

ATT ARTICLE 6 & 7  
ASSESSMENT:  
*RELEVANCE OF ICJ AND UN  
MECHANISMS*

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# OBJECTIVE OF THIS PRESENTATION

- Quick recap on key elements of ATT Arts 6 & 7
- how and why material from the ICJ and UN mechanisms can be relevant to states parties' risk assessments for Arts 6 & 7

# RECAP KEY ELEMENTS ATT ARTS 6 & 7

## Article 6:

prohibits **transfers** (as defined in Art 2(2)) of conventional arms covered under Art 2(1) or items covered under Arts 3 or 4:

- where the transfer **would violate** transferring state's obligations under **measures adopted by the UNSC acting under Chapter VII of the UN Charter**, in particular arms embargoes (Art 6(1)); or its **relevant international obligations** under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms (Art 6(2));
- or if it has **knowledge** at the time of authorization that the arms/items **would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes** as defined by international agreements to which it is a Party (Art 6(3))

# RECAP KEY ELEMENTS ATT ARTS 6 & 7

## Article 7:

If transfer not prohibited under Art 6, then Art 7 requires states parties to assess potential that the export of arms/items:

- **would** contribute to or undermine peace and security (art 7(1)(a));
- **could** be used to commit or facilitate:
  - a serious violation of IHL w (art 7(1)(b)(i)) or IHRL (art 7(1)(b)(ii)); or
  - an offence under international treaties to which the exporting state is a party relating to **terrorism** (art 7(1)(b)(iii)) or **transnational organized crime** (art 7(1)(b)(iv)).
- assessment must consider risk of the arms/items being used to commit/facilitate serious acts of gender-based violence or serious acts of violence against women and children (art 7(4)), and consider whether any available mitigations lower the potential for the negative outcomes above (art 7(2)). After assessment, if there remains overriding risk, export must not be authorized (art 7(3)).

# INTERNATIONAL COURT OF JUSTICE

- completed ICJ cases relevant to ATT (e.g., *Bosnia v Serbia*)
- two relevant pending cases: *South Africa v Israel* and *Nicaragua v Germany*. May take years to be decided and, due to court's jurisdiction, have narrower scope than matters ATT states parties need to address for compliance with Arts 6 & 7.
  - **But:** pending cases put ATT states parties on notice of allegations, which should then be considered as part of the Arts 6 & 7 risk assessments
- In 2024 provisional measures order in *South Africa v Israel*, after referring to ATT, Genocide Convention and Geneva Conventions, ICJ said “*particularly important to remind all States of their international obligations relating to the transfer of arms to parties to an armed conflict, in order to avoid the risk that such arms might be used to violate the above-mentioned Conventions.*”

# TURNING TO UN MECHANISMS...

Mechanisms established by UNSC, UNGA, SG, HCHR, HRC (and predecessor CHR) investigate alleged violations of international human rights and humanitarian law, including international crimes.

## Investigative mechanisms:

- different names and mandates, e.g. *fact-finding mission, commission of inquiry, panel of experts*.
- UN system provides secretariat support but members are independent experts, unpaid.
- Not courts determining individual responsibility but generally consider situation against relevant international law and operate consistent methodology, i.e. “reasonable grounds to believe” standard for finding violations.
- usually required to report findings and recommendations to body that created them. States have opportunity to provide input and dialogue with the mechanisms about their reports.

## Others:

- ‘Special procedures’: different titles (special rapporteur, independent expert, working group etc). Also independent experts appointed by and working to a mandate created by HRC. Currently 14 country-specific special procedures.
- e.g. SRSGs, UNSRs, including those that are thematic, rather than country-specific (e.g., on children in armed conflict: sexual violence in armed conflict; prevention of genocide).

# EXAMPLES

Some reports engage with arms trade issues, e.g., latest report FFM on Sudan:

*“the fighting will stop once the arms flow stops. Therefore, all states and entities must comply with the existing arms embargo in Darfur pursuant to Security Council Resolution 1556 (2004). This embargo should also be expanded to cover the entire Sudan. The supply of weapons, ammunition, and other logistical or financial support to any of the warring parties must end immediately as there is a risk that those supplying arms may be complicit in grave violations of human rights and humanitarian law. Businesses and private actors active in the Sudan must respect the UN Guiding Principles on Business and Human Rights”.*

Others have material that could be relevant to Arts 6 & 7, e.g.:

- same *Sudan* report details widespread sexual and gender-based violence, rape, sexual slavery, abduction, recruitment and use of children in hostilities.
- latest report on *Belarus* notes widespread human rights violations against civilians, including torture and crimes against humanity, stating reasonable grounds to believe some violations amount to international crimes, engaging responsibility of the State and individual criminal responsibility.
- Recent reports of *SR on Afghanistan*, and of *Col on OPT, incl. East Jerusalem, and Israel* refer to attacks on education and healthcare facilities that may constitute IHL violations.
- latest report of IIM *Myanmar* states it has substantial evidence a variety of war crimes and crimes against humanity have been committed.
- UN Special Representative on Sexual Violence in Conflict reports annually to UNSC on implementation of certain UNSC resolutions, cites multiple situations of concern where GBV is occurring.

# CONCLUSION

- Assessments required for compliance with ATT Arts 6 & 7 - each state party to determine, in good faith, how to undertake assessments.
- The same information may be relevant to multiple parts of Arts 6 & 7 – and other assessments (e.g. for export control regimes, UNSC sanctions or human rights risk assessments) – so scope for harmonizing.
- Voluntary guidance available on sources of information, focus here was ICJ and UN mechanisms, which are relevant information at states parties' disposal for purpose of Art 6 & 7 assessments and not considering them, alongside other sources, may mean inability to comply with ATT (and thereby other obligations).