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**Gender-Based Violence and the Arms Trade: The
Adequacy of Art 7(4) of the Arms Trade Treaty and
Implications for New Zealand**

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Abstract

New Zealand has been a key driving State in the establishment of the Arms Trade Treaty (ATT), a Treaty aimed at mitigating the human suffering caused by the international arms trade. The ATT has been criticised for a variety of reasons, one of which is the inadequacies of art 7(4). Article 7(4) was heralded as a protection for victims of gender-based violence, a form of violence which is exacerbated by both legal and illicit trade in arms. However, art 7(4) is ambiguously drafted and poorly implemented even by socially progressive States such as New Zealand, undermining the ATT's goal to reduce human suffering. This paper argues that reform of art 7(4) to provide certainty, oversight and accountability is an urgent necessity to provide GBV victims with sufficient protection.

Key Words

Gender-based violence – Arms Trade Treaty – Article 7(4) – New Zealand

Word length

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I Introduction

The Arms Trade Treaty (ATT) is the only universal binding treaty to regulate the international trade in conventional weapons, and to recognise the connection between gender-based violence (GBV) and arms exports.¹ GBV is a form of violence which predominately impacts women and girls.² Influx of conventional weapons into a country causes GBV rates to increase, tripling the risk of fatal GBV and reducing the level of gender equality nation-wide.³ Article 7(4) of the ATT purports to address this issue by obliging exporting States to consider the risk that exported arms could be used to commit or facilitate GBV before authorising an export.⁴

Although the inclusion of art 7(4) in the ATT was regarded as a success by NGOs and socially progressive States Parties such as New Zealand, the provision has multiple faults.⁵ It is ambiguous, poorly implemented, and lacks an oversight mechanism to verify compliance. Even New Zealand, a leader in the ATT context, needs to go further to effectively implement art 7(4). This paper argues that reform of art 7(4) is urgently necessary to incentivise its implementation and ensure protection for GBV victims. New Zealand should use its influence as an “authoritative voice” on the ATT to support meaningful change.⁶

Part II of this paper will give an overview of the current state of the arms trade globally and in New Zealand specifically. Part III will address the GBV crisis and the impact of the arms trade on this form of violence, using Papua New Guinea as a case study. Part IV will explore the history of the ATT and New Zealand’s role in its elaboration. Part V will analyse the adequacy

¹ Arms Trade Treaty Monitor *ATT Monitor Report 2019* (2019) at 19.

² *Annual Report of the UN High Commissioner for Human Rights* UN Doc A/HRC/19/41 (17 November 2011) at [20]; and Control Arms *How to use the Arms Trade Treaty to address Gender-Based Violence* (August 2018) at 4.

³ Control Arms, above n 2, at 4.

⁴ Arms Trade Treaty 3013 UNTS 1 (opened for signature 3 June 2013, entered into force 24 December 2014), art 7(4).

⁵ Women’s International League for Peace and Freedom *Preventing Gender-Based Violence Through Arms Control* (April 2016) at 4.

⁶ Foreign Affairs, Defence and Trade Committee *International treaty examination of the Arms Trade Treaty* (2014) at 2.

of art 7(4) of the ATT addressing GBV and arms exports. Part VI will address New Zealand's implementation of art 7(4) as well as its efforts towards implementation in the Pacific region. Finally, Part VII will propose four possible reforms to bring clarity, oversight, and accountability to the ATT's GBV obligations.

II The International Arms Trade

A State of the Arms Trade

The arms trade consists of international transfers of conventional weapons, parts and services.⁷ Trade in arms has grown continually between 2003–2019 and was worth approximately NZD 153 billion in 2018.⁸ Many factors drive this growth, including security threats, pursuit of international status and the economic benefits of an arms industry.⁹ States which produce arms supply both State actors and private citizens, and may export arms to other States for profit.¹⁰ States which do not produce arms or have very small production industries must import arms to equip military and law enforcement, and to meet civilian demand.¹¹ In 2014–2019, the major exporting States were the United States, Russia, France, Germany and China.¹² Other notable exporters include the United Kingdom, Spain, Israel, Italy and the Netherlands.¹³ There is also a lucrative illicit arms trade, particularly of small arms and light weapons in conflict-ridden areas.¹⁴ The illicit trade involves conventional weapons being smuggled across borders

⁷ ACDA *World Military Expenditures and Arms Transfers 1999–2000* (February 2003) at 197.

⁸ Tim Bowler “Which country dominates the global arms trade?” (10 May 2018) BBC News <www.bbc.com>; and Stockholm International Peace Research Institute *Trends in International Arms Transfers, 2019* (March 2020) at 1.

⁹ Paul Holtom and Mark Bromley “The International Arms Trade: Difficult to Define, Measure, and Control” (July 2010) Arms Control Association <www.armscontrol.org>.

¹⁰ Holtom and Bromley, above n 9; and ACDA, above n 7, at 197.

¹¹ Philip Alpers and Conor Twyford *Small Arms in the Pacific: Occasional Paper No 8* (Small Arms Survey, March 2003) at 6.

¹² Stockholm International Peace Research Institute, above n 8, at 1.

¹³ Stockholm International Peace Research Institute *Trends in International Arms Transfers, 2017* (March 2018) at 2–5; and Stockholm International Peace Research Institute, above n 8, at 1.

¹⁴ Small Arms Survey “Illicit Trafficking” (2014) <www.smallarmssurvey.org>.

without State authorisation, often to armed groups, terrorists and organised crime groups.¹⁵

The United Nations (UN) General Assembly has recognised that States “bear the primary responsibility” for preventing illicit trade.¹⁶

B New Zealand and the Arms Trade

Despite its commitment to disarmament generally, New Zealand has been classified as a “minor exporter” of conventional weapons and a “medium producer” of small arms, regulated by the Arms Act 1983.¹⁷ In 2012, New Zealand’s overall arms exports reached an all-time high value of NZD 115 million.¹⁸ The majority of New Zealand’s exports are small arms exports. The average annual number of small arms exported in 2015–2019 was 1,377.¹⁹ New Zealand separately records the number of shotguns exported annually, averaging 688 per year in 2016–2019.²⁰

Outside of small arms, New Zealand’s exports are limited, exporting 41 maverick missiles, three light arms and three Seasprite SH2G (NZ) maritime ASW Helicopters in the last five

¹⁵ Small Arms Survey “Captured and Counted: Illicit Weapons in Mexico and the Philippines” in *Small Arms Survey 2013: Everyday Dangers* (Cambridge University Press, Cambridge, 2013) 283 at 286; and Small Arms Survey, above n 14.

¹⁶ International Action Network on Small Arms *Summary of the Outcome of the Third Review Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspects* (October 2018) at 1; and *Addressing the negative humanitarian and development impact of the illicit manufacture, transfer and circulation of small arms and light weapons and their excessive accumulation* GA Res 60/68 (2006) at 2.

¹⁷ Susan O’Connor “Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and its New Zealand Application” (2013) 11 NZYIL 73 at 93; and Arms Act 1983, s 5.

¹⁸ Trading Economics “New Zealand Weapons Sales” (August 2020) <www.tradingeconomics.com>.

¹⁹ New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report of Exports and Imports of Conventional Arms, in Accordance with Article 13(3) of the Arms Trade Treaty* (2015) at 3–6; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report of Exports and Imports of Conventional Arms, in Accordance with Article 13(3) of the Arms Trade Treaty* (2016) at 3–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report of Exports and Imports of Conventional Arms, in Accordance with Article 13(3) of the Arms Trade Treaty* (2017) at 3–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report of Exports and Imports of Conventional Arms, in Accordance with Article 13(3) of the Arms Trade Treaty* (2018) at 3–6; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report of Exports and Imports of Conventional Arms, in Accordance with Article 13(3) of the Arms Trade Treaty* (2019) at 3–5.

²⁰ New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2016*, above n 19, at 6; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2017*, above n 19, at 7; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2018*, above n 19, at 7; and New

years.²¹ New Zealand’s primary export destinations are Australia and China, but it regularly exports smaller amounts of small arms to Fiji, Samoa, French Polynesia, New Caledonia and Papua New Guinea.²² In 2015–2019, Papua New Guinea received a yearly average of 130 small arms from New Zealand, rivalling the number of small arms New Zealand exports to China annually.²³

Transit of arms through New Zealand’s territory is common as New Zealand’s Exclusive Economic Zone is the fifth largest globally.²⁴ Illicit transfer of arms has not been a prominent issue in New Zealand, and is estimated to occur rarely and in small numbers.²⁵ The only large-scale incident of illicit trafficking linked to New Zealand occurred in 2009.²⁶ This involved a New Zealand-registered company chartering a plane to smuggle conventional weapons from the Democratic People’s Republic of Korea to Iran, violating a UN Security Council arms embargo.²⁷ No further large-scale incidents have been recorded.²⁸

Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 19, at 6.

²¹ New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2015*, above n 19, at 6; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2016*, above n 19, at 3 and 6.

²² New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2015*, above n 19, at 3–6; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2016*, above n 19, at 3–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2017*, above n 19, at 3–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2018*, above n 19, at 3–6; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 19, at 3–5.

²³ New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2015*, above n 19, at 4; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division, *Annual Report 2016*, above n 19, at 4–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2017*, above n 19, at 4; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2018*, above n 19, (2018) at 4–5; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 19, at 3–4.

²⁴ O’Connor, above n 17, at 102.

²⁵ Philip Alpers and Michael Picard “New Zealand – Gun Facts, Figures and the Law” (9 June 2020) GunPolicy <www.gunpolicy.org>; New Zealand Police “The Number of Legal Firearms in New Zealand” (29 November 2018) IR-01-12-11101 (Obtained under Official Information Act 1982 Request to New Zealand Police); and Small Arms Survey “Trouble in Paradise: Small Arms in the Pacific” in *Small Arms Survey 2004: Rights at Risk* (Oxford University Press, Oxford, 2004) 277 at 285.

²⁶ Oxfam International *Brokers Without Borders* (October 2010) at 9–13.

²⁷ Oxfam International, above n 26, at 9–13.

²⁸ Alpers and Picard, above n 25.

C Consequences of the Arms Trade

The arms trade, as can be expected, has a significant human cost through armed conflicts, terrorism and armed incidents such as mass civilian shootings.²⁹ In the time taken to read an A4 page, one person is killed globally by conventional weapons.³⁰ The Security Council has devoted considerable attention to the harm that accrues through “destabilizing accumulation of and illicit trafficking in small arms”.³¹ Arms used for both legitimate security and law enforcement purposes by States and private citizens and for illegitimate purposes by States, non-State actors and private citizens are sought to intimidate, injure and kill.³² Unregulated arms transfers impede provision of humanitarian relief, lead to diversion of arms to non-State actors who are less likely to respect international law and increase rates of civilian casualties.³³ Approximately 508,000 people died from armed violence per year in 2007–2012.³⁴ Of this number, 44.1 per cent were killed by small arms.³⁵ An estimated 754,000 people suffer non-lethal small arms injuries each year, while “untold” numbers suffer psychological harm due to armed violence.³⁶ Among these victims of the arms trade are those who experience GBV, a serious violation of human rights which disproportionately affects women and girls.³⁷

²⁹ Robin M Coupland and David R Meddings “Mortality associated with use of weapons in armed conflicts, wartime atrocities, and civilian mass shootings: literature review” (1999) 319 *BMJ* 407 at 407.

³⁰ Debbie Hillier and Brian Wood *Shattered Lives: The Case for Tough International Arms Control* (Amnesty International and Oxfam International, 2003) at 24.

³¹ See SC Res 2220 (2015); SC Res 2117 (2013); SC Res 1467 (2003); and *Statement by the President of the Security Council* UN Doc S/PRST/1999/28 (24 September 1999) at 1.

³² O’Connor, above n 17, at 77.

³³ Peter Woolcott *The Arms Trade Treaty: Introductory Note* (United Nations Audiovisual Library of International Law, 2014) at 1–2; and O’Connor, above n 17, at 77.

³⁴ Geneva Declaration *Global Burden of Armed Violence 2015* (September 2015) at 51; and New Zealand Ministry of Foreign Affairs and Trade “Conventional weapons” (2020) <www.mfat.govt.nz>.

³⁵ Geneva Declaration, above n 34, at 74.

³⁶ Geneva Declaration, above n 34, at 73; and Geneva Declaration *Global Burden of Armed Violence 2008* (September 2008) at 3 and 43–44.

³⁷ Arms Trade Treaty Monitor, above n 1, at 25.

III The Impact of the Arms Trade on Gender-Based Violence

The global arms trade is intrinsically connected to GBV as there is a strong correlation between arms imports and rates of gendered violence.³⁸ This Part will first outline the global problem of GBV, followed by the arms trade's impact on prevalence of GBV. This issue will be explored with reference to arms-related GBV in Papua New Guinea and its autonomous region Bougainville, which Human Rights Watch has termed "one of the most dangerous places in the world to be a woman".³⁹

A The GBV Problem

GBV is the most common form of violence worldwide.⁴⁰ It encompasses violence directed at a person based on their biological sex, gender identity or adherence to gender norms.⁴¹ The most prevalent form of GBV is GBV against women and girls.⁴² The Committee on the Elimination of Discrimination Against Women (the CEDAW Committee) defines GBV against women and girls as "violence that is directed against a woman because she is a woman or that

³⁸ See Irish Delegation *Working Paper Presented by Ireland to the Conference of State Parties to the Arms Trade Treaty: Article 7(4) and Gender-Based Violence Assessment* ATT/CSP3/2017/IRL/183/Conf.WP (4 September 2017) at 2; and Control Arms *The impact of guns on women's lives* (Amnesty International, International Action on Small Arms and Oxfam International, 2005) at 12.

³⁹ See Human Rights Watch "Papua New Guinea: Events of 2016" (2017) <www.hrw.org>; World Economic Forum *Global Gender Gap Report 2020* (2019) at 9; and Emma Fulu and others *Why Do Some Men Use Violence Against Women and How Can We Prevent It?* (United Nations Development Programme and others, September 2013) at 2–5.

⁴⁰ Women's International League for Peace and Freedom *Gender-based Violence and the Arms Trade Treaty* (March 2019) at 6.

⁴¹ Control Arms, above n 2, at 4; and Health Policy Project, Asia Pacific Transgender Network and United Nations Development Programme *Blueprint of Comprehensive Care for Trans People and Trans Communities in Asia and the Pacific* (2015) at 3.

⁴² *Annual Report of the UN High Commissioner for Human Rights*, above n 2, at [20]; and Control Arms, above n 2, at 4.

affects women disproportionately".⁴³ Lesbian, bisexual and transgender women experience higher relative prevalence of GBV than cisgender and heterosexual women.⁴⁴

GBV includes physical, sexual, psychological and economic violence, or threats of such violence.⁴⁵ GBV crimes are serious violations of human rights,⁴⁶ and can also amount to war crimes, genocide, crimes against humanity, violations of international humanitarian law or terrorist acts.⁴⁷ One example of GBV is intimate partner violence, with women making up 82 per cent of intimate partner homicide victims in 2017.⁴⁸ Other forms of GBV include honour-related and dowry-related killings, violence during armed conflict such as mass rapes, sex trafficking and gender-related killings of women, known as femicides.⁴⁹ Rates of GBV have accelerated throughout the COVID-19 pandemic, as lockdown restrictions increase exposure to intimate partner violence and reduce help-seeking behaviours.⁵⁰

⁴³ Committee on the Elimination of Discrimination Against Women (CEDAW Committee) *General Recommendation 19* UN Doc A/47/38 (1992) at [6]; and Committee on the Elimination of Discrimination Against Women (CEDAW Committee) *General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19* UN Doc CEDAW/C/GC/35 (14 July 2017) at [1]–[2].

⁴⁴ *Annual Report of the UN High Commissioner for Human Rights*, above n 2, at [20]; and *Control Arms*, above n 2, at 4.

⁴⁵ *Declaration on the Elimination of Violence against Women* GA Res 48/104 (1993), art 1; and CEDAW Committee *General Recommendation No 35*, above n 43, at [14].

⁴⁶ United Nations Economic and Social Council *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* UN Doc E/CN.4/1998/54 (26 January 1998) at [166].

⁴⁷ Office of the Prosecutor *Policy Paper on Sexual and Gender-Based Crimes* (International Criminal Court, June 2014) at 9; Rome Statute of the International Criminal Court (Rome Statute) 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002), art 7(h); *Prosecutor v Akayesu (judgment)* ICTR Trial Chamber ICTR-96-4-T, 2 September 1998 at [731]–[734]; *Prosecutor v Rutaganda (judgment)* ICTR Trial Chamber ICTR-96-3-T, 6 December 1999 at [65]; and *Aydin v Turkey* [1998] 25 EHRR 251 at [83]–[87].

⁴⁸ United Nations Office on Drugs and Crime *Global Study on Homicide: Gender-Related Killing of Women and Girls* (United Nations, 2018) at 11.

⁴⁹ United Nations Office on Drugs and Crime, above n 48, at 31–34; United Nations Entity for Gender Equality and the Empowerment of Women *Climate Change, Disasters and Gender-Based Violence in the Pacific* (2014) at 1; and Independent State of Papua New Guinea, United Nations Development Programme in Papua New Guinea and Australian Department of Foreign Affairs and Trade *Papua New Guinea National Strategy to Prevent and Respond to Gender Based Violence 2016–2025* (2016) at 18.

⁵⁰ United Nations Entity for Gender Equality and the Empowerment of Women “Press Release: UN Women raises awareness of the shadow pandemic of violence against women during COVID-19” (27 May 2020) <www.unwomen.org>; and Kim Usher and others “Family violence and COVID-19: Increased vulnerability and reduced options for support” (2020) 29(4) *Int J Ment Health Nurs* 549 at 549–550.

Women and girls worldwide experience GBV, but rates in Papua New Guinea and its autonomous region Bougainville have reached “epidemic proportions”.⁵¹ The problem of GBV is worsened in Papua New Guinea and other States by the availability of conventional arms through the arms trade.

B The Role of the Arms Trade

Although conventional weapons are not responsible for all incidents of GBV, the arms trade exacerbates GBV in myriad ways.⁵² One prominent impact of the arms trade is that easy access to small arms increases the rate of femicides, particularly domestic violence femicides.⁵³ The presence of small arms in a household increases the risk of domestic violence femicide threefold.⁵⁴ Increases in tribal violence femicides in Papua New Guinea have also been linked to influx of small arms into the country.⁵⁵ This increase in femicides is due to the lethality of small arms violence.⁵⁶ Bullet wound injuries are commonly life-threatening, and threatened use of small arms “reduces a woman’s capacity for resistance”.⁵⁷

An additional issue is that perpetrators of violence may feel “emboldened by weapons, power and status” to inflict non-lethal GBV more frequently.⁵⁸ Owning and using arms constitutes “rites of passage for manhood”, which exacerbate social norms of men as superior to women

⁵¹ Emily Darko, William Smith and David Walker *Gender violence in Papua New Guinea: The cost to business* (ODI, October 2015) at 1; Human Rights Watch “Papua New Guinea: Events of 2019” (2020) <www.hrw.org>; World Economic Forum, above n 39, at 9; and Fulu and others, above n 39, at 2–5.

⁵² See Small Arms Survey “In War and Peace: Violence Against Women and Girls” in *Small Arms Survey 2014: Women and Guns* (Cambridge University Press, Cambridge, 2014) 9 at 13–28; and Caroline Green and others “Gender-based violence and the Arms Trade Treaty: reflections from a campaigning and legal perspective” (2013) 21 *Gend Dev* 551 at 555.

⁵³ Jacquelyn C Campbell and others “Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study” (2003) 93 *Am J Public Health* 1089 at 1092; and Women’s International League for Peace and Freedom, above n 5, at 26.

⁵⁴ Women’s International League for Peace and Freedom and others *The Arms Trade Treaty: Securing Women’s Rights and Gender Equality* (2012) at 1; and IANSA Women’s Network and Center for Women’s Global Leadership *Domestic Violence and Small Arms* (2012) at 1.

⁵⁵ Prianka Srinivasan, Bethanie Harriman and Isobelle Roe “Papua New Guinea massacre of women and children highlights poor policing, gun influx” (10 July 2019) ABC <www.abc.net.au>.

⁵⁶ Control Arms, above n 38, at 12.

⁵⁷ Control Arms, above n 38, at 12.

⁵⁸ Women’s International League for Peace and Freedom and others, above n 54, at 1.

in the community.⁵⁹ For example, violence by “Raskol” gangs in Papua New Guinea increased significantly as small arms became readily available through importation and illicit transfers.⁶⁰ Gang-related “pack rapes” and other sexual violence facilitated by threatening women with small arms increased by approximately 35 per cent between 1990 and 1999, and by 2015 the lifetime prevalence of sexual violence experienced by women in Papua New Guinea reached 70 per cent.⁶¹

GBV facilitated by arms in conflict is also increased due to the arms trade. The Security Council outlined that accumulating small arms increases the “intensity and duration of armed conflicts” and is responsible for “exacerbating sexual and gender-based violence.”⁶² Mass rapes and other crimes of sexual violence during conflict are often facilitated by use of weapons.⁶³ During the Bougainville civil war, small arms were commonly used by State and non-State forces to compel female victims to perform sexual acts.⁶⁴

Moreover, arms transfers into a country “are correlated with an increase in gendered inequality and a generalised culture of violence against women in particular”.⁶⁵ Channelling of State resources into arms rather than social investment results in disproportionately negative outcomes for women and girls, including reduced political participation, educational opportunities, household equality and economic independence.⁶⁶

⁵⁹ Small Arms Survey, above n 52, at 14.

⁶⁰ David Capie “Small arms, violence and gender in Papua New Guinea: Towards a research agenda” (2011) 52 *Asia Pacific Viewpoint* 42 at 45.

⁶¹ Capie, above n 60, at 45–46; and Human Rights Watch “Papua New Guinea: Events of 2015” (2016) <www.hrw.org>.

⁶² *Statement by the President of the Security Council*, above n 31, at 1.

⁶³ Rashida Manjoo and Calleigh McRaith “Gender-Based Violence and Justice in Conflict and Post-Conflict Areas” (2011) 44 *Cornell Intl L J* 11 at 12; and *Conflict-related sexual violence: Report of the Secretary-General* UN Doc S/2019/280 (12 April 2019) at 1–8.

⁶⁴ Alpers and Twyford, above n 11, at 47.

⁶⁵ Women’s International League for Peace and Freedom, above n 40, at 6; and Control Arms, above n 2, at 4.

⁶⁶ Stuart Casey-Maslen and others *The Arms Trade Treaty: A Commentary* (Oxford University Press, Oxford, 2016) at [7.103]; UNESCO *The Hidden Crisis: Armed Conflict and Education* (2011) at 134; and Gender Action for Peace and Security UK *Putting Women’s Rights into the Arms Trade Treaty* (June 2012) at 6.

Although States in the Pacific and globally have implemented strategies to raise awareness of GBV and change perpetrator behaviour, further work is needed to combat entrenched societal views on gender and gun ownership.⁶⁷ In the absence of effective domestic strategies to end GBV, international regulation of the arms trade is a means to reduce the prevalence of gendered harm.⁶⁸ The ATT addresses this troubling connection between the arms trade and GBV.

IV History and Framework of the Arms Trade Treaty

The ATT is a binding, universal treaty governing arms trade regulation.⁶⁹ The Treaty grew from campaigns of humanitarian-focused States and NGOs, advocating for binding norms on the arms trade and formal recognition of the link between unregulated arms exports and GBV.⁷⁰ However, the ATT's obligations were weakened by compromises reached in negotiations, putting its efficacy into question.⁷¹ This Part will trace the history of the ATT and New Zealand's role in its development, including the campaign for a GBV provision. The Treaty's core provisions regulating arms exports will then be assessed.

A The Origins of the ATT

Article 26 of the UN Charter obliges the Security Council to work with UN members to regulate arms.⁷² Yet, prior to the ATT there was no binding universal instrument addressing the arms

⁶⁷ See Independent State of Papua New Guinea, United Nations Development Programme in Papua New Guinea and Australian Department of Foreign Affairs and Trade, above n 49, at 45–51; New Zealand Ministry of Women's Affairs *Current Thinking on Primary Prevention of Violence Against Women* (October 2013) at 4–11; and Erin A Casey and others "Getting men in the room: perceptions of effective strategies to initiate men's involvement in gender-based violence prevention in a global sample" (2017) 19 *Cult Health Sex* 979 at 980–995.

⁶⁸ Gender Action for Peace and Security UK, above n 66, at 7–9.

⁶⁹ Casey-Maslen and others, above n 66, at 8–9.

⁷⁰ Reaching Critical Will "Arms Trade Treaty" (2009) <www.reachingcriticalwill.org>; IANSA Women's Network and Center for Women's Global Leadership, above n 54, at 1; Women's International League for Peace and Freedom and others, above n 54, at 1; Women's International League for Peace and Freedom, above n 5, at 11; and Gender Action for Peace and Security UK, above n 66, at 1.

⁷¹ Ghazala Yasmin Jalil "Arms Trade Treaty: A Critical Analysis" (2016) 36 *Strategic Studies* 78 at 84; and Mark Bromley, Neil Cooper and Paul Holtom "The UN Arms Trade Treaty: arms export controls, the human security agenda and the lessons of history" (2012) 88 *Int Aff* 1029 at 1046.

⁷² Charter of the United Nations 1 UNTS XVI (opened for signature 26 June 1945, entered into force 24 October 1945), art 26.

trade.⁷³ Trade in conventional weapons was primarily regulated through domestic law and regional instruments,⁷⁴ subject to arms embargoes imposed by Security Council resolutions.⁷⁵

The difficulty in addressing conventional weapons was threefold. First, a complex regulatory regime was required as prohibiting “ordinary weapons” necessary for state security was not acceptable.⁷⁶ Secondly, conventional weapons may be used for both legitimate and illegitimate purposes, known as the “dual use” problem.⁷⁷ Thirdly, the permanent five members of the Security Council (P5) are major arms exporters, rendering agreement in the UN difficult.⁷⁸

Following the Cold War and crises such as the Rwandan genocide, the role of the arms trade in armed conflicts, civilian casualties and social inequalities “came to the fore of the international community’s attention”.⁷⁹ General Assembly resolutions from 1991 called for regulation of the arms trade to mitigate civilian harm, resulting in instruments and programs attempting to control arms transfers.⁸⁰

The UN Register of Conventional Arms (UNROCA) of 1991⁸¹ and the Wassenaar Arrangement of 1996,⁸² encourage states to report on imports and exports, but the non-binding nature of the instruments and the limited information sought in reports reduces their efficacy.⁸³

⁷³ O’Connor, above n 17, at 78.

⁷⁴ See generally Arms Act; Customs and Excise Act 2018; and *Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material* UN Doc A/CONF.192/2006/RC/WP.6 (30 June 2006).

⁷⁵ See, for example, SC Res 2117, above n 31.

⁷⁶ Jan Egeland “Arms Availability and Violations of International Humanitarian Law” (1999) *International Review of the Red Cross* <www.icrc.org>.

⁷⁷ New Zealand Ministry of Foreign Affairs and Trade “Which goods are controlled?” (2020) <www.mfat.govt.nz>.

⁷⁸ Sarah Parker *Implications of States’ Views on an Arms Trade Treaty* (United Nations Institute for Disarmament Research, January 2008) at 4; and Arms Trade Treaty, above n 4, preamble.

⁷⁹ Woolcott, above n 33, at 1; Bromley, Cooper and Holtom, above n 71, at 1035–1036; and Brian Wood and Rasha Abdul-Rahim “The Birth and the Heart of the Arms Trade Treaty” (2015) 12(22) *SUR* 15 at 16.

⁸⁰ See *Transparency in armaments* GA Res 47/52 L (1992).

⁸¹ United Nations Register of Conventional Arms “About” <www.unroca.org>; and *Transparency in armaments* GA Res 46/36 L (1991).

⁸² Wassenaar Arrangement Secretariat *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies: Final Declaration* (19 December 1995) at 1; and Casey-Maslen and others, above n 66, at 5.

⁸³ Siemon T Wezeman *The Future of the United Nations Register of Conventional Arms* (Stockholm International Peace Research Institute, August 2003) at 5–6; and Annyssa Bellal “Regulating International Arms

In 2001, the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN PoA) was established, but this is also non-binding and solely regulates small arms and light weapons.⁸⁴ The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol) was also adopted in 2001.⁸⁵ Similar to UN PoA, the Protocol only addresses small arms and light weapons, and France is the only major exporting State that has ratified the Protocol.⁸⁶

NGOs first highlighted the need for an arms trade treaty, citing the inadequacies of the above instruments and the continued human suffering caused by arms transfers.⁸⁷ The influential Control Arms campaign was created in 2003 by a coalition of NGOs to lobby governments on the issue.⁸⁸ Civil society work was supported by the “seven authors”: Australia, Argentina, Costa Rica, Finland, Japan, Kenya and the United Kingdom, who recognised the unregulated arms trade’s negative impact on international peace and security.⁸⁹ These States jointly drafted Resolution 61/89, urging the Secretary-General to create a group of governmental experts to

Transfers from a Human Rights Perspective” in Stuart Casey-Maslen (ed) *Weapons Under International Human Rights Law* (Cambridge University Press, Cambridge, 2014) 448 at 464.

⁸⁴ *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* UN Doc A/Conf.192/15 (9–20 July 2001) at [96]; *The illicit trade in small arms and light weapons in all its aspects* GA Res 58/241 (2004); and Sarah Parker and Katherine Green *A Decade of Implementing the United Nations Programme of Action on Small Arms and Light Weapons* (Small Arms Survey, United Nations Institute for Disarmament Research, 2012) at xvii.

⁸⁵ *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime* GA Res 55/255 (2001).

⁸⁶ United Nations Treaty Collection “Status of Treaties” (9 October 2020) <www.treaties.un.org>.

⁸⁷ O’Connor, above n 17, at 79; Woolcott, above n 33, at 1; Casey-Maslen and others, above n 66, at 8–9; and Small Arms Survey “Breaking New Ground? The Arms Trade Treaty” in *Small Arms Survey 2014: Women and Guns* (Cambridge University Press, Cambridge, 2014) 77 at 78.

⁸⁸ Control Arms “About Us” (2020) <www.controlarms.org>; and Wood and Abdul-Rahim, above n 79, at 16.

⁸⁹ Roderic Alley “Firing Blanks? The Arms Trade Treaty” (2014) 16 Centre for Strategic Studies Discussion Papers 1 at 4.

consider a binding instrument “establishing common international standards” for the arms trade.⁹⁰

Historically, New Zealand has a reputation as a model international citizen on arms control issues, seen in its active participation in conventional weapons treaties, and its memorable stance on nuclear disarmament in the International Court of Justice.⁹¹ Solidifying this reputation, New Zealand was one of the 76 sponsors of Resolution 61/89 in the General Assembly, and one of the 153 States that voted in favour of the Resolution.⁹² The only vote against the Resolution was the United States, while 24 States abstained, including China and Israel.⁹³

B The Campaign for Inclusion of GBV

Discussions regarding a binding ATT formally began following the Resolution’s adoption.⁹⁴ An ATT provision on GBV was called for by Women’s International League for Peace and Freedom (WILPF), Amnesty International, Women’s Network of the International Action Network on Small Arms (IANSA Women’s Network) and other NGOs engaged in women’s rights work.⁹⁵ The joint policy paper made by these organisations argued that a

⁹⁰ *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms* GA Res 61/89 (2006) at [1]–[2]; Casey-Maslen and others, above n 66, at 9; and Small Arms Survey, above n 87, at 78.

⁹¹ See generally New Zealand Ministry of Foreign Affairs and Trade *Updated Initial Report on Measures Undertaken to Implement the Arms Trade Treaty, in Accordance with its Article 13(1)* (2018) at 3; *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457 at [11]; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects 1342 UNTS 137 (opened for signature 10 October 1980, entered into force 2 December 1983); Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 2056 UNTS 241 (opened for signature 18 September 1997, entered into force 1 March 1999); and Convention on Cluster Munitions 2688 UNTS 39 (opened for signature 30 May 2008, entered into force August 2010).

⁹² United Nations Office for Disarmament Affairs “Resolution 61/89” (2006) <www.ga-fc-vote.un.org>.

⁹³ United Nations Office for Disarmament Affairs, above n 92; and Casey-Maslen and others, above n 66, at 9.

⁹⁴ Casey-Maslen and others, above n 66, at 9.

⁹⁵ Reaching Critical Will, above n 70; IANSA Women’s Network and Center for Women’s Global Leadership, above n 54, at 1; Women’s International League for Peace and Freedom and others, above n 54, at 1; Women’s International League for Peace and Freedom, above n 5, at 11; and Gender Action for Peace and Security UK, above n 66, at 1.

binding treaty regulating arms transfers was an “urgent necessity”, and that a provision addressing GBV was paramount to mitigate the suffering of women and girls.⁹⁶

Inclusion of a GBV provision was supported by certain States, the strongest advocates being Iceland, Norway, Finland, Kenya, Malawi and Trinidad and Tobago.⁹⁷ The President of the Final Conference on the Arms Trade Treaty also recognised GBV in a discussion paper.⁹⁸ However, the proposal was unprecedented in international arms regimes, and its inclusion was doubted by certain States.⁹⁹ For example, the Holy See opposed including “gender” in the treaty, arguing that only “violence against women” should be included.¹⁰⁰ This “deeply discriminatory” view excluded other genders from protection, and refused to recognise that gendered violence exists in the context of patriarchal power relations.¹⁰¹

New Zealand professes interest in “mainstreaming gender issues” and supported the GBV proposal during ATT negotiations.¹⁰² This support reflected New Zealand’s wider commitment to “push boundaries and fight hard for a very strong Treaty” on a variety of issues.¹⁰³ New Zealand’s leadership was recognised by the Conference President, who appointed New Zealand to facilitate negotiations on “general implementation [and] relationship with other international agreements”.¹⁰⁴ New Zealand’s active role in ATT negotiations was driven partly by maintenance of its reputation as a champion for arms control, as well as

⁹⁶ Women’s International League for Peace and Freedom and others, above n 54, at 1.

⁹⁷ *Compilation of views on the elements of an arms trade treaty* UN Doc A/CONF.217/2 (10 May 2012) at 51, 54, 56 and 70; and Green and others, above n 52, at 556.

⁹⁸ Roberto García Moritán *Arms Trade Treaty Conference President’s Discussion Paper* (3 July 2012) at 2.

⁹⁹ Casey-Maslen and others, above n 66, at [7.97]; and Small Arms Survey, above n 87, at 87.

¹⁰⁰ Control Arms *Central and Eastern European Regional Training on the Gender-based Violence (GBV) Criteria in the Arms Trade Treaty* (14–16 May 2019) at 11; and Casey-Maslen and others, above n 66, at [7.97].

¹⁰¹ Control Arms, above n 100, at 11; Casey-Maslen and others, above n 66, at [7.97]; and Small Arms Survey, above n 87, at 87.

¹⁰² Dell Higgie, Ambassador for Disarmament “Fifth Conference of States Parties to the Arms Trade Treaty: Thematic Discussion on Gender and Gender-Based Violence” (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26 August 2019) at 2.

¹⁰³ Helena Whall and Allison Pytlak “The Role of Civil Society in the International Negotiations on the Arms Trade Treaty” (2014) 5 *Glob Policy* 453 at 457.

¹⁰⁴ Casey-Maslen and others, above n 66, at 11.

concerns regarding “the devastating impact that illicit arms transfers have on regional and international security and development, particularly in vulnerable areas such as the Pacific”.¹⁰⁵

By July 2012, New Zealand formed part of a group of 75 States that supported the inclusion of a GBV provision.¹⁰⁶ Yet, the form of the provision, including whether a risk of GBV should be sufficient reason to prohibit an export, provoked significant disagreement between States and NGOs.¹⁰⁷ The original proposal by WILPF and other NGOs was that exports should be prohibited if the risk of arms-related GBV eventuating is “substantial”.¹⁰⁸ A weaker option discussed during negotiations required States to “consider taking feasible measures” to reduce the likelihood of exported arms being used in GBV.¹⁰⁹ It is unclear which option New Zealand supported during negotiations, but New Zealand’s interpretive declaration endorses the substantial risk standard for art 7.¹¹⁰ Views of other States remained divided, and the final form of the GBV provision was a “slightly messy compromise” between the views of supporting and opposing States.¹¹¹

Adoption of the ATT by consensus was not possible due to opposition from the United States, Russia, China, Syria, Iran and the Democratic People’s Republic of Korea.¹¹² However, the final round of negotiations resulted in attenuated obligations and no enforcement mechanism, leading the United States to withdraw its objections to the text.¹¹³ The ATT was adopted in the

¹⁰⁵ Foreign Affairs, Defence and Trade Committee *National Interest Analysis – Arms Trade Treaty* (2014) at [9].

¹⁰⁶ Women’s International League for Peace and Freedom *WILPF perspectives on the draft Arms Trade Treaty (ATT)* (March 2013) at 2.

¹⁰⁷ Casey-Maslen and others, above n 66, at [7.99].

¹⁰⁸ Casey-Maslen and others, above n 66, at [7.17]; and Women’s International League for Peace and Freedom and others, above n 54, at 1.

¹⁰⁹ *Draft Arms Trade Treaty* UN Doc A/CONF.217/CRP.1 (26 July 2013), art 4(6); Casey-Maslen and others, above n 66, at [7.18]; and Paul Holtom and Mark Bromley *SIPRI Yearbook 2013 Armaments: Disarmament and International Security: Arms trade treaty negotiations* (Oxford University Press, Oxford, 2013) at 428.

¹¹⁰ New Zealand “Declaration of New Zealand upon ratification of the Arms Trade Treaty” (2 April 2013).

¹¹¹ Casey-Maslen and others, above n 66, at [7.99].

¹¹² Casey-Maslen and others, above n 66, at 10; and Wood and Abdul-Rahim, above n 79, at 17.

¹¹³ Jalil, above n 71, at 84; and Wood and Abdul-Rahim, above n 79, at 17.

General Assembly by an overwhelming 154 votes in favour and three against.¹¹⁴ There were 22 abstentions, including Russia and China.¹¹⁵ New Zealand was an early signatory to the Treaty on 3 June 2013, before ratifying the ATT on 3 September 2014.¹¹⁶

C Framework of the ATT: A Weak Regime?

The ATT was heralded as a binding enunciation of standards to regulate the arms trade, aiming to promote transparency, prevent illicit trade in arms and reduce the human cost of unregulated arms exports.¹¹⁷ However, the ATT's obligations on exporting States lack oversight and enforcement, risking States prioritising economic benefits of the arms trade over the ATT's humanitarian objectives.¹¹⁸

The Treaty applies widely to transfers of eight categories of conventional arms under art 2, from small arms to battle tanks, as well as ammunition, parts and components.¹¹⁹ "Transfer" includes export, import, transit, trans-shipment and brokering.¹²⁰ States are obliged to establish a national control system and national control list to define which arms are controlled and regulate transfers.¹²¹

Articles 6 and 7 are the core export provisions regulating prohibited arms transfers and export assessments respectively.¹²² Under art 6, an exporting State must not authorise any transfer that would violate Security Council measures or breach international agreements to which it is Party. Transfers must also be prohibited if the State has actual or constructive knowledge that

¹¹⁴ The Democratic People's Republic of Korea, Iran and Syria. *The Arms Trade Treaty* GA Res 67/234 B (2013); Arms Trade Treaty "Treaty Status" (2014) <www.thearmstradetreaty.org>; and Wood and Abdul-Rahim, above n 79, at 17.

¹¹⁵ Arms Trade Treaty, above n 114.

¹¹⁶ O'Connor, above n 17, at 92; and Casey-Maslen and others, above n 66, at 12.

¹¹⁷ O'Connor, above n 17, at 75.

¹¹⁸ Bromley, Cooper and Holtom, above n 71, at 1046; and Jalil, above n 71, at 84.

¹¹⁹ Arms Trade Treaty, above n 4, arts 2–4.

¹²⁰ Article 2(2).

¹²¹ Articles 5(2) and 5(4); and Working Group on Effective Treaty Implementation *Arms Trade Treaty: Basic Guide to Establishing a National Control System* (March 2019) at 6.

¹²² See Appendix 1. Casey-Maslen and others, above n 66, at [6.02].

the export would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions 1949 or war crimes defined in international agreements to which it is Party.¹²³

If art 6 does not apply, art 7 requires exporting States to conduct an export risk assessment in an “objective and non-discriminatory manner”, considering whether exported arms could contribute to the negative consequences in art 7(1).¹²⁴ Under art 7(1)(a), States must assess whether the export would contribute to or undermine peace and security.¹²⁵ Under art 7(1)(b), States must assess whether the export could be used to commit or facilitate serious violations of international humanitarian law or international human rights law and whether it could be used to commit or facilitate offences under conventions on terrorism or transnational organised crime to which the exporting State is Party.¹²⁶

No framework for the export assessment is provided in the ATT, meaning the process is regulated domestically by States Parties. Export assessment factors may include “the nature, type, and quantity of weapons to be exported, their normal and reasonably foreseeable uses, the general situation in the state of final destination and its surrounding region, the intended end user, actors involved in the export, and the intended route of the export”.¹²⁷ The effectiveness of this assessment varies between States Parties depending on the resources and dedication of the exporting State, and the quality of information provided by the importing State under art 8(1).¹²⁸

¹²³ Arms Trade Treaty, above n 4, art 6; and Casey-Maslen and others, above n 66, at [6.93].

¹²⁴ Arms Trade Treaty, above n 4, art 7(1).

¹²⁵ Control Arms “Interpreting the Arms Trade Treaty: International Human Rights Law and Gender-Based Violence in Article 7 Risk Assessments” (Control Arms and International Human Rights Clinic, April 2019) at 8.

¹²⁶ See Appendix 1; and Control Arms, above n 125, at 6.

¹²⁷ Casey-Maslen and others, above n 66, at [7.04].

¹²⁸ Casey-Maslen and others, above n 66, at [7.04].

If the exporting state concludes there is a risk under arts 7(1)(a) or 7(1)(b), it must consider whether mitigating measures such as end-user documentation can neutralise the expected harm.¹²⁹ If an “overriding” risk remains present despite any mitigating factors, then the export may not continue.¹³⁰ “Overriding” is not defined in art 7, and States Parties have noted that multiple meanings are possible.¹³¹ Both arts 6 and 7 therefore lack force. Exporting States retain control over their export processes without any independent oversight, and the terminology is ambiguous, meaning interpretation may differ between States Parties.¹³²

States Parties are also given “considerable latitude” with regards to implementation of arts 6 and 7.¹³³ The reporting obligation under art 13 is not onerous, consisting of an initial report concerning implementation measures,¹³⁴ and subsequently annual reports covering exports and imports.¹³⁵ Under art 5 States must take necessary measures to implement the ATT’s provisions, but there is no enforcement mechanism in the Treaty to ensure compliance.¹³⁶ Article 14 requires States to take “appropriate measures” to enforce domestic laws implementing treaty provisions, but this obligation is attenuated by the qualifier “appropriate” and the lack of detail in the provision.¹³⁷ Article 19(1) governing disputes is also weakened as States are only obliged to resolve disputes “by mutual consent”, meaning intransigent States cannot be compelled to participate in dispute resolution.¹³⁸

The legal obligations imposed by the ATT thus reflect compromises made throughout negotiations to attempt to win the support of major exporting States.¹³⁹ The Treaty is devoid

¹²⁹ Arms Trade Treaty, above n 4, art 7(2); and Casey-Maslen and others, above n 66, at [7.89].

¹³⁰ Arms Trade Treaty, above n 4, art 7(3).

¹³¹ Casey-Maslen and others, above n 66, at [7.02] and [7.95].

¹³² Bromley, Cooper and Holtom, above n 71, at 1046.

¹³³ Casey-Maslen and others, above n 66, at [14.06].

¹³⁴ Arms Trade Treaty, above n 4, art 13(1).

¹³⁵ Article 13(3).

¹³⁶ Article 5(5); and Alley, above n 89, at 12.

¹³⁷ Small Arms Survey, above n 87, at 93.

¹³⁸ Arms Trade Treaty, above n 4, art 19(1); and Casey-Maslen and others, above n 66, at [19.07].

¹³⁹ Jalil, above n 71, at 85; and Wood and Abdul-Rahim, above n 79, at 17.

of oversight and enforcement mechanisms, and arts 6 and 7 defer significantly to State sovereignty and national discretion.¹⁴⁰ The weaknesses of this overarching framework can also be seen in art 7(4) which governs GBV and arms exports.

V Evaluation of the GBV Provision

Article 7(4) of the ATT is the only legally binding recognition in an international treaty that unregulated arms exports contribute to GBV.¹⁴¹ However, the provision has been criticised as “overly broad, unenforceable and unverifiable”, weakened both by its own drafting and the weak infrastructure of the ATT as a whole.¹⁴² This Part will discuss the content of art 7(4), its record of implementation and the issues with its drafting and operation which make it unfit for purpose.

A The Role of Art 7(4)

GBV obligations apply under both arts 6 and 7 of the ATT, although art 7(4) is the only provision to explicitly mention GBV.¹⁴³ Exports may be prohibited under art 6 if the exporting State has actual or constructive knowledge that the export could be used to commit or facilitate GBV amounting to a crime against humanity,¹⁴⁴ genocide,¹⁴⁵ grave breach of the Geneva Conventions¹⁴⁶ or other war crime in its international obligations.¹⁴⁷ If the export is not

¹⁴⁰ Jalil, above n 71, at 84; and Bromley, Cooper and Holtom, above n 71, at 1046.

¹⁴¹ See Irish Delegation, above n 38, at 1; Women’s International League for Peace and Freedom, above n 40, at 4; and José Francisco, Alvarado Cobar and Giovanna Maletta “The inclusion of gender-based violence concerns in arms transfers decisions: The case of the Arms Trade Treaty” (23 August 2019) Stockholm International Peace Research Institute <www.sipri.org>.

¹⁴² Irish Delegation, above n 38, at [3]; Jalil, above n 71, at 85; and Wood and Abdul-Rahim, above n 79, at 17.

¹⁴³ Arms Trade Treaty Monitor, above n 1, at 25.

¹⁴⁴ See Rome Statute, above n 47, art 7(h); Office of the Prosecutor, above n 47, at 9; and *Prosecutor v Rutaganda*, above n 47, at [65].

¹⁴⁵ See *Prosecutor v Akayesu*, above n 47, at [731]–[734].

¹⁴⁶ See generally Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950), art 50; Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950), art 51; Convention relative to the Treatment of Prisoners of War of 12 August 1949 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950), art 130; and Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950), art 147.

¹⁴⁷ Arms Trade Treaty, above n 4, art 6(3); and Casey-Maslen and others, above n 66, at [6.153]–[6.182].

prohibited under art 6, States must then consider art 7(4) as part of the art 7(1) export assessment.¹⁴⁸ Article 7(4) provides that:¹⁴⁹

The exporting State Party, in making this [export] 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.

The meaning of “commit or facilitate” covers arms making a “significant contribution to the illegal act”, including arms “one or more steps removed from the actual violation”.¹⁵⁰ Article 7(4) therefore applies equally to a femicide committed using small arms and sexual violence facilitated via threatened armed violence. Whether GBV is “serious” for the purposes of art 7(4) depends on the gravity of violence and the extent of harm, but domestic violence, sexual violence and femicide are typical examples.¹⁵¹

Risk of GBV is only a reason to refuse to authorise an export under art 7(3) when it amounts to an overriding risk of one of the violations outlined in art 7(1).¹⁵² This goes against WILPF’s proposal that a risk of GBV should be a stand-alone reason for export refusal.¹⁵³ However, there is growing agreement that GBV is “inherently serious in nature”, and will almost always fall within the art 7(1) categories.¹⁵⁴

¹⁴⁸ Casey-Maslen and others, above n 66, at [7.96].

¹⁴⁹ See Appendix 1. Arms Trade Treaty, above n 4, art 7(4).

¹⁵⁰ Casey-Maslen and others, above n 66, at [7.35].

¹⁵¹ Control Arms, above n 125, at 5; and Human Rights Committee *General Comment No 28: Article 3 (The Equality of Rights between Men and Women)* UN Doc CCPR/C/21/Rev.1/Add.10 (29 March 2000) at [8] and [10]–[11].

¹⁵² See Appendix 1. Casey-Maslen and others, above n 66, at [7.99]; and Small Arms Survey, above n 87, at 85.

¹⁵³ Women’s International League for Peace and Freedom and others, above n 54, at 1.

¹⁵⁴ Amnesty International *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights* (2015) at 10; Control Arms, above n 125, at 2; and CEDAW Committee *General Recommendation 19*, above n 43, at [7].

GBV may undermine peace and security under art 7(1)(a), as peace and security encompasses human welfare, including socio-economic welfare.¹⁵⁵ GBV committed in conflict may amount to a serious breach of international humanitarian law under art 7(1)(b)(i).¹⁵⁶ GBV may also amount to a serious violation of international human rights law under art 7(1)(b)(ii) if it is committed by the importing state, its agents or by private citizens and non-State actors when a State has not exercised due diligence to prevent, investigate and punish GBV.¹⁵⁷ Additionally, GBV by extremist groups can constitute an act of terrorism under art 7(1)(b)(iii), while sex trafficking may amount to transnational organised crime under art 7(1)(b)(iv).¹⁵⁸

To identify whether exports pose risks of GBV, exporting States must seek and interpret information about the importing State using the ATT's information access provisions and publicly available records.¹⁵⁹ NGOs have elaborated guidelines which, in the absence of ATT guidance, indicate how to conduct gender-sensitive export assessments.¹⁶⁰ Export officials should examine the importing country's human rights and gender equality record, rates of GBV, the legitimacy of the end user and any risk of diversion.¹⁶¹ Whether the risk of GBV is

¹⁵⁵ See SC Res 1325 (2000); SC Res 1889 (2009); SC Res 2122 (2013); and Control Arms, above n 125, at 2 and 8.

¹⁵⁶ See generally International Committee of the Red Cross *International Humanitarian Law and Gender-Based Violence in the Context of the Arms Trade Treaty* (April 2019) at 2–5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, above n 146, arts 3 and 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978), art 76(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978), art 4; and International Committee of the Red Cross “Rule 134: Women” (2020) <www.ihl-databases.icrc.org>.

¹⁵⁷ See generally CEDAW Committee *General Recommendation 19*, above n 43, at [9]; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1249 UNTS 3 (opened for signature 18 December 1979, entered into force 3 September 1981), art 2; Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 2(1) and 19; and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2.

¹⁵⁸ Women's International League for Peace and Freedom, above n 5, at 40.

¹⁵⁹ Arms Trade Treaty, above n 4, arts 8(1) and 15; Amnesty International, above n 154, at 7; Gender Action for Peace and Security UK, above n 66, at 1; and Women's International League for Peace and Freedom, above n 5, at 17.

¹⁶⁰ See generally Control Arms, above n 2; and Women's International League for Peace and Freedom, above n 5.

¹⁶¹ Control Arms, above n 2, at 7; Women's International League for Peace and Freedom, above n 5, at 6; and Amnesty International *How to Apply Human Rights Standards to Arms Transfer Decisions* (2008) at 9–14.

“overriding” or resolvable through mitigating measures depends on the existence of safeguards to prevent the feared violation, for example, effective GBV legislation in the importing State.¹⁶²

B Implementation: An Overview

As noted in Part IV, the ATT lacks oversight and enforcement mechanisms. It is therefore unclear whether States Parties are implementing and complying with art 7(4). States’ understanding of GBV is improving as seen at the Fifth COP,¹⁶³ but significant confusion about the art 7(4) obligation remains.¹⁶⁴ Further, the international community is experiencing “a multidirectional global avalanche of misogyny”, evidenced by hostility towards women’s rights treaties, extremist and fundamentalist ideologies on gender and increasing rates of GBV.¹⁶⁵ There is a corresponding risk that States Parties may minimise GBV in export assessments due to misogyny, cultural views classing violence against women a private issue, ignorance about the arms trade’s impact on GBV or economic imperatives.¹⁶⁶

According to the Arms Trade Treaty Baseline Assessment Survey, 82 per cent of States Parties consider GBV when conducting export assessments, while 11 per cent do not and 7 per cent are unsure.¹⁶⁷ This would ordinarily be a reassuring result, but because the survey records State

¹⁶² Arms Trade Treaty, above n 4, art 7(3); Casey-Maslen and others, above n 66, at [7.89]; and Control Arms, above n 2, at 18.

¹⁶³ Jānis Kārklīņš *Draft Decision of the CSP5 on Gender and Gender Based Violence* ATT/CSP5/2019/PRES/528/Conf.GenderGBV (26 July 2019) at 1.

¹⁶⁴ Irish Delegation, above n 38, at [3].

¹⁶⁵ See generally Human Rights Council *Report of the Special Rapporteur in the field of cultural rights* UN Doc A/72/155 (17 July 2017) at [95] and 13–20; Elżbieta Korolczuk “The fight against ‘gender’ and ‘LGBT ideology’: new developments in Poland” (2020) 3 *EJPG* 165 at 165–167; BBC News “Istanbul Convention: Poland to leave European treaty on violence against women” (25 July 2020) <www.bbc.com>; Human Rights Watch “Women Face Rising Risk of Violence During Covid-19” (3 July 2020) <www.hrw.org>; and Policy Department for Citizens’ Rights and Constitutional Affairs *Backlash in Gender Equality and Women’s and Girls’ Rights* (European Parliament, June 2018) at 8–18.

¹⁶⁶ See, Women’s International League for Peace and Freedom, above n 5, at 19; Control Arms, above n 100, at 11; and Bonita Meyersfeld “A Theory of Domestic Violence in International Law” (JSD Thesis, Yale Law School, 2016) at 16.

¹⁶⁷ Arms Trade Treaty Baseline Assessment Project “ATT-BAP Survey: Comparison Results” (2014) <www.armstrade.info>.

practice on a self-reported basis without any verification, the accuracy of these responses is unclear.¹⁶⁸

The obvious means to verify the survey is through ATT annual reports.¹⁶⁹ However, States Parties adhere to the minimum requirements for annual reporting as per the ATT annual report template.¹⁷⁰ The template was designed to be simple to use by both major exporters and small States with few transfers.¹⁷¹ Reports based on the template therefore solely record the importing state, the number of arms transferred and whether the report concerns only authorised exports and imports, or actual imports and exports.¹⁷² New Zealand is also one of few States Parties that consistently submits annual reports on time.¹⁷³ Only 54 per cent of States Parties have submitted their 2019 annual reports on time, a decrease of 26 per cent since 2015.¹⁷⁴ At best, these reporting trends are due to scarce time and resources. At worst, minimal reporting could conceal insufficient export assessments in certain States.

The lack of female representation at the COP may also negatively impact States Parties' implementation of art 7(4). The number of women involved in ATT decision-making has been consistently inadequate.¹⁷⁵ Only 27 per cent of delegates at the Fourth COP in 2018 were women, and only 23 per cent of heads of delegation were women.¹⁷⁶ Article 7(4) discussions

¹⁶⁸ Arms Trade Treaty Baseline Assessment Project “About Us” (2014) <www.armstrade.info>; and Arms Trade Treaty Baseline Assessment Project *The ATT Baseline Assessment Project: Identifying Good Practice and Implementation Measures* (August 2015) at 3.

¹⁶⁹ Arms Trade Treaty, above n 4, art 13(3).

¹⁷⁰ Working Group on Transparency and Reporting *Reporting Authorized or Actual Exports and Imports of Conventional Arms Under the ATT* (July 2019) at 8 and 11; and Arms Trade Treaty “Annual Reports” (2 October 2020) <www.thearmstradetreaty.org>.

¹⁷¹ New Zealand Delegation “New Zealand General Debate Statement: Arms Trade Treaty: First Conference of States Parties” (Statement to the First Conference of States Parties to the Arms Trade Treaty, Geneva, 24–27 August 2015) at 3.

¹⁷² Working Group on Transparency and Reporting, above n 170, at 8 and 11.

¹⁷³ Arms Trade Treaty, above n 170.

¹⁷⁴ Arms Trade Treaty, above n 170; and Women’s International League for Peace and Freedom, above n 5, at 16.

¹⁷⁵ Control Arms and International Gender Champions Disarmament Impact Group *Gender in the Arms Trade Treaty* (January 2019) at 1.

¹⁷⁶ Izumi Nakamitsu, High Representative for Disarmament Affairs “Fifth Conference of States Parties to the ATT: Thematic Discussion on Gender and Gender Based Violence” (Statement to the Fifth Conference of States

are thus predominately conducted by delegates without lived experience of gender issues.¹⁷⁷ There has never been a female Conference President.¹⁷⁸ Although Latvian Ambassador Jānis Kārklīņš made GBV the theme of the Fifth COP, progress on Fifth COP decisions received little attention at the Sixth COP.¹⁷⁹

Issues of representation at the COP are compounded by lack of knowledge about gender in export decision-making. WILPF and ATT Monitor report that export officials mostly do not have GBV expertise or training.¹⁸⁰ Only export officials in Germany and Sweden have access to advice from gender experts.¹⁸¹ No State requires export officials to be specifically trained in gender issues.¹⁸² No State references GBV in end-user documentation.¹⁸³ Without gender-balanced COP delegations and gender knowledge among export officials, States Parties lack the diversity of knowledge and experience to make fully informed decisions about art 7(4).¹⁸⁴

Empirical evidence also indicates that the number of States Parties not complying with art 7(4) is higher than the 18 per cent reported in the ATT Baseline Assessment Survey.¹⁸⁵ A recent example of non-compliance is the United Kingdom's arms transfers to Saudi Arabia for use in the Yemeni conflict, which has involved gendered violations of international humanitarian

Parties to the Arms Trade Treaty, Geneva, 26 August 2019) at 1–2; and Control Arms and International Gender Champions Disarmament Impact Group, above n 175, at 2.

¹⁷⁷ Women's International League for Peace and Freedom "Why Local Experiences are the Key to Challenging the Arms Trade" (27 August 2019) Relief Web <www.reliefweb.int>.

¹⁷⁸ Arms Trade Treaty "President" (2020) <www.thearmstradetreaty.org>.

¹⁷⁹ Kārklīņš, above n 163, at 1; Arms Trade Treaty Secretariat *Final Report of the Fifth Conference of States Parties to the Arms Trade Treaty* ATT/SCP6/2020/SEC/635/Conf.FinRep.Rev1 (21 August 2020) at 6; Working Group on Effective Treaty Implementation *Chair's Draft Report to CSP6* ATT/CSp6.WGETI/2020/CHAIR/606/Conf.Rep (17 July 2020) at 2–3; and Women's International League for Peace and Freedom "Statement to the Sixth Conference of States Parties to the Arms Trade Treaty" (Statement to the Sixth Conference of States Parties to the Arms Trade Treaty, 17 August 2020) at 3.

¹⁸⁰ Women's International League for Peace and Freedom, above n 5, at 16; and Irish Delegation, above n 38, at 4.

¹⁸¹ Arms Trade Treaty Monitor, above n 1, at 29.

¹⁸² Women's International League for Peace and Freedom, above n 5, at 16; and Irish Delegation, above n 38, at 4.

¹⁸³ Women's International League for Peace and Freedom, above n 5, at 14.

¹⁸⁴ Nakamitsu, above n 176, at 1–2; and Elizabeth Minor "Missing Voices: The Continuing Underrepresentation of Women in Multilateral Forums on Weapons and Disarmament" (December 2017) Arms Control Association <www.armscontrol.org>.

¹⁸⁵ Allison Pytlak "Are Arms Trade Treaty Meetings Being Used to Their Full Potential?" (2020) 12 GR2P 156 at 171.

law.¹⁸⁶ A judicial review of the export decisions was successful on appeal because the decision to export despite the risks of international law violations was “irrational and therefore unlawful”.¹⁸⁷ Thus, although verifiable information about State practice is scarce, minimal reporting, poor female representation and “irrational” transfers indicate that implementation of art 7(4) is unsatisfactory.¹⁸⁸

C Analysis of Art 7(4): A Pyrrhic Victory?

In addition to poor implementation, evaluation of art 7(4)’s drafting suggests that the provision requires reform. One issue is the provision’s placement in the treaty text. Article 7(4) was separated from the art 7(1) risk assessment due to a compromise between the interests of States Parties opposed to the GBV provision and humanitarian NGOs.¹⁸⁹ Certain States Parties resisted placing GBV alongside serious violations of international law under art 7(1), while NGOs called for specific attention for GBV due to its historical marginalisation in international law.¹⁹⁰ The result of this compromise makes the relevance of art 7(4) to the export assessment ambiguous.¹⁹¹ Placing the GBV criterion under art 7(1) would have “underlined the relationship” between GBV and serious international law violations, and would have clarified that export assessments must include assessment of GBV risks.¹⁹²

Placing art 7(4) separate from and subsequent to art 7(1) risks GBV appearing as an afterthought; something qualitatively different to and of less importance than the violations in

¹⁸⁶ Oxfam, Gender Standby Capacity Project and CARE International *Conflict and Gender Relations in Yemen* (November 2016) at 22–25; Arms Trade Treaty Monitor *Dealing in Double Standards: How Arms Sales to Saudi Arabia Are Causing Human Suffering in Yemen* (2016) at 5–7; and Simone Wisotzki *Violating the Arms Trade Treaty: Arms Exports to Saudi Arabia and the Humanitarian Crisis in Yemen* (Peace Research Institute Frankfurt, 2018) at 3–4.

¹⁸⁷ *R (on the application of Campaign against The Arms Trade) v the Secretary of State for International Trade and Interveners* [2019] EWCA Civ 1020 at [49], [138], [145] and [167]; and Field Fisher “UK suspends arms sales to Saudi Arabia following landmark Court of Appeal ruling” (26 June 2019) <www.fieldfisher.com>.

¹⁸⁸ Pytlak, above n 185, at 171.

¹⁸⁹ Green and others, above n 52, at 556; and Casey-Maslen and others, above n 66, at [7.99].

¹⁹⁰ Arms Trade Treaty Monitor, above n 1, at 25; Green and others, above n 52, at 556; and Casey-Maslen and others, above n 66, at [7.99].

¹⁹¹ Green and others, above n 52, at 559; and Small Arms Survey, above n 87, at 87.

¹⁹² Small Arms Survey, above n 87, at 87.

art 7(1).¹⁹³ The practical effect is separation of ‘women’s rights’ violations under art 7(4) from ‘human rights’ violations under art 7(1), a common issue in human rights instruments.¹⁹⁴ This separation may result in States Parties treating GBV as a “‘lesser’ category of abuse” compared to the art 7(1) violations.¹⁹⁵ Although GBV will almost always fall within the art 7(1) categories, separating GBV from the risk assessment means States have “scope to argue that denial [of exports] is not always required”.¹⁹⁶ Making GBV a stand-alone violation under art 7(1) may have prevented this marginalisation of gender issues.¹⁹⁷

A wider failing of the ATT which weakens art 7(4) is the ambiguous term “overriding risk” in art 7(3). The ATT does not define “overriding risk”, which New Zealand has described as unfortunate, expressing support for WILPF’s submission that “substantial” was a more precise term.¹⁹⁸ “Overriding risk” is susceptible to various meanings, including “taking precedence over all other subjects”.¹⁹⁹ This ambiguous terminology negatively impacts art 7(4) as although GBV must be considered in export assessments, if States conclude the risk is outweighed by “expected positive effects of arms transfers”, then the export may continue.²⁰⁰ More broadly, this means the ATT does not prohibit exports likely contributing to art 7(1) violations unless the risk is “overriding”.²⁰¹ This terminology thus undermines “the humanitarian concerns of

¹⁹³ Green and others, above n 52, at 559.

¹⁹⁴ Green and others, above n 52, at 559; and Radhika Coomaraswamy “Women, Ethnicity and the Discourse of Rights” in Rebecca J Cook (ed) *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, Pennsylvania, 1994) 39 at 40.

¹⁹⁵ Jānis Kārklīņš *Working Paper Presented by the President of the Fifth Conference of States Parties to the ATT: Gender and Gender Based Violence* ATT/CSP5/2019/PRES/410/PM1.GenderGBV (15 January 2019) at 5; and Green and others, above n 52, at 556 and 559.

¹⁹⁶ Green and others, above n 52, at 559.

¹⁹⁷ Women’s International League for Peace and Freedom and others, above n 54, at 1.

¹⁹⁸ Casey-Maslen and others, above n 66, at [7.17] and [7.92]–[7.94]; New Zealand, above n 110; and Small Arms Survey, above n 87, at 88.

¹⁹⁹ Oxford English Dictionary Online “Overriding, adjective” <www.oed.com>; Casey-Maslen and others, above n 66, at [7.91]–[7.92]; and Women’s International League for Peace and Freedom and others, above n 54, at 1.

²⁰⁰ Ray Acheson “The ATT is needed for saving lives, not profits” (2012) 5(17) *Arms Trade Treaty Monitor* 1 at 1; and Casey-Maslen and others, above n 66, at [7.93].

²⁰¹ Casey-Maslen and others, above n 66, at [7.94].

the Treaty by the simple fact of its inclusion”, as exports may pose risks of serious international law violations and still be carried out lawfully under the ATT.²⁰²

States and NGOs at the Fifth COP expressed concern about “overriding risk”, noting that discrepancies in interpretation may lead to flawed export decisions.²⁰³ New Zealand, Switzerland, Lichtenstein and Canada have all declared that overriding risk will be interpreted as substantial risk.²⁰⁴ This constitutes state practice against which the ATT is interpreted, but to be determinative more States Parties would need to adopt this interpretation.²⁰⁵ The Fifth COP tasked the Working Group on Effective Treaty Implementation (the WGETI) with examining the issue, but little progress had been made by the Sixth COP.²⁰⁶ Without further action, this interpretive issue weakens the ATT’s potential to reduce human suffering such as GBV.²⁰⁷

An additional drafting problem is that the exporting State is entirely responsible for conducting the export assessment and deciding whether exports pose an overriding risk under art 7(3).²⁰⁸ This lack of oversight raises concerns regarding “political manipulation” of export decisions.²⁰⁹ In recognition of State sovereignty, legitimate interests in the arms trade and the

²⁰² O’Connor, above n 17, at 88.

²⁰³ International Committee of the Red Cross “5th Conference of States Parties to the Arms Trade Treaty: Statement of the International Committee of the Red Cross” (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 28 August 2019) at 2; Swiss Delegation “Agenda Point 4: Thematic discussion on Gender and Gender-Based Violence” (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 1; and Irish Delegation, above n 38, at 4.

²⁰⁴ New Zealand, above n 110; Switzerland “Declaration of Switzerland upon ratification of the Arms Trade Treaty” (30 January 2015); Lichtenstein “Declaration of Lichtenstein upon ratification of the Arms Trade Treaty” (16 December 2014); Global Affairs Canada “Deposition of Canada’s instrument of accession to the Arms Trade Treaty” (2019) Government of Canada <www.canada.ca>; and Casey-Maslen and others, above n 66, at [7.94].

²⁰⁵ Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(b); and Casey-Maslen and others, above n 66, at [7.94].

²⁰⁶ Arms Trade Treaty Secretariat, above n 179, at 6; Working Group on Effective Treaty Implementation, above n 179, at 2–3; and Women’s International League for Peace and Freedom, above n 175, at 3.

²⁰⁷ Arms Trade Treaty, above n 4, art 1.

²⁰⁸ Arms Trade Treaty, above n 4, arts 7(1)–7(4).

²⁰⁹ O’Connor, above n 17, at 88; and Women’s International League for Peace and Freedom “Statement to the Fifth Conference of States Parties to the Arms Trade Treaty” (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 2.

right to self-defence, the ATT allows States Parties to make independent decisions about arms transfers.²¹⁰ This latitude is particularly concerning in the art 7(4) context, as GBV is left undefined. Although treaties must be interpreted against relevant and applicable international law,²¹¹ the most prominent international law definition of GBV is non-binding soft law and has a poor record of implementation.²¹² There is also little available information about States Parties' current interpretive practice.²¹³

Identifying an overriding risk of GBV is therefore left to export officials, many of whom do not have GBV training.²¹⁴ The ATT reporting requirement exposes States to some scrutiny which may incentivise responsible transfers.²¹⁵ However, outlining reasons for export decisions is not required in annual reports, meaning the content of export assessments is not verifiable.²¹⁶ Safeguards for women and other victims of rights violations are therefore controlled by States which benefit economically and politically from exports going ahead, making the regime “highly abusable”.²¹⁷

WILPF has raised concerns about the drafting and operation of art 7(4), with good reason.²¹⁸ Poor implementation compounded by the above drafting issues means art 7(4) is “not living up to the task” of addressing arms-related GBV.²¹⁹ Even advocates for art 7(4) such as New Zealand display questionable implementation of the provision, indicating that art 7(4) is not sufficiently robust.

²¹⁰ Arms Trade Treaty, above n 4, principles and art 5.

²¹¹ Vienna Convention on the Law of Treaties, above n 205, art 31(3)(c).

²¹² CEDAW Committee *General Recommendation 19*, above n 43 at [6]; and Andreea Vesa *International and Regional Standards for Protecting Victims of Domestic Violence* (2004) 12 AM U J Gender Soc Poly & L 309 at 312.

²¹³ Vienna Convention on the Law of Treaties, above n 205, art 31(3)(b); Kārklīņš, above n 195, at 6; and Irish Delegation, above n 38, at 4.

²¹⁴ Women's International League for Peace and Freedom, above n 5, at 16.

²¹⁵ Alley, above n 89, at 2–3.

²¹⁶ Working Group on Transparency and Reporting, above n 170, at 8; and Kārklīņš, above n 195, at 6.

²¹⁷ O'Connor, above n 17, at 88; and Casey-Maslen and others, above n 66, at [7.03].

²¹⁸ Women's International League for Peace and Freedom, above n 209, at 2.

²¹⁹ Women's International League for Peace and Freedom, above n 209, at 2.

VI Assessing New Zealand's Implementation of Art 7(4)

New Zealand is a self-described “authoritative voice” on art 7(4) and the ATT generally, evidenced by its influential role in ATT negotiations and the COP.²²⁰ Nevertheless, New Zealand’s implementation of art 7(4) does not live up to its reputation as an advocate for gender issues. This Part examines New Zealand’s strong implementation of arts 6 and 7 generally, the issues raised by its approach to art 7(4) and the lack of attention afforded to GBV in its advocacy in the Pacific.

A New Zealand's Implementation of Arts 6 and 7

New Zealand’s implementation of the ATT’s export provisions is, for the most part, exemplary. New Zealand did not need to pass new domestic legislation to implement the ATT aside from the provisions on brokering,²²¹ as the domestic framework was already largely compliant with ATT obligations.²²² This compliance was due to New Zealand’s prior participation in the Wassenaar Arrangement and other non-binding regimes governing non-proliferation.²²³ However, New Zealand has not always been at the forefront of State action to mitigate arms-related harm. It was only following the 2019 Christchurch terror attack that New Zealand made its firearms laws more restrictive in line with the Firearms Protocol.²²⁴

New Zealand’s national control system governs exporting of “strategic goods”, including conventional weapons and parts under arts 2–4 of the ATT, as well as chemical, nuclear and biological material.²²⁵ The national control list, or “Strategic Goods List”, specifies goods that cannot be exported without an export licence or other authorisation from the Secretary of

²²⁰ Higgin, above n 102, at 1; and Foreign Affairs, Defence and Trade Committee, above n 6, at 2.

²²¹ Brokering (Weapons and Related Items) Controls Act 2018.

²²² Foreign Affairs, Defence and Trade Committee, above n 6, at 2.

²²³ See Wassenaar Arrangement Secretariat, above n 82 at 1; and O’Connor, above n 17, at 97.

²²⁴ Arms Act, s 4A; New Zealand Ministry of Foreign Affairs and Trade, above n 91, at 2; and DW “New Zealand plans to tighten gun laws in wake of Christchurch massacre” (22 July 2019) <www.dw.com>.

²²⁵ Customs and Excise Act, ss 96 and 97; and New Zealand Ministry of Foreign Affairs and Trade *New Zealand Strategic Goods List* (October 2017) at 3–4.

Foreign Affairs and Trade.²²⁶ If exporting strategic goods would violate art 6 of the ATT, the export will be refused.²²⁷

If art 6 is complied with, an export risk assessment is conducted by MFAT Export Controls Officers.²²⁸ The export assessment criteria are publicly available and include the factors in arts 7 and 11(2) of the ATT.²²⁹ However, New Zealand does not release information on the reasons for export decision-making in ATT annual reports or MFAT annual reports.²³⁰ As a comparison, the United Kingdom releases a Strategic Export Controls annual report stating the percentage of export licences issued, revoked and refused, and indicating the reasons for refusals.²³¹

New Zealand adopts a lower threshold for refusal of exports than is required by the ATT.²³² If the risks are “substantial” and cannot be mitigated, then the export application will be denied.²³³ New Zealand’s export assessments also go beyond the requirements in the ATT by considering additional factors, including the importing state’s human rights record, its involvement in conflict and the impact of the export on regional security.²³⁴ New Zealand has reportedly robustly adhered to the export criteria.²³⁵ For example, a high profile

²²⁶ Arms Trade Treaty, above n 4, art 5(2); and New Zealand Ministry of Foreign Affairs and Trade *Strategic Goods List*, above n 225, at 5.

²²⁷ New Zealand Ministry of Foreign Affairs and Trade “How your application is assessed” (2020) <www.mfat.govt.nz>.

²²⁸ New Zealand Ministry of Foreign Affairs and Trade, above n 91, at 1; and New Zealand Ministry of Foreign Affairs and Trade, above n 227.

²²⁹ New Zealand Ministry of Foreign Affairs and Trade, above n 227.

²³⁰ See New Zealand Ministry of Foreign Affairs and Trade *Annual Report 2018–2019* (2019) at 16; and New Zealand Ministry of Foreign Affairs and Trade *Annual Report 2017–2018* (2018) at 130.

²³¹ Export Control Act 2002 (UK), s 10; and United Kingdom Government *United Kingdom Strategic Export Controls Annual Report 2018* (OGL, 18 July 2019) at 9 and 14.

²³² Arms Trade Treaty, above n 4, art 7(3).

²³³ New Zealand Ministry of Foreign Affairs and Trade, above n 227.

²³⁴ New Zealand Ministry of Foreign Affairs and Trade, above n 227.

²³⁵ O’Connor, above n 17, at 98.

application by Osmar International was denied in 2005 due to the risk of exacerbating the Israeli conflict.²³⁶

Subject to some transparency issues, New Zealand thus appears to be a model international citizen regarding general implementation of arts 6 and 7. New Zealand's implementation of art 7(4), however, requires improvement to set an example for other States Parties and attain New Zealand's goal of "mainstreaming gender issues".²³⁷

B New Zealand's Implementation of Art 7(4)

GBV is listed in New Zealand's export criteria, but New Zealand export officials are not required to have any knowledge or training in gender issues.²³⁸ Unlike in Germany and Sweden where export officials may seek advice from gender experts, GBV knowledge is not emphasised by New Zealand.²³⁹ Officials receive only generalised training on the export criteria, and although ministerial oversight of export assessments is available for complex applications, this is not often implemented.²⁴⁰

Similar to Switzerland, Lichtenstein and Canada, New Zealand claims to interpret overriding risk as "substantial risk" for the purposes of export assessments and the GBV criterion specifically.²⁴¹ If there is a "real indication" that an export poses a risk of GBV, New Zealand states that the export would be refused.²⁴² However, New Zealand does not state whether or how GBV risks are considered during export assessments in its ATT annual reports.²⁴³ New

²³⁶ O'Connor, above n 17, at 98.

²³⁷ Higgie, above n 102, at 2.

²³⁸ New Zealand Ministry of Foreign Affairs and Trade, above n 227; and New Zealand Ministry of Foreign Affairs and Trade, above n 91, at 10–11.

²³⁹ New Zealand Ministry of Foreign Affairs and Trade, above n 91, at 10–11; and Arms Trade Treaty Monitor, above n 1, at 29.

²⁴⁰ New Zealand Ministry of Foreign Affairs and Trade, above n 91, at 10–11.

²⁴¹ New Zealand Ministry of Foreign Affairs and Trade, above n 227; New Zealand, above n 110; Switzerland, above n 204; Lichtenstein, above n 204; Global Affairs Canada, above n 204; and Casey-Maslen and others, above n 66, at [7.94].

²⁴² Higgie, above n 102, at 2.

²⁴³ See generally New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 19.

Zealand's minimal reporting style may be explained by lack of time and resources, the expectations of the ATT Secretariat and the practice of other States Parties.²⁴⁴ Nevertheless, the annual report template is a minimum expectation for reporting, and New Zealand could set an example for other States Parties by recording any implications exports have for art 7(4).²⁴⁵ Further, empirical evidence of questionable transfers suggests New Zealand is not rigorously complying with art 7(4). Taking New Zealand's exports to Papua New Guinea as an example, export officials would need significant information about the country's prevalence of GBV and the likely impact of the export to conclude on the question of substantial risk.²⁴⁶ The crisis in Pacific States of armed violence and GBV shows "how deeply even a small number of small arms can damage small communities".²⁴⁷ Arms exports to Papua New Guinea, even in small amounts, pose risks due to rising rates of sexual violence facilitated by small arms.²⁴⁸ New Zealand would have to be satisfied that mitigating measures are in place to nullify the risk.²⁴⁹ Yet, effective measures to prevent GBV in Papua New Guinea are sparse, as noted in Part III.²⁵⁰ On this basis, New Zealand export assessments do not appear to exemplarily comply with art 7(4).

Despite these issues, New Zealand's formal statements declare that GBV and arms trade is "an issue of great importance to New Zealand".²⁵¹ At the Fifth COP, New Zealand underlined the importance of art 7(4), called for stronger understanding of the provision among States Parties and suggested a "voluntary manual" to guide States in their implementation of art 7(4).²⁵² New

²⁴⁴ Working Group on Transparency and Reporting, above n 170, at 8.

²⁴⁵ Working Group on Transparency and Reporting, above n 170, at 8.

²⁴⁶ Amnesty International, above n 154, at 7; Gender Action for Peace and Security UK, above n 66, at 1; Women's International League for Peace and Freedom, above n 5, at 17; and Arms Trade Treaty, above n 4, arts 8(1) and 15.

²⁴⁷ Small Arms Survey, above n 25, at 277.

²⁴⁸ Capie, above n 60, at 45–46; and Human Rights Watch, above n 61.

²⁴⁹ Arms Trade Treaty, above n 4, art 7(2).

²⁵⁰ See Independent State of Papua New Guinea, United Nations Development Programme in Papua New Guinea and Australian Department of Foreign Affairs and Trade, above n 49, at 44–51.

²⁵¹ Higgin, above n 102, at 1.

²⁵² Higgin, above n 102, at 1.

Zealand has also been vocal about gender issues and arms generally under the Ardern government, taking part in multiple joint statements urging States to focus on gender issues in disarmament.²⁵³ New Zealand therefore should do more to match its implementation of art 7(4) to its formal statements on GBV and the arms trade, by centring GBV in export assessments and promoting transparency in its export decision-making.

C Regional Implementation

New Zealand's efforts to support ATT ratification and implementation in the Pacific also display a lack of emphasis on GBV. New Zealand has a special relationship with Pacific Island States, involving strong connections of trade, aid and security.²⁵⁴ Australia and New Zealand have given significant diplomatic attention to raising awareness of the dangers of illicit arms trade and the benefits of the ATT in the Pacific.²⁵⁵ However, as at 2020, Samoa, Palau and Tuvalu are the only Pacific Island States that have ratified the ATT, following "close and regular bilateral engagement" with New Zealand.²⁵⁶ Nauru, Vanuatu and Kiribati have signed but not ratified the ATT.²⁵⁷ This lack of attention to the ATT may be due to Pacific Island

²⁵³ See Namibia Delegation "Joint Statement on gender and the disarmament machinery" (Statement to the 73rd Session of the UN General Assembly First Committee, Geneva, 31 October 2018) at 1–2; and Nobushige Takamizawa "Joint Statement on practical measures for promoting Disarmament and Non-Proliferation Education" (Statement to the Third Session of the Preparatory Committee for the 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Geneva, 1 May 2019) at 3.

²⁵⁴ New Zealand Ministry of Foreign Affairs and Trade "Pacific" (2020) <www.mfat.govt.nz>.

²⁵⁵ Charlotte Skerten, Deputy Permanent Representative to the Conference on Disarmament "Fifth Conference of States Parties to the Arms Trade Treaty: Treaty Universalization" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 28 August 2019) at 2; Dell Higgie, Ambassador for Disarmament "Statement by Dell Higgie, Ambassador for Disarmament to the Fourth Conference of States Parties to the Arms Trade Treaty: General Debate" (Statement to the Fourth Conference of States Parties to the Arms Trade Treaty, Geneva, 20 August 2018) at 1–2; Pacific Islands Forum Secretariat "Pacific nations join forces to tackle international arms trade" (1 March 2012) <www.forumsec.org>; and Centre for Armed Violence Reduction "Asia-Pacific Progress Towards the Ratification and Implementation of the Arms Trade Treaty" (2019) <www.armedviolencereduction.org>.

²⁵⁶ Arms Trade Treaty Secretariat *States Parties to the ATT (in alphabetical order)* (August 2020) at 5–7; and Dell Higgie, Ambassador for Disarmament "Statement by New Zealand: Sixth Conference of States Parties to the Arms Trade Treaty" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, August 2020) at 2.

²⁵⁷ Arms Trade Treaty Secretariat *ATT Signatories that have not yet ratified, accepted, or approved the Treaty* (August 2020) at 1.

States being primarily importers and transit States rather than arms exporters, and therefore arms trade regulation being low on their national agendas.²⁵⁸

In response to this issue, New Zealand produced a “Model Law” aimed at Pacific States, in collaboration with the NGO Small Arms Survey.²⁵⁹ Model legislation is an encouraged form of international assistance under art 16 of the ATT, although its success depends on effective implementation.²⁶⁰ New Zealand recognised at the First COP that Asia-Pacific States have been “the slowest to join the Treaty” and barriers to their participation needed to be removed.²⁶¹ To this end, the Model Law provides Pacific States and other prospective States Parties with examples of legislative provisions which translate ATT obligations into domestic law.²⁶² The Model Law has also been used by States Parties in Africa and Latin America.²⁶³ The scope of the Model Law matches the scope of the ATT, addressing exports, imports, transit and transshipment, brokers and brokering, record-keeping, administration of national legislation, national control lists and model regulations.²⁶⁴

The Model Law makes some positive statements about art 7(4), including clarifying its connection to the art 7 export assessment,²⁶⁵ and encouraging Pacific States to use “substantial” rather than “overriding” risk as the export assessment standard.²⁶⁶ However, the Model Law displays three issues regarding art 7(4). First, a footnote indicates that art 7(4) is a “non-mandatory provision”, which may be misleading.²⁶⁷ The Model Law should clarify that

²⁵⁸ New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey *Arms Trade Treaty: Model Law to Assist Pacific States to Implement the Arms Trade Treaty* (2014) at 2.

²⁵⁹ New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 258, at 2; and Small Arms Survey “Arms Trade Treaty: Model Law” (2014) <www.smallarmssurvey.org>.

²⁶⁰ Arms Trade Treaty, above n 4, art 16(1).

²⁶¹ New Zealand Delegation, above n 171, at 3.

²⁶² New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 258 at 2; and New Zealand Delegation, above n 171, at 3.

²⁶³ New Zealand Ministry of Foreign Affairs and Trade “Preventing illegal transfers” (2020) <www.mfat.govt.nz>.

²⁶⁴ New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 258, at 2.

²⁶⁵ At 8.

²⁶⁶ At 11.

²⁶⁷ At 12.

considering GBV in export assessments is always mandatory,²⁶⁸ but a GBV risk is not a reason for refusal unless it amounts to an substantial risk of an art 7(1) violation.²⁶⁹

Secondly, GBV is not mentioned under the model provision implementing art 6.²⁷⁰ Due to the risk of GBV being overlooked in export assessments, emphasising that GBV can amount to genocide, crimes against humanity or grave breaches of the Geneva Conventions under art 6 would be advisable.²⁷¹

Thirdly, the Model Law states that GBV risks are only a reason to refuse exports when they amount to a serious violation of international human rights law or international humanitarian law, which could be misinterpreted.²⁷² The Model Law should note that GBV is not only relevant to arts 7(1)(b)(i)–7(1)(b)(ii), but may amount to any of the art 7(1) violations.²⁷³

Issues in the Model Law mean New Zealand has missed an opportunity to emphasise the importance of GBV in export assessments. On one view, lack of attention to art 7(4) in the model law recognises the minimal exporting capacity of Pacific States. A more worrying view would be that these issues reflect a lack of understanding or commitment on New Zealand's part regarding the role of art 7(4) in the Treaty.

This would be especially concerning in light of New Zealand's current role as the Chair of the ATT Voluntary Trust Fund Selection Committee.²⁷⁴ The Voluntary Trust Fund, established under art 16 of the ATT, offers States financial assistance to implement the ATT.²⁷⁵ New Zealand therefore administers funding of implementation projects by States Parties, with the

²⁶⁸ Arms Trade Treaty, above n 4, art 7(4).

²⁶⁹ Casey-Maslen and others, above n 66, at [7.99]; and Small Arms Survey, above n 87, at 85.

²⁷⁰ New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 258, at 10.

²⁷¹ Women's International League for Peace and Freedom, above n 5, at 11; and Holtom and Bromley, above n 109, at 438.

²⁷² New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 258, at 12.

²⁷³ Control Arms, above n 125, at 2.

²⁷⁴ Dell Higgle, Ambassador for Disarmament "Fifth Conference of States Parties to the Arms Trade Treaty: International Assistance (ATT Voluntary Trust Fund)" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 27 August 2019) at 1.

²⁷⁵ Arms Trade Treaty Secretariat *Voluntary Trust Fund: Terms of Reference* (2018) at 1.

corresponding opportunity to incentivise projects concerning implementation of art 7(4).²⁷⁶ No gender-specific projects have been approved in the 2019 Trust Fund cycle.²⁷⁷

New Zealand's prominence in ATT negotiations, reputation as a progressive and influential State Party and public commitments to art 7(4) should be a recipe for exemplary understanding and implementation of the ATT's GBV provisions.²⁷⁸ Yet, New Zealand's domestic implementation and regional advocacy display lack of attention to GBV issues, and possible misconceptions about art 7(4).²⁷⁹ This continued marginalisation of GBV issues by States Parties demonstrates that art 7(4) is ineffective in its current form. There is a compelling need for reform of the provision to remedy these inadequacies and protect victims of GBV.

VII Options for Reform

As the above analysis indicates, art 7(4) is failing GBV victims due to poor drafting, poor implementation and poor compliance. This Part will analyse the content, benefits and likelihood of success of four reforms to the ATT with regards to GBV. These reforms will be discussed in order of likelihood of success, from most ambitious to most feasible. First, this Part will explore the most ambitious reform option; an oversight body and enhanced reporting obligations through a Protocol to the ATT. Secondly, the option of amending the ATT to clarify and strengthen the GBV obligations will be discussed. Thirdly, the possibility of reform outside of the ATT through a Security Council resolution on arms trade and GBV will be examined.

²⁷⁶ Higgie, above n 274, at 1.

²⁷⁷ Arms Trade Treaty Secretariat *3rd Voluntary Trust Fund Cycle (2019): Overview of Projects Approved for ATT VTF Funding* (2019) at 1–5.

²⁷⁸ Higgie, above n 102, at 2.

²⁷⁹ Green and others, above n 52, at 559.

Finally, this Part will evaluate the least controversial reform; soft law guidelines to support States Parties in their implementation of art 7(4).

A Oversight Body

1 Outline of the reform

Poor implementation of art 7(4) may be addressed by establishing independent oversight for arts 6 and 7 through a Protocol to the ATT. The Protocol would be centred on verification of compliance, with a strong focus on art 7(4). The Protocol would emphasise that exporting States have a duty to comply with arts 6 and 7, and that GBV requires particular attention in export assessments due to its historical and continued marginalisation in international law.²⁸⁰

The Protocol would thus implement oversight for the export assessment process generally, while particularly emphasising GBV obligations. The Protocol could be drafted by States Parties such as New Zealand that support robust enforcement and GBV protections, in collaboration with NGOs.²⁸¹

The Protocol's objective would be creation of a monitoring body to verify States Parties' compliance with arts 6 and 7, with special emphasis on GBV obligations (the ATT body).²⁸²

The ATT body would provide oversight by reviewing annual reports, issuing recommendations to support implementation and proactively investigating non-compliance.²⁸³ The mandate of the ATT body would become binding on all States that ratify the Protocol.

²⁸⁰ Arms Trade Treaty Monitor, above n 1, at 25; and Alice Edwards *Violence Against Women Under International Human Rights Law* (Cambridge University Press, Cambridge, 2013) at 7.

²⁸¹ Green and others, above n 52, at 556.

²⁸² See Appendix 2.

²⁸³ See generally Convention for the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) 1975 UNTS 45 (opened for signature 3 September 1992, entered into force 29 April 1997), art VIII; and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women 2131 UNTS 83 (opened for signature 6 October 1999, entered into force 22 December 2000), arts 8–9.

The proposed ATT body's organisational structure would be similar to the Organisation for the Prohibition of Chemical Weapons (OPCW).²⁸⁴ The OPCW monitors implementation of and compliance with the Chemical Weapons Convention.²⁸⁵ It is made up of the Chemical Weapons Convention COP, an Executive body and an independent Secretariat.²⁸⁶

The ATT Executive body would be the primary body regulating implementation of and compliance with arts 6 and 7, comprising an elected group of States Parties to the Protocol.²⁸⁷ Members of the Executive body would be elected by majority vote in the Protocol's first COP to serve two-year terms, ensuring that membership reflects the geographical distribution of the COP.²⁸⁸ The Executive body's oversight responsibilities would include issuing reports and recommendations to the COP on general implementation issues,²⁸⁹ initiating investigations in response to possible non-compliance and approving arrangements made by non-compliant States in negotiation with the Secretariat branch.²⁹⁰

The ATT Secretariat branch would monitor implementation via annual reports and carry out decisions of the Executive body.²⁹¹ To promote independence, members of the Secretariat branch would be elected at the COP in their personal capacity, not as representatives of the nominating State Party.²⁹² Expertise in GBV and the arms trade would be a pre-requisite for nomination.²⁹³ The Secretariat branch's responsibilities would include receiving and analysing annual reports (paying particular attention to GBV obligations), and issuing concluding

²⁸⁴ Chemical Weapons Convention, above n 283, art VIII.

²⁸⁵ Chemical Weapons Convention, above n 283, art VIII(1).

²⁸⁶ Articles VIII B–VIII D.

²⁸⁷ See Chemical Weapons Convention, above n 283, art VIII(30).

²⁸⁸ See art VIII(23).

²⁸⁹ See generally OPCW Executive Council *Draft Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and On Their Destruction in 2019* (7 July 2020) at 7–22.

²⁹⁰ See Chemical Weapons Convention, above n 283, arts VIII(34)–VIII(36).

²⁹¹ See art VIII D(37).

²⁹² See CEDAW, above n 157, art 17.

²⁹³ See Women's International League for Peace and Freedom, above n 5, at 16.

observations to aid States' implementation of arts 6 and 7.²⁹⁴ To support this, annual reporting obligations would be expanded to require States Parties to briefly outline the basis for export decisions, including decisions implicating art 7(4).²⁹⁵

The Secretariat branch would also conduct investigations called for by the Executive body.²⁹⁶ On receipt of a direction from the Executive body, the Secretariat branch would notify the alleged non-compliant State Party, discuss with the State's export officials, review the State's export assessment criteria and assess the State's expanded annual reports. On the approval of the Executive body, the outcome of the inquiry would be transmitted to the State Party, with recommendations for change.²⁹⁷ Within 6 months the State Party would be expected to respond to the recommendations, outlining changes that have been made.²⁹⁸

2 Evaluation

This reform would directly address whether States Parties are complying with GBV obligations through expanded reporting, general and State-specific recommendations and an investigatory function. Expanding reporting obligations to include reasons for export decisions is a significant increase on current reporting obligations. New Zealand has raised concerns about the capacity of small States to comply with burdensome reporting obligations.²⁹⁹ However, small States could be supported to fulfil expanded reporting obligations by NGOs or through

²⁹⁴ See Office of the United Nations High Commissioner for Human Rights *Monitoring implementation of the international human rights instruments: an overview of the current treaty body system* (2005) at 5–7.

²⁹⁵ See Working Group on Transparency and Reporting, above n 170, at 8.

²⁹⁶ Chemical Weapons Convention, above n 283, arts VIII(39)–VIII(40); and Helen Keller and Geir Ulfstein *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) at 74.

²⁹⁷ See Chemical Weapons Convention, above n 283, art VIII(39); and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, above n 283, arts 8–9.

²⁹⁸ See Chemical Weapons Convention, above n 283, Annex on Implementation and Verification; and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, above n 283, arts 8–9.

²⁹⁹ Higgie, above n 256, at 2.

the Voluntary Trust Fund.³⁰⁰ Alternatively, a staggered reporting system could be implemented to reduce the annual burden on States Parties' and the Secretariat branch.

These adjustments are arguably a small price to pay if expanding the reporting obligation positively impacts compliance with art 7(4). Increased scrutiny of export assessments on the basis of ATT reports may incentivise States to assiduously conduct gender-sensitive export risk assessments.³⁰¹ The need to articulate brief reasons for export assessment decisions may also lead States to be more meticulous in export assessments. Research in other contexts suggests that requirements to justify decisions in writing promote greater critical thinking and may reduce bias.³⁰²

Additionally, issuing general recommendations and concluding observations on the basis of annual reports would allow the ATT body to identify non-compliant States and encourage them to emphasise GBV in their export assessment processes.³⁰³ The effectiveness of recommendations from monitoring bodies is questionable.³⁰⁴ For example, the Human Rights Committee has reported that approximately 30 per cent of the responses to its Views implement the suggested measures.³⁰⁵ Nevertheless, the recommendations of treaty monitoring bodies, although non-binding, have normative significance.³⁰⁶ As a comparison, the Views of the Human Rights Committee have been described as "strong indicators of legal obligations, so rejections of those decisions is good evidence of a State's bad faith attitude towards its ICCPR

³⁰⁰ Arms Trade Treaty Secretariat, above n 275, at 1.

³⁰¹ Keller and Ulfstein, above n 296, at 74–75.

³⁰² See generally A Burd and Valerie P Hans "Reasoned Verdicts: Oversold?" (2018) 51 Cornell Intl L J 319 at 333–334.

³⁰³ Keller and Ulfstein, above n 296, at 26–29.

³⁰⁴ Keller and Ulfstein, above n 296, at 357.

³⁰⁵ Human Rights Committee *Report of the Human Rights Committee* UN Doc A/64/40 (1 January 2009) at [230]–[236]; and Keller and Ulfstein, above n 296, at 357.

³⁰⁶ See Keller and Ulfstein, above n 296, at 93; Human Rights Commission *Draft General Comment No 33* CCPR/C/GC/33 (2009) at 19; and Machiko Kanetake "UN Human Rights Treaty Monitoring Bodies Before Domestic Courts" (2018) 67 ICLQ 201 at 204.

obligations”.³⁰⁷ Publicising non-compliance through concluding observations may also incentivise States to comply with art 7(4) to preserve their reputations.³⁰⁸

Independent investigation of non-compliance may have a further positive impact on compliance with art 7(4). The ATT body would have the opportunity to address questionable transfers such as the United Kingdom’s transfers to Saudi Arabia on its own motion.³⁰⁹ Independent investigation is likely to be more effective in the ATT context than a complaints mechanism, as GBV victims in importing States may not have the knowledge and resources to identify the source of inappropriate transfers.³¹⁰ The OPCW exemplifies the possible success of an investigatory body, securing destruction of 90 per cent of global declared chemical agents stockpiles in 2017.³¹¹ However, the OPCW’s investigations in Syria regarding the March 2017 chemical attacks have faced repeated obstacles, leading to criticism of its efficacy.³¹² This suggests that the investigatory model has limitations in highly political interventions when views of States Parties are divided.³¹³

3 Likelihood of success

The main barrier to this reform would be sufficient support from States Parties to negotiate and adopt a Protocol. Negotiation of a Protocol would involve extensive time and resources. Establishing, equipping and staffing an Executive body and Secretariat would require

³⁰⁷ S Joseph, J Schultz and M Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, Oxford University Press, Oxford, 2004) at 24; and Keller and Ulfstein, above n 296, at 93.

³⁰⁸ Andrew T Guzman *How International Law Works: A Rational Choice Theory* (Oxford University Press, Oxford, 2008) at 73–77.

³⁰⁹ Wisotzki, above n 186, at 3–4.

³¹⁰ See Loveday Hodson “Women’s Rights and the Periphery: CEDAW’s Optional Protocol” (2014) 25 *European J Intl L* 561 at 567.

³¹¹ Peter van Ham, Sico van der Meer and Malik Ellahi *Chemical Weapons Challenges Ahead: The Past and Future of the OPCW* (October 2017) at 9.

³¹² OPCW Executive Council *Report by the Director-General: Progress in the Elimination of the Syrian Chemical Weapons Programme* (24 September 2020) at 4–5; van Ham, van der Meer and Ellahi, above n 311, at 49; and Julia Masterson “OPCW Blames Syria for 2017 Attacks” (May 2020) <www.armscontrol.org>.

³¹³ Van Ham, van der Meer and Ellahi, above n 311, at 49.

significant funding from States Parties.³¹⁴ This cost is likely to be a deterrent, particularly as States are globally trending towards protectionism in the wake of the COVID-19 pandemic.³¹⁵

Currently, there is also lack of appetite in the COP for addressing compliance with arts 6 and 7.³¹⁶ Attempts by civil society organisations to attribute responsibility for inappropriate arms transfers have been criticised by States as “politicising” the COP.³¹⁷ Whether the investigatory function would receive the necessary support is particularly doubtful. The primary obstacle is that ATT body investigations may be regarded as an invasion into sovereignty.³¹⁸ The ATT recognises “the sovereign right of any State to regulate and control conventional arms exclusively within its territory”.³¹⁹ The investigatory role of the OPCW has largely been accepted by States, but chemical weapons have an international stigma stretching back to the 1925 Geneva Protocol.³²⁰ States may be less willing to accept interference regarding “ordinary” conventional weapons as, unlike chemical weapons, conventional weapons are entrenched in the economy and security frameworks of most States.³²¹

Further, the political, economic and security imperatives of the arms trade would likely preclude States Parties from agreeing on a robust oversight Protocol where the jurisdiction of the ATT body is compulsory. The ATT’s principles include respect for “the legitimate interests” of States to acquire, produce and transfer conventional weapons.³²² In the original ATT negotiations, the support of the United Kingdom, France, Italy and other prominent

³¹⁴ See OPCW Executive Council *Financial Statements of the Organisation for the Prohibition of Chemical Weapons and Report of the External Auditor for the Year ending 31 December 2018* (13 August 2019) at 13.

³¹⁵ Mireya Solís “The post COVID-19 world: Economic nationalism triumphant?” (10 July 2020) Brookings <www.brookings.edu>.

³¹⁶ Pytlak, above n 185, at 172.

³¹⁷ Ray Acheson “Gaslighting and Mansplaining at CSP3” (2017) 10(5) ATT Monitor 1 at 1.

³¹⁸ Casey-Maslen and others, above n 66, at [0.71].

³¹⁹ Arms Trade Treaty, above n 4, preamble.

³²⁰ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 94 LNTS 65 (opened for signature 17 June 1925, entered into force 8 February 1928).

³²¹ Egeland, above n 76.

³²² Casey-Maslen and others, above n 66, at [0.71].

exporters were won at the cost of a mechanism to verify compliance.³²³ A weak ATT is an economic advantage for major exporting States, as it allows the benefits of exports to be reaped with little scrutiny from the international community.³²⁴ If the ATT body's jurisdiction were not compulsory, few States would likely consent to its jurisdiction, rendering the Protocol largely redundant.

Although the likelihood of this reform's success is low, there are indications that ATT States Parties are beginning to place more emphasis on information sharing and transparency.³²⁵ At the Fifth COP, States Parties were encouraged to share their export assessment practice with respect to GBV to "facilitate learning between States Parties".³²⁶ Including GBV risks within the annual reporting template was also raised for consideration by the WGETI.³²⁷ Thus, States Parties are already seeing the benefits of increased transparency in the GBV context. This suggests gradual changes, such as expanding the reporting obligation, may gain support if strongly advocated for by influential States Parties such as New Zealand. Incremental change would lay the foundations for an oversight mechanism over time.

B Amending Art 7(4)

1 Outline of the reform

One solution to the ambiguous drafting of art 7(4) would be for New Zealand or other States Parties to propose an amendment to the ATT at the COP.³²⁸ Amending the text would clarify

³²³ Jalil, above n 71, at 85; and Wood and Abdul-Rahim, above n 79, at 17.

³²⁴ Jalil, above n 71, at 84; and Bromley, Cooper and Holtom, above n 71, at 1046.

³²⁵ Gender Action for Peace and Security UK, above n 66, at 1.

³²⁶ Kārklīņš, above n 163, at 1.

³²⁷ Kārklīņš, above n 163, at 1.

³²⁸ Arms Trade Treaty, above n 4, arts 20(1)–20(3).

and strengthen the obligation in art 7(4). 2020 was the first year that States could propose amendments to the ATT.³²⁹ The next opportunity is in 2023.³³⁰

The problems of drafting and interpretation outlined in Part V may be remedied via four amendments to arts 2, 6 and 7.³³¹ A statement would be added to art 2 of the ATT to clarify that GBV should be interpreted in accordance with international law such as General Recommendation 19.³³² Article 6 would be amended to explain that GBV may amount to the art 6 violations, including genocide and crimes against humanity.³³³ The art 7(1) threshold would be reduced from “overriding” to “substantial” risk, bringing the ATT in line with WILPF’s proposal and the current export practice of multiple States Parties, including New Zealand.³³⁴ Finally, art 7(4) in its current form would be removed, and inserted as a new sub-paragraph to art 7(1). This new sub-paragraph would specify that States must assess the potential that exported arms could be used to commit or facilitate serious GBV. This amendment would make GBV a stand-alone reason to refuse an export.³³⁵

An additional amendment would be a binding framework for export officials to follow when assessing GBV risks.³³⁶ This would be developed by States and NGOs which championed the

³²⁹ Arms Trade Treaty, above n 4, art 20(1).

³³⁰ Arms Trade Treaty, above n 4, art 20(1).

³³¹ See Appendix 3.

³³² See for example CEDAW Committee *General Recommendation 19*, above n 43, at [6]; CEDAW Committee *General Recommendation No 35*, above n 43, at [14]; *Declaration on the Elimination of Violence against Women*, above n 45, art 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, above n 146, art 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, above n 156, art 76(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, above n 156, art 4; International Covenant on Civil and Political Rights, above n 157, art 3; and Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 2.

³³³ Casey-Maslen and others, above n 66, at [6.153]–[6.182].

³³⁴ Women’s International League for Peace and Freedom and others, above n 54, at 1; and New Zealand Ministry of Foreign Affairs and Trade, above n 227.

³³⁵ Green and others, above n 52, at 559.

³³⁶ Control Arms, above n 2, at 7–18.

issue of GBV in ATT negotiations, including New Zealand.³³⁷ The Practical Guide issued by Control Arms in 2018 is a detailed basis for developing binding guidelines.³³⁸

Guidelines could be drafted in four steps. At Step 1, the guidelines would indicate the forms of GBV that amount to violations of arts 6 and 7, with reference to the art 2 amendment clarifying the interpretation of GBV.³³⁹

At Step 2, the guidelines would address the GBV information-gathering process. The guidelines would outline relevant factors for States to assess GBV prevalence and the capacity of the importing State to prevent, investigate and punish GBV.³⁴⁰ The guidelines would also note that GBV is severely underreported worldwide.³⁴¹ States should therefore recognise that minimal formal reporting of GBV likely indicates “a much larger phenomenon taking place behind closed doors”.³⁴²

At Step 3, the guidelines would outline how to identify a substantial risk that the exported items could be used to commit or facilitate serious GBV.³⁴³ This would involve assessment of the types of arms, proposed use and end user, in light of the GBV evidence gathered at Step 2.³⁴⁴

At Step 4, the availability of mitigating measures would be discussed.³⁴⁵ The guidelines would note that mitigating measures must be “timely, robust and practical” and realistically reduce or eradicate the risk of serious GBV.³⁴⁶ Examples of mitigating measures would be specified in the guidelines, including end-user undertakings or effective GBV legislation in the importing

³³⁷ See Green and others, above n 52, at 556.

³³⁸ See generally Control Arms, above n 2.

³³⁹ Control Arms, above n 2, at 2–5; and Amnesty International, above n 154, at 10.

³⁴⁰ Women’s International League for Peace and Freedom, above n 5, at 43–46; Control Arms, above n 2, at 7; and Amnesty International, above n 161, at 9–14.

³⁴¹ Arms Trade Treaty Monitor, above n 1, at 294.

³⁴² Arms Trade Treaty Monitor, above n 1, at 294.

³⁴³ Control Arms, above n 2, at 15; and Casey-Maslen and others, above n 66, at [7.92].

³⁴⁴ Control Arms, above n 2, at 7; Women’s International League for Peace and Freedom, above n 5, at 6; and Amnesty International, above n 161, at 9–14.

³⁴⁵ Control Arms, above n 2, at 5 and 18.

³⁴⁶ International Committee of the Red Cross *Understanding the Arms Trade Treaty from a Humanitarian Perspective* (September 2017) at 38–39.

State.³⁴⁷ The guidelines would specify that if mitigating measures do not nullify the risk identified at Step 3, the export will be prohibited.³⁴⁸

This four-step framework would be developed into full guidelines and appended to the treaty as an Annex. Although this appears to be quite an invasive assessment, it is only making explicit what States are already expected to do under art 7.³⁴⁹ To pass, the proposed amendments would require the support of a three-quarters majority of States Parties at the COP, and any subsequent changes would require the same conditions.³⁵⁰

2 Evaluation

These amendments may resolve the issues of drafting and terminology which have weakened art 7(4). Clarifying the terminology relating to the GBV obligation aids States which have struggled with implementation due to ignorance about the issue or confusion at the drafting of arts 7(3) and 7(4).³⁵¹ Making GBV a stand-alone reason to prohibit exports avoids gender issues being minimised or overlooked in export assessments, and mainstreams gender issues in the ATT.³⁵² Binding GBV guidelines require States Parties to have a uniform standard of protection for GBV victims in importing States. These amendments would also preclude States arguing that lack of compliance with GBV obligations is due to lack of information about the issue and the expectations of the ATT.

The terminology in the amendments is not uncontroversial. Retaining the qualifier of “serious” GBV may give States scope to minimise the seriousness of GBV incidents.³⁵³ To combat this, guidelines would indicate that an extent and gravity of harm assessment is required, and that

³⁴⁷ Casey-Maslen and others, above n 66, at [7.89].

³⁴⁸ Casey-Maslen and others, above n 66, at [7.89]; and Control Arms, above n 2, at 18.

³⁴⁹ Casey-Maslen and others, above n 66, at [7.04].

³⁵⁰ Arms Trade Treaty, above n 4, art 20(3).

³⁵¹ Irish Delegation, above n 38, at [3].

³⁵² Women’s International League for Peace and Freedom, above n 5, at 11; and Holtom and Bromley, above n 109, at 438.

³⁵³ Green and others, above n 52, at 559.

GBV incidents typically amount to serious violations.³⁵⁴ “Substantial risk” also has some ambiguity, variously being defined by States as “more likely than not”, or the presence of a “connection, based on compelling evidence” between the negative consequences and the export.³⁵⁵ Nonetheless, States which endorse substantial risk agree that substantial is less ambiguous and a lower threshold than “overriding”.³⁵⁶ This strengthens art 7 in its entirety.³⁵⁷

However, amending the text alone will not ensure that States comply with the GBV obligations. Proposing formal amendments to strengthen art 7(4) could erode States Parties’ support for the GBV provision and worsen compliance. Discussions in the COP about art 7(4)’s inadequacy may resurrect and deepen the opposition from certain States Parties seen in the original ATT negotiations.³⁵⁸

Another possibility is that formal change may have little effect on implementation in the absence of enforcement and oversight.³⁵⁹ The arms trade is booming, while GBV rates are rising globally.³⁶⁰ Economic and security imperatives may outweigh formal GBV obligations, particularly in States which display “cultural acceptability” of GBV due to societal views on gender roles.³⁶¹ Until societal views change, and without verification of compliance with the proposed amendments, certain States may continue to deny GBV the attention it merits.³⁶²

³⁵⁴ Human Rights Committee, above n 151, at [8] and [10]–[11]; and Control Arms, above n 125, at 5.

³⁵⁵ Switzerland, above n 204; Lichtenstein, above n 204; and Global Affairs Canada, above n 204.

³⁵⁶ New Zealand, above n 110; Switzerland, above n 204; Lichtenstein, above n 204; Global Affairs Canada, above n 204; and Casey-Maslen and others, above n 66, at [7.92].

³⁵⁷ Casey-Maslen and others, above n 66, at [7.92].

³⁵⁸ Casey-Maslen and others, above n 66, at [7.97]; and Small Arms Survey, above n 87, at 87.

³⁵⁹ Jalil, above n 71, at 84; and Bromley, Cooper and Holtom, above n 71, at 1046.

³⁶⁰ Izumi Nakamitsu, High Representative for Disarmament Affairs “The Fifth Conference of States Parties to the Arms Trade Treaty: Keynote address by Ms Izumi Nakamitsu High Representative for Disarmament Affairs” (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26 August 2019) at 2; *Report of the Special Rapporteur in the field of cultural rights*, above n 165, at [95] and 13–20; Human Rights Watch, above n 165; and see generally Policy Department for Citizens’ Rights and Constitutional Affairs, above n 165, at 8–18.

³⁶¹ World Health Organization *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (Department of Reproductive Health and Research: World Health Organization, 2013) at 26.

³⁶² Edwards, above n 280, at 7.

3 Likelihood of success

Further, considering the original backlash to the GBV provision proposal, it is questionable whether a more robust iteration of the provision would achieve sufficient support.³⁶³ Making GBV a stand-alone reason for refusal of an export was unable to be agreed upon in ATT negotiations, and the same objections may be raised against the proposed amendments.³⁶⁴ For example, the European Union delegation at the Fifth COP stated that art 7(4) was sufficient, and implementation was the real problem to be addressed.³⁶⁵ Retaining the status quo preserves the compromise of the original ATT negotiations, but does not remedy the harm GBV victims are exposed to due to art 7(4)'s weaknesses.

However, the adequacy of art 7(4) has attracted more attention in recent years, notably being the theme of the Fifth COP.³⁶⁶ This increased attention may pose an opportunity for socially progressive States Parties and NGOs to gradually change the interpretation of art 7(4) through interpretive statements at the COP.³⁶⁷ The President of the Fifth COP noted that State delegations raised issues of equal representation in ATT decision-making, the importance of gender-disaggregated data on armed violence and displayed a "high level of interest" in engaging with gender perspectives in the ATT.³⁶⁸ These issues were discussed in statements by both Western States and developing States, citing the influence of NGOs.³⁶⁹ This suggests

³⁶³ Casey-Maslen and others, above n 66, at [7.97]; and Small Arms Survey, above n 87, at 87.

³⁶⁴ Casey-Maslen and others, above n 66, at [7.99].

³⁶⁵ European Union "EU Statement on Gender and Gender Based Violence" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 3.

³⁶⁶ Kārklīņš, above n 163, at 1.

³⁶⁷ Vienna Convention on the Law of Treaties, above n 205, art 31(3)(b); and Casey-Maslen and others, above n 66, at [7.94].

³⁶⁸ Kārklīņš, above n 163, at 1.

³⁶⁹ See Australian Delegation "Gender and Gender-Based Violence Statement" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 1–2; German Delegation "German Statement on Sexual and Gender-Based Violence" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26 August) at 2–3; United Kingdom Delegation "CSP5: Thematic Discussion on Gender: UK Statement" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 1–2; Montenegro Delegation "Intervention of Montenegro" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 1–2; and Mozambique Delegation "Statement by the Delegation of Mozambique at the CSP 5" (Statement to the Fifth Conference of States Parties to the Arms Trade Treaty, Geneva, 26–30 August 2019) at 1–2.

a level of consensus between States Parties about the important impact of the arms trade on GBV.³⁷⁰ States' views therefore appear to have evolved on GBV obligations since early negotiations, demonstrating a curiosity about gender issues and a growing recognition of the importance of gender equality at the decision-making level.

The Fifth COP also resulted in “what could be the most precise and far-reaching outputs” of the ATT to date.³⁷¹ Issues which were noted for action by the COP included ambiguous terms such as “overriding”, and the need for a “voluntary training guide” to assist States Parties to implement art 7(4).³⁷² This indicates that the COP already recognises that interpretation of art 7(4) may evolve.

ATT leaders such as New Zealand, supported by engaged NGOs, could make interpretive statements at the COP to lay the foundation for formal amendments.³⁷³ These statements would record that certain States Parties interpret art 7(4) in accordance with the proposed amendments.³⁷⁴ If these statements are not rejected by other States Parties, over time this may constitute agreement on a more robust interpretation of art 7(4).³⁷⁵ Building from this informal process of interpretive change, the prospect of a formal amendment may eventually attract sufficient support.

C Security Council Resolution

1 Outline of the reform

Outside of the ATT, the Security Council could play a role in reform by making a resolution highlighting the link between GBV and the arms trade. This could take one of two forms; either

³⁷⁰ Pytlak, above n 185, at 170.

³⁷¹ Pytlak, above n 185, at 169.

³⁷² Kārklīņš, above n 163, at 2.

³⁷³ Vienna Convention on the Law of Treaties, above n 205, arts 31(3)(b).

³⁷⁴ Pytlak, above n 185, at 169.

³⁷⁵ Vienna Convention on the Law of Treaties, above n 205, arts 31(3)(b); and Casey-Maslen and others, above n 66, at [7.94].

a non-binding resolution aimed at raising awareness of GBV among exporting States,³⁷⁶ or a more ambitious quasi-legislative resolution requiring States to assess the risk of GBV before authorising exports.³⁷⁷

The Security Council has previously issued non-binding resolutions specifically addressing gender issues, notably Resolution 1325 as part of its women, peace and security agenda.³⁷⁸ Resolution 1325 was a “landmark resolution” as it recognised that armed conflict has a disproportionate impact on women and girls, and called on all UN members to take “special measures” to prevent GBV.³⁷⁹ A similar resolution could be issued on the topic of the arms trade’s impact on GBV. This Resolution would emphasise the link between increased rates of GBV and the arms trade, call on all exporting States to assess the risk of GBV before authorising exports and encourage States to not carry out exports where there is a substantial risk of GBV.

The Resolution would reinforce the importance of gender equality among ATT delegations and in export decision-making, recalling the statements about female representation under Resolution 1325.³⁸⁰ The Resolution would also note that women, girls and other victims of GBV are not only victims of the arms trade, but also have agency as “peacebuilders and decision-makers”.³⁸¹ Transparency about the issue could be increased by the Secretary-General conducting studies on the arms trade and GBV, and reporting on implementation of the Resolution by UN member States.³⁸²

³⁷⁶ See for example SC Res 1325, above n 155; and SC Res 1889, above n 155.

³⁷⁷ See for example SC Res 1373 (2001).

³⁷⁸ SC Res 1325, above n 155.

³⁷⁹ Office of the Special Adviser on Gender “Landmark resolution on Women, Peace and Security” (2004) United Nations <www.un.org>; and SC Res 1325, above n 155, at [10].

³⁸⁰ SC Res 1325, above n 155, at [1]–[3].

³⁸¹ Lakshmi Puri “Statement by Lakshmi Puri on the Adoption of the UN Arms Trade Treaty” (Statement on behalf of the United Nations Entity for Gender Equality and the Empowerment of Women, 3 April 2013) at 1.

³⁸² See generally *Women and peace and security: Report of the Secretary-General* UN Doc S/2019/800 (9 October 2019).

A quasi-legislative resolution, on the other hand, would impose a binding obligation on States to prohibit arms exports where there is a substantial risk of GBV ensuing. Quasi-legislative resolutions “create obligations of a sort usually found only in treaties”.³⁸³ Resolution 1373, made in the aftermath of the September 11 terrorist attacks, is an example.³⁸⁴ Resolution 1373 decided that States were legally obliged to take a variety of actions related to preventing and suppressing terrorist acts.³⁸⁵

A quasi-legislative resolution would involve a decision made under Chapter VII of the UN Charter, classing the arms trade’s impact on GBV as a threat to peace and security due to the scale of harm for victims and their communities.³⁸⁶ The Resolution would require States to undertake a GBV risk assessment before authorising exports, and refrain from authorising exports which pose a substantial risk of GBV. Any transfers made in breach of these obligations could be regarded as conduct amounting to a threat to the peace.³⁸⁷

A Security Council committee similar to the Resolution 1373 Counter-Terrorism Committee would be established to monitor the implementation of the Resolution.³⁸⁸ A Security Council Committee on the arms trade and GBV would comprise the 15 Security Council members and would perform oversight functions pursuant to the Resolution.³⁸⁹ These functions may include

³⁸³ Ian Johnstone “Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit” (2008) 102 Am J Intl Law 275 at 283.

³⁸⁴ SC Res 1373, above n 377.

³⁸⁵ SC Res 1373, above n 377, at [2].

³⁸⁶ Charter of the United Nations, above n 72, arts 25 and 39; and see United Nations Secretary-General “Deputy Secretary-General’s statement to the Security Council on Sexual Violence in Conflict [as delivered]” (15 May 2017) United Nations <www.un.org>.

³⁸⁷ Charter of the United Nations, above n 72, art 39.

³⁸⁸ SC Res 1373, above n 377, at [6].

³⁸⁹ See Security Council Counter-Terrorism Committee “About the Counter-Terrorism Committee” (2020) <www.un.org>; and Counter-Terrorism Committee Executive Directorate *United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED) Factsheet* (July 2018) at 1.

receiving implementation reports,³⁹⁰ conducting State visits to assess implementation and issuing recommendations to aid compliance.³⁹¹

The Resolution would also include as exhortatory provisions the issues of female representation and victim agency as outlined above, and call for the Secretary-General to issue a study on the interrelation between arms trade and GBV. The mandatory provisions of this Resolution would bind all UN members under art 25 of the UN Charter.³⁹²

2 Evaluation

A non-binding Security Council Resolution would have the advantage of universality and persuasive force.³⁹³ It would be addressed to all UN members not only States Parties to the ATT.³⁹⁴ Although it would be an exhortatory rather than binding instrument, the Security Council urging States to comply would be an important signal regarding good exporting practice.³⁹⁵ The disadvantage of a non-binding resolution is that there is no guarantee that the behaviour of States will change. The issue of implementation has been seen in the women, peace and security agenda, where “there remains a stark contrast between rhetoric and reality”.³⁹⁶

Conversely, the quasi-legislative Resolution would make UN members de facto parties to a more robust version of the GBV obligations in the ATT.³⁹⁷ The protection afforded to GBV

³⁹⁰ See SC Res 1373, above n 377, at [6].

³⁹¹ See *Framework document for Counter-Terrorism Committee visits to Member States aimed at monitoring, promoting and facilitating the implementation of Security Council resolutions 1373 (2001), 1624 (2005), 2178 (2014), 2396 (2017), 2462 (2019) and 2482 (2019) and other relevant Council resolutions* UN Doc S/2020/731 (21 July 2020) at 3–7.

³⁹² Charter of the United Nations, above n 72, art 25; and Marko Duvac Oberg “The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ” (2006) 16 EJIL 879 at 885.

³⁹³ Oberg, above n 392, at 885.

³⁹⁴ Charter of the United Nations, above n 72, art 25.

³⁹⁵ Oberg, above n 392, at 885.

³⁹⁶ *Women and peace and security: Report of the Secretary-General*, above n 382, at [2]–[5]; and SC Res 2493 (2019) at 1.

³⁹⁷ Charter of the United Nations, above n 72, art 25.

victims would therefore be greater in scope than reforms made within the ATT regime. ATT obligations have been the result of compromises achieved by States Parties with varying political, economic and humanitarian agendas.³⁹⁸ Subject to Security Council agreement, the obligations in a binding Resolution would be more robust than those reached by compromise in the COP or through a Protocol.

Importantly, implementation would be compulsory rather than voluntary, as the Resolution's obligations would be binding and subject to enforcement through Security Council sanctions.³⁹⁹ Nevertheless, whether member States would successfully implement the Resolution is questionable. For example, the Counter-Terrorism Committee reports that although most States have complied with the core provisions of Resolution 1373, lack of political will and resources means implementation of certain provisions "remains inadequate".⁴⁰⁰ Despite binding obligations and the support of a Security Council Committee, implementation is not a certainty.⁴⁰¹

3 Likelihood of success

The main obstacle to this proposal would be political divisions within the Security Council. Although the United Kingdom and France were early parties to the ATT, and China became a party this year,⁴⁰² the United States and Russia have not joined the ATT, and both States have openly criticised the Treaty.⁴⁰³ However, the United States was an original signatory to the ATT in 2014, and was among the 75 States that supported including a GBV provision in

³⁹⁸ Jalil, above n 71, at 85; and Wood and Abdul-Rahim, above n 79, at 17.

³⁹⁹ Charter of the United Nations, above n 72, arts 40–42.

⁴⁰⁰ *Global Survey 2008 of the implementation of Security Council resolution 1373 (2001) by Member States* UN Doc S/2008/379 (10 June 2008) at 29–37; and *Global survey 2016 of the implementation of Security Council resolution 1373 (2001) by Member States* UN Doc S/2016/49 (20 January 2016) at 107–121.

⁴⁰¹ *Global Survey 2008 of the implementation of Security Council resolution 1373*, above n 400, at 29–37; and *Global survey 2016 of the implementation of Security Council resolution 1373*, above n 400, at 107–121.

⁴⁰² Arms Trade Treaty, above n 256, at 5–7; and Arms Trade Treaty, above n 257, at 1.

⁴⁰³ Arms Control Association "US to Quit Arms Trade Treaty" (May 2019) <www.armscontrol.org>; Agence France-Presse "Russia Will Not Sign 'Weak' Arms Trade Treaty" (17 May 2015) Defense News <www.defensenews.com>; and Wood and Abdul-Rahim, above n 79, at 17.

negotiations.⁴⁰⁴ If a change of administration eventuates in 2020, it is possible that the United States would support a resolution addressing GBV and the arms trade.

The position of Russia is more doubtful. Russia has never supported the ATT, and its response to GBV in its own territory has been criticised by Human Rights Watch as an “ongoing failure”.⁴⁰⁵ Russia has not amended its protections of women and girls despite the urging of the CEDAW Committee, suggesting a dismissive attitude towards GBV.⁴⁰⁶ Its views on the ATT and GBV prevention could drive Russia to use its veto power to block a binding GBV resolution, particularly in light of the proposed Security Council Committee.⁴⁰⁷ However, Russia has supported all but one of the women, peace and security non-binding Resolutions, and the majority of these Resolutions have been adopted unanimously.⁴⁰⁸ A non-binding resolution on GBV and the arms trade may therefore gain sufficient support from the Security Council.

D Soft Law Guidelines

1 Outline of the reform

The least controversial reform option, as suggested by New Zealand at the Fifth COP, is the creation of soft law guidelines to aid States in their implementation of art 7(4).⁴⁰⁹ Soft law guidelines would have no binding force and could be implemented voluntarily by States in their export assessments.⁴¹⁰ This would be a form of “primary” soft law, clarifying “previously

⁴⁰⁴ Women’s International League for Peace and Freedom, above n 106, at 2.

⁴⁰⁵ Human Rights Watch “Submission to the Committee on the Elimination of Discrimination against Women on Russia” (3 July 2020) <www.hrw.org>.

⁴⁰⁶ Committee on the Elimination of Discrimination Against Women *Concluding Observations: Russia* UN Doc CEDAW/C/RUS/CO/8 (20 November 2015) at [21]–[22].

⁴⁰⁷ Charter of the United Nations, above n 72, art 27(3).

⁴⁰⁸ United Nations Digital Library “Voting Data” (2020) <www.digitalibrary.un.org>.

⁴⁰⁹ Higgle, above n 102, at 1.

⁴¹⁰ Henry Deeb Gabriel “The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference” (2009) 34(3) *Symposium: Ruling the World: Generating International Legal Norms* 655 at 658.

accepted vague or general standards” for export assessments.⁴¹¹ An example of primary soft law is the UN Declaration on the Elimination of All Forms of Intolerance based on Religion or Belief, elaborating the equality and non-discrimination principle in the UN Charter.⁴¹²

In the ATT context, a soft law resolution could be made by the COP.⁴¹³ NGOs are often crucial to the process of adopting soft law. For example, Amnesty International was a driving force behind the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴¹⁴ WILPF and IANSA could play a similar role in advocating for soft law guidelines on GBV and export assessments, backed by New Zealand and other influential States Parties. The content of these guidelines would ideally be similar to the proposed binding guidelines discussed in section B of this Part.

2 Evaluation

Soft law guidelines would give exporting States more information with which to implement art 7(4).⁴¹⁵ Article 7(4) is a complex and relatively burdensome obligation for exporting States. Soft law guidelines would help States Parties to interpret art 7(4), identify the risk of GBV in the importing country and assess whether that risk is overriding in light of possible mitigating measures.⁴¹⁶

However, putting guidelines relevant to GBV obligations in a soft law instrument poses practical and symbolic problems. Research indicates non-binding obligations are regarded as

⁴¹¹ Dinah Shelton “Compliance with International Human Rights Soft Law” (1997) 29 *Stud Transnatl Legal Poly* 119 at 121.

⁴¹² *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* GA Res 36/55 (1981); Charter of the United Nations, above n 72, art 13(1); and Shelton, above n 411, at 122.

⁴¹³ Alan E Boyle “Some Reflections on the Relationship of Treaties and Soft Law” (1999) 48(4) *Int Comp Law Q* 901 at 905.

⁴¹⁴ *Declaration on the Protection of All Persons from being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* GA Res 3452 (1975); and Shelton, above n 411, at 130.

⁴¹⁵ Women’s International League for Peace and Freedom, above n 5, at 25–47.

⁴¹⁶ *Control Arms*, above n 2, at 5.

being of less significance by States, negatively impacting compliance.⁴¹⁷ GBV is already marginalised in the ATT and international law more widely.⁴¹⁸ Addressing GBV in soft law may cause the issue to be disregarded further.⁴¹⁹ For example, General Recommendation 19 calling for States Parties to CEDAW to combat GBV is a non-binding soft law instrument.⁴²⁰ This Recommendation has suffered from repeated non-compliance, to the point of being ignored by certain Western European States.⁴²¹

Enforcement is also at issue as soft law instruments lack robust means of ensuring compliance.⁴²² Without binding obligations and oversight, States Parties cannot be held accountable for inappropriate transfers that threaten the lives of GBV victims.⁴²³ Relegation of GBV to a soft law instrument may thus symbolise continued marginalisation of GBV in international law and lack of concern for the safety of women and girls.

Nevertheless, soft law provides more flexibility than an amendment. Binding norms must be drafted in a way that creates “a high comfort level” between the various States Parties, their legal and cultural traditions and their priorities for the instrument in question.⁴²⁴ This process of reaching a middle ground acceptable to a majority of States Parties necessarily reduces the potency of obligations. Soft law facilitates agreement on more ambitious provisions, as States’ “legal commitment, and the consequences of any non-compliance, are more limited”.⁴²⁵ Free from the “straightjacket” that comes with binding norms, including domestic ratification

⁴¹⁷ Mary Ellen O’Connell “The Role of Soft Law in a Global Order” in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2003) 100 at 111.

⁴¹⁸ Arms Trade Treaty Monitor, above n 1, at 25; and Edwards, above n 280, at 7.

⁴¹⁹ Edwards, above n 280, at 7.

⁴²⁰ See generally CEDAW Committee *General Recommendation 19*, above n 43.

⁴²¹ Ronagh J A McQuigg “The Responses of States to the Comments of the CEDAW Committee on Domestic Violence” (2007) 11(4) *Int J Hum Rights* 461 at 467–472.

⁴²² O’Connell, above n 417, at 111.

⁴²³ See Human Rights Council *2014 Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo* UN Doc A/HRC/26/38 (28 May 2014) at [68].

⁴²⁴ Gabriel, above n 410, at 663.

⁴²⁵ Boyle, above n 413, at 903.

processes, agreement on soft law may be reached more easily.⁴²⁶ Soft law can also be more easily amended to meet international developments than treaties, which must comply with internal amendment rules.⁴²⁷

Further, soft law guidelines have normative value and can provide a model for future developments.⁴²⁸ Soft law guidelines on GBV may eventually crystallise into binding norms.⁴²⁹ This could take the form of an amendment or Protocol to the ATT, or even a dedicated instrument addressing GBV and the arms trade if States' concerns about the issue increased.

3 Likelihood of success

Soft law guidelines for arts 6 and 7 are already being discussed by the WGETI. At the Sixth COP, the WGETI sub-working group on arts 6 and 7 presented a draft outline of soft law guidelines entitled “elements of a voluntary guide to implementing Articles 6 and 7 of the Arms Trade Treaty”.⁴³⁰ The outline will continue to be discussed among States Parties into 2021, with substantive drafting likely beginning after the Seventh COP.⁴³¹ New Zealand and other engaged States Parties could draw on art 7(4)'s poor drafting and implementation to advocate for GBV receiving extensive attention in the soft law guidelines.

New Zealand has expressed support for a voluntary manual on art 7(4), arguing that implementation is best achieved by increasing understanding of the provision and raising awareness of best practices.⁴³² In light of the current work of the WGETI, the positive reactions to gender issues at the Fifth COP and the non-binding nature of soft law guidelines, this reform

⁴²⁶ Gabriel, above n 410, at 663.

⁴²⁷ Boyle, above n 413, at 903.

⁴²⁸ Boyle, above n 413, at 903.

⁴²⁹ Boyle, above n 413, at 904–905.

⁴³⁰ Working Group on Effective Treaty Implementation *Chair Letter and Sub-working Group Documents for CSP6 ATT/CSP6.WGETI/2020/CHAIR/596/M2.LetterWorkPlans* (7 April 2020) at Annex B.

⁴³¹ Working Group on Effective Treaty Implementation, above n 179, at 2.

⁴³² Skerten, above n 255, at 2.

has the strongest likelihood of success of those proposed.⁴³³ However, soft law guidelines also provide the least protection for GBV victims out of the four reforms discussed.

VIII Conclusion

Ultimately, the recognition of GBV in the ATT is a triumph of inclusion, but a failure of implementation and compliance. The language and placement of the provision is confusing and abusable, and there is no meaningful oversight to prevent States making mistakes or intentionally minimising gender issues in export assessments.⁴³⁴

Despite formal commitments emphasising GBV obligations, New Zealand displays a level of complacency regarding art 7(4). GBV is not sufficiently centralised in New Zealand's export assessments or regional advocacy. These issues reflect the failure of art 7(4) to address the problem of arms-related GBV. Without clarity, oversight and accountability, the GBV obligations in the ATT "become farcical and erode the instrument's credibility".⁴³⁵ As the crisis of arms-related GBV accelerates, art 7(4)'s inherent weaknesses must be addressed through meaningful reform.

At the very least, New Zealand should use its influence in the COP to advocate for the creation of detailed soft law guidelines to ensure States have sufficient information about GBV to implement art 7(4). However, more ambitious reform aimed at strengthening GBV obligations, verifying compliance and securing accountability is needed for the ATT to fulfil its objectives and reduce the suffering of GBV victims.⁴³⁶ Enduring change to art 7(4) and the ATT regime generally is possible through dedicated action by influential States.

⁴³³ Kārklīņš, above n 163, at 1; and Gabriel, above n 410, at 663.

⁴³⁴ Women's International League for Peace and Freedom, above n 5, at 11.

⁴³⁵ Pytlak, above n 185, at 177.

⁴³⁶ Pytlak, above n 185, at 156.

Supporting some of the reforms in this paper would give New Zealand the opportunity to match its positive rhetoric about GBV to decisive action which may save lives.

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Appendix 1: Extracts from Arts 6 and 7 of the Arms Trade Treaty

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.
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.

Appendix 2: Proposed Oversight Body Table

Function and Mandate
Oversight of export assessments with a particular emphasis on compliance with art 7(4). Jurisdiction of the ATT body compulsory for all States that ratify the ATT Protocol.
Composition
Executive body made up of States Parties that gives general recommendations on implementation and makes decisions regarding investigation of non-compliance. Independent Secretariat branch to carry out investigations directed by the Executive Council. Members of both bodies appointed by Protocol's COP.
Reporting
Annual reporting obligations expanded to require States Parties to give brief reasons for export decisions.
Secretariat body to receive and analyse reports (paying particular attention to GBV obligations), and issue concluding observations for States Parties to improve their implementation.
Investigations
Executive body initiates investigation into non-compliance.
Secretariat branch investigates by contacting the alleged non-compliant State Party, discussing with export officials, reviewing export assessment criteria and assessing annual reports.
Secretary branch seeks approval of Executive body on final inquiry report. Executive body transmits outcome of inquiry to State Party with recommendations for change.
State Party expected to respond to recommendations within six months.

Appendix 3: Proposed Amendments to the ATT

Article 2

2(4). *For the purposes of this Treaty, “gender-based violence” shall be interpreted in accordance with relevant international law.*⁴³⁷

Article 6

6(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, *including gender-based violence amounting to any of the above violations.*

Article 7:

1.If the export is not prohibited under Article 6, each exporting State Party...shall...assess the potential that the conventional arms or items:

(b) could be used to:

...

(v) *commit or facilitate gender-based violence or violence against women or children.*

...

7(3). If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is a *substantial* risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

⁴³⁷ CEDAW Committee *General Recommendation 19*, above n 43, at [6]; CEDAW Committee *General Recommendation No 35*, above n 43, at [14]; *Declaration on the Elimination of Violence against Women*, above n 45, art 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, above n 146, art 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, above n 156, art 76(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, above n 156, art 4; International Covenant on Civil and Political Rights, above n 157, art 3; and Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, above n 332, art 1.