The Intersections Between the Arms Trade Treaty and the International Law of Foreign Intervention in Situations of Internal Unrest

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1. Introduction

In December 2014, the Arms Trade Treaty (ATT) entered into force[3] and for the first time provided 'common international standards on the import, export, and transfer of conventional arms'.[4] The ATT contains a series of provisions affecting a state's decision to transfer or authorise the transfer of arms to foreign states or authorised non-state actors.[5] In particular, the ATT requires the arms-exporting state to assess whether the recipient of the arms is likely to commit international law violations with the transferred arms, including serious violations of International Humanitarian Law (IHL) and International Human Rights Law (IHRL). For this reason, the ATT can not only be seen as outlining a common international legal framework regulating the international transfer of arms, but also as contributing to shaping up the practice related to foreign intervention in situations of internal unrest. Indeed, interventions can occur not only by dispatching combat troops in support of one of the factions, but also – and more frequently - by supplying weaponry and other war *matériel*.

Through an analysis of the two core provisions of the ATT – Articles 6 and 7 – this article explores their interaction with the customary norms on foreign intervention in situations of internal unrest, namely the principles of non-intervention and of internal

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[3] Arms Trade Treaty (adopted 2 April 2013 UNGA Res 67/234B, entered into force 24 December 2014) 3013 UNTS 315 (hereafter 'ATT').
[4] General Assembly, Resolution 61/89 of 6 December 2006.
[5] Arms can be supplied either by a foreign state directly or by private entities after being granted an export license by state authorities. In this article, the expression 'arms exporting state' refers to both roles played by the state.

self-determination and the prohibition of the use of force. After delineating both the treaty and the customary regimes, this article will compare them and will identify potential conflicts. It will also explore how these conflicts can be reconciled and how the two regimes can reinforce each other.

Before proceeding, a word of caution. What the present article focuses on is how compliance with and implementation of the ATT can affect the customary obligations of its states parties with regard to arms transfers to countries in internal unrest.[6] It does not claim, explicitly or implicitly, that the provisions of the ATT reflect existing customary international law.[7]

2. Arms transfers and the law of foreign intervention before the UN Charter

In the XIXth century, the international law of foreign intervention was essentially based on the distinction between rebellions and insurrection on one side and recognition of belligerency on the other.[8] When, in a civil war, an incumbent government and/or third states recognized the belligerency of the insurgents, the latter were no longer considered common criminals but acquired a limited international legal personality entailing certain rights and obligations under international law: more specifically, recognition of belligerency by the government rendered the laws of war applicable in the conflict, while recognition of belligerency by third states activated the law of neutrality in the relations between them and the belligerents.[9] The consequence of the latter was that third states

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[6] As *lex specialis*, a multilateral treaty can derogate customary *lex generalis* for its states parties and, when the treaty enjoys general adherence, it can be considered as the new *lex generalis*. Yoram Dinstein, 'The Interaction between Customary International Law and Treaties', 322 Collected Courses of the Hague Academy of International Law 2006, 407; more generally, see *Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) I.C.J. Reports 1982, para 24; Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of a Study Group of the International Law Commission, 58th Session, (UN Doc A/CN.4/L.682, 2006), 39-40, 45.

[7] Cf. Chiara Redaelli, *Intervention in Civil Wars: Effectiveness, Legitimacy, and Human Rights* (Hart Publishing 2021), 170; Tom Ruys, 'Of Arms, Funding, and "Non-Lethal Assistance" – Issues Surrounding Third-State Intervention in the Syrian Civil War' (2014) 13 Chinese Journal of International Law, 29.

[8] For a discussion of the significance of this classification, see Marco Roscini, 'Intervention in XIXth Century International Law and the Distinction between Rebellions, Insurrections and Civil Wars' 50 *Israel Yearbook on Human Rights* (2020) 269-303.

[9] Andrew Clapham, *Brierly's Law of Nations* (7th edn, OUP 2012) 154. According to Art 8 of the Neuchâtel Resolution of the *Institut de droit international*, to be recognized as belligerents by third states the insurgents must have gained control of a certain part of the national territory, set up a provisional government that exercises the rights attached to sovereignty over that territory, and conduct hostilities with

could not supply arms to any of the belligerents if they wanted to benefit from the advantages of neutral status but, unless otherwise provided in a treaty or in domestic legislation,[10] had no obligation to also prohibit the private arms trade as long as they did not discriminate between the belligerents.[11] It is important to emphasize that, even though recognition of belligerency by third states normally took the form of, or resulted from, a proclamation of neutrality, neutrality was not an *obligation* automatically arising from recognition of belligerency. In other words, if a request to respect the rights of neutrals necessarily implied recognition of belligerency (as there cannot be neutrality in a technical sense without at least two belligerents),[12] a recognition of belligerency by third states in other forms (e.g., a declaration of recognition *expressis verbis*, or the acquiescence in the exercise of belligerent rights by the parties to the civil war beyond national territory), and all the more a recognition of belligerency by the incumbent government, did not necessarily entail neutrality. Indeed, recognition of belligerency merely acknowledged the existence of a war in the legal sense between a government and its subjects and considered it 'as much as if it was waged between two independent nations'.[13] If the civil war had to be treated 'as if' it was an interstate conflict, third states could either remain neutral *or* support one of the belligerents and become at war with the other.[14]

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organized troops, submitted to military discipline and consistently with the laws and customs of war (text in (1900) (20) *Annuaire de l'Institut de droit international* 227).

[10] In the additional articles to the 1814 Treaty of Friendship and Alliance with Spain, for instance, Britain committed 'to take the most effectual measures for preventing his Subjects from furnishing Arms, Ammunition, or any other warlike article to the revolted in America' (Art III). The text of the articles is in *British and Foreign State Papers 1812-1814*, vol I - Part I (1841) 292.

[11] Article 7 of Hague Conventions V, in particular, distinguishes between the transfer of arms as a state policy and as a commercial transaction and provides that '[a] neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet'. An almost identical text is contained in Article 7 of Hague Convention XIII. Convention respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910), Article 7 ('Hague Convention V'); Convention concerning the Rights and Duties of Neutral Powers in Naval War (adopted 18 October 1907, entered into force 26 January 1910) ('Hague Convention XIII'), Article 7. See also Erik Castrén, *Civil War* (Suomalainen Tiedeakatemi 1966), 200-201. On the occasion of the capture of the French steamer *Syrie*, responsible for contraband of arms in favour of the Libyan rebels against Italy in Cyrenaica, for instance, the Italian Ambassador in Paris relied on 'the most recent international law scholarly works' to argue that third states must not intervene, neither diplomatically nor militarily, in an armed conflict between a state and its subjects, although they are not required to prevent the supply of arms, ammunition, and funding by their nationals (Romano Avezzana to Mussolini, Paris, 25 February 1924, ASE, P 1919-30, 1398 <http://www.prassi.cnr.it/prassi/content.html?id=2750>).

[12] US Supreme Court, *The Three Friends* (1897) 166 U.S. 1, 63, at 76.

[13] US Supreme Court, *Ford v Surget* (1878) 97 U.S. 594, at 611.

[14] This appears to be also the view of some contemporary scholars including James Crawford, *The Creation of States in International Law* (2nd edn, OUP 2006) 381; Mohamed Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes* (Librairie Génerale de Droit et de Jurisprudence R Pichon et R Durand-Auzias 1974, 18; Richard A Falk, 'Janus Tormented: The International Law of Internal War' in

In a mere rebellion or insurrection, on the other hand, third states had to comply with the customary principle of non-intervention, which allowed third states to assist a foreign government to regain control of its country upon its valid request and prohibited any support for the insurgents.[15] Even before recognition of belligerency was granted, however, in the absence of an alliance treaty providing otherwise, third states could have always remained mere spectators and refrained from assisting any of the parties involved in the internal unrest, adopting a position that can be called, for want of a better expression, of 'negative equality' with respect to the rebellion or insurrection.[16] Negative equality could have been an obligation assumed by treaty but was more frequently a unilateral decision made on the basis of political considerations, and should not be confused with neutral status in a technical sense and with non-intervention.[17] If – as Dinstein writes - '[t]he two pillars of the laws of neutrality are non-participation and non-discrimination'[18] and if the principle of non-intervention allows both participation and discrimination in favour of one party (the incumbent government), negative equality only

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James N Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press 1964) 185, at 203; Schwarzenberger, *International Law*, vol II, 573; and Alberto Miele, *L'estraneità ai conflitti armati secondo il diritto internazionale*, vol II (CEDAM 1970) 495.

[15] See Art 1(3) of the 1928 Havana Convention on the Duties and Rights of States in the Event of Civil Strife, LNTS, vol CXXXIV, 45 (hereafter 'Havana Convention'). The 1957 Protocol to the Havana Convention also prohibits 'the exportation or importation of any shipment of arms and war material intended for starting, promoting, or supporting civil strife in another American state'. Protocol to the Convention on Duties and Rights of States in the Event of Civil Strife (adopted 1 May 1957) 284 UNTS 201 (hereafter, 'Havana Protocol') text at <http://www.oas.org/juridico/english/treaties/a-27.html> accessed 13 February 2022, Article 1(c). See also Articles 2(2) and 7 of the Resolution on the rights and duties of foreign Powers as regards the established and recognized governments in case of insurrection, adopted at the 1900 Session of Neuchâtel by the *Institut de droit international*, text available at <https://www.idi-iil.org/app/uploads/2019/06/Annexe-1bis-Compilation-Resolutions-EN.pdf> accessed 14 February 2022, 113. 'Rebellion' was used to refer to "a sporadic challenge to the legitimate government by a faction within a state for the purpose of seizing power" (RP Dhokalia, "Civil Wars and International Law" (1971) 11 *Indian J. Int'l L.*, 224). Insurrection (or insurgency), on the other hand, referred to a factual situation where there was "a more sustained and substantial internal conflict when the groups in revolt against the government of the state are sufficiently well-organized to offer effective resistance with the object of obtaining control of the government and to prevent the access of supplies from outside states" (ibid, 225). What distinguished an insurrection from a mere rebellion, therefore, was the fact that in the former the situation had gone "beyond the control of the *de jure* government, by the magnitude of the hostilities and the consequent uncertainty of the result" (Quincy Wright, "International Law and the American Civil War" (1967) 61 *ASIL Proceedings* 51).

[16] The expression 'negative equality' is employed by the International Fact-Finding Commission on the Conflict in Georgia (Report of the Independent International Fact-Finding Commission on the Conflict in Georgia, vol II, 277-8) and is often used by contemporary scholarship on intervention by invitation to refer to an obligation not to assist either the government or the armed opposition group(s) when a civil war breaks out. See eg Erika de Wet, *Military Assistance on Request and the Use of Force* (OUP 2020) 77).

[17] While the principle of non-intervention and neutrality were, respectively, an obligation and a status under customary international law, negative equality could only result from a treaty or unilateral declaration.

[18] Yoram Dinstein, *War, Aggression and Self-Defense* (6th edn, CUP 2017) 27.

means that, in addition to not supporting insurgents, the third state has also opted not to intervene on the side of the government in spite of its request: it entails, therefore, non-participation on either side but not necessarily non-discrimination as the insurgents still do not have belligerent rights. While '[a] neutral nation may, if it is so disposed, without a breach of its neutral character, grant permission to both belligerents to equip their vessels of war within its territory',[19] for instance, in case of negative equality the third state could only deny, but not grant, such permission to both the governmental and rebel ships, as it would still be required to deliver the war or merchant ships equipped by the rebels that entered its ports to the incumbent government of the state in civil strife.[20] Furthermore, unlike in a negative equality regime, neutral states must acquiesce to certain limitations to their freedoms and those of their nationals, in particular the right of the belligerents to visit and search neutral ships on the high seas, to blockade, and to confiscate contraband.[21]

3. Arms transfers and situations of internal unrest in contemporary customary international law

In the period which follows the end of the Second World War and the entry into force of the Charter of the United Nations,[22] new customary rules and principles consolidate, with the result that, even when belligerency has not been granted, the principle of non-intervention is no longer is the only legal regime applicable to arms transfers during situations of internal unrest but needs to be reconciled with the prohibition of the use of force, the principle of self-determination, and the protection of human rights.

3.1 The principle of non-intervention, the prohibition of the use of force, and arms transfers in situations of internal unrest

The principle of non-intervention in the internal affairs of other states is still the default legal regime which applies in the relation between third states and that in internal unrest.

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[19] US Supreme Court, *The Divina Pastora*, (1819) 17 U.S. 52, at 71.
[20] Article 3 of the 1928 Havana Convention.
[21] Montague Bernard, *A Historical Account of the Neutrality of Great Britain during the American Civil War* (Longmans 1870) 113.
[22] Charter of the United Nations (adopted 26 June 1945, entered into force 26 June 1945) 1 UNTS XVI (hereafter 'UN Charter').

As the principle only prohibits *coercive* interferences,[23] an intervention that has been validly consented by the territorial sovereign would fall outside the scope of the prohibition as it would not constitute an 'intervention' at all. Consent is required not only to avoid a violation of the principle of non-intervention, but also, if the extraterritorial act in question involves the use of armed force, that codified in Article 2(4) of the UN Charter,[24] which prohibits force 'against' a state.

Both the principle of non-intervention and the prohibition of the use of armed force, on the other hand, prevent states from providing any support to insurgents fighting against another state's government, regardless of their invitation.[25] It is the mere fact of supporting insurgents, and not the motives for doing so, that counts for the violation of the principle of non-intervention, which is breached even if the intervening state does not intend to overthrow the foreign government.[26] For our purposes, it is worth recalling that, in *Nicaragua v USA*, the International Court of Justice (ICJ) found that not only the dispatch of troops but also the arming and training of insurgents constitutes a violation of the prohibition of the use of force.[27]

Does the principle of non-intervention not only prohibit third states to supply arms to insurgents, but also require them to prevent their nationals from doing so? [28] In his 1966 classic monograph on civil wars, Castrén applies the same principle of the law of neutrality to internal armed conflicts and argues that third states are not required under customary international law to prohibit assistance of a private nature to insurgents.[29] It has been argued, however, that, as arms exports are now subordinated to a licence system in virtually all states,[30] the distinction between public and private transfers is difficult to

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[23] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, para 205 (hereafter '*Nicaragua v USA*').
[24] UN Charter, Article 2(4).
[25] In *Nicaragua v USA*, the ICJ unequivocally held that intervention cannot occur at the request of an opposition group. *Nicaragua v USA*, paras 209, 246.
[26] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, para 163 (hereafter '*DRC v Uganda*').
[27] *Nicaragua v USA*, para 228.
[28] The supply of arms to Zaire in the Second Shaba War (1978), for instance, was carried out not by the Belgian government, but by Belgian firms (Jean JA Salmon and Michel Vincineau, 'La pratique du pouvoir exécutif et le contrôle des chambres législatives en matière de droit international (1977-1978)' (1980) 15 *Revue belge de droit international* 433, at 629).
[29] Castrén, *Civil War*, 125-6.
[30] For an overview of the licence systems of the major arms-exporting states, see Laurence Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (Bloomsbury 2020).

maintain and 'private arms exports proper are virtually non-existent'.[31] Obligations for states to forbid the traffic of arms and war material and 'to prevent any person, national or alien, from deliberately participating in the … contribution, supply or provision of arms and war material' are indeed contained, respectively, in the 1928 Havana Convention on Duties and Rights of States in the Event of Civil Strife and its 1957 Protocol.[32] The *Institut de droit international*'s Wiesbaden Resolution on the Principle of Non-Intervention in Civil Wars, adopted in 1975, also requires states not only not to provide weapons and military instructors to any party in a civil war, but also not to allow them to be supplied or sent.[33] In the current state of international law, however, it would be difficult to convincingly demonstrate that this obligation reflects customary international law as, if it is true that states no longer defend their nationals' right to sell weapons, 'the sentiment of legal obligation … seems diluted in considerations of moral dictate or political suitability'.[34]

3.2 The role played by the principle of internal self-determination

The principle of non-intervention formed as a corollary of the sovereign equality of states. In particular, it is one of the legal instruments protecting state sovereignty, which has both a territorial and decisional dimension: the former is a state's exclusive jurisdiction on a defined portion of the globe,[35] while the latter, also known as political independence, entails that a state may 'conduct its affairs without outside interference'.[36] This political independence includes the narrower right to 'internal' self-determination,[37]

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[31] George P Politakis, 'Variations on a Myth: Neutrality and the Arms Trade' (1992) 35 *German Yearbook of International Law* (hereafter 'Variations'), 494. According to the German Manual of the Law of Armed Conflict, '[s]tate practice has modified the former contractual rule that a neutral State is not called upon to prevent the export and transport of war materiel by private persons for the benefit of one of the Parties to a conflict … If the export of war materiel is State controlled, allowing such export is considered an unneutral service' (Joint Service Regulation (ZDv) 15/2, Law of Armed Conflict – Manual, May 2013, para 1209). Illegal arms transfers escaping the licensing system would not be attributable to states.

[32] Havana Convention, Article 1(3); Havana Protocol, Articles 1(c), 5.

[33] *Institut de droit international*, 'Le principe de non-intervention dans les guerres civiles', Wiesbaden, 13 August 1975, Article 2(2) [1975] 56 *Annuaire de l'Institut de droit international* 544 (hereafter 'Wiesdaben Resolution').

[34] Politakis, 'Variations', 506.

[35] *Island of Palmas case (Netherlands v USA)*, 4 April 1928, United Nations, *Reports of International Arbitral Awards*, vol II, 838 (hereafter *Island of Palmas*).

[36] *Nicaragua v USA*, para 202.

[37] The International Law Commission's Draft Declaration on the Rights and Duties of States, for instance, affirms that '[e]very State has the right to independence and hence to exercise freely, without dictation by any other state, all its legal powers, *including* the choice of its own form of government' (text in [1949]

i.e. to determine one's own political, economic, social, and cultural systems without external interferences, a right which is expressly incorporated in the 1948 Charter of the Organization of American States (OAS),[38] General Assembly Resolutions 2131 (1965) and 2625 (1970),[39] and other resolutions,[40] as well as in the 1975 Helsinki Final Act.[41] That this right is not only the flipside of the duty of non-intervention but also has its separate identity results clearly from the letter of Article 12 of the 1947 Inter-American Treaty of Reciprocal Assistance (Rio Treaty), according to which nothing in the treaty 'shall be interpreted as limiting or impairing in any way the principle of nonintervention *and* the right of all states to choose freely their political, economic and social organization'.[42] The UN Committee on Human Rights highlighted the link but also the distinction between internal self-determination and non-intervention in its General Comment on Article 1 of the 1966 International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) where it affirmed that '[s]tates must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination'.[43]

Yearbook of the International Law Commission 286; emphasis added): it is this latter aspect that we now call 'internal self-determination'.

[38] Charter of the Organization of American States (adopted 30 April 1948) 119 UNTS 47 (hereafter OAS Charter), Article 3(e).

[39] GA Resolutions 2131 and 2625 contain a more succinct version of Art 3(e) of the OAS Charter and add the cultural system to those that every state has the right to freely choose without external interferences. General Assembly Resolution 20/2131 of 21 December 1965; General Assembly Resolution 25/2625 of 24 October 1970.

[40] See, in particular, the resolutions on the elimination of coercive economic measures as a means of political and economic compulsion, such as General Assembly Resolutions 51/22 of 6 December 1996 (para 1) and 53/10 of 3 November 1998 (para 2).

[41] Final Act of the 1st CSCE Summit of Heads of State or Government, Helsinki, 1 August 1975, Principle I <https://www.osce.org/it/mc/39504>. The Helsinki Final Act also refers to the right of a state to determine its own laws and regulations.

[42] Inter-American Treaty of Reciprocal Assistance and Final Act of the Inter-American Conference for the Maintenance of Continental Pace and Security (adopted 2 September 1947, entered into force 3 December 1948, amended 26 July 1975), 21 UNTS 77, 14 ILM 1122 (emphasis added). See also OAS General Assembly Resolution 78 (II-0/72) of 21 April 1972 entitled Strengthening of the Principles of Non-intervention and the Self-Determination of Peoples and Measures to Guarantee their Observance.

[43] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereafter ICCPR), Article 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), Article 1; UN Doc A/39/40, 1984, 143. Several states have also noted that the principles of non-intervention and self-determination, although distinct, are closely inter-connected, including Bolivia (UN Doc A/PV.677, 13 September 1957, 1467), Denmark (ibid, 1464), Belgium (UN Doc S/PV.746, 28 October 1956, 32), Cuba (UN Doc S/PV.752, 2 November 1956, 16), France (ibid, 19), United States (UN Doc A/33/216, 21 September 1978, 32), Chile (UN Doc A/C.1/SR.1402, 8 December 1965, para 44), El Salvador (UN Doc A/44/PV.88, 10 January 1990, 33), and UAR (UN Doc A/C.1/SR.1403, 9 December 1965, para 3 and A/C.6/SR.875, 15 November 1965, para 40).

The principle of internal self-determination imposes an obligation of negative equality on third states whenever a process for the modification of a state's political system has been set in motion, either by ballot or by bullet. In the latter situation, it is essential to identify what situations of internal unrest trigger the application of the principle under consideration, as '[i]f, in the event of even the slightest symptoms of an internal conflict, relations with the government were to be suspended, inter-state contacts would be virtually impossible'.[44] As the most serious form of internal unrest, the occurrence of a 'civil war' is the quintessential violent means to modify a state's political system.[45] A 2007 note to the UN Assistant Secretary-General for Political Affairs regarding the usage of the term 'civil war' defines it as 'a notion of two warring factions within a State … fighting for the control of the political system or secession, each having effective control over parts of the State territory'.[46] This definition differs from that of non-international armed conflict (NIAC) in IHL in two important elements. First, if the purpose pursued by the armed group is irrelevant for the application of the *jus in bello* rules (apart from the case of 'national liberation movements'),[47] in the context of the law of foreign intervention a civil war has always been conceived as an armed conflict where one of the parties is an organised armed group with political objectives (normally the overthrow of the incumbent government or the secession of part of the state's territory).[48] The political objectives of the insurgents, however, are insufficient on their own to trigger an obligation of negative equality: a small group of pro-democracy protesters clearly does not represent a sufficient challenge to the incumbent's authority so to constitute a process for the modification of their state's political system. The degree of internal unrest, therefore, also

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[44] JH Leurdijk, 'Civil War and Intervention in International Law' (1977) 24 *Netherlands International Law Review* 143, at 146.

[45] See, among others, Castrén, *Civil War*, 17-18, 21-22.

[46] [2007] United Nations Juridical Yearbook 459.

[47] The International Criminal Tribunal for the former Yugoslavia (ICTY), in particular, found that '[t]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant' (ICTY, *Prosecutor v Limaj et al*, Judgment (Trial Chamber) (IT-03-66-T), 30 November 2005, para 170).

[48] Article 1 of the Wiesbaden Resolution defines a civil war as 'opposition between established government and one or more insurgent movements whose aim is to overthrow the government or the political, economic or social order of the State, or to achieve secession or self-government for any part of that State', or between such armed groups in the absence of an established government. See also Marco Pertile, *Diritto internazionale e rapporti economici nelle guerre civili* (Editoriale Scientifica 2019) 111; Bennouna, *Le consentement*, 14; Ross R Oglesby, 'A Search for Legal Norms in Contemporary Situations of Civil Strife' (1970) 3 *Case Western Resource Journal of International Law*, 34; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 318; Roger Pinto, *Les règles du droit international concernant la guerre civile*, 114 Collected Courses of the Hague Academy of International Law 1965, 464; Dhokalia, 'Civil Wars', 219; Tullio Treves, *Diritto internazionale* (5th edn, Giuffrè 2005) 177-8.

plays a significant role: the more widespread and serious the political opposition to the incumbent, the more under threat the principle of internal self-determination in case of foreign armed intervention to quell it. More specifically, the internal unrest must have led to the loss of effective control by the incumbent government over parts of the national territory.[49] Partial loss of territorial control by the incumbent does not per se result in loss of its governmental status (at least until it continues to offer more than nominal resistance),[50] but is the strongest indication that an internal process for the modification of the political system of the concerned state is under way. This is most evident when the insurgents have also established an alternative administration over the territory they control and thus exercise some form of governance over a collectivity of people to the exclusion of the incumbent.[51]

Even though there are important dissenting voices,[52] several authors now maintain that, whenever a situation of internal unrest becomes a civil war, third states are prevented by the principle of internal self-determination from intervening in the conflict on any side by sending combat troops.[53] There are also indications of a growing reluctance to accept that third states can transfer or grant licences for the export of arms to governments

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[49] Control of territory, in particular, is one of the requirements for recognition of belligerency by third states. As Jennings and Watts put it, '[s]o long as the government is in overall control of the state and internal disturbances are essentially limited to matters of local law and order or isolated guerrilla or terrorist activities, it may seek assistance from other states which are entitled to provide it. But when there exists a civil war and control of the State is divided between warring factions, any form of assistance amounts to intervention contrary to international law' (Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law*, vol I (9th edn, OUP 1996) 438).

[50] Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 93-4.

[51] This scenario has been termed 'rebelocracy' *(*Ana Arjona, 'Wartime Institutions: A Research Agenda' (2014) 58 *J Conflict Resol* 1375). As an English court has noted, the notion of government does not necessarily need to correspond to 'Western ideas', as 'different types of a structure may exist … which may legitimately come within the ambit of an authority, which wields power sufficient to constitute an official body' (*R v Zardad (Faryadi)*, 7 April 2004, para 33).

[52] See eg Yoram Dinstein, *Non-International Armed Conflicts in International Law* (2nd edn, CUP 2021) 98-102; de Wet, *Military Assistance*, 76-83.

[53] Charles Chaumont, 'Analyse critique de l'intervention américaine au Vietnam' (1968) 4 *Revue belge de droit international*, 75; Wolfgang Friedmann, 'United States Policy and the Crisis of International Law: Some Reflections on the State of International Law in "International Co-operation Year"' (1965) 59 *American Journal of International Law*, 866; Rein Mullerson, 'Intervention by Invitation' in Lori Fisler Damrosch and David J. Scheffer (eds), *Law and Force in the New International Order* (Westview Press 1991), 132; Quincy Wright, 'Non-Military Intervention' in Karl W. Deutsch and Stanley Hoffman (eds), *The Relevance of International Law. Essays in Honor of Leo Gross* (Schenkman 1968), 17-8; Oscar Schachter, 'International Law: The Right of States to Use Armed Force' (1984) 82 *Michigan Law Review*, 1641; Louise Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government' [1985] 56 *British Year Book of International Law*, 243; Georg Nolte, *Eingreifen auf Einladung* (Springer 1999) 562-3; Theodore Christakis and Karine Bannelier-Christakis, '*Volenti non fit injuria*? Les effets du

involved in a civil war.[54] The problem is that, unlike that related to the dispatch of combat troops, state practice with regard to this form of intervention is not accompanied by sufficiently clear *opinio juris*: said otherwise, it remains uncertain whether states actually believe that arming a government involved in a civil war is unlawful.[55] A negative answer seems suggested by the fact that, differently from those in favour of insurgents, pro-government arms transfers during a civil war are often publicly acknowledged by states, rarely justified in legal terms, and even more rarely condemned.[56] When states do take an official position, the illegality claims are based on the violation of UN Security Council (UNSC) resolutions imposing arms embargoes or of treaty obligations, but not of internal self-determination.[57] All in all, a complete withdrawal of existing assistance to a government exactly when it is most needed would never be, or be perceived as, an impartial act, as it would result in an advantage for the opposition.[58]

While the black letter formulation of the principle of internal self-determination as it appears in the OAS Charter and in General Assembly Resolutions 2131 and 2625 is comprehensive enough to prohibit *any* third state intervention in a civil war, therefore, this is not reflected in state practice and *opinio juris*, which distinguish between

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consentement à l'intervention militaire' (2004) 50 *Annuaire français de droit international* 120; Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Bloomsbury 2021), 274-278.

[54] Several states, for instance, do not grant permits for export of arms to countries where a civil war is taking place. See, among others, Politakis, 'Variations', 487, 490. Foreign Affairs Minister Lavrov also claimed that Russia's supply of arms to Syria aimed 'to support Syria's defense capabilities in the face of external political threat, and not to back Bashar al-Assad' ('Russia supplying arms to Syria under old contracts: Lavrov', Reuters, 5 November 2012 <https://www.reuters.com/article/us-syria-crisis-russia-arms/russia-supplying-arms-to-syria-under-old-contracts-lavrov-idUSBRE8A40DS20121105> accessed 14 February 2022).

[55] While Britain continued to provide arms to the Batista government against the Castro insurgents in Cuba until a couple of months before its demise, for instance, the Minister of State defended the sale of seventeen fighter aircraft by arguing that '[a]t the time the sales were approved there was no evidence that the insurgent elements in Cuba had more than a limited measure of support in some parts of the Eastern Provinces of Cuba' (Elihu Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law' (1959) 8 *International and Comparative Law Quarterly*, 157). For Lauterpacht, this might suggest that, if the insurgents had had more substantial control of territory or popular support, the British government would have felt compelled not to supply the aircraft to the Cuban government (ibid). Lauterpacht acknowledges, however, that the decision could have been made on the basis of political considerations. The US government also initially continued to supply arms to the Batista government, but, after the Cuban dictator suspended the constitution and the insurgents gained control of territory, the shipments were suspended (14 March 1958) (Roscoe Ralph Oglesby, *Internal War and the Search for Normative Order* (Springer 1971) 120-1). It is however unclear whether the United States suspended the shipments of arms out of a sense of a legal obligation arising from the fact that the insurgency had reached a certain threshold or because of criticism from members of the Congress and from the press. The Cuban government claimed that the suspension of the supply of arms was a violation of the Havana Convention (ibid, 121).

intervention by sending combat troops (prohibited) and other lesser forms of intervention (tolerated).[59] This leads to a 'paradox' where 'providing war *matériel* to the established government in a fully-fledged civil war is illegal as a matter of general principle [but] such assistance is almost always deemed lawful in practice'.[60] As a result, the principle of internal self-determination as an all-embracing prohibition of any foreign intervention in a civil war is a treaty obligation binding on the OAS member states but not (yet) customary international law.

4. The Arms Trade Treaty

The ATT is the first global treaty regulating the international circulation of conventional weaponry.[61] The core of this treaty lies in its Articles 6 and 7.[62] On the one hand, Article 6 directly bans transfers when these contravene certain obligations of the arms-exporting state, or the arms-exporting state is aware of the possible unlawful use of the arms by the recipient state.[63] On the other, '[i]f the export is not prohibited under Article 6', Article 7 outlines a series of criteria for a multifaceted pre-export assessment, which might lead to the obligation of halting a transfer.[64]

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[56] Brad R Roth, *Governmental Illegitimacy* (OUP 2003), 186. In the 1967-1970 Nigerian Civil War, France and other countries denied any supply of arms to the Biafran insurgents, while that to the government by Britain and the USSR was officially acknowledged (Bennouna, *Le consentement*, 90-1). In the Congo conflict of the 1960s, the United States provided military *matériel* and training assistance to the Congolese government, claiming that most African countries were also receiving it in the exercise of their own sovereign right (UN Doc S/PV.1174, 14 December 1964, para 97). Another illustration comes from the Laotian Civil War (1959-1975): while the airstrikes against the communist insurgency were not acknowledged by the United States, the supply of military aid to Prince Souvanna Phouma's government and to anti-communist rebels was admitted by the State Department (*Keesing's Contemporary Archives* (1961-2), 17975, 18561). In the Nepalese Civil War (1996-2006), India, United States, Belgium, and United Kingdom also provided arms, military equipment, helicopters, and training to the Royal Nepalese Army against the Maoist insurgency (Gyan Pradhan, 'Nepal's Civil War and Its Economic Costs' (2009) 1(1) *Journal of International and Global Studies*, 118). More recently, no country has suggested that the supply of arms by Russia and Iran to the Assad government in the Syrian Civil War is illegal, although some have considered it politically reproachable. Christian Henderson, The Provision of Arms and 'Non-Lethal Assistance to Governmental and Opposition Forces' 36(2) *The University of New South Wales Law Journal*, 699.

[57] See for instance the statements made by Belgium and the United States in the UNSC in relation to the military cooperation between Libya's Government of National Accord (GNA) and Turkey (UN Doc S/PV.871030 January 2020, 8, 14).

[58] Ann Van Wynen Thomas and A J Thomas, *Non-Intervention: the Law and Its Import in the Americas* (Southern Methodist University Press 1956), 218; Michael J Matheson, 'Practical Considerations for the Development of Legal Standards for Intervention' (1983) 13 *Georgia Journal of International and Comparative Law*, 207-8; Tom J Farer, 'Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife' (1969) 82 *Harvard Law Review*, 531; Dietrich Schindler, 'Le principe de non-

Whilst not without its deficiencies,[65] the ATT contains two important novelties. First, the ATT is not only concerned with the transfer of arms involving unauthorised non-state actors, which is the traditional definition of illicit trafficking of arms,[66] but it also specifically regulates state-to-state arms transfers, breaking with the traditional approach which mainly focused on banning arms transfers directed to non-state actors [67] Secondly, the ATT internationalises the approach adopted in the domestic legislation and policies of some major arms-exporting states and requires state organs to assess the impact of the transfer of arms.[68] The ATT thus delegates the decision on transferring arms to individual arms-exporting states, which need not wait for a determination by the UNSC and its adoption of an arms embargo.[69]

4.1 The Scope of the ATT

Before analysing the content of the provisions of Articles 6 and 7, it is important to outline the scope of application of the ATT and consider what types of weaponry, related

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intervention dans les guerres civiles', Rapport provisoire, in *Annuaire de l'Institut de droit international*, vol 55, 1973, 469-70 ; Roth, *Governmental Illegitimacy*, 180.

[59] In literature, the view that there is no prohibition of intervention short of sending troops in support of a government involved in a civil war has been argued by, among others, Rosalyn Higgins, 'Intervention and International Law' in Bull (ed), *Intervention in World Politics* (Clarendon Press 1984), 41; Louis B Sohn, 'Gradations of Intervention in Internal Conflict', (1983) 13 *Georgia Journal of International and Comparative Law* 225, at 227-8; Doswald-Beck, 'The Legal Validity', 251; Tom Ruys, 'Of Arms', 44.

[60] Roth, *Governmental Illegitimacy*, 185.

[61] Stuart Casey-Maslen and others, *The Arms Trade Treaty: A Commentary* (OUP 2016), 3–7; Matthew Bolton and Katelyn E James, 'Nascent Spirit of New York or Ghost of Arms Control Past? The Normative Implications of the Arms Trade Treaty for Global Policymaking' (2014) 5 *Global Policy* 439.

[62] ATT, Articles 6, 7.

[63] ATT, Article 6.

[64] ATT, Article 7.

[65] See, among others, Laurence Lustgarten, 'The Arms Trade Treaty: Achievement, Failings, Future' (2015) 64 *International & Comparative Law Quarterly* 569; Anna Stavrianakis, 'Legitimizing Liberal Militarism: Politics, Law and War in the Arms Trade Treaty' (2016) 37 *Third World Quarterly* 840-855; Peter Woolcott, 'Introduction' in Clare Da Silva and Brian Wood (eds), *The Arms Trade Treaty: Weapons and International Law* (Intersentia Uitgevers NV 2021) 1-4.

[66] See, for example, 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 (adopted 31 May 2001 UNGA Res 55/255, entered into force 3 July 2005) 2326 UNTS 208, Article 3(e) (hereafter UN Firearms Protocol).

items, and types of transfer are regulated by this treaty.[70] A brief examination of Articles 2, 3, and 4 – the provisions outlining the scope of the ATT – is also essential to appreciate the impact of the ATT on the customary international law of foreign intervention. The ATT concerns seven categories of major conventional weapons (MCW) – battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers – and small arms and light weapons (SALW).[71] The ATT does not define these eight categories of weaponry, but it prescribes that state parties shall not adopt definitions that are less comprehensive than those contained in the United Nations Register of Conventional Arms (UNROCA) for the MCW, and of 'relevant United Nations instruments' for SALW, at the time of the entry into force of the ATT.[72] The definition of weaponry for legal purposes at the international level has never been an easy and straightforward task.[73] The difference in national policies, military tactics, and strategies among the states taking part in the drafting of disarmament treaties, along with the fast development of military technology, have always led to definitions or descriptions based on compromises.[74] The ATT's eight categories are no exception to this approach, which results in gaps in the limitation of arms transfers also during internal unrest. For example, 'armoured combat vehicles', the second category, is described as

> [t]racked, semi-tracked or wheeled self-propelled vehicles, with armoured protection and cross-country capability, either: (a) designed and equipped to transport a squad of

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[67] Riccardo Labianco, 'Public International Law and the Responsibility of Arms-Exporting States' (PhD thesis, SOAS University of London 2021) 124–132.
[68] For an outline of current domestic legislation and policy on the matter, see, among others, Lustgarten, *Law and the Arms Trade*, 103-277.
[69] See, for example, Riccardo Labianco, 'The Parliamentary Practice of Italy on Arms Export: The Cases of Libya, Somalia, Saudi Arabia, Qatar, Ukraine and Egypt.' (2017) 26 Italian Yearbook of International Law, 604; Gillard, 'What's Legal?', 35.
[70] For a more detailed discussion of these aspects, see Casey-Maslen and others, *A Commentary*, 58–136; Paul Holtom, 'Article 2: Scope' in Da Silva and Wood (eds), *The Arms Trade Treaty*, 24–57.
[71] ATT, Article 2(1).
[72] ATT, Article 5(3).
[73] On the process to define SALW internationally, see, Zeray Yihdego, *The Arms Trade and International Law* (Hart Publishing 2007), 13-48. For an outline of the issues regarding the definition of 'weapons of war', Romain Yakemtchouk, *Les transferts internationaux d'armes de guerre* (A Pedone 1980), 16–22. See also the difficulties in the definition of regulated weaponry in the Brussels General Act of 1890, one of the first international treaties on the matter, Yakemtchouk, *Les transferts*, 53–56.
[74] See, for example, Lustgarten, *Law and the Arms Trade*, 402–409; Casey-Maslen and others, *A Commentary*, 79, 84, 91, 95, 98, 103, 120.

four or more infantrymen, or (b) armed with an integral or organic weapon of at least 12.5 millimetres calibre or a missile launcher.[75]

The lack of one of the requirements listed in the description leads to exclude certain military vehicles from the scope of application of the ATT, such as tactical utility vehicles without armoured protection, motorcycles, as well as vehicles 'specifically designed, or modified and equipped' to perform reconnaissance or target indication missions or equipped with 'means designed for electronic warfare'.[76] Another similar problematic gap of the ATT definitions concerns the fifth category, attack helicopters, which does not include military helicopters designed for the transport of personnel.[77] Furthermore, whilst the eight ATT categories cover a large number of types of weapons, there are some types of technology that have slipped through the net. For example, as pointed out by some commentators, devices and technology for electronic and cyber warfare or surveillance do not fall within the scope of the ATT.[78] The result is that the ATT only overlaps with the law of foreign intervention with regard to the transfers of certain types of weapons.

Articles 3 and 4 of the ATT also include 'ammunition/munitions' and 'parts and components' in the scope of application of Articles 6 and 7. More specifically, Article 3 requires states to apply Articles 6 and 7 to the export of ammunition/munitions 'fired, launched or delivered by the conventional arms' of the eight categories described earlier.[79] As noted by some authors, the use of the 'fired, launched or delivered' language leads to the exclusion of explosives that are 'placed' by hand, such as those used as 'demolition charge', or thrown, as in the case of hand grenades.[80]

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[75] Continuing operation of the United Nations Register of Conventional Arms and its further development UN Doc A/58/274 (13 August 2003), Annex IV, 51.
[76] Casey-Maslen and others, *A Commentary*, 80.
[77] ibid 95.
[78] Lustgarten, *Law and the Arms Trade*, 404. On what constitutes a 'cyber weapon' in the context of the *jus ad bellum* and *jus in bello*, see Marco Roscini, *Cyber Operations and the Use of Force in International Law* (OUP 2014) 49-52.
[79] ATT, Article 3.
[80] Casey-Maslen and others, *A Commentary*, 145. For Amnesty International, for instance, this language results in excluding devices such as tear-gas grenades. See 'Arms for Internal Security Will They Be Covered by An Arms Trade Treaty' (Amnesty International 2011) <https://www.amnesty.org/en/documents/ACT30/120/2011/en/> accessed 14 February 2022.

With regard to 'parts and components', for which no generally agreed definition exists,[81] article 4 requires states to control and regulate the export of those items used to 'assemble the conventional arms' of the aforementioned eight categories.[82] Unlike other instruments regulating dual-use goods, the ATT refers to 'the export' and not the nature of the goods.[83] Accordingly, even goods with an apparent civilian use might fall within the scope of this provision if they are aimed at assembling conventional weaponry. It has been pointed out that a strict literal interpretation of article 4, in the part where it refers to the assembling of the weaponry, might exclude parts and components that can be used to repair the arms.[84] Another exclusion could involve those parts and components related to the manufacturing of ammunition.[85]

More generally, the presence of these two categories in Articles 3 and 4 is consistent with the aim of preventing the functioning of weaponry already in the hands of the recipient state which are intended or likely to be used to commit violations of international law. Indeed, it is not infrequent that, after the reception of weapons included in the eight ATT categories, the importing state remains dependent on the exporting state for the procurement of ammunition, parts and components.[86] Furthermore, the inclusion of parts and components has an anti-circumvention purpose:[87] not only does it avoid that the control on transfers of regulated weaponry is deflected by disassembling the weapon itself but also prevents that transfers of parts and components directed to manufacturing sites on the territory of the recipient state go unchecked.[88]

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[81] Casey-Maslen and others, *A Commentary*, 160–161.
[82] ATT, Article 4.
[83] Casey-Maslen and others, *A Commentary*, 161–162.
[84] Andrew Wood, 'Article 4: Parts and Components' in Da Silva and Wood (eds), *The Arms Trade Treaty*, 81.
[85] Casey-Maslen and others, *A Commentary*, 163.
[86] For example, it is not infrequent that states purchasing complex weaponry technologies, such as military aircraft, develop a dependent relationship with the arms-exporting states for the provision of ammunition, parts, and components. Christian Catrina, *Arms Transfers and Dependence* (Taylor & Francis - United Nations Institute for Disarmament Research 1988), 229–234. For an illustration, see Riccardo Labianco, 'Spain Tries to Limit Arms Sales to Saudi Arabia – but Following International Law Is Expensive' (*The Conversation*, 14 September 2018) <http://theconversation.com/spain-tries-to-limit-arms-sales-to-saudi-arabia-but-following-international-law-is-expensive-102936> accessed 14 February 2022.
[87] Casey-Maslen and others, *A Commentary*, 140-141, 156-158, 159-160.
[88] This has been the case of Myanmar, where, after years of arms embargoes, the country developed its own domestic arms manufacturing sector. See 'The economic interests of the Myanmar military', 55-59; Miles Vining, 'Seeking Supplies: Developments of Small Arms Production and Industry in Myanmar' (*Medium*, 4 August 2020) <https://smallarmssurvey.medium.com/seeking-supplies-developments-of-small-arms-production-and-industry-in-myanmar-e2fb72daccd7> accessed 14 February 2022.

Finally, Article 2(2) of the ATT describes the term 'activities of the international trade' as comprising 'export, import, transit, trans-shipment and brokering' which are all later indicated as 'transfer'. While Article 6 applies to 'any transfer', which includes all the above activities, Article 7 only applies to exports, which, although not defined in the treaty itself, has been interpreted as '[t]he act of taking out or causing to be taken out any goods from the Customs territory'.[89] It is unclear whether gifting weaponry or leasing weaponry fall within the scope of Article 2(2).[90] The inclusion of gifts and leases within the scope of the ATT was opposed by some states, including China,[91] and the point was not clarified in the final version of the treaty, leaving, as reported by some commentators, 'constructive ambiguity' on the point.[92] Article 2(3) also clarifies that international movements of weaponry undertaken 'by, or on behalf of' a state 'for its use do not fall within the scope of the ATT, 'provided that the conventional arms remain under' the ownership of that state.[93] This is a typical exception that has always been, directly or indirectly, introduced in talks on the regulation of conventional arms transfer.[94] It is aimed at covering those transfers of *matériel* directed to troops stationed overseas.[95] Nevertheless, this provision also indirectly regulates the cases of the so-called 'left-behind' weapons, namely situations where foreign troops transfer their weaponry to local authorities before leaving the country. In this case, the transfer of ownership 'defuses' the Article 2(3) exception, imposing ATT obligations on the actors or entities engaged in the transfer.[96] From this perspective, Article 2(3) further defines the definition of transfer of the previous paragraph, providing a *sui generis* exceptional case of export of arms occurring after their physical movement.[97]

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[89] World Customs Organization, 'Glossary of International Customs Terms' (December 2018) available at <www.wcoomd.org/-/media/wco/public/global/pdf/topics/facilitation/instruments-and-tools/tools/glossary-of-international-customs-terms/glossary-of-international-customs-terms.pdf> accessed 14 February 2022, 18; Revised Kyoto Convention, Annex C (adopted June 1999, entered into force 3 February 2006) available at <unstats.un.org/unsd/trade/ws%20bangkok06/workshop%20materia17yotooto%20convention.pdf> accessed 14 February 2022.

[90] Lustgarten, *Law and the Arms* Trade, 401–402.

[91] Holtom, Article 2: Scope, 30–31.

[92] Casey-Maslen and others, *A Commentary*, 66.

[93] ATT, Article 2(3).

[94] See, for example, Report of the Panel of Governmental Technical Experts on the Register of Conventional Arms" UN Doc A/47/342 (14 August 1992) (1992 Report of the Panel of Governmental Technical Experts on the Register of Conventional Arms), 10.

[95] Casey-Maslen and others, *A Commentary*, 67–68, 131–136; Lustgarten, *Law and the Arms Trade*, 401. See also the 1992 Report on the UNROCA, on which the drafters of the ATT relied (1992 Report of the Panel of Governmental Technical Experts on the Register of Conventional Arms, 10, para 12).

[96] Casey-Maslen and others, *A Commentary*, 131–136.

[97] Labianco, 'Public International Law', 140-142.

4.2 Prohibitions

The first part of the core of the ATT is its Article 6, titled 'Prohibitions'. The first two paragraphs of Article 6 ban transfers that would breach obligations arising from 'measures adopted by the United Nations Security Council acting under Chapter VII' of the UN Charter, such as arms embargoes,[98] and obligations based on obligations arising from 'international agreements' to which the authorising state is a party.[99] As to the former, the wording of the paragraph appears to refer not only to the implementation of arms embargoes established by the UNSC but also to obligations arising from other Chapter VII resolutions.[100] Whilst UNSC arms embargoes generally tend to have a broader scope of application than the ATT, it has been claimed that Article 6(1) can be seen as instrumental to strengthen their respect and effective implementation.[101]

Article 6(2) refers to 'international agreements to which' the authorising state is a party. These agreements include those 'relating to the transfer of, or illicit trafficking in, conventional arms',[102] such as the 2001 UN Firearms Protocol and analogous regional agreements. Interestingly, according to these treaties, a transfer of arms becomes illicit if, among other things, 'any one of the States Parties concerned does not authorize it in accordance with the terms' of the Firearms Protocol.[103] Despite the lack of an explicit prohibition to transfer arms to non-state actors,[104] the reference in Article 6(2) to treaties on the illicit-trafficking of arms can be seen as an endorsement of the prohibition of

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[98] ATT, Article 6(1).
[99] ATT, Article 6(2).
[100] An example that has been made is UNSC Resolution 1540 (2004), requiring states not to support in any way the development of weapons of mass destruction by non-state actors. Clare Da Silva and Penelope Nevill, 'Article 6: Prohibitions' in Da Silva and Wood (eds), *The Arms Trade Treaty*, 109–110.
[101] Da Silva and Nevill, 'Article 6: Prohibitions', 108–110.
[102] ATT, Article 6(2).
[103] UN Firearms Protocol, Article 3(e); Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other related Materials, adopted by the Twenty-Fourth Special Session of the General Assembly of the Organisation of American States (14 November 1997) entered into force 1 July 1998 (CIFTA), Article I(2); Protocol on the Control of Firearms, Ammunition and Other Related Materials in The Southern African Development Community (SADC) Region (adopted 14 August 2001, entered into force 8 November 2004) (SADC Protocol), Article 1(2); The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (adopted 21 April 2004, entered into force 5 May 2005) (Nairobi Protocol), Article 1; Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (adopted 30 April 2010, entered into force 8 March 2017) (Kinshasa Convention), Article 2(h).
[104] Casey-Maslen and others, *A Commentary*, 195.

transfers to that type of actors as well. Beyond agreements on the illicit trafficking of weaponry, Article 6(2) also refers to other treaties binding the authorising state.[105] Some commentators have suggested that this can include treaties on corruption practices connected to the transaction[106] or human rights treaties.[107] Arms transfers that are likely to divert resources that should be devoted to human development and the 'full realization of' economic, social and cultural rights have also been claimed to be banned as a consequence of the joint application of Article 6(2) of the ATT, Article 26 of the UN Charter, and Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), among others.[108]

Article 6(3) refers to situations in which the authorising state

> has knowledge at the time of the authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilians objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.[109]

Article 6(3) is the first provision that explicitly refers to the conduct of the recipient of the arms. On the one hand, this paragraph imposes an obligation to undertake a predictive assessment like the previous paragraphs of Article 6. On the other hand, it differs from them due to its explicit reference to the rules against which the recipient's conduct must be assessed. An important aspect of Article 6(3) is that the authorising state must have 'knowledge' of the possible violation. Limiting the 'knowledge' to actual knowledge

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[105] ATT, Article 6(2).
[106] Casey-Maslen and others, *A Commentary*, 200–201.
[107] Cf. Da Silva and Nevill, 'Article 6: Prohibitions', 119–120. Even though human rights treaties do not ban or regulate arms transfers per se, certain states include them in the scope of Article 6(2). See, for example, 'Adoption of the ATT by the General Assembly Political Declaration delivered by Mexico on behalf of 98 States' (2 April 2013). A human rights treaty that has been applied to halt the transfer of arms is the 1948 Genocide Convention. Admittedly, however, in this case, ICJ required at least constructive knowledge and based the obligation to halt the transfer on the obligation to prevent genocide in the 1948 Convention. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, paras 430-431 (hereafter *Genocide* case); Annyssa Bellal, 'Arms Transfers and International Human Rights Law', in Stuart Casey-Maslen (ed), *Weapons under International Human Rights Law* (CUP 2015), 457–458.
[108] UN Charter, Article 26; ICESCR, Article 2(1).
[109] ATT, Article 6(3).

would assimilate this provision to a situation of complicity in the commission of an unlawful act.[110] Nevertheless, Article 6(3) appears to be more a norm aimed at *preventing* certain conduct similarly to the ICJ's findings in the *Corfu Channel* and *Genocide* cases, where the Court applied the 'should have known' (constructive knowledge) standard.[111] 'Constructive knowledge' is also justified by the object and purpose of the ATT,[112] which clearly states that it was adopted to reduce 'human suffering' through the establishment of 'highest possible common international standards' in the regulation of conventional arms transfers.[113] All in all, limiting the application of Article 6(3), and Article 6 in general, to scenarios where the arms-exporting state has actual 'knowledge of the circumstances of the internationally wrongful act', or where such knowledge can be inferred from the seriousness of the violations, appears to be too a restrictive interpretation of the provision.[114] Instead, the arms-exporting state should be required to use its 'privileged position' to anticipate possible breaches of the rules listed in Article 6(3).[115] Interestingly, Article 6(3) uses the same approach of Article 6(2), as it requires the arms-exporting state to assess the recipient's possible conduct against norms prohibiting war crimes as 'defined by international agreements' to which the authorising state is a party.[116] A state party to the Rome Statute of the International Criminal Court (ICC), for example, can refer to war crimes as defined therein,[117] even when the recipient state has not ratified the Statute itself.

4.3 Pre-Export Assessment

Article 7 addresses arms transfers that are not prohibited under Article 6 and bans those transfers that fail to pass a pre-export assessment. The arms-exporting state, however, is

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[110] Such as the ones outlined by Articles 16 or 40 and 41 of the Articles on the Responsibility of States for International Wrongful Acts. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), in Yearbook of the International Law Commission, 2001, vol II Part Two (hereafter ARSIWA), 65,112-113.

[111] See, for example, *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, I.C.J Reports 1949, 4 (hereafter *Corfu Channel* case), 18; *Genocide* case, para 432.

[112] Cf. Casey-Maslen and others, *A Commentary*, 204–208.

[113] ATT, Article 1.

[114] The two standards refer to ARSIWA, Articles 16 and 40 respectively.

[115] See, *mutatis mutandis*, Riccardo Labianco, 'UK-Saudi Arabia Arms Trade before the High Court: Questions Following the Judgment' (*Opinio Juris*, 2017) <http://opiniojuris.org/2017/09/13/uk-saudi-arabia-arms-trade-before-the-high-court-questions-following-the-judgment/> accessed 14 February 2022.

[116] ATT, Article 6(2)-(3).

[117] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (hereafter ICC Statute).

allowed to consider possible mitigating measures, which might decrease the level of risk associated with the transfer.[118] Arms-exporting states are required to assess the potential impact of transferring 'conventional arms or items' against a series of very heterogenous criteria.[119] First, according to paragraph 7(1)(a), the assessment needs to include consideration of whether the weaponry and items 'would contribute to or undermine peace and security'.[120] 'Peace and security' is not an expression defined in Article 7(1)(a), but it can be interpreted as referring to situations threatening or breaching international peace and security, as defined by the UN Charter and the practice of the UNSC.[121] From this perspective, it is worth recalling that the Council has defined systematic violations of human rights within the borders of a state as threats to international peace and security.[122] Nevertheless, as pointed out by some commentators, the absence of the qualifier 'international' in the ATT provision suggests that this expression is broader than that in the UN Charter and might also include situations of violence and insecurity within the borders of a state.[123] At the same time, the expression 'contribute to or undermine peace and security' allows arms-exporting states to claim that a recipient state needs weaponry as a consequence of the arms acquired by a rival country or to defeat insurgents operating on or threatening its territory.[124] These arguments have been used on a regular basis by the governments of arms-exporting states, including by Britain in the Biafran conflict,[125] and, more recently, by the US with regard to Saudi Arabia and its engagement in the Yemen Civil War.[126] Interestingly, the lack of a direct reference to the 'use' of the weapons and items in the provision opens up to the possibility of assessing the impact of the transfer on peace and security regardless of the actual use the weaponry.[127] For example, 'peace and security' might be undermined by the mere

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[118] On the issues related to the adoption of rules based on the concepts of risk and risk assessment in the field of the regulation of arms transfers, see Stavrianakis, 'Legitimizing', 840-855; Lustgarten, *Law and the Arms Trade*, 32–38.
[119] ATT, Article 7.
[120] ATT, Article 7(1)(a).
[121] Casey-Maslen and others, *A Commentary*, 254–255; see also Rüdiger Wolfrum, 'Article 1' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 109–110.
[122] See for example, UNSC Res 418 (4 November 1977), UNSC Res S/RES/418, UNSC Res 1556 (30 July 2004), UN Doc S/RES/1556. More generally, see Yihdego, *The Arms Trade*, 101–102.
[123] Casey-Maslen and others, *A Commentary*, 254–255.
[124] Ibid; more generally, see Stavrianakis, 'Legitimizing', 840-855.
[125] HC Deb 12 June 1968, vol 766, cols 243-300; HC Deb 12 June 1968, vol 766, cols 243-300. See also Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (Thames and Hudson 1972) 44–45.
[126] See, for example, Donald J Trump, 'S.J. Res. 36 Veto Message' (*The White House*, 24 July 2019) <https://www.whitehouse.gov/presidential-actions/s-j-res-36-veto-message/> accessed 13 February 2020.
[127] Casey-Maslen and others, *A Commentary*, 255–256.

delivery of arms if this emboldens a government to continue its hostilities against insurgents instead of reaching an agreement with them.

Article 7(1)(b) introduces another element of the assessment, which concerns the use of the weaponry and items at destination. This criterion refers to serious violations of IHL (i) and IHRL (ii), as well as acts 'constituting an offence under international conventions or protocols relating to' terrorism (iii) or transnational organised crime (iv) 'to which the exporting State is a Party'. 'Serious violations' of IHL have been defined as including grave breaches of the 1949 Geneva Conventions, Additional Protocol I, conventional and customary war crimes in both International Armed Conflicts (IACs) and NIACs.[128] In this category, some authors also include violations of Common Article 3 of the 1949 Geneva Conventions and violations of the Additional Protocol II to the Geneva Conventions when the violation 'infringe fundamental values or have serious consequences for individual civilians or the civilian population as a whole'.[129] Serious violations of IHRL, on the other hand, is an ill-defined concept. It has been suggested that it refers to either violations of customary IHRL, as the right to life, or peremptory norms, such as the prohibition of torture.[130] Alternatively, it could include systematic or widespread violations of any human right.[131]

Points 'iii' and 'iv' of Article 7(1)(b) concern conduct that is unlawful according to treaties binding the arms-exporting state despite it taking place outside its jurisdiction, in a similar fashion to Article 6(2). Interestingly, each of the abovementioned criteria refer to the use of the weaponry or items for the commission or the facilitation of one of the

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[128] This was the opinion by the ICRC during the drafting of the ATT, where the ICRC appeared to equate serious violations of IHL to war crimes. Nevertheless, some authors pointed out that there can be serious violations of IHL that do not amount to war crimes. See ICRC, 'What Are "Serious Violations of International Humanitarian Law"? Explanatory Note' <https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf> accessed 9 February 2022. For a more restrictive view in the context of IACs, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, CUP 2016), 298. Cf. Ed Robinson, 'Arms Exports to Saudi Arabia in the High Court: What Is a "Serious Violation of International Humanitarian Law"?' (*EJIL: Talk!*, 3 April 2017) <https://www.ejiltalk.org/arms-exports-to-saudi-arabia-in-the-high-court-what-is-a-serious-violation-of-international-humanitarian-law/> accessed 9 February 2022.

[129] Philippe Sands, Andrew Clapham and Blinne Ní Ghrálaigh, 'The Lawfulness of the Authorisation by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen' (2015) 51 <https://www.amnesty.org.uk/files/webfm/Documents/issues/final_legal_opinion_saudi_arabia_18_december_2015_-_final.pdf> accessed 14 February 2022; Robinson (n 156).

[130] ibid 260–261.

[131] ibid.

listed acts. This formulation extends the scope of the assessment to conduct leading to one of the listed violations, and not only the direct use of the weaponry.[132] All the criteria seen above inform the Article-7 pre-export assessment required from the arms-exporting state, which is allowed to take into account possible measures to mitigate the risk of violations, including 'confidence-building measures or jointly developed and agreed programmes' involving both the exporting and importing state.[133] If, in spite of the mitigating measures, the risk remains 'overriding', the prohibition to transfer the arms is triggered.[134]

Finally, according to Article 7(4), the assessment must also include an examination of the risk that the transferred weaponry and items could be used in the commission or facilitation of 'serious acts of gender-based violence or serious acts of violence against women and children.[135] Interestingly, the wording of this provision seems to suggest that, whilst it is part of the general assessment, this type of violation is not subject to mitigating measures or is able to trigger the prohibition of transfer contained in Article 7(3), unless the violation breaches one of the criteria of Article 7(1)(a)-(b).[136]

All in all, Article 7 outlines the content of and procedure for risk assessment in relation to arms transfers. This mechanism is clearly based on the assumption and acceptance of a certain degree of risk, indicated by the expression 'overriding risk', which is typical of norms regarding conduct not directly attributable to the controlling state.[137] The acceptance of some degree of risk also appears suggested by the general approach underpinning the ATT, which does not completely ban the circulation of conventional arms. Nevertheless, it is important to highlight that not all the criteria appear to have the same weight in the risk assessment. In relation to peace and security, the use of 'would' appears to require more certainty that the result will occur.[138] With regard to the Article 7(1)(b) criteria, including serious violations of IHL and IHRL, the use of 'could' allows to base the prediction on a more speculative ground than the previous criterion. This

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[132] ibid 255–256.
[133] ATT, Article 7(2).
[134] ATT, Article 7(3).
[135] ATT, Article 7(4).
[136] [136] Casey-Maslen and others, *A Commentary*, 276–278.
[137] See, for example, Phoebe Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (OUP 2000) 88–89; Julio Barboza, *The Environment, Risk and Liability in International Law* (Martinus Nijhoff Publishers 2011) 10–11.
[138] Casey-Maslen and others, *A Commentary*, 254.

difference in language conveys the difference in the weight of the criteria. Such a difference is particularly relevant for the balancing act between the weapons' positive contribution to peace of security and the suspicion of possible IHL and IHRL serious violations. In line with the approach adopted in other regimes, such as *non-refoulement* in case of torture,[139] security considerations can be overcome by the prospect of a serious violation of IHRL. Similarly, IHL norms cannot be set aside by claims based on military necessity falling outside the IHL normative framework.[140] In this sense, an arms-exporting state cannot ignore the risk of those serious violations on the basis of a positive contribution of the weaponry to peace and security. Finally, it is important to highlight that the arms-exporting state is 'encouraged' by Article 7 to repeat the assessment in case it acquires 'new relevant information'.[141] Even though the wording of this last paragraph does not convey a sense of obligation, this provision emphasises the importance of conducting a pre-export assessment based on up-to-date information. It has been suggested that this information must include the recipient state's past conduct, which can be important evidence to predict its future behaviour.[142]

5. The ATT and the customary international law of foreign intervention in situations of internal unrest: conflict of laws or systemic interaction?

As has been seen in the previous Sections, the scope of application of the ATT overlaps with the international customary law of foreign intervention (principle of non-intervention, principle of internal self-determination, prohibition of the use of armed force) when its states parties provide certain weapons to the factions in a situation of an internal unrest occurring in another country. The question that needs to be addressed is what the differences are between these legal regimes and how they mutually interact.[143]

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[139] See, for example, *Chahal v. UK* App no 22414/93 (ECtHR, 15 November 1996), para 79-80.
[140] Dinstein, *The Conduct*, 8-12
[141] ATT, Article 7(7).
[142] See, for example, 'Arms Transfers Decisions. Applying International Humanitarian Law and International Human Rights Law Criteria. A Practical Guide' (International Committee of the Red Cross 2016) 11. See also *R (Campaign Against Arms Trade) v Secretary of State for International Trade (Amnesty International and others intervening)* [2019] EWCA Civ 1020, paras 62, 118.
[143] On the possibility of the interaction between customary and conventional law, see Koskenniemi, 'Fragmentation', 39-40, 45.

The first difference is that the ATT applies regardless of the qualification of the situation of internal unrest, while the principle of non-intervention applies to situations of internal unrest short of civil war and that of internal self-determination to civil wars.[144] In the ATT framework, therefore, the aforementioned definitional problems faced by the negative equality doctrine of intervention are avoided as there is no need to identify different thresholds of internal unrest. By prohibiting arms transfers to an incumbent government as a consequence of its unlawful conduct even in situations short of civil war, the ATT incorporates the approach adopted by the *Institut de droit international*'s 2011 Rhodes Resolution on Military Assistance on Request, which applies to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, including acts of terrorism, below the threshold of non-international armed conflict in the sense of Article 1 of Protocol II Additional to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts of 1977' and which prohibits military assistance to any faction 'when it is exercised in violation of … generally accepted standards of human rights and in particular when its object is to support an established government against its own population'.[145] For the ATT parties, therefore, the lawfulness of arms transfers is not only dependent on a valid request by the incumbent government facing internal unrest, but also on its respect of the obligations listed in Articles 6 and 7 of the ATT.[146] It is worth recalling, however, that the ATT parties are not only required to assess the risk behind a transfer of arms, but they are also given the chance to mitigate that risk.[147] If, after the mitigation, the risk is not 'overriding', the Article 7 prohibitions are not triggered and customary international law continues to apply.[148]

On the other hand, the ATT is narrower in scope than the customary law of intervention with regard to the type of transferred arms which form the object of the prohibitions: while the principles of non-intervention and internal self-determination, as well as the prohibition of the use of force, do not distinguish between different types of weaponry (with the possible exception of 'non-lethal equipment'),[149] the ATT regime is not only

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[144] Above, Section 3.
[145] *Institut de droit international*, 'Military Assistance on Request', Rhodes, 8 September 2011, Articles 2(1) and 3(1), in *Annuaire de l'Institut de droit international*, vol 74, 2013, 278 (hereafter 'Rhodes Resolution').
[146] ATT, Articles 6 and 7; see also above, Sections 4.2 and 4.3.
[147] ATT, Article 7(2)-(3); see also above, Section 4.3.
[148] ATT, Article 7(3); see also above, Section 4.3.
[149] For an analysis of the legality of the supply of 'non-lethal equipment', see Henderson, 'The Provision', 648-650.

limited to the eight categories of conventional arms seen earlier,[150] but the central role played by the arms exporting state's authorisation and by the pre-export assessment can also have the effect of banning only the transfer of those types of arms which present a significant risk of breach of the listed obligations. In this sense, for example, the ATT might ban the transfer of SALW due to the risk of their being used by a government to violently suffocate popular demonstrations in violation of IHRL, but not the delivery of warships or military aircraft that are not associated with a specific risk.[151] Transfers of weaponry not linked to a breach of any of the criteria outlined in Articles 6 and 7 remain regulated by the customary law of foreign intervention, including the principles of non-intervention and internal self-determination.

Thirdly, while the principle of non-intervention and the prohibition of the use of force only prohibit third states to supply arms to oppositions groups but not to an incumbent government, the ATT does not distinguish between different factions and prohibits arms transfers to any of them whenever there is a risk of serious violations of IHL and IHRL, a threat to peace and security, and the breach of other selected norms of international law, some of which based on legal sources that only bind the arms-exporting state.[152] By doing so, the ATT imposes a treaty-based negative equality regime similar to that resulting from the application of the principle of internal self-determination in civil wars. There are, however, significant differences between the two regimes. Unlike that resulting from the principle of internal self-determination, the ATT-based negative equality constitutes a measure to prevent or respond to certain serious violations of international law. Furthermore, the ATT negative equality is not as comprehensive as that resulting from the principle of internal self-determination: in addition to the aforementioned limitations related to the type of arms, the ATT appears to allow the transfer of arms when this contributes to peace and security, provided that there is no risk of serious violations of IHL and IHRL and other discrete norms of international law.[153] As has been seen in Section 3.2, however, it is doubtful that the negative equality regime identified in the *Institut de droit international*'s Wiesbaden Resolution reflects customary international

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[150] Above, Section 4.1.
[151] Although not based on the ATT, an example of this selective approach is the Conclusions of the Council of the European Union of August 2013, whereby EU Member States decided to suspend the licences for the export of 'any equipment which might be used for internal repression' to Egypt. See Council of the European Union, 'Conclusions on Egypt' (21 August 2013) available at <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138599.pdf> accessed 14 February 2022, para 8; see also, more generally, Lustgarten, *Law and the Arms Trade*, 31-32.
[152] See above, Sections 4.2 and 4.3.
[153] Ibid.

law, at least with regard to the prohibition of arms transfers to an incumbent government involved in a civil war. Despite its limitations, therefore, the ATT allows to extend an obligation of negative equality not only beyond civil wars, but also beyond the dispatch of troops so to include the transfer of at least certain types of arms in certain circumstances. It is not to be excluded that the entry into force of the ATT and its widespread ratification (110 parties as of February 2022) might in the future lead customary international law to develop in the same direction: as the as the ICJ has noted, treaties 'may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them'.[154]

In light of the above differences, what regime prevails when they overlap? It is our contention that the ATT prevails over both the principle of non-intervention and that of internal self-determination (to the extent that the latter is not considered a *jus cogens* norm)[155] on the basis of both *lex posterior* and *lex specialis* considerations. Indeed, not only was the ATT concluded well after the formation of those customary principles,[156] but it also contains more specific regulation which only applies to certain categories of weapons and in specific circumstances (i.e. when there is a risk that the arms are employed by the recipient in violation of certain international law obligations).[157] As new and special come before old and general,[158] therefore, the arms transfer regulation contained in the ATT trumps that of the principles of non-intervention and self-determination whenever a conflict between them arises for the ATT states parties. The result is that the ATT parties cannot transfer the arms listed in Article 2(1) ATT to an incumbent government involved in a situation of internal unrest when there is a risk of IHRL/IHL violations or breaches other criteria set by Articles 6 and 7 of the ATT, even when the principle of non-intervention would allow it (that is, when the transfer has been validly requested by the incumbent and the internal unrest has not become a civil war);

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[154] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) I.C.J. Reports 1985, para 27.

[155] For Cassese, the entire principle of self-determination, in both its external and internal aspects, now belongs to the body of peremptory norms as, when states have referred to self-determination as *jus cogens*, they have not made any distinctions (Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (CUP 1995), 140). Craven, on the other hand, is more cautious (Matthew Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Year Book of International Law*, 382-383).

[156] See, among others, Dinstein, 'The Interaction', 413-414; Rudolf Bernhardt, 'Custom and Treaty in the Law of the Sea', (1987) 205 Collected Courses of the Hague Academy of International Law, 276.

[157] On the application of the *lex specialis* principle to the relation between customary and treaty provisions, see *Nicaragua v USA*, para 274; see also, among others, Koskenniemi, 'Fragmentation', 34-35, 79.

[158] This principle was adopted, for example, in a case concerning two treaties in *Mavrommatis Palestine Concessions case*, P.C.I.J. Series A, No. 2 (1924), 31.

and they cannot transfer the prohibited arms to any faction when a civil war breaks out in the concerned country even though the principle of internal self-determination does not extend, in its present customary international law version, to the supply of weapons.

Whilst the *lex specialis* and *lex posterior* generally regulate the whole relationship, a few points of overlapping between the customary international law on foreign intervention and the ATT need to be clarified.[159] First, the ATT clearly applies to transfers of arms involving states or non-state actors that are authorised by a state to ship or receive the arms. This results from the fact that the ATT is aimed at preventing and eradicating 'the illicit trade in conventional arms and prevent their diversion' and from the provisions regarding the control of the import of arms.[160] Whilst the obligation for a state to prevent them is not uncontroversial in the customary international law of foreign intervention,[161] therefore, the ATT establishes a clear duty to prevent privately-run arms transfers in every circumstance.[162] In fact, the ATT not only bans the transfer of the weapons listed in Article 2(1) to unauthorised non-state actors, but such a prohibition can also be seen as extended to those cases in which no recognised state authorities able to authorise the import of the arms exist, as in a case of a civil war which has led to 'state failure'. Similarly, it is also worth highlighting that a situation in which the right of internal self-determination is systematically violated can trigger the prohibition of Article 6(2) of the ATT on the basis of IHRL treaties,[163] or be considered a serious violation of IHRL according to Article 7(1)(b)(ii).[164] In this sense, the ATT provisions can be seen, once again, as strengthening the negative equality scenario based on the principle of internal self-determination.[165]

6. Conclusions

[159] As explained by Dinstein in the case of application of the principle *lex posterior derogat lex priori*, the complete abrogation occurs only when there is a 'genuine incompatibility'; otherwise, the two norms can continue to exist in parallel. Dinstein, 'The Interaction', 413-414.
[160] ATT, Articles 1 and 8.
[161] See above, Section 3.1.
[162] ATT, Articles 6 and 7; see also above, Sections 4.2 and 4.3.
[163] Such as, ICCPR, Article 1; ICESCR, Article 1; see also above, Section 4.2
[164] ATT, Article 7(1)(b)(ii); see also above, Section 4.3
[165] In fact, as Koskenniemi warns, the principle of *lex specialis* 'does not admit automatic application'. In its 2004 Advisory Opinion, the ICJ showed a similar careful approach with regard to the principle of *lex specialis*. Koskenniemi, 'Fragmentation', 35; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para 106.

The ATT is not a 'self-contained regime'[166] and cannot be analysed in isolation, for at least two reasons. First, it has introduced internationally binding rules on arms transfers by referring to other international norms and regimes, including IHL and IHRL. Secondly, it significantly intersects with the customary international law of foreign intervention during internal unrest, namely the principles of non-intervention and internal self-determination and the prohibition of the use of armed force. As noted by Koskenniemi, one should not fear the interactions among different international law regimes, given the existence of a toolbox that can be used to clarify how such interactions can be recomposed.[167]

This article has argued that the intersections between the customary norms on foreign intervention in situations of internal unrest and the ATT are essentially regulated by the two principles of *lex specialis* and *lex posterior*. Articles 6 and 7 of the ATT, however, do not simply derogate from the pre-existing customary international law of foreign intervention but also have the effect of expanding and strengthening its normative content with regard to arms transfers, thus constituting yet another example of cross-fertilisation among different regimes. Unpacking the relationship between the customary law of foreign intervention and the ATT, therefore, is not only useful to analyse the legal issues arising from the ATT but also contributes to the study of the possible future development of customary international law concerning international arms transfers in situations of internal unrest.

[166] Koskenniemi, 'Fragmentation', 248.
[167] Koskenniemi, 'Fragmentation', 248-249.