

GENDER-BASED VIOLENCE AND THE ARMS TRADE TREATY: ARTICLE 7(4) UNDER FIRE

*Jessica Sutton**

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 (GBV), 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 article argues that reform of art 7(4) to provide certainty, oversight and accountability is an urgent necessity to secure added protection for GBV victims.

I INTRODUCTION

The Arms Trade Treaty (ATT) is the only universal binding treaty to regulate 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 nationwide.³ Article 7(4) of the ATT purports to address this

* BA/LLB(Hons) Victoria University of Wellington; 2021 Rhodes Scholar-Elect for New Zealand. I would like to thank Professor Alberto Costi for his supervision of this piece as part of my Honours seminar.

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.

issue by obliging exporting states to consider the risk that exported arms could be used to commit or facilitate GBV before authorising exports.⁴

Although the inclusion of art 7(4) in the ATT was regarded as a success by non-governmental organisations (NGOs) and socially progressive states parties such as New Zealand, the provision has multiple faults.⁵ It is ambiguous, poorly implemented and, like the Treaty as a whole, 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 article argues that reform of art 7(4) is urgently necessary to incentivise its implementation and increase 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 article will give an overview of the current state of the arms trade globally. Part III will address the GBV crisis and arms-related GBV, using examples from Papua New Guinea. Part IV will explore the history of the ATT and the origins of art 7(4). Part V will analyse the adequacy of art 7(4) of the ATT in addressing GBV and arms exports. Part VI will address New Zealand's ATT journey, including its domestic implementation of art 7(4) as well as its efforts towards regional implementation. 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, it was worth approximately NZD 153 billion in 2018.⁸ Many factors drive this growth, including security threats,⁹ pursuit of international

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.

7 Arms Control and Disarmament Agency *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>.

status¹⁰ and the economic benefits of an arms industry.¹¹ In 2014–2019, the major exporting states were the United States of America, 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 a variety of irregular transactions in conventional weapons, from government supply to non-state actors, to smuggling of weapons across borders without state authorisation.¹⁵ The United Nations (UN) General Assembly has recognised that states "bear the primary responsibility" for preventing illicit trade.¹⁶

B 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.¹⁷ In the time taken to read an A4 page, one person is killed globally by conventional weapons.¹⁸ The UN Security Council has repeatedly warned against "destabilizing accumulation of and illicit trafficking in small arms".¹⁹ Arms used for both legitimate security 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.²⁰ Unregulated arms

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

11 Stockholm International Peace Research Institute *The Financial Value of National Arms Exports, 2001-2017, in current US\$* (30 September 2017).

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>.

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 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.

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

19 *Statement by the President of the Security Council* UN Doc S/PRST/1999/28 (24 September 1999) at 2. See also SC Res 2220 (2015); SC Res 2117 (2013); and SC Res 1467 (2003).

20 Susan O'Connor "Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and its New Zealand Application" (2013) 11 *NZYIL* 73 at 77.

transfers impede provision of humanitarian relief and allow diversion of arms to non-state actors that are less likely to respect international law and increase rates of civilian casualties.²¹

Approximately 508,000 people died from armed violence per year in 2007–2012.²² Of this number, 44.1 per cent were killed by small arms.²³ An estimated 754,000 people suffer non-lethal small arms injuries each year, while "untold" numbers suffer psychological injury.²⁴ Among the arms trade's victims are those who experience GBV, a serious violation of human rights which disproportionately affects women and girls.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.²⁶ This Part first outlines the global problem of GBV, followed by the arms trade's impact on GBV prevalence. This is 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".²⁷

21 Peter Woolcott *The Arms Trade Treaty: Introductory Note* (United Nations Audiovisual Library of International Law, 2014) at 1–2; and O'Connor, above n 20, at 77.

22 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>.

23 Geneva Declaration, above n 22, at 74.

24 At 73; and Geneva Declaration *Global Burden of Armed Violence 2008* (September 2008) at 3 and 43–44.

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

26 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.

27 See Human Rights Watch "Papua New Guinea: Events of 2016" (2017) <www.hrw.org>; World Economic Forum *Global Gender Gap Report 2020* (16 December 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.

A *The GBV Problem Generally*

GBV is the most common form of violence worldwide.²⁸ It encompasses violence directed at a person based on their biological sex, gender identity or adherence to gender norms.²⁹ The most prevalent form of GBV is that against women and girls.³⁰ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) defines GBV against women and girls as "violence that is directed against a woman because she is a woman or that affects women disproportionately".³¹ Lesbian, bisexual and transgender women experience higher relative prevalence of GBV than cisgender and heterosexual women.³²

GBV includes physical, sexual, psychological and economic violence, or threats of such violence.³³ GBV crimes are serious violations of human rights,³⁴ and can also amount to war crimes, genocide, crimes against humanity, violations of international humanitarian law or terrorist acts.³⁵ The prohibition of GBV has now been recognised as a norm of customary international law.³⁶

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- 28 See generally World Health Organization *Violence Against Women Prevalence Estimates, 2018* (United Nations Inter-Agency Working Group on Violence Against Women Estimation and Data, March 2021); and Women's International League for Peace and Freedom *Gender-based Violence and the Arms Trade Treaty* (March 2019) at 6.
- 29 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.
- 30 *Annual Report of the UN High Commissioner for Human Rights*, above n 2, at [20]; and Control Arms, above n 2, at 4.
- 31 Committee on the Elimination of Discrimination Against Women *General Recommendation No 19: violence against women* UN Doc A/47/38 (1992) [CEDAW Committee *General Recommendation No 19*] at [6]; and Committee on the Elimination of Discrimination Against Women *General Recommendation No 35 on gender-based violence against women, updating general recommendation No 19* UN Doc CEDAW/C/GC/35 (14 July 2017) [CEDAW Committee *General Recommendation No 35*] at [1]–[2].
- 32 *Annual Report of the UN High Commissioner for Human Rights*, above n 2, at [20]; and Control Arms, above n 2, at 4.
- 33 *Declaration on the Elimination of Violence against Women* GA Res 48/104 (1993), art 1; and CEDAW Committee *General Recommendation No 35*, above n 31, at [14].
- 34 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].
- 35 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 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [(Rome Statute), 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 (ECHR) at [83]–[87].
- 36 CEDAW Committee *General Recommendation No 35*, above n 31, at [2].

Examples of GBV include intimate partner violence,³⁷ sexual violence during armed conflict, sex trafficking and gender-related killings of women, known as femicides,³⁸ rates of which have accelerated throughout the COVID-19 pandemic.³⁹ Women and girls worldwide experience GBV, but in Papua New Guinea and, now, to a lesser extent in its autonomous region Bougainville, GBV has reached "epidemic proportions".⁴⁰ The problem 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.⁴¹ Women and girls are not the majority victims of arms-related homicide, making up 16 per cent of armed violence victims in 2017.⁴² However, women and girls experience armed violence in different ways and to a different extent than men and boys. Easy access to small arms, especially where illicit trade in small arms is prevalent, increases the rate of femicides, particularly domestic violence femicides.⁴³ The presence of small arms in a household increases the

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

38 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.

39 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>; "IRC data shows an increase in reports of gender-based violence across Latin America" (9 June 2020) International Rescue Committee <www.rescue.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.

40 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 27, at 9; and Fulu and others, above n 27, at 2–5.

41 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.

42 Anna Alvazzi del Frate, Gergely Hideg and Emile LeBrun *Gender Counts: Assessing Global Armed Violence Datasets for Gender Relevance* (Small Arms Survey, March 2020) at 4.

43 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; David Capie "Small arms, violence and gender in Papua New Guinea: Towards a research agenda" (2011) 52 Asia Pacific Viewpoint 42 at 45; and Women's International League for Peace and Freedom, above n 5, at 26.

risk of domestic violence femicide threefold.⁴⁴ Increases in tribal violence femicides in Papua New Guinea have also been linked to influx of small arms into the country.⁴⁵ This increase in femicides is due to the lethality of small arms violence.⁴⁶ Bullet wound injuries are commonly life-threatening, and threatened use of small arms "reduces a woman's capacity for resistance".⁴⁷

Perpetrators of violence may also feel "[e]mboldened by weapons, power and status" to inflict non-lethal GBV more frequently.⁴⁸ Owning and using arms constitutes "rites of passage for manhood", which solidify social norms of men as superior to women.⁴⁹ For example, violence by "Raskol" gangs in Papua New Guinea increased significantly as small arms became readily available through importation and illicit transfers and customary dispute settlement processes broke down.⁵⁰ Gang-related "pack rapes" facilitated by threatening women with small arms increased by approximately 35 per cent between 1990 and 1999; by 2015, the lifetime prevalence of sexual violence experienced by women in Papua New Guinea reached 70 per cent.⁵¹

The arms trade also increases GBV facilitated by arms in conflict. The UN Security Council outlined that accumulating small arms increases the "intensity and duration of armed conflicts" and is responsible for exacerbating sexual violence and GBV.⁵² Mass rapes and other sexual violence during conflict are often facilitated by use of weapons.⁵³ During the Bougainville civil war, small arms were commonly used by state and non-state forces to compel women to perform sexual acts.⁵⁴

44 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.

45 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>.

46 Control Arms, above n 26, at 12.

47 At 12.

48 Women's International League for Peace and Freedom and others, above n 44, at 1.

49 Small Arms Survey, above n 41, at 14.

50 Capie, above n 43, at 45.

51 At 45–46; and Human Rights Watch "Papua New Guinea: Events of 2015" (2016) <www.hrw.org>.

52 *Statement by the President of the Security Council*, above n 19, at 1.

53 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.

54 Philip Alpers and Conor Twyford *Small Arms in the Pacific: Occasional Paper No 8* (Small Arms Survey, March 2003) at 47.

Channelling state resources into arms rather than social investment results in disproportionately negative outcomes for women and girls,⁵⁵ including reduced political participation, educational opportunities, household equality and economic independence.⁵⁶ 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.⁵⁷ 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.⁵⁸

IV HISTORY AND FRAMEWORK OF THE ARMS TRADE TREATY

The ATT is a binding, universal treaty governing arms trade regulation.⁵⁹ The Treaty grew from campaigns by 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.⁶⁰ However, the ATT's obligations were weakened by compromises between economic and humanitarian imperatives reached in negotiations, putting its efficacy into question.⁶¹ This Part traces the history of the ATT and New Zealand's role in its development, including the campaign for a GBV provision. The strength of the Treaty's core provisions regulating arms exports are then assessed.

55 Women's International league for Peace and Freedom, above n 28, at 6; and Control Arms, above n 2, at 4.

56 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.

57 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 38, 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.

58 Gender Action for Peace and Security UK, above n 56, at 7–9.

59 Casey-Maslen and others, above n 56, at 8–9.

60 "Arms Trade Treaty" (2009) Reaching Critical Will <www.reachingcriticalwill.org>; IANSA Women's Network and Center for Women's Global Leadership, above n 44, at 1; Women's International League for Peace and Freedom and others, above n 44, 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 56, at 1.

61 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.

A *The Origins of the ATT*

Prior to the ATT,⁶² there was no binding universal instrument addressing the arms trade.⁶³ Trade in conventional weapons was primarily regulated through domestic law and regional instruments,⁶⁴ or subject to arms embargoes imposed by UN Security Council resolutions.⁶⁵ The difficulty in addressing conventional weapons was threefold. First, a complex regulatory regime was required as states would not accept the prohibition of "ordinary weapons" necessary for state security.⁶⁶ Secondly, conventional weapons may be used for both legitimate and illegitimate purposes, while legitimate transfers may be diverted and become illicit transfers.⁶⁷ Thirdly, the permanent five members (P5) of the UN Security Council are major arms exporters, rendering agreement in the UN difficult.⁶⁸

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".⁶⁹ The collapse of the Soviet Union led to major output of conventional weapons onto the global market from former Soviet-controlled states, undercutting prices and spurring competition from Western suppliers.⁷⁰ General Assembly resolutions from 1991 called for regulation of the arms trade to mitigate civilian harm, resulting in instruments and programmes attempting to control arms transfers.⁷¹

62 Charter of the United Nations, art 26.

63 O'Connor, above n 20, at 78.

64 See generally Arms Act 1983; 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).

65 See for example SC Res 2117, above n 19.

66 Jan Egeland "Arms Availability and Violations of International Humanitarian Law" (1999) International Committee of the Red Cross <www.icrc.org>.

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

68 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.

69 Woolcott, above n 21, at 1; Bromley, Cooper and Holtom, above n 61, 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.

70 See generally Richard F Grimmelt *Conventional Arms Transfers in the Post-Cold War Era* (Congressional Research Service, Report 93-852 F, 28 September 1993).

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

The UN Register of Conventional Arms (UNROCA) of 1991⁷² and the Wassenaar Arrangement of 1996⁷³ encourage states to report on imports and exports, but the non-binding nature of these instruments and the limited information sought in reports has reduced their efficacy, particularly in UNROCA's case.⁷⁴ 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, and the related International Tracing Instrument adopted in 2005 required states to facilitate small arms tracing, including marking and record-keeping.⁷⁵ But UN PoA is also non-binding and solely regulates small arms and light weapons.⁷⁶ The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol) was also adopted in 2001,⁷⁷ but this is limited in scope and has not been ratified by many major exporting states.⁷⁸

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.⁷⁹ The influential Control Arms campaign was created in 2003 by a coalition of NGOs to lobby governments on the issue.⁸⁰ Civil society work was supported by the "seven authors": Australia, Argentina, Costa Rica, Finland,

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

73 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 56, at 5.

74 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 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.

75 *Report of the Group of Governmental Experts established pursuant to General Assembly Resolution 56/24 of 24 December 2001* UN Doc A/58/138 (11 July 2003) at [96]; and *The illicit trade in small arms and light weapons in all its aspects* GA Res 58/241 (2004).

76 *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*, above n 75; 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 and United Nations Institute for Disarmament Research, 2012) at xvii.

77 *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).

78 "Status of Treaties" United Nations Treaty Collection (9 October 2020) <www.treaties.un.org>.

79 O'Connor, above n 20, at 79; Woolcott, above n 21, at 1; Casey-Maslen and others, above n 56, 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.

80 "About Us" Control Arms (2020) <www.controlarms.org>; and Wood and Abdul-Rahim, above n 69, at 16.

Japan, Kenya and the United Kingdom, who recognised the unregulated arms trade's negative impact on international peace and security.⁸¹ These states jointly drafted General Assembly Resolution 61/89, urging the UN Secretary-General to create a group of governmental experts to consider ways of establishing an arms trade treaty.⁸² The only vote against the Resolution was the United States, while 24 states abstained, including China and Israel.⁸³

B The Campaign for Inclusion of GBV

Discussions regarding a binding ATT formally began following Resolution 61/89's adoption.⁸⁴ An ATT provision on GBV was called for by the Women's International League for Peace and Freedom (WILPF) and other NGOs engaged in women's rights work.⁸⁵ The joint policy paper made by these organisations argued that a treaty was an "urgent necessity", and that a provision addressing GBV was paramount in order to mitigate harm to women and girls.⁸⁶

The strongest advocates for a GBV provision were Iceland, Norway, Finland, Kenya, Malawi and Trinidad and Tobago,⁸⁷ with support from the President of the Final Conference.⁸⁸ However, the proposal was unprecedented in international arms control regimes, and its inclusion was doubted by certain states.⁸⁹ For example, the Holy See opposed including "gender" in the treaty, arguing that only "violence against women" should be included.⁹⁰ This "deeply discriminatory" view excluded other

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

82 *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 56, at 9; and Small Arms Survey, above n 79, at 78.

83 United Nations Office for Disarmament Affairs "Resolution 61/89" (2006) <www.gafr-vote.un.org>; and Casey-Maslen and others, above n 56, at 9.

84 Casey-Maslen and others, above n 56, at 9.

85 Reaching Critical Will, above n 60; IANSA Women's Network and Center for Women's Global Leadership, above n 44, at 1; Women's International League for Peace and Freedom and others, above n 44, 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 56, at 1.

86 Women's International League for Peace and Freedom and others, above n 44, at 1.

87 *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 41, at 556.

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

89 Casey-Maslen and others, above n 56, at [7.97]; and Small Arms Survey, above n 79, at 87.

90 *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 56, at [7.97].

genders from protection, and refused to recognise that gendered violence exists in the context of patriarchal power relations.⁹¹

By July 2012, a group of 75 states supported the inclusion of a GBV provision.⁹² Yet, the form of the provision, including whether a risk of GBV should be sufficient reason to prohibit an export licence, provoked significant disagreement between states and NGOs.⁹³ The original proposal by WILPF and other NGOs was that exports should be prohibited if the risk of arms-related GBV eventuating is "substantial".⁹⁴ The alternative option required states to "consider taking feasible measures" to reduce the risk of arms-related GBV.⁹⁵ Views of states remained divided; the final form of the GBV provision was a "slightly messy compromise" between the views of supporting and opposing states.⁹⁶

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.⁹⁷ 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.⁹⁸ The ATT was adopted in the General Assembly by an overwhelming 154 votes in favour and three against.⁹⁹ There were 22 abstentions, including Russia and China.¹⁰⁰

91 Women's International League for Peace and Freedom *Women, Weapons and War: A Gendered Critique of Multilateral Instruments* (October 2015) at 11; Control Arms, above n 90, at 11; Casey-Maslen and others, above n 56, at [7.97]; and Small Arms Survey, above n 79, at 87.

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

93 Casey-Maslen and others, above n 56, at [7.99].

94 Casey-Maslen and others, above n 56, at [7.17]; and Women's International League for Peace and Freedom and others, above n 44, at 1.

95 *Draft Arms Trade Treaty* UN Doc A/CONF.217/CRP.1 (26 July 2013), art 4(6); Casey-Maslen and others, above n 56, 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.

96 Casey-Maslen and others, above n 56, at [7.99].

97 Casey-Maslen and others, above n 56, at 10; and Wood and Abdul-Rahim, above n 69, at 17.

98 Jalil, above n 61, at 84; Casey-Maslen and others, above n 56, at 10; and Wood and Abdul-Rahim, above n 69, at 17.

99 *The Arms Trade Treaty* GA Res 67/234 B (2013). The Democratic People's Republic of Korea, Iran and Syria voted against it. See Arms Trade Treaty "Treaty Status" (2014) <www.thearmstradetreaty.org>; and Wood and Abdul-Rahim, above n 69, at 17.

100 Arms Trade Treaty, above n 99.

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.¹⁰¹ However, the ATT's obligations on exporting states lack oversight and enforcement, creating the risk that states may prioritise economic benefits of the arms trade over the ATT's humanitarian objectives.¹⁰²

The ATT 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.¹⁰³ "Transfer" includes export, import, transit, trans-shipment and brokering.¹⁰⁴ States are obliged to establish a national control system and national control list to define which arms are controlled and means to regulate transfers.¹⁰⁵

Articles 6 and 7 are the core export provisions regulating prohibited arms transfers and export assessments respectively.¹⁰⁶ Under art 6, an exporting state must not authorise any transfer that would violate Security Council measures or breach its international agreements. Transfers must also be prohibited if the state has actual or constructive knowledge that an export would be used to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions or war crimes defined under its international provisions.¹⁰⁷

If art 6 does not apply, art 7 requires exporting states to conduct an export risk assessment considering whether exported arms could contribute to the negative consequences in art 7(1).¹⁰⁸ Under art 7(1)(a), states must assess whether the export would contribute to or undermine peace and security.¹⁰⁹ Under art 7(1)(b), states must assess whether the export could be used to commit or

101 O'Connor, above n 20, at 75.

102 Bromley, Cooper and Holtom, above n 61, at 1046; and Jalil, above n 61, at 84.

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

104 Article 2(2).

105 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.

106 Casey-Maslen and others, above n 56, at [6.02].

107 Arms Trade Treaty, above n 4, art 6; and Casey-Maslen and others, above n 56, at [6.93].

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

109 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.

facilitate serious violations of international humanitarian law, international human rights law or conventions on terrorism and transnational organised crime.¹¹⁰

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:¹¹¹

... the nature, type, and quantity of weapons to be exported, their normal and reasonably foreseeable uses, the general situation in the state of final destination and its surrounding region, the intended end user, actors involved in the export, and the intended route of the export.

The 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).¹¹²

If the exporting state concludes that there is a risk under arts 7(1)(a) or 7(1)(b), it must consider whether mitigating measures such as arms receiving end-user documentation can neutralise the expected harm.¹¹³ If an "overriding" risk remains present despite any mitigating factors, then the export may not continue.¹¹⁴ "Overriding" is not defined in art 7, and states parties have noted that multiple meanings are possible.¹¹⁵ Arguably, the term is inherently imprecise and not susceptible to legal definition. Both arts 6 and 7, therefore, lack force, and there is growing concern about this ambiguous language.¹¹⁶ Exporting states retain control over their export processes without any independent oversight, and the terminology is ambiguous, meaning interpretation may differ between states parties.¹¹⁷

States parties are also given "considerable latitude" with regards to implementation of arts 6 and 7.¹¹⁸ The reporting obligation under art 13 is not onerous, consisting of an initial report concerning

¹¹⁰ See Control Arms, above n 109, at 6.

¹¹¹ Casey-Maslen and others, above n 56, at [7.04].

¹¹² At [7.04].

¹¹³ Arms Trade Treaty, above n 4, art 7(2); and Casey-Maslen and others, above n 56, at [7.89].

¹¹⁴ Arms Trade Treaty, above n 4, art 7(3).

¹¹⁵ Casey-Maslen and others, above n 56, at [7.02] and [7.95].

¹¹⁶ Jānis Kārklīš *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.

¹¹⁷ Bromley, Cooper and Holtom, above n 61, at 1046.

¹¹⁸ Casey-Maslen and others, above n 56, at [14.06].

implementation measures,¹¹⁹ and subsequent annual reports covering exports and imports.¹²⁰ 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.¹²¹ 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.¹²² 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.¹²³

The legal obligations imposed by the ATT thus reflect compromises made throughout negotiations to attempt to win the support of major exporting states.¹²⁴ The Treaty is devoid of oversight and enforcement mechanisms, and arts 6 and 7 defer significantly to state sovereignty and national discretion.¹²⁵ 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.¹²⁶ 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.¹²⁷ 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 Article 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.¹²⁸ Exports may be prohibited under art 6 if the exporting state has actual

¹¹⁹ Arms Trade Treaty, above n 4, art 13(1).

¹²⁰ Article 13(3).

¹²¹ Article 5(5). See Alley, above n 81, at 12.

¹²² Small Arms Survey, above n 79, at 93.

¹²³ Arms Trade Treaty, above n 4, art 19(1). See Casey-Maslen and others, above n 56, at [19.07].

¹²⁴ Jalil, above n 61, at 85; and Wood and Abdul-Rahim, above n 69, at 17.

¹²⁵ Jalil, above n 61, at 84; and Bromley, Cooper and Holtom, above n 61, at 1046.

¹²⁶ See Irish Delegation, above n 26, at 1; Women's International League for Peace and Freedom, above n 28, 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>.

¹²⁷ Irish Delegation, above n 26, at 3; Jalil, above n 61, at 85; and Wood and Abdul-Rahim, above n 69, at 17.

¹²⁸ Arms Trade Treaty Monitor, above n 1, at 25.

or constructive knowledge that the export could be used to commit or facilitate GBV amounting to a crime against humanity,¹²⁹ genocide,¹³⁰ grave breach under the Geneva Conventions¹³¹ or other war crimes under its international humanitarian law obligations.¹³² If the export is not prohibited under art 6, states must then consider art 7(4) as part of the art 7(1) export assessment.¹³³ Article 7(4) provides that:¹³⁴

The exporting State Party, in making this [export] assessment, shall take into account the risk of the conventional arms ... being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

"Commit or facilitate" denotes arms making a "significant contribution to the illegal act", including arms "one or more steps removed from the actual violation".¹³⁵ Article 7(4), therefore, applies equally to a femicide committed using small arms, or 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.¹³⁶

Risk of GBV is only one 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).¹³⁷ This goes against WILPF's proposal that a risk of GBV should be a stand-alone reason for export refusal.¹³⁸ However, there is growing

129 See Rome Statute, above n 35, art 7(h); Office of the Prosecutor, above n 35, at 9; and *Prosecutor v Rutaganda*, above n 35, at [65].

130 See *Prosecutor v Akayesu*, above n 35, at [731]–[734].

131 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.

132 Arms Trade Treaty, above n 4, art 6(3); and Casey-Maslen and others, above n 56, at [6.153]–[6.182].

133 Casey-Maslen and others, above n 56, at [7.96].

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

135 Casey-Maslen and others, above n 56, at [7.35] and [7.37].

136 Control Arms, above n 109, 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].

137 Casey-Maslen and others, above n 56, at [7.99]; and Small Arms Survey, above n 79, at 85.

138 Women's International League for Peace and Freedom and others, above n 44, at 1.

agreement that GBV is "inherently serious in nature", and will almost always fall within the art 7(1) categories.¹³⁹

GBV may undermine peace and security under art 7(1)(a), as peace and security encompass human welfare.¹⁴⁰ GBV committed in conflict may amount to a serious breach of international humanitarian law under art 7(1)(b)(i).¹⁴¹ 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.¹⁴² 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).¹⁴³

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.¹⁴⁴ NGOs have elaborated guidelines which, in the absence of ATT guidance,

139 Amnesty International *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights* (2015) at 10; Control Arms, above n 109, at 2; and CEDAW Committee *General Recommendation No 19*, above n 31, at [7].

140 See SC Res 1325 (2000); SC Res 1889 (2009); SC Res 2122 (2013); and Control Arms, above n 109, at 2 and 8.

141 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 131, 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 "Customary International Humanitarian Law Rule 134: Women" (2020) <www.ihl-databases.icrc.org>.

142 See generally CEDAW Committee *General Recommendation No 19*, above n 31, at [9]; Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 3 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW], 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; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2173 UNTS 222 (opened for signature 25 May 2000, entered into force 12 February 2002); 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.

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

144 Arms Trade Treaty, above n 4, arts 8(1) and 15; Amnesty International, above n 139, at 7; Gender Action for Peace and Security UK, above n 56, at 1; and Women's International League for Peace and Freedom, above n 5, at 17.

indicate how to conduct gender-sensitive export assessments.¹⁴⁵ Export officials should examine the importing country's human rights and gender equality record, rates of GBV, the legitimacy of the arms receiving end user and any risk of diversion.¹⁴⁶ Whether the risk of GBV is "overriding" or resolvable through mitigating measures depends on the existence of safeguards to prevent any feared violation, for example, effective GBV legislation in the importing state.¹⁴⁷

B Implementation: An Overview

As noted in Part IV, the ATT lacks oversight and enforcement mechanisms, making the record of compliance with art 7(4) unclear. States' understanding of GBV is improving as seen at the Fifth Conference of States Parties (COP),¹⁴⁸ but significant confusion about the art 7(4) obligation remains.¹⁴⁹ 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.¹⁵⁰ There is a corresponding risk that states parties may minimise GBV in export assessments due to misogyny, cultural views about violence against women, ignorance about the arms trade's impact on GBV or economic imperatives.¹⁵¹

The framework of the ATT rests on the assumption that states will have effective national laws to ensure implementation of arts 6 and 7. The assessment of mitigating measures also relies substantially on GBV legislation in the importing states, which is increasingly common, but typically poorly

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

146 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.

147 Arms Trade Treaty, above n 4, art 7(3); Casey-Maslen and others, above n 56, at [7.89]; and Control Arms, above n 2, at 18.

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

149 Irish Delegation, above n 26, at [3].

150 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 ch 3 and [95]; Elżbieta Korolczuk "The fight against 'gender' and 'LGBT ideology': new developments in Poland" (2020) 3 EJP 165 at 165–167; "Istanbul Convention: Poland to leave European treaty on violence against women" (25 July 2020) BBC News <www.bbc.com>; "Women Face Rising Risk of Violence During Covid-19" (3 July 2020) Human Rights Watch <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.

151 See Women's International League for Peace and Freedom, above n 5, at 19; Control Arms, above n 90, at 11; and Bonita Meyersfeld "A Theory of Domestic Violence in International Law" (JSD Thesis, Yale Law School, 2016) at 16.

implemented.¹⁵² Where these domestic laws do not exist, or are not enforced, there are significant implications for compliance with art 7(4). In the absence of oversight and enforcement, little can be done to hold non-compliant exporting states responsible. Although outside the scope of this article, it should be noted that the problem of implementation is even more complex when non-state actors are considered.¹⁵³

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 seven per cent are unsure.¹⁵⁴ This would ordinarily be a reassuring result, but because the survey records state practice on a self-reported basis without any verification, the accuracy of these responses is unclear.¹⁵⁵

The obvious means to verify the survey is through ATT annual reports.¹⁵⁶ However, states parties adhere to the minimum requirements for annual reporting as per the ATT annual report template.¹⁵⁷ The template was designed to be simple to use for both major exporters and small states with few transfers.¹⁵⁸ 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.¹⁵⁹ New Zealand is also one of few states parties that consistently submits annual reports on time.¹⁶⁰ Only 54 per cent of states parties have submitted their 2019 annual reports on time,

152 World Bank *Women, Business and the Law 2020* (International Bank for Reconstruction and Development, 2020) at 15.

153 See Pascal Bongard and Jonathan Somer "Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call *Deed of Commitment*" (2011) 93 *Int Rev Red Cross* 673.

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

155 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.

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

157 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 "Annual Reports" Arms Trade Treaty (2 October 2020) <www.thearmstradetreaty.org>.

158 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.

159 Working Group on Transparency and Reporting, above n 157, at 8 and 11.

160 Arms Trade Treaty, above n 157.

a decrease of 26 per cent since 2015.¹⁶¹ 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).¹⁶² 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.¹⁶³ Article 7(4) discussions are thus predominately conducted by delegates without lived experience of gender issues.¹⁶⁴ There has never been a female Conference President.¹⁶⁵ Although Latvian Ambassador Jānis Kārklīšs made GBV the theme of the Fifth COP, progress on Fifth COP decisions received little attention at the Sixth COP.¹⁶⁶ The Sixth COP was also hampered by its silence procedure for decision-making which caused discontent among officials.¹⁶⁷

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.¹⁶⁸ Only export officials in Germany and Sweden have access to advice from

161 Arms Trade Treaty, above n 157; Rachel Stohl "Arms Trade Treaty Still Not Meeting Potential" (12 September 2018) Stimson Center <www.stimson.org>; and Women's International League for Peace and Freedom, above n 5, at 16.

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

163 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 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 162, at 2.

164 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>.

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

166 Kārklīšs, above n 148, 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.

167 See generally Carlos Foradori *Outcome of CSP6 Decision-Making Process Via Silence Procedure* (Arms Trade Treaty Secretariat, 19 August 2020).

168 Women's International League for Peace and Freedom, above n 5, at 16; and Irish Delegation, above n 26, at 4.

gender experts.¹⁶⁹ No state requires export officials to be specifically trained in gender issues.¹⁷⁰ No state references GBV in arms receiving end-user documentation.¹⁷¹ 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).¹⁷²

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.¹⁷³ 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 law.¹⁷⁴ 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".¹⁷⁵ However, the United Kingdom has remade the decisions, and the arms transfers continue despite calls for compliance with the ATT.¹⁷⁶

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.¹⁷⁷

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

170 Women's International League for Peace and Freedom, above n 5, at 16; and Irish Delegation, above n 26, at 4.

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

172 Nakamitsu, above n 163, 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>.

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

174 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.

175 *R (Campaign against the Arms Trade) v Secretary of State for International Trade and Others* [2019] EWCA Civ 1020, [2019] 1 WLR 5765 at [49], [138], [145] and [167]; and "UK suspends arms sales to Saudi Arabia following landmark Court of Appeal ruling" (26 June 2019) Field Fisher <www.fieldfisher.com>.

176 "UK to resume Saudi arms exports despite Yemen war concerns" (7 July 2020) Al Jazeera <www.aljazeera.com>.

177 Pytlak, above n 173, at 171.

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 ATT 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 (primarily major arms traders) and humanitarian NGOs.¹⁷⁸ 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.¹⁷⁹ The result of this compromise makes the relevance of art 7(4) to the export assessment ambiguous.¹⁸⁰ Placing the GBV criterion under art 7(1) would have highlighted the connection between GBV and serious international law violations, and would have clarified that export assessments must include assessment of GBV risks.¹⁸¹

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 art 7(1).¹⁸² 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.¹⁸³ This separation may result in some states parties treating GBV as a "lesser" category of abuse" compared to the art 7(1) violations.¹⁸⁴ 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".¹⁸⁵ This argument cannot be made for European Union (EU) states, as the EU code of conduct provides that human rights law and international humanitarian law fully cover GBV concerns.¹⁸⁶ Nevertheless, making GBV a stand-alone violation under art 7(1) may have dissuaded states from wilfully marginalising gender issues.¹⁸⁷

178 Green and others, above n 41, at 556; and Casey-Maslen and others, above n 56, at [7.99].

179 Arms Trade Treaty Monitor, above n 1, at 25; Green and others, above n 41, at 556; and Casey-Maslen and others, above n 56, at [7.99].

180 Green and others, above n 41, at 559; and Small Arms Survey, above n 79, at 87.

181 Small Arms Survey, above n 79, at 87.

182 Green and others, above n 41, at 559.

183 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, Philadelphia, 1994) 39 at 40.

184 Kārkliņš, above n 116, at 5; and Green and others, above n 41, at 556 and 559.

185 Green and others, above n 41, at 559.

186 Irish Delegation, above n 26, at 3.

187 Women's International League for Peace and Freedom and others, above n 44, at 1.

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". New Zealand has described this omission as unfortunate, stating that "substantial" was a more precise term.¹⁸⁸ "Overriding risk" is susceptible to various meanings, including "taking precedence over all other subjects".¹⁸⁹ This ambiguous terminology negatively impacts art 7(4) as although GBV must be considered in export assessments, if states conclude that the risk is outweighed by any "expected positive effects of arms transfers", then the export may continue.¹⁹⁰ More broadly, this means that the ATT does not prohibit exports likely contributing to art 7(1) violations unless the risk is "overriding".¹⁹¹ This terminology thus undermines the ATT's humanitarian aims "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.¹⁹²

Despite the fact that the states' obligation to assess GBV risks remains intact regardless of state interpretation of the provision, states parties have raised concerns about "overriding risk", noting that discrepancies in interpretation may lead to flawed export decisions.¹⁹³ New Zealand, Switzerland, Lichtenstein and Canada have all declared that "overriding risk" will be interpreted as substantial risk.¹⁹⁴ This constitutes state practice against which the ATT is interpreted, but to be determinative, more states parties would need to adopt this interpretation.¹⁹⁵ The Fifth COP tasked the Working Group on Effective Treaty Implementation (the WGETI) with examining the issue, but little progress

188 Casey-Maslen and others, above n 56, at [7.17] and [7.92]–[7.94]; New Zealand "Declaration of New Zealand upon ratification of the Arms Trade Treaty" (2 April 2013); and Small Arms Survey, above n 79, at 88.

189 Oxford English Dictionary Online "Overriding, adjective" <www.oed.com>; Casey-Maslen and others, above n 56, at [7.91]–[7.92]; and Women's International League for Peace and Freedom and others, above n 44, at 1.

190 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 56, at [7.93].

191 Casey-Maslen and others, above n 56, at [7.94].

192 O'Connor, above n 20, at 88.

193 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 26, at 4.

194 New Zealand, above n 188; Lichtenstein "Declaration of Lichtenstein upon ratification of the Arms Trade Treaty" (16 December 2014); Switzerland "Declaration of Switzerland upon ratification of the Arms Trade Treaty" (30 January 2015); and Global Affairs Canada "Deposition of Canada's instrument of accession to the Arms Trade Treaty" (2019) Government of Canada <www.canada.ca>. See also Casey-Maslen and others, above n 56, at [7.94].

195 Vienna Convention on the Law of Treaties 1131 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(b). See also Casey-Maslen and others, above n 56, at [7.94].

had been made by the Sixth COP.¹⁹⁶ Without further action, this interpretive issue weakens the ATT's potential to reduce human suffering such as GBV.¹⁹⁷

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).¹⁹⁸ Identifying an overriding risk of GBV is left to export officials, many of whom do not have GBV training.¹⁹⁹ Yet, data on GBV is sparse both due to underreporting and lack of state attention to gender-disaggregated data.²⁰⁰ Data specifically linking GBV with arms exports is even more scarce.²⁰¹ States' domestic efforts towards identifying and eradicating GBV thus have a direct impact on the efficacy of the ATT's provisions. Judging the risk of GBV without reliable data is challenging at best and near impossible at worst for exports officials.

Furthermore, this lack of oversight for export assessments raises concerns regarding "political manipulation" of export decisions.²⁰² In recognition of state sovereignty, legitimate interests in the arms trade and the right to self-defence, the ATT allows states parties to make independent decisions about arms transfers.²⁰³ This latitude is particularly concerning in the art 7(4) context, as GBV is left undefined. States' understanding of the meaning of GBV remained "uneven" at the Fifth COP.²⁰⁴ Although treaties must be interpreted against relevant and applicable international law,²⁰⁵ the most prominent international law definition of GBV is non-binding soft law and has a poor record of

196 Arms Trade Treaty Secretariat, above n 166, at 6; Working Group on Effective Treaty Implementation, above n 166, at 2–3.

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

198 Article 7(1)–7(4).

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

200 UN Women *The World's Women 2015, Trends and Statistics* (2015) at 159; and Arms Trade Treaty Monitor, above n 1, at 294.

201 Hannah Papachristidis "The Arms Trade Treaty & Gender-Based Violence: Challenges Require Data & Willpower" (7 January 2021) Strife Blog <www.strifeblog.org>.

202 O'Connor, above n 20, 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.

203 Arms Trade Treaty, above n 4, preamble and art 5.

204 Arms Trade Treaty Monitor, above n 1, at 19.

205 Vienna Convention on the Law of Treaties, above n 195, art 31(3)(c).

implementation.²⁰⁶ There is also little available information about states parties' current interpretive practice.²⁰⁷

The ATT reporting requirement exposes states to some scrutiny which may incentivise responsible transfers.²⁰⁸ However, outlining reasons for export decisions is not required in annual reports, meaning the content of export assessments is not verifiable.²⁰⁹ Safeguards for women and other victims of rights violations are thus controlled by states which benefit economically and politically from exports going ahead, making the regime "highly abusable".²¹⁰

Improving art 7(4) will not resolve the underlying problems contributing to arms-related GBV, including governments' imperatives for arms transfers and the gendered impact of armed conflict. But the impoverished language and implementation of art 7(4) is a significant flaw in the current protections afforded to GBV victims. These problems are exacerbated by significant corruption in the arms trade, an industry which Joe Roeber has described as "hardwired for corruption".²¹¹

Article 7(4) is simply "not living up to the task" of addressing arms-related GBV.²¹² 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.²¹³

VI ASSESSING NEW ZEALAND'S IMPLEMENTATION OF ARTICLE 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.²¹⁴ Nevertheless, New Zealand's implementation of art 7(4) does not live up to its reputation as an advocate for gender issues. This

206 CEDAW Committee *General Recommendation No 19*, above n 31, 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.

207 Vienna Convention on the Law of Treaties, above n 195, art 31(3)(b); Kārkliņš, above n 116, at 6; and Irish Delegation, above n 26, at 4.

208 Alley, above n 81, at 2–3.

209 Working Group on Transparency and Reporting, above n 157, at 8; and Kārkliņš, above n 116, at 6.

210 O'Connor, above n 20, at 88; and Casey-Maslen and others, above n 56, at [7.03].

211 Joe Roeber "Hard-wired for Corruption" *Prospect* (online ed, London, 28 August 2005).

212 Women's International League for Peace and Freedom, above n 202, at 2.

213 At 2.

214 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 1; and Foreign Affairs, Defence and Trade Committee, above n 6, at 2.

Part examines New Zealand's role in the ATT's development, its strong implementation of arts 6 and 7 generally, the issues raised by its approach to art 7(4) and the lack of attention afforded GBV in its advocacy in the Pacific.

A 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 1983.²¹⁵ In 2012, New Zealand's overall arms exports reached an all-time high value of NZD 115 million.²¹⁶ The majority of New Zealand's arms exports are small arms.²¹⁷ The average annual number of small arms exported in 2015–2019 was 1,377.²¹⁸

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 years.²¹⁹ 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.²²⁰

215 O'Connor, above n 20, at 93. See Arms Act 1983, s 5.

216 "New Zealand Weapons Sales" Trading Economics (August 2020) <www.tradingeconomics.com>.

217 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.

218 New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2016*, above n 217, at 6; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2017*, above n 217, at 7; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2018*, above n 217, at 7; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 217, at 6.

219 New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2015*, above n 217, at 6; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2016*, above n 217, at 3 and 6.

220 New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2015*, above n 217, at 3–6; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2016*, above n 217, at 3–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2017*, above n 217, at 3–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division

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.²²¹

Transit of arms through New Zealand's territory is common as New Zealand's Exclusive Economic Zone is the fifth largest globally.²²² Illicit transfer of arms has not been a prominent issue in New Zealand, and is estimated to occur rarely and in small numbers.²²³ The only large-scale incident of illicit trafficking linked to New Zealand occurred in 2009.²²⁴ 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.²²⁵ No further large-scale incidents have been recorded.²²⁶

B New Zealand and the ATT

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 before the International Court of Justice.²²⁷ Solidifying this reputation, New Zealand

Annual Report 2018, above n 217, at 3–6; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 217, at 3–5.

221 New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2015*, above n 217, at 4; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division, *Annual Report 2016*, above n 217, at 4–5; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2017*, above n 217, at 4; New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2018*, above n 217, (2018) at 4–5; and New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 217, at 3–4.

222 O'Connor, above n 20, at 102.

223 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.

224 Oxfam International *Brokers Without Borders* (October 2010) at 9–13; SC Res 1874 (2009); and SC Res 1747 (2007).

225 Oxfam International, above n 224, at 9–13.

226 Alpers and Picard, above n 223.

227 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 459–460; 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

was one of the 76 sponsors of Resolution 61/89 in the UN General Assembly, and one of the 153 states that voted in favour of this Resolution.²²⁸

New Zealand has professed interest in "mainstreaming gender issues" and supported the GBV proposal during ATT negotiations.²²⁹ This support reflected New Zealand's wider commitment to "push boundaries and fight hard for a very strong Treaty" on a variety of issues.²³⁰ 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".²³¹ New Zealand's active role in ATT negotiations was driven partly by maintenance of its reputation as a champion for arms control and disarmament, as well as concerns regarding "the devastating impact that illicit arms transfers have on regional and international security and development, particularly in vulnerable areas like the Pacific".²³² New Zealand was an early signatory to the Treaty on 3 June 2013, before ratifying the ATT on 3 September 2014.²³³

C New Zealand's Implementation of Articles 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.²³⁴ The domestic framework was already largely compliant with ATT obligations,²³⁵ due to New Zealand's prior participation in the Wassenaar Arrangement²³⁶ and other non-binding non-proliferation regimes.²³⁷

into force 1 March 1999); and Convention on Cluster Munitions 2688 UNTS 39 (opened for signature 30 May 2008, entered into force August 2010).

228 United Nations Office for Disarmament, above n 83.

229 Higgle, above n 214, at 2.

230 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.

231 Casey-Maslen and others, above n 56, at 11.

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

233 O'Connor, above n 20, at 92; and Casey-Maslen and others, above n 56, at 12.

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

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

236 See Wassenaar Arrangement Secretariat, above n 73 at 1; and O'Connor, above n 20, at 97.

237 Arms Act 1983, s 4A; New Zealand Ministry of Foreign Affairs and Trade, above n 227, at 2; and "New Zealand plans to tighten gun laws in wake of Christchurch massacre" (22 July 2019) DW News <www.dw.com>.

New Zealand's national control system governs exporting "strategic goods", including conventional weapons and parts under arts 2–4 of the ATT.²³⁸ The "Strategic Goods List" specifies goods that cannot be exported without an export licence or other authorisation from the Secretary of Foreign Affairs and Trade.²³⁹ If exporting strategic goods would violate art 6 of the ATT, the export will be refused.²⁴⁰

If art 6 is complied with, an export risk assessment is conducted by Export Controls Officers of the Ministry of Foreign Affairs and Trade.²⁴¹ The export assessment criteria are publicly available and include the factors in arts 7 and 11(2) of the ATT.²⁴² However, New Zealand does not release information on the reasons for export decision-making in ATT annual reports or Ministry of Foreign Affairs and Trade annual reports.²⁴³ 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.²⁴⁴

New Zealand adopts a lower threshold for refusal of exports than is required by the ATT.²⁴⁵ If the risks are "substantial" and cannot be mitigated, then the export application will be denied.²⁴⁶ New Zealand's export assessments also consider the importing state's human rights record, its involvement in conflict and the impact of the export on regional security.²⁴⁷ New Zealand has reportedly robustly

238 Customs and Excise Act 2018, ss 96 and 97; and New Zealand Ministry of Foreign Affairs and Trade *New Zealand Strategic Goods List* (October 2017) at 3–4.

239 Arms Trade Treaty, above n 4, art 5(2); and New Zealand Ministry of Foreign Affairs and Trade, above n 238, at 5.

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

241 New Zealand Ministry of Foreign Affairs and Trade, above n 91, at 1; and New Zealand Ministry of Foreign Affairs and Trade, above n 240.

242 New Zealand Ministry of Foreign Affairs and Trade, above n 240.

243 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.

244 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.

245 Arms Trade Treaty, above n 4, art 7(3); and New Zealand Ministry of Foreign Affairs and Trade, above n 240.

246 New Zealand Ministry of Foreign Affairs and Trade, above n 240.

247 New Zealand Ministry of Foreign Affairs and Trade, above n 240.

adhered to the export criteria.²⁴⁸ For example, a high profile application by Osmar International was denied in 2005 due to the risk of exacerbating the Israeli conflict.²⁴⁹

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".²⁵⁰

D New Zealand's Implementation of Article 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.²⁵¹ Unlike in Germany and Sweden where export officials may seek advice from gender experts, GBV knowledge is not emphasised by New Zealand.²⁵² 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.²⁵³

Similar to Switzerland, Lichtenstein and Canada, New Zealand claims to interpret overriding risk as "substantial risk" in export assessments.²⁵⁴ If there is a "real indication" that an export poses a risk of GBV, New Zealand states that the export would be refused.²⁵⁵ However, New Zealand's ATT annual reports do not indicate whether or how GBV risks are considered during export assessments.²⁵⁶ New 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.²⁵⁷ Nevertheless, the annual

248 O'Connor, above n 20, at 98.

249 At 98.

250 Higgle, above n 214, at 2.

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

252 New Zealand Ministry of Foreign Affairs and Trade, above n 227, at 10–11; and Arms Trade Treaty Monitor, above n 1, at 29.

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

254 New Zealand Ministry of Foreign Affairs and Trade, above n 240; New Zealand, above n 188; Switzerland, above n 194; Lichtenstein, above n 194; Global Affairs Canada, above n 194; and Casey-Maslen and others, above n 56, at [7.94].

255 Higgle, above n 214, at 2.

256 See generally New Zealand Ministry of Foreign Affairs and Trade, International Security and Disarmament Division *Annual Report 2019*, above n 217.

257 Working Group on Transparency and Reporting, above n 157, at 8.

report template is a minimum expectation for reporting, and New Zealand could and should record exports implicating art 7(4) to set an example for other states parties.²⁵⁸

Further, evidence of questionable transfers suggest New Zealand is not rigorously complying with art 7(4). For New Zealand's exports to Papua New Guinea, export officials would need significant information about GBV prevalence and export impact to conclude on the question of substantial risk.²⁵⁹ The crisis in Pacific island states of arms-related GBV shows "how deeply even a small number of small arms can damage small communities".²⁶⁰ Arms exports to Papua New Guinea, even in small amounts, pose GBV risks.²⁶¹ New Zealand would have to be satisfied that mitigating measures are in place to nullify the risk.²⁶² Yet, making a fully informed assessment of the GBV situation in Papua New Guinea is difficult. Diversion of arms remains common, there is little gender-disaggregated data on armed violence, and effective measures to prevent GBV are sparse, as noted in Part III.²⁶³ 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".²⁶⁴ 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" on art 7(4) to guide states' implementation.²⁶⁵ New 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.²⁶⁶ New Zealand, therefore, should do more to match its implementation of art 7(4) to its formal statements on GBV

258 At 8.

259 Amnesty International, above n 139, at 7; Gender Action for Peace and Security UK, above n 56, 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.

260 Small Arms Survey, above n 223, at 277.

261 Capie, above n 43, at 45–46; and Human Rights Watch, above n 51.

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

263 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 38, at 44–51; and Capie, above n 43, at 49.

264 Higgie, above n 214, at 1.

265 At 1.

266 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.

and the arms trade, by centring GBV in export assessments and promoting transparency in its export decision-making.

E Regional Implementation

New Zealand's efforts to support ATT ratification and implementation in the Pacific also display a lack of emphasis on GBV.²⁶⁷ 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.²⁶⁸ 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.²⁶⁹ Nauru, Vanuatu and Kiribati have signed but not ratified the ATT.²⁷⁰ This lack of attention to the ATT may be due to Pacific island states being primarily importers and transit states rather than arms exporters, and, therefore, arms trade regulation being low on their national agendas.²⁷¹

In response to this issue, New Zealand produced a "Model Law" aimed at Pacific island states.²⁷² Model legislation is an encouraged form of international assistance under art 16 of the ATT, although its success depends on effective implementation.²⁷³ 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.²⁷⁴ To this end, the Model Law provides Pacific island states and other prospective states parties with examples of legislative provisions which translate ATT obligations into domestic

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

268 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 nations join forces to tackle international arms trade" Pacific Islands Forum Secretariat (1 March 2012) <www.forumsec.org>; and "Asia-Pacific Progress Towards the Ratification and Implementation of the Arms Trade Treaty" (2019) <www.armedviolencereduction.org>.

269 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 Sixth Conference of States Parties to the Arms Trade Treaty, August 2020) at 2.

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

271 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.

272 At 2; and Small Arms Survey "Arms Trade Treaty: Model Law" (2014) <www.smallarmssurvey.org>.

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

274 New Zealand Delegation, above n 158, at 3.

law.²⁷⁵ The Model Law has also been used by states parties in Africa and Latin America.²⁷⁶ 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.²⁷⁷

The Model Law makes some positive statements about art 7(4), including clarifying its connection to the art 7 export assessment,²⁷⁸ and encouraging Pacific island states to use "substantial" rather than "overriding" risk as the export assessment standard.²⁷⁹ 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.²⁸⁰ The Model Law should clarify that considering GBV in export assessments is always mandatory,²⁸¹ but a GBV risk is not a reason for refusal unless it amounts to an substantial risk of an art 7(1) violation.²⁸²

Secondly, GBV is not mentioned under the model provision implementing art 6.²⁸³ 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.²⁸⁴

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 to mean that GBV risks are *only* relevant to art 7(1)(b)(i) and

275 New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 271, at 2; and New Zealand Delegation, above n 158, at 3.

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

277 New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 271, at 2.

278 At 8.

279 At 11.

280 At 12.

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

282 Casey-Maslen and others, above n 56, at [7.99]; and Small Arms Survey, above n 79, at 85.

283 New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 271, at 10.

284 Women's International League for Peace and Freedom, above n 5, at 11; and Holtom and Bromley, above n 91, at 438.

7(1)(b)(ii).²⁸⁵ The Model Law should note that GBV is not only relevant to arts 7(1)(b)(i) and 7(1)(b)(ii), but may amount to any of the art 7(1) violations.²⁸⁶

Issues in the Model Law mean that 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 island 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.²⁸⁷ The Voluntary Trust Fund, established under art 16 of the ATT, offers states that financial assistance to implement the ATT.²⁸⁸ New Zealand, therefore, administers funding of implementation projects by states parties, with the corresponding opportunity to incentivise projects concerning implementation of art 7(4).²⁸⁹ Applications for gender-specific projects have been minimal, and none were approved in the 2019 Trust Fund cycle.²⁹⁰

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.²⁹¹ Yet, New Zealand's domestic implementation and regional advocacy display lack of attention to GBV issues, and possible misconceptions about art 7(4).²⁹² 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 analyses the content, benefits and appropriateness of four reforms to the ATT with regard to GBV. These reforms are discussed in order of likelihood of

285 New Zealand Ministry of Foreign Affairs and Trade and Small Arms Survey, above n 271, at 12.

286 Control Arms, above n 109, at 2.

287 Dell Higgie, 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.

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

289 Higgie, above n 287, at 1.

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

291 Higgie, above n 214, at 2.

292 Green and others, above n 41, at 559.

success, from most ambitious to most feasible. First, this Part explores 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 is discussed. Thirdly, the possibility of reform outside of the ATT through a Security Council resolution on arms trade and GBV is examined. Finally, this Part evaluates 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.²⁹³ 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.²⁹⁴

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). The ATT body would provide oversight by reviewing annual reports, issuing recommendations to support implementation and proactively investigating non-compliance.²⁹⁵ The mandate of the ATT body would become binding on all states that ratify the Protocol.

The proposed ATT body's organisational structure would draw inspiration from the Organisation for the Prohibition of Chemical Weapons (OPCW) and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Protocol).²⁹⁶ The OPCW monitors implementation of, and compliance with, the Chemical Weapons

293 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.

294 Green and others, above n 41, at 556.

295 See generally Convention for the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1975 UNTS 45 (opened for signature 3 September 1992, entered into force 29 April 1997) [Chemical Weapons Convention], 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.

296 Chemical Weapons Convention, above n 295, art VIII; and Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2375 UNTS 237 (opened for signature 18 December 2002, entered into force 22 June 2006) [Torture Protocol].

Convention.²⁹⁷ It is made up of the Chemical Weapons Convention COP, an Executive body and an independent Secretariat.²⁹⁸ The Torture Protocol established a Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to carry out state site visits, make recommendations and assist states parties with implementation.²⁹⁹

The ATT 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.³⁰⁰ Members of the ATT 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.³⁰¹ The ATT body's oversight responsibilities would include issuing reports and recommendations to the COP on general implementation issues,³⁰² initiating investigations in response to possible non-compliance and approving arrangements made by non-compliant states in negotiation with the Secretariat branch.³⁰³ The current ATT Secretariat would continue its functions for ATT obligations not implicating GBV.

A Committee on GBV and the arms trade would be established to monitor implementation via annual reports and carry out decisions of the Executive body.³⁰⁴ To promote independence, members of the Committee would be elected at the COP in their personal capacity, not as representatives of the nominating state party.³⁰⁵ Expertise in GBV and the arms trade would be a pre-requisite for nomination.³⁰⁶ The Committee responsibilities would include receiving and analysing annual reports (paying particular attention to GBV obligations), and issuing concluding observations to aid states' implementation of arts 6 and 7.³⁰⁷ To support this, annual reporting obligations would be expanded

297 Chemical Weapons Convention, above n 295, art VIII(1).

298 Articles VIIIB–VIIID.

299 Torture Protocol, above n 296, art 11.

300 See Chemical Weapons Convention, above n 295, art VIII(30).

301 See art VIII(23).

302 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.

303 See Chemical Weapons Convention, above n 295, art VIII(34)–VIII(36).

304 Article VIIID(37); and Torture Protocol, above n 296, art 11.

305 See CEDAW, above n 142, art 17.

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

307 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.

to require states parties to briefly outline the basis for export decisions, including decisions implicating art 7(4).³⁰⁸

The Committee would also conduct site visits and investigations called for by the Executive body.³⁰⁹ On receipt of a direction from the Executive body, the Committee 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 ATT body, the outcome of the inquiry would be transmitted to the state party, with recommendations for change.³¹⁰ Within six months, the state party would be expected to respond to the recommendations, outlining changes that have been made.³¹¹

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.³¹² However, small states could be supported to fulfil expanded reporting obligations by NGOs.³¹³ Alternatively, a staggered reporting system could be implemented to reduce the annual burden on states parties, the ATT Secretariat and the Committee.

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.³¹⁴ The need to articulate brief reasons for export assessment decisions may also lead

308 See Working Group on Transparency and Reporting, above n 157, at 8.

309 Chemical Weapons Convention, above n 295, arts VIII(39)–VIII(40); Torture Protocol, above n 296, art 11; and Helen Keller and Geir Ulfstein *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) at 74.

310 See Chemical Weapons Convention, above n 295, art VIII(39); Torture Protocol, above n 296, arts 12–16; and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, above n 295, arts 8–9.

311 See Chemical Weapons Convention, above n 295, Annex on Implementation and Verification; and Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, above n 295, arts 8–9.

312 Higgie, above n 269, at 2.

313 Arms Trade Treaty Secretariat, above n 288, at 1.

314 Keller and Ulfstein, above n 309, at 74–75.

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.³¹⁵

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.³¹⁶ The effectiveness of recommendations from monitoring bodies is questionable.³¹⁷ For example, the UN Human Rights Committee has reported that approximately 30 per cent of the responses to its views implement the suggested measures.³¹⁸ Nevertheless, the recommendations of treaty monitoring bodies, although non-binding, have normative significance.³¹⁹ 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 obligations".³²⁰ Publicising non-compliance through concluding observations may also incentivise states to comply with art 7(4) to preserve their reputations.³²¹

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.³²² 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.³²³ The OPWC exemplifies the possible success of an investigatory body, securing destruction of 90 per

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

316 Keller and Ulfstein, above n 309, at 26–29.

317 At 357.

318 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 309, at 357.

319 See Keller and Ulfstein, above n 309, 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.

320 Sarah Joseph, Jennifer Schultz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed, Oxford University Press, Oxford, 2004) at 24. See also Keller and Ulfstein, above n 309, at 93.

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

322 Wisotzki, above n 174, at 3–4.

323 See Loveday Hodson "Women's Rights and the Periphery: CEDAW's Optional Protocol" (2014) 25 EJIL 561 at 567.

cent of global declared chemical agents stockpiles in 2017.³²⁴ However, the OPCW's investigations in Syria regarding the March 2017 chemical attacks have faced repeated obstacles, leading to criticism of its efficacy.³²⁵ States have also largely failed to have recourse to the International Humanitarian Law Fact Finding Commission.³²⁶ This suggests that the investigatory model has limitations in highly political interventions when views of states parties are divided.³²⁷

3 *Likelihood of success*

The main barrier to this reform would be sufficient support from states parties to negotiate and adopt a protocol, and the practical obstacles associated with doing so. Negotiation of a protocol would require extensive time, resources and the dedicated leadership of a core group of states parties and NGOs. A protocol on GBV could take years to negotiate, as COVID-19 excludes other issues from states' agendas. Establishing, equipping and staffing an executive body and secretariat would require significant funding from states parties.³²⁸ This cost is likely to be a deterrent, particularly as states are globally trending towards protectionism in the wake of the COVID-19 pandemic.³²⁹

Currently, there is also lack of appetite in the COP for addressing compliance with arts 6 and 7.³³⁰ Attempts by civil society organisations to attribute responsibility for inappropriate arms transfers have been criticised by states as "politicising" the COP.³³¹ 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.³³² The ATT recognises "the sovereign right of any State to regulate and control conventional arms exclusively within its territory".³³³ The

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

325 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 324, at 49; and Julia Masterson "OPCW Blames Syria for 2017 Attacks" (May 2020) <www.armscontrol.org>.

326 See generally Robert Heinsch "The Future of the International Humanitarian Fact-Finding Commission: A Possibility to Overcome the Weakness of IHL Compliance Mechanisms?" in Dražan Djukić and Niccolò Pons (eds) *The Companion to International Humanitarian Law* (Brill, Leiden, 2018) 79.

327 Van Ham, van der Meer and Ellahi, above n 324, at 49.

328 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.

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

330 Pytlak, above n 173, at 172.

331 Ray Acheson "Gaslighting and Mansplaining at CSP3" (2017) 10(5) ATT Monitor 1 at 1.

332 Casey-Maslen and others, above n 56, at [0.71].

333 Arms Trade Treaty, above n 4, preamble.

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.³³⁴ 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.³³⁵

Moreover, 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.³³⁶ In the original ATT negotiations, the support of the United Kingdom, France, Italy and other prominent exporters was won at the cost of a mechanism to verify compliance.³³⁷ 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.³³⁸ If the ATT body's jurisdiction were not compulsory, few states would likely consent to its jurisdiction, rendering the protocol largely redundant.

Although this reform's likelihood of success is low, there are indications that ATT states parties are beginning to place more emphasis on information sharing and transparency.³³⁹ At the Fifth COP, states parties were encouraged to share their export assessment practice with respect to GBV to "facilitate learning between States Parties".³⁴⁰ Including GBV risks within the annual reporting template was also raised for consideration by the WGETI.³⁴¹ Thus, states parties are already seeing the benefits of increased transparency in the GBV context. This suggests that 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.

334 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).

335 Egeland, above n 66.

336 Casey-Maslen and others, above n 56, at [0.71].

337 Jalil, above n 61, at 85; and Wood and Abdul-Rahim, above n 69, at 17.

338 Jalil, above n 61, at 84; and Bromley, Cooper and Holtom, above n 61, at 1046.

339 Gender Action for Peace and Security UK, above n 56, at 1.

340 Kārklīņš, above n 148, at 1.

341 At 1.

B Amending Article 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.³⁴² Amending the text would clarify and strengthen the obligation in art 7(4). 2020 was the first year that states could propose amendments to the ATT.³⁴³ The next opportunity is in 2023.³⁴⁴

The problems of drafting and interpretation outlined in Part V may be remedied via the following four amendments to arts 2, 6 and 7. 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 Recommendations Nos 19 and 35.³⁴⁵ Article 6 would be amended to explain that GBV may amount to art 6 violations, including genocide and crimes against humanity.³⁴⁶ 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.³⁴⁷ 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.³⁴⁸

An additional amendment would be a binding framework for export officials to follow when assessing GBV risks.³⁴⁹ This would be developed by states and NGOs which championed the issue

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

343 Article 20(1).

344 Article 20(1).

345 See for example CEDAW Committee *General Recommendation No 19*, above n 31, at [6]; CEDAW Committee *General Recommendation No 35*, above n 31, at [14]; *Declaration on the Elimination of Violence against Women*, above n 33, art 1; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, above n 131, 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 141, 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 141, art 4; International Covenant on Civil and Political Rights, above n 142, 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.

346 Casey-Maslen and others, above n 56, at [6.153]–[6.182].

347 Women's International League for Peace and Freedom and others, above n 44, at 1; and New Zealand Ministry of Foreign Affairs and Trade, above n 240.

348 Green and others, above n 41, at 559.

349 Control Arms, above n 2, at 7–18.

of GBV in ATT negotiations, including New Zealand.³⁵⁰ The Practical Guide issued by Control Arms in 2018 is a useful basis for developing binding guidelines.³⁵¹

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.³⁵² 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.³⁵³ The guidelines would also note that GBV is severely underreported worldwide.³⁵⁴ States should, therefore, recognise that minimal formal reporting of GBV likely indicates "a much larger phenomenon taking place behind closed doors".³⁵⁵

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.³⁵⁶ This would involve assessment of the types of arms, proposed use and end user, in light of the GBV evidence gathered at step 2.³⁵⁷

At step 4, the availability of mitigating measures would be discussed.³⁵⁸ The guidelines would note that mitigating measures must be "timely, robust and practical" and realistically reduce or eradicate the risk of serious GBV.³⁵⁹ Examples of mitigating measures would be specified in the guidelines, including arms receiving end-user undertakings or effective GBV legislation in the importing state.³⁶⁰ The guidelines would specify that if mitigating measures do not nullify the risk identified at step 3, the export will be prohibited.³⁶¹

350 See Green and others, above n 41, at 556.

351 See generally Control Arms, above n 2.

352 At 2–5. See also Amnesty International, above n 139, at 10.

353 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 146, at 9–14.

354 Arms Trade Treaty Monitor, above n 1, at 24.

355 At 24.

356 Control Arms, above n 2, at 15; and Casey-Maslen and others, above n 56, at [7.92].

357 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 146, at 9–14.

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

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

360 Casey-Maslen and others, above n 56, at [7.89].

361 At [7.89]; and Control Arms, above n 2, at 18.

This four-step framework would be developed into full guidelines and appended to the ATT as an annex. Although this appears to be quite an invasive assessment, it only makes explicit what states are already expected to do under art 7.³⁶² 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.³⁶³

If states failed to comply with the amendments and binding guidelines, they could be held accountable with reference to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. These Draft Articles are increasingly considered as having the status of customary international law.³⁶⁴ Under art 16 of the Draft Articles, if a state aids or assists another state in committing an internationally wrongful act with knowledge of the circumstances of the internationally wrongful act, and if the act would be internationally wrongful if committed by that state, the state will be internationally responsible for doing so.³⁶⁵ In 2013, Austria considered that any member state supplying arms to Syria would incur state responsibility under art 16 of the Draft Articles for aiding and assisting in the commission of war crimes.³⁶⁶

Victims of GBV stemming from a state's failure to accord with ATT obligations may be entitled to an effective remedy and reparations such as compensation.³⁶⁷ States' existing obligations regarding victim assistance could be reinforced by a further amendment to the ATT similar to the following proposal by Amnesty International:³⁶⁸

Each state party undertakes to take steps to meet its existing obligations to ensure the provision of effective remedies and reparations to victims of violations of international law, including gross violations of international human rights law and serious violations of international humanitarian law. Remedies include the victim's right to the following as provided for under international law:

362 Casey-Maslen and others, above n 56, at [7.04].

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

364 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43 at 217.

365 *Draft articles on Responsibility of States for Internationally Wrongful Acts*, art 16; and "Report of the International Law Commission on the work of its fifty-third session" [2001] 2 YILC pt 2 at 65–66. See also Alberto Costi and Conor Donohue "State Responsibility" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 509 at 537–538.

366 See Austrian Government "SYRIA: Austrian Position on Arms Embargo" (13 May 2013) at [4].

367 Amnesty International *The Arms Trade Treaty and Victim Assistance: Revised Version* (2012) at 4.

368 At 7.

- Equal and effective access to justice;
- Adequate, effective and prompt reparation for harm suffered;
- Access to relevant information concerning violations and reparation mechanisms.

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).³⁶⁹ 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.³⁷⁰ 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.³⁷¹ To combat this, guidelines would indicate that an extent and gravity of harm assessment is required, and that GBV incidents typically amount to serious violations.³⁷² "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.³⁷³ Nonetheless, states which endorse substantial risk agree that substantial is less ambiguous and a lower threshold than "overriding".³⁷⁴ This strengthens art 7 in its entirety.³⁷⁵

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.³⁷⁶

³⁶⁹ Irish Delegation, above n 26, at [3].

³⁷⁰ Women's International League for Peace and Freedom, above n 5, at 11; and Holtom and Bromley, above n 95, at 438.

³⁷¹ Green and others, above n 41, at 559.

³⁷² Human Rights Committee, above n 136, at [8] and [10]–[11]; and Control Arms, above n 109, at 5.

³⁷³ Switzerland, above n 194; Lichtenstein, above n 194; and Global Affairs Canada, above n 194.

³⁷⁴ New Zealand, above n 188; Switzerland, above n 194; Lichtenstein, above n 194; Global Affairs Canada, above n 194; and Casey-Maslen and others, above n 56, at [7.92].

³⁷⁵ Casey-Maslen and others, above n 56, at [7.92].

³⁷⁶ At [7.97]; and Small Arms Survey, above n 79, at 87.

Another possibility is that formal change may have little effect on implementation in the absence of enforcement and oversight.³⁷⁷ The arms trade is booming, while GBV rates are rising globally.³⁷⁸ 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.³⁷⁹ The main difficulty with holding states accountable for breaches of the amendments and binding guidelines would be identifying the causal link between the non-compliant export and the ensuing acts of arms-related GBV in the importing country. Application of art 16 of the Draft Articles is further limited by the contentious requirement for "knowledge of the circumstances of the internationally wrongful act".³⁸⁰

In addition, rules about victim assistance, although well-accepted by the international community, are poorly enforced.³⁸¹ A provision restating victim assistance obligations in the ATT would not remedy the problem of enforcing those obligations.

In short, international law has limits. Until societal views change, and without verification of compliance with the proposed amendments, certain states may continue to deny GBV the attention it merits.³⁸² Significant intersectional feminist advocacy from NGOs and states would be required for these legal changes to have tangible effect.

3 *Likelihood of success*

Furthermore, considering the original backlash to the GBV provision proposal, it is questionable whether a more robust iteration of the provision would achieve sufficient support.³⁸³ 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 these proposed amendments.³⁸⁴ For example, the EU delegation at the Fifth COP stated that art 7(4) was sufficient, and implementation was the real

377 Jalil, above n 61, at 84; and Bromley, Cooper and Holtom, above n 61, at 1046.

378 Nakamitsu, above n 163, at 2; Human Rights Council, above n 150, at ch 3 and [95]; and Human Rights Watch, above n 150. See generally Policy Department for Citizens' Rights and Constitutional Affairs, above n 150, at 8–18.

379 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.

380 "Report of the International Law Commission on the work of its fifty-third session" above n 365, at 66.

381 Amnesty International, above n 367, at 7.

382 Edwards, above n 293, at 7.

383 Casey-Maslen and others, above n 56, at [7.97]; and Small Arms Survey, above n 79, at 87.

384 Casey-Maslen and others, above n 56, at [7.99].

problem to be addressed.³⁸⁵ 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.³⁸⁶ 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.³⁸⁷ The President of the Fifth COP noted that state delegations raised issues of equal representation in ATT decision-making and the importance of gender-disaggregated data on armed violence, and displayed a "high level of interest" in engaging with gender perspectives in the ATT.³⁸⁸ These issues were discussed in statements by both Western and developing states, citing the influence of NGOs.³⁸⁹ This suggests a level of consensus between states parties about the important impact of the arms trade on GBV.³⁹⁰ States' views thus 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.³⁹¹ 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

385 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.

386 Kārklīņš, above n 148, at 1. Government participating in the conferences of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects are also beginning to consider GBV issues: see Allison Pytlak "Let's Set the Stage for Real Review" (2018) 9(1) Small Arms Monitor 1 at 1.

387 Vienna Convention on the Law of Treaties, above n 195, art 31(3)(b); and Casey-Maslen and others, above n 56, at [7.94].

388 Kārklīņš, above n 148, at 1.

389 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.

390 Pytlak, above n 173, at 170.

391 At 169.

7(4).³⁹² This indicates that the COP already recognises that interpretation of art 7(4) may evolve. There is also increased pressure on states to be seen to be responding to GBV, as violence against women becomes a more prominent concern globally.

ATT leaders such as New Zealand, supported by engaged NGOs, could make interpretive statements at the COP to lay the foundation for formal amendments.³⁹³ These statements would record that certain states parties interpret art 7(4) in accordance with the proposed amendments.³⁹⁴ 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).³⁹⁵ 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 a non-binding resolution aimed at raising awareness of GBV among exporting states;³⁹⁶ or a more ambitious quasi-legislative resolution requiring states to assess the risk of GBV before authorising exports.³⁹⁷

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.³⁹⁸ 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.³⁹⁹ 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.

³⁹² Kārkliņš, above n 148, at 2.

³⁹³ Vienna Convention on the Law of Treaties, above n 195, arts 31(3)(b).

³⁹⁴ Pytlak, above n 173, at 169.

³⁹⁵ Vienna Convention on the Law of Treaties, above n 195, arts 31(3)(b); and Casey-Maslen and others, above n 56, at [7.94].

³⁹⁶ See for example SC Res 1325, above n 140; and SC Res 1889, above n 140.

³⁹⁷ See for example SC Res 1373 (2001).

³⁹⁸ SC Res 1325, above n 140.

³⁹⁹ 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 140, at [10].

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 1325.⁴⁰⁰ 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".⁴⁰¹ 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.⁴⁰²

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".⁴⁰³ Resolution 1373, made in the aftermath of terrorist attacks of 11 September 2001, is an example.⁴⁰⁴ Resolution 1373 decided that states were legally obliged to take a variety of actions related to preventing and suppressing terrorist acts.⁴⁰⁵

A quasi-legislative resolution would involve a decision made under ch 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.⁴⁰⁶ 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.⁴⁰⁷

A Security Council committee similar to the Resolution 1373 Counter-Terrorism Committee would be established to monitor the implementation of the resolution.⁴⁰⁸ A Security Council committee on the arms trade and GBV would comprise the 15 Security Council members and would

400 SC Res 1325, above n 140, at [1]–[3].

401 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.

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

403 Ian Johnstone "Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit" (2008) 102 AJIL 275 at 283.

404 SC Res 1373, above n 397.

405 At [2].

406 Charter of the United Nations, arts 25 and 39. 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>.

407 Charter of the United Nations, art 39.

408 SC Res 1373, above n 397, at [6].

perform oversight functions pursuant to the resolution.⁴⁰⁹ These functions may include receiving implementation reports,⁴¹⁰ conducting state visits to assess implementation and issuing recommendations to aid compliance.⁴¹¹

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.⁴¹²

2 Evaluation

A non-binding Security Council resolution would have the advantage of universality and persuasive force.⁴¹³ It would be addressed to all UN members, not only states parties to the ATT.⁴¹⁴ 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.⁴¹⁵ 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".⁴¹⁶

Conversely, the quasi-legislative resolution would make UN members de facto parties to a more robust version of the GBV obligations in the ATT.⁴¹⁷ ATT obligations have been the result of compromises achieved by states parties with varying political, economic and humanitarian

409 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.

410 See SC Res 1373, above n 397, at [6].

411 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.

412 Charter of the United Nations, art 25. See Marko Divac Öberg "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.

413 Öberg, above n 412, at 885.

414 Charter of the United Nations, art 25.

415 Öberg, above n 412, at 885.

416 *Women and peace and security: Report of the Secretary-General*, above n 402, at [2]–[5]; and SC Res 2493 (2019) at 1.

417 Charter of the United Nations, art 25.

agendas.⁴¹⁸ The protection afforded to GBV victims under a binding resolution would therefore be greater in scope than reforms made within the ATT regime. A binding resolution would need agreement on a definition of GBV and the procedure for investigations. If the Security Council agreed, 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.⁴¹⁹

Nevertheless, whether member states would successfully implement the resolution is questionable. Resolution 1373 shows the weaknesses of this model. 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".⁴²⁰ The lack of agreement on the definition of "terrorism" has also led to states interpreting the resolution differently.⁴²¹ GBV may pose similar definitional problems. Thus, despite binding obligations and the support of a Security Council Committee, implementation is not a certainty.⁴²²

3 *Likelihood of success*

The main obstacle to this proposal would be political divisions within the permanent five members of the Security Council, each of which are major arms exporters. Although the United Kingdom and France were early parties to the ATT, and China became a party in 2020,⁴²³ the United States and Russia have not joined the ATT, and both states have openly criticised the Treaty.⁴²⁴ However, the United States was an original signatory to the ATT in 2014, and was among the 75 states that

418 Jalil, above n 61, at 85; and Wood and Abdul-Rahim, above n 69, at 17.

419 Charter of the United Nations, arts 40–42.

420 *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.

421 *Global Survey 2008 of the implementation of Security Council resolution 1373 by Member States*, above n 420, at 29–37; and *Global survey 2016 of the implementation of Security Council resolution 1373 (2001) by Member States*, above n 420, at 107–121.

422 *Global Survey 2008 of the implementation of Security Council resolution 1373 by Member States*, above n 420, at 29–37; and *Global survey 2016 of the implementation of Security Council resolution 1373 by Member States*, above n 420, at 107–121.

423 Arms Trade Treaty Secretariat, above n 269, at 2.

424 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 69, at 17.

supported including a GBV provision in negotiations.⁴²⁵ With a change of administration in 2020, it is possible that the United States will 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".⁴²⁶ Russia has not amended its protections of women and girls despite the urging of the CEDAW Committee, suggesting a dismissive attitude towards GBV.⁴²⁷ Its views on the ATT and GBV prevention could drive Russia to use its veto power to block a binding GBV resolution, particularly in the light of the proposed Security Council committee.⁴²⁸ 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.⁴²⁹ 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).⁴³⁰ Soft law guidelines would have no binding force and could be implemented voluntarily by states in their export assessments.⁴³¹ This would be a form of "primary" soft law, clarifying "previously accepted vague or general standards" for export assessments.⁴³² 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.⁴³³

425 Women's International League for Peace and Freedom, above n 92, at 2.

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

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

428 Charter of the United Nations, art 27(3).

429 United Nations Digital Library "Voting Data" (2020) <www.digitallibrary.un.org>.

430 Higgie, above n 214, at 1.

431 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.

432 Dinah Shelton "Compliance with International Human Rights Soft Law" (1997) 29 Stud Transnatl Legal Poly 119 at 121.

433 *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, art 1(3); and Shelton, above n 432, at 122.

In the ATT context, a soft law resolution could be made by the COP.⁴³⁴ 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.⁴³⁵ WILPF and the International Action Network on Small Arms 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).⁴³⁶ 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 the light of possible mitigating measures.⁴³⁷

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 being of less significance by states, negatively impacting compliance.⁴³⁸ GBV is already marginalised in the ATT and international law more widely, although this is starting to improve.⁴³⁹ Addressing GBV in soft law may cause the issue to be disregarded further.⁴⁴⁰ For example, General Recommendation No 19 calling for states parties to Convention on the Elimination of All Forms of Discrimination Against Women to combat GBV is a non-binding soft law instrument.⁴⁴¹ This Recommendation has suffered

434 Alan E Boyle "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 ICLQ 901 at 905.

435 *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). See Shelton, above n 432, at 130.

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

437 Control Arms, above n 2, at 5.

438 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.

439 Arms Trade Treaty Monitor, above n 1, at 25; Edwards, above n 293, at 7; and CEDAW Committee *General Recommendation No 35*, above n 31, at [2].

440 Edwards, above n 293, at 7.

441 See generally CEDAW Committee *General Recommendation No 19*, above n 31.

from instances of non-compliance, to the point of being ignored by certain Western European states.⁴⁴²

Enforcement is also at issue as soft law instruments lack robust means of ensuring compliance.⁴⁴³ Without binding obligations and oversight, states parties cannot be held accountable for inappropriate transfers that threaten the lives of GBV victims.⁴⁴⁴ 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.⁴⁴⁵ 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".⁴⁴⁶ Free from the "straightjacket" that comes with binding norms, including domestic ratification processes, agreement on soft law may be reached more easily.⁴⁴⁷ Soft law can also be more easily amended to meet international developments than treaties, which must comply with internal amendment rules.⁴⁴⁸

Moreover, soft law guidelines have normative value and can provide a model for future developments.⁴⁴⁹ Soft law guidelines on GBV may eventually crystallise into binding norms.⁴⁵⁰ 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.

442 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.

443 O'Connell, above n 438, at 111.

444 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].

445 Gabriel, above n 431, at 663.

446 Boyle, above n 434, at 903.

447 Gabriel, above n 431, at 663.

448 Boyle, above n 434, at 903.

449 At 903. See generally Matthew J Hoffman "Norms and Social Constructivism in International Relations" (22 December 2017) Oxford Research Encyclopedia of International Studies <www.oxfordre.com/internationalstudies>.

450 Boyle, above n 434, at 904–905.

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".⁴⁵¹ The outline will continue to be discussed among states parties into 2021, with substantive drafting likely beginning after the Seventh COP.⁴⁵² 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.⁴⁵³ In the 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 has the strongest likelihood of success of those proposed.⁴⁵⁴ 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.⁴⁵⁵

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".⁴⁵⁶ 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 that states have sufficient information about GBV to implement

451 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.

452 Working Group on Effective Treaty Implementation, above n 166, at 2.

453 Skerten, above n 268, at 2.

454 Kārklīš, above n 148, at 1; and Gabriel, above n 431, at 663.

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

456 Pytlak, above n 173, at 177.

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.⁴⁵⁷ Enduring change to art 7(4) and the ATT regime generally is possible through dedicated action by influential states. Supporting some of the reforms in this article would give New Zealand the opportunity to match its positive rhetoric about GBV to decisive action which may save lives.

⁴⁵⁷ At 156.

