

## VOLUNTARY GUIDE TO IMPLEMENTING ARTICLES 6 & 7 OF THE ARMS TRADE TREATY<sup>1</sup>

### EXECUTIVE SUMMARY

*This Voluntary Guide to Implementing Articles 6 & 7 of the ATT is a voluntary, non-descriptive, living guidance tool that was developed in the Sub-working Group on Articles 6 & 7 of the ATT Working Group on Effective Treaty Implementation and endorsed by States Parties at the Tenth Conference of States Parties. It provides a picture of how States Parties to the ATT approach the implementation of the Treaty obligations in Articles 6 & 7 and how these obligations are operationalized to support the practice of arms transfer decision-making, with the aim of helping States Parties that are in the process of establishing or improving their national control systems to identify options for approaching the interpretation and application of the obligations in Articles 6 & 7 in their national practice. The Voluntary Guide unpacks the key concepts and obligations in Articles 6 & 7 and is structured around the topics and guiding questions concerning Articles 6 & 7 that were identified in the multi-year workplan of the Sub-working Group. The voluntary guidance reflects and builds on the interventions of participants during the sessions of the Sub-working Group in which these topics and guiding questions were discussed, the working papers and presentations that informed the discussions, as well as the relevant international and regional instruments and reference documents which presenters and participants directed attention to. To provide a focused and comprehensive overview of its substantive content and to help readers navigate through the document, the Voluntary Guide includes a complete list of the key concepts and questions that are addressed.*

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<sup>1</sup> Annex A of the Working Group on Effective Treaty Implementation (WGETI) Chair's Report to CSP10 ([ATT/CSP10.WGETI/2024/CHAIR/799/Conf.Rep](https://att.csp10.wgeti/2024/CHAIR/799/Conf.Rep)), endorsed by States Parties at CSP10 as a living document of a voluntary nature, to be reviewed and updated by the Working Group, as appropriate.

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**CONTENTS**

EXECUTIVE SUMMARY ..... 1

INTRODUCTION ..... 3

TREATY TEXT ..... 6

COMPLETE LIST OF KEY CONCEPTS AND QUESTIONS ..... 8

CHAPTER 1 – KEY CONCEPTS ..... 9

    Background ..... 10

    Findings/National practices and approaches to key concepts ..... 10

CHAPTER 2 – PROHIBITIONS ..... 19

    Background ..... 20

    Principal obligation ..... 20

    Article 6 (1) ..... 21

    Article 6 (2) ..... 21

    Article 6 (3) ..... 22

    Relationship between Article 6 and Articles 7, 8, 9 and 10 ..... 29

CHAPTER 3 – EXPORT AND EXPORT ASSESSMENT ..... 31

    Background ..... 32

    National structures and processes required to implement Articles 6 & 7 ..... 32

    Export assessment under Article 7 ..... 35

    Gender-based violence and violence against women and children ..... 39

    Mitigating measures ..... 41

CONCLUSION ..... 50

ANNEX A. PROVISIONS OF THE GENEVA CONVENTIONS AND THE ROME STATUTE THAT  
DEFINE /ARE RELEVANT TO ‘SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW’  
..... 51

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## INTRODUCTION

### *Background and process*

1. Following the establishment of the WGETI Sub-working Group on Articles 6 (Prohibitions) and 7 (Export and Export Assessment) in the CSP4 cycle, the CSP5 endorsed the recommendation of the WGETI Chair to develop a multi-year work plan pertaining to the work of this Sub-working Group.<sup>2</sup> Subsequently, during the CSP6 cycle, the Sub-working Group on Articles 6 & 7 discussed a draft multi-year workplan, as well as a methodology template for unpacking key concepts and a draft outline of a possible voluntary guide to be developed by the sub-working group during the course of its work, titled: *'Elements of a voluntary guide to implementing Articles 6 & 7 of the Arms Trade Treaty'*.<sup>3</sup> As the work within the ATT process was disrupted due to the COVID-19 pandemic, the multi-year work plan for the Sub-working Group was only welcomed by States Parties via silence procedure in the course of the CSP7 cycle, *"as a living document of a voluntary nature to be reviewed and updated regularly by the WGETI, as appropriate, and taking account of work undertaken by the different Working Groups"*.<sup>4</sup> The draft elements of the different chapters of the proposed Voluntary Guide were included as topics in the multi-year work plan, with the clear indication that the purpose of the proposed Voluntary Guide would not be for States Parties to define or agree a single interpretation of the ATT provisions or to constitute approved practice in the context of Articles 6 and 7, but to give examples of existing national practice that may assist States Parties in their implementation of Articles 6 and 7. The Guide would be developed on the basis of discussions, national presentations and views exchanged on each topic.

2. The multi-year workplan proposed three chapters for the Voluntary Guide to address the relevant Treaty obligations in Articles 6 & 7. The first chapter would unpack the key concepts in Articles 6 & 7, while chapters 2 and 3 would respectively address the specific Treaty obligations in Article 6 & 7. For each of these Chapters, the multi-year workplan identified concrete concepts, topics and issues to be discussed and concrete questions to be addressed during various sessions of the sub-Working Group. These sessions took place in the CSP7, CSP8 and CSP9 cycles and were informed by working papers and (expert) presentations. In line with the multi-year workplan, the draft elements for the three chapters of the proposed Voluntary Guide were systematically prepared by the Facilitator of the Sub-working Group and discussed in the sub-Working Group following the discussions on the relevant topics for each Chapter.<sup>5</sup> In that respect, the Conference noted the completion of draft Chapters 1 and

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<sup>2</sup> See in that regard the workplan for the 06 March 2018 WGETI meeting ([ATT/CSP4.WGETI/2018/CHAIR/248/M1.AgendaWorkPlans](#)), paragraph 31 (b) of the WGETI Chair's Draft Report to CSP5 ([ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep](#)) and paragraph 25 of the CSP5 Final Report ([ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1](#)).

<sup>3</sup> See Annex A of the WGETI Chair letter for the 04-05 February 2020 WGETI meeting ([ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1](#)) and the WGETI Chair's Draft Report to CSP6 ([ATT/CSP6.WGETI/2020/CHAIR/606/Conf.Rep](#)).

<sup>4</sup> The "welcomed" multi-year work is available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

<sup>5</sup> During the CSP7, CSP8 and CSP9 cycles, the discussions in the Sub-working Group on Articles 6 & 7 were facilitated by Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain. During the CSP10 cycle, the then WGETI Chair, Ambassador Christian GUILLERMET FERNÁNDEZ of Costa Rica acted as Facilitator for this Sub-working Group.

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2 during the CSP8 and CSP9 cycles, while the full Guide, including draft Chapter 3, was submitted for endorsement to CSP10.<sup>6</sup>

### ***Structure and substance***

3. The structure and substance of the three chapters of the Voluntary flow from the multi-year workplan, as explained above. Chapter 1 is structured around the key concepts in Articles 6 & 7 and primarily reflects and builds on the contributions that were received in response to the *Methodology Template for Unpacking Key Concepts in Articles 6&7*, which the Facilitator of the Sub-working Group invited delegations to complete on a voluntary basis by inserting an explanation of their approach to the interpretation of each concept listed in the template. In addition, the Chapter reflects and builds on the interventions of participants during the sessions of the Sub-working Group dedicated to discussing the key concepts. Chapters 2 and 3 are structured around the guiding questions and topics which the multi-year workplan provided for the discussions on the obligations in Articles 6 & 7. These chapters reflect and build on the interventions of participants during the relevant sessions of the Sub-working Group, the working papers and presentations that informed the discussions, as well as the relevant international and regional instruments and reference documents which presenters and participants directed attention to.

4. To facilitate the use of the Voluntary Guide, the Guide first includes the Treaty text of Articles 6 & 7, in which the key concepts and phrases that are addressed in the Guide are marked, with links to the most relevant sections in the Guide. For that same purpose, the Guide also includes as complete list of the key concepts and questions that are addressed in the Voluntary Guide. To contextualize the guidance included, each Chapter also contains a dedicated background section, in addition to the general background provided in this introduction.

### ***Purpose and nature***

5. In line with the overall goal of the Voluntary Guide, the purpose of the three chapters is to provide a picture of how States Parties approach the implementation of the Treaty obligations in Articles 6 & 7 and how these obligations are operationalized to support the practice of arms transfer decision-making. This is done with the ultimate aim to help States Parties that are in the process of establishing or improving their national control systems to identify options for approaching the interpretation and application of these obligations in their national practice. It is also for that reason that Chapter 2 pays attention to the relationship between Articles 6 & 7 and other Treaty Articles and that the Voluntary Guide includes many cross-references between the three chapters.

6. As it concerns a *voluntary* instrument, the Voluntary Guide does not intend to prescribe, create new norms and standards or establish an agreement on a single interpretation of the obligations in Articles 6 & 7, nor to reinterpret established definitions in international law. That is also why the Voluntary Guide does not include any definitive recommendations or conclusions on the application of the obligations in Articles 6 & 7. It is noted, however, that most of the obligations in Articles 6 & 7

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<sup>6</sup> Draft Chapters 1 and 2 were respectively included in Annex A of the WGETI Chair's Draft Report to CSP8 ([ATT/CSP8.WGETI/2022/CHAIR/733/Conf.Rep](https://www.un.org/development/dcpd/infocentre/record.aspx?ref=ATT/CSP8.WGETI/2022/CHAIR/733/Conf.Rep)) and Annex A of the WGETI Chair's Draft Report to CSP9 ([ATT/CSP9.WGETI/2023/CHAIR/767/Conf.Rep](https://www.un.org/development/dcpd/infocentre/record.aspx?ref=ATT/CSP9.WGETI/2023/CHAIR/767/Conf.Rep)). See also paragraph 23 of the CSP8 Final Report ([ATT/CSP8/2022/SEC/739/Conf.FinRep.Rev\\_2](https://www.un.org/development/dcpd/infocentre/record.aspx?ref=ATT/CSP8/2022/SEC/739/Conf.FinRep.Rev_2)) and paragraph 24 (a) of the CSP9 Final Report ([ATT/CSP9/2023/SEC/773/Conf.FinRep.Rev2](https://www.un.org/development/dcpd/infocentre/record.aspx?ref=ATT/CSP9/2023/SEC/773/Conf.FinRep.Rev2)). The draft of the full guide was included in Annex A of the WGETI Chair's Draft Report to CSP10 ([ATT/CSP10.WGETI/2024/CHAIR/783/Conf.Rep](https://www.un.org/development/dcpd/infocentre/record.aspx?ref=ATT/CSP10.WGETI/2024/CHAIR/783/Conf.Rep)).

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relate to concepts and obligations that are enshrined in other international agreements or even customary international law. In that respect, when States Parties apply the obligations in Articles 6 & 7 in practice, they are expected to comply with their relevant underlying obligations.

7. The Voluntary Guide is also intended as a living document, that can be reviewed and updated by the WGETI, as appropriate. This entails that in case delegations would identify issues during future discussions on Articles 6 & 7 which would benefit from further guidance, or would want to expand the current guidance, the Voluntary Guide can be amended.

#### ***Other ATT documents***

8. It needs to be noted that this Voluntary Guide is not the first document which the Sub-working Group on Article 6 & 7 developed to support the implementation of Articles 6 & 7. During the CSP4 cycle, the Sub-Working group also developed: i) a list with possible voluntary guiding and supporting elements in implementing obligations under article 6 (1); and ii) a list of possible reference documents to be considered by States Parties in conducting the risk assessment under Article 7. Both documents were welcomed by CSP4 and made available on the ATT website.<sup>7</sup> Where relevant, the Voluntary Guide makes reference to these documents, which are complementary to this Guide.

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<sup>7</sup> See in the regard Annexes B and E of the WGETI Chair's Draft Report to CSP4 ([ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep](https://www.thearmstradetreaty.org/ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep)). The list of possible reference documents to be considered by States Parties in conducting the risk assessment under Article 7 was subsequently updated by CSP5; see in that regard Annex B of the WGETI Chair's Draft Report to CSP5 ([ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep](https://www.thearmstradetreaty.org/ATT/CSP5.WGETI/2019/CHAIR/529/Conf.Rep)). Both documents are also available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

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## TREATY TEXT<sup>8</sup>

### ARTICLE 6 – PROHIBITIONS

1. A State Party **shall not authorize any transfer** of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its **obligations under measures adopted by the United Nations Security Council** acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its **relevant international obligations under international agreements** to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has **knowledge at the time of authorization** that the arms or items would be used in the commission of **genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes** as defined by international agreements to which it is a Party.

### 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 protocols relating to terrorism to which the exporting State is a Party; or
    - iv. commit or **facilitate** an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.
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.

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<sup>8</sup> The concepts and phrases in blue are mostly addressed in Chapter 1, those in red mostly in Chapter 2 and those in green mostly in Chapter 3 (note that ‘knowledge at the time of authorization’ is extensively addressed in both Chapters 1 and 2). Clicking on these concepts and phrases directs the user to the most relevant section of the Voluntary Guide.

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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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## COMPLETE LIST OF KEY CONCEPTS AND QUESTIONS

### CONTENTS

<b>CHAPTER 1 – KEY CONCEPTS</b> .....	<b>9</b>
<b>Findings/National practices and approaches to key concepts</b> .....	<b>10</b>
Key concept 1: “facilitate” .....	11
Key concept 2: “serious violation of international humanitarian law” (7.1.b(i)) .....	11
Key concept 3: “serious violation of international human rights law” (7.1.b(ii)) .....	12
Key concept 4: “serious acts of gender-based violence or serious acts of violence against women and children” (7.4) .....	14
Key concept 5: “overriding risk” (7.3.) .....	17
Key concept 6: “knowledge at the time of authorization” (6.3) .....	18
<b>CHAPTER 2 – PROHIBITIONS</b> .....	<b>19</b>
<b>Principal obligation</b> .....	<b>20</b>
What does ‘shall not authorize any transfer’ entail in the context of Article 6? .....	20
<b>Article 6 (1)</b> .....	<b>21</b>
What ‘obligations under measures adopted by the United Nations Security Council’ are covered under Article 6(1)? .....	21
<b>Article 6 (2)</b> .....	<b>21</b>
What ‘international obligations under international agreements’ are ‘relevant’ under Article 6(2)? .....	21
<b>Article 6 (3)</b> .....	<b>22</b>
What constitutes ‘knowledge at the time of authorization’ under Article 6(3)? .....	22
How is ‘genocide’ defined under international law? .....	23
How are ‘crimes against humanity’ defined under international law? .....	24
What are ‘grave breaches of the Geneva Conventions of 1949’? .....	27
What are ‘attacks directed against civilian objects or civilians protected as such’? .....	27
What other ‘war crimes’ may be included? .....	29
<b>Relationship between Article 6 and Articles 7, 8, 9 and 10</b> .....	<b>29</b>
Relationship between Article 6 and Article 7 .....	29
Relationship between Article 6 and Articles 8, 9 and 10 .....	30
<b>CHAPTER 3 – EXPORT AND EXPORT ASSESSMENT</b> .....	<b>31</b>
<b>National structures and processes required to implement Articles 6 &amp; 7</b> .....	<b>32</b>
What kind of structure do States Parties use for arms export risk assessment and decision-making? .....	33
How does the procedure for assessing export applications work? .....	33
<b>Export assessment under Article 7</b> .....	<b>35</b>
How have States Parties integrated the export assessment criteria of Article 7 in their national control system? .....	35
Which information sources do States Parties use to assess export applications? .....	36
How do States Parties conduct the risk assessment under Article 7 substantively? .....	37
<b>Gender-based violence and violence against women and children</b> .....	<b>39</b>
<b>Mitigating measures</b> .....	<b>41</b>
What constitute “mitigating measures”? .....	42
Which mitigating measures do States Parties apply or could States Parties apply? .....	43
How to reconcile the long-term nature of risk mitigation and the instant nature of arms export decisions? ..	47
Measures to mitigate the risk of gender-based violence and violence against women and children .....	47

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VOLUNTARY GUIDE TO IMPLEMENTING ARTICLES 6 & 7  
OF THE ARMS TRADE TREATY

**CHAPTER 1 – KEY CONCEPTS**

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## Background

9. This Chapter concerns topic 5 in the multi-year workplan of the Sub-working Group on Articles 6 & 7 (Voluntary Guide – Draft Elements of Chapter 1 on Key concepts), and reflects the work done under topics 2 (Methodology for unpacking concepts) and 4 (Unpacking key concepts). During its meeting of 04 February 2020, the Sub-working Group on Articles 6 & 7 discussed a *Methodology Template for Unpacking Key Concepts in Articles 6&7 of the Arms Trade Treaty*, which the Facilitator of the Sub-working Group subsequently circulated to all ATT States Parties on 17 February 2020 with an invitation to complete the template on a voluntary basis by inserting an explanation of their approach to the interpretation of each concept listed in the template.<sup>9</sup> The “methodology exercise” received contributions from twenty (20) States Parties, one regional organization (the European Union) and three non-governmental organizations. During the (virtual) meeting of the Sub-working Group of 26 April 2021, the Sub-working Group discussed the findings of the exercise on the basis of a summary report of the Facilitator, which led to further inputs.<sup>10</sup> The discussions during this meeting were also informed by expert presentations of Dr. Maya BREHM (International Committee of the Red Cross) and Professor Andrew CLAPHAM (Graduate Institute of International and Development Studies) on the concepts of ‘serious violation of international humanitarian law’ and ‘serious violation of international human rights law’. In accordance with the multi-year workplan, the Facilitator subsequently prepared the list of possible draft elements for this Chapter 1 on the basis of his summary report and the subsequent discussions and presentations, which was then discussed during the Sub-working Group meetings of 15 February 2022 and 26 April 2022.<sup>11</sup> At CSP8, on the basis of a revised version attached to the WGETI Chair’s Draft Report to CSP8, States Parties noted that draft Chapter 1 was completed, as a living document of a voluntary nature to be reviewed and updated regularly by the WGETI, as appropriate.<sup>12</sup>

10. It is noted specifically regarding this Chapter 1 that the inputs received during the “methodology exercise” are summarized in this chapter, and references made to legal instruments and concepts by respondents have been elaborated to give readers a fuller picture and better understanding of some of the jurisprudence and ongoing legal discussions which surround some of these key concepts. It is also noted that the key concepts are further explored in more detail in Chapters 2 and 3 of this Voluntary Guide.

## Findings/National practices and approaches to key concepts

11. As indicated, the inputs received during the exercise are summarized below. Notably, in addition to what is reflected below, as a general comment, most respondent States indicated that they apply the key concepts to concrete transfers on a ‘case-by-case’ basis.

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<sup>9</sup> See the draft methodology template in Annex A, Attachment 2 of the WGETI Chair letter for the 04-05 February 2020 WGETI meeting ([ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1](https://www.un.org/ruia/dhpa/ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1)).

<sup>10</sup> “Summary Report: Approaches to Key Concepts in Articles 6 & 7 of the ATT”, Annex A, Attachment 2 of the WGETI Chair letter for the 26-28 April 2021 WGETI meeting ([ATT/CSP7.WGETI/2021/CHAIR/655/M.LetterWorkPlans](https://www.un.org/ruia/dhpa/ATT/CSP7.WGETI/2021/CHAIR/655/M.LetterWorkPlans)).

<sup>11</sup> See Annex A, Attachment 2 of the WGETI Chair letter for the 15-16 February 2022 WGETI meeting ([ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs](https://www.un.org/ruia/dhpa/ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs)) and Annex A, Attachment 2 of the WGETI Chair letter for the 26-27 April 2022 WGETI meeting ([ATT/CSP8.WGETI/2022/CHAIR/719/M2.LetterSubDocs](https://www.un.org/ruia/dhpa/ATT/CSP8.WGETI/2022/CHAIR/719/M2.LetterSubDocs)).

<sup>12</sup> See Annex A of the WGETI Chair’s Draft Report to CSP8 ([ATT/CSP8.WGETI/2022/CHAIR/733/Conf.Rep](https://www.un.org/ruia/dhpa/ATT/CSP8.WGETI/2022/CHAIR/733/Conf.Rep)) and paragraph 23 of the CSP8 Final Report ([ATT/CSP8/2022/SEC/739/Conf.FinRep.Rev 2](https://www.un.org/ruia/dhpa/ATT/CSP8/2022/SEC/739/Conf.FinRep.Rev2)).

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**Key concept 1: “facilitate”**

12. The term ‘facilitate’ is used in Articles 7(1)(b)(i) –(iv) and 7(4) as part of the obligation on the part of States Parties to assess whether conventional arms or items ‘could be used to commit or facilitate’ one or more of the negative consequences listed.

13. In describing what they consider when assessing whether conventional arms or items could be used to ‘facilitate’ one or more of the negative consequences listed in Article 7, some respondent States indicated that they consider one or more of the following:

- if the fact that conventional arms/items are more easily available enables IHRL/IHL violations
- if conventional arms/items could be used to commit IHRL/IHL violations
- if available conventional arms/items make a significant contribution<sup>13</sup> to IHRL/IHL violations
- the capacity of the conventional arms/items to enable or contribute to violations, even if not directly used in the commission of the act
- if available conventional arms/items assist in bringing about a negative outcome
- whether [the use and presence of] conventional arms/items make[s] a violation of IHRL/IHL easier, including through intimidation and submission of individuals by the simple presence of a conventional arm suitable for this purpose.

14. One State referred to Article 25(3)(c)<sup>14</sup> of the Rome Statute of the International Criminal Court (the Article on individual criminal responsibility) as a source of guidance on how to approach the interpretation of the term ‘facilitate’.

**Key concept 2: “serious violation of international humanitarian law” (7.1.b(ii))**

15. The phrase ‘serious violation of international humanitarian law’ is the first criterion or negative consequence listed in Article 7(1)(b) that States Parties must consider and apply when conducting a risk assessment prior to authorizing an export.

16. In describing what they consider when assessing whether conventional arms or items could be used to commit or facilitate a ‘serious violation of international humanitarian law’, most respondent States specified that they consider ‘serious violations of international humanitarian law’ to cover:

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<sup>13</sup> The use of the phrase ‘significant contribution’ is a reference to the International Law Commission’s (ILC) Commentary to Article 16 (Aid or assistance in the commission of an internationally wrongful act) of the *Draft Articles on State Responsibility*, in which the ILC makes it clear that for a State to be held internationally responsible for aiding and assisting another State in the commission of an internationally wrongful act, ‘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’ (emphasis added)(Draft Articles on State Responsibility, commentary, 2001, UN doc. A/56/10 (ILC Commentary), Commentary to Article 16, para. 5).

<sup>14</sup> Article 25(3)(c) stipulates: ‘...a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:...(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission’. [References in this document to the International Criminal Court reflect the responses of certain States that indicated they use the Rome Statute and other International Criminal Court-related documents as sources of guidance on how to approach certain concepts in the ATT. The inclusion of the reference in this document is not intended to apply criminal law standards regarding *individual* criminal responsibility to these ATT provisions.]

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- grave breaches as specified under the four Geneva Conventions of 1949 (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively);
  - grave breaches as specified under Additional Protocol I of 1977<sup>15</sup> (Articles 11 and 85);
  - war crimes as specified under Article 8 of the Rome Statute of the International Criminal Court; and
  - all war crimes in international and non-international armed conflicts both under conventional and customary international humanitarian law.

17. The relevant provisions of the Geneva Conventions, Additional Protocol I and the Rome Statute are included in Annex 1 to this Chapter.

18. Respondent States either referred to the Geneva Conventions and/or the Rome Statute directly or indirectly by indicating that their national implementation of this provision as well as their national approach of the interpretation of their “key concepts” is guided by the [User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment](#) (EU Users' Guide) as amended by Council Decision (CFSP) 2019/1560<sup>16</sup> (see paragraph 2.11).

19. A violation of IHL must be considered to be ‘serious’ when it constitutes a breach of a rule protecting important values and the breach involves grave consequences for the victim.<sup>17</sup> In addition to war crimes, one respondent also indicated that it considers that, in order to implement Article 7.1.b(i), “serious violations of international humanitarian law” does not require a specific element of intent or some other *mens rea*, and includes conduct that is not itself criminalized, for example, where conduct that is not a war crime takes on a ‘serious’ nature because of its systematic repetition or the circumstances. Another respondent indicated that it considers reports on the importing State’s respect for international humanitarian law and the nature, scale, and effect of any previous violations by that State.<sup>18</sup>

**Key concept 3: “serious violation of international human rights law” (7.1.b(ii))**

20. The phrase ‘serious violation of international human rights law’ is used in Article 7(1)(b)(ii) and is the second criteria or negative consequence States Parties must consider and apply when conducting a risk assessment prior to authorizing an export.

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<sup>15</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

<sup>16</sup> The User’s guide was revised in 2019 in particular to take into account the provisions of the Arms Trade Treaty to which all EU member states are parties.

<sup>17</sup> ICTY, *Prosecutor v Tadic*, IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §94. Based on an analysis of this case, and other international and national instruments and jurisprudence, the ICRC takes the view that violations of IHL are in practice treated as serious “if they endanger protected persons or objects or if they breach important values” (ICRC, Customary IHL study, Rule 156).

<sup>18</sup> Art 89 of 1977 Additional Protocol I to the Geneva Conventions refers to “situations of serious violations”. Such situations include “conduct ... which takes on a serious nature because of the frequency of the individual acts committed or because of the systematic repetition thereof or because of circumstances” or generalized nature in that “a particular situation, a territory or a whole category of persons or objects is withdrawn from the application of the [Geneva] Conventions or the Protocol.” (*Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, §3592).

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21. In describing how they approach their interpretation of the phrase ‘serious violation of international human rights law’, respondent States provided information on the following elements of the concept:

*International human rights law*

22. Respondent States gave numerous examples of the international instruments they are party to and rely on as a source of human rights law, including:

- Covenant on Civil and Political Rights (1966)
- Covenant on Economic, Social and Cultural Rights (1966)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Convention on the Rights of the Child (1989)
- Convention on the Rights of Persons with Disabilities (2006)
- Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)
- Convention relating to the Status of Refugees (1951)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)
- Convention for the Protection of All Persons from Enforced Disappearance (2006)
- U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (2000)

The above list is not exhaustive, and other international and regional instruments that were not explicitly mentioned by respondent States may also be relevant. In addition to being indicative only, the list does not reflect a common understanding of *all* States Parties, but may nevertheless be used as a reference by States Parties when they are implementing Article 7 of the Treaty, should they wish to do so. Obviously, some States Parties may not be parties to one or more of these instruments and are not bound by their terms

*Seriousness*

23. Several States noted that any violation of the peremptory rules of public international law (*jus cogens*)<sup>19</sup> are considered a ‘serious’ violations of internationally recognized human rights, while noting that for human rights that do not belong to this narrow circle of peremptory norms of international law, the threshold to consider a violation as ‘serious’ is likely to be higher. Only a few States gave examples of the human rights they consider to be *jus cogens*:

- Prohibition on torture or to cruel, inhuman or degrading treatment or punishment<sup>20</sup>

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<sup>19</sup> The International Law Commission has defined a peremptory norm of general international law (*jus cogens*) as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ ([Report of the International Law Commission](#), (A/74/10), Chapter V, paragraph 56, Conclusion 2).

<sup>20</sup> (International Covenant on Civil and Political Rights (ICCPR), art. 7; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art. 3, American Convention on Human Rights (ACHR), art. 5.

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- Prohibition on slavery<sup>21</sup>
  - Enforced disappearances
  - Summary or arbitrary executions

This list is not exhaustive and other violations may also be relevant.

24. Others noted that violations may be ‘serious’ violations based on their nature and effects, such as:

- Violations of the right to life<sup>22</sup>, including murder and massacre, and extrajudicial and summary executions
- Arbitrary arrest and detention<sup>23</sup>
- Excessive use of force by law-enforcement officials
- Rape and other sexual violence

This list is not exhaustive and other violations may also be relevant.

25. Several respondent States noted that they approach the concept of ‘serious violation of international human rights law’ in accordance with the *EU User’s Guide* (see paragraph 2.6).

**Key concept 4: “serious acts of gender-based violence or serious acts of violence against women and children” (7.4)**

26. The phrase ‘serious acts of gender-based violence or serious acts of violence against women and children’ is used in Article 7(4) and is another risk States Parties must consider when conducting a risk assessment prior to authorizing an export.

27. In describing how they approach their interpretation of the phrase ‘serious acts of gender-based violence or serious acts of violence against women and children’, respondent States provided information on the following elements of the concept:

*Seriousness*

28. Some respondent States noted that there is an overlap between Articles 7(1)(b)(i) and (ii), and Article 7(4), such that serious acts of gender-based violence and violence against women and children will often be covered by article 7 paragraphs (1)(b)(i) and (ii). In such cases, the threshold of ‘seriousness’ will be the same. Some States referred to the *EU User’s Guide* on this point (see paragraph 2.12).

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Here and throughout the document, this list is not exhaustive, and other international and regional instruments that may also be relevant. In addition to being indicative only, the list does not reflect a common understanding of all States Parties, but may nevertheless be used as a reference by States Parties when they are implementing Article 7 of the Treaty, should they wish to do so.)

<sup>21</sup> (ICCPR, art. 8; ECHR, 64, art. 4; ACHR, art. 6.)

<sup>22</sup> (ICCPR, art. 6)

<sup>23</sup> (ICCPR, art. 9; ECHR, 64, art. 5; ACHR, art. 7.)

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29. Others indicated that whether specific acts qualify as ‘serious’ should be determined both qualitatively and quantitatively by both the gravity of the violation (its character) and the manner of its commission (the extent of harm to victims, which need not be systematic or widespread).

#### *Gender-based violence*

30. Many respondent States indicated that they interpret ‘gender-based violence’ to mean violence directed against a person on the basis of gender<sup>24</sup> or sex, including acts that can inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and deprivations of liberty. This definition is/appears to be derived from the interpretation given by the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). [General Recommendation 19](#) of the CEDAW Committee of 1992 interpreted the term ‘discrimination’ in Article 1 of the Convention as including gender-based violence, that is ‘violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty’.

31. One State Party responded that it considers the International Criminal Court’s Office of the Prosecutor’s position in its [Policy Paper on Sexual and Gender-Based Crimes](#), which defines “Gender-based crimes”<sup>25</sup> as ‘those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles’.<sup>26</sup> It also referenced the ICRC Working Paper, [International Humanitarian Law and Gender Based Violence in the Context of the Arms Trade Treaty](#), 2019, which notes that ‘GBV need not be sexual in nature; it is broader than (but includes) sexual violence’ and that unlawful killings, which constitute serious violations of international law, can also constitute GBV in some circumstances. For example, ‘in some armed conflicts, military---age males are the victims of mass killings to prevent them from participating in hostilities’.

#### *Violence against women*

32. In addition to CEDAW, some States referred to specific international and/or regional instruments they perceive as relevant to the interpretation of the phrase ‘serious acts of violence against women’, including:

- The Declaration on the Elimination of Violence against Women<sup>27</sup>
- The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)<sup>28</sup>

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<sup>24</sup> Some broadened this to ‘gender identity, gender expression or perceived gender’.

<sup>25</sup> Not necessarily sexual *violence*, but also non-sexual attacks.

<sup>26</sup> ‘Gender’, in accordance with article 7(3) of the Rome Statute (“Statute”) of the ICC, refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys” (*Policy Paper on Sexual and Gender-Based Crimes*, International Criminal Court, The Office of the Prosecutor, June 2014, p3). See also: Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, International Law Commission, A/74/10, 2019, Commentary to Article 2, §§41-42, pp45-46.

<sup>27</sup> Proclaimed by General Assembly resolution 48/104 of 20 December 1993.

<sup>28</sup> Article 1 of the Convention stipulates: ‘For the purposes of this 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’.

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- The Council of Europe Convention on preventing and combating violence against women and domestic violence, better known as the Istanbul Convention
  - The 1995 Beijing Declaration and Platform for Action.

With regard to serious acts of gender-based violence or serious acts of violence against women and children, this list is not exhaustive and other instruments may also be relevant.

33. The definition of ‘violence against women’ enshrined in the Declaration on the Elimination of Violence against Women is included in Box 1 below.

**Box 1. ‘Violence against women’ (Declaration on the Elimination of Violence against Women)**

*Article 1*

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.

*Article 2*

Violence against women shall be understood to encompass, but not be 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.

*Violence against children*

34. Some States referred to specific international and/or regional instruments they perceive as relevant to the interpretation of the phrase ‘serious acts of violence against ... children’, namely:

- The Convention on the Rights of the Child<sup>29</sup>
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

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<sup>29</sup> Article 19(1) of the Convention stipulates: ‘States Parties shall 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.’

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35. The definition of ‘violence’ in the context of the Convention on the Rights of the Child given by the Committee on the Rights of the Child is included in Box 2.

**Box 2. ‘Violence against children’ (Committee on the Rights of the Child)**

**Definition of violence.** For the purposes of the present general comment, “violence” is understood to mean “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” as listed in article 19, paragraph 1, of the Convention. The term violence has been chosen here to represent all forms of harm to children as listed in article 19, paragraph 1, in conformity with the terminology used in the 2006 United Nations study on violence against children, although the other terms used to describe types of harm (injury, abuse, neglect or negligent treatment, maltreatment and exploitation) carry equal weight. In common parlance the term violence is often understood to mean only physical harm and/or intentional harm. However, the Committee emphasizes most strongly that the choice of the term violence in the present general comment must not be interpreted in any way to minimize the impact of, and need to address, non-physical and/or non-intentional forms of harm (such as, inter alia, neglect and psychological maltreatment).

([General Comment No. 13 \(2011\)](#), paragraph 1.4)

**Key concept 5: “overriding risk” (7.3.)**

36. The phrase ‘overriding risk’ is used in Article 7(3) and indicates the threshold States Parties must apply when assessing the potential of any of the negative consequences listed in Article 7(1)(b). A State Party must not authorize an export if it determines, after considering available mitigating measures, that there is an ‘overriding risk’.

37. In describing how they interpret or apply the term ‘overriding risk’ in their national control systems, respondent States reported that they interpret the phrase to mean one or more of the following:

- “substantial risk”
- “clear risk”
- “high” potential
- A negative consequence set out in Article 7(1) is “very likely” or “more likely than not” to occur even after the expected effect of any mitigating measure has been considered.

38. Some State respondents linked their interpretation of ‘overriding risk’ to the obligation to *mitigate* any risk identified contained in Article 7(2), indicating it is an identified risk that cannot be mitigated sufficiently or at all.

39. The respondent States that referenced the phrase “clear risk” were generally EU States who noted that they interpret ‘overriding risk’ to broadly conform with the meaning of ‘clear risk’ threshold elaborated in the *EU User’s Guide*.

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**Key concept 6: “knowledge at the time of authorization” (6.3)**

40. The phrase ‘knowledge at the time of authorization’ is used in Article 6(3) and denotes the point at which a State Party shall not authorize a transfer of arms or items.

41. Most respondent States indicated they interpret “knowledge” as (sufficiently) reliable facts or information that are available to the State at the time it authorizes the transfer of arms. Some indicated that this covers information that the State is aware of or should (normally) have been aware of (‘and thus establishes an obligation to actively seek out information’). Others indicated that it includes:

- information ‘that can be reasonably obtained’
- information that is ‘public’
- ‘facts at its disposal’ at the time of the authorization
- ‘information in its possession or that is reasonably available to it’
- facts or information ‘that are or become available at the time of assessing the authorization request’
- information that is ‘normally expected to be known by the importing States’

This list is not exhaustive and furthermore, some information listed in some of the bullet points above may not be sufficient on their own.

42. Some also touched on the sources of such information, noting it includes information from ‘domestic and overseas sources’ or ‘internal or external sources’. With others indicating it implies assessing the current and past behaviour of the recipient.

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VOLUNTARY GUIDE TO IMPLEMENTING ARTICLES 6 & 7  
OF THE ARMS TRADE TREATY

**CHAPTER 2 – PROHIBITIONS**

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## Background

43. This Chapter concerns topics 8 and 10 in the multi-year workplan of the Sub-working Group on Articles 6 & 7 (Voluntary Guide – Draft Elements of Chapter 2 on Prohibitions), and reflects the work done under topics 6 and 7 (Scope of Article 6) and 9 (Relationship between Article 6 and other Articles). The Sub-working addressed the guiding questions concerning the scope of Article 6, which provide the structure for this Chapter, during its meetings of 15 February 2022 and 26 April 2022.<sup>30</sup> During the latter meeting, the International Committee of the Red Cross (ICRC) informed discussions with an expert presentation on the concept of “knowledge” and other terms in Article 6 (3) of the Treaty.<sup>31</sup> The Sub-working subsequently addressed the guiding questions concerning the relationship between Article 6 and other Articles during its joint meeting with the Sub-working Group on Article 9 of 14 February 2023 on the basis of a background paper of the Facilitator.<sup>32</sup> In line with the multi-year workplan of the Sub-working Group, the draft elements of the Facilitator for draft Chapter 2 were discussed in its meetings of 14 February 2023 and 09 May 2023.<sup>33</sup> At CSP9, on the basis of a revised version attached to the WGETI Chair’s Draft Report to CSP9, States Parties noted that draft Chapter 2 was completed, as a living document of a voluntary nature to be reviewed and updated regularly by the WGETI, as appropriate.<sup>34</sup>

## Principal obligation

### *What does ‘shall not authorize any transfer’ entail in the context of Article 6?*

44. The phrase ‘shall not authorize any transfer’ is not defined in the Treaty. In their interventions during the discussions on this topic, States Parties focused on the aspect that the obligations in Article 6 extend to all the types of transfer covered under Article 2 (2), namely export, import, transit, trans-shipment and brokering. States Parties also indicated that in their national control system, an export involves the transfer of title to and control over the arms in addition to the physical movement of the arms.

45. Factoring in their general obligation in Article 5 (2) to establish and maintain a national control system in order to implement the provisions of the Treaty, and Articles 2, 3 and 4, it entails that as part of their national control system, States Parties cannot allow any export, import, transit, trans-shipment and brokering shipment under its jurisdiction of conventional arms covered under Article 2 (1) of the

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<sup>30</sup> For these discussions, no other documentation than the relevant extract of the multi-year workplan of the Sub-working Group on Articles 6 & 7 was provided.

<sup>31</sup> The presentation of the ICRC is available on the ATT website at: [https://www.thearmstradetreaty.org/hyper-images/file/ICRC\\_Kick-off%20remarks%20on%20Art%206.3\\_WGETI%20SubWG%20on%20Arts%206&7\\_26.04.2022/ICRC\\_Kick-off%20remarks%20on%20Art%206.3\\_WGETI%20SubWG%20on%20Arts%206&7\\_26.04.2022.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ICRC_Kick-off%20remarks%20on%20Art%206.3_WGETI%20SubWG%20on%20Arts%206&7_26.04.2022/ICRC_Kick-off%20remarks%20on%20Art%206.3_WGETI%20SubWG%20on%20Arts%206&7_26.04.2022.pdf).

<sup>32</sup> The background paper on the relationship between Treaty Articles is included as Attachment 4 of Annex A, Part I in the WGETI Chair letter for the 14-15 February 2023 WGETI meeting (<ATT/CSP9.WGETI/2023/CHAIR/740/M1.LetterSubDocs>).

<sup>33</sup> See Attachment 2 of Annex A, Part I of the WGETI Chair letter for the 14-15 February 2023 WGETI meeting (<ATT/CSP9.WGETI/2023/CHAIR/740/M1.LetterSubDocs>) and Attachment 2 of Annex A of the WGETI Chair letter for the 09-10 May 2023 WGETI meeting (<ATT/CSP9.WGETI/2023/CHAIR/748/M2.LetterSubDocs>).

<sup>34</sup> See Annex A of the WGETI Chair’s Draft Report to CSP9 (<ATT/CSP9.WGETI/2023/CHAIR/767/Conf.Rep>) and paragraph 24 (a) of the CSP9 Final Report (<ATT/CSP9/2023/SEC/773/Conf.FinRep.Rev2>).

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Treaty and of items covered under Article 3 or Article 4 that is prohibited in paragraphs 1 to 3 of Article 6.

#### **Article 6 (1)**

##### ***What ‘obligations under measures adopted by the United Nations Security Council’ are covered under Article 6(1)?***

46. This question was partially addressed within the ATT process as part of the discussions in the WGETI during the CSP4 cycle on [possible voluntary guiding and supporting elements in implementing obligations under article 6 \(1\)](#). The document with these elements was welcomed by States Parties at CSP4 as a living document of a voluntary nature and is available in the *Tools and Guidelines* section of the ATT website at <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

47. The use of the phrase “*in particular arms embargoes*” indicates that the obligation in Article 6 (1) applies to arms embargoes as well as all other binding measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations. It therefore applies to all binding economic sanctions regarding the relevant State and designated individuals and entities, which concern the export, import, transit, trans-shipment and brokering of the conventional arms covered under Article 2 (1) of the Treaty and/or of items covered under Article 3 or Article 4. In that respect, it is not necessary that the measures in question are explicitly designated as an “arms embargo”, which is not defined in the Treaty or the UN Charter, neither in international law in general.

48. The abovementioned document also includes instructions on how to apply the obligation in Article 6 (1) in practice and where to find the relevant measures.

#### **Article 6 (2)**

##### ***What ‘international obligations under international agreements’ are ‘relevant’ under Article 6(2)?***

49. This question was already addressed within the ATT process as part of the discussions in the Working Group on Transparency and Reporting (WGTR) during the CSP6 and CSP7 cycles on the review of the ATT Initial Reporting Template. In the relevant section about the implementation of Article 6 (Prohibitions), the amended Initial Reporting Template that was endorsed and recommended for use at CSP7 contains a reference to a non-exhaustive list of examples of the international agreements which States Parties have reported ‘are relevant’ to Article 6(2) in their Initial Reports. The list is maintained by the ATT Secretariat, and will be updated every time a new State Party includes one or more agreements in its Initial Report which were not yet mentioned. The list is available in the *Tools and Guidelines* section of the ATT website at <https://www.thearmstradetreaty.org/initial-report-list-of-examples-for-q-2-b-2-c.html>.

50. In their interventions during the discussions on this topic, States Parties and other stakeholders referred to a mixture of agreements, including but not limited to the UN Charter, the Convention on Certain Conventional Weapons (CCW), the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines, the Convention on Cluster Munitions, the UN

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Convention against Transnational Organized Crime and its Firearms Protocol, the UN Convention against Corruption and several human rights treaties.<sup>35</sup>

51. In respect of these listed agreements, it needs to be noted that States Parties only need to take into account those agreements that it itself is a Party to. The listed agreements are merely examples which States Parties provided as relevant on the basis of their own practice and international commitments.

### **Article 6 (3)**

#### ***What constitutes ‘knowledge at the time of authorization’ under Article 6(3)?***

52. The concept of ‘knowledge at the time of authorization’ is already addressed in chapter 1 of this Voluntary Guide, which includes an overview of national practices with respect to the interpretation of this concept, which were submitted by States Parties in the context of the “methodology exercise” for unpacking key concepts in articles 6 & 7 of the Treaty (see paragraphs 40-42).

53. Subsequent to the completion of the “methodology exercise”, the interpretation of the term ‘knowledge’ in international law was also addressed in the aforementioned expert presentation of the ICRC. On the basis of its overview, the ICRC recommends that *“the term ‘knowledge’ in Art. 6.3 should be interpreted objectively to include what a State Party can normally be expected to know, based on information in its possession or reasonably available to it”*.

54. Concerning practical implementation and application, the ICRC holds the position that *“A State Party must deny a transfer under Art. 6.3 if it has substantial grounds to believe, based on information in its possession or that is reasonably available it, that the weapons would be used to commit genocide, crimes against humanity or war crimes”*. States Parties need to make a prospective assessment of the future behaviour of a recipient, how they are likely to behave and how the arms to be transferred will likely be used. Next to present circumstances and reasonable expectations, this can be based on the historic behaviour, yet without any requirement of evidence beyond reasonable doubt of past crimes. Also taking into account States’ due diligence requirements of international law, States have an obligation to actively seek out information to make their assessment.

55. Concerning relevant sources of States Parties’ ‘knowledge’, intelligence and information exchange between States were mentioned, and reference was made to sources listed in two other WGETI documents, the previously mentioned document with on [possible voluntary guiding and supporting elements in implementing obligations under Article 6 \(1\)](#) and the [list of possible reference documents to be considered by States Parties in conducting a risk assessment under Article 7](#) (both welcomed at CSP4).

56. As indicated in the WGETI Chair’s report to CSP8, during the discussions following the expert presentation, States Parties shared their approaches to interpreting the term ‘knowledge’ under

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<sup>35</sup> Mention was also made of States’ obligations under customary international law, but as Article 6 (2) only refers to States’ international obligations under international *agreements*, customary law obligations are outside the scope of Article 6 (2).

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Article 6(3), whether it encompasses ‘actual’ and ‘constructive’ knowledge, what level of knowledge is contemplated, and the extent to which there is a common view on this. It was put forward by intervening State Parties that only a ‘constructive’ knowledge standard, as presented by the ICRC, is in line with the object and purpose of the Treaty, arguing that absolute certainty will rarely be obtained. It was also pointed out that most respondents in the “methodology exercise” apply a ‘constructive’ knowledge standard. Other participants asserted that the Treaty requires the ‘actual’ knowledge standard as a minimum. It is noted in this context that States Parties also need to respect the parameters of their relevant underlying obligations (see paragraphs 59 and 69 about the Genocide Convention and the Geneva Conventions).

### ***How is ‘genocide’ defined under international law?***

57. This question was addressed in the aforementioned expert presentation of the ICRC, with intervening States Parties subsequently indicating that this guide should not redefine the existing definition.

58. The crime of “genocide” is defined in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). This definition is considered to have the status of customary international law. That entails that this definition is binding on all States, regardless whether they are a Party to the Genocide Convention or not.<sup>36</sup>

#### **Box 1. ‘Genocide’ (Article II Genocide Convention)**

*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*

*(a) Killing members of the group;*

*(b) Causing serious bodily or mental harm to members of the group;*

*(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*

*(d) Imposing measures intended to prevent births within the group;*

*(e) Forcibly transferring children of the group to another group.*

59. In terms of the practical application of the obligation in Article 6 (3), States Parties will need to comply with the parameters of their general obligation to prevent genocide, laid down in Article I of the Genocide Convention. In reference to the parameters set out by the International Court of Justice (ICJ) in the case on the application of the Genocide Convention, this entails that States Parties must refrain from authorizing and must take all measures (including legal measures) within their power to halt arms transfers (under their jurisdiction) from the moment that they are aware *or should normally*

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<sup>36</sup> An identical definition of genocide is included in Article 6 of the Rome Statute of the International Criminal Court (ICC; see <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>). It needs to be noted, however, that this definition in the ICC Statute specifically concerns the jurisdiction of the ICC and the establishment of individual criminal responsibility and does not concern the establishment of state responsibility for genocide.

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*be aware* that acts of genocide are occurring or that there exists a serious danger of genocide occurring and that the arms in question would be used in the commission of these acts.<sup>37</sup>

60. In order to establish the occurrence or imminent danger of acts of genocide, the ICRC referred to two important elements in its presentation: 1) genocide can be committed in and outside the context of armed conflict and both by State and non-state actors; and 2) in addition to the occurrence of the above acts, States Parties need to establish the specific intent to destroy, in whole or in part, the national, ethnical, racial or religious group, as such. Concerning the latter, the aforementioned ICJ case on the application of the Genocide Convention refers to a concerted plan or a consistent pattern of conduct which could only point to the existence of such specific intent.

61. To make the determination in the practical context of an upcoming arms transfer, coordination between different State authorities is likely required. The elements mentioned in paragraphs 54 and 55 above are relevant in this regard.

### ***How are ‘crimes against humanity’ defined under international law?***

62. The prevention and punishment of crimes against humanity has been under consideration by the International Law Commission since 2013.<sup>38</sup> Its 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity, submitted to the UN General Assembly, provides the following definition in Article 2<sup>39</sup>:

#### **Box 2. ‘Crimes against humanity’ (Article 2 Draft articles on Prevention and Punishment of Crimes Against Humanity)**

*1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

*(a) murder;*

*(b) extermination;*

*(c) enslavement;*

*(d) deportation or forcible transfer of population;*

*(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*

*(f) torture;*

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<sup>37</sup> ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, § 432: “By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”.

<sup>38</sup> See [https://legal.un.org/ilc/texts/7\\_7.shtml](https://legal.un.org/ilc/texts/7_7.shtml).

<sup>39</sup> See [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/7\\_7\\_2019.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf).

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*(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*

*(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;*

*(i) enforced disappearance of persons;*

*(j) the crime of apartheid;*

*(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

*2. For the purpose of paragraph 1:*

*(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;*

*(b) "extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;*

*(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;*

*(d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;*

*(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;*

*(f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;*

*(g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;*

*(h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;*

*(i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*

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3. *This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.*

63. In their interventions during the discussions on this topic, States Parties also referred to the definition of crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court (ICC).<sup>40</sup> It needs to be noted, however, that this definition in the ICC Statute specifically concerns the jurisdiction of the ICC and the establishment of individual criminal responsibility, and does not concern the establishment of state responsibility for crimes against humanity. The ICC Statute is also only binding on ICC States Parties.

64. Just like genocide, crimes against humanity can be committed in and outside the context of armed conflict and both by State and non-state actors. Unlike in the case of genocide, crimes against humanity do not need require the specific intent mentioned in paragraph 60.

65. In line with the definition above in the Draft Articles on Prevention and Punishment of Crimes Against Humanity, as well as the Rome Statute, the ICRC emphasized in its expert presentation a few key elements of crimes against humanity, namely that the above acts need to be: 1) committed as part of a *widespread or systematic* attack directed against any civilian population; and 2) *multiple* and committed pursuant to or in furtherance of a *State or organizational policy* to commit such. These requirements essentially exclude spontaneous or isolated acts of violence from constituting crimes against humanity (which does not exclude that such acts could constitute war crimes if committed in the context of armed conflict).

66. The widespread or systematic attack requirement is not cumulative, meaning that the attack does not need to be widespread and systematic for the committed acts to constitute crimes against humanity. The commentaries to the aforementioned Draft Articles elaborate on the meaning of these terms in reference to the jurisprudence of the ICTY, ICTR and the ICC. In short, “widespread” involves factors such as the large scale of the attack (in acts and/or area) and the number of victims, which are assessed case-by-case. For an attack to be “systematic”, factors such as the organized nature or a regular pattern of acts are relevant.

67. The distinct State or organizational policy requirement essentially requires a link between the widespread or systematic acts of violence and the State or an organization (i.e. an organized non-state actor). Its scope and standard of proof are debated. For the purpose of this Voluntary Guide, it suffices to refer to the guidance on this in the commentaries to the relevant Draft articles and the Elements of Crimes of the Rome Statute.<sup>41</sup> The latter indicate that a “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population. The Elements further specify that a policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action. The commentaries to the abovementioned Draft articles also elaborate on this topic, referring to the Elements of Crimes of the Rome Statute and the jurisprudence of the International Criminal Court, as well as the jurisprudence of the ICTY and previous work of the ILC. In doing so, it also recalls the ILC’s 1996 draft Code of Crimes against the Peace and Security of

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<sup>40</sup> See <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

<sup>41</sup> Elements of Crimes, <https://www.icc-cpi.int/publication/elements-crimes>, page 3.

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Mankind, which required that the abovementioned acts were committed “*in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group*”.<sup>42</sup> It is important to note for assessment purposes that regardless a policy requirement does not entail proof that a formal policy was established or promulgated; a policy can also be deduced from circumstantial elements such as the way in which acts occur, a regular pattern, their repetition and preparatory activities.

### ***What are ‘grave breaches of the Geneva Conventions of 1949’?***

68. Grave breaches of the Geneva Conventions of 1949 are already mentioned in Chapter 1 of this Voluntary Guide, as States included them in their description of what they consider ‘serious violations of International Humanitarian Law (IHL)’ to cover. In that regard, grave breaches of the Geneva Conventions of 1949 are the serious violations of IHL included in respectively Articles 50 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, Article 130 of Geneva Convention (III) on Prisoners of War, and Article 147 of Geneva Convention (IV) on Civilians. Annex A of Chapter 1 contains the full text of these provisions.

69. In terms of the practical application of the obligation in Article 6 (3), the ICRC indicated in its expert presentation that States Parties will need to take into account their underlying general obligation to ensure respect for the Geneva Conventions in all circumstances, laid down in Article 1 common to the Geneva Conventions. In that respect, the (updated) Commentary to Article 1 explicitly mentions the context of arms transfers as an illustration of the negative obligation not to encourage, nor aid or assist in violations of the Convention.<sup>43</sup> It indicates that common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an *expectation, based on facts or knowledge of past patterns*, that such weapons would be used to violate the Conventions. In terms of their positive obligation to prevent violations, the Commentary to Article 1 identifies this as a due diligence obligation to act if there is a foreseeable risk that violations will be committed and to prevent further violations in case they have already occurred. It should be noted that this obligation concerns all violations of the Conventions, not only grave breaches.

### ***What are ‘attacks directed against civilian objects or civilians protected as such’?***

70. The phrase “attacks directed against civilian objects or civilians protected as such” is part of a three-part enumeration of serious violations of international humanitarian law in Article 6 (3), in between “grave breaches of the Geneva Conventions of 1949” and “other war crimes as defined by international agreements to which [the transferring State Party] is a Party”.

71. The exact phrase by itself is not taken from any international legal instrument on international humanitarian law, but recalls the wording of Articles 51(2), 52(1) and 85 (3) of Additional Protocol (I) to the Geneva Conventions. The acts described in these articles are grave breaches of Additional

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<sup>42</sup> 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity with commentaries, [https://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_7\\_2019.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf); page 38.

<sup>43</sup> Geneva Convention (III) of 12 August 1949 relative to the Treatment of Prisoners of War, commentary of 2020, article 1 : respect for the convention, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538#83\\_B](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538#83_B).

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Protocol (I) to the Geneva Conventions, applicable to international armed conflicts, but also constitute war crimes in international and non-international armed conflicts under customary international law.

72. It should be noted that these provisions do not explicitly include the phrase “directed against” that is used in Article 6 (3). This phrase is nevertheless mentioned in the definition of crimes against humanity, which involves a widespread or systematic attack *directed against* any civilian population (see above). In that context, the commentaries to the abovementioned Draft articles on Prevention and Punishment of Crimes Against Humanity cite case law of the ICTY, stating that “the phrase “directed against” requires that civilians be the *intended primary target* of the attack, rather than *incidental victims*”.<sup>44</sup> Further elaboration clarifies, however, that taking into account several factors, also attacks which fail to discriminate between military objectives and civilians (indiscriminate attacks) or are disproportionate in terms of the incidental damage to civilian objects or the injury to civilians (disproportionate attacks) can give rise to the inference of direct attacks on civilians. Consistent with that position, the ICRC mentioned in its expert presentation that in the ICRC’s view, “*depending on circumstances, [also] indiscriminate attacks and disproportionate attacks could qualify as attacks directed against civilian objects or civilians protected as such*”.

**Box 3. Attacks [directed against] civilian objects or civilians in Additional Protocol (I) to the Geneva Conventions**

Article 51 (2):

*2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*

Article 52 (1):

*1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.*

Article 85 (3)

*3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:*

*(a) making the civilian population or individual civilians the object of attack;*

*(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);*

*(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);*

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<sup>44</sup> 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity with commentaries, [https://legal.un.org/ilc/texts/instruments/english/commentaries/7\\_7\\_2019.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf); page 34.

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### ***What other ‘war crimes’ may be included?***

73. This question was already partially addressed in Chapter 1, which includes States’ descriptions of what they consider serious violations of IHL to cover (for clarity, war crimes are serious violations of IHL that entail individual criminal responsibility). In that respect, Chapter 1 also includes an annex with the text of all the provisions of the Geneva conventions and the Rome statute that define /are relevant to ‘serious violations of international humanitarian law’. In that list, “*other war crimes*” are then those that are not ‘grave breaches of the Geneva Conventions of 1949’ or ‘attacks against civilian objects or civilians protected as such’. It should be noted, however, that Article 6(3) specifically refers to other war crimes ‘*as defined by international agreements to which [the State Party in question] is a Party*’. This excludes those that are *only* war crimes under customary international law.

74. During the 26 April 2022 meeting of the WGETI Sub-working Group on Articles 6&7, the ICRC also addressed this topic. The ICRC recommended that States Parties adopt a broad scope of war crimes to implement Article 6 (3) and referred to Rule 156 in the ICRC study on customary international humanitarian law. Some States parties apply Article 6 (3) to all war crimes, including those in Rule 156 that are *only* war crimes under customary international law, even if this goes beyond the mandatory scope of Article 6 (3).<sup>45</sup>

### **Relationship between Article 6 and Articles 7, 8, 9 and 10**

#### ***Relationship between Article 6 and Article 7***

75. Articles 6 & 7 both include requirements concerning the substance or material scope of States Parties’ export controls, i.e. circumstances that should be subject to control (and prevented), and assessment criteria to apply. Although some provisions in these articles refer to similar elements, the obligations in both articles are very different in nature. Article 6 involves absolute prohibitions, whilst Article 7 requires a risk assessment, weighing several factors, as well as the mandatory consideration of mitigating measures. In that respect, while States Parties can apply Articles 6 & 7 jointly in one assessment, they need to respect the different nature of these respective obligations. If a State Party establishes that one of the prohibitions in Article 6 is applicable, it needs to simply halt the export; there is no question of taking into account certain other considerations or considering mitigating measures as there is when conducting the risk assessment under Article 7.

76. During the dedicated discussion on the relationship between Treaty articles, limited interventions were made on this particular topic. These mostly referred to the national risk assessment process and relevant information, such as documentation that is used for public safety purposes. One State Party explained that the prohibitions in Article 6 and the export risk assessment criteria in Article 7 are integrated jointly in its national legislation. Another State Party highlighted the importance of also subjecting ammunition and parts and components to the export assessment in Article 7.

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<sup>45</sup> These war crimes do remain relevant for the implementation of Article 7(1)(b)(i). This provision requires exporting States Parties to assess the potential that the conventional arms or items could be used to commit or facilitate a serious violation of international humanitarian law. This obligation applies to all war crimes in international and non-international armed conflicts, both under conventional and customary international humanitarian law.

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### ***Relationship between Article 6 and Articles 8, 9 and 10***

77. Unlike Article 7 on Export and Export Assessment, Articles 8, 9 and 10 all lack any guidance concerning the substance or material scope of States Parties' import, transit and trans-shipment and brokering controls. They do not refer to circumstances that should be subject to control (and prevented), nor to any assessment criteria to apply. In that regard, the fact that Article 6 also applies to those types of transfers is crucial in terms of understanding the required minimum scope of States Parties' import, transit and trans-shipment and brokering controls. It means that, as a minimum, States Parties will have to regulate import, transit and trans-shipment and brokering in order to fulfil its obligations under Article 6, and that the measures undertaken also have to extend to ammunition/munitions, as well as parts and components (because unlike Articles 8, 9 and 10, Article 6 does not only refer to conventional arms covered under Article 2 (1), but also to the items covered under Articles 3 and 4). The importance of Article 6 for the implementation of Articles 8, 9 and 10 is also acknowledged in the ATT Initial Reporting Template, which systematically includes the question whether the national control system includes measures to prevent imports, transit and trans-shipment and brokering in violation of Article 6.<sup>46</sup>

78. During the dedicated discussion on the relationship between Treaty articles, also few participants intervened on this topic. Those who did, focused on the relationship between Article 6 and Article 9; those exchanges are reflected in the Voluntary Guide to implementing Article 9.<sup>47</sup> Concerning the relationship between Article 6 and Articles 8 and 10, one State Party did explain that it applies exactly the same assessment criteria to brokering as it does to export, referring to both Article 6 and 7, and that these criteria are also applied to import of ammunition/munitions, as well as parts and components.

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<sup>46</sup> This concerns the revised Initial Reporting Template, endorsed and recommended for use at CSP7 and available on the *Reporting Requirements* page of the ATT website: <https://www.thearmstradetreaty.org/reporting.html>

<sup>47</sup> The Voluntary Guide to implementing Article 9 is available in the *Tools and Guidelines* section of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

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VOLUNTARY GUIDE TO IMPLEMENTING ARTICLES 6 & 7  
OF THE ARMS TRADE TREATY

**CHAPTER 3 – EXPORT AND EXPORT ASSESSMENT**

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## Background

79. This Chapter concerns topics 12 in the multi-year workplan of the Sub-working Group on Articles 6 & 7 (Voluntary Guide – Draft Elements of Chapter 3 on Article 7 / Export and Export Assessment), and reflects the work done under topic 11 (Article 7 (2) – Mitigation measures), as well as the relevant topics that were addressed in national presentations and exchanges of views during the meetings of the Sub-working Group during the CSP4 and CSP5 cycles (before the multi-year workplan was developed). During these cycles, the Sub-working group discussed a variety of topics relevant to the practical implementation of Article 7, in particular national structures and processes required to implement Articles 6 & 7, the export assessment under Article 7, and the export criterion concerning gender-based violence (GBV) in Article 7 (4).<sup>48</sup> These topics provide the structure of the first part of this Chapter. The Sub-working addressed the guiding questions concerning mitigating measures, which provide the structure for the second part of this Chapter, during its meetings of 09 May 2023 on the basis of a background paper of the Facilitator.<sup>49</sup> During this meeting, discussions were informed by presentations of Small Arms Survey and Argentina.<sup>50</sup> The draft elements of the Facilitator for draft Chapter 3 were discussed in the meeting of the Sub-working Group of 20 February 2024.<sup>51</sup> At CSP10, States Parties endorsed the draft Chapter 3 as part of the completed Voluntary Guide, as a living document of a voluntary nature, to be reviewed and updated by the Working Group, as appropriate.<sup>52</sup>

### National structures and processes required to implement Articles 6 & 7

80. During the CSP4 and CSP5 cycles, States Parties addressed their national structures and processes in discussions on the practical implementation of Article 5 and Articles 6 & 7. General information and experiences shared by States Parties in the context of Article 5 are reflected in the Voluntary Basic Guide to Establishing a National Control System, welcomed at CSP5.<sup>53</sup> Several States

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<sup>48</sup> Concerning the CSP4 cycle, see the workplans for the 06 March 2018 meeting ([ATT/CSP4.WGETI/2018/CHAIR/248/M1.AgendaWorkPlans](https://www.thearmstradetreaty.org/ATT/CSP4.WGETI/2018/CHAIR/248/M1.AgendaWorkPlans)) and the 29 May 2018 meeting ([ATT/CSP4.WGETI/2018/CHAIR/301/M2.WorkPlanArt6&7](https://www.thearmstradetreaty.org/ATT/CSP4.WGETI/2018/CHAIR/301/M2.WorkPlanArt6&7)) of the Sub-working Group on Articles 6 & 7 and the relevant presentations and working papers for these meetings, available at <https://www.thearmstradetreaty.org/csp-4-first-preparatory-process-schedule-of-meetings.html> and <https://www.thearmstradetreaty.org/2nd-working-group-and-preparatory-meetings-csp-4>.

Concerning the CSP5 cycle, the workplans for the 29 January 2019 meeting ([ATT/CSP5.WGETI/2019/CHAIR/400/M1.LetterWorkPlans](https://www.thearmstradetreaty.org/ATT/CSP5.WGETI/2019/CHAIR/400/M1.LetterWorkPlans)) and the 02 April 2019 meeting ([ATT/CSP5.WGETI/2019/CHAIR/441/M2.LetterWorkPlans](https://www.thearmstradetreaty.org/ATT/CSP5.WGETI/2019/CHAIR/441/M2.LetterWorkPlans)) of the Sub-working Group on Articles 6 & 7 and the relevant presentations and working papers for these meetings, available at <https://www.thearmstradetreaty.org/1st-working-group-and-preparatory-meeting-csp5> and <https://www.thearmstradetreaty.org/2nd-working-group-and-preparatory-meetings>.

<sup>49</sup> The background paper on mitigating measures is included as Attachment 3 of Annex A in the WGETI Chair letter for the 09-10 May 2023 WGETI meeting ([ATT/CSP9.WGETI/2023/CHAIR/748/M2.LetterSubDocs](https://www.thearmstradetreaty.org/ATT/CSP9.WGETI/2023/CHAIR/748/M2.LetterSubDocs)).

<sup>50</sup> These presentations are available on the ATT website at <https://www.thearmstradetreaty.org/csp9-2nd-working-group-and-preparatory-meeting>.

<sup>51</sup> See Annex A-2 of the WGETI Chair letter for the 20-21 February 2024 WGETI meeting ([ATT/CSP10.WGETI/2024/CHAIR/775/LetterSubDocs](https://www.thearmstradetreaty.org/ATT/CSP10.WGETI/2024/CHAIR/775/LetterSubDocs)).

<sup>52</sup> See Annex A of the WGETI Chair's Draft Report to CSP10 ([ATT/CSP10.WGETI/2024/CHAIR/783/Conf.Rep](https://www.thearmstradetreaty.org/ATT/CSP10.WGETI/2024/CHAIR/783/Conf.Rep)) and paragraph XX of the CSP10 Final Report ([ATT/CSP10/2024/SEC/XXX/Conf.FinRep](https://www.thearmstradetreaty.org/ATT/CSP10/2024/SEC/XXX/Conf.FinRep)).

<sup>53</sup> The Voluntary Basic Guide to Establishing a National Control System is available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>. The relevant section about the topic at hand is the section about "Institutions", as from page 10.

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Parties, however, did also present their national structures and processes with a specific focus on the application of the prohibitions in Article 6 and the export assessment in Article 7.<sup>54</sup>

***What kind of structure do States Parties use for arms export risk assessment and decision-making?***

81. Concerning structures, presentations and interventions indicated that most of States Parties have a dedicated structure for risk assessment and decision-making that may or may not be enshrined in legislation or administrative regulations. The assessment entity is often hosted within a particular ministry or department, most likely the ministry of Defence, Foreign Affairs or Trade. It sometimes nevertheless is made up of representatives of several relevant, departments or agencies, charged with, *inter alia*, defence (armed forces), foreign affairs, internal security (police), state security and oversight over public enterprises. In such cases, these representatives usually have a designated role that is defined in regulations in light of their expertise. Some States Parties have a fully independent and stand-alone assessment entity, not hosted within a particular ministry or department.

82. While the assessment entity is mostly an administrative body, the decision-making entity is often political or made up of political authorities, with exceptions. The decision-making entity can be a single person, for example a cabinet minister, or an (interministerial) committee. Sensitive cases are regularly decided on the highest political level. In some States Parties, however, also the final decisions are made at the administrative level.

83. In terms of personnel, it is considered important that an assessment entity is staffed with different profiles, in order to cover all relevant aspects of export risk assessments. These include foreign policy experts (including desk officers dealing with the relevant countries), defence/military experts, human rights and international humanitarian law (IHL) experts, technical experts (such as engineers) and legal experts. Other States Parties rather rely on systematic consultations with other entities for different experts to weigh in, in which case the assessment entity itself has more of a coordination role (see the next section's reference to inter-agency coordination). Other States Parties combine comprehensive expertise within the assessment entity with external consultations.

***How does the procedure for assessing export applications work?***

84. The presentations and interventions of States Parties indicate that an export assessment procedure mostly starts with an export application followed by a desk analysis within the assessment entity. This might involve either systematic or ad hoc consultations with other relevant bodies within their own State (intra-agency cooperation) or the competent authorities in other States (international cooperation). These consultations can be formal, for example on the basis of national legislation, administrative regulations or regional cooperation agreements, or informal, on the basis of practice. They can also be mandatory or voluntary. And their outcomes can be binding or non-binding. As a

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<sup>54</sup> See, for example, presentations by Sweden ([https://www.thearmstradetreaty.org/hyper-images/file/Sweden\\_ISP\\_06\\_March\\_2018/Sweden\\_ISP\\_06\\_March\\_2018.pdf](https://www.thearmstradetreaty.org/hyper-images/file/Sweden_ISP_06_March_2018/Sweden_ISP_06_March_2018.pdf)), Japan ([https://www.thearmstradetreaty.org/hyper-images/file/180529\\_WGETI\\_Overview\\_of\\_Japans\\_Strategic\\_Trade\\_Control\\_29\\_May\\_2018Rev1/180529\\_WGETI\\_Overview\\_of\\_Japans\\_Strategic\\_Trade\\_Control\\_29\\_May\\_2018Rev1.pdf](https://www.thearmstradetreaty.org/hyper-images/file/180529_WGETI_Overview_of_Japans_Strategic_Trade_Control_29_May_2018Rev1/180529_WGETI_Overview_of_Japans_Strategic_Trade_Control_29_May_2018Rev1.pdf)), Serbia (<https://www.thearmstradetreaty.org/hyper-images/file/20190129%20-%20Serbia%20-%20Arms%20export%20control/20190129%20-%20Serbia%20-%20Arms%20export%20control.pdf>) and South Africa ([https://www.thearmstradetreaty.org/hyper-images/file/South%20Africa%20\(02%20April%202019\)/South%20Africa%20\(02%20April%202019\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/South%20Africa%20(02%20April%202019)/South%20Africa%20(02%20April%202019).pdf))

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subsequent step, the desk analysis and consultations usually result in some kind of memorandum or opinion that is further discussed internally, in the assessment entity, and then forwarded to the decision-making entity for a decision. Alternatively, as an intermediary step between the assessment and the final decision, the assessment (memorandum or opinion) is transmitted to an interagency committee that will discuss the export and provide a recommendation to the final decision-making entity.

85. Not all export applications follow the same route. The level of analysis and experts or entities involved might differ according to the sensitivity of a case. In-depth analysis will mostly happen with sensitive recipients/destination and/or sensitive materiel and focus on the overall criteria of most concern. States Parties also employ simplified procedures for low-risk transfers which they generally consider unproblematic in light of Articles 6 and 7 of the Treaty, for example, where based on a relationship of trust (confidence) between the states involved.

86. The stage in the transfer chain at which the assessment process starts – and therefore an authorization is required – differs between States Parties. While some States Parties only require authorization for the actual export of the arms, others already require this at the start of the negotiations about a potential export or even at both stages.<sup>55</sup>

87. States Parties also shared more intricate details about their export assessment processes, such as timelines and possible appeals procedures on arms export decisions. In that respect, it appears that while most States do not have formal time limits, sixty to ninety days is a common timeframe for taking decisions, with shorter timelines applying to straightforward transfers and sensitive cases taking up to six months or more. On the possibility of appealing arms export decisions, States practices differ significantly, *inter alia*, due to different legal systems. In some States arms export decisions cannot be challenged at all; they are considered political decisions that are beyond (judicial) review. In States that have some kind of review, differences concern both the nature, scope and outcomes of challenges, as well as the actors that can introduce challenges. In terms of the nature, scope and outcomes, this varies from non-binding administrative challenges to judicial challenges that can lead to overturning of an original decision, suspending or annulling specific export authorizations or (temporarily) freezing exports to a certain destination all together. The scope of challenges is often limited, allowing the administrative or judicial body only to conduct a narrow review of the legality and the reasonableness or rationality of an original decision. In terms of actors, some States allow exporters who have been denied an arms export authorization to challenge the original decision, while in some States non-governmental organisations with a relevant corporate purpose, such as promoting responsible arms transfers, (also) have legal standing to challenge the government's arms export decisions.

**Box 1. No one-size-fits-all structure**

88. As indicated in the WGETI Chair's Draft Report to CSP4, it was acknowledged in the discussions following the presentations that States Parties have different baselines when it comes to arms exports and the structures to control those. In that respect, not all States Parties need to establish an export

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<sup>55</sup> Some States Parties also provide risk assessments in the phase of marketing towards potential recipient countries before any concrete export contracts are on the radar. This is mostly done in the context of some form of voluntary informal advice that is made available to potential exporters on their request.

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control system like those that have a sizeable arms industry and arms exports.<sup>56</sup> The Treaty allows flexibility and variation based on States Parties' national situation, provided that the structures and processes established allow a State Party to conduct an export risk assessment as foreseen in Article 7. Delegations also emphasized the importance of flexibility within a State Party's national control system itself, to be able to deal with any issue that might come up in an effective manner.

### **Export assessment under Article 7**

89. During the CSP4 and CSP5 cycles, the Sub-working group on Articles 6 & 7 discussed a number of practical and substantive questions regarding the mandatory export assessment in Article 7, with some States Parties presenting their approach, including their export criteria and sources of information. These practical and substantive questions are addressed below. In addition to States Parties presentations, an expert presentation by the Geneva Centre for Security Policy (GCSP) also provided an overview of States Parties' implementation of Articles 6 and 7.<sup>57</sup>

90. As indicated above, in CSP4 and CSP5 cycles, the Sub-Working group also developed two guidance documents relevant to the application of the mandatory export assessment under Article 7. Specifically concerning Article 7, the Sub-working Group developed a list of possible reference documents to be considered by States Parties in conducting the risk assessment under Article 7, which was welcomed by CSP4 and subsequently updated by CSP5. The Sub-working Group also developed a list with possible voluntary guiding and supporting elements in implementing obligations under article 6 (1), which was also welcomed at CSP4 and is also helpful for the risk assessment under Article 7.<sup>58</sup>

91. It is further noted that that some relevant aspects of the export assessment under Article 7 were also addressed in the discussions about the prohibitions in Article 6 and subsequently in Chapter 2 of this Voluntary Guide. Where applicable, this work will be reiterated and applied specifically to the export assessment under Article 7.

### ***How have States Parties integrated the export assessment criteria of Article 7 in their national control system?***

92. Presentations of States Parties and an expert presentation by GCSP demonstrated that States Parties do not always transpose the mandatory risk assessment criteria of Article 7 into national legislation, thereby taking into account the basic tenets of their legal system. There are States that apply the criteria directly on the basis of the Treaty itself, or on the basis of policy guidance documents, general principles, etc. Other States Parties apply the mandatory risk assessment on the basis of their existing national legislation, which already included criteria that are similar to those in Article 7 (as well

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<sup>56</sup> See paragraphs 17 and 18 of the WGETI Chair's Draft Report to CSP4 ([ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep](https://www.thearmstradetreaty.org/hyper-images/file/GCSP%20-%20Prohibitions%20and%20Export%20Assessment%20-%20Tracking%20Implementation%20of%20the%20Arms%20Trade%20Treaty%20(02%20April%202019)/GCSP%20-%20Prohibitions%20and%20Export%20Assessment%20-%20Tracking%20Implementation%20of%20the%20Arms%20Trade%20Treaty%20(02%20April%202019).pdf)).

<sup>57</sup>See [https://www.thearmstradetreaty.org/hyper-images/file/GCSP%20-%20Prohibitions%20and%20Export%20Assessment%20-%20Tracking%20Implementation%20of%20the%20Arms%20Trade%20Treaty%20\(02%20April%202019\)/GCSP%20-%20Prohibitions%20and%20Export%20Assessment%20-%20Tracking%20Implementation%20of%20the%20Arms%20Trade%20Treaty%20\(02%20April%202019\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/GCSP%20-%20Prohibitions%20and%20Export%20Assessment%20-%20Tracking%20Implementation%20of%20the%20Arms%20Trade%20Treaty%20(02%20April%202019)/GCSP%20-%20Prohibitions%20and%20Export%20Assessment%20-%20Tracking%20Implementation%20of%20the%20Arms%20Trade%20Treaty%20(02%20April%202019).pdf). This presentation was based on the GCSP publication "Prohibitions and Export Assessment: Tracking Implementation of the Arms Trade Treaty, available at: <https://www.gcsp.ch/publications/prohibitions-and-export-assessment-tracking-implementation-arms-trade-treaty>.

<sup>58</sup> Both documents are available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

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as criteria about the risk of diversion, which is important in light of Article 11 of the Treaty). This particular aspect was also addressed in the discussions about the prohibitions in Article 6 and the ensuing Chapter 2. As described in the section on the relationship between Article 6 and Article 7 (paragraphs 75 and 76 of Chapter 2), one State Party explained that it had integrated the prohibitions in Article 6 and the export risk assessment criteria in Article 7 *jointly* in its national legislation. It was indicated, in that regard, that “*while States Parties can apply Articles 6 & 7 jointly in one assessment, they need to respect the different nature of these respective obligations*”. This was further clarified as follows: “*If a State Party establishes that one of the prohibitions in Article 6 is applicable, it needs to simply halt the export; there is no question of taking into account certain other considerations or considering mitigating measures as there is when conducting the risk assessment under Article 7.*”.

### **Box 2. Additional national criteria**

93. Presentations also reflected the important point that the Treaty does not restrict States Parties risk assessments to the criteria in Article 7 (and the prohibitions in Article 6). As the Treaty provides “*the floor, not the ceiling*” for States Parties transfer controls, they can also apply additional, national criteria.<sup>59</sup>

Presentations also showed that States Parties also look at other positive and negative aspects such as:

- their own national security, and/or that of their allies and friendly States;
- the enhancement of their security and defence cooperation, as well as their foreign policy, economic and industrial interests; and
- the impact on development and human security.

Some States Parties also deny all exports if the recipient country is involved in an armed conflict, albeit with exceptions for situations such as self-defence. Other States Parties deny all exports if the end-user is a non-State actor.

### ***Which information sources do States Parties use to assess export applications?***

94. The following information sources were mentioned in presentations by States Parties and subsequent interventions:

- Various government entities, including the ministries of Foreign Affairs and Defence, intelligence services, diplomatic missions, governmental research institutions, and national human rights institutions;
- bilateral and regional cooperation arrangements which involve information-sharing;
- international organisations and their bodies, including the UN Human Rights Council, international commissions of inquiry and fact-finding missions;
- other multilateral institutions, including multilateral export control regimes; and
- think tanks, media, and other international, regional and national non-governmental organizations.

95. Many of these sources are included in the aforementioned list of possible reference documents to be considered by States Parties in conducting risk assessment under Article 7, among others (cf. paragraphs 8 and 90). A good practice mentioned was to create a database on the national,

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<sup>59</sup> The expert presentation of the GCSP indicated that 47% of the 58 States Parties which had submitted publicly available Initial Reports as of March 2019, applied additional export criteria.

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the regional level or even the ATT level that collects all the relevant information from these sources, in order to facilitate the work of the assessment entities in the involved States. In that respect, also existing open-source databases could be useful. One State Party explicitly referred to the Wisconsin Project on Nuclear Arms Control, an open-source database used for strategic trade control.<sup>60</sup> Similarly, focusing on human rights-related criteria, States Parties could consider consulting UNHCR's *refworld* and the related *ecoi.net*, which collect up-to-date human rights and security information about countries, in their case for the benefit of officials involved in all forms of international protection.<sup>61</sup> Concerning IHL and peace and security, reference was made to databases of the Geneva Academy of IHL and Human Rights and the International Institute for Strategic Studies.<sup>62</sup>

96. While some of these sources are authoritative by nature, it is up to States Parties to make an assessment of the level of reliability of information sources and the available information, as well as their weight. This assessment needs to be done in good faith, taking into account all available information.

97. This information obviously complements the information that licence applicants, consignees and/or end-users need to provide to the exporting State, such as end-user certificates. In order to make a comprehensive assessment, this sometimes also includes information about transport routes and all parties that are involved in the export, such as brokers and transport companies. In that regard, reference can be made to Article 8 (1) of the Treaty, which obliges importing States Parties to “*take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7*”. More generally, Article 15 of the Treaty obliges all States Parties to “*cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty*”, which includes exchanging relevant information.<sup>63</sup>

98. The discussions on this specific topic and risk assessment in general made clear that access to comprehensive, reliable and pertinent information remains a challenge for all States Parties. These challenges concern capacity, resources as well as difficult coordination between relevant agencies. In that respect, States Parties and other stakeholders called for further discussions on this topic, *inter alia*, to explore how to optimize inter-agency exchanges of information, as well as to explore possibilities of international cooperation between States Parties.

### ***How do States Parties conduct the risk assessment under Article 7 substantively?***

99. In terms of the substance of their risk assessment, presentations and interventions demonstrated that States Parties mostly conduct an overall assessment of the recipient country's attitude to human rights and IHL principles, terrorism, transnational organised crime and gender, as well as a targeted analysis that takes into account the specific type of materiel that is exported, the specific consignee and end-user and the anticipated use of the materiel. This twofold analysis is considered important to assess the potential use of the materiel for the acts included in Article 7 (1)

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<sup>60</sup> See in that regard <https://www.wisconsinproject.org/>.

<sup>61</sup> See <https://www.refworld.org/> and <https://www.ecoi.net/>.

<sup>62</sup> See in that regard <https://www.geneva-academy.ch/research/rule-of-law-in-armed-conflicts> and <https://www.iiss.org/the-military-balance-plus/>.

<sup>63</sup> For clarity, the Treaty also includes requirements for exporting States Parties to share information with importing States Parties, as well as transit and trans-shipment States Parties, but these do not fall within the scope of this section.

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and (4), as well as the risk of diversion, in a comprehensive manner. The analysis will look at past and present behaviour of the recipient/end-user and will anticipate future behaviour on the basis of that. In doing that analysis, States Parties will take into account their own export history, whilst maintaining a case-by-case approach. Special caution is exercised when there is a conflict situation in the recipient country (with some States Parties applying a principled ban on export to countries involve in armed conflict; see paragraph 93). It is because of this diverse nature of aspects to take into account that most States run a system of intra-agency cooperation as explained in paragraph 84 and following, with different entities focusing on their fields of expertise and providing different perspectives. In order to facilitate the risk assessment and to ensure consistency in assessment and decision-making, the work is often carried out on the basis of substantive guidelines which clarify the interpretation and practical application of the export assessment criteria.

100. In terms of the risk threshold that States Parties apply in order to determine when an export is problematic and should be denied authorization, reference is made to Chapter 1 of this Voluntary Guide, which unpacks the key concept of “overriding risk” in Article 7 (3). The CSP4 cycle discussions already clarified that States Parties apply different thresholds, using terms such as “clear risk”, “high risk”, “substantial risk” or “reasonable suspicion”, without necessarily defining their remit. States Parties also have different views on the level of causality that would be needed between (the export of) the conventional arms at hand and the acts included in Article 7 (1) and (4). While Chapter 1 (paragraph 12-14) unpacks the key concept of “facilitate” that is used in Articles 7(1)(b)(i) –(iv) and 7(4), it was already indicated during the CSP4 cycle discussions by some States Parties that they are of the understanding that they have to take into account the *indirect* effects of the transferred conventional arms.

101. It is noted that this substantive aspect of the export assessment under Article 7 was also addressed in the discussions about the prohibitions in Article 6 and the ensuing Chapter 2 of this Voluntary Guide. In paragraph 54 of Chapter 2, reference is made to the expert presentation of the International Committee of the Red Cross (ICRC) in the Sub-working Group about the interpretation of the term ‘knowledge’ in international law and the obligation in Article 6 (3) in general. In its presentation, the ICRC outlined the ambit of a risk assessment that is also relevant to Article 7 in light of the requirement in Article 7 (1)(b)(i) to assess the potential that the conventional arms or items in question could be used to commit or facilitate a serious violation of IHL.<sup>64</sup> The ICRC indicated that States Parties need to make a prospective assessment of the future behaviour of a recipient, how they are likely to behave and how the arms to be transferred will likely be used. Next to present circumstances and reasonable expectations, this can be based on the historic behaviour, yet without any requirement of evidence beyond reasonable doubt of past crimes. Also taking into account States’ due diligence requirements of international law, States have an obligation to actively seek out information to make their assessment.

102. By the same token it is also relevant to refer to paragraph 69 of Chapter 2, and to reiterate the reference by the ICRC to States Parties’ underlying general obligation to ensure respect for the Geneva Conventions in all circumstances, laid down in Article 1 common to the Geneva Conventions. In that regard, the (updated) Commentary to Article 1 explicitly mentions the context of arms transfers as an illustration of the negative obligation not to encourage, nor aid or assist in violations of the

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<sup>64</sup> Paragraph 54 of Chapter2.

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Convention.<sup>65</sup> It indicates that common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an *expectation, based on facts or knowledge of past patterns*, that such weapons would be used to violate the Conventions. In terms of their positive obligation to prevent violations, the Commentary to Article 1 identifies this as a due diligence obligation to act if there is a foreseeable risk that violations will be committed and to prevent further violations in case they have already occurred. It should be noted that this obligation concerns all violations of the Conventions, not only grave breaches.

103. Following the risk assessment as such, Article 7 (3) requires States Parties to consider measures that could mitigate the risks they have identified, which could include post-shipment controls. Mitigating measures are dealt with in a separate section of this Chapter, while post-shipment controls are extensively addressed in another voluntary guiding document that was developed within the WGETI, with possible measures to prevent diversion.<sup>66</sup>

### Gender-based violence and violence against women and children

104. As gender and gender-based violence (GBV) was the priority theme of the CSP5 President, the Sub-working Group on Articles 6 & 7 also addressed this topic extensively during the CSP5 cycle.<sup>67</sup> These discussions were informed by expert presentations by Control Arms, presenting its *“Practical Guide For Risk Assessment on How to use the ATT to address Gender-Based Violence”*, and the ICRC, explaining GBV in the context of IHL.<sup>68</sup> Both documents seek to establish what types of GBV are covered as violations under Articles 6 & 7 of the Treaty, how their prevalence in the recipient country can be

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<sup>65</sup> Geneva Convention (III) of 12 August 1949 relative to the Treatment of Prisoners of War, commentary of 2020, article 1 : respect for the convention, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538#83\\_B](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538#83_B).

<sup>66</sup> This document is also available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

<sup>67</sup> The topic was first addressed substantively in a working paper submitted by Ireland to CSP3, which included policy recommendations for further discussions: *“Article 7(4) and Gender Based Violence Assessment”* (<ATT/CSP3/2017/IRL/183/Conf.WP>). The topic was subsequently addressed in the WGETI during the CSP4 cycle, but the discussions were limited due to time restrictions and mostly constituted an initial impetus for the discussions during the CSP5 cycle, highlighting the need to clarify the scope of GBV, develop GBV risk indicators and share national experiences with GBV risk assessments. In addition to discussions in Sub-working Group on Articles 6 & 7, the WGETI also considered GBV more generally on the basis of a discussion paper *“Gender and ATT Implementation”* (Annex A of the WGETI Chair letter for the 02-03 April 2019 WGETI meeting; <ATT/CSP5.WGETI/2019/CHAIR/441/M2.LetterWorkPlans>).

<sup>68</sup> For the presentation by Control Arms, see <https://www.thearmstradetreaty.org/hyper-images/file/20190129%20-%20Control%20Arms%20-%20GBV/20190129%20-%20Control%20Arms%20-%20GBV.pdf>. For the Control Arms Practical Guide itself, see [https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide\\_ONLINE.pdf](https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide_ONLINE.pdf). For the presentation by the ICRC, see [https://www.thearmstradetreaty.org/hyper-images/file/ICRC%20-%20ATT%20WGETI%20GBV%20IHL%20\(02%20April%202019\)/ICRC%20-%20ATT%20WGETI%20GBV%20IHL%20\(02%20April%202019\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/ICRC%20-%20ATT%20WGETI%20GBV%20IHL%20(02%20April%202019)/ICRC%20-%20ATT%20WGETI%20GBV%20IHL%20(02%20April%202019).pdf) and the related working paper *“International Law and Gender-Based Violence in the Context of the ATT”* at <https://www.thearmstradetreaty.org/hyper-images/file/CSP5%20-%20working%20paper%20-%20GBV%20and%20IHL/CSP5%20-%20working%20paper%20-%20GBV%20and%20IHL.pdf>. The Guide and the working paper are also among the guidance documents relating to the implementation of Article 7 (4) that were included in the updated version of the previously mentioned *“list of possible reference documents to be considered by States Parties in conducting a risk assessment under Article 7”*, which was welcomed at CSP5.

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identified, and how the risk of conventional arms being used to commit or facilitate such violations can be assessed, including indicators, information sources and examples.<sup>69</sup> These are paraphrased in the box below.

**Box 3. Expert presentations about GBV: types of GBV, prevalence of GBV, state capacity and risk indicators**

In terms of what types of GBV are covered, both presentations emphasized that these concern both sexual violence and other acts committed against an individual because of their sex and/or socially constructed gender role. In that respect, the following acts were identified:

- *sexual acts: Sexual: rape, forced prostitution, sexual violence, forced abortion, forced sterilization, forced pregnancy; and*
- *Other acts: assault; human trafficking and slavery; honour killings; attacks targeting women human rights defenders, activists or politicians; attacks targeting LGBTQI individuals.*

In terms of prevalence of GBV in a recipient State and that State's capacity to respond, the presentation of Control Arms included several criteria with related indicators and information sources. These criteria were: i) *Use of weapons in intentional killings, particularly of women (femicide) and of children (both in and outside armed conflict); ii) Use of weapons to commit/threaten acts of torture or violence against specific groups, particularly based on gender-identity/sexual orientation; iii) Use of firearms in domestic violence, which may constitute a serious violation of international human rights law; iv) Existence of human trafficking networks, or of systematic modern slavery, including forced labour; and v) Strategic use or high levels of rape and sexual violence.*

Concerning the capacity of a State to respond, the criteria were: i) *Existence or risk of armed conflict within the recipient state; ii) Existence of insecure communities within recipient state; iii) Existence of GBV prevention and punishment laws and policies including as IHL and international human rights law violations; iv) Ability of the state to uphold and enforce GBV prevention laws and policies including as IHL and international human rights law violations; v) Ability of the state to protect against diversion; and vi) Effectiveness of the state of developing laws that minimize violence perpetrated with illicit arms.*

In terms of concrete risk assessments, the presentation of ICRC included similar questions for States Parties to consider when assessing the risk that the relevant arms or other items could be used to commit or facilitate serious acts of GBV which constitute war crimes:

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

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<sup>69</sup> For the aspect of the definition of the phrase 'serious acts of gender-based violence or serious acts of violence against women and children', see paragraph 26.

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105. In the follow-up discussions, based on a number of guiding questions of the Facilitator, States Parties and other stakeholders mostly identified relevant elements for applying the GBV risk assessment of Article 7 (4) in practice, and the related challenges. These included getting the right data for GBV risk assessments, access to relevant expertise and training of licensing officers, as well as sharing information between States Parties, for example about licence denials based on Article 7 (4), possibly in a regional context.<sup>70</sup>

106. Following adoption of the CSP5 Final Report, and the observation that the implementation of Article 7 (4) implementation would need to be addressed in the broader context of the implementation of Articles 6 & 7 rather than in isolation, the topic of GBV was further addressed during the CSP7 and CSP8 cycles in the context of the “methodology exercise” for unpacking key concepts in Articles 6 & 7 of the Treaty. In that regard, Chapter 1 includes a section about how States Parties approach their interpretation of the phrase ‘*serious acts of gender-based violence or serious acts of violence against women and children*’.

107. The topic was also revisited during the CSP9 cycle, as part of the discussions about mitigating measures. These discussions are reflected in paragraphs 129-135 of this chapter. As indicated in that section, many of the elements included in the paragraphs above were also raised in the discussion in the presentations and discussions about GBV mitigating measures.

108. Going forward, CSP9 encouraged States Parties to keep the risk of conventional arms being used to commit or facilitate serious acts of GBV or serious acts of violence against women and children as an important topic of attention and to initiate the discussion and exchange of information and good practices on this topic in the CSP10 cycle. In that respect, the Conference also took note of the working papers presented on this topic by Argentina and by Mexico, and Spain supported by Small Arms Survey.<sup>71</sup> In possible further discussions and development of dedicated voluntary guidance, it will be important to take stock of all preceding discussions on the topic in the WGETI, the guidance that is already in this Voluntary Guide to implementing Articles 6 & 7, as well as the existing guidance on implementing Article 7 (4) of several stakeholders, mentioned above, in order to avoid duplication of efforts. The issues that would benefit from further clarification should first be identified.

### **Mitigating measures**

109. The topic of mitigating measures was specifically discussed during the meeting of the Sub-working Group on Articles 6 & 7 on 09 May 2023, in accordance with the multi-year workplan of the Sub-working Group. That workplan directed the Sub-working Group to address several questions about the implementation of their obligation in Article 7 (2), which are reproduced in the box below. During

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<sup>70</sup> See in that regard the work plan for the Sub-Group in Annex B of the WGETI Chair letter for the 29-30 January 2019 WGETI meeting ([ATT/CSP5.WGETI/2019/CHAIR/400/M1.LetterWorkPlans](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP5.WGETI/2019/CHAIR/400/M1.LetterWorkPlans)), as well as paragraphs 10 and 18 of the [WGETI Chair’s Draft Report to CSP5](#).

<sup>71</sup> The working paper of Argentina is available on the ATT website at: [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP9\\_Argentina%20Working%20Paper%20on%20GBV\\_EN/ATT\\_CSP9\\_Argentina%20Working%20Paper%20on%20GBV\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP9_Argentina%20Working%20Paper%20on%20GBV_EN/ATT_CSP9_Argentina%20Working%20Paper%20on%20GBV_EN.pdf). The working paper by Mexico, Spain and Small Arms Survey is available on the ATT website at <https://www.thearmstradetreaty.org/hyper-images/file/Mexico%20Spain%20Small%20Arms%20Survey%20ATT%20CSP9%20SOGIESC%20Working%20Paper/Mexico%20Spain%20Small%20Arms%20Survey%20ATT%20CSP9%20SOGIESC%20Working%20Paper.pdf>.

the meeting, the Sub-working Group had a general discussion on mitigating measures, as well as a dedicated discussion about mitigating measures concerning GBV and violence against women and children. To inform these discussions, the Facilitator presented a general background paper and invited Small Arms Survey and Argentina to give presentations.<sup>72</sup>

#### **Box 4. Guiding questions about mitigating measures in multi-year workplan**

*This discussion will explore the obligation in Article 7(2) for exporting States Parties to ‘consider whether there are measures that could be undertaken to mitigate risks identified’ when conducting assessments in accordance with Articles 7.1(a) and (b) as well as Article 7.4. The discussion will focus on State practice with respect to the following aspects:*

- *What do states believe constitute “mitigation measures”?*
- *What do states consider the purpose of mitigation measures?*
- *Under what circumstances would mitigation measures be explored?*
- *What kind of mitigation measures could an exporting state take under consideration in order to avoid the specific negative consequences in Article 7 (1)?*
- *At what point would other states in the transfer chain (i.e. transit or importing states) be involved in discussions concerning mitigation measures?*
- *What do states view as the roles of different parties (exporting State, importing State, exporters and/or industry) with regard to mitigation measures?*
- *What considerations might be taken into account when developing and applying mitigation measures?*
- *Do states have public examples of mitigation measures being applied effectively or not (whether by ATT States Parties or not)?*
- *What ‘confidence-building measures’ have States undertaken to mitigate risks?*
- *What ‘jointly developed and agreed programmes’ have been developed or adopted by export and importing States to mitigate risks?*
  - *What are the practicalities of developing and implementing such programmes?*
  - *What are the characteristics/elements or prerequisites for successful programmes (i.e. those that have mitigated identified risks)?*
- *How do States determine when/that an identified risk has been adequately mitigated?*

110. During the discussions, the following aspects were addressed: i) what actually constitute “mitigating measures”; ii) which “mitigating measures” do States Parties apply (or could apply); iii) how to reconcile the long-term nature of many mitigation measures and the instant decision that States Parties need to make about proposed arms exports; and iv) measures to mitigate the risk of GBV and violence against women and children.

#### ***What constitute “mitigating measures”?***

111. The Treaty’s understanding of mitigating measures is reflected in the structure of Article 7. Article 7 provides a three-step export assessment in which mitigating measures constitute step

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<sup>72</sup> The background paper on mitigating measures is included as Attachment 3 of Annex A in the WGETI Chair letter for the 09-10 May 2023 WGETI meeting ([ATT/CSP9.WGETI/2023/CHAIR/748/M2.LetterSubDocs](https://www.thearmstradetreaty.org/csp9-2nd-working-group-and-preparatory-meeting)). The presentations by Small Arms Survey and Argentina are available on the ATT website at <https://www.thearmstradetreaty.org/csp9-2nd-working-group-and-preparatory-meeting>.

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number two. In step one, States Parties are required to assess the risks included in paragraph one. In step two, they are required to consider whether there are measures that could be undertaken to mitigate the risks identified in step one. In step three, deciding on the export, they are required to not authorize the export if they determine that there is an overriding risk of the negative consequences in paragraph 1.

112. During the discussions, some delegations located risk mitigation within their own risk assessment process, step number one in the paragraph above. They remarked that to mitigate risks, they conduct in-depth analyses before granting export licences, insist on detailed descriptions of the specific use of weapons by the end-user and have the flexibility in their systems to react to changes in circumstances after the export.

113. In that context of risk assessment, delegations also referred to the identification of mitigating policies or processes in the importing State, aimed to prevent or address the acts included in Article 7 (1) and (4), as a form of mitigating measures. This could also include formal commitments of the recipient State to relevant international instruments and their implementation on the national level.

114. Still in this context of risk assessment, some delegations put forward that also the application of due diligence by exporters plays a role in risk mitigation.

115. Other delegations noted that risk mitigation stretches beyond the initial risk assessment, requiring the exporting State to look at what could be done to reduce the risks it has identified. This could be specific actions of the exporting State, requests for actions by the importing State, or joint actions, as encouraged in Article 7 (2) of the Treaty. In that regard, one delegation described that arms sales are dealt with as part of a partnership with the importing State, which imply a long-term-dialogue on the safe and legal use of exported arms.

116. Finally, concerning their nature, it is reiterated that the consideration of mitigating measures only applies to the risks in article 7, not to the prohibitions in Article 6. As explained in paragraph 75 of Chapter 2 of this Voluntary Guide, the prohibitions in Article 6 are absolute, which means that when a State Party establishes that one of the prohibitions in Article 6 is applicable, it needs to simply halt the export. There is no question of taking into account certain other considerations or considering mitigating measures as there is when conducting the risk assessment under Article 7.

#### ***Which mitigating measures do States Parties apply or could States Parties apply?***

117. In Article 7 (2), the Treaty itself refers to “*confidence-building measures or jointly developed and agreed programmes by the exporting and importing States*” as concrete examples of mitigating measures. Article 11 (2) repeats these examples in the specific context of mitigating the risk of diversion, while Article 11 (3) also includes the general requirement for importing, transit, trans-shipment and exporting States Parties to cooperate and exchange information to mitigate the risk of diversion (pursuant to their national laws, where appropriate and feasible). In that regard, the background paper of the Facilitator indicated that measures to mitigate the risk of diversion have been extensively discussed in the WGETI Sub-Working Group on Article 11, and are also incorporated in the document with Possible Measures to Prevent and Address Diversion, welcomed at CSP4, which was

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complemented at CSP9 with an Annex dedicated to the specific mitigating measure of post-shipment cooperation.<sup>73</sup>

118. For the discussion in the WGETI Sub-Working Group on Articles 6 & 7 and this Chapter of the Voluntary Guide, the focus was put on measures that could mitigate the relevant risks under Articles 7 (1) and 7(4), namely the risk of international law violations, in particular those related to peace and security, human rights, IHL, terrorism and transnational organized crime, as well as GBV and violence against women and children. These risks in particular could also include potential abuse or misuse of the conventional arms in question by the *intended* recipient or end-user.

119. The background paper continued with a reference to State practices that were included in ATT Initial Reports submitted to the ATT Secretariat, and a non-exhaustive overview of good practices taken from documents of a broad range of ATT stakeholders. While the input of States Parties in their Initial Reports mostly focused on diversion-related measures such as end-user documentation, end-user assurances and post-delivery cooperation, the cited documents of other stakeholders included measures that were more specific to the risks under Articles 7 (1) and 7(4). To paint a picture, these examples from the background paper are included in the box below.

**Box 5. Non-exhaustive overview of ATT stakeholders' examples of mitigating measures**

The UN Office for Disarmament Affairs (UNODA) addresses mitigating measures in its ATT Implementation Toolkit, which provides examples of confidence-building measures and jointly developed and agreed programmes.<sup>74</sup> Many examples are diversion-related: i) an undertaking by the importing State not to re-export or re-transfer in a manner that would run counter to the provisions of the ATT; ii) provision of information on weapons or items stolen, lost or otherwise unaccounted for; iii) post-delivery monitoring/cooperation programmes; and iv) joint programmes to enhance the capacity of importing States to control weapons and prevent their diversion. Examples that relate more to the risks under Article 7 (1) and 7 (4) are the following: i) a declaration by the importing State of intended use of the transferred weapons or items, accompanied by the undertaking/assurance/guarantee not to use them for other purposes; ii) disclosure by the importing State of its records regarding observation of relevant international human rights law, international humanitarian law, international conventions or protocols relating to terrorism and to transnational organized crime; iii) enhancement of transparency on military matters; and iv) joint programmes to enhance the implementation by importing State of, and compliance with, relevant international human rights law, international humanitarian law, international conventions or protocols relating to terrorism and to transnational organized crime.

The Geneva Centre for Security Policy (GCSP), in addressing the measure of end-user certificates, incorporated in the abovementioned document with Possible Measures to Prevent and Address Diversion, writes that “*a few states explicitly mention in the end-user certificates that the weapons cannot be used for committing certain violations of international human rights and humanitarian law*”. It adds that “*other than that, States rarely use measures specifically and directly addressed to mitigate risks listed in Article 7, such as Security Sector Reform or training in international humanitarian law,*

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<sup>73</sup> This document is available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

<sup>74</sup> UN Office for Disarmament Affairs (UNODA), ATT Implementation Toolkit, Module 6 – Export, 18, available at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2015/08/2015-08-21-Toolkit-Module-6.pdf>.

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*due to the limited resources typically available". It also points out that "another point made during the treaty negotiations was that mitigation measures that take the form of training courses rarely have observable effects until long after a license is issued, and sometimes may not have sustainable effects at all".<sup>75</sup>*

The latter was also addressed by the ICRC, indicating that *"specific risk-mitigation measures could include training by the exporting State of the recipient's armed and security forces in IHL and human rights", but that "the ability of training to effectively offset the risk of violations will depend on the circumstances, including the time lapse between the training and its practical effects".* Next to a reference to post-delivery cooperation, the ICRC also made the general point that risk mitigation measures *"must be assessed cautiously in terms of what is realistically achievable in the circumstances to offset the risk of violations"; they can be a positive tool as long as they are timely, robust and reliable, and as long as the exporter and importer have the capacity to effectively implement them, and do so in good faith".* Regarding assurances provided by the recipient, the ICRC indicated that these *"should be viewed against its policies and practices and in any case do not replace the exporting State's obligation under Article 7 to carry out a thorough assessment of the proposed export of arms or related items".<sup>76</sup>*

The EU's User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, mentions that *"mitigating factors such as improved openness and an on-going process of dialogue to address human rights concerns in the recipient state may lead to the possibility of a more positive assessment", adding that "it is important to recognise that a lengthy passage of time since any highly publicised instances of repression in a recipient state is not on its own a reliable measure of the absence of clear risk"; "there is no substitute for up-to-date information from reliable data sources if a proper case-by-case assessment is to be made".<sup>77</sup>*

120. During the discussions in the Sub-Working Group, States Parties and other stakeholders shared national practices.

121. As indicated above, some States Parties referred to aspects of their export assessment process as risk mitigating measures. Examples include: i) not approving any export without the consent of all relevant authorities; ii) including diplomatic missions and intelligence services in the assessment process; iii) requiring a description of the specific intended end use of the arms in the end-user certificate, as well a non re-transfer clause.

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<sup>75</sup> Geneva Centre for Security Policy (GCSP), "Prohibitions and Export Assessment: Tracking Implementation of the Arms Trade Treaty", Geneva Paper 23/19, March 2019, 14, available at <https://www.gcsp.ch/publications/prohibitions-and-export-assessment-tracking-implementation-arms-trade-treaty>.

<sup>76</sup> ICRC, "Understanding the ATT from a humanitarian perspective", 2016, 38, available at <https://www.icrc.org/en/publication/4252-understanding-arms-trade-treaty-humanitarian-perspective>. The concerns expressed by the ICRC and GCSP are also addressed in Casey-Maslen, Clapham, Giacca, Parker, "The Arms Trade Treaty: A Commentary", Art.7 Export and Export Assessment, 2016, 274, 7.88 et seq, available at <https://opil.ouplaw.com/display/10.1093/law/9780198723523.001.0001/law-9780198723523>.

<sup>77</sup> User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 2019, 49, available at <https://www.consilium.europa.eu/media/40659/st12189-en19.pdf>.

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122. States Parties and other stakeholders focusing on the conduct of the importing State gave some examples of the of mitigating policies or processes they consider in their export assessment. These include legislation and procedures to prevent and address the acts included in Article 7 (1) and (4), including effective disciplinary and judicial bodies, as well as national action plans to prevent and address such acts in broader society. Mention was also be made of commitments to international instruments relevant to the use of arms, such as disarmament or export control agreements, but also of broader formal commitments, for example to respect IHL in the case of armed conflict. Such commitments should nevertheless be confirmed by actual State practice in order for the exporting State Party to consider such commitments as risk mitigation. In addition they should also be appraised by the exporting State in light of the importing State's compliance with its international commitments more generally. In this context some delegations also mentioned the distinct responsibility of the importing State to adopt risk mitigating measures, in particular measures to ensure safe and legal use of imported arms.

123. The States Parties that put forward mandatory due diligence by exporters as a form of risk mitigation referred to the requirement of an internal compliance programme (ICP) as a practical measure. For that purpose, the ICP should then include internal policies regarding human rights, IHL and GBV. Some States Parties subject exporters to a general registration or authorisation requirement, to allow control over the exporter's internal compliance and due diligence.

124. In terms of specific measures to mitigate the risk of use in violation of IHL, delegations mostly elaborated on those mentioned in the Facilitator's background paper regarding capacity-building and training. Concerning capacity-building, reference was made to proper weapons and ammunition management and security sector reform (SSR) programs, but also to a broader spectre, ensuring that government policies, regulations, process, recruitment and culture are aimed at respecting international law. Concerning training, it was indicated that its feasibility and potential impact depend on the concrete circumstances in the recipient country, and that training programs always needs to be tailored to the needs of the recipient, systematically reviewed and adapted, if necessary. Training to support the proper and legal use of weapons is of particular importance; users need to have a good knowledge of the effects of their weapons in order to be able to assess when their use is feasible in view of the rules of IHL concerning the conduct of hostilities, especially when targeting populated areas.<sup>78</sup>

125. Some delegations also addressed the role of international cooperation to mitigate risks, with the importing State, but also others. That could extend to measures such as joint investigations in case of suspected proliferation and proactive information-sharing on arms proliferation as well as general risk assessments. In this context, delegations also mentioned more diversion-related measures, such as capacity-building concerning weapons and ammunition management record-keeping, marking and tracing).

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<sup>78</sup> See in that regard also ICRC, "Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Human Cost of War", 2021, 49-50, available at <https://www.icrc.org/en/publication/4498-allies-partners-and-proxies-managing-support-relationships-armed-conflict-reduce>, as well as "Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria – a Practical Guide", 2016, 12, available at <https://www.icrc.org/en/publication/0916-arms-transfer-decisions-applying-international-humanitarian-law-criteria>, and ICRC, "Understanding the Arms Trade Treaty from a humanitarian perspective", 2016.

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## ***How to reconcile the long-term nature of risk mitigation and the instant nature of arms export decisions?***

126. An inherent and crucial issue that was raised in both the general discussion and the GBV-specific discussion (see below) was that many mitigating measures require long term commitment and monitoring, while States Parties' decisions about arms exports are ad hoc, taken at a specific moment in time.

127. In that regard, a key message shared was that States Parties which apply mitigation measures or identify mitigating processes in the recipient State should monitor the impact of the measures and processes in question and look at tangible outcomes. In that context, States Parties also referred to the flexibility in their systems to react to changes in circumstances after the export. In that respect, reference can be made to Article 7 (7) of the Treaty, which reads as follows:

### **Box 6. Article 7 (7) of the Treaty**

*"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."*

128. Next to these reactive options, States Parties also have to conduct a proactive assessment of the feasible impact of the proposed or identified mitigating measures and processes. In that respect, during the discussions, reference was made to the following point made by the ICRC which was included in the Facilitator's background paper: mitigation measures *"must be assessed cautiously in terms of what is realistically achievable in the circumstances to offset the risk of violations"*; *"they can be a positive tool as long as they are timely, robust and reliable, and as long as the exporter and importer have the capacity to effectively implement them, and do so in good faith"*.

## ***Measures to mitigate the risk of gender-based violence and violence against women and children***

129. As indicated above, during its session on mitigating measures, the Sub-working Group devoted particular attention to mitigating the risk of GBV and violence against women and children. The Small Arms Survey kicked-off the discussion on this topic with an expert presentation that focused on the two main aspects: the particularities of GBV and violence against women and children compared to (other) IHL and human rights violations and the information that is necessary to assess possible mitigation of GBV-related risks.<sup>79</sup> In doing so, the presentation did not only address GBV and violence against women and children in the context of armed conflict (and law enforcement), but also in private relations (intimate partner relations in particular).

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<sup>79</sup> The presentation of the Small Arms Survey is available on the ATT website at: [https://www.thearmstradetreaty.org/hyper-images/file/Watson%20\(SAS\)%20Presentation%20GBV%20ATT%20Art.%207%20\(09%20May%202023\)\\_ATT\\_CSP9\\_2InfPrep%20Meet/Watson%20\(SAS\)%20Presentation%20GBV%20ATT%20Art.%207%20\(09%20May%202023\)\\_ATT\\_CSP9\\_2InfPrep%20Meet.pdf](https://www.thearmstradetreaty.org/hyper-images/file/Watson%20(SAS)%20Presentation%20GBV%20ATT%20Art.%207%20(09%20May%202023)_ATT_CSP9_2InfPrep%20Meet/Watson%20(SAS)%20Presentation%20GBV%20ATT%20Art.%207%20(09%20May%202023)_ATT_CSP9_2InfPrep%20Meet.pdf). The related briefing paper *"At Whose Risk? Understanding States Parties' Implementation of Arms Trade Treaty Gender-based Violence Provisions"* is available on the website of the Small Arms Survey: <https://www.smallarmssurvey.org/resource/whose-risk-understanding-states-parties-implementation-arms-trade-treaty-gender-based>.

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130. Concerning the particularities of GBV and violence against women and children, notably the following might be relevant to take into account in the assessment of proposed arms exports and the consideration of mitigating measures. One particular aspect is that the mere presence of an arm can often be considered as form of facilitating GBV. Another aspect is that GBV can be systemic, socially normalized or tolerated behaviour, which makes looking at government policies addressing this very important.

131. Concerning information to consider, in line with its overall theme, the presentation focused on processes, policies and data-gathering that recipient State itself is taking to prevent and address GBV and violence against women and children. The presentation included a list of relevant questions for exporting States to consider when examining the risk of arms to be exported contributing to GBV and violence against women and children.

132. On this topic, the presentation also reflected the general discussions and presentations about GBV in the CSP4 and CSP5 cycles, which makes the elements included in paragraphs 104-105 and box 3 also relevant in this context. This focus was also reflected in the Facilitators' background paper on mitigating measures and its non-exhaustive overview of good practices taken from documents of ATT stakeholders. In that overview, the background paper mentioned the GBV-specific practices of risk mitigation in the box below mentioned.

**Box 7. Non-exhaustive overview of ATT stakeholders' examples of mitigating measures in regard to gender-based violence (GBV)**

Specifically concerning GBV, Control Arms gives as an example of a possible mitigation measure *“an importing state’s agreement to provide gender sensitivity training to its family court judges, [...] in a state where prosecution of domestic abusers is notoriously low”*, albeit pointing out that *“this measure alone would not in itself sufficiently mitigate the risk of GBV as a serious human rights violation”*.<sup>80</sup> Control Arms also mentions as a method to identify possible mitigation measures for GBV-related risks examining the recipient State’s obligations under relevant instruments and look at causes and remedies for types of arms-related GBV that might be indicated in shadow reports and recommendations, given the concrete example of the reporting procedures under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>81</sup> Small Arms Survey similarly advises States Parties to look at measures that the recipient State is taking itself to prevent and respond to patterns of serious acts of GBV, such as: i) *changing national legislation to include GBV offences and provide for appropriate sanctions*; ii) *designing and implementing strategies to address GBV committed by police, armed forces, and security forces members*; iii) *training military and criminal justice stakeholders to deal with incidents of GBV*; iv) *creating a government agency, institution, or ombudsperson to combat and prosecute GBV*; and v) *developing information management systems or databases that, among other things, include GBV-related information*.<sup>82</sup> Small Arms Survey does note

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<sup>80</sup> Control Arms, “Interpreting the Arms Trade Treaty: International Human Rights Law and Gender-Based Violence in Article 7 Risk Assessments”, 2019, 10, available at <https://controlarms.org/wp-content/uploads/2019/04/Interpreting-the-Arms-Trade-Treaty-ver-1.pdf>.

<sup>81</sup> Control Arms, “How to use the Arms Trade Treaty to address Gender-Based Violence: A Practical Guide for Risk Assessment”, 2018, 17, available at [https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide ONLINE.pdf](https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide_ONLINE.pdf).

<sup>82</sup> Small Arms Survey, “At Whose Risk? Understanding States Parties’ Implementation of Arms Trade Treaty Gender-based Violence Provisions”, 2022, 7, available at

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reports that question the effective implementation and enforcement of such measures, as well as the need to monitor and evaluate their impact, and mentions that interviewed officials were sceptical about the use of mitigation measures in general and consider the abovementioned measures more as relevant information than as mitigating measures.

133. The focus on mitigating processes in the recipient State entails that the exporting State needs to monitor the impact of the measures and processes in question and look at tangible results in order to effectively accept ongoing processes as risk mitigation. This is often a challenge, as such processes require a sustained effort by the importing State. In that respect, exporting States could look at the information that the recipient State provides in the framework of relevant international commitments.

134. In the discussion following the expert presentation, many aspects were raised that have been included in the general part of this section about mitigating measures (as they were not specific to mitigating GBV-risks). These include the issue of reconciling the long-term nature of risk mitigation and the instant nature of arms export decisions, as well as concrete examples of mitigating measures. Concerning relevant formal commitments and information shared in that context, also reference was made again to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the reports that States submit to the related Committee.<sup>83</sup> Delegations also highlighted the importance of information-sharing, in particular on the regional level, about policies and concrete data regarding GBV and violence against women and children, as well as their use in the context of arms transfer decisions.

135. The Argentina working paper, finally, is mentioned in this Chapter following its presentation in the session about mitigating measures, even though it does not contain national practices regarding mitigating measures itself.<sup>84</sup> The working paper proposes a good practice guide that would provide States Parties with the necessary tools to carry out effective risk assessments of exports of small and light weapons ammunition and parts and components. Like the Small Arms Survey presentation, the proposal focuses on processes, policies and data-gathering in the recipient State and therefore includes a questionnaire about States Parties' practices in that domain. In response to the proposal, reference was made to existing guidance of ATT stakeholders that could be taken into account in this process.<sup>85</sup> As reflected in this reference, it needs to be noted that the proposal for further discussion

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<https://www.smallarmssurvey.org/resource/whose-risk-understanding-states-parties-implementation-arms-trade-treaty-gender-based>.

<sup>83</sup> See <https://www.ohchr.org/en/treaty-bodies/cedaw>. For other instruments, see Control Arms, "How to use the Arms Trade Treaty to address Gender-Based Violence: A Practical Guide for Risk Assessment", 2018, 17, available at [https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide\\_ONLINE.pdf](https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide_ONLINE.pdf).

<sup>84</sup> The working paper of Argentina is available on the ATT website at: [https://www.thearmstradetreaty.org/hyper-images/file/ATT\\_CSP9\\_Argentina%20Working%20Paper%20on%20GBV\\_EN/ATT\\_CSP9\\_Argentina%20Working%20Paper%20on%20GBV\\_EN.pdf](https://www.thearmstradetreaty.org/hyper-images/file/ATT_CSP9_Argentina%20Working%20Paper%20on%20GBV_EN/ATT_CSP9_Argentina%20Working%20Paper%20on%20GBV_EN.pdf).

<sup>85</sup> Concretely mention was made of: Control Arms, "How to use the Arms Trade Treaty to address Gender-Based Violence: A Practical Guide for Risk Assessment", reference in footnote 34); Control Arms, "ATT Gender Action Plan: Operationalizing CSP5 Decisions on Gender and Gender-based Violence", 2022, available at <https://controlarms.org/wp-content/uploads/2022/08/Control-Arms-Gender-and-GBV-Methodology.pdf> ; and Women's International League for Peace and Freedom (WILPF), "Preventing gender-based violence through arms control: tools and guidelines to implement the Arms Trade Treaty and UN Programme of Action", 2016, available at <http://reachingcriticalwill.org/images/documents/Publications/preventing-gbv.pdf> and "Preventing

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and developing additional guidance does not actually focus on the topic mitigating measures, but rather the implementation of Article 7 (4) in general and particular aspects of the risk assessment States Parties need to conduct under that provision. Any consideration of the Argentinian proposal should therefore be linked with the consideration of further work on the topic of GBV and violence against women and children in general and the proposals that were made in that context, as included in paragraph 108.

## **CONCLUSION**

136. As explained throughout this Voluntary Guide, its aim is to provide a picture of how States Parties approach the implementation of the obligations in Articles 6 & 7 of the Treaty and to provide some understanding of the key concepts in these Articles. It is not its purpose of to prescribe, create new norms and standards or establish an agreement on a single interpretation of the obligations in Articles 6 &7, nor to reinterpret established definitions in international law. That is also why this Voluntary Guide does not include definitive recommendations or conclusions on the application of the obligations in Articles 6 & 7. The presentations, papers and exchanges that underpin this Voluntary Guide have nevertheless shed a clear light on many relevant aspects of the prohibitions and export assessment in Articles 6 & 7, as well as their practical implementation in States Parties' national control systems. At the same time, they have also displayed how the obligations in Articles 6 & 7 relate to States Parties' other international obligations which they need to observe in this context. This makes this Voluntary Guide a useful instrument for all States that need to introduce arms transfer controls in accordance with the Treaty and their other relevant international obligations or intend to update their existing controls.

137. As Articles 6 & 7 include the most fundamental obligations of the Treaty, it is crucial that the WGETI keeps on discussing the continuous duty of States Parties to not authorize transfers in breach of the prohibitions in Article 6 and to assess exports in accordance with Article 7. This includes exchanges about national practices and States Parties' substantive approach to the prohibitions and risk assessment. In that respect, it is highlighted again that this Voluntary Guide is intended as a living document of a voluntary nature, to be reviewed and updated by the WGETI, as appropriate. This entails that in case the continuing discussions on the implementation of Articles 6 & 7 would reveal a need to for updated or expanded guidance, the Voluntary Guide is intended to accommodate updates and additions.

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**ANNEX A. PROVISIONS OF THE GENEVA CONVENTIONS AND THE ROME STATUTE THAT DEFINE /ARE RELEVANT TO 'SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW'**

**Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949**

ARTICLE 50

Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

**Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949**

ARTICLE 51

Grave breaches ... shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

**Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949**

ARTICLE 130

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

**Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949**

ARTICLE 147

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

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**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977**

ARTICLE 11 -- PROTECTION OF PERSONS

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:

(a) physical mutilations;

(b) medical or scientific experiments;

(c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power

ARTICLE 85 -- REPRESSION OF BREACHES OF THIS PROTOCOL

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol,

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or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
- (d) making non-defended localities and demilitarized zones the object of attack;
- (e) making a person the object of attack in the knowledge that he is ' hors de combat ';
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

- (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
- (b) unjustifiable delay in the repatriation of prisoners of war or civilians;
- (c) practices of ' apartheid ' and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
- (d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
- (e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

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## Rome Statute

### ARTICLE 8 - WAR CRIMES

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

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- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

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(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against 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:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

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(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

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