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| Law and Development

# Arms transfer prohibitions due to human rights violations abroad

Is there a place for human rights law in Article 6(2) of the Arms Trade Treaty?



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## List of abbreviations

ACHR	American Convention on Human Rights
ATT	Arms Trade Treaty
CAT	United Nations Convention Against Torture
CAT	Committee Against Torture
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECmHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Common Position	Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
OHCHR	Office of the High Commissioner for Human Rights
UN	United Nations



# 1. Introduction

As economic trade relations become more prominent in the globalised world, it is important not to disregard the human rights violations that often manifest as a consequence. When creating economic opportunities between states, such as in the field of arms trade, states must be willing to take on corresponding responsibilities as well. Arms trade must not be perceived as mutually exclusive to human rights obligations. That is why the Arms Trade Treaty is to be seen as a landmark instrument in the sphere of global arms trade control. After various campaigns by civil society organisations, the treaty was adopted on 2 April 2013. It is the first multilateral treaty regulating the international trade in conventional arms for the purpose of preventing and eradicating the illicit trade and diversion of conventional arms.

However, the treaty is accompanied by various criticisms and controversies. More specifically, several important articles contain gaps and are subject to multiple interpretations. One such article is Article 6(2), which addresses one of the conditions under which it is prohibited to authorise an arms transfer. According to this article, an arms transfer from a state to another is prohibited if it “would violate [the said state’s] relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms”.<sup>1</sup> Thus, it seems clear that treaties dealing with arms transfers and illicit trafficking fall within the scope of Article 6(2).

The question of whether human rights obligations fall within the scope of Article 6(2) is more debatable. Certain state parties to the ATT are in agreement on the relevance of human rights law for article 6(2) ATT since they include these obligations in their initial state reports.<sup>2</sup> This is nonetheless insufficient to determine the existence of a transfer prohibition in article 6(2).

Two elements are important for the operationalization of article 6(2) ATT. It must first be determined whether human rights law can be seen as “relevant” in the sense of the Article. Many analyses stop after answering this question, which is insufficient to determine the possible existence of a transfer prohibition. Hence, it is also vital to answer the question whether human rights obligations can be violated by arms transfers by the transferring state, to determine whether the transfer would actually violate the said state’s international obligations and lead to a prohibition on transfer under Article 6.

This paper will answer two questions relating to the interpretation and operationalization of article 6(2) ATT:

- 1) Are human rights obligations “relevant international obligations” in the sense of Article 6(2)?
- 2) Can an arms transfer violate human rights law, leading to an absolute prohibition on transfer under Article 6(2)?

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<sup>1</sup> Article 6 (2) ATT, signed 24 December 2014, *UN Treaty Series*, vol. 3013, 106.

<sup>2</sup> The Arms Trade Treaty, “Initial Reports”, available at <https://thearmstradetreaty.org/initial-reports.html?templateId=209839> (last accessed at 15 May 2021).

The paper finds that human rights obligations are “relevant” under article 6(2). Nevertheless, the current state of human rights law and jurisprudence with regard to jurisdictional limitations poses challenges in holding sending states responsible for human rights violations abroad. The paper therefore presents arguments that support a more progressive reading of human rights law and draws recommendations therefrom. Employing a more progressive reading, human rights obligations should fall within the scope of Article 6(2) ATT. That is why the report elaborates on due diligence and good faith arguments, in combination with several other recommendations.

This paper is limited to the analysis of the following human rights instruments: European Convention on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention against Torture.

This working paper only refers to the scope of the transfer prohibition in article 6(2) and does not examine human rights law violations in connection with arms trade outside of article 6(2) of the ATT.

## 2. The relevance of human rights law for arms trade

### **Article 6 Arms Trade Treaty: Prohibitions**

*(2) A State Party shall not authorise any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.*

The scope of Article 6(2) is subject to various interpretations. The Vienna Convention on the Law of Treaties is needed as a means for interpretation to decipher vague language such as ‘relevant’ and ‘in particular’. On the basis of Articles 31-33 of the Vienna Convention it could be established whether human rights obligations constitute “relevant international obligations” in the sense of Article 6(2) ATT and thus, answer the first question of this policy paper.

The first question that arises is what falls under the notion of international agreement, because the relevant obligations must be contained in international agreements to which the state is a party. The United Nations Treaty collection has a treaty reference guide to facilitate the understanding of terms being used in UN treaties, such as the ATT.<sup>3</sup> In the generic meaning, the reference is made to the VCLT that uses the term agreements in its broadest form, embracing not only treaties but a wide range of international instruments.<sup>4</sup> Regarding the specific meaning of the term agreement, the reference guide states that ‘agreement’ is usually used for instruments dealing with a more technical or administrative matter in a less formal way and not always subject to ratification.<sup>5</sup> Hence, one could argue that the relevant obligations under international agreements in Article 6 (2) do not only include obligations

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<sup>3</sup> United Nations Treaty Collection, “Definition of key terms used in the UN Treaty Collection: Agreements”, available at [https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml](https://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml) (last accessed 21 December 2021).

<sup>4</sup> Id., “Agreement”.

<sup>5</sup> Id.

established in treaties but also obligations established in other binding instruments, such as the EU Common Position. Customary International law, on the other hand, is not included in article 6(2).<sup>6</sup>

Moreover, since the object is to establish ‘the highest possible common international standards’<sup>7</sup>, it could be argued that relevant obligations do not exclude obligations that are established in agreements that are not defined as a treaty, such as the EU Common Position. Excluding them would only undermine its effectiveness and goal to achieve the highest possible common international standards.

Secondly, it must be established what the notion of ‘in particular’ entails. Some authors believe that a broad interpretation of ‘in particular’ would undermine the objective of Article 6(2), since too many transfers would lead to a breach of Article 6(2) when implementing human rights.<sup>8</sup> However, the notion ‘in particular’ does not mean that only disarmament treaties and arms-related agreements can be included. Other more general treaties also fall within the scope of article 6(2).<sup>9</sup> Practice shows that states also take a broad view. By looking at the initial reports that states have submitted according to Article 13(1) ATT, it becomes clear that some states have included references to international human rights instruments, which thus do not solely address the transfer of, or illicit trafficking in, conventional arms, but also human rights commitments.<sup>10</sup>

Subsequently, a last question arises as to whether ‘relevant international obligations’ in the sense of Article 6(2) ATT entail human rights obligations. The preamble of the treaty contains several principles by which state parties should abide when they are fulfilling their obligations under the treaty. According to some authors, Preambular Principle 5 and 6 refer to the duty of states to respect humanitarian law and human rights and their responsibility to act in accordance with their respective international obligations. The use of such preambular principles is not required in international treaties, so the reference to international human rights law in these principles has been viewed as something significant.<sup>11</sup> As a result, it would be reasonable to assume that Article 6(2) does not exclude human rights obligations. In addition, on the day of the adoption of the arms trade treaty, Mexico delivered a joint declaration on behalf of 98 states.<sup>12</sup> The declaration stated that “[t]he Treaty prohibits

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<sup>6</sup> CASEY-MASLEN, S., “Article 6. Prohibitions” in CLAPHAM, A., CASEY-MASLEN, S. et. al. (eds.), *The Arms Trade Treaty: A Commentary*, Oxford University Press, 2016, 181.

<sup>7</sup> Art. 1 ATT.

<sup>8</sup> DA SILVA, C. & NEVILL, P., “Article 6. Prohibitions” in DA SILVA, C. & WOOD, B. (eds.), *Weapons and International Law: the Arms Trade Treaty*, Larcier, 2015, (88) 94.

<sup>9</sup> CASEY-MASLEN, S., *supra* n. 6, at 193.

<sup>10</sup> The Arms Trade Treaty, “Initial Reports”, available at <https://thearmstradetreaty.org/initial-reports.html?templateId=209839> (last accessed at 15 May 2020). For example: Croatia and Switzerland.

<sup>11</sup> CASEY-MASLEN, S., GIACCA, G. & VESTNER, T., “Academy Briefing No. 3: The Arms Trade Treaty (2013)”, available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/Publications/Academy%20Briefings/ATT%20Briefing%203%20web.pdf> (last accessed on 28 May 2020), 24.

<sup>12</sup> UNGA, General Assembly official record 67th session: 71st plenary meeting, Tuesday 2 april 2013 Draft Resolution (A/67/PV.71) (2013), 20.

conventional arms transfers when they would violate relevant international treaty obligations, including those contained in human rights(...) Any transfer that has the potential to lead to negative consequences, such as serious violations of human rights and international humanitarian law shall not be authorised.”<sup>13</sup> This declaration provides an insight into the intentions of the drafters, which can be used as a supplementary means of interpretation through Article 32 of the VCLT for the interpretation of Article 6(2). Furthermore, it should be mentioned that in the draft papers the predecessor of Article 6(2) at that time contained the word ‘regarding’ instead of ‘in particular’.<sup>14</sup> This change of wording may furthermore indicate a broad interpretation.

Consequently, it can be reasonably assumed that human rights obligations, defined in legally binding international instruments, are “relevant international obligations” in the sense of Article 6(2) ATT. Human rights obligations in other international instruments, such as *jus cogens* norms, soft law and customary human rights norms (e.g. Universal Declaration on Human Rights), fall outside of the scope of Article 6(2). Whether an arms transfer can violate obligations in legally binding international human rights instruments, leading to an absolute prohibition to transfer under Article 6(2), will be further examined in the following chapters.

### 3. Territoriality and extraterritoriality in human rights law

Traditionally, States have the obligation to ensure human rights compliance within their borders.<sup>15</sup> States’ human rights obligations, and even responsibility, are limited due to notions of jurisdiction and territoriality included in treaties and conventions.<sup>16</sup> In case of territoriality, the human rights violation takes place on the territory of the state, being the geographic area over which the state has sovereignty.<sup>17</sup>

The extraterritorial application of human rights treaties, on the other hand, entails application of the obligations in these treaties in respect of individuals whose rights are violated outside the territory of

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<sup>13</sup> Id.

<sup>14</sup> The Preparatory Committee, “Chairman’s draft paper 3 March 2011”, available at <https://www.adh-geneve.ch/RULAC/pdf/Chairmans-draft-paper.pdf> (Last accessed on 18 May 2020).

<sup>15</sup> TZEVELEKOS, V., “Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility”, *Michigan Journal of International Law* (2014) 129, 129.

<sup>16</sup> GIBNEY, M., “International Jurisdiction” in MIHR, A. & GIBNEY, M. (eds.), *The SAGE Handbook of Human Rights*, SAGE Publications, 2014, (786) 786.

<sup>17</sup> MILANOVIC, M., *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, 2011, 8.



the state concerned. Most often, the extraterritorial application of human rights law is engaged by an extraterritorial act by the state, which is conduct performed outside of its sovereign borders.<sup>18</sup>

Territoriality and extraterritoriality manifest themselves differently in human rights treaties. Some treaties, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) have general jurisdiction clauses, defining the scope of states' human rights obligations, referring to the state's jurisdiction or territory.<sup>19</sup>

**Article 1 European Convention on Human Rights:**

*“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”*

**Article 2(1) International Covenant on Civil and Political Rights:**

*“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

Other treaties, such as the United Nations Convention Against Torture (CAT), do not contain a general jurisdiction clause but rather use jurisdiction clauses in specific provisions and obligations.<sup>20</sup> A final category of treaties does not contain any reference to jurisdiction to define the territorial application. An example of such a universal human rights treaty is the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>21</sup>

The traditional territorial application of human rights law is supplemented by international and regional supervisory bodies' interpretation of the relevant human rights conventions. Even when these conventions have general or provision-specific jurisdiction clauses, this does not mean that they are necessarily limited to the geographical territory of the state concerned, as will be shown in the next Chapter.

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<sup>18</sup> Id.

<sup>19</sup> Id., at 11.

<sup>20</sup> Id., at 12. ; Jurisdiction clauses can be found in articles 7(1), 11, 12, 13, 16, and 22(1).

<sup>21</sup> Id., at 17.



## 4. The potential of arms transfers to violate human rights law: capita selecta

### 4.1 European Convention on Human Rights

Even though the ECHR has a jurisdiction clause, the meaning of 'jurisdiction' has not always been clear. Several cases have been brought before the European Court of Human Rights (ECtHR) and the European Commission of Human Rights (ECmHR) to clarify what the notion entails. In the *travaux préparatoires* of the ECHR it is stipulated that its provisions must be interpreted as widely as possible in order to protect as many categories of people as possible.<sup>22</sup> When determining the existence of extraterritorial obligations in the ECHR, several cases before the Court establish jurisdiction based on a State's effective control over an area abroad<sup>23</sup>, or on the exercise by state's agents present abroad of control and authority over persons there.<sup>24</sup> These classic interpretations of extraterritorial jurisdiction cannot be applied in the case of arms transfers. Authorising arms transfers does not imply the presence of state agents abroad. Moreover, once the transfer has taken place the transferring State does not have any control over the use of weapons by the receiving state in its own territory.<sup>25</sup>

It is nevertheless important to look at certain cases that are particularly relevant for arms transfers. The case of *Tugar v. Italy* is the only decision of an international human rights body on the responsibility of a state for arms transfers.<sup>26</sup> Tugar, an Iraqi mine clearer, suffered a grave injury as he was working on clearing a minefield in Iraq and stepped on an anti-personnel mine. The mine had been supplied to Iraq by an Italian armament company. Tugar submitted a claim before the ECmHR on the basis of Article 2 ECHR, the right to life. He claimed that Italy had violated Article 2 by knowingly supplying mines to Iraq that would likely be used indiscriminately. Moreover, he argued Italy had failed to comply with its positive obligations under Article 2 to protect the right to life by effectively regulating arms transfers.

The ECmHR nevertheless declared the claim inadmissible. It found that "*the applicant's injury cannot be seen as a direct consequence of the failure of the Italian authorities to legislate on arms transfers. [...] It follows that the "adverse consequences" of the failure of Italy to regulate arms transfers to Iraq are "too remote" to attract the Italian responsibility.*" Regarding the claim of Italy's failure to implement an arms transfers licensing system, the Court underlined that such an obligation for State Parties does not exist in the Convention. Therefore, Italy could not be found responsible under the ECHR on this basis.

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<sup>22</sup> COOMANS, F. & KAMMINGA-MENNO, T., *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, 89.

<sup>23</sup> ECHR, 23 March 1995, *Loizidou v. Turkey*, no. 15318/89. ; ECHR, 8 July 2004, *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99.

<sup>24</sup> ECHR, 12 May 2005, *Ocalan v. Turkey*, no. 46221/99. ; ECHR, 16 November 2004, *Issa and Others v. Turkey*, no. 31821/96. ; ECHR, 7 July 2011, *Al Skeini and Others v. United Kingdom*, no. 55721/07. ; ECHR, 7 July 2011, *Al Jedda v. United Kingdom*, no. 27021/08.

<sup>25</sup> MONNHEIMER, M., *Due diligence obligations in international human rights law*, Cambridge University Press, 2021, 296.

<sup>26</sup> ECmHR, 18 October 1995, *Tugar v. Italy*, no. 2869/93.

In *Tugar v. Italy*, the applicant draws a parallel to *Soering v. UK*<sup>27</sup>, another case that could be considered relevant for arms transfers. Indeed, it concerns a State's responsibility for an act it takes in its own territory, which has an impact on human rights abroad. In *Soering*, the Court found that the United Kingdom would breach article 3 on the prohibition of torture and inhuman or degrading treatment or punishment by extraditing the applicant to the United States, where being on death row would expose him to a real risk of undergoing such treatment.<sup>28</sup> Nevertheless, the Commission ruled that this factual comparison was not relevant. It found that the causal link in *Soering* between the decision to extradite and the violation was a direct one, as opposed to the link claimed by *Tugar*. Eventually, the principle enunciated in *Soering* has been found to only apply to cases where a State expelling a person under its jurisdiction would lead them to be exposed to a risk abroad, under Articles 2 and 3 of the ECHR.<sup>29</sup> Furthermore, in the case *Bankovic* the Court refuted a "cause-and-effect notion of jurisdiction" following which a State would be responsible for any adverse effects on human rights of persons abroad that would flow from its actions.<sup>30</sup>

Thus it seems that, even though human rights obligations under the ECHR fall within the meaning of relevant obligations in terms of Article 6(2) ATT, the Court most likely will rule that there is no immediate and direct link with arms transfers since the Court will find that the human rights violation took place outside of the state's jurisdiction. However, this does not mean that the state does not have any obligation at all within its jurisdiction. The provisions of the ECHR must be implemented through 'practical and effective safeguards'.<sup>31</sup> For example, under Article 1 and 3 ECHR there is the positive obligation upon the state to protect against and prevent ill-treatment and torture that takes place within the state jurisdiction<sup>32</sup>, as well as any risk to the right to life enshrined in Article 2 ECHR.<sup>33</sup> As a result, if the ECtHR or the ECmHR would interpret the notion of jurisdiction more broadly and offer those practical and effective safeguards in arms transfers, then a human rights violation could be established instead of resulting in impunity. However, currently there is no such case law established.

## 4.2 International Covenant on Civil and Political Rights

Article 2(1) of the ICCPR provides that State Parties must respect and ensure the rights enshrined to "all persons who may be within their territory and to all persons subject to their jurisdiction". The Human Rights Committee has interpreted this article as listing two alternative conditions, rather than cumulative. Persons not in the territory of the State Party may therefore still fall under its jurisdiction.<sup>34</sup>

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<sup>27</sup> ECHR, 7 July 1989, *Soering v. The United Kingdom*, no. 14038/88.

<sup>28</sup> *Id.*, §111.

<sup>29</sup> KARAKAŞ, I., BAKIRCI, H., "Extraterritorial application of the European Convention on Human Rights", in VAN AAKEN, A., MOTOC, I. (eds.), *The European Convention on Human Rights and general international law*, Oxford University Press, 2018, 117.

<sup>30</sup> *Id.*, §75.

<sup>31</sup> REIDY, A., "The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights", *Human Rights Handbooks*, No. 6, 2003, 36.

<sup>32</sup> *Id.*, at 37.

<sup>33</sup> ECHR, "Guide on Article 2 of the European Convention on Human Rights : Right to life", available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf) (last accessed 20 December 2021).

<sup>34</sup> HRC, General comment No. 31 on the nature of the general legal obligation imposed on state parties to the Covenant (CCPR/C/21/Rev.1/Add.13)(2004), 10.

International bodies such as the ICJ<sup>35</sup> and HRC<sup>36</sup> have interpreted the latter condition to mean that the ICCPR applies extraterritorially to situations where the State party exercises effective control over territory or over persons abroad.<sup>37</sup> Such situations nonetheless do not exist in arms transfers cases. However, two specific rights that are particularly relevant for arms trade need to be clarified: the right to self-determination and the right to life. Indeed, these rights have been interpreted by the Human Rights Committee as having a broader scope than the one resulting from the application of the effective control criteria.

### **Article 1(3) ICCPR**

*“The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”*

### **Article 6 ICCPR**

*(1)“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”*

Firstly, the right to self-determination in Article 1 is relevant. States have the obligation under article 1(3) to promote the realisation of the right to self-determination and to respect this right. The UN Human Rights Committee has stated that state obligations with regard to the right to self-determination under Article 1(3) are not limited to the State Parties’ own population but relate to “all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination”.<sup>38</sup> This encompasses both the negative obligation of non-interference in the internal affairs of foreign States and the positive obligation to facilitate realisation of the right.<sup>39</sup>

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<sup>35</sup> ICJ, Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory opinion, I.C.J. Reports 1996, p. 232, §107-111 ; ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgement, I.C.J. Reports 2005, p. 168, §216.

<sup>36</sup> HRC, General comment No. 31 on the nature of the general legal obligation imposed on state parties to the Covenant (CCPR/C/21/Rev.1/Add.13)(2004), §10; HRC, Concluding Observations on the Third Report of Israel (CCPR/C/ISR/CO/3)(2010), §5.

<sup>37</sup> COSTA, K. D., *The Extraterritorial Application of Selected Human Rights Treaties*, Martinus Nijhoff Publishers, 2013, 56-57.

<sup>38</sup> HRC, General Comment No. 12 on article 1 of the International Covenant on Civil and Political Rights, on the right to self-determination (HRI/GEN/1/Rev.9 (Vol. I)(1984) §6.

<sup>39</sup> Id.

Two scenarios with regards to arms transfers are relevant in the case of this right: a transfer to a state that does not respect the right to self-determination of its people and a transfer to a non-state actor that is striving for self-determination within a state.

Firstly, a party that supplies arms to a state that does not respect the right to self-determination of its people could be considered to breach its obligations under Article 1(3),<sup>40</sup> and subsequently Article 6(2) of the ATT. Secondly, it is unclear whether supplying arms to a people striving for self-determination, as a positive action to realise the right, would be allowed under international law. Since the right to self-determination must be in conformity with certain provisions of the UN Charter, it is important to determine whether these provisions would be violated in the process. It is debated whether national liberation movements are allowed to use force in their pursuit of self-determination.<sup>41</sup> As of yet, the prohibition on the use of force against any state is absolute and supplying arms can be seen as an indirect use of force, which is prohibited under article 2(4) UN Charter.<sup>42</sup> So, even in the case where an arms transfer would help in realising the right to self-determination of a people elsewhere, this would not be in conformity with certain provisions of the UN Charter, when the use of force is not justified, and therefore would not be a positive action that is allowed under Article 1 ICCPR.<sup>43</sup>

The second right in question is the right to life in Article 6. This right has been interpreted by the UN Human Rights Committee, the monitoring body of the ICCPR, in its General Comment No. 36.<sup>44</sup> It states that as part of the duty to protect life, states must take measures with regard to activities that take place within their jurisdiction but that have a “direct and reasonably foreseeable impact on the right to life of individuals outside their territory”.<sup>45</sup> This includes activities undertaken by corporations that produce arms that have the state in question as their home state. Moreover, it provides that States parties engaged in the sale or purchase of weapons must take into consideration their impact on the right to life.<sup>46</sup> Therefore, in its General Comment No. 36 the HRC adopts what can be defined as a

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<sup>40</sup> NAHAPETIAN, K., “Confronting state complicity in international law”, *UCLA Journal of International Law and Foreign Affairs* (2002) 99, 114.

<sup>41</sup> GRAY, C., *International Law and the Use of Force*, Oxford University Press, 2008, 61.

<sup>42</sup> ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, § 345. ; SCHRIJVER, N., “The Ban on the use of Force in the UN Charter” in WELLER, M. (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford University Press, 2015, (465) 481. ; HENDERSON, C., *The Use of Force and International Law*, Cambridge University Press, 2018, 61.

<sup>43</sup> HRC, General Comment No. 12 on article 1 of the International Covenant on Civil and Political Rights, on the right to self-determination (HRI/GEN/1/Rev.9 (Vol. I)(1984).

<sup>44</sup> This General Comment is a non-binding instrument but constitutes an authoritative source on the interpretation of the ICCPR.

<sup>45</sup> HRC, General comment No. 36 on article 6 (right to life) of the International Covenant on Civil and Political Rights (CCPR/C/GC/36)(2018), §22.

<sup>46</sup> *Id.*, at §65.

“functional approach to jurisdiction”<sup>47</sup> that relies upon the results of states’ actions.<sup>48</sup> This is less rigid than the “effective control” criteria as applied by the Human Rights Committee.<sup>49</sup>

Finally, an argument has been made in favour of taking into account the good faith obligation not to go against the object and purpose of the treaty.<sup>50</sup> The good faith requirement, as well as the progressive evolution towards a broader understanding of jurisdiction, will be further explained below.

### 4.3 United Nations Convention Against Torture

The prohibition of torture is one of the rights that is the most relevant to control arms transfers and is enshrined in the UN Convention Against Torture (CAT). It is therefore necessary to see whether the obligations under the CAT could apply to an arms transfer covered by the ATT. The obligations under the CAT will be looked at independently of the customary international law prohibition of torture, which does not fall under article 6(2).

The CAT imposes extraterritorial obligations upon States Parties where they have effective control over territory abroad, but also in a wider interpretation whenever it has effective control over persons abroad.<sup>51</sup> This does not allow the extraterritorial jurisdiction of the sending state to be established in the case of an arms transfer.

The UN Convention Against Torture imposes upon States the obligation to prevent torture and to criminalize torture as well as complicity or participation in torture.<sup>52</sup> There is no explicit provision that engages state parties’ responsibility for complicity in acts of torture occurring beyond their jurisdiction. However, there have been efforts to determine whether the CAT could be constructed in a similar way to the Genocide Convention in order to engage state responsibility for complicity in genocide despite the lack of effective control over territory or persons.

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<sup>47</sup> AL-HIHI, E., “The right to life in jus ad bellum targeting; a functional approach to extraterritorial jurisdiction in human rights law”, *UCLA Journal of International Law and Foreign Affairs* (2020), 359, 376.

<sup>48</sup> *Id.*, at 373.

<sup>49</sup> HRC, General comment No. 31 on the nature of the general legal obligation imposed on state parties to the Covenant (CCPR/C/21/Rev.1/Add.13)(2004), §10; HRC, Concluding Observations on the Third Report of Israel (CCPR/C/ISR/CO/3)(2010), §5.

<sup>50</sup> NAHAPETIAN, K., *supra* n. 45, at 113.

<sup>51</sup> Article 2(1) and 4, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed 4 February 1985, *UN Treaty Series*, vol. 1465, 85 ; CATee, General Comment No. 2 on the implementation of article 2 by State Parties (CAT/C/GC/2)(2008), §7 ; COSTA, K. D., *supra* n. 43, 294-300.

<sup>52</sup> *Id.*

The ICJ construed Article I, on the obligation to prevent genocide and Article III, which provides that complicity in genocide is punishable, by relying upon the customary law prohibition to aid or assist in the commission of an internationally wrongful act, as expressed in Article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission.<sup>53</sup> Article III(e) of the Genocide Convention was originally understood to impose upon States the obligation to prosecute individuals for a number of acts, including complicity in genocide. Nevertheless, relying upon Article 16 of the articles on State Responsibility and Article I on the obligation of states to prevent genocide, and employing a teleological reasoning, the ICJ widely interpreted Article III(e) as also engaging state responsibility and imposing upon States the obligation not to become complicit in genocide.<sup>54</sup>

However, it is difficult to find that the CAT could be interpreted as containing obligations upon States not to be complicit in another State's acts of torture by transferring arms, because of the jurisdictional scope of the Convention, which is limited to acts of torture occurring in a territory under the State's jurisdiction.<sup>55</sup> This is different from the obligation of prevention contained in the Genocide Convention, which is not limited to the territory of the State concerned.<sup>56</sup> The jurisdictional limits of the CAT therefore cannot cover inter-state complicity.<sup>57</sup> Thus, it seems like a State could not be found complicit under the CAT for solely transferring arms to a recipient that would engage in torture. The provisions of CAT would not be violated by an arms transfer and therefore cannot support a transfer prohibition under article 6(2).<sup>58</sup>

To conclude, it is important to note that the transfer of arms to a state that would use them to engage in torture could nevertheless be prohibited by other provisions of the ATT. Indeed, Article 6(3) engages the responsibility of supplier states that authorise arms transfers that will be used by recipient states to commit international crimes. Moreover, torture would also be relevant under article 7, which requires state parties to carry out a risk assessment prior to approving a transfer, and in particular Article 7(1) (b) (ii) which refers to a 'serious violation' of international human rights law. Finally, the fact that third state complicity in torture is not prohibited under the CAT and thus does not fall under

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<sup>53</sup> United Nations, "Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries", available at [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (last accessed at 31 May 2020).

<sup>54</sup> AUST, H. P., *Complicity and the law of state responsibility*, Cambridge University Press, 2011, 393 ; ICJ, Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgement, I.C.J. Reports 2007, p. 43, §166-167 and 419-420.

<sup>55</sup> Article 2(1), UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed 4 February 1985, *UN Treaty Series*, vol. 1465, 85.

<sup>56</sup> ICJ, Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgement, I.C.J. Reports 2007, p. 43, §81.

<sup>57</sup> AUST, H. P., *supra* n. 54., at 393.

<sup>58</sup> N.B. This is without prejudice to complicity under international law and the prohibition of torture as a norm of jus cogens. These norms remain applicable and can be violated, also in inter-state arms trade, but they do not warrant a specific export prohibition under article 6(2) of the Arms Trade Treaty.

article 6(2) does not prevent arms transfers from being prohibited independently of the ATT, under international customary law on complicity and the jus cogens prohibition of torture.

#### 4.4 International Covenant on Economic, Social and Cultural Rights

Arms trade can impact economic, social and cultural rights both directly and indirectly.

The indirect impact is due to the potential of arms transfers to undermine economic, social and cultural rights because the recipient state may divert finance from spending in sectors such as health and education towards armaments.<sup>59</sup> This ‘opportunity cost’ is recognized in Article 26 of the UN Charter and acknowledged in the preamble of the ATT.<sup>60</sup>

##### **Preamble Arms Trade Treaty**

*“Recalling Article 26 of the Charter of the United Nations which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources”*

There is no human rights norm that imposes obligations upon states with regard to the relative weight of military versus social expenditure. The principle is that this remains at the discretion of sovereign states.<sup>61</sup> However, the ICESCR prescribes that the ‘maximum available resources’ should be devoted to realising economic, social and cultural rights.<sup>62</sup> The Committee on Economic, Social and Cultural Rights has delivered opinions that elaborate upon this prescription.<sup>63</sup> At least, it would amount to a legal obligation to respect the principle of reasonableness<sup>64</sup> in the context of social expenditure. Giacca and Karimova have considered that it could also be interpreted as an obligation to equitably balance interests in resource allocation or even to prioritise human rights obligations. However, UN bodies

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<sup>59</sup> Report of the Office of the United Nations High Commissioner for Human Rights, “Impact of arms transfer on the enjoyment of human rights”, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/109/83/PDF/G1710983.pdf?OpenElement> (last accessed at 7 June 2020), §8.

<sup>60</sup> Id.; Article 26 Charter of the United Nations and Statute of the International Court of Justice, signed 26 June 1945, *UN Treaty Series*, vol. XVI, 1 ; §3 preamble Arms Trade Treaty, signed 24 December 2014, *UN Treaty Series*, vol. 3013, 106.

<sup>61</sup> GIACCA, G. & KARIMOVA, T., “Implications for arms acquisitions of economic, social, and cultural rights”, in CASEY-MASLEN (ed.), *Weapons under International Human Rights Law*, Cambridge University Press, 2014, (472) 494.

<sup>62</sup> Article 2 International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, *UN Treaty Series*, vol. 993, 3.

<sup>63</sup> CESCR, General Comment No. 3 on the nature of States Parties’ obligations under Article 2(1) of the Covenant (E/1991/23) (1990), §9-13 ; CESCR, Statement on an evaluation of the obligation to take steps to the ‘maximum of available resources’ under an optional protocol to the Covenant (E/C.12/2007/1) (2007).

<sup>64</sup> PISILLO MAZZESCHI, R., “Responsabilité de l’Etat pour violation des obligations positives relatives aux droits de l’homme” in Hague Academy of International Law (ed.), *Collected Courses v. 333*, Brill Nijhoff, 2008, 175, 466-7.



have never prescribed a specific course of action to follow with regard to this obligation.<sup>65</sup> Moreover, this duty would be imposed upon the recipient state and not the sending state.

Nevertheless, the comments and opinions of UN bodies in this context can be useful in interpreting the obligations incumbent to EU member states under the EU Common Position on control of exports of military technology and equipment<sup>66</sup>. Indeed, the EU Common Position is seen as binding upon EU Member States and it can thus be argued that this agreement falls under Article 6(2). Its Criterion Eight under Article 2 requires states, when authorising or denying an arms transfer, to consider the impact it will have on the recipient state's allocation of economic resources. Namely, the state must meet its security needs with the "least diversion of human and economic resources".<sup>67</sup> The user's guide of the EU Common Position requires states to take all relevant factors into consideration to assess what is least diversion and to consider the "relative levels of military and social expenditure".<sup>68</sup> It does not, however, refer to binding international human rights obligations.<sup>69</sup> It can nevertheless be considered that the obligation incumbent upon the recipient state to devote the maximum available resources should be taken into account by the sending states when performing the due diligence duty under Criterion Eight.

### **Article 2 EU Common Position: Criteria**

*"Criterion Eight: Compatibility of the exports of the military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments"*

In addition to the diversion of resources, arms transfers can also have a more direct impact on economic, social and cultural rights, through contributing to armed violence.<sup>70</sup> According to Amnesty International, armed force is often used for unlawful evictions and forcing people into labour. These are acts which violate the ICESCR.<sup>71</sup> As a result, if a state has the knowledge that the weapons which it

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<sup>65</sup> GIACCA, G. & KARIMOVA, T., *supra* n. 61, at 497-501.

<sup>66</sup> Common Position 2008/944/CFSP of the Council of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *OJ L* 335, 13.12.2008, 99–103.

<sup>67</sup> *Id.*, Article 2(8).

<sup>68</sup> Council of the European Union, "User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment", available at <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf> (last accessed at 9 June 2020) 144-145.

<sup>69</sup> GIACCA, G. & KARIMOVA, T., *supra* n. 61, 491.

<sup>70</sup> HRC, Impact of arms transfer on the enjoyment of human rights Report of the Office of the United Nations High Commissioner for Human Right (A/HRC/35/8) (2017), §10.

<sup>71</sup> AMNESTY INTERNATIONAL, *How to apply human rights standards to arms transfers decisions*, Amnesty International Publications(2008), 4, 21. ; Article 6, 7, 11 International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, *UN Treaty Series*, vol. 993, 3.



transfers will be used for the violation of land rights, unlawful evictions, forced labour and other violations of the ICESCR, it could be said that the transfer should be prohibited. Hence, it could be argued that the ICESCR contains 'relevant obligations' under Article 6(2) ATT. Nevertheless, it should be noted that this reasoning is very broad and raises the question of the reach of the extraterritorial human rights obligations of the sending state with regard to arms transfers, which have not been clearly defined by the relevant human rights instruments and bodies.

Most treaties that address economic, social and cultural rights, such as the ICESCR, do not contain a jurisdiction clause. The absence of a jurisdiction clause is nevertheless not conclusive in determining the existence of the extraterritorial scope of the obligations and thus this needs to be analysed in a more precise way.<sup>72</sup> Moreover, the ICESCR refers to international cooperation and assistance<sup>73</sup>, which can be understood as alluding to extraterritorial obligations.<sup>74</sup> Jurisdiction has been defined by the Committee on Economic, Social and Cultural Rights (CESCR) as covering any territory where the state concerned has "geographical, functional or personal jurisdiction", including *de facto* control.<sup>75</sup> It has been noted however that this theory with regard to the extraterritorial reach of the ICESCR has been developed with regard to the situation of foreign occupation, and there is less clarity with regard to other less direct involvements of States in connection to violations of ESC rights abroad.<sup>76</sup> There is no consensus on the question of whether ESC human rights obligations extend to situations where a State is able to prevent an act that would perpetuate a harm committed by another state.<sup>77</sup>

There have been recent developments in human rights law that suggest a more progressive approach with regard to extraterritorial obligations. They will be introduced, while keeping in mind that the conclusions drawn remain *de lege ferenda*. Indeed, the Maastricht Principles on Extraterritorial Obligations of States in the Area of ESC rights do adopt a broader view of jurisdiction, by extending States' extraterritorial obligations in the field of ESC rights to situations in which the State's "acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights,

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<sup>72</sup> GIACCA, G., *Economic, Social, and Cultural Rights in Armed Conflict*, Oxford University Press, 2014, 134.

<sup>73</sup> Article 2 (1) International Covenant on Economic, Social and Cultural Rights, signed 16 December 1966, *UN Treaty Series*, vol. 993, 3.

<sup>74</sup> LANGFORD, M., COOMANS, F. & GOMEZ ISA, F., "Extraterritorial duties in international law", in LANGFORD, M., VANDENHOLE, W., SCHEININ, M. & VAN GENUGTEN, W. (eds.), *Global justice, state duties. The extraterritorial scope of economic, social, and cultural rights in international law*, Cambridge University Press, 2012, (51) 73.

<sup>75</sup> CESCR, "Report on the eighteenth and nineteenth sessions", available at : <https://www.un.org/esa/documents/ecosoc/docs/1999/e1999-22.htm> (last accessed at 11 August 2020), §232.

<sup>76</sup> DEN HEIJER, M. & LAWSON, R., "Extraterritorial human rights and the concept of jurisdiction", in LANGFORD, M., VANDENHOLE, W., SCHEININ, M. & VAN GENUGTEN, W. (eds.), *Global justice, state duties. The extraterritorial scope of economic, social, and cultural rights in international law*, Cambridge University Press, 2012, (153) 186.

<sup>77</sup> LANGFORD, M., *et. al.*, *supra* n. 74, at 61 ; COURTIS, C. & SEPULVEDA, M., "Are extra-territorial obligations reviewable under the Optional Protocol to the ICESCR?", *Nordisk Tidsskrift for Menneskerettigheter* (2009) 54, 58.

whether within or outside its territory” as well as the situations in which the State is “in a position to exercise decisive influence”.<sup>78</sup>

In addition, the Maastricht Principles provide that States have, as part of their obligations in the field of ESC rights, the negative obligation to refrain from aiding or assisting another State in breaching its obligations concerning ESC rights.<sup>79</sup> This obligation could be breached by an arms transfer to a state whose use of weapons would violate the aforementioned obligations.

These Guidelines are soft law – however, the case law of international courts has in certain instances followed the same direction. Indeed, the ICJ<sup>80</sup> as well as the ECHR<sup>81</sup> have both recognized the existence of positive human rights obligations of a state with regard to persons abroad, without requiring a demonstration of that state’s extraterritorial jurisdiction. This is of relevance since ESC rights usually contain duties in the form of positive obligations. What could be deduced from these cases is that the existence of these positive obligations was not derived from ‘effective control’ but from the special circumstances due to which a state is in a position to prevent human rights violations abroad.<sup>82</sup>

Moreover, in an advisory opinion on the environment and human rights, the Inter-American Court also recognized the existence of extraterritorial jurisdiction over persons abroad “when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights”.<sup>83</sup> This link is based upon the cause-and-effect nexus between conduct taking place in one state and its impact on human rights abroad<sup>84</sup> and is thus different from the usual criterion of effective control over territory or persons in another state. It does not encompass all situations where human rights would be adversely affected by the conduct of one state. Indeed, the Court describes the existence of a jurisdictional link with reference to the due diligence obligations of

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<sup>78</sup> ETO Consortium, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights”, available at [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) (last accessed at 11 August 2020), II (9) (b) (c).

<sup>79</sup> ETO Consortium, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights”, available at [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) (last accessed at 11 August 2020), III. 21. b).

<sup>80</sup> The ICJ has recognized this when applying the Convention on the Elimination of All Forms of Discrimination. See ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, § 109.

<sup>81</sup> ECtHR, 3 March 2005, *Manoilescu and Dobrescu v Romania and Russia*, no 60861/00. ; ECHR, 29 June 2006, *Treska v. Albania and Italy*, no. 26937/04.

<sup>82</sup> DEN HEIJER, M. & LAWSON, R., *supra* n. 76, at 189.

<sup>83</sup> IACtHR, Advisory Opinion on the environment and human rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity : interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention on Human Rights) (OC-23/17) § 104 (h).

<sup>84</sup> *Id.*, at §95 ; 101-102.

a state in international environmental law with regard to activities taking place on its own territory<sup>85</sup>, thus implying that there has to be a failure of the state to exercise its due diligence for such responsibility to be incurred.<sup>86</sup> While this opinion refers to the due diligence obligation existing in international environmental law, such an obligation also exists with regards to arms transfers.<sup>87</sup> It must also be noted that this opinion is limited to transboundary harm or damage affecting the rights to life and to personal integrity, nevertheless its broad formulation might imply that such a link could also exist with regard to other rights under the Convention including economic, social and cultural rights.<sup>88</sup>

The aforementioned developments could thus show increasing recognition that the criterion of effective control over territory or persons is inadequate to deal with the various situations in which a State can impact human rights abroad and that human rights law is not confined to this concept when establishing extraterritorial human rights obligations.<sup>89</sup>

Regarding state regulation of non-state actors, the CESCR has prescribed that whenever states can take measures to influence third parties to respect human rights abroad, then they have an obligation to do so.<sup>90</sup> The aforementioned advisory opinion of the Inter-American Court of Human Rights points in the same direction. Vandenberg considers that this may amount to states having an obligation to protect whenever this is within their legal competence.<sup>91</sup> This could be of relevance in the case of weapons manufacturers over which the state has jurisdiction, if we consider that they have an impact upon human rights abroad even though their activities remain within the home state. Thus, one could conclude that if it is within the legal competence of a state to refuse a transfer whenever this would have an impact upon ESC rights abroad, then there is an obligation to do so which is relevant under Article 6(2). The Maastricht principles indeed express obligations for states that would apply to such

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<sup>85</sup> Id., at §96-103.

<sup>86</sup> BERKES, A., "A new extraterritorial jurisdictional link recognised by the IACtHR", available at : <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/> (last accessed 21 February 2021).

<sup>87</sup> See below part 5. a. on due diligence and Article 7 Arms Trade Treaty, signed 24 December 2014, *UN Treaty Series*, vol. 3013, 106.

<sup>88</sup> Id.

<sup>89</sup> Id., at 182.

<sup>90</sup> CESCR, Statement on the obligations of State parties regarding the corporate sector and economic, social and cultural rights (E/C.12/2011/1) (2011) §5 ; CESCR, General comment No. 15 on the right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/2002/11) (2002), §33.

<sup>91</sup> VANDENBOGAERDE, A., Jurisdiction Revisited: Attributing Extraterritorial State Obligations Under the International Covenant on Economic, Social and Cultural Rights, *Human Rights & International Legal Discourse* (2015) 6, 15-16. ; It must be noted, however, that the CESCR has neither affirmed nor rejected this in a clear manner to clarify the discussion.

situations, by providing that the state has *inter alia* an “obligation to regulate” concerning non-State actors for which they are “in a position” to do so.<sup>92</sup>

## 4.5 Progressive evolutions on obligations and jurisdiction

### 4.5.1 Due diligence

In light of international collective interests, one can say that human rights must not only be ensured on one's own state territory, but also beyond.<sup>93</sup> Due diligence obligations seek to prevent human rights violations where the state knew (positive knowledge), or ought to have known (constructive knowledge), of the existence of a human rights risk in a specific case.<sup>94</sup> It imposes subjective responsibility, meaning that if the state can prove that preventing the violation was impossible given the fact that the available means could not achieve that goal, then the state can escape liability. Thus, the notion of due diligence imposes obligations of means rather than obligations of result.<sup>95</sup>

It can be argued that there is a form of legal duty of states and private companies to ensure the legitimate use of their ammunition and weapons so that the international community can remain protected. As a result, a due diligence obligation can exist for the sending state to preventively assess the risks related to arms transfers for human rights violations in the recipient state. States themselves are required to take effective measures in prohibiting arms transfers when they are likely to be used to commit human rights violations and obtain knowledge about the human rights violations.<sup>96</sup>

When looking at due diligence under Article 6(2) of the ATT, it is useful to do this in the light of the EU Common Position on Governing Control of Exports of Military Equipment and the right to life as stated in the ECHR and the ICCPR, which are relevant international agreements under Article 6(2).

The right to life as stated in Article 2 of the ECHR entails a positive obligation for the state to take “appropriate steps to safeguard the lives of those within its jurisdiction”.<sup>97</sup> The due diligence obligation resting upon the state is twofold. The state has the obligation to provide a regulatory framework and

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<sup>92</sup> ETO Consortium, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights”, available at [https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23) (last accessed at 11 August 2020), IV. 24.

<sup>93</sup> TZEVELEKOS, V., *supra* n. 15, at 130.

<sup>94</sup> MONNHEIMER, M., *supra* n. 25, at 204.

<sup>95</sup> TZEVELEKOS, V., *supra* n. 15, at 134.

<sup>96</sup> WOOD, B., DAVID, E., TURP, D. & AZAROVA, V., “Opinion on the International Legality of Arms Transfers to Saudi Arabia, the United Arab Emirates and other Members of the Coalition Militarily Involved in Yemen”, available at [https://ipisresearch.be/wp-content/uploads/2019/12/191209-Yemen-EN\\_WEB-2.pdf](https://ipisresearch.be/wp-content/uploads/2019/12/191209-Yemen-EN_WEB-2.pdf) (last accessed at 8 June 2020), at 67.

<sup>97</sup> European Court of Human Rights, “Guide on Article 2 of the European Convention on Human Rights” available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf) (last accessed at 16 August 2020).

the state has the obligation to take preventive measures to protect the right to life.<sup>98</sup> In the context of arms trade, the case of *Osman v. UK* is of specific relevance.<sup>99</sup> The ECHR stated that a state breaches its due diligence obligation when it “did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge”.<sup>100</sup> An answer to the question when a state has or ought to have knowledge of a real and immediate risk remains vague. A possible criterion would be a well-known and persistent pattern of human rights violations by the recipient state. As a result, a sending state could be held responsible for failing to uphold its positive obligations when authorising a transfer, while there is a consistent pattern of gross human rights violations by the recipient country and if there would be further escalation of the conflict by exporting arms.<sup>101</sup> One must prove that through the authorization of the arms transfer there would be an immediate risk to the life of an identified individual and that the supplier state has failed to take measures and avoid the risk. Nevertheless, the due diligence obligation in the ECHR is limited to the sending state’s jurisdiction. Consequently, the difficulties as described in the previous chapter on extraterritorial jurisdiction remain present.

In interpreting the right to life in the ICCPR, the Human Rights Committee takes a broader approach to the due diligence obligation. In the General Comment No. 36 on Article 6, the Human Rights Committee argues that states must take measures to protect the right to life with regard to activities that take place within their jurisdiction but that have a “direct and reasonably foreseeable impact on the right to life of individuals outside their territory”.<sup>102</sup> It could be argued that this means that a sending state, when granting licences and thus operating within its jurisdiction, has to fulfil its due diligence obligation to assess the direct and reasonably foreseeable impact of this authorization on the right to life in the recipient state. As a result, the sending state could be held responsible not for the act which violated human rights but for the fact that it failed to prevent the violation, and thus its due diligence obligation. Moreover, the Human Rights Committee clarified that the right to life entails the obligation for the sending state to prohibit small arms exports which will “foreseeably be used to commit serious human rights violations and life-terminating threats”.<sup>103</sup> It is not difficult for the state to have positive or constructive knowledge, or for the consequences of arms transfers to be foreseeable since arms are inherently capable of violating human rights. Moreover, information on human rights violations is widely available through the UN and NGOs. Since information on a potential misuse is widely accessible, it will be very hard for the transferring state to argue that the consequences were not foreseeable. As a result, merely omissive conduct is required of the state, namely, not transferring arms

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<sup>98</sup> *Id.*

<sup>99</sup> ECHR, 28 October 1998, *Osman v. The United Kingdom*, no. 23452/94.

<sup>100</sup> *Id.*, at §116.

<sup>101</sup> HOFSTOTTER, B., “European Court of Human Rights: Positive Obligations in *E. and others v. United Kingdom*”, *International Journal of Constitutional Law* (2004) 525, 528.

<sup>102</sup> HRC, General comment No. 36 on article 6 (right to life) of the International Covenant on Civil and Political Rights (CCPR/C/GC/36)(2019), §22.

<sup>103</sup> *Id.*, at §6.

when there is a foreseeable risk of human rights violations. It would be difficult for the state to claim that they did not have the capacity to refrain from transferring.<sup>104</sup>

In addition, states also have a due diligence obligation with regard to private actors. Traditionally, a state can be held responsible for acts committed by private non-state actors, such as arms manufacturers, when the private conduct is attributable to the state.<sup>105</sup> However, the Human Rights Committee broadens this legal duty for private actors through the mechanism of due diligence. According to the General Comment on Article 6, a state can be responsible for the human rights violation of a private actor because it failed to prevent this violation from happening.<sup>106</sup> Hence, the state would have violated its due diligence obligation to protect the right to life.

The Inter-American Court of Human Rights confirms this viewpoint and seems to be more prone and willing to establish positive obligations in the form of due diligence. In the case of *Velasquez Rodriguez v. Honduras*,<sup>107</sup> the IACtHR mentioned that the indirect attribution to the state is possible “not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”.<sup>108</sup>

Moreover, the EU Common Position is not limited by jurisdiction. Therefore, the link with Article 6(2) can more easily be established and its obligations seen as relevant. Criterion two of the EU Common Position imposes a due diligence obligation for the sending state.<sup>109</sup> Prior to an arms export, the sending state needs to evaluate the human rights risks related to a certain transfer.<sup>110</sup> The sending state has the obligation to assess the recipient state’s attitude towards respecting human rights obligations.<sup>111</sup> The threshold, however, for the risk assessment remains ambiguous since the EU Common Position uses two different assessment thresholds, namely ‘might be used’ and ‘clear

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<sup>104</sup> MONHNHEIMER, M., *supra* n. 25, at 301.

<sup>105</sup> HRC, General comment No. 36 on article 6 (right to life) of the International Covenant on Civil and Political Rights (CCPR/C/GC/36)(2019), §3.

<sup>106</sup> *Id.*, at §7.

<sup>107</sup> IACtHR, 29 July 1988, *Velásquez-Rodríguez v. Honduras*, 35 OAS/ser. L/V/III.19, doc. 13, 172.

<sup>108</sup> HOFSTOTTER, B., *supra* n. 104, at 530.

<sup>109</sup> The difference with the obligations under article 7 ATT is that article 6 holds absolute export prohibitions, while the obligations in article 7 are much weaker (due to the notion of “peace and security” which includes national security concerns, and the use of “overriding risk” which is a much vaguer concept than “clear risk” used in the EUCP). Articles 6 and 7 provide a two-step process, meaning that the determination of a prohibition (under article 6) always precedes the export assessment (article 7). Meaning that if a relevant obligation falls under article 6 this would lead to an absolute prohibition and the more vague export assessment would then not be necessary anymore.

<sup>110</sup> SCHLIEMANN, C. & BRYK, L., “Arms Trade and Corporate Responsibility”, *Friederich-Ebert-Stiftung* (2019) 2, 4: Available at <http://library.fes.de/pdf-files/iez/15850.pdf> (last accessed at 15 August 2020).

<sup>111</sup> *Id.*, at 212.

risks'.<sup>112</sup> As a result, the sending state would have to refuse the authorization of an arms transfer to a country where there is a 'clear risk' of their subsequent use for human rights violations. What this 'clear risk' is precisely, would then depend on the quality of the information obtained by the European sending state.<sup>113</sup> When no clear risk can be established, the sending state has to adopt a 'certain vigilance and special caution' in issuing licences, provided that human rights violations have already occurred in the recipient state.<sup>114</sup> Consequently, it could be argued that a state breaches its due diligence obligation when authorising a transfer to a country where there is a clear risk of human rights violations or when it neglects being cautious.<sup>115</sup> Moreover, these obligations entail "a description of the related goods, their quantity, their technical specifications, the buyer and the proposed end user" in a formal written notification from the government.<sup>116</sup>

In 2019 the Belgian Council of State (the highest administrative court) suspended and annulled several arms transfer licences granted by the regional government of Wallonia, which has the competence under Belgian law to decide on licences for the region Wallonia. The Council decided that the regional government had breached the due diligence obligation of the EU Common Position. The Council of State held that, given the lack of assessment by the government, the authorizations for the export of weapons to Saudi Arabia were not lawful.<sup>117</sup> A similar decision was made by the UK Court of Appeal in 2019, which put on hold British arms companies' exports to Saudi Arabia in connection with the Yemen conflict by ruling that "it was irrational and therefore unlawful for the Secretary of State to proceed as he did", meaning that proper assessment procedure should have been followed by the Secretary of State.<sup>118</sup> The Court said that "the most important reason for making such assessments is that, without them, how was the Secretary of State to reach a rational conclusion as to the effect of the training, support or other inputs by the UK, or the effect of any high level assurances by Saudi authorities?" Thus, the Court made a clear observation that the UK government had made no thorough attempt to assess past and current violations.<sup>119</sup> Hence, the UK government had failed its due diligence obligation. Nevertheless, it must be noted that this latter case was ruled on breaches of the European Common Position rules on international humanitarian law, as opposed to international human rights law.

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<sup>112</sup> MARTINEZ, A.A.B., "A Balance of Risks: The Protection of Human Rights in International Arms Trade Agreements", *Security and Human Rights* (2018) 199, 212.

<sup>113</sup> *Id.*, at 210.

<sup>114</sup> *Id.*, at 213.

<sup>115</sup> SCHLIEMANN, C. & BRYK. L., *supra* n. 110.

<sup>116</sup> MARTINEZ, A.A.B., *supra* n. 112, at 213.

<sup>117</sup> SCHLIEMANN, C. & BRYK. L., *supra* n. 110, at 10.

<sup>118</sup> UK Court of Appeal, 20 June 2019, Campaign Against Arms Trade (CAAT) v. The Secretary of State for International Trade, Case No. T3/2017/2079, paragraph 145.

<sup>119</sup> *Id.*



These due diligence obligations seem to imply a paradigm shift. Whereas a state could previously only be held responsible when it had the full knowledge that the transported weapons would be used to commit human rights violations, there seems to be a shift towards the prevention of human rights violations via arms transfers.<sup>120</sup> The important aspect of the due diligence obligation is, thus, that it adds an extra dimension, that of prevention of human rights violations, which in case of negligence can then engage the legal responsibility of the state.<sup>121</sup>

Thus, while human rights due diligence was already long accepted within the states' jurisdiction, there is also an emerging consensus that it applies to arms transfer decisions. This should not only be regarded as an obligation in arms transfer regimes but also as a human rights obligation in itself. Among other benefits, this would greatly enhance enforcement of human rights obligations since it offers victims a legal instrument that can sanction noncompliance with human rights law. Following this approach, human rights obligations would prohibit, or at least restrict, arms transfer if it is foreseeable that they will be used to commit human rights violations.<sup>122</sup>

To conclude, through the mechanism of due diligence, the sending state can be held responsible for human rights violations committed by a third party, which are normally not attributable to the sending state. Hence, states are under the obligation to prevent human rights violations, as described in the EU Common Position and the ICCPR. It is not relevant whether the violation was committed by a private actor or the state itself. Therefore, due diligence is an indirect means of attributing responsibility to the state. States are under the "primary, generic obligation of international law"<sup>123</sup> to exercise due diligence in order to prevent<sup>124</sup> arms transfers that result in human rights violations in the recipient state. Consequently, as the due diligence obligation is a relevant obligation under Article 6(2), a State Party to the ATT would be prohibited under Article 6(2) from authorising an arms transfer, if the transfer would violate the State Party's due diligence obligation in the EU Common Position, the ECHR and the ICCPR.

#### 4.5.2 Broader understanding of extraterritoriality and jurisdiction

The traditional approach of human rights law partly ignores the current reality of globalisation and interdependence of international private and public actors in the global legal and political order.<sup>125</sup> A territorial and conservative approach to human rights law that merely wishes to protect individuals

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<sup>120</sup> MARTINEZ, A.A.B., *supra* n. 112, at 213.

<sup>121</sup> TZEVELEKOS, V., *supra* n. 15, at 153.

<sup>122</sup> MONNHEIMER, M., *supra* n. 25, at 306.

<sup>123</sup> *Id.*

<sup>124</sup> COOMANS, F. & KAMMINGA-MENNO, *supra* n. 22, at 255.

<sup>125</sup> SKOGLY, S. & GIBNEY, M., "Introduction" in SKOGLY, S. & GIBNEY, M. (eds.), *Universal Human Rights and Extraterritorial Obligations*, University of Pennsylvania Press, 2010, (1) 2.



against the state whose territory they find themselves on or under whose control they are is gravely inadequate to ensure universal protection of human rights.

A more expansive reading of jurisdiction is thus necessary to achieve the promise of universality of human rights law - to ensure human rights for everyone, everywhere.<sup>126</sup> Notably, a state's accession to a human rights treaty indicates a level of support and promise of devotion towards the protection and the well-being of all people everywhere. Limiting these promises to national borders would make the accession to an international or regional human rights treaty meaningless, as this would not be needed for a state to protect its own people.<sup>127</sup> A more expansive reading of jurisdiction would thus be preferable.

An argument can even be made for abolishing the notion of jurisdiction. A new concept of extraterritorial obligations would then not be based on effective control but on the question whether the state has the potential to affect human rights. The starting point would be to determine whether the state has the potential to, either directly or indirectly, violate human rights where they operate. This would refer to the failure to respect, protect and fulfil human rights.<sup>128</sup> This would be similar to what is currently laid down in the Maastricht Principles, namely that the state has obligations when it can exercise decisive influence or when they can take measures to realise the rights.<sup>129</sup> Adding new principles in soft law, that could subsequently evolve into customary law, does not in itself aid in broadening the scope of article 6(2), as customary law and soft law cannot be seen as "relevant international obligations under international agreements to which it is a Party". It is necessary that the understanding of extraterritorial obligations within the treaties takes on a broader scope and that States and international bodies accept broader obligations.

Progressive interpretations that plead for a so-called 'quantum leap' in human rights law are widely supported in legal scholarship and support seems to be growing. Three elements indicate that an evolution is taking place in this regard.

Firstly, there is a trend in the adoption of conventions and protocols that recognize a state's international, or extraterritorial, obligations and responsibility.<sup>130</sup> For instance, the more recent

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<sup>126</sup> GIBNEY, M., *supra* n. 16, at 797.

<sup>127</sup> *Id.*

<sup>128</sup> KANALAN, I., "Extraterritorial State Obligations Beyond the Concept of Jurisdiction", *German law Journal* (2018) 43, 55.

<sup>129</sup> *Id.*, at 56.

<sup>130</sup> NYONGESA WABWILE, M., "Universal Human Rights and States' International Responsibility" in MIHR, A. & GIBNEY, M. (eds.), *The SAGE Handbook of Human Rights*, SAGE Publications, 2014, (994) 1006.

Convention on the Rights of Persons with Disabilities does not contain any jurisdiction clause and recognizes a state's extraterritorial responsibilities to promote, respect and ensure these rights.<sup>131</sup>

Secondly, the UN bodies, such as those issuing General Comments, seek to clarify and affirm that states have extraterritorial obligations.<sup>132</sup> For instance, in the General Comment No. 36 on the right to life, the UN Human Rights Committee states that “[t]he State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner”.<sup>133</sup> Moreover, the Inter-American Court has stated that regarding the environment and human rights a jurisdictional link is established “when the State of origin exercises effective control over the activities carried out that caused the harm and consequent violation of human rights”.<sup>134</sup> Thus, both statements refer rather to the control of the state on the rights of a person and the realisation thereof, instead of control over a person or a territory.<sup>135</sup>

We can see a similar trend in the German Constitutional Court's judgement of 19 May 2020.<sup>136</sup> The case concerned the surveillance performed by the German intelligence services of non-Germans living outside of Germany and whether this violated the right to privacy as protected under the German Constitution.<sup>137</sup> Before going into detail the Court had to determine whether the fundamental rights protected in the constitution extend beyond the German territory. While answering that question the German Constitutional Court validated the control over rights doctrine. The surveillance of non-Germans living outside the German territory does not fall under the traditional control over a territory nor the control of a person theory.<sup>138</sup> Even though the Court did not explicitly mention the control over

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<sup>131</sup> OHCHR, “The Convention on the Rights of Persons with Disabilities - Training Guide”, available at [https://www.ohchr.org/Documents/Publications/CRPD\\_TrainingGuide\\_PTS19\\_EN%20Accessible.pdf](https://www.ohchr.org/Documents/Publications/CRPD_TrainingGuide_PTS19_EN%20Accessible.pdf) (Last accessed at 29 January 2021), 92.

<sup>132</sup> NYONGESA WABWILE, M., *supra* n. 130, at 1006.

<sup>133</sup> HRC, General comment No. 36 on article 6 (right to life) of the International Covenant on Civil and Political Rights (CCPR/C/GC/36)(2018), §63.

<sup>134</sup> IACtHR, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, IACtHR, Series A No. 23 2017, §104.

<sup>135</sup> CALI, B., “Has ‘Control of Rights Doctrine’ for extraterritorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn”, available at <https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/> (last accessed at 29 January 2021).

<sup>136</sup> Id.; BVerfG, Judgment of the First Senate of the Federal Constitutional Court, 19 May 2020, Federal Intelligence Service – foreign surveillance, 1 BvR 2835/17.

<sup>137</sup> Id.

<sup>138</sup> CALI, B., *supra* n. 135.

rights theory in that way, it did refer to some interesting aspects. The Court relied on international human rights law and referred to the current realities of the increasing involvement of states beyond their borders and the internationalised political action<sup>139</sup> and stated that ruling otherwise “would result in a situation where the fundamental rights protection of the Basic Law could not keep up with the expanding scope of action of German state authority and where it might – on the contrary – even be undermined through the interaction of different states. Yet the fact that the state as the politically legitimated and accountable actor is bound by fundamental rights ensures that fundamental rights protection keeps up with an international extension of state activities”.<sup>140</sup> Additionally, the Court also referred to the uncertainties on the interpretation of extraterritorial jurisdiction of the ECHR.<sup>141</sup>

Finally, as we can see with the making of the Maastricht Principles, scholars and academics devote themselves towards elaborating more on the doctrine of extraterritoriality.<sup>142</sup>

Hence, it can be said that a process is taking place towards a more progressive interpretation of jurisdiction and extraterritoriality within human rights law. However, this process is still very limited and not sufficient to overcome the hurdles resulting from the more limited approach towards jurisdiction.

#### 4.5.3 The potential of good faith in treaty interpretation

The assessment where states can transfer arms to third states that use them for human rights violations seems contradictory to the good faith requirement. States parties to a treaty have the duty not to go against the object and purpose of that treaty. According to Article 26 of the Vienna Convention on the Law of Treaties (VCLT) every treaty must be performed in good faith.<sup>143</sup>

In the narrow sense, this obligation means that states have to comply with the wording of the treaty. However, it is not limited to such a narrow reading as it is also possible for a state to breach its good faith obligation when they do not specifically breach a treaty obligation but nevertheless act in a way that is not in accordance with the object and purpose of said treaty.<sup>144</sup> In circumstances where there would be an arms transfer that goes against the object and purpose of a human rights treaty, in the case where this does not lead to a violation of the state’s obligations because of the jurisdictional limits, one could argue that there is a violation of Article 26 VCLT. However, there is no indication that

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<sup>139</sup> BVerfG, Judgment of the First Senate of the Federal Constitutional Court, 19 May 2020 , Federal Intelligence Service – foreign surveillance, 1 BvR 2835/17, §96.

<sup>140</sup> Id.

<sup>141</sup> Id., §97.

<sup>142</sup> NYONGESA WABWILE, M., *supra* n. 130, at 1006.

<sup>143</sup> Article 26 Vienna Convention on the Law of Treaties, signed 23 May 1969, UN Treaty Series, vol. 1155, 331.; LINDERFALK, U., “What Are the Functions of the General Principles? Good Faith and International Legal Pragmatics”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2018) 1, 4.

<sup>144</sup> DÖRR, O. & SCHMALENBACH, K., *Vienna Convention on the Law of Treaties: A Commentary*, Springer, 2018, 584.

the VCLT falls under the scope of Article 6(2) because it cannot be seen as an obligation that is “relevant”.<sup>145</sup>

Nevertheless, the good faith requirement entails that the state parties of the ATT have to perform their treaty obligations in good faith. Consequently, when states act in the light of Article 6(2), they have to do so in accordance with the object and purpose of the ATT. As a result, it could be said that transferring arms to a government that violates human rights would be going against the object and purpose of the ATT.<sup>146</sup> Since one of the objectives of the ATT is “contributing to peace and security”, which is the first pillar of the UN, Stuart Casey-Maslen Gilles Giacca and Tobias Vestner believe that the second objective of the ATT, which is “reducing human suffering”, implicitly includes human rights and development, two of the three other UN pillars.<sup>147</sup> Otherwise reducing human suffering would be rather general.<sup>148</sup> It can thus be concluded that authorising an arms transfer that would violate human rights would go against the principle of good faith in treaty law, and therefore breaches a state’s obligation in terms of the VCLT under international law. While this would not lead to a transfer prohibition in the sense of article 6(2), due to the lack of “relevance” of the VCLT and the exclusion of general principles, it would still be a violation of the state’s obligation under international law.

## 6. Recommendations

The specific wording of article 6(2) ATT brings a lot of challenges in opening the treaty for human rights obligations. The scope is limited to obligations in binding agreements or instruments, to the detriment of customary law and other human rights norms not part of binding agreements.

While the relevance of human rights law for arms trade is undeniable and states parties rightly include these obligations as “relevant international obligations” in their reports, the issue in including human rights in article 6(2) lies in finding a violation of the sending state. This indicates that the current state of human rights law does not acknowledge the effects of globalisation on human rights.

In order to overcome this difficulty, it is recommended to:

- 1) Broaden and develop the doctrine of extraterritoriality.
- 2) Consider states’ due diligence obligations under human rights instruments and the EU Common Position.
- 3) Ensure respect for the obligation to implement the ATT in good faith.

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<sup>145</sup> The good faith obligation is also a principle of international law, however, general principles of international law do not fall under the scope of Article 6(2) ATT. It is important to note that violating the good faith obligation actually does not mean that a state violates the respective human rights treaty itself, but instead the VCLT or the general principle, meaning that this does not lead to violation of a human rights obligation that would make it applicable under Article 6(2) ATT.

<sup>146</sup> NAHAPETIAN, K., *supra* n. 45, at 113.

<sup>147</sup> CASEY-MASLEN, S., GIACCA, G. & VESTNER, T., *supra* n. 11, at 17.

<sup>148</sup> *Id.*

Firstly, it is recommended to further evolve the doctrine of extraterritoriality beyond control over persons or territory. A doctrine based on the control over persons' rights, instead of over persons or territory, allows a much broader range of violations to be attributed to the transferring state. This would ensure that states cannot transfer arms to other states, where they are aware that these would be used for human rights violations. The traditional territorial approach to human rights law does not always allow us to establish that a transferring state would violate its relevant international obligations under human rights law solely by transferring arms. Nevertheless, certain human rights obligations that are not limited expressly or implicitly to the territory or control of the transferring state (e.g. the right to self-determination in article 1(3) ICCPR). For these obligations, it would be possible to conclude that they can be violated by arms transfers.

Regarding provisions that are territorially limited, due diligence can offer relief. Both the Human Rights Committee and the IACtHR support a broad view of due diligence for the right to life and it is recommended that states follow this. Moreover, the EU Common Position might be a relevant instrument that requires more stringent human rights due diligence and economic and social considerations and that does not limit itself through jurisdiction clauses. The inclusion of human rights due diligence for arms control in article 6 would significantly strengthen the human rights protection of the ATT. While this is arguably already a part of article 7 on export assessments, including it into article 6 would lead to a stronger protection. Namely, when a state does not properly conduct its human rights due diligence for arms transfers, this transfer should be prohibited on the basis of article 6(2) since the transfer would violate its relevant international human rights obligation in an international agreement. Article 7, on the other hand, allows for some sort of loophole since the state must decide whether there is an "overriding risk" that the arms could be used to commit or facilitate a serious violation of IHRL. Moreover, the inclusion of human rights law into article 6(2) would not merely be limited to those violations that are "serious".

Finally, states would violate the principle of good faith in the VCLT and the corresponding general principle of law by authorising arms transfers when they are aware that these would be used to commit human rights violations. This broad obligation ensures that states cannot transfer in these cases and it must always be considered prior to authorization.

In conclusion, while it is currently difficult to establish a violation of binding human rights conventions by the transferring state, this does not mean that all hope is lost. Article 6(2) is an evolving provision that will stand the test of time and remain relevant while human rights law progresses.



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