

State Responsibility for Arms Transfers

The Law of State Responsibility and the Arms Trade Treaty

Silke Zwijsen, Machiko Kanetake & Cedric Ryngaert*

* S. Zwijsen is graduate student at the Legal Research Master, Utrecht University. Dr. M. Kanetake is Assistant Professor of Public International Law, Utrecht University. Prof. dr. C.M.J. Ryngaert is Professor of Public International Law, Utrecht University. Kanetake and Ryngaert carried out their research under the auspices of respectively the RENFORCE and Ucall research programmes of the Law School.

1 *Situation of human rights in Yemen, including violations and abuses since September 2014* (Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 17 August 2018), *UN Doc A/HRC/39/43*; P. Wezeman, 'Saudi Arabia, armaments and conflict in the Middle East', *Stockholm International Peace Research Institute* 14 December 2018, www.sipri.org/commentary/topical-backgrounders/2018/saudi-arabia-armaments-and-conflict-middle-east (accessed 26 October 2019).

2 Court of Appeal (UK) 20 June 2019, *Campaign against Arms Trade v The Secretary of State for International Trade*, [2019] EWCA Civ 1020, par. 138-145. In July 2019, the government was granted permission to appeal to the Supreme Court.

Introduction

It was recently reported that arms exported to Saudi Arabia from the United Kingdom, the United States, France, and Belgium may have been used to commit violations of international humanitarian law in Yemen (e.g., targeting civilians), where Saudi Arabia carries out military operations.¹ Arms exports to Saudi Arabia have been subject to judicial challenges, including in the UK, where the Court of Appeal concluded in June 2019 that the government's decisions to approve arms exports to Saudi Arabia were unlawful.² Although these cases focused on the national implementation of the EU Council Common Position,³ it is the aim of this contribution to focus on the international regulation of the trade in conventional arms. We examine whether an arms-exporting State is internationally responsible if the importing State goes on to use these arms to commit internationally wrongful acts, or if the exporting State accepts the risk that such acts might be committed. The legal consequences of a finding of responsibility are that the exporting State is required to cease its conduct,⁴ to offer appropriate assurances and guarantees of non-repetition,⁵ and to make reparation (e.g., offer compensation).⁶

The Arms Trade Treaty specifically regulates the cross-border transfer of conventional arms, and links responsibility to the exporting State's failure to conduct an appropriate risk assessment

Under the general international law of State responsibility, the responsibility of arms-exporting States is governed by customary norms on States aiding and assisting another State in the commission of internationally wrongful acts (Section 1). In 2013, however, the Arms Trade Treaty (ATT) was adopted at the UN General Assembly.⁷ It entered into force in 2014, is signed by 130 States and ratified by 105.⁸ The ATT specifically regulates the cross-border transfer of conventional arms,⁹ and links responsibility to the exporting State's failure to conduct an appropriate risk assessment (Section 2).¹⁰ In principle, the international responsibility of arms-exporting States could arise according to the general law of State responsibility as well as under the ATT. As will be argued in this

contribution, however, an interpretative fog surrounds the application of the customary responsibility norms as well as the relevant ATT norms, for example, regarding the required knowledge of the risk of violations or the weighing of human rights violations against peace and security. As a result, international legal regimes still preserve a great leeway on the part of exporting States in approving arms transfers to high risk countries, such as countries where serious violations of international humanitarian or human rights law take place.¹¹ That being said, the ATT's explicit reference to international human rights law under Article 7 can incrementally develop international standards with which to assess the decision-making processes of arms-exporting countries (Section 3).

1 Aiding and assisting: the customary international law framework of State responsibility for arms transfers resulting in violations of international law

Under general international law, in order to determine the international responsibility of a State for transferring weapons to another State that consequently uses the arms to commit serious violations of international humanitarian law or human rights law, it is possible to invoke the customary international law framework for State responsibility. This framework can be found in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), drawn up by the International Law Commission (ILC) and finally adopted in 2001.¹² Article 16 ARSIWA provides that a State is responsible if it aids or assists another State in the commission of an internationally wrongful act, at least provided that (a) that State does so with knowledge of the circumstances of the internationally wrongful act (hereafter: the knowledge requirement); and (b) the act would be internationally wrongful if committed by that State. The International Court of Justice (ICJ) confirmed the customary nature of responsibility based on aiding and assisting in the *Bosnian Genocide* case (2007).¹³ This means that the ICJ has acknowledged that there is sufficient state practice and *opinio juris* on aiding and assisting in order for the substance of article 16 ARSIWA to be considered a (binding) customary norm of international law.¹⁴

The concept of State responsibility based on aiding and assisting is of relatively recent vintage. In the late 1970s it became increasingly apparent that the 'monolithic view of [a] breach' of international law did not acknowledge the complex structures of international relations.¹⁵ As a result, the Special Rapporteur of the ILC at the time, Roberto Ago, introduced a provision on state complicity that would eventually form the basis of article 16 ARSIWA. The term 'complicity' was later replaced with the more neutral term 'aid or assistance' in that article,¹⁶ although the term 'complicity' is still used in ILC documents.¹⁷ Aiding and assisting constitutes an autonomous wrongful act under international law.¹⁸ However, it derives from the principal offence;¹⁹ it is, in our case the violation of international humanitarian law or human rights law by the State to which the arms have been transferred. This also means that a State can only be held responsible for aiding and assisting after the principal wrongful act has in fact been committed.²⁰ Thus, an arms-transferring State's responsibility will only be engaged if the State purchasing the arms actually commits a violation of international law.

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Article 16 ARSIWA may, at first sight at least, allow for an arms-transferring State to be held internationally responsible for aiding and assisting another State to commit violations of international law. However, as the following sections will describe, given the constructive ambiguity of article 16 ARSIWA, it is not entirely clear how the form of aid or assistance of article 16 ARSIWA is to be defined and how the knowledge requirement of article 16(a) ARSIWA has to be interpreted. This lack of conceptual clarity may render it problematic to hold arms-transferring States internationally responsible under the law of State responsibility. We discuss in turn the form of aid or assistance and, especially, the knowledge requirement of article 16(a) ARSIWA.

- 3 Consolidated EU and National Arms Export Licensing Criteria, HC Deb, 25 March 2014, col 9WS; Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment [2008] OJ L 335/99, art. 2(2).
- 4 ARSIWA, art. 30(a).
- 5 ARSIWA, art. 30(b).
- 6 ARSIWA, art. 31.
- 7 The Arms Trade Treaty, 2 April 2013, *UNTS Online*, vol. 3013 (entered into effect 24 December 2014).
- 8 As of 28 October 2019. See for the status of ratifications of the ATT: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&clang=en (6 November 2019).
- 9 See on what constitutes 'risk': ATT art. 7. See further Section 2.2 of this article.
- 10 See on the factors to be taken account of 'in an objective and non-discriminatory manner': ATT art. 7(1). See further Section 2.2 of this article.
- 11 ATT art. 7(b)(i)-(ii).
- 12 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chapter IV.E.1 [ARSIWA].
- 13 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ Reports 2007, 43, par. 420.
- 14 Art. 38(1)(b), Statute of the International Court of Justice (18 April 1946).
- 15 V. Lanovoy, 'Complicity in an Internationally Wrongful Act', in: A. Nollkaemper & I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art*, Cambridge: Cambridge University Press 2014, p. 137.
- 16 Lanovoy 2014, p. 138; R. Ago, 'Seventh Report on State Responsibility' in: International Law Commission, *Yearbook 1978/II(1)*, New York: United Nations Publications 1978, par. 76.
- 17 See for example: 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries [ARSIWA Commentary]' in: International Law Commission, *Yearbook 2001/II(2)*, New York: United Nations Publications, art. 16, par. 11.
- 18 International Law Commission, *Yearbook 1978/II(2)*, New York: United Nations Publications 1978, p. 104.
- 19 S.H. Kadish, 'Complicity, cause



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1.1 *The form of aid or assistance under article 16 ARSIWA*

While the aid or assistance does not need to be indispensable to the commission of the principal wrongful act,²¹ a certain nexus – which remains undefined – is required between the aid and the principal act. The scenario of State X selling arms to the army of State Y, which subsequently commits serious violations of international law using these weapons, would normally fall within the scope of article 16 ARSIWA. However, it is not clear whether acts of assistance that have a more distant and tenuous nexus with the principal offence can be considered as ‘facilitating’ the commission of the acts that article 16 ARSIWA mentions. For instance, what if State X sells arms to the army of State Y but the violations are committed by its police force instead of the army? Or what if the wrongful acts are committed ten years after the sale?

The ILC only states that the aid or assistance must have the ‘effect of making it materially easier’ for the other State to commit an internationally wrongful act.²² ILC Special Rapporteur Nikolai Ushakov

argued that aid or assistance essentially covers a spectrum, but that only those acts that are ‘active and direct’ are considered to be facilitating the commission of acts under article 16 ARSIWA.²³ Ushakov went on to state:

‘It must not be too direct, however, for the participant then became a co-author of the offence, and that went beyond complicity. If, on the other hand, participation were too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.’²⁴

By the same token, Lanovoy argued that in practice, the line between co-authorship and complicity may be difficult to draw, for instance in the case of wrongful acts committed in the context of military interventions involving multi-state coalitions.²⁵

In any event, whether or not the responsibility of a State is engaged under article 16 ARSIWA for transferring arms to a State that goes on to commit violations of international law, seems to be highly context-dependent. There do not appear to be

and Blame’, *California Law Review* (73) 1985, Issue 2, p. 337.
 20 Ago 1978, par. 72.

21 J. Crawford, *State Responsibility: The General Part*, Cambridge: Cambridge University Press 2013, p. 402.

22 H.P. Aust, *Complicity and the Law of State Responsibility*, Cambridge: Cambridge University Press 2011, p. 104; ILC Yearbook 1978/II, p. 104.

23 ILC Yearbook 1978/I, p. 239.

24 ILC Yearbook 1978/I, p. 239.

25 Lanovoy 2014, p. 144.

clear criteria for evaluating what acts are considered aid and assistance under this provision.²⁶

1.2 The knowledge requirement of article 16(a) ARSIWA

Even more uncertainty surrounds the knowledge requirement of article 16(a) ARSIWA. There are specific criteria that are used to determine whether a State had knowledge of another State's internationally wrongful acts. Based on previous ICJ judgements regarding aiding and assisting,²⁷ Lanovoy argues that the 'notoriety of facts' is an important indicator; that is, whether the circumstances 'called for some reaction, within a reasonable period'.²⁸ Also, 'the special interest of the aiding or assisting State in the region' and the geographical proximity are indicative of knowledge on behalf of the assisting State.²⁹ Furthermore, 'the existence of legal proceedings involving the state recipient of aid or assistance or other independent inquiries into the allegations of complicity' can be a relevant factor.³⁰ Knowledge may be presumed if the illegality of a specific conduct has been declared prior to the provision of aid or assistance.³¹

'Knowledge' is to be established on the basis of *objective* criteria, as borne out by the ICJ's judgement in the *Corfu Channel* case, in which the Court was asked to determine whether Albania had knowledge of the presence of mines in its territorial waters, bearing in mind that a State has an obligation 'not to allow knowingly its territory to be used for acts contrary to the rights of other States'.³² Although Albania denied that it was informed of the existence of mines,³³ the Court concluded otherwise, based on reports of experts that a minelaying ship 'would have been seen' by one of the Albanian government's look-out posts, even under the most unfavourable circumstances.³⁴ This holding underlines that objective criteria govern the presence of knowledge.

The main sticking point regarding the interpretation of the notion of knowledge in article 16(a) ARSIWA, however, is whether in addition to knowledge, *intent* is also required from the assisting State. As such, article 16(a) ARSIWA does not mention intent, recklessness or deliberate conduct, but 'only' requires that a State has 'knowledge' of the circumstances of the principal internationally wrongful act.³⁵ Nor does the general law of State responsibility appear to require

intent. The ILC Commentary on article 2 ARSIWA, which provides the elements of an internationally wrongful act, states that it is 'only the act of a state that matters, independently of any intention' if a specific *mens rea* has not been made specific in the primary obligation.³⁶

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Nevertheless, the ILC Commentary to article 16(a) ARSIWA notes that a State is not responsible 'unless [it] *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct'.³⁷ Also, the original drafter of the article, Roberto Ago, seemed to consider intent to be inherent to complicity:

'The very idea of "complicity" in the internationally wrongful act of another necessarily presupposes intent to collaborate in the commission of an act of this kind, and hence, in the cases considered, knowledge of the specific purpose for which the State receiving certain supplies intends to use them. Without this condition, there can be no question of complicity.'³⁸

Still, it has been alleged that Ago may in fact not have advocated an intent requirement, as he did not use 'intent' synonymously with 'purpose'.³⁹ Arguably, his use of 'intent' may have wider purchase and include all types of states of mind.⁴⁰ This interpretation indeed may be more likely in view of the examples of State practice that Ago supplies to the ILC.⁴¹ One of those examples is Germany's decision in 1958 to allow the United States to use its territory for a military intervention in Lebanon in the same year. When Germany was accused by the USSR of complicity or even participation in the US act of aggression in Lebanon, it defended the actions of the US and denied that an act of aggression had taken place. Ago opined that *if* aggression had taken place, Germany's act of support could have been considered as a form of complicity,⁴² even if in all likelihood Ger-

26 Aust 2011, p.192, 210 also quoting the Irish High Court in *Edward Horgan v. An Taoiseach and others*, Application for Declaratory relief, 2003, par. 174: '[t]he issue of "participation" is not a black and white issue. It may well ultimately be, as stated by the Taoiseach, a matter of "substance and degree".'

27 International Court of Justice, *Temple of Preah Vihear (Merits)* Judgement of 15 June 1962, p. 23 and *Fisheries (United Kingdom v. Norway)* Judgement of 18 December 1951, p. 139.

28 Lanovoy 2014, p. 155.

29 Lanovoy 2014, p.155, citing International Court of Justice, *Fisheries (United Kingdom v. Norway)* Judgement of 18 December 1951, p. 139; *Bosnian Genocide* 2007, par. 430.

30 Lanovoy 2014, p. 155.

31 Lanovoy 2014, p. 156.

32 *Corfu Channel case, Judgement of April 9th, 1949: I.C.J. Reports 1949, p. 22.*

33 *Corfu Channel* 1949, p. 22.

34 *Corfu Channel* 1949, p. 21-22.

35 ARSIWA 2001, art. 16(1).

36 ARSIWA Commentary 2001, art. 2, p. 36, par. 10.

37 ARSIWA Commentary 2001, art. 16, p. 66, par. 5 (emphasis added). See: L. Hill-Cawthorne, 'Appealing the High Court's Judgement in the Public Law Challenge against UK Arms Export Licenses to Saudi Arabia', *EJIL:TALK!* 2018.

38 Ago 1978, par. 72.

39 J. Quigley, 'Complicity in international Law: a new direction in the law of state responsibility', *British Yearbook of International Law* 1978, p. 112.

40 Quigley 1978, p. 112.

41 Ago 1978, par. 59.

42 Ago 1978, par. 29.

many *did not desire* a military intervention in Lebanon, but rather acted to preserve diplomatic ties.⁴³

Scholarship on the topic is divided. Some consider the ‘intent’-requirement to be a *probatio diabolica* – a legal requirement to achieve an impossible proof, arguing that the concept of complicity in public international law is ‘unworkable’.⁴⁴ In contrast, Helmut Aust argues that governmental statements on complicity tend to advance an ‘intent’-requirement, as opposed to a weaker mental element such as mere knowledge.⁴⁵ He reaches this conclusion after analysing various *lex specialis* instruments, such as the Convention on Anti-Personnel Land Mines, the Cluster Munitions Convention and the Nuclear Non-Proliferation Treaty, finding that Member States were keen to limit the concept of ‘assistance’ to ‘active participation’, which would require intent.⁴⁶ For instance, Zimbabwe, in an amendment proposed to the Convention on Anti-Personnel Land Mines, stated that ‘the term assistance and active participation in the context of article 1 means *knowingly and intentionally* participating directly and or rendering assistance on the use, transfer and or production of APMs’.⁴⁷ Furthermore, Aust is of the view that the high standard of intent is called for from a systemic perspective so as to avoid the overly broad attribution of ‘aiding-and-assisting’-based responsibility for conduct which is not *per se* unlawful.⁴⁸

The ICJ for its part, was able to skirt the requirement of intent in the context of state complicity in genocide in the *Bosnian Genocide* case. In essence, the Court stated that, as Serbia had no knowledge of the commission of genocide, it did not have to address whether intent was required:⁴⁹

‘[t]here is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at the least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator. If that condition is not fulfilled, that is sufficient to exclude categorization as complicity. The Court will thus first consider whether this latter condition is met in the present case. *It is only if it replies to that question of fact in the affirmative that it will need to determine the legal point referred to above [i.e., intent].*⁵⁰

Aust and Nolte have interpreted the ICJ’s use of the terminology ‘at the least’ in the second sentence of this paragraph as mean-

ing that ‘as a general rule, more than mere knowledge is required’; the authors here appear to imply intent.⁵¹ However, a later paragraph in *Bosnian Genocide* appears to support the interpretation that mere knowledge of the factual aspects of the wrongful act (‘full knowledge of the facts’⁵²), suffices for State responsibility for aiding and assisting to be engaged.⁵³ If this full knowledge of the factual circumstances is not present but a State ‘should have been aware’ (‘constructive knowledge’), responsibility for complicity is not triggered, although State responsibility for violating an *obligation to prevent* may still be an option.⁵⁴ This concept of constructive knowledge (‘should have known’ concept) was employed by the ICJ in *Bosnian Genocide* in the context of determining whether Serbia had violated its responsibility to prevent genocide: ‘a State’s obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed’.⁵⁵ Constructive knowledge implies that the arms-exporting State may have to gather information regarding the purposes for which the importing State is likely to use the arms.

When a State transfers arms to another State, the former does thereby not normally want violations to be committed. Intent will normally be lacking. In contrast, if mere knowledge suffices, exporting States are more likely to be held responsible

Obviously, if intent were required, it would be a tall order to hold an arms-exporting State responsible for aiding and assisting another State’s violations of international law. When a State transfers arms to another State, the former does thereby not normally want violations to be committed. Intent will normally be lacking. In contrast, if mere knowledge suffices, exporting States are more likely to be held responsible. It remains, however, that actual knowledge is required for responsibility, although

43 Quigley 1978, p. 111.

44 B. Graefrath, ‘Complicity in the Law of International Responsibility’, *Revue Belge de Droit International* 1996, p. 375.

45 Aust 2011, p. 238.

46 Aust 2011, p. 209.

47 Aust 2011, p. 209, citing: Convention on Anti-Personnel Land Mines, ‘Zimbabwe’s Intervention on the Standing Committee on the General Status and Operations of the Convention: Article 1’ (31 May 2002) www.apminebanconvention.org/fileadmin/APMBC/IWP/SC_may02/speeches_gs/Statement_Zimbabwe.pdf (6 November 2019) (original emphasis).

48 Aust 2011, p. 237-241.

49 *Bosnian Genocide* 2007, par. 421.

50 *Bosnian Genocide* 2007, par. 421 (our emphasis; original italics removed).

51 G. Nolte & H.P. Aust, ‘Equivocal Helpers – complicit states, mixed messages and international law’, *International & Comparative Law Quarterly* 2009, p. 14.

52 *Bosnian Genocide* 2007, par. 432.

53 *Bosnian Genocide* 2007, par. 432.

54 *Bosnian Genocide* 2007, par. 432.

55 *Bosnian Genocide* 2007, par. 431.

there is a window for constructive knowledge standards in the context of failures to prevent. An additional, and crucial obstacle to holding an exporting State responsible under the law of State responsibility, is that actual violations of international law should have occurred. The increased risk that such violations *might* occur as a result of arms transfers does not suffice.

One of the basic hurdles under article 16 ARSIWA pertains to the presence of an internationally wrongful act committed by the State to which arms have been exported. The ATT remedies this hurdle by uncoupling the regulation of arms trade from the trading partner's internationally wrongful act

2 The Arms Trade Treaty: removing the dependency on ultimate wrongful acts

As noted in the previous section, one of the basic hurdles under article 16 ARSIWA pertains to the presence of an internationally wrongful act committed by the State to which arms have been exported. As will be elaborated on in this section, the ATT remedies this hurdle by uncoupling the regulation of arms trade from the trading partner's internationally wrongful act – and from the difficulties of proving this relationship. The ATT does so by prohibiting a number of arms transfers (art. 6 ATT) and requiring exporting States to carry out a risk assessment against certain prescribed criteria (art. 7 ATT). These are 'primary obligations': whether or not exporting states are found in breach of the provision does not, in principle, depend on the internationally wrongful act on the part of the arms recipients. In this sense, articles 6 and 7 ATT are fundamentally different from article 16(a) ARSIWA (discussed above), not simply owing to the distinction between primary and secondary rules, but also the paradigms of prevention and risk assessment on which the ATT is based. We discuss articles 6 and 7 ATT in turn, and subject them to a critical evaluation.

2.1 Prohibiting specific arms transfers:

article 6 ATT and the knowledge requirement Article 6 ATT provides for the prohibition of three categories of transfers of conventional arms. Article 6(1) prohibits the transfer of conventional arms, ammunition/munitions and parts and components, as defined by articles 2(1) and 3-4 ATT, insofar as the transfer would violate a State party's obligations under the UN Security Council (UNSC)'s Chapter VII measures, such as arms embargoes.⁵⁶ The content of the obligations under article 6(1) thus depends upon each sanctions regime. The UNSC's mandatory arms embargoes tend to cover all the weapons and items stipulated in articles 2(1) and 3-4 ATT,⁵⁷ although there are some embargoes that exclude, for instance, small arms and light weapons.⁵⁸ While article 6(1) ATT is one of the few provisions with respect to which the Conference of States Parties has published voluntary guidance,⁵⁹ it is fair to say that article 6(1) ATT is only confirmatory of existing obligations under the UN Charter (*i.e.*, art. 6(1) ATT does not add anything to existing UNSC prohibitions). Should a State party transfer conventional arms in violation of UNSC resolutions, the State would also be in breach of article 6(1) ATT. The exception is the case of Palestine, which acceded to the ATT in December 2017 without UN membership. Article 6(1) ATT does not have direct legal relevance to Palestine, insofar as the legal basis for the UNSC to impose obligations on non-Member States remains contested.⁶⁰

Article 6(2) ATT is similar to article 6(1) in that it reaffirms States Parties' commitments under existing international legal obligations. It prohibits arms transfers that would violate international agreements to which a State is a party, 'in particular those relating to the transfer of, or illicit trafficking in, conventional arms'.⁶¹ The phrasing of this article ('agreements') excludes instruments that are not customary international law or hard law, such as the Programme of Action on Small Arms (2001) or the International Tracing Instrument (2005).⁶² Relevant agreements that could fall under article 6(2) ATT are, for example, corruption treaties, such as the Palermo Convention,⁶³ or disarmament treaties such as the Anti-Personnel Mine Ban Convention⁶⁴ and the Convention on Cluster Munitions.⁶⁵

Human rights treaties could likewise be included under article 6(2) ATT,⁶⁶ given the relevance of the right to life in particular.⁶⁷

56 ATT art. 6(1).

57 For example: UN Security Council Resolution 2216 (2015) S/RES/2216, par. 14 (mandatory arms embargo against Yemen, covering 'arms and related material of all types').

58 A. Clapham, S. Casey-Maslen, G. Giacca & S. Parker (eds.), *The Arms Trade Treaty: A Commentary*, Oxford: Oxford University Press 2016, p. 188-189. See for example: UN Security Council Resolution 1718 (2006) S/RES/1718 (14 October 2006), par. 8(a)(i) (although the restriction was modified by UNSC Resolution 2270 (2016) S/RES/2270, par. 6).

59 Fourth Conference of States Parties to the Arms Trade Treaty, 'Possible Voluntary Guiding and Supporting Elements in Implementing Obligations under Article 6(1)' ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep 2008. The document refers to, for instance, a non-exhaustive list of sources of information in order to allow a timely and up-to-date risk assessment within the States parties' licensing practices.

60 Clapham et al. 2016, p. 91-193. As Falk pointed out, the UN's authority over non-Member States could only be explained by the *sui generis* nature of the UN Charter and ultimately the will of the international community: R.A. Falk, *The Authority of the United Nations over Non-Members*, Princeton: Princeton University 1965.

61 ATT art. 6(2).

62 Clapham et al. 2016, p. 181; L. Lustgarten, 'The Arms Trade Treaty: Achievements, Failings, Future', *International & Comparative Law Quarterly* 2015, p. 587; UN Office for Disarmament Affairs, 'Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects', *UN Doc A/CONF.192/15* 2001; UN Office for Disarmament Affairs, 'International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons', *UN Doc A/CONF.192/15* 2015.

63 The United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

64 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999).

65 Convention on Cluster Munitions, 30 May 2008, 2688 UNTS

Yet when it comes to the International Covenant on Civil and Political Rights (ICCPR), its applicability to the context of arms transfers has been hindered by the Covenant's jurisdictional clause, according to which states' obligations apply to individuals within its territory and subject to jurisdiction.⁶⁸ Even if we assume that the ICCPR is applicable to anyone within the effective control of a state party,⁶⁹ this interpretation does not readily overcome the jurisdictional hurdle in the context of arms transfers, which requires consideration of the rights of those individuals whose unique identity may be unknown to States when they approve arms transfers. In its General Comment No. 36 on the right to life, the Human Rights Committee referred to the 'sale or purchase' of weapons and requested States parties to 'consider [the] impact [of weapons] on the right to life'.⁷⁰ Despite its significance, the General Comment does not specifically refer to international arms transfer; nor does it further explain how States parties ought to give consideration to the impact on the right to life.

As contrasted with article 6(1) and (2) ATT, which rely on States parties' existing obligations, article 6(3) ATT adds a new set of expectations. It prohibits the authorisation of transfers if a State Party has 'knowledge at the time of authorization' that the arms or items 'would be used in the commission of' one or more of the following crimes under international law: 'genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such' and 'other war crimes as defined by international agreements to which it is a party'.⁷¹ Such 'other crimes' should include serious violations of common article 3 of the 1949 Geneva Conventions, which are applicable to non-international armed conflicts.⁷²

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The major point of controversy regarding article 6(3) ATT is centered on the interpretation of the requirement of 'knowledge'. The ATT purposefully avoided any 'intent'

requirement during the drafting process, as several delegations objected to the use of the phrase 'for the purpose of' in an earlier draft of article 6(3) ATT, which read as follows:

'A State Party shall not authorize a transfer of conventional arms within the scope of this Treaty for the purpose of facilitating the commission of genocide, crimes against humanity, war crimes constituting grave breaches of the Geneva Conventions of 1949, or serious violations of common article 3 of the Geneva Conventions of 1949.'⁷³

The phrase 'for the purpose of' also appears in article 25(3)(c) of the Rome Statute of the International Criminal Court, which provides for the individual criminal responsibility of a person who 'for the purpose of facilitating the commission of [a crime], aids, abets or otherwise assists in its commission or its attempted commission'.⁷⁴ In contrast with the case law of the *ad hoc* tribunals, the Rome Statute employs a higher subjective standard, requiring that the aider or abettor has to share the intent of the perpetrator to commit the primary offence.⁷⁵ A number of delegations, as well as the International Committee of the Red Cross (ICRC), rejected the phrase 'for the purpose of', which they found would render the prohibition inoperable and set too high a threshold.⁷⁶ The ICRC recommended applying the standard of 'knowledge' which the ICRC found would be compatible with article 16(a) ARSIWA.⁷⁷

With regard to the temporal dimension of the 'knowledge'-requirement, article 6(3) ATT employs the phrase 'at the time of authorization', without explicitly referring to the need for reassessment and revocation of export licenses if information on international crimes comes to light after authorization is granted. This is contrasted with article 7 ATT, pursuant to which States are 'encouraged to reassess the authorisation after consultations, if appropriate, with the importing State'.⁷⁸ Such a possible 'drafting oversight'⁷⁹ can only be remedied by a teleological reading of the provision that States' failure to revoke authorization, which cannot be indefinite, would be contrary to article 6(3) ATT.

2.2 Focusing on prevention: the ATT and export risk assessment

As noted at the beginning of Section 2, the ATT regulates the conduct of arms-transferring States without legally relying

39 (entered into force 1 August 2010).

66 Clapham et al. 2016, p. 193-195, citing the Political Declaration delivered by Mexico on behalf of 98 States at the adoption of the ATT in New York by the UNGA (2 April 2013): https://mision.sre.gob.mx/onu/images/disc_att_2abril13.pdf.

67 Art. 6 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (1966).

68 Art. 2(1) ICCPR 1966.

69 Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', *UN Doc CCPR/C/21/Rev.1/Add.13* 2004, par. 10.

70 Human Rights Committee, 'General Comment No. 36: Right to Life', *UN Doc CCPR/C/GC/36* 2019, par. 65.

71 ATT art. 6(3).

72 Clapham et al. 2016, p. 234-235 (emphasis added).

73 Draft of the Arms Trade Treaty, Submitted by the President of the Conference (UN Conference on the Arms Trade Treaty, 2-27 July 2012), A/CONF.217/CRP.1 (1 August 2012), art. 3(3). Also see: L. Ferro, 'Brothers in Arms: Ancillary State Responsibility and Individual Criminal Liability for Arms Transfers to International Criminals', *Mil. L. & L. War Review* (54) 2015, Issue 1, p. 149-152.

74 Rome Statute of the International Criminal Court, 37 ILM 1002 (1998); 2187 UNTS 90, art. 25(3) (c).

75 M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Brussels: Torkel Opsahl Academic EPublisher 2017, p. 269.

76 ICRC, 'Arms Trade Treaty, ICRC statement, Diplomatic Conference, 21 March 2013', *ICRC Website*, www.icrc.org/en/doc/resources/documents/statement/2013/03-21att-arms-availability-statement.htm.

77 ICRC 2013.

78 ATT art 7(7).

79 Lustgarten 2015, p. 590.

on the actual commission of internationally wrongful acts by the recipients of arms.⁸⁰ In this sense, the ATT aims at preventing the occurrence of such acts in the first place by providing the yardsticks with which to assess States' risk assessment. According to article 7(1) ATT, in authorising the export of conventional arms (and ammunition/munitions and parts and components), States parties are required to assess the 'potential' that the arms or items 'would contribute to or undermine peace and security'⁸¹ or 'could be used' to 'commit or facilitate a serious violation of international humanitarian law' or 'a serious violation of international human rights law'.⁸² In making the assessment, the exporting State has to pay specific attention to gender-based violence and violence against women and children,⁸³ and has to consider mitigating measures to combat the risks.⁸⁴ Such measures may include, for instance, the use of end-user certificates in which the importing state pledges to limit the use of exported arms to certain contexts, or the arrangement of post-shipment verifications by the exporting state.⁸⁵

The ATT aims at preventing the occurrence of internationally wrongful acts in the first place by providing the yardsticks with which to assess States' risk assessment

The risk assessment aspect of the ATT can be contrasted with the EU's arms policy, which initially consisted of the Code of Conduct on Arms Exports (1998) and was later developed into the EU's Common Position on Arms Exports (2008).⁸⁶ Under the Common Position's criterion two, EU Member States are obligated to deny arms export when there is a 'clear risk' that the military technology or equipment 'might' be used for 'internal repression'⁸⁷ or 'in the commission of serious violations of international humanitarian law'.⁸⁸ Internal repression includes major violations of human rights and fundamental freedoms.⁸⁹

To aid application of the EU Common Position, the Council of the EU's User's Guide prescribes that an assessment as to whether there is a clear risk of an international humanitarian law violation would include:

'an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.'⁹⁰

The EU explicitly excludes 'isolated incidents', while stressing that a pattern of violations or the recipient State's failure to take appropriate steps to address the violations 'should give cause for serious concern'.⁹¹ It has to be noted that the international trade in arms ultimately remains a matter of national competence under article 346(1)(b) of the Treaty on the Functioning of the European Union. Therefore, the actual decision-making on export licenses is not a Union matter. The User's Guide only gives an idea of what an assessment may include. Apart from the criteria from the Common Position, there are no strict obligations with regard to the design of the assessment procedure.

While the ATT also obliges states to conduct risk assessment, the modes of assessment differ from those under the EU's Common Position. Under article 7(3) ATT, the exporting State is prohibited from authorising the export if there is an 'overriding' risk of any of the negative consequences mentioned under article 7(1) ATT, including a serious violation of international humanitarian or human rights law.⁹² This is arguably a more flexible standard than a 'clear risk' employed under the EU's Common Position and any quantitative threshold, such as 'substantial risk', was expressly discarded in the drafting process of the ATT.⁹³ The commentary provides a reason for this specific verbiage:

'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.'⁹⁴

States have to conduct a balancing exercise, weighing the pros and cons as they assess whether an export license should be granted. It is only when one of the risks is, in their judgement, 'overriding' that authorisation is prohibited.

80 As pointed out earlier, it may be very difficult to establish a material and mental link between the exporting and importing States for purposes of the application of the general State responsibility rules regarding aiding and assisting (art. 16 ARSIWA).

81 Art. 7(1)(a).

82 ATT art. 7(1)(b)(i)-(ii).

83 ATT art. 7(4).

84 ATT art. 7(2).

85 Clapham et al. 2016, 274.

86 N.H. Jorgensen, 'Current Developments: State responsibility for aiding or assisting international crimes in the context of the Arms Trade Treaty', *American Journal of International Law* (108) 2014, Issue 4, p. 728; European Union Code of Conduct on Arms Exports, 8675/2/98 Rev 2 (5 June 1998); Council Common Position 2008/944/CFSP of 8 December 2008 Defining Common Rules Governing Control of Exports of Military Technology and Equipment (2008) *OJ L* 335/99 [EU Common Position].

87 EU Common Position, art. 2(2)(a).

88 EU Common Position, art. 2(2)(c).

89 EU Common Position, art. 2(2)(b).

90 User's Guide to the Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment (updated 16 September 2019) 12189/19, p. 55 [User's Guide].

91 User's Guide 2019, p. 55.

92 ATT art. 7(3).

93 Clapham et al. 2016, p. 251.

94 Clapham et al. 2016, p. 275.

Moreover, the identification of risks can readily vary significantly depending on the kind of information that States parties consult. The ATT itself does not provide any guidance on the scope of information that States parties ought to rely on in identifying the likelihood of, for instance, a serious violation of international human rights law. It is encouraging that the ATT Secretariat's Working Group on Effective Treaty Implementation has published a 'List of possible reference documents to be considered by States Parties in conducting risk assessment under article 7'.⁹⁵ This list provides a wide array of sources, including research institutes, databases, UN agencies, NGOs, (local) media reports and judgements by the ICC and *ad hoc* tribunals.⁹⁶ While the list is an indication of some of the possible sources, it may assist not only States parties but also their domestic constituencies in contesting their governments' risk assessment.

The conscious choice of the drafters of the ATT to use the 'knowledge'-standard in article 6(3) ATT clears up any confusion on the role of intent in State responsibility, yet it also leaves much to be desired

2.3 Gaps and critiques: meeting the ATT's object and purpose

The conscious choice of the drafters of the ATT to use the 'knowledge'-standard in article 6(3) ATT clears up any confusion on the role of intent in State responsibility, yet it also leaves much to be desired. First, the type of knowledge that is required under article 6(3) ATT remains unclear: would it be sufficient to prove that authorities would 'normally' have learned of another State's intention to attack civilians, or is it required to prove that they actually knew? In the *Bosnian Genocide* case, the ICJ found that the responsibility to prevent genocide is triggered when a State violates its duty to act when it receives actual knowledge ('the instant that the State learns') or constructive knowledge ('or should normally have learned') of the existence of a serious risk that genocide would take place.⁹⁷ However, apart from this standard for genocide, it is still quite unclear what the 'knowledge'-

standard requires of States with regard to the steps they have to take to *become* aware of the circumstances in which transferred arms may end up under this provision. For arms exports, the ATT demands that a State at least assesses the information that is provided by the importing State,⁹⁸ but this is not an obligation under the provisions regarding the brokering or transit of arms for example. It has been argued that a teleological interpretation of article 6 ATT, based on the ATT's object to 'establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms',⁹⁹ would trigger responsibility if a State would fail to 'follow up reasonable suspicions by seeking further information'.¹⁰⁰ However, the exact due diligence obligations for States suffer from an interpretative gap. It has to be concluded that the ATT lacks ambition in this respect: given the fact that States, especially those that play a large role in the arms trade, spend a significant portion of their budget on obtaining foreign intelligence, it would not have been excessive to have used the standard of 'knowing or ought to have known'.¹⁰¹

To the ATT's credit, establishing to what extent arms exports played a role in serious violations of international humanitarian law is no longer necessary to determine State responsibility: for States that have ratified the ATT, responsibility is triggered as soon as States fail to conduct a risk assessment under article 7 ATT. The potential of this risk assessment to meet the ATT's objective to reduce human suffering is severely limited in two respects, however. First, States enjoy a large amount of discretion in the assessment and it depends on good faith national translation of this obligation whether it contributes to the ATT's purposes. Second, the design of the export assessment criteria under article 7 ATT also leaves much to be desired. The fact that violations of *inter alia* human rights law can be weighed against contributions to 'peace and security' 'comes very close to consequentialist reasoning claiming that the "end justifies the means"'.¹⁰² For example, if a State is completely confident that exported weapons will be used to target innocent civilians, it may still authorise an export license based on the fact that the risk does not override the benefit to peace and security. The fact that the ATT leaves

95 Working Group on Effective Treaty Implementation, 'List of possible reference documents to be considered by States Parties in conducting risk assessment under Article 7, Annex B of Draft Report to the Fifth Conference of States Parties (CSP5) ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1 2019; Draft Report to the Fifth Conference of States Parties (CSP5) ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1 2019, par. 26.

96 Working Group on Effective Treaty Implementation 2019, p. 1-4.

97 *Bosnian Genocide* 2007, par. 431.

98 ATT art. 7(1).

99 ATT art. 1.

100 B. Wood & R. Abdul-Rahim, 'The Birth and the Heart of the Arms Trade Treaty', *The Sur File on Arms and Human Rights* 2015, Issue 22, p. 19.

101 Lustgarten 2015, p. 589.

102 A. Clapham, 'The Arms Trade Treaty; A Call for an Awakening', *ESIL Reflections* (2) 2013, Issue 5.

this option open remains contentious, as this essentially allows ‘inviolable’ rights to be violated – going straight against the basic rationale of human rights law. The ATT does not recognise that respect for international humanitarian law and human rights in itself contributes to peace and security.¹⁰³

3 Concluding observations

Finding responsibility for States transferring weapons to other States that commit serious violations of international humanitarian law under the aiding and assisting framework of article 16 ARSIWA is incredibly complex and challenging, yet the ATT’s heart also has its pitfalls. The effects of various aspects of articles 6 and 7 on the ATT’s objects and purposes rely heavily on national implementation and how the provisions are put into practice. Nevertheless, the relationship between the heart of the ATT and the customary international legal framework is symbiotic: as the ATT constitutes modern State practice, it also has the potential to influence the development of the interpretation of customary law on State responsibility with regard to inter-State arms trade.¹⁰⁴ Over the coming decade, it may be possible that the ATT’s provisions and related debates would influence the assessment of a state’s responsibility for aiding and assisting.

Over the coming decade, it may be possible that the Arms Trade Treaty’s provisions and related debates would influence the assessment of a state’s responsibility for aiding and assisting

Apart from the possible contribution to the interpretive development of article 16 ARSIWA, one of the significant aspects of the ATT pertains to its explicit reference to international human rights law as

one of the frameworks to be considered in authorising the export of conventional arms and related items. There is no denying that the significance of human rights languages in the ATT has been overshadowed by the phrase ‘overriding risk’ under article 7(3) ATT, which allows the risks – even those concerning serious human rights violations – to be weighed against any ‘positive’ consequences.¹⁰⁵ To determine any ‘positive’ implications against the risks of serious violations of international human rights and humanitarian law is necessarily a value judgement. The ATT itself does not provide any specific instructions on the modalities of risk assessment and the weighing of risks against benefits, which leaves a great deal of discretion to States parties.

At the same time, the insertion of international human rights law facilitates the engagement of international and national human rights institutions in the assessment of States’ arms trade practices. For instance, the 2017 report of the UN High Commissioner for Human Rights specifically addressed the impact of arms transfers on the enjoyment of human rights.¹⁰⁶ The report contained the list of suggested factors that ‘could form the basis for the human rights risk assessments’ under article 7 ATT.¹⁰⁷ The UN human rights bodies’ narrative about arms transfers may empower those which assess governmental practices and, in the long run, define States’ human rights risk assessment and the work of the Conference of States Parties and its Working Groups.

Overall, States’ decisions to transfer arms and related items are subject to legal scrutiny on multiple fronts. This is not merely about the availability of different legal frameworks with which to hold arms-transferring States responsible under international law. While article 16 ARSIWA may have been a commodity for international lawyers, the ATT’s explicit engagement with international human rights law significantly diversified international and national fora through which States’ decisions to transfer arms can be deliberated, assessed, and critiqued.

103 R. Acheson, ‘Starting Somewhere: The Arms Trade Treaty, Human Rights and Gender-Based Violence’, *Human Rights Defender* (22) 2013, Issue 2, p. 18.

104 Ferro 2015, p. 152.

105 UN Office for Disarmament Affairs, ‘Arms Trade Treaty Implementation Toolkit: Module 6, Export’, www.un.org/disarmament/convarms/arms-trade-treaty-2/, p. 18.

106 Report of the Office of the UN High Commissioner for Human Rights, ‘Impact of Arms Transfers on the Enjoyment of Human Rights’, *UN Doc A/HRC/35/8* (3 May 2017); Resolution of the Human Rights Council, ‘Impact of Arms Transfers on Human Rights’, *UN Doc A/HRC/RES/32/12* (15 July 2016).

107 UNHR Report Arms Transfers 2017, par. 38-41, 48.