

**MAKE IT BINDING**

**INCLUDE GENDER-BASED  
VIOLENCE IN THE ATT**



**Gender and the Arms Trade Treaty  
- A legal overview**

**Written by Christine Chinkin**

On behalf of Women's International League for  
Peace and Freedom (WILPF)



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## 1. Introduction

The human costs of the arms trade are well known: ‘In all parts of the world, the ready availability of weapons and ammunition has led to human suffering, political repression and terror among civilian populations.’ (UN Office for Disarmament Affairs). What is not always so widely recognised is the impact of gender on such suffering and the need therefore to take account of gender in the substantive regulation of the arms trade that is to include it in the Arms Trade Treaty.

This paper:

- examines how the use of small arms and weapons constitutes gender-based violence;
- sets out states’ obligations under international human rights law with respect to the prevention of and protection against gender-based violence;
- references states’ obligations under international humanitarian law;
- shows how these obligations are in conformity with the UN Security Council’s agenda for women, peace and security;
- concludes that incorporating gender considerations into the Arms Trade Treaty is not a matter of political choice but is required by existing international law and that failure to do so is in violation of states’ obligations.

## 2. Gender-based violence

The UN Committee on the Elimination of Discrimination against Women defined gender-based violence as ‘violence that is directed against a woman because she is a woman or that affects women disproportionately’ and as a form of discrimination against women contrary to the 1979 Convention on the Elimination of All Forms of Violence against Women (CEDAW) (Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, 1992). As such it violates women’s human rights and impairs women’s enjoyment of their civil and political, economic, social and cultural rights. This has been recognised in legally binding treaties at the regional level by the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994 (Convention of *Belém do Pará*), Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2003 (PRWA) and the Council of Europe Convention on Preventing and Combating Violence against Women, 2011 (Istanbul Convention). In requiring states to



condemn such violence the United Nations General Assembly and Beijing Platform for Action have also affirmed that it is a ‘manifestation of the historically unequal power relations between men and women’ (UN GA Resolution 48/104 (1993); Beijing Platform for Action, §118). Women’s subordinate economic and social status is both a cause and consequence of violence against women.

### **3. Small Arms and Weapons and Violence against Women**

The availability of small arms and weapons has significant and gendered consequences. Although men and boys are the majority of victims of small arms and weapons, they are also the major possessors and users of such weapons. Within many cultures possession of such arms defines and sustains notions of masculinity and of being a ‘real man’. Guns are an expression of male power within already unequal societies on the basis of sex and gender. This in turn contributes on the one hand to the normalisation of weapons and on the other to the terrorising of women and children through the threat and actuality of sexual and gendered violence, during armed conflict, post-conflict, and in non-conflict situations. Precisely because of this normalisation and because of social constraints upon women reporting the violence committed against them, and a lack of recorded detail even when reported, documented evidence is limited. However accounts by UN experts and researchers indicate the role of arms in the commission of gender-based violence.

During conflict men comprise the majority of regular and irregular armed forces; ‘Since almost all men are armed in times of conflict, it is inevitable that their weaponry is implicated in the exercise of power over women.’ (Rebecca Gerome, ‘Limit Arms Exports to Reduce Violence against Women, 2011). The disproportionate incidents of widespread and systematic rape of women as presented in evidence before the International Tribunals for former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the International Criminal Court (for instance in the Democratic Republic of Congo, Central African Republic) would not have been possible without the possession of arms. Brutal rapes with weapons are also prevalent in armed conflict, as is provided for in the definition of rape adopted by the ad hoc international tribunals: ‘sexual penetration ... or [by] any other object used by the perpetrator’. (*Gacumbitsi v Prosecutor*, ICTR-01-64-A, 7 July 2006, §§ 147- 157) The Special Court for Sierra Leone considered the abduction of women and girls in circumstances of extreme



violence and their forced conjugal association (that is backed by weapons) as defining features of forced marriage as a crime against humanity. (*Prosecutor v Brima, Kamara and Kanu*, SCSL-04-16- A-675, 22 February 2008, §§ 190-5). The Special Representative of the Secretary-General on Sexual Violence in Armed Conflict has detailed many incidents during and post-conflict; for instance she makes two observations with respect to South Sudan. ‘First, [that] cases of sexual violence took place in and around encampments of the Sudan People’s Liberation Army (SPLA), and were reported when the armed forces remained in an area for some time without engaging in active conflict; second, sexual violence took place during SPLA military operations against militia groups. In Somalia ‘Displaced women and girls were reportedly subjected to sexual assaults and threats of sexual violence by bandits or men with guns while in transit, and upon arrival in refugee camps in Kenya.’ Poor care of weapons means that they could fall into the hands of – and use by - unauthorised persons. (Report of the Secretary-General, Conflict-related sexual violence, UN Doc. A/66/657\*-S/2012/33, 13 January 2012). Domestic violence is widely reported in post-conflict situations where weapons remain in wide circulation. More generally, the special rapporteur on violence against women has reported that the proliferation of small arms, in conjunction with such factors as gangs, organized crime, drug dealing, human and drug trafficking chains, has had a ‘devastating impact’ on women’s lives, particularly in Central America.( Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/20/16, 23 May 2012) For instance, there are alarming levels of violence in El Salvador, including domestic and gender-based violence, and increased homicide rates for women. The special rapporteur notes that ‘The proliferation of small and light weapons and the actions of violent gangs (*maras*) contribute to such levels of violence.’ (Report of the Special Rapporteur on violence against women, Mission to El Salvador, A/HRC/17/26/Add.2, 14 February 2011). Further, she found that small arms were used in 90% of femicides in Guatemala and 79% in Honduras. She also reports on violence against women with firearms in the US and Australia. In 2008 firearms were the most common means used by men to murder women. (Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/20/16, 23 May 2012).

In sum, although more men are affected over all by small arms and weapons the different ways in which they are used in violent crimes against women constitute forms of violence against women. The presence of guns and other small arms threatens women’s security in



both the private and public sphere, in both conflict and non-conflict. Their possession of arms by perpetrators of violence deters those who might intervene to assist victims. Small arms facilitate *inter alia* the crimes of: harassment and intimidation, domestic violence, rape, trafficking, forced prostitution, assault, and sexual violence, crimes that are committed disproportionately against women because they are women, thus constituting gender-based violence.

#### **4. States' Obligations under International Human Rights Law**

The right of women to be free from gender-based violence triggers duties in states. (European Court of Human Rights (ECtHR), *Opuz v Turkey*, appl. no. 33401/02, judgment of 9 June, 2009, para 74; see also Convention of *Belém do Pará*, article 3). A state policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (ECtHR, *D.H. and Others v Czech Republic* ([GC], appl. no. 57325/00, judgment of 13 November 2007, §§ 175-180). The link between availability of arms and gender-based violence has been demonstrated above and gender-based violence has been recognised as discriminatory by the CEDAW Committee, the UN Commission on Human Rights, the Convention of *Belém do Pará* and the Inter-American Commission on Human Rights (*Opuz v Turkey*, paras 185-191). Most recently the Istanbul Convention has recognised violence against women to be 'a violation of human rights and a form of discrimination against women.' (article 3 (a)). States are under an obligation to condemn and eliminate all forms of discrimination against women (e.g. CEDAW, article 2; PRWA, article 2). Therefore, as a form of such discrimination states must condemn and eliminate all forms of gender-based violence.

It is now widely accepted that international human rights law obliges states to respect, protect and fulfil all human rights. The obligation to respect human rights is based in the wording of human rights treaties (E.g., International Covenant on Civil and Political Rights, 1966, article 2: 'undertake to respect'; Inter-American Convention on Human Rights, article 1: 'undertake to respect'; African Charter on Human and Peoples' Rights, article 1: 'shall undertake to adopt legislative or other measures') ). It requires States 'to refrain from discriminatory actions that directly or indirectly result in the denial of the equal right of men and women to their enjoyment of [human] rights,' (UN Committee on Economic, Social and



Cultural Rights, General Comment No. 16, 2005, para 18). The obligation to respect women's right to be free from violence includes the duty to ensure that criminal, civil and administrative laws provide an effective legal framework for combating violence against women : 'to enact and enforce laws to prohibit all forms of violence against women' (PRWA, article 4). Further, all states have 'a legal interest in the performance by every other State Party of its obligations' (UN Human Rights Committee, General Comment No. 31, 2004, para 2). This would include the legal regulatory framework for the export and import of arms.

States are not only obliged to refrain from violating human rights through their own policies and practices but also have a positive duty to protect individuals from violations committed by private actors :: 'the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities' . (UN Human Rights Committee, General Comment No. 31, 2004, para 8). In particular, the right to life requires states to 'to take appropriate steps to safeguard the lives of those within its jurisdiction'. (*Opuz v Turkey*, para 128; see also Inter-American Court of Human Rights, *González et al. ("Cotton Field") v Mexico*, Judgment of November 16, 2009, para 245)

The obligation to protect (or 'guarantee' rights) is the positive obligation upon states to exercise due diligence to prevent human rights violations, as spelled out by the Inter-American Court in the landmark case of *Velasquez Rodriguez v. Honduras* (Ser. C, No. 4, 1988, judgment of 29 July 1988, paras 172-5). The obligation has been made explicitly applicable to the prevention of violence against women and to protect women from such violence committed by non-state actors, for instance individual family members, people within the community or paramilitaries. (CEDAW, General Recommendation No. 19; UN GA Resolution, 48/104 (1993), Declaration on the Elimination of Violence against Women; Convention of Belém do Pará, article 7; Istanbul Convention, article 5 (2); *Cotton Field*, para 253). The UN special rapporteur on violence against women has concluded that '' [b]ased on practice and the opinio juris [...] it may be concluded that there is a norm of customary international law that obliges States to prevent and respond with due diligence to acts of



violence against women.’ (cited *Cotton Field*, para 254). This obligation of prevention encompasses all those measures of a legal, political, administrative and cultural nature that ensure the safeguard of human rights, (*Cotton Field*, para 252). The CEDAW Committee has explained that the duty of due diligence with respect to the acts of private actors arises when there is a situation of extreme danger of violence of which the State authorities ‘knew or should have known’. (*Şahide Goecke v Austria*, CEDAW Committee, Communication No. 5/2005, para 12.1.4; *Fatma Yildirim v Austria*, CEDAW Committee, Communication No. 6/2005, para 12.1.4.; see also *Opuz v Turkey*, para 130). In order to comply with the obligation of due diligence states ‘should adopt comprehensive measures ... in other words, it should prevent the risk factors.’ (*Cotton Field*, para 258). As seen above much of the violence against women committed by non-state actors is committed by small arms, or is enabled through the possession of small arms. The risk of gender-based violence posed by the widespread availability of such weapons is evident and accordingly the obligation of prevention requires the adoption of measures to regulate the transfer and availability of such arms. In its articles on risk assessment and management the Istanbul Convention requires states parties to ‘take the necessary legislative or other measures to ensure that an assessment of the lethality risk, ... is carried out by all relevant authorities in order to manage the risk and if necessary to provide co-ordinated safety and support’, which shall take into account ‘the fact that perpetrators of acts of violence covered by the scope of this Convention possess or have access to firearms.’ (Istanbul Convention, article 51). The commission of an act of violence against women with the use or threat of a weapon is an ‘aggravating’ factor under the Istanbul Convention (article 46 (g)). The obligation to prevent is also supported by the importance given to prevention in the Responsibility to Protect. (UN General Assembly resolution, 60/1, 2005 World Summit Outcome, para 138: ‘This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.’)

States’ obligation to fulfil looks to the long term. It requires states to be forward looking and to adopt short, medium and long term policies to combat violence against women in all its forms and manifestations, aiming at the eventual fulfilment of its elimination. The drafting of the Arms Trade Treaty that has such obvious implications for this long-term objective without incorporating gender appropriate provisions runs counter to the obligation to fulfil.





This conclusion is supported by reference to the Commentary to the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the UN General Assembly resolution 56/83, 12 December 2001). Article 16 affirms that a state is internationally responsible for the commission of an internationally wrongful act if it provides material aid to a state that uses the aid to commit human rights violations. The ILC makes reference to the General Assembly's call to member states 'to refrain from supplying arms and other military assistance to countries found to be committing serious human rights abuses.' Gender-based violence is a serious human rights abuse. State responsibility for facilitating human rights abuses committed by another state must depend upon the facts of any given case, particularly whether the aiding state 'was aware of and intended to facilitate the commission of the internationally wrongful conduct'. Given the data on the killings and other violence against women committed by small arms and weapons, such deaths must be regarded as foreseeable thereby lending support to the argument that the obligation to prevent violations of the right to life requires restraints upon the transfer and circulation of small arms. The foreseeability of harm is supported by the ECtHR in *Opuz v Turkey* and is especially strong in the context of armed conflict.

### **5. States Obligations under International Humanitarian Law**

In accordance with common article 1 of the Geneva Conventions, 1949 states 'undertake to respect and to ensure respect for the ... Convention[s] in all circumstances.' This makes it clear that the Conventions do not apply only during international or non-international armed conflict but also to non-conflict situations. The wording of common article 1 is wide enough to encompass the commercial dealings of states. States, especially those that produce and export arms should therefore take measures to ensure that exported weapons are not to be used in ways that violate their obligations under the Geneva Conventions. These include prevention, protection from (Geneva Convention IV, article 27; Additional Protocol I, article 76) and prosecution of gender-based and sexual violence, which have been recognised by the International Tribunals for former Yugoslavia and Rwanda as crimes against humanity and war crimes when the other elements of these crimes are present. Similarly the Rome Statute of the International Criminal Court lists rape and other forms of sexual violence as crimes against humanity and violations of the laws and customs of war. (Rome Statute, article 7 (1)



(g); article 8 (2) (b) (xxii)). The Geneva Conventions and 1977 Protocols require non-discriminatory application. ‘Gender inequality becomes more pronounced in conflict and crisis situations, as competing masculine discourses place contradictory demands on women, and conflict is instrumentalized as a pretext to further entrench patriarchal control.’ (Special rapporteur on violence against women, A/HRC/20/16, 23 May 2012, Gender related killings of women). Such inequality is manifested in gender-based and sexual violence in conflict, which states are required to address, including through preventive measures as required by common article 1.

## 6. Conclusions

States have existing obligations under international law with respect to the prevention of gender-based violence and discrimination on the grounds of sex and gender. There is remarkable consistency across international and regional instruments in this regard, and in the weight bestowed by international and regional institutions. Thus General Recommendation no. 19 of the CEDAW Committee has been applied by both the European Court of Human Rights and the Inter-American Court of Human Rights, which in turn have each turned to and reinforced the jurisprudence of each other (see especially *Cotton Field* and *Opuz v Turkey*). Through the UNITE to end violence against women, launched in 2008, the UN Secretary-General has made elimination of violence against women a priority. The Security Council too in its resolutions on Women, peace and security has reaffirmed ‘the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts’. It has especially called upon ‘all parties to armed conflict to take special measures to protect women and girls from gender-based violence’. It is entirely consistent to extend this to non-conflict situations as well (UN Security Council Resolutions 1325 (2000); 1820 (2008); 1888 (2009); 1889 (2009); 1960 (2010). The 2005 World Summit Outcome expressed its resolve to eliminate all forms of violence against women and girls ((UN General Assembly resolution, 60/1, 2005 World Summit Outcome). The Beijing Platform for Action included in its strategic objectives to control the availability of arms. (Beijing Platform for Action, para 143).



Gender mainstreaming has become a major policy of the UN as demonstrated the establishment of UN Women with a mandate for gender equality and the empowerment of women. The Beijing Platform for Action explicitly called for ‘an active and visible policy of mainstreaming a gender perspective into all policies and programmes’ to address violence against women in both non-conflict and armed conflict situations. (Beijing Platform for Actions, paras 123, 141). In 2006 the Geneva Declaration on Armed Violence and Development similarly called for a ‘comprehensive approach to armed violence reduction issues, recognising the different situations, needs and resources of men and women, boys and girls, as reflected in the provisions of UN Security Council Resolutions 1325 and 1612, The Declaration has been signed by over 100states. While not legally binding such ‘soft law’ instruments create political expectations and contribute to the state practice and opinio juris requirements of customary international law. Failure to include gender-based violence in the Arms Trade Treaty would run counter to this approach and undermine the need for an integrated policy with respect to the transfer of arms.

In drafting the Arms Trade Treaty states should ensure consistency with their existing treaty and customary international law obligations. The Treaty should be based in and contribute to the growing jurisprudence on violence against women. Omission of states’ obligations with respect to protection against and prevention of such violence against women from the Treaty is contrary to the body of regional and international law which has recognised the specific nature of gender-based violence, its causes and consequences and its basis in existing and persistent discrimination. Failure to include the importance of eliminating gender-based violence in the principles, objectives or substantive provisions of the Arms Trade Treaty undermines the agreed goal of a legally binding instrument ‘of the highest possible common international standards for the transfer of conventional arms.’ (UN General Assembly resolution 64/48 (2009)).