

**EXPERT GROUP ON ATT IMPLEMENTATION**

# Prevention, transit and innocent passage under the Arms Trade Treaty

EGAI

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## Acknowledgements

This briefing was written by Cynthia L. Ebbs and James Upcher on behalf of ATT Legal – a network of pro-bono lawyers established by the Control Arms Coalition that provides legal assistance on Arms Trade Treaty application and implementation to States and Civil Society. For more information please visit:

<http://controlarms.org/en/ATTLegal/>

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# 1

## Introduction

The Arms Trade Treaty (ATT) was conceived, negotiated and concluded against the backdrop of existing international legal regimes. Now that the Treaty has entered into force, and as States seek to implement the Treaty's obligations into their domestic legal orders, it is a matter of considerable importance to determine how the Treaty is to be reconciled with longstanding rules of international law that potentially affect ATT obligations.

**This paper explores the interaction of the ATT with the right of innocent passage, which is a rule of customary international law and codified in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>1</sup>** The right of innocent passage regulates the interaction between the ability of coastal States to control access to their territorial sea and the rights of foreign flagged vessels to enjoy the principle of freedom of navigation.

A significant proportion of conventional weapons are shipped by sea. This fact means that coastal State Parties to the ATT are faced with two potentially conflicting international obligations. On the one hand, States Parties are under the obligation imposed by Article 6 of the ATT not to authorise transfers of conventional arms under certain circumstances. On the other hand, coastal States Parties have the obligation not to hinder innocent passage by foreign-flagged ships through their territorial seas, except for certain defined circumstances set out in UNCLOS. With regard to transit and trans-shipment of conventional arms, the ATT itself contemplates such existing international norms in Article 9, indicating that “[e]ach State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2.1 through its territory in accordance with relevant international law”.

Determining how these potentially conflicting obligations are to apply is essential to effective implementation of the Treaty by coastal States Parties. In order to shed some light on this complex area, the following three inter-related scenarios are presented for discussion.

1. Consider Islandia, a coastal State. A number of foreign-flagged vessels seek to travel through Islandia's territorial sea, including a ship flying the flag of Mountainville conveying weapons bound for rebels based in Lakeland. Lakeland is involved in a non-international armed conflict that has spill-over effects into a neighbouring State and could affect Islandia. Can Islandia prevent passage of the Mountainville-flagged ship pursuant to an exception to the right of innocent passage in UNCLOS?

<sup>1</sup> United Nations Convention on the Law of the Sea (done on 10 December 1982, entered into force 16 November 1994) 1833 United Nations Treaty Series (UNTS) 3.

2. The UN Security Council imposes an arms embargo on Lakeland pursuant to Article 41 of the UN Charter. Under these circumstances, what are Islandia's international legal obligations with regard to the Mountainville vessel a) when Islandia is a non-State Party to the ATT, and b) when Islandia is a State Party to the ATT?
3. If Islandia, as a State Party to the ATT, now has knowledge that genocide, crimes against humanity and war crimes are being perpetrated in Lakeland, what are its international legal obligations with regard to the Mountainville vessel?

The paper considers these scenarios sequentially and demonstrates how the ATT interacts with the right of innocent passage in international law. It concludes that a State Party to the ATT must deny passage to a foreign-flagged vessel if permitting passage of such vessel would violate a UN arms embargo or other measures imposed by the UN Security Council under Chapter VII of the UN Charter or any other 'relevant' international agreements to which the coastal State Party is a party. In addition, a State Party to the ATT must also deny passage when it has 'knowledge' of any of the situations enumerated in Article 6.3, which relate to both codified and customary international humanitarian law. Each of the obligations under Article 6 will apply regardless of whether the vessel in question is registered to a State Party to the ATT or to a non-State Party.

# 2

## Scenario 1

### The application of the right of innocent passage

#### The development and status of innocent passage

The right of innocent passage permits foreign-flagged ships to transit through a coastal State's territorial sea – part of the sovereign territory of each State extending up to 12 nautical miles from a State's baselines.<sup>2</sup> The right has a long historical pedigree as a rule of customary international law and was first codified in Article 14.1 of the Convention on the Territorial Sea and the Contiguous Zone.<sup>3</sup> It was then further codified in Article 17 of UNCLOS, which states:

*“Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”<sup>4</sup>*

In order for a foreign-flagged vessel to exercise the right of innocent passage, there are a number of conditions it must fulfil. Firstly, passage must be continuous and expeditious. Ships are required to proceed swiftly and with due regard for safety. Passage includes stopping and anchoring only if those are incidental to navigation or rendered necessary by force majeure or distress, or for the purpose of providing assistance to persons, ships or aircraft in danger or distress.<sup>5</sup> Secondly, submarines and other underwater craft must navigate on the surface and display their flag.<sup>6</sup> Thirdly, foreign vessels exercising the right of innocent passage through the territorial sea must comply with all such laws and regulations and relevant international regulations relating to the prevention of collisions at sea.<sup>7</sup>

The circumstances in which passage is deemed ‘non-innocent’ are set out in Article 19.1 of UNCLOS:

*“Passage is innocent so long as it is not prejudicial to the peace, good order or security of the Coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.”<sup>8</sup>*

Article 19.1 is critical because it provides the key conditions under which passage of a foreign flagged ship can be deemed not innocent, that is: (1) when it is prejudicial to the peace, good order or security of the Coastal State; and (2) when it is found to contravene UNCLOS or other rules of international law. **Both of these elements of**

<sup>2</sup> UNCLOS, Article 3.

<sup>3</sup> 516 UNTS 205. Entered into force 10 September 1964.

<sup>4</sup> UNCLOS, Article 17.1.

<sup>5</sup> UNCLOS, Article 18.2.

<sup>6</sup> UNCLOS, Article 20.

<sup>7</sup> UNCLOS, Article 21.4.

<sup>8</sup> UNCLOS, Article 19.1.

**Article 19.1 demonstrate that the right of innocent passage is not absolute and set forth the conditions when passage may be deemed non-innocent.**

Article 19.2 then sets out a (non-exhaustive) catalogue of activities that are considered prejudicial, in terms of the manner by which passage is exercised. Notably, **Article 19.2 provides that passage ceases to be innocent when the ship engages in “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations”.**<sup>9</sup> It is worth noting, however, that as a matter of treaty interpretation, it is commonly agreed that a coastal State can regard passage of a ship as non-innocent on the basis of Article 19.1, regardless of whether the passage concerned falls within the activities listed in Article 19.2.<sup>10</sup>

### Islandia’s rights and duties regarding innocent passage

With regard to the example of Islandia in scenario 1, as a coastal State, Islandia is under a general obligation not to *impede* the exercise of innocent passage. Article 24.1 of UNCLOS states that the coastal State must not:

“(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or  
(b) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State”.<sup>11</sup>

Islandia may, however, take measures to *regulate* innocent passage. Article 21 of UNCLOS provides for the right of coastal States to adopt publicised laws and regulations relating to innocent passage which include laws relating to safety of navigation, conservation of living resources, and customs, fiscal or immigration matters.<sup>12</sup>

Under UNCLOS Article 25.1, Islandia may also take “necessary measures” against passage which is deemed not to be innocent.<sup>13</sup> Whereas this Article does not set out the specific measures which a coastal State may take to prevent such passage, each State has sovereign authority to take measures consistent with international law to restrict passage. According to State practice and generally acceptable methods of denial of passage outlined in academic literature, such measures may include:

- requesting a delinquent ship to refrain from certain conduct;
- requesting a ship to leave the territorial sea;
- physical prevention of the continuation of passage;
- boarding, arrest and detention of the ship; and
- exclusion of the ship from its territorial sea.<sup>14</sup>

It has been noted that Article 25 is broadly drafted and leaves considerable discretion to the coastal State to respond with measures calibrated to the circumstances. Any response, however, would be limited by the international law principles of necessity and proportionality.<sup>15</sup>

With regard to the first scenario outlined above, could Islandia prevent passage of the Mountainville-flagged vessel through its territorial sea? An interpretation of Article 19.2 of UNCLOS may provide one possible way to do so. Article 19.2 (a) of UNCLOS provides

<sup>9</sup> UNCLOS, Article 19.2(a).

<sup>10</sup> Y Tanaka *The International Law of the Sea* (Cambridge, CUP 2012) 87.

<sup>11</sup> UNCLOS, Article 24.1.

<sup>12</sup> UNCLOS, Article 21.

<sup>13</sup> UNCLOS, Article 25.1: ‘The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.’

<sup>14</sup> DR Rothwell and T Stephens, *The International Law of the Sea* (Oxford, Hart 2010) 424–425; Tanaka, *The International Law of the Sea* (Cambridge, CUP 2012) 94.

<sup>15</sup> Rothwell and Stephens, *The International Law of the Sea* (Oxford, Hart 2010) 218.

that a ship engaged in “any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations” is not engaging in passage that is innocent.<sup>16</sup> The International Court of Justice has determined that “assistance to rebels in the form of the provision of weapons or logistical or other support . . . may be regarded as a threat or use of force . . .”<sup>17</sup> If the provision of weapons or logistical or other support to rebels could be regarded as a threat or use of force against the target State, could it also constitute a threat or use of force against the coastal transit State, for the purposes of Article 19.2(a), thereby permitting enforcement measures against such non-innocent passage?

A progressive interpretation of Article 19.2(a) would indicate that the transit of the Mountainville-flagged ship through the territorial sea of Islandia constitutes a “threat or use of force” against Islandia (as well as a threat or use of force against Lakeland). This requires reading Article 19.2 alongside Article 88 of UNCLOS, which provides that “[t]he high seas shall be reserved for peaceful purposes”.<sup>18</sup> Furthermore, Article 301 of UNCLOS states that in exercising rights or performing their obligations under UNCLOS, States must “refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations”.<sup>19</sup> **The effect of Article 88 and Article 301 of UNCLOS is to tie the use of force at sea to the UN Charter’s restrictions on the use of force, so that any threat or use of force contrary to the UN Charter would be grounds for denying passage through the territorial sea.**<sup>20</sup> Therefore, it appears that under UNCLOS alone, the coastal State, Islandia, could deny passage to the Mountainville-flagged vessel carrying weapons bound for Lakeland rebels.

<sup>16</sup> UNCLOS, Article 19.2(a).

<sup>17</sup> Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, *ICJ Reports* 1986, 14, 104 [95].

<sup>18</sup> UNCLOS, Article 88.

<sup>19</sup> UNCLOS Article 301.

<sup>20</sup> S Kaye, ‘Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction’ in D Freestone, R Barnes and D M Ong (eds) *The Law of the Sea: Progress and Prospects* (OUP, Oxford 2006) 347, 353. A V Lowe, ‘The Commander’s Handbook on the Law of Naval Operations and the Contemporary Law of the Sea’ in H B Robertson Jr (ed) *The Law of Naval Operations* (International Law Studies 64, US Naval War College, Newport 1991) 109, 131.

# 3

## The ATT

### Obligations relating to transit and trans-shipment

In considering how a coastal State must fulfil its obligations as a State Party to the ATT in relation to the right of innocent passage and other international legal obligations, it will, first of all, be helpful to outline the key obligations in the ATT with regard to prohibition and regulation in the context of transfer, transit and trans-shipment.

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#### The concept of 'transfer' in the ATT

The ATT seeks to “prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorised end use and end users, including in the commission of terrorist acts”<sup>21</sup>

Beyond this, one of the key principles of the Treaty is an acknowledgement of the responsibility of all States “to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems”<sup>22</sup>

Article 2 sets out the Treaty’s scope. After setting out the different types of conventional arms to which the Treaty applies, Article 2.2 sets out what is covered by the concept of an international ‘transfer’ of conventional arms, which relates directly to the Treaty’s prohibition and prevention obligations:

*“For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as ‘transfer’”.*

The concept of ‘transfer’ is, therefore, of considerable breadth and encompasses any form of transit or trans-shipment through a State Party’s territory or jurisdiction.

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#### The requirement of implementation under Article 5 of the ATT

Given the importance of national legislation and other safeguards incorporating the standards of the ATT’s provisions, Article 5 contains various provisions relating to implementation of the ATT. Each State Party is required to implement the Treaty in a consistent, objective and non-discriminatory manner<sup>23</sup> while Article 5.5 of the ATT requires that “[e]ach State Party shall take measures necessary to implement the provisions of this Treaty”<sup>24</sup>

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<sup>21</sup> ATT, preamble.

<sup>22</sup> ATT, preamble.

<sup>23</sup> ATT, Article 5.1.

<sup>24</sup> ATT, Article 5.5.

## The scope of the prohibition under Article 6 of the ATT

Article 6, entitled ‘Prohibitions’, states that a State Party shall not authorize any transfer of conventional arms or their ammunition, parts or components listed under Articles 2.1, 3 or 4 of the ATT:

- if the transfer would violate a State Party’s obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, including UN Security Council arms embargoes;
- if the transfer would violate a State Party’s relevant obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; or
- if the State Party has “knowledge”, at the time of authorisation of the transfer, that the arms or items would be used to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks directed at civilian objects or civilians protected as such, or certain war crimes defined by treaties to which the State is a party.<sup>25</sup>

The requirement of “knowledge” in Article 6.3 is one that is not often used in arms control treaties<sup>26</sup> and the ATT does not specify the level of knowledge required. It is not clear whether it is enough for a State to have ‘constructive knowledge’ (i.e. that the State ‘should know’ or ‘should have known’) that one of the violations listed in Article 6.3 would occur, or whether the State must have ‘actual knowledge’, or clear, tangible evidence that the conventional arms or other items would be used in the commission of one of the listed crimes.

## The scope of regulation under Article 9 of the ATT

As noted above, Article 9 of the ATT provides that:

*“Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2.1 through its territory in accordance with relevant international law”.*<sup>27</sup>

**The language of Article 9 highlights that States Parties that do not initiate arms transfers but whose territories are used for trans-shipment and transit nevertheless have obligations under the Treaty.** When arms cross the jurisdictions of States Parties, those States Parties are under an obligation to ‘regulate’ those transits in certain circumstances. ‘Appropriate measures’ and national implementation of transit and trans-shipment controls may typically involve a variety of measures, including: a licensing or authorization regime; pre-notification requirements; and/or enforcement measures taken by national law enforcement and intelligence agencies.

Standing alone, Article 9 is not an absolute obligation: regulation as to transit or trans-shipment is required only where ‘necessary and feasible’. What is ‘necessary and feasible’ leaves considerable discretion to States Parties and reflects in part the difficulties many States Parties will face in exercising comprehensive control over all aspects of their territories. This clause ensures that transit States are not held to unrealistic expectations with regard to their regulation of covered items that pass through their jurisdiction and, for States Parties that are exporting or importing covered items lawfully, that the right of innocent passage is maintained.

<sup>25</sup> ATT, Articles 6.1–6.3.

<sup>26</sup> B Kellman, ‘Controlling the Arms Trade: One Important Stride for Humankind’ (2014) 37 *Fordham International Law Journal* 687, 711.

<sup>27</sup> ATT, Article 9.

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## The interplay between Articles 5, 6 and 9 of the ATT and their application consistent with the right of innocent passage

**It is critical to note that the flexibility provided to states under Article 9 in its “necessary and feasible” language cannot be read as relieving States Parties of their obligation to uphold the prohibitions contained in Article 6.** Instead, States Parties must fulfil their obligations relating to Article 6 based on a holistic interpretation of Article 5, 6 and 9 of the Treaty.

Under Article 5.5, each State Party (including each transit State Party) “shall take measures necessary to implement” the ATT. The prohibitions set forth in Article 6, which all States Parties must comply with, certainly fall within the provisions that State Parties “shall ... implement”.

It follows that, regardless of whether a transit State has in place, at the time of entry into force of or subsequent accession to the Treaty, a robust transit regulation system, as a State Party to the ATT it must take measures necessary to implement the provisions of Article 6 through its national laws, regulations or otherwise.

Considering Article 9 in isolation, independent of the mandatory provisions in Article 6, the reference to “where necessary and feasible” could be interpreted to mean that transit States need not ‘regulate’ where they deem such regulation not to be ‘necessary and feasible ... under relevant international law’. **However, while the ‘necessary and feasible’ language applies to the general ‘regulation’ of transfers under Article 9, it cannot be read to apply to transfers that fall under the mandatory prohibitions of Article 6.** Doing so would be inconsistent with the ATT’s object and purpose, and therefore contrary to established rules of treaty interpretation. An interpretation of the terms of Articles 6 and 9 in their context, with regard to the object and purpose of the Treaty, suggests that the obligations contained in Article 6, must take priority over the ‘necessary and feasible’ language of Article 9.

It is important to note that the scope of obligation to regulate transit “where necessary and feasible” is narrower than that of Article 6. Article 9 applies only to conventional arms referred to in Article 2.1, and not those items covered in Articles 3 and 4, and therefore excludes ammunition and parts and components. However, irrespective of the narrower scope of Article 9, according to Article 5.5 each State Party – including transit states – must implement measures to comply with the broader requirements of Article 6.

Nevertheless, even if an ATT State Party decides that it is not “necessary and feasible” to develop and support a comprehensive transit regulation system, the State Party remains under an obligation to implement Article 6, either through the implementation of national legislation or regulations that enable the State Party to comply with the ATT’s transit regime, or through other national measures.

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## Scenario 2

### The ATT, innocent passage and UN Security Council arms embargoes

The second scenario whereby Lakeland is subject to a UN Security Council arms embargo can now be considered in further detail. When the UN Security Council takes enforcement action under Article 41 and imposes an arms embargo or sanctions regime against a State, it is a decision taken under Chapter VII of the UN Charter. This generally requires ‘all States’ to comply with the decision and prevails over any treaty obligations that are inconsistent with or contrary to the decision.<sup>28</sup> Full compliance with this obligation requires transit States to suspend innocent passage in situations where implementation of a UN arms embargo requires it; it is likely that the Security Council resolution calling for the arms embargo would seek to set out in detail how any interdiction measures should be implemented.<sup>29</sup>

The application of these provisions to scenario 2 indicates that Islandia, faced with the prospect of a vessel flying the flag of Mountainville carrying weapons in contravention of a UN arms embargo, must give precedence to the Security Council’s arms embargo imposed under Article 41 of the UN Charter over any assertion of the right of innocent passage and take active measures to comply with the terms of the arms embargo.

**The ATT reinforces States’ adherence to arms embargoes and sanctions regimes decided under Chapter VII of the UN Charter through Article 6.1. While the effect of Article 6.1 is to reaffirm the Security Council’s primary responsibility for the maintenance of peace and security, it also creates a separate primary rule under the ATT that prohibits States Parties from authorising a transfer of arms and other items to a State in violation of a UN Security Council arms embargo.<sup>30</sup> The ATT therefore imposes an additional and complementary form of legal responsibility.**

If Islandia is a State Party to the ATT, it is required pursuant to the Security Council’s arms embargo *and* Article 6.1 to deny passage of the Mountainville-flagged vessel through its territorial sea. If Islandia is not a party to the ATT, it is still required to act in compliance with the UN Security Council resolution and to prevent the passage of the Mountainville-flagged vessel through its territorial sea.

<sup>28</sup> UN Charter, Article 103.

<sup>29</sup> See R McLaughlin, ‘United Nations Mandated Naval Interdiction in the Territorial Sea’ (2002) 51 *International and Comparative Law Quarterly* 249.

<sup>30</sup> B Kellman, ‘Controlling the Arms Trade: One Important Stride for Humankind’ (2014) 37 *Fordham International Law Journal* 687, 708.

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## Scenario 3

### The ATT, innocent passage and the prohibition of genocide and other obligations of international humanitarian law

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#### The ATT, innocent passage and the commission of genocide, crimes against humanity or war crimes

Article 6.3 prohibits a State party from authorizing the transfer of conventional arms, ammunition and parts and components when the State party has “knowledge at the time of authorisation” that the arms or items would be used to commit genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, attacks on civilian objects or civilians protected as such, or other war crimes defined in instruments to which the State Party to the ATT is a party.<sup>31</sup>

In scenario 3, Islandia is a State Party to the ATT. It has knowledge at the time it would authorise passage through its territorial sea that genocide, crimes against humanity and war crimes are being perpetrated in Lakeland. If Islandia also knows that the arms or items on the Mountainville vessel “would be used in the commission” of these crimes, Islandia is required to deny authorization, pursuant to ATT Article 6.3, of the passage of the Mountainville-flagged vessel through Islandia’s territorial sea.

As with the example of the Security Council arms embargo, the provisions of the ATT complement existing international obligations. If Islandia were a non-Party to the ATT yet had knowledge that the Mountainville-flagged vessel was conveying arms for the commission of genocide in Lakeland, Islandia would be under a separate obligation under the terms of the Convention on the Prevention and Punishment of the Crime of Genocide (‘the Genocide Convention’) to prevent passage of the vessel. The Genocide Convention provides in Article 1 that States Parties must undertake to prevent and to punish the crime of genocide.<sup>32</sup> This obligation is undoubtedly an obligation of customary international law and, indeed, of *jus cogens*, i.e. the corpus of the most fundamental norms of the international legal order from which no derogation is permitted.<sup>33</sup> In further support, the International Court of Justice in the *Bosnia Genocide* case stated that the capacity to prevent genocide is judged pursuant to a standard of ‘due diligence’ which requires every State to take all measures to prevent genocide within its power, based on its capacity to influence effectively the action of persons likely to commit, or already committing, genocide. The capacity of States to fulfil their

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<sup>31</sup> ATT, Article 6.3.

<sup>32</sup> Convention on the Prevention and Punishment of the Crime of Genocide (done on 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Article 1.

<sup>33</sup> For a list of commonly accepted *jus cogens* norms see International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.702, 18 July 2006, para 33.

due diligence obligation can be linked to such factors as, for example, the geographical proximity of the State concerned from the events, the State's political links with the main actors in the events, and the State's legal position concerning the events and those potentially, or actually, affected.<sup>34</sup>

Also relevant here are principles of the Law of State Responsibility, notably the concept of complicity. The concept of complicity is established in customary international law and is also contained in Article 16 of the International Law Commission's Articles on State Responsibility.<sup>35</sup> Article 16 provides that:

*“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*

*(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and*

*(b) the act would be internationally wrongful if committed by that State”.*<sup>36</sup>

In order for Islandia to be complicit under the law of State responsibility, Mountainville must commit an internationally wrongful act. Such an “internationally wrongful act” could be the violation of an UN-ordered arms embargo, a violation of the Genocide Convention or other rules of international humanitarian law. As long as (1) Islandia had “knowledge of the circumstances,” (2) the act would be wrongful if committed by Islandia itself, and (3) the element of attribution to Mountainville can be established, it is arguable that a failure to prevent or disrupt the non-innocent passage of the Mountainville-flagged vessel on the part of Islandia would fall under Article 16 and Article 41.2 of the Articles on State Responsibility, resulting in complicity in the commission of an internationally wrongful act. Islandia would therefore be obligated under these legal regimes to prevent the shipment of arms to Lakeland.

With regard to States' obligations under international humanitarian law and international criminal law, the ATT imposes an additional and complementary form of legal responsibility, consistent with existing international legal obligations deriving from treaty and customary international law. Article 6.3 supplements existing obligations of international humanitarian law and international criminal law by linking directly the commission of violations of international humanitarian law to the transfer of arms.

**Thus, a transit State Party that permits a transfer of covered items that falls within the ambit of Article 6.3 has more than just secondary responsibility as a complicit party under Article 16 of the Articles of State Responsibility and more responsibility than discharging its due diligence obligation under the Genocide Convention: the transit State commits a direct violation of a primary rule of international law under the ATT.**

**Accordingly, for States Parties to the ATT, the obligations under Article 6.3 must take priority over the right of innocent passage.** Firstly, Article 6.3 prevails as a matter of law because, in comparison to the right of innocent passage, Article 6.3 of the ATT is the more specialised and more recently developed legal obligation and it contains an absolute prohibition not to authorize a transfer in circumstances where the authorizing State has the requisite knowledge. Secondly, the obligations in Article 6.3 clearly support and supplement existing prohibitions in international law that rise to the level of *jus cogens* norms and which are of a higher normative force than the right of innocent passage. Thirdly, passage that is contrary to Article 6.3 on the basis of knowledge of those circumstances is clearly ‘non-innocent’ within the meaning of Article 19 of UNCLOS. Thus, with regard to the Mountainville-flagged vessel, as a State Party to the ATT, Islandia would be under an obligation to regulate and prevent

<sup>34</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43, [430].

<sup>35</sup> See generally HP Aust, *Complicity and the Law of State Responsibility* (CUP, Cambridge 2011); Responsibility of States for Internationally Wrongful Acts, annexed to UN Doc A/RES/56/83 of 12 December 2011, Article 16.

<sup>36</sup> Responsibility of States for Internationally Wrongful Acts, annexed to UN Doc A/RES/56/83 of 12 December 2011, Article 16.

passage of that vessel if Islandia had knowledge that the items aboard would be used to commit genocide, crimes against humanity or certain war crimes.

This obligation flows directly from Islandia's obligations under Article 6; for a non-State Party, it would derive from other complementary obligations under the Genocide Convention, international humanitarian law and the principle of complicity. Such an obligation would prevail over Mountainville's right of innocent passage. A coastal State with knowledge of the circumstances in Article 6.3 could clearly restrict and prevent passage on the basis of the ATT or Article 19 of UNCLOS.

What if Islandia were a State Party and Mountainville a non-State-Party to the ATT? In Scenario 3, Islandia is under obligations stemming from Article 5, 6 and 9. It must take certain action in order not to breach the Treaty. But Mountainville would not be under any obligations arising out of the Treaty. It may seek to insist on its freedom of navigation and emphasise that passage can be restricted or prevented only pursuant to UNCLOS. While Islandia would be obliged to act in accordance with Article 6, and with its obligations under other rules of international humanitarian law, the Genocide Convention and State responsibility, the most prudent course of action for Islandia likely would be to ensure that its prevention of passage is also tied to the complementary grounds listed in UNCLOS.

# 6

## Conclusion

The right of innocent passage, codified under UNCLOS, permits vessels to travel through the territorial seas of other States unencumbered, as long as the vessel observes the conditions of innocent passage, and its transit cannot be otherwise deemed ‘non-innocent’. At the same time, according to Article 9 of the ATT, States Parties to the ATT are obligated to regulate the transit or trans-shipment of certain arms “where necessary and feasible” in accordance with relevant international law, including UNCLOS.

However, in the context of Article 6 of the ATT, a State Party is under an absolute obligation not to authorise passage through its territorial sea of foreign-flagged ships that fall within its prohibitions, including transit that would impede a UN arms embargo or transit where a State has knowledge that the arms or items transferred would be used in the commission of genocide. While in many cases, the coastal State Party will be able to reconcile the absolute obligations of Article 6 with the right of innocent passage under UNCLOS, it remains the case that a State Party’s obligations under Article 6 of the ATT will take priority over granting the right of innocent passage. As a result, the complementary effect of the application of Article 6 of the ATT not only serves to clarify, but to strengthen the coastal State Party’s obligation to restrict passage through its waters in certain circumstances.

## Saferworld

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with local people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe that everyone should be able to lead peaceful, fulfilling lives, free from insecurity and violent conflict.

## The Expert Group on ATT Implementation

The Expert Group on ATT Implementation (EGAI) is convened by Saferworld. Its purpose is to help develop common understandings among Government and Civil Society experts from all world regions on issues relevant to ATT implementation, with a view to promoting progressive interpretation of the Treaty's provisions and the development of a robust ATT regime.

As of August 2015 the EGAI has met on four occasions: in London, November 2013; Stockholm, May 2014; Berlin, July 2014; and San Jose, Costa Rica, March 2015. An earlier draft of this paper was presented for discussion at the fourth meeting of the EGAI in San Jose, Costa Rica. It has since been refined and developed based on the discussions that took place resulting in this briefing – the third output of the EGAI process. The views and ideas expressed herein should not be taken as reflecting the official view of those States or individual experts that have participated in this process.

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