, with respect to the consequences for peace and security, the assessment encompasses consideration of both the consequences of the delivery of the arms or items and of the circumstances and impact of their subsequent use. For the consequences set out in sub-paragraph (b), the formulation is perhaps a little strange ('assess the potential ... that the conventional arms or items *could* be used ... ') insofar as any weapon *could* be used to violate international law. An alternative formulation could have required states to assess the likelihood that a weapon *would* be so used, although this would have weakened the distinction between the two sub-paragraphs (a) and (b) of Article 7(1).²⁷

Would Contribute to or Undermine Peace and Security


7.32 Assessment is of the likelihood of impact of the conventional arms or items on peace and security. As explained below, the use of the word 'would' implies that there must be a high level of probability.²⁸ Suspicion or a vague possibility is therefore not sufficient. As noted above,²⁹ the UN Charter refers to *international* peace and security,³⁰ while Article 7(1)(a) of the ATT refers only to peace and security, which is a considerably broader concept encompassing domestic peace and security concerns. Peace has been explained as 'freedom from civil unrest or disorder'³¹ while security is explained as the 'state or condition of being protected from or not exposed to danger; safety'.³²

 References

7.33 A contribution to peace and security could therefore be a delivery of arms that would equip a state facing an insurgency or a terrorist threat to be able to defend itself, or to deter or ward off external aggression. It could enable a state to seal and control its borders to prevent infiltration by foreign terrorists or organized criminal gangs. It could equip a nation's peacekeepers who will be engaged in promoting peace and security abroad. It could also potentially right an imbalance in the

level of armaments across a region or sub-region. To make a substantially positive contribution, however, the arms or items must themselves be significant in the prevailing circumstances. This might mean that a small shipment of arms or ammunition would be more difficult to justify as a contribution to (p. 255) peace and security as its potential impact would be minimal or even nil. It also means that the nature of the arms being exported is also a 'relevant' factor.

7.34 Undermining peace and security is, logically, the flip side of what amounts to a contribution to peace and security. Thus, for example, providing arms to a state likely to be engaged in future violations of *jus ad bellum*³³ or in wanton oppression of its own people or a national minority³⁴ would be obvious examples of conduct that would undermine peace and security. Providing arms to a state where this would foreseeably lead to a regional arms race would also undermine peace and security as the regional impact is also a 'relevant' factor in the assessment.

 References

Could be Used to Commit or Facilitate

7.35 In contrast to Article 6(3), which demands that the arms would be used in the 'commission of' the relevant crimes, here one need only show that the weapons could be used to 'commit or facilitate' the relevant violations. This means that the weapons may be one or more steps removed from the actual violation. So weapons that could be used to round up people who are later summarily executed with other weapons or by other means would be covered by this provision. Weapons used to guard people detained in an arbitrary way would similarly fall foul of this clause. In the parallel regime of state-to-state complicity, the International Law Commission (ILC) made it clear that the general rule is that assistance will be illegal even if the act would have happened anyway. 'There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act.'³⁵

 References

7.36 Nevertheless with regard to the actual injury suffered (as opposed to the act in violation of international law) it is enough if 'the assistance may have been only an incidental factor in the commission of the primary act, and may have contributed only to a minor degree, if at all, to the injury suffered'.³⁶ In such a case, the assisting state would only have to indemnify the victim to the extent of its own contribution to the harm suffered. Where the assistance is so significant that the violations could not have happened without it, the ILC considers this may mean that the two states share concurrent responsibility with a different sort of liability for the harm suffered.³⁷

7.37 Bearing in mind that states bear responsibility in general international law for facilitating internationally wrongful acts, and that the ILC specifically referred in this context to the fact that 'the General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations',³⁸ we can conclude that the facilitation in this context should involve *a significant contribution to the illegal act even if the assistance only contributed in a minor way to the actual harm suffered*. It would be strange if the new treaty (p. 256) demanded a stricter level of causation than that applicable under general international law already binding on the transferring state.

7.38 In contrast to the previous sub-paragraph (on the contribution to, or undermining of, peace and security) it is necessary to assess the potential that the arms *could* be used to commit or facilitate a violation or offence listed in sub-paragraph (b). One does not need to show that they *would* be so used. Arguably, the practical difference between the two formulations is minimal as in both cases it is a potential that is being assessed. In fact, the choice of different language is not accidental. It implies that the probability that arms would undermine or contribute to peace and security must be high: suspicion or even a firm conviction without evidence are not sufficient.

A Serious Violation of International Humanitarian Law

7.39 In July 2012, at the United Nations Conference on the Arms Trade Treaty, the International Committee of the Red Cross (ICRC) distributed a document explaining that serious violations of international humanitarian law (IHL) cover grave breaches of the 1949 Geneva Conventions³⁹ and 1977 Additional Protocol I, war crimes under Article 8 of the 1998 Rome Statute of the International Criminal Court, and other war crimes in customary IHL.⁴⁰ It would be fair to say that these parameters informed the drafting and there is no reason to doubt that states saw the scope of 'serious violations of IHL' as anything radically different. Nevertheless, as set out in the commentary on Article 6(3), it is important to distinguish the war crimes that are encompassed by the serious violations of IHL and the violations of these rules by states and organized armed groups party to an armed conflict. While there may be specific elements of intent required for certain war crimes which have to be proved before an individual can be convicted, the elements for proving state responsibility will be different as one will not normally need to show intent or some other mens rea on the part of a state.

 References

7.40 After the adoption of the ATT, the ICRC published *Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty*. This booklet explains:

'Serious violation of IHL' is another term for 'war crime' and encompasses grave breaches of the 1949 Geneva Conventions and of Protocol I of 8 June 1977 additional to the Geneva Conventions, as well as the other war crimes listed in the Rome Statute of the International Criminal Court and those defined under customary IHL. Serious violations of IHL include wilful killing, torture or inhuman treatment, taking of hostages, pillage, rape, directing attacks against civilian objects or civilians not taking direct part in hostilities, and directing attacks against hospitals, ambulances, or medical staff using the distinctive emblems of the Geneva Conventions.⁴¹

 References

7.41 For the sake of clarity and completeness we can summarize that such serious violations of IHL include:

- grave breaches as specified under the four 1949 Geneva Conventions (Articles 50, 51, 130, and 147 of Conventions I, II, III, and IV, respectively);
- serious violations of Common Article 3 to the 1949 Geneva Conventions;
- (p. 257) • grave breaches as specified under Additional Protocol I of 1977 (Articles 11 and 85);
- war crimes as specified under Article 8 of the ICC Statute;
- other war crimes in international and non-international armed conflicts under customary law.⁴²

 References

7.42 But the scope of the notion of a serious violation of IHL is broader than the scope of Article 6(3), because there is no limitation here as there is in Article 6(3) to 'war crimes as defined by international agreements' to which the exporting state is a party. As we explained above, the categories of war crimes in the Geneva Conventions, the Additional Protocol, and the ICC Statute are clearly set out. It remains to list here what might fall into the category of other war crimes under international and non-international armed conflict. The ICRC customary study follows the structure of the ICC Statute, adds the grave breaches in Additional Protocol I, and then includes the following list for non-international armed conflicts:⁴³

- using prohibited weapons
- launching an indiscriminate attack resulting in death or injury to civilians, or an attack in

the knowledge that it will cause excessive incidental civilian loss, injury, or damage (or a combination thereof)

- making non-defended localities and demilitarized zones the object of attack
- using human shields
- slavery
- collective punishments
- using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including by impeding relief supplies.

 References

7.43 The key violations worth detailing here concern indiscriminate attacks resulting in death or injury to civilians, and attacks in the knowledge that they would cause excessive incidental civilian loss, injury or damage (disproportionate attacks). The ICRC study details the evidence that such attacks represent war crimes under international law, based on international condemnations, national legislation, and the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY).⁴⁴ In any event we should recall that Article 7(1)(b) does not actually demand that the possible violations be strictly defined as war crimes but rather as a serious violation of IHL. Therefore, even if there may be uncertainty about whether certain IHL violations have created individual duties under international law, there is much less doubt that those violations of the same norms by a state or armed group represent a serious violation of IHL. The war crimes of indiscriminate and disproportionate attacks on civilians just mentioned stem from the customary rules of IHL listed by the ICRC as Rules 11 and 14.⁴⁵

 References

7.44 In contrast to the prosecution of a war crime of indiscriminate attack where one would have to show actual civilian damage, and for a disproportionate attack where one would (p. 258) have to show a level of knowledge and recklessness, Article 7(1)(b) is concerned with possible future indiscriminate or disproportionate deaths. It is therefore misleading to equate the evaluation of the risk of future serious violations of IHL with the elements one must prove to convict an individual of a war crime. It is the underlying rule that is relevant. As long as the primary humanitarian rule constituting the war crime might be violated, one is in the presence of a possible future serious violation of IHL. Moreover, a serious violation of IHL also includes conduct that is not itself criminalized, for example where isolated instances of unlawful conduct, which are not war crimes, are nevertheless of a serious nature; where conduct that is not a war crime takes on a serious nature because of its systematic repetition or the circumstances, and where there are 'global' violations, for instance where a situation, territory, or category of persons or objects is withdrawn from the application of IHL.⁴⁶

 References

7.45 Having determined the parameters of what constitutes a serious violation of IHL we might consider what sort of questions decision-makers will have to ask themselves in assessing the potential that an export could be used to commit or facilitate such a violation. In an earlier publication entitled *Arms Transfer Decisions: Applying International Humanitarian Law Criteria* the ICRC had offered the following suggestion for determining whether arms will be used to commit such violations:⁴⁷

Proposed indicators to assess the risk that transferred arms or military equipment will be used in the commission of serious violations of international humanitarian law

- Whether a recipient which is, or has been, engaged in an armed conflict, has committed serious violations of IHL

- Whether a recipient which is, or has been, engaged in an armed conflict has taken all feasible measures to prevent violations of IHL or cause them to cease, including by punishing those responsible
- Whether the recipient has made a formal commitment to apply the rules of IHL and taken appropriate measures for their implementation
- Whether the recipient country has in place the legal, judicial, and administrative measures necessary for the repression of serious violations of IHL
- Whether the recipient disseminates IHL, in particular to the armed forces and other arms bearers, and has integrated IHL into its military doctrine, manuals, and instructions
- Whether the recipient has taken steps to prevent the recruitment of children into the armed forces or armed groups and their participation in hostilities
- Whether accountable authority structures exist with the capacity and will to ensure respect for IHL
- Whether the arms or military equipment requested are commensurate with the operational requirements and capacities of the stated end user
- Whether the recipient maintains strict and effective control over its arms and military equipment and their further transfer.

7.46 Later in the publication the ICRC states:

An assessment of the risk that transferred weapons will be used to commit violations of humanitarian law should be conducted regardless of whether the recipient is a State or a non-State entity (e.g. a non-State entity authorized to import weapons on a State's behalf, a private military (p. 259) company, or an armed group).⁴⁸ The risk of diversion to recipients other than the stated end-user is an additional reason why a broad risk assessment is required.⁴⁹

This is another reminder that, despite the lack of agreement during the drafting of the ATT over whether to explicitly prohibit arms transfers that may end up in the hands of armed non-state actors, where any export could be used to commit or facilitate a serious violation of IHL by an armed group then that export must be prohibited if this represents an 'overriding' risk according to the terms of Article 7(3). War crimes by armed opposition groups also have to be taken into account when making an Article 7(2) assessment.

7.47 Of course, in order to assess the potential that exported arms or items could be used to commit or facilitate a serious violation of IHL, an exporting state must also determine whether an armed conflict is in progress or is about to break out. There are two types of armed conflict under international criminal law and IHL (without substantive difference definition between these two branches of law): international armed conflict (IAC) and armed conflict of a non-international character (non-international armed conflict or NIAC).


7.48 As noted above,⁵⁰ for an IAC there needs to be a use of force by one state against another, although the threshold is relatively low. The concept also includes foreign military occupation and a declared war between two or more states. For an occupation there need be no actual force used but there has to be an absence of consent on the part of the occupied state.⁵¹ A declaration of war might not involve any force or even an occupation but such declarations with legal effect are today rare. States may deny that they are in a state of IAC but in most cases it will be objectively clear whether or not this is the case.⁵²



References

7.49 Non-international armed conflict is not explicitly defined in any treaty text.⁵³ In accordance with the definition set out by the ICTY Appeals Chamber in the *Tadić* case, though, a NIAC is considered a situation of regular and intense armed violence between the security forces of a state,⁵⁴ especially the army, and one or more organized⁵⁵ non-governmental armed groups. A

NIAC will also occur in a situation of intense armed violence between two or more organized armed groups within a state.⁵⁶ These definitions (p. 260) of NIAC explicitly does not extend to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.⁵⁷

 References

A Serious Violation of International Human Rights Law

7.50 In contrast to the expression 'a serious violation of international humanitarian law', there is less convergence on what constitutes 'a serious violation of international human rights law'. The qualifying word 'serious' can be taken either to indicate the gravity of the violation or the type of human right in question. It is to be assumed that both possibilities arise here. Accordingly, any violation of the right to life or the prohibition of torture would be inherently serious, whereas certain other rights might need to be violated either grossly (such as where physical integrity is harmed or threatened) or consistently or in a widespread manner. This is explained below.

7.51 An arms transfer can potentially affect enjoyment of a range of human rights that are protected by international treaty and, to a certain extent, customary international law, such as the following:

- the right to life (including murder, extrajudicial executions, enforced disappearance, and genocidal killings)
- the right to freedom from torture and other forms of cruel, inhuman, or degrading treatment or punishment
- the rights to liberty and security of person
- the right to freedom from slavery
- the right to freedom of thought, conscience, and religion
- the rights to freedom of assembly and of expression and, potentially,
- the rights to health, education, food, and housing.⁵⁸

7.52 It is clear that acts that violate human rights that are *jus cogens* (peremptory norms of international law) constitute serious violations of international human rights law. Although the precise content of such norms is not agreed in the practice of states, in jurisprudence, or among scholars, one can safely assume that the rights to freedom from torture, slavery, enforced disappearance, and arbitrary deprivation of life belong to this category. As with IHL, a potential causal link must be shown between the arms or items in question and the incidence of a rights violation.

7.53 With respect to rights that are not *jus cogens*, there may be a threshold to cross. Terms such as 'gross', 'gross or systematic', or 'gross and systematic' have been widely used, especially with respect to duties of remedy and reparation.⁵⁹ In the words of one (p. 261) UN-appointed independent expert, the term 'gross human rights violations' has been employed 'not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity'.⁶⁰ Such references include a 'collective' element, in that several victims are involved or abuses occur repeatedly across time or space.

 References

7.54 Criterion two of the 1998 European Union Code of Conduct on Arms Exports (which was made binding on member states in 2008) covers 'serious violations of human rights'. Introducing the parameters that EU member states use to assess violations, the user's guide to the Code of Conduct says:

Violations do not have to be systematic or widespread in order to be considered as

'serious' for the Criterion Two analysis. According to Criterion Two, a major factor in the analysis is whether the competent bodies of the UN,⁶¹ the EU or the Council of Europe have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term 'serious' themselves; it is sufficient that they establish that violations have occurred.⁶²

 References

7.55 It is worth detailing emerging practice in the UN in the context of its human rights due-diligence policy developed in the context of UN support to security forces in the context of peacekeeping. This policy is now integrated into Security Council mandates,⁶³ and, while the definitions only apply for the purposes of implementing this policy, the thrust would appear relevant for a similar assessment of a potential arms export which might be used to commit or facilitate a serious violation of human rights.

 References

7.56 While one could construct a complicated legal explanation of what sort of activity by the UN will lead to complicity in violations of human rights by those that the UN assists, this is not strictly necessary for day-to-day policy-making as the UN has developed its own due-diligence policy in this context. It states that the support given by UN entities to non-UN security forces must be consistent with the organization's purposes and principles under the UN Charter and with its obligations 'under international law to respect, promote and encourage respect for international humanitarian law, human rights and refugee law'.⁶⁴ The actual policy is then explained in part: 'Consistent with these obligations, United Nations support cannot be provided where there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures.'⁶⁵

 References

7.57 The relevant definition is then explained as follows:⁶⁶(p. 262)

'Grave violations' mean, for the purposes of the present policy:

(a) In the case of a unit:

- (i) Commission of 'war crimes' or of 'crimes against humanity', as defined in the Rome Statute of the International Criminal Court, or 'gross violations' of human rights, including summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature, or acts of refoulement under refugee law that are committed on a significant scale or with a significant degree of frequency (that is, they are more than isolated or merely sporadic phenomena); or
- (ii) A pattern of repeated violations of international humanitarian, human rights or refugee law committed by a significant number of members of the unit; or
- (iii) The presence in a senior command position of the unit of one or more officers about whom there are substantial grounds to suspect:
 - Direct responsibility for the commission of 'war crimes', 'gross violations' of human rights or acts of refoulement; or
 - Command responsibility, as defined in the Rome Statute of the International Criminal Court, for the commission of such crimes, violations or acts by those under their command; or

- Failure to take effective measures to prevent, repress, investigate or prosecute other violations of international humanitarian, human rights or refugee law committed on a significant scale by those under their command;

(b) In the case of civilian or military authorities that are directly responsible for the management, administration or command of non-United Nations security forces:

- (i) Commission of grave violations by one or more units under their command;
- (ii) Combined with a failure to take effective measures to investigate and prosecute the violators.

7.58 So a grave violation of human rights is assimilated to a crime against humanity, or alternatively, a 'gross violation of human rights', which *includes* the following: 'summary executions and extrajudicial killings, acts of torture, enforced disappearances, enslavement, rape and sexual violence of a comparable serious nature'. We can see here with the additional category of violations committed by the authorities that the definition is not limited to individual crimes but also to institutional failure to deal with violations committed under their command. It is not necessary to identify a particular perpetrator or a particular commander; grave violations can be committed both by individuals and by civilian or military authorities. In addition where there is the presence of an officer about whom there are substantial grounds to suspect direct responsibility, command responsibility, or failure to take action, this will be considered to trigger the policy of preventing support due to the risk of grave violations.⁶⁷

7.59 This UN policy with regard to assessing the appropriateness of future support is quite a close match to the sort of exercise expected of a prospective arms-exporting state. The UN policy covers 'material support' (which of course could include an arms transfer) and, interestingly, even foresees a clash with the objectives of the overall UN mission. As any such mission involving support to 'security forces' is almost certain to be undertaken with the UN Charter aim of restoring international peace and security, it is worth noting that the due-diligence policy tips the balance in favour of denying support to (p. 263) forces likely to commit grave violations, even where this threatens the UN's mandate. The policy states:

In the peacekeeping context, withholding or withdrawing support in the face of a failure by recipient security forces to comply with the core principles of the policy may significantly diminish the mission's ability to fulfil the overall mandate and objectives set out by the Security Council. Suspension or withdrawal of logistical, material or technical support may, however, become necessary where continued support would implicate the Organization in grave violations of international humanitarian, human rights or refugee law.⁶⁸

 References

7.60 Leaving the UN due-diligence policy we might explore other contexts where the international community distinguishes serious violations of human rights from simple violations of human rights.⁶⁹ In the early days of the UN Commission on Human Rights, states were wary about condemning other states for violations of human rights. The threshold that developed turned on the notion of 'gross and systematic violations' of human rights. Tardu's study examines the term 'consistent pattern of gross violations' based on debates concerning the landmark Economic and Social Council (ECOSOC) Resolutions 1235 and 1503.⁷⁰ These highlighted several quantitative and qualitative characteristics of a 'consistent pattern of gross violations':

- Violations 'cannot easily involve a single victim'
- A number of breaches occur, spread over a period
- 'An element of planning or of sustained will on the part of the perpetrator' must be present
- According to a qualitative test, the violation must inherently have an 'inhuman and degrading character'.⁷¹

(p. 264) In addition, the qualitative test ‘needs to be applied cumulatively or as an alternative to some of the preceding quantitative tests, in order to ascertain the “gross” character of violations’.

 References

7.61 Qualitative evaluation can be further subdivided into analysis of the type of right(s) violated and the nature of the act. A consideration of types of right leads inevitably to the complex and controversial question of whether human rights can or should be ordered hierarchically. In international law, this issue is sharply disputed.⁷² Moreover, its examination necessarily involves an inquiry into the related concepts of *jus cogens*, *erga omnes*, non-derogable, and core rights—each of which is the subject of academic debate and none of which has an agreed identity.⁷³ As Pierre-Marie Dupuy cautions, though, introducing a hierarchy of rights creates a trap because, being based on value judgements, it generates arbitrariness.⁷⁴ Nor is it reconcilable with affirming that rights are indivisible and interdependent.⁷⁵ Yet analysis of treaty texts suggests that, strictly on the basis of agreed international law, ‘some rights are obviously more important than other human rights’.⁷⁶ Though no agreed criteria differentiate ‘higher’ from ‘ordinary’ rights, a widely used approach distinguishes derogable from non-derogable rights.⁷⁷ Drawing on Article 4(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR), Article 15(2) of the 1950 European Convention on Human Rights (ECHR), and Article 27 of the 1969 American Convention on Human Rights (ACHR), non-derogable rights (common to all three treaties) include: the right to life,⁷⁸ the prohibition of slavery, the prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment, and the prohibition of retroactive penal measures.

 References

7.62 This distinction contains weaknesses. If the nature of the right were to determine the ‘seriousness’ of a violation, it might follow that a minor violation of a non-derogable or essential obligation would be considered a ‘serious violation’, whereas a major or sustained breach of a derogable right might not. Such an outcome would not be satisfactory. Recourse to additional criteria is therefore needed. The UN Independent Expert on the Right to Restitution, Compensation, and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Bassiouni, has asserted that ‘the term “gross violations of human rights” has been employed in the United Nations context not to denote a particular category of human rights violations per se, but rather to describe (p. 265) situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity’.⁷⁹

7.63 The nature of the right violated is not the only factor, some suggest, that renders human rights violations gross or grave.⁸⁰ The character of the violation must also be considered. According to Cecilia Medina, personal security provides a clear-cut illustration: ‘The agreement as to massive violations of this right constituting “gross violations” is limited to torture, torture being the most serious manner in which personal security may be violated.’⁸¹ Dinah Shelton defines ‘gross’ violations as ‘those that are particularly serious in nature because of their cruelty or depravity’.⁸² When the character of violations is considered, several treaties provide useful guidance. For example, Article 4(2) of the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment requires each state party to ‘make these offences punishable by appropriate penalties which take into account their grave nature’. Regional instruments on torture and forced disappearance demand that, in addition to recognizing that these are offences in domestic criminal law, a state must punish perpetrators and impose ‘severe penalties that take into account their serious nature’.⁸³ Article III of the 1994 Inter-American Convention on Forced Disappearance of Persons requires that ‘an appropriate punishment commensurate with its extreme gravity’ be imposed.

 References

7.64 The Council of Europe may have considered that mandatory penalization in domestic law is an indicator of the seriousness of a violation. Its *Guidelines on Eradicating Impunity for Serious*

Human Rights Violations state, inter alia, that:

For the purposes of these guidelines, 'serious human rights violations' concern those acts in respect of which states have an obligation under the Convention [ECHR], and in the light of the Court's case-law, to enact criminal law provisions. Such obligations arise in the context of the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of forced labour and slavery (Article 4) and with regard to certain aspects of the right to liberty and security (Article 5(1)) and of the right to respect for private and family life (Article 8).

However, the *Guidelines* also state that '[n]ot all violations of these articles will necessarily reach this threshold'.⁸⁴

 References

7.65 In the run-up to the ATT final negotiations, Amnesty International and the International Action Network on Small Arms (IANSA) produced a document which contained the following passage:⁸⁵

For the purposes of the ATT, 'serious violations' should be assessed against one or both of the following criteria:

Gravity of the violation and the harm suffered: Exporting or transferring states should be required to consider possible violations of any human right, be it civil, cultural, economic, political and (p. 266) social; the severity of impact on the affected individuals should also play a role in determining whether the ATT provisions apply to the transfer. Unlawfully depriving a person of his or her life, subjecting the person to torture or other cruel, inhuman or degrading treatment or punishment, excessive or unnecessary use of force in violation of human rights, imprisoning a person for his or her beliefs, systematic discrimination, subjecting people to slavery-like practices or forced labour, systematically destroying their homes or sources of food, and other violations of comparable gravity should be considered serious by reason of the nature of the harm suffered by the individuals whose rights were violated.

The scale or pervasiveness of the violations: Is there information that indicates/demonstrates a pattern of such violations or abuse? Are the violations persistent or affecting many people? The provision in the ATT to prevent states or individuals from contributing to human rights violations should clearly apply where the violations in question are occurring on a widespread or systematic basis.

7.66 The ILC, for the purposes of its Draft Code of Offences against the Peace and Security of Mankind, took the view that a crime against the peace and security of mankind which attracts individual criminal responsibility is to be considered 'serious'. Thiam, the Rapporteur, reaffirmed that 'seriousness' is a subjective concept and is not 'quantifiable'.⁸⁶ It is to be deduced 'either from the character of the act defined as a crime (cruelty, atrocity, barbarity, etc.), or from the extent of its effects (its nature, when the victims are peoples, populations or ethnic groups), or from the intention of the perpetrator (genocide, etc.)'.⁸⁷ He further stated that the 'seriousness of a transgression is gauged according to the public conscience, that is to say the disapproval it gives rise to, the shock it provokes, the degree of horror it arouses within the national or international community'.⁸⁸

 References

7.67 In the context of its work Article 19 (in earlier drafts of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts) referred to 'serious' breaches of international law. When discussing the draft, those present mentioned examples of international crimes, including a 'serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as [the prohibition of] slavery, genocide, and apartheid'.⁸⁹ Here, the ILC noted two indices: the 'essential importance' of the obligation involved and the

'seriousness' of the breach. In the final version of the Draft Articles, the test of seriousness made its way into Article 40, which states that a breach of a peremptory norm of general international law is serious if it involves a 'gross' or 'systematic' failure by the responsible state to fulfil the relevant obligation.⁹⁰ The full text of Article 40 reads as follows:

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

 **References**

(p. 267) **7.68** The relevant part of the ILC's Commentary further specifies that the word 'serious' 'signifies that a certain order of magnitude of violation is necessary in order not to trivialize the breach' and that 'it is not intended to suggest that any violation of these obligations is not serious or is somehow excusable'.⁹¹ The ILC proposes two criteria to distinguish serious breaches from other breaches. The first concerns the character of the obligation breached (in other words, an obligation deriving from a peremptory norm) and the second the intensity of the violation.⁹² The commentary on the Draft Article provides some examples of the peremptory norms in question, including several drawn from human rights law, such as the right to self-determination and the prohibitions of genocide, racial discrimination, apartheid, and torture. Of greater interest, the ILC's Commentary elaborates on the nature of a serious breach, which, under Article 40(2), involves a 'gross' or 'systematic' failure by the state responsible to fulfil relevant obligations. The Commentary on the article explains this as follows:

To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term 'gross' refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.⁹³

 **References**

7.69 In addition to the two criteria (character of the norm and intensity of the violations), the Commentary suggests that several additional factors may be relevant when examining the 'seriousness' of a violation:

- The intent to violate the norm in question
- The quantum (scope and number) of individual violations
- The gravity of their consequences for the victims (i.e. their impact).

Though paragraph 2 of Article 40 uses the word 'or', the ILC's accompanying Commentary states that serious breaches are 'usually' both systematic and gross. The ILC's definition of a 'serious' breach arises in the context of breaches of peremptory norms and therefore concentrates on the nature of the violation rather than the character of the obligation violated.

Violations by Armed Non-State Actors

7.70 We turn now to the question of whether the phrase 'a serious violation of international human rights law' can cover the behaviour of a non-state actor. Given that there is certainly a clear prohibition on transferring arms to non-state actors where they would be used for the acts listed in

Article 6(3), and that potential serious violations of IHL are covered by the previous clause related to a serious violation of IHL in Article 7(1)(b)(i), it would be odd if arms transfers would be scrutinized for potential to commit or facilitate a violation of international human rights law by the government's police and security (p. 268) forces but not by the armed groups they were opposed by. The issue has to be addressed here because of a long-running doctrinal debate over whether human rights obligations extend to non-state actors.⁹⁴

7.71 The resistance to including non-state actors as possible bearers of human rights obligations and therefore possible human rights violators stems at one level from a legal analysis which focuses on the fact that human rights treaties are ratified by states and not by armed groups. And at another level resistance can be traced to a political reticence to allow a seeming 'recognition' of armed groups by treating them as if they were states subject to international human rights obligations. The fact that such groups are undoubtedly said to be bound by IHL only exacerbates the controversy as it highlights for some a need to keep IHL and human rights separate.

7.72 For present purposes we can assume that armed non-state actors (or non-state actors seeking arms) are covered by this provision. This is for three main reasons. First, the ATT at this point is not referring to human rights treaties but rather to international human rights law. Even cautious commentators, for some time, have accepted that armed groups can be bound by human rights law (even if they are not directly accountable to the bodies set up to monitor compliance by states with their treaty obligations). Application 'in principle' of human rights *treaties* to non-state actors has been recognized by Greenwood who writes:

The obligations created by international humanitarian law apply not just to states but to individuals and to non-state actors such as a rebel faction or secessionist movement in a civil war. The application to non-state actors of human rights treaties is more problematic and even if they may be regarded as applicable in principle, the enforcement machinery created by human rights treaties can normally be invoked only in proceedings against a state.⁹⁵

7.73 Second, for some time various parts of the UN human rights monitoring apparatus have been reporting on human rights violations committed by armed groups. In some cases this has been linked to treaty obligations. The International Commission of Inquiry on Syria concluded in 2013 that 'Anti-Government armed groups are also responsible for using children under the age of 18 in hostilities in violation of the CRC-OPAC, which by its terms applies to non-State actors.' The summary makes the same point: 'Both Government-affiliated militia and anti-Government armed groups were found to have violated the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, to which the Syrian Arab Republic is a party.'⁹⁶ Such direct invocation of a treaty provision is, however, unusual, and for the most part the UN operations, special rapporteurs, and commissions of inquiry have presented this as a question of customary international law or *jus cogens*.⁹⁷ A more recent statement (and perhaps the clearest) has come in the context of the UN report on South Sudan:

The most basic human rights obligations, in particular those emanating from peremptory international law (*jus cogens*) bind both the State and armed opposition groups in times of peace and (p. 269) during armed conflict. In particular, international human rights law requires States, armed groups and others to respect the prohibitions of extrajudicial killing, maiming, torture, cruel inhuman or degrading treatment or punishment, enforced disappearance, rape, other conflict related sexual violence, sexual and other forms of slavery, the recruitment and use of children in hostilities, arbitrary detention as well as of any violations that amount to war crimes, crimes against humanity, or genocide.⁹⁸

References

7.74 Third, the Security Council has developed procedures for monitoring 'grave violations' of children's rights by armed non-state actors. Reports by the UN Secretary-General to the Security Council on certain country situations now list the non-state actors concerned and whether or not they are involved in any of six categories of 'grave violations':

- (a) killing or maiming of children
- (b) recruiting or using child soldiers
- (c) attacks against schools or hospitals
- (d) rape or other grave sexual violence against children
- (e) abduction of children
- (f) denial of humanitarian access for children.

7.75 The UN Secretary-General's initial report explains that these violations are based on international norms, and commitments that have been made by the parties to the conflict, as well as national laws and peace agreements.⁹⁹ Subsequent reports on various country situations have detailed the 'grave violations of children's rights' committed by the non-state actors concerned. These reports dedicate as much, if not more, space to the violations committed by the non-state actors, as they do to addressing the states concerned.¹⁰⁰ Although the focus started with recruitment, the Security Council has now requested the Secretary-General to include in his reports 'those parties to armed conflict that engage, in contravention of applicable international law, in patterns of killing and maiming of children and/or rape and other sexual violence against children, in situations of armed conflict'.¹⁰¹

 References

7.76 The mechanism vis-à-vis the non-state actor works not only through naming and shaming, but by encouraging the non-state actor to submit an 'action plan' to the Security Council. In this way the group can be removed from the list of violators. The Security Council also has in mind that it could adopt 'country-specific resolutions, targeted and graduated measures, such as, inter alia, a ban on the export and supply of small arms and light weapons and of other military equipment and on military assistance, against parties to situations of armed conflict which are on the Security Council's agenda and are in violation of applicable international law relating to the rights and protection of children in armed conflict'.¹⁰²

 References

(p. 270) Conclusions

7.77 Based on the discussion above, it is possible to draw a number of conclusions. Definitions based on *enumeration* are not without problems. A first obvious danger is that enumeration is bound to be less than exhaustive and risks omitting emerging concerns. For example, it is only recently that sexual violence has been given greater priority on the human rights agenda. Second, such distinctions have in the past been based on ideological or political differences. It is far from clear, for instance, that the distinction in the 1993 Vienna Declaration and Programme of Action between *obstacles* to the achievement of economic, social, and cultural rights and *violations* of civil and political rights would be acceptable today. Both the ICCPR and the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) now have Optional Protocols that allow for individual complaints about *violations* of the rights contained in the treaties.¹⁰³ The more recent Protocol on Economic, Social, and Cultural Rights includes an additional inquiry procedure where the Committee receives reliable conformation concerning 'grave or systematic violations'.¹⁰⁴

 References

7.78 Definitions based on enumeration have a third major problem. Some lists include standards whose violation could be said to be inherently serious, such as slavery, torture, and forced deportation. Crimes such as genocide, apartheid, and crimes against humanity have been granted a distinctive standing precisely because of their inherent gross and systematic character.¹⁰⁵ But these categories should not be taken to preclude other violations from being considered serious: we have already mentioned sexual violence, but using these traditional lists also overlooks

phenomena such as enforced disappearances, extrajudicial executions, and starvation.

7.79 With respect to definitions based on *criteria*, it is clear that the *quality* of the violations is the cardinal reference: this represents the starting point for understanding what constitutes a serious violation. The work of ILC Rapporteur Thiam is helpful for understanding appropriate elements of seriousness: intent, scope, consequences for victims, and the shocking effect. While the ILC's seriousness test for state responsibility operates in the context of the duties of states to react to past serious violations, the ATT is concerned with a future violation and so there should be no need to show a gross or systematic failure by the state.

7.80 As the paper from Amnesty International and IANSA (cited above) demonstrates, the better approach is to look at the relevant phenomena: arbitrary deprivation of life, and liberty, excessive use of force, torture, inhuman or degrading treatment or punishment, denial of housing and food. Developing lists based on the categories of non-derogable rights, *jus cogens* rights, or rights giving rise to criminal law obligations will fail to capture the modern-day nature of the concept of 'a serious violation of human rights'. A wide range of rights are involved, including to life, to liberty and security, to assembly, to housing, to food, and to education; and the rights to be free from torture, from inhumane or degrading treatment (including sexual violence), forced labour, slavery, and discrimination.

(p. 271) **7.81** Determining whether a future violation can be classed as a serious violation for the purposes of the ATT should therefore depend less on the type of right or actor involved, and more on the level of the harm to the victim. There is no sense in equating 'serious' with 'gross and systematic' violations of human rights as this would imply a policy and the prospect of crimes against humanity. Any prospective transfer of arms that would lead to crimes against humanity is first and foremost to be dealt with under the rule set out in Article 6(3).

7.82 Finally, as to sources of information relating to a possible serious violation of IHL and/or international human rights law, a range of reliable institutions and experts exist. These include the following:

- Concluding observations relating to a state party to a human rights treaty by the relevant UN treaty body (e.g. the Human Rights Committee for the ICCPR; ¹⁰⁶ the Committee on Economic, Social or Cultural Rights for the ICESCR; ¹⁰⁷ the Committee against Torture for CAT; ¹⁰⁸ the Committee on the Rights of the Child for the 1989 Convention on the Rights of the Child; ¹⁰⁹ and the Committee on the Elimination of Discrimination against Women for the 1979 Convention on the Elimination of All Forms of Discrimination against Women) ¹¹⁰
- Reports of Special Procedures of the Human Rights Council (e.g. the country-specific mandates and thematic working groups, independent experts, and special rapporteurs, ¹¹¹ such as the Special Rapporteur on extrajudicial, summary or arbitrary executions; ¹¹² the Special Rapporteur on freedom from torture and other forms of cruel, inhuman, or degrading treatment or punishment; ¹¹³ and the Special Rapporteur on contemporary forms of slavery, including its causes and consequences) ¹¹⁴
- Reports of Commissions of Inquiry, particularly those established by the Human Rights Council, such as for Syria (ongoing as of writing) ¹¹⁵
- Reports by UN missions, such as on the protection of civilians (the annual and bi-annual reports of the UN Assistance Mission in Afghanistan are a particularly good example) ¹¹⁶
- Documentation in the Universal Periodic Review process undertaken under the auspices of the Human Rights Council ¹¹⁷
- Reports on specific countries or situations by independent human rights NGOs, such as Amnesty International ¹¹⁸ or Human Rights Watch. ¹¹⁹

 References

(p. 272) Commit or Facilitate an Act of Terrorism

7.83 Sub-paragraph (iii) covers acts, committed by means of a conventional arm or item covered by the ATT¹²⁰ and provided by the exporting state, which would constitute an offence under a

treaty relating to terrorism to which the exporting state is party. Of particular importance in this regard would be the 1997 Terrorist Bombings Convention.¹²¹ Under Article 2(1) of that Convention:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

- (a) With the intent to cause death or serious bodily injury; or
- (b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

 References

7.84 However, under Article 19(2), the acts of armed forces *in bello* (i.e. in a situation of armed conflict) and certain acts covered by international human rights law undertaken by a state's armed forces are explicitly excluded from the purview of the Convention:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

 References

Commit or Facilitate Transnational Organized Crime

7.85 Sub-paragraph (iv) refers to acts that constitute an offence under international conventions or protocols relating to transnational organized crime to which the exporting state is a party. Relevant international instruments are the UN Convention against Transnational Organized Crime (often called the Palermo Convention) and its related Protocols. The acts covered are: serious crimes; participation in an organized criminal group; laundering of the proceeds of crimes and corruption;¹²² trafficking in persons;¹²³ smuggling of migrants;¹²⁴ and illicit manufacturing and trafficking in firearms.¹²⁵

 References

7.86 This provision differs to that in Article 6(2) as in that provision it is the transfer itself that is the act that constitutes the offence,¹²⁶ whereas in sub-paragraph (iv) of Article 7(1)(b) the exporting state is assessing the potential that the arms or items will be used (p. 273) *after* they have been exported to commit an act that amounts to transnational organized crime. Such an act is one that fulfils five cumulative criteria:

- It is a '**serious crime**', meaning conduct constituting an offence punishable by up to at least four years' imprisonment.¹²⁷
- The **offence is transnational** in nature, meaning it is committed in more than one state; or it is committed in one state but a substantial part of its preparation, planning, direction, or control takes place in another; it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or it is committed in one state but has substantial effects in another.¹²⁸
- It involves an '**organized criminal group**', meaning a structured group of three or more, acting in concert with the aim of committing one or more serious crimes under the Palermo Convention, in order to obtain, directly or indirectly, a financial or other material benefit.¹²⁹
- It concerns one of the following crimes:

- Agreeing with one or more others to commit a serious crime for financial or other material benefit ¹³⁰
 - Conduct by someone with knowledge of the aim and general criminal activity of an organized criminal group or its intent to commit certain crimes, actively participates in the criminal activities of the group or its other activities, knowing that participation will contribute to achieving the criminal aim ¹³¹
 - Organizing, directing, aiding, abetting, facilitating, or counselling a serious crime involving an organized criminal group ¹³²
 - The offer or giving to a public official, ¹³³ directly or indirectly, of an undue advantage, for him/her or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties ¹³⁴
 - The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for him/her or another person or entity, in order that the official act, or refrain from acting, in the exercise of his/her official duties ¹³⁵
 - Use of physical force, threats, or intimidation or the offer or giving of an undue advantage to induce false testimony or to interfere in testimony or production of evidence in a proceeding relating to offences in the Palermo Convention ¹³⁶
 - Use of physical force, threats, or intimidation to interfere with official duties by a justice or law enforcement official in relation to offences in the Palermo Convention. ¹³⁷
- The exporting state is party to the relevant treaty that establishes the offence, such as the Palermo Convention or one of its protocols.

References

(p. 274) **7.87** Thus, the transfer of arms or items that could be used to commit or facilitate a serious crime by an organized criminal group, such as drugs, arms, or people smuggling, piracy, bribery of state officials, or witness intimidation, could all be covered by sub-paragraph (iv). It does not appear, though, that if the export were itself subject to corrupt practices this would be caught by the provision as the arms could not be said to be ‘used’ to commit or facilitate a serious crime. One must understand use for the purpose of Article 7(1)(b) as, among other things, the discharge of a firearm, the firing of a bullet, or the launching, firing, or dropping of another weapon, such as a rocket or bomb.

Paragraph 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.

7.88 As part of their export assessment, having examined the criteria under Paragraph 1, national control authorities must consider whether appropriate measures could be undertaken to mitigate risks they identify that exported weapons might be used to violate international law. In so doing, states parties are free to decide whether they act and what they do. Numerous measures are theoretically available to them, though in practice the choices of an exporting state will often be constrained by its resources. Certain measures require co-operation between the exporting and importing state, which is reflected in the reference to confidence-building measures and jointly developed or agreed programmes. Since risk-mitigation measures may lead to a positive export assessment, they are usually in the interest of both exporting and importing states. However, they may be perceived by an importing state as interference in its domestic affairs.

7.89 Specific examples of risk-mitigation measures 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 IHL. These examples indicate the presence of two different approaches to risk mitigation. Some measures take the form of systematic due diligence (e.g. end user certificates), while others reduce a specific risk (capacity-building projects). With the latter, a challenge remains that considerable time will often elapse between an export assessment, the execution of mitigation measures, and their practical effects. When evaluating the legality of a proposed export, the impact of risk-mitigation measures must therefore be assessed cautiously.

Paragraph 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.

7.90 Paragraph 3 is central to Article 7 (and the controversy surrounding it) because it addresses the point of decision. Having conducted steps one and two (risk assessment and mitigation), national control authorities must determine whether the risks that have been identified can be mitigated sufficiently to make them less than ‘overriding’. The (p. 275) formulation ‘if ... the exporting state party determines’ clearly grants significant discretion to exporting states parties but, in accordance with the principle of good faith in the implementation (‘performance’) of all treaties,¹³⁸ their decisions must be reasonable and should certainly not be manifestly unfounded.

References

7.91 The text of paragraph 3 states that, if an ‘overriding risk’ of negative consequences exists (as detailed in paragraphs 1(a) and (b)), namely consequences that are greater than is any contribution by the exported arms and items would make to peace and security, the state party shall not authorize the export. While the legal consequence of ‘shall not authorize’ is clear, the meaning of ‘overriding risk’ is not self-evident, and it is not a clear or established concept in international law. The *Oxford English Dictionary* defines the verb ‘override’ as ‘to be more important than’, and ‘overriding’ as ‘more important than any other considerations’. Arguably, this implies that a national control authority must balance the predictable positive and negative consequences of arms exports (provided the risk is not one that is already prohibited under Article 6(2) or 6(3)).

7.92 During the negotiations, persistent attempts were made by certain states to replace ‘overriding’ by ‘substantial’ or an adjective with a similar meaning, in order to avoid balancing and create a clear red line defined by the negative consequences set out in paragraph 1. These attempts were unsuccessful. The term has been translated in the French version of the ATT as ‘prépondérant’ (predominant, overriding) and, similarly, in the Spanish version as ‘preponderante’. That said, states parties may still interpret the provision broadly, applying absolute rather than relative concepts. Addressing the General Assembly after the ATT’s adoption, New Zealand stated that it would interpret ‘the concept of “overriding” risk’ as a ‘substantial’ risk, for example. Other suggestions for the meaning of the term ‘overriding’ are that it means ‘more likely than not’.

7.93 The reasoning behind this controversial concept is that sometimes the expected positive effects of arms transfers, coupled with the effect of any relevant and available risk-mitigation measures, may outweigh their possible misuses (as outlined in paragraph 1). Examples would include assisting people to defend themselves against genocide or crimes against humanity, or to exercise their right to self-determination when attacked by an oppressive state. However, as Andrew Clapham has cautioned: ‘Such reasoning comes very close to consequentialist reasoning claiming that the “end justifies the means”’. In turn this flies in the face of the theory and practice of human rights.¹³⁹

7.94 When ratifying the ATT, New Zealand affirmed that it ‘considers the effect of the term “overriding risk” in Article 7(3) is to require that it decline to authorize any export where it is

determined that there is a substantial risk of any of the negative consequences in Article 7(1).¹⁴⁰ Upon its ratification of the treaty, Switzerland declared its understanding that the term 'encompasses, in the light of the object and purpose of this Treaty and in accordance with the ordinary meaning of all equally authentic language versions of this term in this Treaty, an obligation not to authorize the export whenever the State Party concerned determines that any of the negative consequences set out paragraph 1 are more likely to materialize than not, even after the expected effect of any mitigating measures (p. 276) has been considered'.¹⁴¹ Liechtenstein similarly declared that the term 'overriding risk' 'encompasses ... an obligation not to authorize the export whenever the state party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered'.¹⁴² These are relevant instances of state practice.¹⁴³ Further, the ATT Monitor argues that '[s]etting a specific magnitude or threshold to measure "overriding risk", such as "substantial risk" or "clear risk" could allow for a more tangible and consistent application between States Parties'.¹⁴⁴ That is certainly true, but is more of a policy than a legal argument.

7.95 The ATT Monitor acknowledges that there are other interpretations of the term 'overriding'. It cites Amnesty International's description of the operation of Article 7 as follows:

Ultimately, for an export to be authorized ... the exporting State is first required to demonstrate in a clear and identifiable way that the export would make a positive contribution to peace and security in lawful manner. The exporting state must also demonstrate that any potential negative consequences identified in the risk assessment ... will not be so grave and likely as to override that positive contribution.¹⁴⁵

According to this interpretation an exporting state party is required to determine whether there is an overriding risk of any of the *negative* consequences in paragraph 1. If there were no balancing, and it was a question only of the substantive threshold of potential harm, there would be no need for the inclusion of the notion of a contribution to peace and security. It is clear, however, that the language is sufficiently unclear and ambiguous that if enough states maintain their interpretation that an absolute 'shall not authorize' obligation exists once a sufficient threshold of risk is attained this might, in time, become the authoritative interpretation of the provision.

Paragraph 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.

7.96 Paragraph 4 requires that the assessment conducted in accordance with paragraph 1 take into account the risk that the arms or items will be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. If any of these acts fall within the criteria in one or more of the four sub-paragraphs of (p. 277) Article 7(1)(b) then the procedure laid down in paragraphs (2) and (3) must be followed by the exporting state party.

7.97 A reference to gender-based violence was included in the preamble of the President's Discussion Paper of 3 July 2012 submitted to the United Nations Conference on the Arms Trade Treaty. During the Conference a number of delegations called for gender-based violence to be included as a specific criterion in the export assessment. Other delegations, notably the Holy See¹⁴⁶ and states from the Middle East and North Africa, opposed this. As we saw above, the July 2012 Draft Arms Trade Treaty, submitted to the Conference at the end of the negotiations, would have required a state party considering a proposed export of conventional arms to 'consider taking feasible measures ... to avoid the arms: ... b. being used to commit or facilitate gender-based violence or violence against children'.¹⁴⁷

7.98 At the United Nations Final Conference on the Arms Trade Treaty, the preamble of the President's Non-Paper of 22 March 2013 recognized 'that acts of gender based violence may constitute violations of international humanitarian law and human rights law'.¹⁴⁸ A similar provision

to that incorporated in the July 2012 Draft Arms Trade Treaty would have obliged each exporting state party to 'consider taking measures ... to reduce the likelihood of the conventional arms: ... (b) being used to commit or facilitate gender based violence, or violence against civilians particularly women and children'.¹⁴⁹

7.99 But with no consensus existing among negotiating states on the inclusion of the criterion, the President of the Conference incorporated in the treaty text a slightly messy compromise. According to the text of Article 7 as adopted, the export assessment must specifically take account of the risk that arms or items will be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. However, there will only be binding consequences for the transfer if such acts would also amount to a serious violation of international humanitarian or human rights law, or a transnational organized crime or an act of terrorism, as specified in sub-paragraphs (i) to (iv) of Article 7(1)(b).

Gender-Based Violence

7.100 According to the Inter-Agency Standing Committee (IASC)'s Guidelines for Gender-based Violence Interventions in Humanitarian Settings, gender-based violence¹⁵⁰ is 'an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed (gender) differences between males and females'.¹⁵¹ As the IASC has observed:

[t]he term 'gender-based violence' is often used interchangeably with the term 'violence against women.' The term highlights the gender dimension of these types of acts; in other words, the relationship between females' subordinate status in society and their increased vulnerability to (p. 278) violence. It is important to note, however, that men and boys may also be victims of gender-based violence, especially sexual violence.¹⁵²

In its Resolution 2106 (2013) on women, peace, and security, the UN Security Council expressly noted that 'sexual violence in armed conflict and post-conflict situations disproportionately affects women and girls, as well as groups that are particularly vulnerable or may be specifically targeted, while also affecting men and boys and those secondarily traumatized as forced witnesses of sexual violence against family members'.¹⁵³ The resolution noted 'the provision in the Arms Trade Treaty that exporting States Parties shall take into account the risk of covered conventional arms or items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children'.¹⁵⁴

References

7.101 According to Freedom House, an international human rights non-governmental organization (NGO):

Lesbian, gay, bisexual, transgender and intersex (LGBTI) people around the world face discrimination, persecution and violence simply for expressing who they are and choose to love. Consensual same-sex conduct is criminalized in more than 70 countries, with punishment including fines, flogging, and imprisonment and in seven countries, the death penalty. Laws that treat LGBTI people as criminals dehumanize them, reinforce stigma and prejudice, and provide legal cover for serious human rights violations. LGBTI people are targets for torture or ill-treatment by the government not only for their political beliefs or activism but also for their identity.¹⁵⁵

7.102 Freedom House further state that: 'For many, violence begins at home, in the classrooms and halls of schools, at the workplace, and in the streets. Lesbians, in particular, are the victims of grave human rights violations, including "corrective rape", forced pregnancy, and "honour killing", not only because of their sexual orientation but also because of their gender.'¹⁵⁶

7.103 The NGO Reaching Critical Will affirms that gender-based violence:

is violence that is directed at a person based on her or his specific sex or gender role in society. It is linked to the gendered identity of being a woman, man, intersex, transsexual,

or transgendered. The term GBV recognises that violence takes place as a result of unequal power relations and discrimination in society on the basis of one's sex or gender.

Such gender-based violence can be grouped into these four categories:

- **Sexual violence:** Sexual harassment, rape, forced prostitution, sexual violence during conflict, and harmful customary or traditional practices such as female genital mutilation, forced marriages, and honour crimes.
- **Physical violence:** Physical assault, domestic violence, human trafficking and slavery, forced sterilization, forced abortion.
- (p. 279) • **Emotional and psychological violence:** Abuse, humiliation, and confinement.
- **Socio-economic violence:** Discrimination and/or denial of opportunities and services; prevention of the exercise and enjoyment of civil, social, economic, cultural, and political rights.¹⁵⁷

7.104 In her annual report to the Human Rights Council in 2011, the UN High Commissioner for Human Rights stated that:

The application of international human rights law is guided by the principles of universality and non-discrimination enshrined in article 1 of the Universal Declaration of Human Rights, which states that 'all human beings are born free and equal in dignity and rights'. All people, including lesbian, gay, bisexual and transgender (LGBT) persons, are entitled to enjoy the protections provided for by international human rights law, including in respect of rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.¹⁵⁸

7.105 She further observed that: 'Homophobic and transphobic violence has been recorded in all regions. Such violence may be physical (including murder, beatings, kidnappings, rape and sexual assault) or psychological (including threats, coercion and arbitrary deprivations of liberty). These attacks constitute a form of gender-based violence, driven by a desire to punish those seen as defying gender norms.'¹⁵⁹

7.106 In a 2010 resolution, the Council of Europe's Parliamentary Assembly called on member states to 'recognize that lesbian, bisexual and transgender women face an increased risk of gender-based violence (in particular rape, sexual violence and harassment, as well as forced marriages) and provide protection commensurate with the increased risk'.¹⁶⁰ In Africa, in 2014 the African Commission on Human and Peoples' Rights adopted a resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity in which it condemned 'the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and (p. 280) other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity'.¹⁶¹ The resolution strongly urged states:

to end all acts of violence and abuse, whether committed by State or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence including those targeting persons on the basis of their imputed or real sexual orientation or gender identities, ensuring proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims.¹⁶²

7.107 In the realm of IHL, Common Article 3 to the 1949 Geneva Conventions, a minimum yardstick in all armed conflicts,¹⁶³ requires that each Party to the conflict apply, as a minimum, the following provisions: 'Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on ... sex ... or any other similar criteria.' Violence to life and person, in

particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; and outrages upon personal dignity, in particular humiliating and degrading treatment are all acts that are prohibited 'at any time and in any place whatsoever'.¹⁶⁴

 References

The Definition of Violence

7.108 There is no accepted definition of violence under international law. According to the World Health Organization (WHO), however, it is 'the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation'.¹⁶⁵ In its report entitled the World Report on Violence and Health, WHO argued for a 'typology' of violence as a 'useful way to understand the contexts in which violence occurs and the interactions between types of violence'.¹⁶⁶ The typology distinguishes four modes in which violence may be inflicted: physical, sexual, and psychological attack, and deprivation. It further divides the general definition of violence into three sub-types according to the victim-perpetrator relationship:

Self-directed violence refers to violence in which the perpetrator and the victim are the same individual and is subdivided into self-abuse and suicide.

Interpersonal violence refers to violence between individuals, and is subdivided into family and intimate partner violence and community violence. The former category includes child maltreatment; intimate partner violence; and elder abuse, while the (p. 281) latter is broken down into acquaintance and stranger violence and includes youth violence; assault by strangers; violence related to property crimes; and violence in workplaces and other institutions.

Collective violence refers to violence committed by larger groups of individuals and can be subdivided into social, political, and economic violence.¹⁶⁷

Violence against Women

7.109 The 1993 Vienna Declaration and Programme of Action stated that 'the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community'.¹⁶⁸ Sexual violence is prohibited under human rights law for example through the customary law prohibition of torture and other forms of cruel, inhuman, or degrading treatment or punishment as well as through the right to privacy.

 References

7.110 According to WHO, violence against women, particularly intimate-partner violence and sexual violence against women, are major public health problems and violations of women's human rights. Global prevalence figures indicate that 35 per cent of women worldwide have experienced either intimate partner violence or non-partner sexual violence in their lifetime. On average, 30 per cent of women who have been in a relationship report that they have experienced some form of physical or sexual violence by their partner. Globally, as many as 38 per cent of murders of women are reportedly committed by an intimate partner.¹⁶⁹

7.111 Violence can result in physical, mental, sexual, reproductive health, and other health problems, and may increase vulnerability to HIV. Risk factors for being a perpetrator include low education, exposure to child maltreatment or witnessing violence in the family, harmful use of alcohol, and attitudes accepting of violence and gender inequality. Risk factors for being a victim of intimate partner and sexual violence include low education, witnessing violence between parents, exposure to abuse during childhood, and attitudes accepting violence and gender inequality.

Situations of conflict, post-conflict, and displacement may exacerbate existing violence and present additional forms of violence against women.¹⁷⁰

7.112 According to Article 1 of the 1993 UN Declaration on the Elimination of Violence against Women:

For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.¹⁷¹

(p. 282) Article 2 explains that violence against women encompasses, but is not limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.¹⁷²

 References

7.113 According to the 1995 Beijing Declaration and Platform of Action, other acts of violence against women 'include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy'.¹⁷³ They also include forced sterilization and forced abortion, coercive/forced use of contraceptives, prenatal sex selection, and female infanticide.¹⁷⁴

 References

7.114 The 1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women provides that, for the purposes of the Convention, violence against women 'shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere'.¹⁷⁵ The notion 'is also understood to include physical, sexual and psychological violence':

- that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery, and sexual abuse;
- that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping, and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
- that is perpetrated or condoned by the state or its agents regardless of where it occurs.¹⁷⁶

 References

7.115 The Council of Europe Convention on preventing and combating violence against women and domestic violence was the first European legal instrument to create a comprehensive legal framework to protect women against all forms of violence.¹⁷⁷ The Convention applies to all forms of

violence against women, 'including domestic violence, which affects women disproportionately', although parties are also encouraged to apply the Convention to *all* victims of domestic violence.¹⁷⁸ The Convention applies in times of peace and in situations of armed conflict.¹⁷⁹

 References

(p. 283) **7.116** The prohibition of rape and other forms of sexual violence in situations of armed conflict is as absolute as it is in times of peace. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.¹⁸⁰ While Common Article 3 of the Geneva Conventions does not explicitly mention rape or other forms of sexual violence, as we saw it prohibits 'violence to life and person' including cruel treatment and torture and 'outrages upon personal dignity', which encompasses all form of sexual violence.

 References

7.117 In its Resolution 1325 (2000) on women, peace, and security, the Security Council called on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict.¹⁸¹ The resolution further emphasizes the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, 'where feasible', from amnesty provisions.¹⁸²

 References

Violence against Children

7.118 Under Article 19 of the 1989 Convention on the Rights of the Child, which elsewhere defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier',¹⁸³ states parties are required to

take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.¹⁸⁴

In 2001, on the recommendation of the Committee on the Rights of the Child, the UN General Assembly by Resolution 56/138 requested the UN Secretary-General to conduct an in-depth study on the question of violence against children and to put forward recommendations for consideration by member states for appropriate action. In February 2003, Paulo Sergio Pinheiro was appointed by the Secretary-General to lead the study, the final report of which was formally presented to the UN General Assembly in October 2006.

 References

7.119 According to the UN Study, violence against children takes a variety of forms and is influenced by a wide range of factors, from the personal characteristics of the victim and perpetrator to their cultural and physical environments. However, much violence against children remains hidden.¹⁸⁵ Available (albeit partial) data indicate that while some violence is unexpected and isolated, the majority of violent acts experienced by children are (p. 284) perpetrated by people who are part of their lives: parents, schoolmates, teachers, employers, boyfriends or girlfriends, spouses, and partners.¹⁸⁶ The study cites an estimate by WHO whereby almost 53,000 children may have died worldwide in 2002 as a result of homicide.¹⁸⁷ WHO also estimated that 150 million girls and 73 million boys under 18 experienced forced sexual intercourse or other forms of

sexual violence during that year.¹⁸⁸ The UN Study further notes that studies from many countries in all regions of the world suggest that up to 80 per cent and even 98 per cent of children suffer physical punishment in their homes, with a third or more experiencing severe physical punishment resulting from the use of 'implements'.¹⁸⁹

7.120 In his recommendations to UN member states, the Secretary-General's independent expert called on states to prioritize preventing violence against children by addressing its underlying causes. He recommended, among other things, that policies and programmes address immediate risk factors, such as access to firearms.¹⁹⁰ He observed that while the community is a source of protection and solidarity for children, it can also be a site of violence, including peer violence, violence related to guns and other weapons, gang violence, police violence, physical and sexual violence, abductions, and trafficking. He concluded that older children are at greatest risk of violence in the community, and girls are at increased risk of sexual and gender-based violence.¹⁹¹ As a result of the Study, the UN General Assembly established the post of Special Representative of the Secretary-General on violence against children.¹⁹² In so doing, the Assembly, by overwhelming majority, condemned

all forms of violence against children, including physical, mental, psychological and sexual violence, torture and other cruel, inhuman or degrading treatment, child abuse and exploitation, hostage-taking, domestic violence, trafficking in or sale of children and their organs, paedophilia, child prostitution, child pornography, child sex tourism, gang-related violence, bullying and harmful traditional practices.¹⁹³

The Assembly urged states 'to strengthen efforts to prevent and protect children from all such violence through a comprehensive approach and to develop a multifaceted and systematic framework, which is integrated into national planning processes, to respond to violence against children'.¹⁹⁴

 References

Paragraph 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.

(p. 285) **7.121** This paragraph obliges states parties to deliver export authorizations in a detailed and timely manner. Authorizations are not required to take a printed form, and electronic authorizations may be acceptable. Details should presumably include exactly what may be exported, when, and to whom. They should clearly delimit the rights of agents involved in the export, and authorize arrangements for subsequent control by foreign authorities.

7.122 Information that is commonly contained in export authorizations includes: 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. As exports without a valid authorization would violate the ATT, these documents must be issued before the export occurs, so that the actors concerned can execute the relevant actions.

Paragraph 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.

7.123 In order to establish effective international control of the arms trade, and especially to prevent and combat diversion, importing and transiting or trans-shipping states may request information on export authorizations from the exporting state. The provision explicitly permits states

to limit the information they provide ('subject to national laws, practices, or policies'), in order to protect their security or commercial interests. As discussed in the relevant commentary below,¹⁹⁵ this is a broader exception than that granted to importing states under Article 8.

7.124 The information to be provided may be: a copy or excerpt of the export authorization; information on involved actors; intended routes of the transfer; or execution or planned risk-mitigation measures.

Paragraph 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.

7.125 Export authorizations are valid for a certain period, usually for one to five years, but are sometimes renewed automatically if not used and if no change of circumstance has occurred. States parties are therefore encouraged to reassess authorization if new information indicates that the situation in the state of final destination or its surrounding region has changed or generated important risks.¹⁹⁶

7.126 In accordance with the terms of paragraph 7, reassessment may lead a state to suspend or revoke its export authorization, but it is under no obligation to do so. It may also consult with the importing state 'if appropriate', and would normally do so, but again this is not required. This provision was substantially weakened during the final diplomatic conference as part of the deal to address concern about the draft provision that would ultimately become Article 26.

Footnotes:

¹ There is an evident overlap between Arts 6(3) and 7(2), since any proposed export that would be prohibited under Art. 6(3) would most likely also constitute a serious violation of international humanitarian law or human rights law. To avoid any risk of confusion, it was made explicit in the final text of the ATT that Art. 7 only applies if the export has not already been prohibited under Art. 6.

² This might involve the balancing of competing international/regional and national consequences. On this issue see, below, the commentary on Art. 7(1)(a), esp. MN7.32ff.

³ In accordance with Art. 7(4), the assessment shall also 'take into account the risk of the ... (arms or items) being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children'.

⁴ See MN1.46–1.49.

⁵ See, above, the relevant commentary on Art. 2(2) at MN 2.21.

⁶ See Art. 26, 1969 Vienna Convention on the Law of Treaties.

⁷ See, e.g., Chair's Draft Papers of 22 July 2010 and 24 July 2011.

⁸ See, e.g., Facilitator's Summary on Parameters of 22 July 2010; Chair's Draft Paper of 16 July 2012.

⁹ See Art. 4, July 2012 Draft Arms Trade Treaty, UN doc. A/CONF.217/CRP.1, 26 July 2012; and Art. 5, President's Non-Paper, 20 March 2013 (though see also Art. 6 ('Export')).

¹⁰ Facilitator's Summary on Parameters of 22 July 2010.

¹¹ See further in G. Giacca and T. Karimova, 'The Implications of Economic and Social Rights for Arms Acquisitions', Ch. 16 in S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, CUP, Cambridge, 2014.

¹² Arguably, this element is covered by the term 'relevant factors' included in the chapeau of Art. 7(1) as adopted as well as the change in wording from 'export' to 'the conventional arms or items'. See, below, MN7.19.

¹³ Art. 6(A)(1), President's Discussion Paper of 3 July 2012.

- ¹⁴ Art. 6(A)(2), President's Discussion Paper of 3 July 2012.
- ¹⁵ As noted above in the commentary on Art. 6(2), 'Knowingly assisting a state through arms transfers to commit an act of aggression is already a violation of international law.' See MN6.65ff.
- ¹⁶ Art. 6(B)(1), President's Discussion Paper of 3 July 2012.
- ¹⁷ Art. 6(B)(2), President's Discussion Paper of 3 July 2012.
- ¹⁸ President's Non-Paper of 20 March 2013.
- ¹⁹ The issue of corrupt practices is discussed below in relation to transnational organized crime. See MN7.86.
- ²⁰ See, above, the commentary on Art. 6.
- ²¹ See, above, MN2.21.
- ²² Art. 2(3), ATT.
- ²³ See, above, MN5.17ff.
- ²⁴ See, above, MN0.72–0.73 and 5.13ff.
- ²⁵ It is a general principle of international treaty law that: 'A treaty does not create either obligations or rights for a third State without its consent.' Art. 34 ('General rule regarding third States'), 1969 Vienna Convention on the Law of Treaties.
- ²⁶ *OED* online, Definition B2, at: <<http://www.oed.com/view/Entry/148805?redirectedFrom=potential#eid>> (subscription needed).
- ²⁷ See, below, MN7.38.
- ²⁸ See, below, MN7.38.
- ²⁹ See in the Commentary on the Preamble, MN0.25.
- ³⁰ Preamble and Arts 1, 2, 11, 12, 15, 18, 23, 24, 26, 33, 34, 37, 39, 42, 43, 47, 48, 51, 52, 54, 73, 76, 84, 99, and 106, UN Charter.
- ³¹ 'Peace', *OED* online, definition 1(a), accessed on 6 October 2015 at: <<http://www.oed.com/view/Entry/139215?rskey=QZq3lF&result=1#eid>> (subscription needed).
- ³² 'Security', *OED* online, definition 2(a), accessed on 6 October 2015 at: <<http://www.oed.com/view/Entry/174661?redirectedFrom=security#eid>> (subscription needed).
- ³³ *Jus ad bellum* is the body of international law that restricts use of force by one state against, or on the territory of, another. Any use of force other than in (self-)defence against an armed attack or in compliance with a UN Security Council decision taken under Chapter VII of the UN Charter is likely to violate *jus ad bellum*. On the crime of aggression, see, above, MN6.65–6.67.
- ³⁴ As the third preambular para. to the 1948 Universal Declaration of Human Rights famously observes, 'Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'.
- ³⁵ Draft Articles on State Responsibility, commentary, 2001, UN doc. A/56/10 (ILC Commentary), Commentary to Article 16, §5.
- ³⁶ ILC Commentary to Article 16, §10.
- ³⁷ *Ibid.*
- ³⁸ *Ibid.*, §9.
- ³⁹ Although in IHL there is a technical meaning under treaty law which attaches to the expression 'grave breaches of the Geneva Conventions', the expression 'grave breaches' was avoided in Art. 7 in order to preserve the technical meaning in the context of the Geneva Conventions, so central to Art. 6(3).
- ⁴⁰ See ICRC, 'What are "serious violations of international humanitarian law"? Explanatory Note', available at: <<http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>>.

- ⁴¹ ICRC, *Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty*, Geneva, 2013, p. 4.
- ⁴² The ICRC's customary IHL study helpfully sets out the customary international war crimes that are not included in the ICC Statute, see J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law—Volume 1: Rules*, Cambridge University Press (CUP), Cambridge, 2005, pp. 568–603.
- ⁴³ *Ibid.*, at p. 599.
- ⁴⁴ *Ibid.*, at p. 601.
- ⁴⁵ Rule 11: 'Indiscriminate attacks are prohibited.' Rule 14: 'Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.' *Ibid.*, at pp. 37ff. and 46ff.
- ⁴⁶ See ICRC Commentary on Art. 89, 1977 Additional Protocol I, §3592. The provision concerns 'serious violations' of the Protocol.
- ⁴⁷ ICRC, Geneva, 2007, at p. 5. A second edition of the document was being finalized as of writing.
- ⁴⁸ Footnote in the original reads, 'Some States have committed themselves to supplying small arms only to governments (either directly or through duly licensed entities authorized to procure weapons on their behalf), but most States have not made such commitments.'
- ⁴⁹ *Ibid.*, at p. 8.
- ⁵⁰ See, above, MN6.155.
- ⁵¹ See Common Article 2 to the 1949 Geneva Conventions.
- ⁵² See generally D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, OUP, Oxford, 2012, pp. 32–79; S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations', *International Review of the Red Cross*, Vol. 91, No. 873 (2009), pp. 69–94.
- ⁵³ See generally S. Casey-Maslen (ed.), *The War Report: Armed Conflict in 2013*, OUP, Oxford, pp. 18ff.
- ⁵⁴ In the trial judgment in *Tadić* and other cases, the ICTY confirmed that the specific meaning it gave to 'protracted' when qualifying armed violence was an insistence on the intensity of conflict (even though the word's meaning in ordinary parlance is one of duration, not intensity): ICTY, *Prosecutor v. Tadić*, Opinion and Judgment, 7 May 1997, §562; see also ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Judgment (Trial Chamber) (Case No. IT-04-84-T), 3 April 2008, §§40ff.; ICTY, *Prosecutor v. Slobodan Milosevic*, Decision on Motion for Judgment of Acquittal (Case No. IT-02-54-T), 16 June 2004, §17.
- ⁵⁵ Organized armed groups are those with a command-and-control structure, which typically possess and use a variety of weapons, and which control a significant logistical capacity that gives them the capability to conduct regular military operations.
- ⁵⁶ Although not explicitly foreseen by the *Tadić* decision, a NIAC will also occur where intense armed violence occurs between two or more organized armed groups across an international border, such as between Hezbollah and the Free Syrian Army in Syria and across the border into Lebanon in 2013.
- ⁵⁷ See Art. 1(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977 Additional Protocol II); Art. 8(2) (d), 1998 Rome Statute of the International Criminal Court.
- ⁵⁸ See further in A. Bellal, 'Arms Transfers and International Human Rights Law', Ch. 15 in S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, CUP, Cambridge, 2014; and G. Giacca and T. Karimova, 'The Implications of Economic and Social Rights for Arms Acquisitions', Ch. 16 *ibid.*; and see also I.-M. Siatitsa, "'A Serious Violation of International Human Rights Law": An Attempt to Clarify a Crucial Provision of the Arms Trade Treaty', *European Journal of Human Rights* (2015), pp. 606–30.

⁵⁹ See, e.g., the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 16 December 2005. Section 502B of the United States' 1961 Foreign Assistance Act, as amended, provides: 'For the purposes of this section—(1) the term "gross violations of internationally recognized human rights" includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, ... and other flagrant denial of the right to life, liberty, or the security of person.' S. 502B, 1961 Foreign Assistance Act, as amended, p. 233. The same section refers to 'extrajudicial killings, torture, or other serious violations of human rights'. *Ibid.*, p. 231.

⁶⁰ Cherif Bassiouni, 'Report on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms', UN doc. E/CN.4/1999/65, 1999, §65.

⁶¹ Reference is made to the UN General Assembly (including country-specific resolutions), the UN Security Council, the Human Rights Council, ECOSOC, the Office of the UN High Commissioner for Human Rights (OHCHR), the UN Special Procedures and other mandate-holders, and the UN Treaty Bodies. *User's Guide to the EU Code of Conduct on Arms Exports*, 3 July 2007, Annex III. See further, below, MN7.82.

⁶² S. 3.2.6.

⁶³ Resolution 2149 at §39.

⁶⁴ UN doc. A/67/775-S/2013/110, 5 March 2013, Annex, §1.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, at §12.

⁶⁷ See also §18: 'In particular, recipients should be notified that United Nations support cannot be provided to units that fall under the command of individuals against whom there are substantiated allegations of grave violations of international humanitarian, human rights or refugee law.'

⁶⁸ *Ibid.*, at §28.

⁶⁹ The following section draws on and reproduces passages from T. Karimova, 'What amounts to "a serious violation of international human rights law"? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty', Academy Briefing No. 6, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, August 2014.

⁷⁰ ECOSOC Resolution 1235 (XLII), 42 UNESCOR Supp. (No. 1) at 17, UN doc. E/4393 (1967): 'Authorizes the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in conformity with the provisions of paragraph 1 of the Commission's resolution 8 (XXIII), to examine information relevant to *gross violations of human rights and fundamental freedoms*, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa, and to racial discrimination as practiced notably in Southern Rhodesia, contained in the communications listed by the Secretary-General pursuant to Economic and Social Council resolution 728 F (XXVIII) of 30 July 1959' (emphasis added). ECOSOC Resolution 1503 (XLVIII), 48 UNESCOR (No. 1A) at 8, UN doc. E/4832/Add.1 (1970): 'Authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group consisting of not more than twenty-five members, with due regard to geographical distribution, to meet once a year in private meetings for a period not exceeding ten days immediately before the sessions of the Sub-Commission to consider all communications, including replies of Governments thereon, received by the Secretary-General under Council resolution 728 F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a *consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms* within the terms of reference of the Sub-Commission' [emphasis added].

⁷¹ M. E. Tardu, 'United Nations Response to Gross Violations of Human Rights: The 1503

Procedure', *Santa Clara Law Review*, Vol. 20 (1980), pp. 583ff. At the time Tardu, although writing in a personal capacity, was Chief of the Research and Studies Unit at the UN Division of Human Rights.

⁷² J. H. H. Weiler and A. L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?', *European Journal of International Law*, Vol. 8 (1997), pp. 545–65.

⁷³ J. Crawford, *Brownlie's Principles of Public International Law*, 8th edn, OUP, Oxford, 2012.

⁷⁴ P.-M. Dupuy, *Droit International Public*, 5th edn, Dalloz, Paris, 2000, p. 213. Meron also considers that 'the characterisation of some rights as fundamental results largely from our own subjective perceptions of their importance'. T. Meron, 'On a Hierarchy of International Human Rights', *American Journal of International Law*, Vol. 80, No. 1 (1986), p. 8.

⁷⁵ T. van Boven, 'Distinguishing Criteria of Human Rights', in K. Vasak (ed.), *The International Dimensions of Human Rights*, UNESCO, Paris, 1982, p. 43. The preambles of the Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights refer to each other and, since the 1968 Tehran Conference on Human Rights, the indivisibility of human rights has consistently been reaffirmed.

⁷⁶ Meron, 'On a Hierarchy of International Human Rights', p. 4.

⁷⁷ For a critique of the concept of non-derogable rights as a legacy of colonialism, see B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, CUP, Cambridge, 2003, pp. 176–7.

⁷⁸ Leaving aside derogation of the right to life under Art. 15 of the ECHR for lawful acts of war.

⁷⁹ 'Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43', §85.

⁸⁰ C. Medina Quiroga, *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System*, Martinus Nijhoff, Dordrecht, 1988, p. 15.

⁸¹ *Ibid.*

⁸² D. Shelton, *Remedies in International Human Rights Law*, OUP, Oxford, 2006, p. 390.

⁸³ Inter-American Convention to Prevent and Punish Torture, 1985, Art. 6.

⁸⁴ Council of Europe, Directorate General of Human Rights and Rule of Law, *Eradicating Impunity for Serious Human Rights Violations: Guidelines and Reference Texts*, Strasbourg, adopted 30 March 2011, p. 7.

⁸⁵ Key Elements of the Arms Trade Treaty: An Annotated Guide, ACT 30/069/2012.

⁸⁶ ILC, Fifth Report on the Draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur, UN doc. A/CN.4/404, 17 March 1987, p. 2.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, §47.

⁸⁹ *ILC Yearbook 1976*, Vol. 1, p. 253. For the discussion, see J. Weiler, A. Cassese, and M. Spinedi (eds), *International Crimes of States—A Critical Analysis of the International Law Commission's Article 19 on State Responsibility*, Walter de Gruyter, Berlin, 1989.

⁹⁰ Art. 40, Draft Articles on Responsibility of States for Internationally Wrongful Acts. This provision probably cannot be considered reflective of customary international law (which would bind all states).

⁹¹ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. Commentary to Article 40, p. 113.

⁹² *Ibid.*, p. 112.

⁹³ *Ibid.*, p. 113, §8.

⁹⁴ For some of the background see P. Alston (ed.), *Non-State Actors and Human Rights*, OUP,

Oxford, 2005; A. Clapham, *Human Rights Obligations of Non-State Actors*, OUP, Oxford, 2006; N. Rodley, 'Non-state Actors and Human Rights', in S. Sheeran and N. Rodley (eds), *Routledge Handbook of International Human Rights Law*, Routledge, Abingdon, 2013, pp. 523–44; A. Clapham (ed.), *Human Rights and Non-State Actors*, Elgar, Cheltenham, 2013.

⁹⁵ 'Scope of Application of Humanitarian Law' in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, 2nd edn, OUP, Oxford, 2007, p. 76.

⁹⁶ UN doc. A/HRC/22/59, 5 February 2013, at §44 and p. 2.

⁹⁷ See A. Clapham, 'Focusing on Armed Non-State Actors', in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, OUP, Oxford, 2014, pp. 766–810, esp. at 793–9.

⁹⁸ 8 May 2014, §18; available at: <[https://unmiss.unmissions.org/Portals/unmiss/Human Rights Reports/UNMISS Conflict in South Sudan - A Human Rights Report.pdf](https://unmiss.unmissions.org/Portals/unmiss/Human%20Rights%20Reports/UNMISS%20Conflict%20in%20South%20Sudan%20-%20A%20Human%20Rights%20Report.pdf)>.

⁹⁹ UN doc. S/2005/72.

¹⁰⁰ For a study of practice to 2010 see A. Constantineides, 'Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council', *Human Rights and International Legal Discourse*, Vol. 4 (2010), pp. 89–110.

¹⁰¹ UN Security Council Resolution 1882, 4 August 2009.

¹⁰² Security Council Resolution 1612, §9; for a site with the relevant documents produced by the Security Council's Working group on Children in Armed Conflict see <<http://www.securitycouncilreport.org/un-documents/children-and-armed-conflict/>>.

¹⁰³ See ICCPR First Optional Protocol, Art. 2; ICESCR Optional Protocol, Art. 2.

¹⁰⁴ Art. 11(2).

¹⁰⁵ J. Salmon, 'Duration of the Breach', in J. Crawford, A. Pellet, and S. Olleson (eds), *The Law of International Responsibility*, OUP, Oxford, 2010, pp. 391–2.

¹⁰⁶ See: <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>>.

¹⁰⁷ See: <<http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>>.

¹⁰⁸ See: <<http://www.ohchr.org/en/hrbodies/cat/pages/catindex.aspx>>.

¹⁰⁹ See: <<http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>>.

¹¹⁰ See: <<http://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx>>.

¹¹¹ As of 27 March 2015, there were 41 thematic and 14 country mandates. See OHCHR, 'Special Procedures of the Human Rights Council', at: <<http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>>.

¹¹² See: <<http://www.ohchr.org/EN/Issues/Executions/Pages/SRExecutionsIndex.aspx>>.

¹¹³ See: <<http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx>>.

¹¹⁴ See: <<http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx>>.

¹¹⁵ See: <<http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>>.

¹¹⁶ Available at: <<http://unama.unmissions.org/Default.aspx?tabid=13941>>.

¹¹⁷ See: <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>>.

¹¹⁸ See: <<https://www.amnesty.org/en/countries/>>.

¹¹⁹ See: <<https://www.hrw.org/publications>>.

¹²⁰ See the commentary on Art. 2(1).

¹²¹ 1997 International Convention for the Suppression of Terrorist Bombings. Other relevant treaties would include the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the 1979 International Convention against the Taking of Hostages; and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

- 122** 2000 UN Convention against Transnational Organized Crime, Art. 3.
- 123** 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Art. 3.
- 124** 2001 Protocol against the Smuggling of Migrants by Land, Sea and Air, Art. 3.
- 125** 2001 Firearms Protocol, Art. 3.
- 126** '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 obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.'
- 127** Art. 2(b), Palermo Convention.
- 128** Art. 3(2), Palermo Convention.
- 129** This definition is set out in the Palermo Convention in Art. 2(a).
- 130** Art. 5(1)(a)(i), Palermo Convention.
- 131** Art. 5(1)(a)(ii), Palermo Convention.
- 132** Art. 5(1)(b), Palermo Convention.
- 133** Defined in Art. 8(4) as 'a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.'
- 134** Art. 8(1)(a), Palermo Convention.
- 135** Art. 8(1)(b), Palermo Convention.
- 136** Art. 23(a), Palermo Convention.
- 137** Art. 23(b), Palermo Convention.
- 138** Art. 26, 1969 Vienna Convention on the Law of Treaties.
- 139** A. Clapham, 'The Arms Trade Treaty: A Call for an Awakening', *European Society of International Law*, Vol. 2, Issue 5 (2013), at: <<http://www.esil-sedi.eu/node/329>>.
- 140** Declaration of New Zealand upon ratification of the ATT, 2 September 2014, at: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>>.
- 141** Declaration of Switzerland upon ratification of the ATT, 30 January 2015, at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&lang=en#EndDec>.
- 142** Declaration of Liechtenstein upon ratification of the ATT, 16 December 2014, at: <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVI/XXVI-8.en.pdf>>.
- 143** According to para. 3(b) of Art. 31 ('General rule of interpretation') of the 1969 Vienna Convention on the Law of Treaties, in interpreting a treaty: 'There shall be taken into account, together with the context ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.
- 144** ATT Monitor, *ATT Monitor Report 2015*, Control Arms, New York, 2015, p. 42.
- 145** Amnesty International, *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights*, London, 2015, pp. 19–20, at: <<https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>>.
- 146** The Holy See made it clear they would not oppose a reference in the treaty to violence against women, it was specifically the term 'gender' that they would not accept.
- 147** Art. 4(6), July 2012 Draft Arms Trade Treaty, UN doc. A/CONF.217/CRP.1, 26 July 2012.
- 148** Tenth preambular para.
- 149** Art. 7(8), President's Non-Paper of 22 March 2013.
- 150** Background research into gender-based violence and violence against women and children was conducted by Chiara Redaelli and Silvia Caterini, whose assistance is gratefully

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151 Inter-Agency Standing Committee (IASC), *Guidelines for Gender-based Violence Interventions in Humanitarian Settings Focusing on Prevention of and Response to Sexual Violence in Emergency*, September 2005, p. 7, available at: <<http://www.unhcr.org/453492294.pdf>>.

152 Ibid. See also UN Global Protection Cluster, *Handbook for Coordinating Gender-based Violence Interventions in Humanitarian Settings*, July 2010, p. 10.

153 UN Security Council Resolution 2106, adopted on 24 June 2013, sixth preambular para.

154 Ibid., tenth preambular para.

155 Freedom House, 'LGBTI Rights', undated but accessed on 14 November 2015 at: <<https://freedomhouse.org/issues/lgbti-rights>>.

156 Ibid. In 2014, a report on domestic and family violence in lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) communities in New South Wales found that people in non-heterosexual relationships are suffering domestic violence that is specific to their gender identity and sexual preferences at alarming levels. The report, *Calling It What It Really Is*, the first comprehensive, qualitative survey conducted on the issue, found that members of the LGBTIQ community often suffer from emotional and social abuse specific to that community. 'Perpetrators of domestic violence may exploit homophobia, transphobia, heterosexism ... within their partner's family, social networks and/or wider community in order to control and harm their partner.' More than half of the 813 respondents—nearly 55 per cent—said they had previously been in an emotionally abusive relationship. Just under 35 per cent said they had experienced sexual or physical violence in a past relationship. LGBTIQ Domestic and Family Violence Interagency and the Centre for Social Research in Health, University of NSW, *Calling It What It Really Is: A Report into Lesbian, Gay, Bisexual, Transgender, Gender Diverse, Intersex and Queer Experiences of Domestic and Family Violence*, New South Wales, Australia, 2014, pp. 3, 21, at: <http://www.thelookout.org.au/sites/default/files/Calling_It_What_It_Really_Is_LGBTIQ_DFV_report_2015.pdf>. See: S. Medhora, 'Domestic violence affects LGBTIQ communities at alarming levels – report', *The Guardian*, 2 November 2015, at: <<http://www.theguardian.com/society/2015/nov/03/domestic-violence-affects-lgbtiq-communities-at-alarming-levels-report>>.

157 R. Acheson and M. Gandenberge, *Gender-Based Violence and the Arms Trade Treaty*, Reaching Critical Will of the Women's International League for Peace and Freedom, August 2015, p. 5, at: <<http://www.reachingcriticalwill.org/resources/publications-and-research/publications/10112-gender-based-violence-and-the-arms-trade-treaty>>. See *The Arms Trade Treaty: A Practical Guide to National Implementation*, Small Arms Survey, Geneva, 2015.

158 Annual Report of the UN High Commissioner for Human Rights, UN doc. A/HRC/19/41, 17 November 2011, §5.

159 Ibid., §20.

160 Parliamentary Assembly of the Council of Europe, Resolution 1728 (2010), adopted on 29 April 2010, §16.3.

161 African Commission on Human and Peoples' Rights, Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, adopted at the 55th Ordinary Session of the Commission in Luanda, 28 April to 12 May 2014, §1.

162 Ibid., §4.

163 International Court of Justice, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)*, Judgment (Merits), 27 June 1986, §218.

164 Common Article 3 to the 1949 Geneva Conventions, §1(a), (b), and (c).

165 WHO, 'World Report on Violence and Health', Geneva 2002, available at: <http://www.who.int/violence_injury_prevention/violence/world_report/chapters/en/>.

166 WHO, 'Definition and typology of violence', undated but accessed on 14 November 2015 at: <<http://www.who.int/violenceprevention/approach/definition/en/>>.

- 167** Ibid.
- 168** Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, §18.
- 169** WHO, 'Violence against women: Intimate partner and sexual violence against women', Fact sheet No. 239, Updated November 2014, at: <http://www.who.int/mediacentre/factsheets/fs239/en/>.
- 170** Ibid.
- 171** The same formulation is found in the 1995 Beijing Declaration and Platform of Action, §114.
- 172** See similarly *ibid.*
- 173** *Ibid.*, §115.
- 174** *Ibid.*, §115bis.
- 175** Art. 1, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted at Belem do Para, Brazil, on 6 September 1994. As of November 2015, there were thirty-three states parties to the Convention. See: <http://www.oas.org/juridico/english/sigs/a-61.html>.
- 176** Art. 2, 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.
- 177** Convention on preventing and combating violence against women and domestic violence, opened for signature in Istanbul on 11 May 2011 (Istanbul Convention); entry into force on 1 August 2014.
- 178** Art. 2(1) and (2), Istanbul Convention.
- 179** Art. 2(3), Istanbul Convention.
- 180** ICRC Customary IHL Study, Rule 93. See: J. M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, CUP, Cambridge, 2005, pp. 323–7. Rule 93 is gender neutral, covering violence against both males and females.
- 181** UN Security Council Resolution 1325 (2000) on women, peace, and security, §10.
- 182** *Ibid.*, §11.
- 183** Art. 1, 1989 Convention on the Rights of the Child.
- 184** According to Art. 16 of the 1990 African Charter on the Rights and Welfare of the Child, states parties 'shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child'. The Charter entered into force on 29 November 1999. As of November 2015, there were forty-one states parties.
- 185** 'Report of the Independent Expert for the United Nations Study on Violence against Children', UN doc. 61/299, 29 August 2006, §25.
- 186** *Ibid.*, §28.
- 187** 'Global Estimates of Health Consequences due to Violence against Children', Background paper for the UN Study on Violence against Children, WHO, Geneva, 2006.
- 188** *Ibid.*, note 8, based on estimates by G. Andrews et al., 'Child Sexual Abuse', Ch. 23 in M. Ezzati et al., *Comparative Quantification of Health Risks: Global and Regional Burden of Disease Attributable to Selected Major Risk Factors*, WHO, Geneva, 2004, Vol. 2, pp. 1851–1940, and using data of the Population Division of the UN Department of Economic and Social Affairs for population under 18 years of age.
- 189** Report of the independent expert for the United Nations study on violence against children, §28.
- 190** *Ibid.*, Recommendation 3, §99.
- 191** *Ibid.*, §69.

192 UN General Assembly Resolution 62/141, adopted on 18 December 2007 by 183 votes to 1 (the United States of America), §58. The resolution encouraged the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Children’s Fund (UNICEF), WHO, and the International Labour Organization (ILO) to co-operate with the Special Representative.

193 *Ibid.*, §52.

194 *Ibid.*

195 See, below, MN8.43.

196 See, above, MN7.21.