

TEAR GAS TRADE AND A PROGRESSIVE INTERNATIONAL HUMAN RIGHTS REGIME*

ABSTRACT

In an increasingly globalized world, the actions of one State have an undeniable impact and influence on other States and their individuals. This article aims to show that the vast web of interconnections existing today mandates an expanding and evolving interpretation of the human right obligations of a State. The article attempts to explain this proposal with the help of a scenario that recently arose in the international arena. Although the case is a particular one, it serves as an exemplary base to examine several general principles that would apply in similar situations. In January 2015, a South Korean Company made a sale of 1.9 million canisters of tear gas to Turkey. In light of the atrocities committed by the arbitrary use of tear gas by Turkish officials in the past decade and more recently at the 2013 Gezi Park protests, South Korea's export was condemned by several international human right organisations. This article seeks to address some interesting questions that arise under international law in respect of such a situation - can a State be held responsible under international law for exports from its territory that may be used in committing human right violations in another State? Does a State have extraterritorial obligations to protect rights of people outside its jurisdiction? If such extraterritorial obligations exist, does a State have a duty to regulate its exports and abstain from exporting to a country that commits wrongful acts? Would responsibility arise only for State (i.e. government) exports or also for a non-state actor's (i.e. private) exports? The article proposes that while the answers under traditional State responsibility may seem unclear, a progressive and proactive interpretation of human right obligations, as examined in the article, responsive to the needs of a highly globalized world, could fill in the gap towards achieving a primary goal under International Law to respect and protect the human person.

Key words: Tear Gas trade Human Rights State responsibility extraterritorial obligations due diligence

I. INTRODUCTION

In January 2015, Dae Kwang Chemical Corporation, a South Korean Company made a shipment of 1.9 million canisters of tear gas to the Turkish government.¹ Organisations such

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¹ Howard Eissenstat, *Dark Days Ahead: Thinking about Turkey's Tear Gas Purchase*, Amnesty International USA: Turkey Regional Action Network, 17January2014,

as Amnesty International fervently protested against the sale. Marek Marczynski, Head of Military, Security and Police at the organisation stated *All shipments of tear gas and other riot control equipment to Turkey must be suspended immediately...*² While the wartime use of tear gas is prohibited under international law, its domestic use as a riot control agent or law enforcement measure is not. If domestic use is permitted, then, why did organisations such as Amnesty International, protest against the export? During the 2013 Gezi Park protests - which began as peaceful protests for conserving a plot of land where trees were to be cut down for development purposes, and later grew into a full blown agitation against the Turkish government, engulfing almost all of Turkey's provinces³ - the use of tear gas by Turkish security forces was described as being *arbitrary, reckless and abusive*.⁴ Over 8000 people were injured and approximately 11 people were killed.⁵ Tear gas was also used unlawfully to curb the Labor Day protests in May 2014, at the Taksim Square in Istanbul. The misuse of tear gas by Turkish officials resulted in gross violations of human rights.⁶ 1.9 million canisters is approximately fifteen times more than the amount of tear gas used by Turkey in the first twenty days of the Gezi protest and would allow Turkish forces to carry on suppressions for approximately ten more months if used at the same rate.⁷ In light of such atrocities by the Turkish forces Mr. Marczynski stated *The South Korean authorities need to send a clear and urgent message that no arms will be supplied to a country where abusive and arbitrary force is being used against protesters.*⁸ Such a concern and assertion raises some interesting questions under international law. *Can a State be held responsible if commodities exported by it are used by the importing state in committing human right violations?* In a highly globalized world, where one State's acts and omissions have an undeniable impact on individuals in another State, *does a State have an obligation under*

<http://humanrightsturkey.org/2014/12/17/dark-days-ahead-thinking-about-turkeys-tear-gas-purchase/>
last visited 6December2015

² *South Korea: Stop tear gas supply or risk fuelling repression in Turkey*, Amnesty International, 15/12/2014, <https://www.amnesty.org/en/latest/news/2014/12/south-korea-stop-tear-gas-supply-or-risk-fuelling-repression-turkey/>, last visited 6December2015

³ *Turkey protests spread after violence in Istanbul over park demolition*, The Guardian, 1/6/2013, <http://www.theguardian.com/world/2013/may/31/istanbul-protesters-violent-clashes-police>, last visited 6December2015

⁴ *2014 Country Reports on Human Rights Practices*, US Department of State, Bureau of Democracy, Human Rights and Labor, 25/6/2015

⁵ Christopher de Bellaigue, *Turkey: Surreal, Menacing...Pompous*, New York Review of Books, December 2013; *Turkish police tear gas protestors on Taksim Anniversary*, BBC News Europe, 31/5/2014, <http://www.bbc.com/news/world-europe-27649472>, last visited 6/December2015; Tim Phillips, *New Report on human rights violations during Turkey's response to Gezi Park Protests*, Activist Defense, 4/10/2013, <https://activistdefense.wordpress.com/2013/10/04/new-report-on-human-rights-violations-during-turkeys-response-to-gezi-park-protests/>, last visited 6December2015

⁶ *Turkey: End Incorrect, Unlawful Use of Tear Gas*, Human Rights Watch, 16/7/2013, <https://www.hrw.org/news/2013/07/16/turkey-end-incorrect-unlawful-use-teargas>, last visited 6/December2015

⁷ *Supra* n.1

⁸ *Supra* n.2

international law to regulate and prohibit exports to a country where the supplies may be used to commit internationally wrongful acts? Part II of this article describes the current status of international law regulating the use of tear gas. Part III deals with the use of tear gas by Turkey. It states that although reasonable domestic use of riot control agents is permitted, Turkey's use of tear gas being arbitrary and excessive is a violation of international law. Part IV explores whether in the light of such violations, a State (in the present case - The Republic of Korea) *can* be held responsible under the traditional articles of State Responsibility for wrongfully permitting the supply of tear gas. Part V (A) proposes that irrespective of the State's responsibility dealt with in Part IV, a State *should* have a duty by virtue of its international human rights obligations to abstain from such exports. V (B) states that it must regulate its exports not only to prevent human right violations within its own borders, but also to prevent violations that are committed extraterritorially or beyond its borders, in order to further the goal of universal protection of human rights. Generally, States are not responsible for the acts of private entities. However, Part V (C) of the article argues that international human right obligations of a State would require it to take due diligence measures at a domestic level to prevent not only its own exports, but also those of private domestic suppliers that would contribute to abuses of fundamental human rights abroad. The rationale behind such measures goes beyond the aim of regulating private exports to the fundamental and primary duty of States to protect human life and dignity.⁹ Finally, the conclusion in Part VI puts forth that the vacuum under traditional State Responsibility to hold a State liable for such acts can be filled by the international human right obligations of a State. In order to fulfill its primary international human obligations, a State needs to enforce positive, precautionary and proactive measures at the domestic level.

II. THE USE OF TEAR GAS UNDER INTERNATIONAL LAW

A. *Tear Gas and its effects*

Tear Gas is a chemical substance that causes irritation in the mucous membranes of the eyes, nose, mouth and lungs resulting in coughing, sneezing, temporary blindness and respiratory

⁹ The inalienable and universal nature of human rights is recognised by several international instruments such as the Charter of the United Nations, The Universal Declaration on Human Rights, The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and various regional human rights instruments.

spasms and pain.¹⁰ Pharmacology professor Sven-Eric Jordt, at Yale University discovered in the 2000s that tear gas activates pain-sensing nerves.¹¹ Several chemicals can be used as tear gas but the most common ones are OC (oleum capsicum i.e. chili pepper oil) and CS (2-chlorobenzalmalononitrile). OC is the primary ingredient in pepper spray and CS gas contains a chemical that activates pain receptors.¹² CS gas causes *a burning sensation in the eyes...severe irritation of the respiratory tract, burning pain in the nose, sneezing, soreness and tightness of the chest. Even very light exposure can cause a rapid rise in blood pressure, and as this increases, gagging, nausea and vomiting*¹³ Tear gas used in open spaces has only transient effects and is not lethal for healthy adults.¹⁴ The effects on vulnerable populations such as asthmatic patients, senior citizens and children may be more severe. Improper or excessive use, highly concentrated or long-term exposure, firing directly at a target or from a close range, can be extremely dangerous and even fatal in certain instances.¹⁵

B. International Law Regulating the use of Tear Gas

The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare declares the prohibition of tear gas to be a part of International Law.¹⁶ The 1993 Chemical Weapons Convention (*Hereinafter* CWC) has 191 State parties, thereby reflecting well-established international consensus.¹⁷ Article 1 (5) of the CWC states that riot control agents will not be used as a method of warfare. Riot control agents are defined in article 2(7) as *Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical*

¹⁰ *Tear Gas*, Encyclopedia Britannica, 15/9/2008, <http://www.britannica.com/technology/tear-gas>, last visited 6/12/2015; Office of Environmental Health Hazard Assessment, California Government, http://oehha.ca.gov/public_info/emergency/chemicals.html last visited 20/9/2015; Oya Ataman v. Turkey, 5/12/2006 European Court of Human Rights, at 17

¹¹ Brian Clark Howard, *The Surprising History and Science of Tear Gas*, National Geographic, June 2015, http://news.nationalgeographic.com/news/2013/06/130612-tear-gas-history-science-turkey-protests/?rptregcta=reg_free_np&rptregcampaign=2015012_invitation_ro_all#, last visited 6December2015

¹² *Ibid*

¹³ *Crowd Control Technologies: An Assessment of Crowd Control Technology Options for the European Union*, Final Study, Omega Foundation, European Parliament Directorate General for Research Directorate A, May 2000

¹⁴ Harward Hu and others, *Tear Gas: Harassing Agent or Toxic Chemical Weapon*, The Journal of the American Medical Association, Volume 262, 4/8/1989

¹⁵ Blain PG, *Tear gases and Irritant Incapacitants*, Toxicol Review, 22(2): 103-10, 2003

¹⁶ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925 states *...prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations*

¹⁷ Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction, 1993

effects which disappear within a short time following termination of exposure .¹⁸ However, the use of tear gas during peacetime is permitted under article 2.9(d) of the CWC, whereby, law enforcement, including domestic riot control purposes is not prohibited.¹⁹ This implies that all States are permitted to reasonably use tear gas as a domestic law enforcement measure. Though it may seem paradoxical to prohibit riot control agents such as tear gas during war but permit their use during peacetime, a plausible reason for doing so is that soldiers during war cannot distinguish between tear gas and other more toxic gases or chemicals. To prevent soldiers from mistaking tear gas for a more dangerous gas and retaliating disproportionately, a uniform wartime ban was imposed on all gases.

C. What constitutes Lawful and Reasonable Domestic use?

The CWC under Article 2 (1)(d) permits the domestic use of tear gas. While no specific international standards exist for regulating the use of tear gas for domestic law enforcement,²⁰ some basic principles are in place. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials²¹ state: "*Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint...and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment...*" Thus, proportionality and a duty to minimize the injury and effects underlie the domestic use by government and police forces. The right to peaceful assembly and the right to freedom from torture are most likely to be affected by the wrongful use of tear gas. The Universal Declaration of Human Rights and Article 21 of the International Covenant on Civil and Political Rights (*Hereinafter* ICCPR) guarantee the right to peaceful assembly. Article 1 and article 16 of the 1987 Convention Against Torture (*Hereinafter* CAT) prohibit torture and cruel, inhumane or degrading treatment by a public official or person acting in an official capacity. These Conventions are universally acknowledged as binding on all States and therefore limitations on the rights protected by them cannot be imposed, unless for legitimate purposes such as necessary for a democratic society, national security or public safety, order, health or morals or for protecting rights and freedoms of others.²² The UN Special Rapporteur on Torture notes that non-lethal weapons (such as tear gas) may often be misused

¹⁸ *Ibid*, Article 2(7)

¹⁹ *Ibid*, Article 2.9(d)

²⁰ *The Pain Merchants: Security equipment and its use in torture and other ill treatment*, Amnesty International, ACT 40/008/2003, p 63, 2/12/2003

²¹ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, U.N. Doc. A/CONF.144/28/Rev.1, 27 August - 7 September 1990, at 112

²² Such legitimate purpose requirements underlie all international human right treaties.

due to improper training or intentionally used to inflict torture or ill treatment.²³ Force that is not necessary or disproportionate is always prohibited.²⁴ Article 3 of the UN Code of Conduct for Law Enforcement Officials states that force should be used *only when strictly necessary*. The Commentary to Article 3 states that the use of force should be *exceptional*; it should be used only *as is reasonably necessary under the circumstances*; and that it should be used for only two purposes, namely to prevent crime or to assist in the lawful arrest of offenders or suspected offender. Even in light of these exceptional legitimate purposes, security forces cannot use tear gas disproportionately.²⁵ In the concluding observations of the Centre for Civil and Political Rights (*Hereinafter* CCPR) at the 97th session of the Human Rights Committee, the CCPR raised concerns that Ecuador's police and armed forces have been responsible for death caused by the use of tear gas of people participating in public demonstrations and recommended to the State to put an end to use of tear gas that was in contravention to articles of the ICCPR.²⁶ The Committee for the Prevention of Torture (*Hereinafter* CPT), also requires adherence to the duty to minimize harmful effects, laying down that *...Pepper spray is a potentially dangerous substance and should not be used in confined spaces. Even when used in open spaces the CPT has serious reservations; if exceptionally it needs to be used, there should be clearly defined safeguards in place*.²⁷ Thus, the general principles laid down imply that respect and protection of human rights is an underlying principle and the use of tear gas is permitted for domestic law enforcement purposes so long as it does not violate Human Rights. This requires conformation to principles of necessity, proportionality, minimization of harm and a duty to ensure effective redress. Violations of such human right standards and principles would render the use of tear gas unreasonable and therefore unlawful.

III. UNLAWFUL USE OF TEAR GAS BY TURKEY

Turkey's systemic violations of its citizens' right to assemble peacefully, use of excessive force to break up peaceful demonstrations and lack of investigations into allegations for the above acts were the subject of The Ataman Group Cases, a group of approximately 45 cases

²³ United Nations Economic and Social Council, *Special Rapporteur on Torture, Study on the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms*, UN Doc E/CN.4/2003/69, 13/1/2003

²⁴ A. Bellal, *Arms Transfers and International Human Rights Law in Weapons under International Human Rights Law*, Cambridge University Press, 2013, 436

²⁵ *Ibid* p 442

²⁶ United Nations International Covenant on Civil and Political Rights, Human Rights Committee, Ninety-seventh session, Concluding Observations, CCPR/C/ECU/CO/5, 12-30 October 2009, para 16

²⁷ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CPT/Inf, 2009, 25

before the European Court of Human Rights (*Hereinafter* ECHR).²⁸ Judgments of the Court since 2006 have called on the Turkish Government to abstain from such acts. In the case of *Izci v. Turkey* the Court observed that *in over forty of its judgments against Turkey the heavy-handed intervention of law enforcement officials in demonstrations...against applicants for taking part in peaceful demonstrations was in breach of articles 3 and/or 11 of the Convention*(European Convention on Human Rights)²⁹ .³⁰ It also noted the failure to show tolerance towards peaceful gatherings and the precipitate use of physical force including tear gas. Thus, the Court in the Ataman cases observed the intervention and disproportionate use of force (in 41 out of 45 cases)³¹ in gatherings to be in violation of articles 3 and 11 of the Convention.

The ECHR found in almost all of the 45 Ataman Group Cases that the measures taken by the government were not those that fall under necessary in a democratic society.³² Protestors were subjected to torture, cruel, inhumane and degrading treatment in violation of article 3³³ due to excessive pain and suffering including the use of tear gas.³⁴ The ECHR, observed in *Izci v. Turkey* that 130 applications against Turkey, concerning the right to freedom of assembly and/or use of force by law enforcement officials during demonstrations, were pending before it.³⁵ In *Abdullah Yasa v. Turkey and Izci v. Turkey*³⁶ the Court found systemic problems with the legal and administrative framework relating to the use of tear

²⁸ Dr. Basak Cali, *The Execution of the Ataman Group Cases, Monitoring Report*, Delegation of the European Union to Turkey, Secretariat General, Council of Europe, 20/1/2015

²⁹ European Convention on Human Rights, 1950, Article 3 prohibits torture, inhuman or degrading treatment or punishment and article 11 protects the right to freedom of assembly and association, including the right to form trade unions, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society".

³⁰ *Izci v. Turkey*, 23/10/2013, European Court of Human Rights, para 95-97; European Convention of Human Rights, 1950, Article 3 Prohibition of Torture No one shall be subjected to torture or to inhuman or degrading treatment or punishment. article 11 Freedom of Assembly and Association 1. Everyone has the right to freedom of peaceful assembly to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

³¹ *Supra* n.28, Annex II

³² *Biçici v. Turkey*, no. 30357/05, 27/5/2010, European Court of Human Rights; *GülizarTuncer v. Turkey*, no.23708/05, 21/9/2010, European Court of Human Rights; *Güler Şahin and others v. Turkey*, no. 68263/0121, December 2006, European Court of Human Rights; *Oya Ataman v. Turkey*, no.74552/01, 5/12/2006, European Court of Human Rights; *Uzunget v. Turkey*, no. 21831/03, 13/10/2009, European Court of Human Rights

³³ *Aytaş and others v. Turkey*, no. 6758/05, 8/12/2009, European Court of Human Right; *İşeri and others v. Turkey*, no.29283/07, 9/10/2012, European Court of Human Rights; *Serkan Yılmaz and others v. Turkey*, no.25499/04, 13/10/2009, European Court of Human Rights

³⁴ *Ali Güneş v. Turkey*, 2012, European Court of Human Rights, para 41

³⁵ *Supra* n.27 para 97

³⁶ *Supra* n.27 para 98

gas by the Turkish government and police forces and laid down guidelines for a comprehensive legal framework to be put in place. Although, some attempts have been made, these guidelines have not yet been sufficiently incorporated by the Turkish government.³⁷

As adjudged by the ECHR, the consistently disproportionate use of tear gas by Turkish forces against its civilian population, spanning from 2006-2013 in the Ataman cases and repeated in the 2013 Gezi Park and 2014 Labor Day protests demonstrates a systemic and protracted violation of international standards embodied under various human right treaties as set out in Part II above. Keeping such gross violations of international norms in mind, the question that then arises is whether South Korea has an obligation under international law to abstain from such a supply to Turkey.

IV. CAN A STATE BE HELD RESPONSIBLE FOR COMMITTING AN INTERNATIONALLY WRONGFUL ACT FOR EXPORTING TO A STATE WHERE THE GOODS SUPPLIED MAY BE USED TO COMMIT HUMAN RIGHT VIOLATIONS?

The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (*Hereinafter* articles) lay down the conditions for a State to be considered responsible for an internationally wrongful act. While the Articles primarily address independent responsibility of a State, Chapter 4 deals with cases where one State can be held responsible for the internationally wrongful acts of another, even if primary responsibility lies with the other State.³⁸

Article 16 lays down 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.*

The Commentary to the articles puts forth three requirements to be fulfilled while considering whether a State can be held responsible for aiding or assisting an internationally wrongful act. Firstly, the State must be aware of the circumstances making the conduct of the assisted State wrongful. Secondly, the assistance must be given with a view to facilitating the commission of the act. Thirdly, the act must be such that it would be wrongful had it been committed on the part of the assisting State itself. In the present situation, as put forth in Part II and III,

³⁷ *Supra* n.28, 15-17

³⁸ International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* 2001, United Nations 2008, 64 http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, last visited 6December2015

Turkey's use of tear gas was reported world over by newspapers and news channels, it was the subject of several debates and campaigns and adjudged as wrongful by the ECHR in the Ataman cases discussed above. It was a well-known fact clearly established in the public domain. This satisfies the first criteria that South Korea had undeniable *knowledge* of the circumstances that made Turkey's conduct wrongful. South Korea being a party to the ICCPR, ICESCR and CAT would itself be responsible for committing a wrongful act under international law had it committed the same violations as Turkey. Thus satisfying the third criteria. The second criteria requires *intent* to facilitate the wrongful act on the part of the assisting State. It seems far-fetched to assert that South Korea permitted the supply of the tear gas canisters with a view to abet the human right violations by the Turkish government. To say that anything more than commercial gain motivated the export would be to stretch the imagination too far. Moreover the difficulty in proving any intent to abet human right violations would render such allegations baseless. Therefore, Article 16 sets a rather high threshold of knowledge coupled with intent to establish responsibility of a third state. An application of the requirements under the Articles of State Responsibility, thus suggests that South Korea cannot be held responsible for aiding and assisting Turkey's internationally wrongful acts and that the export of tear gas to Turkey is permissible under international law. However, this article proposes that examining responsibility under the Articles of State Responsibility, only presents half the picture. The author proposes in the following section that a State cannot be absolved of all liability under international law and it does have a responsibility to regulate and abstain such exports under the human rights regime.

V. RESPONSIBILITY UNDER INTERNATIONAL HUMAN RIGHTS LAW

A. SHOULD a State be held Responsible?

This article proposes that the primary nature of international human right obligations of a State generate the responsibility of a State and impose a positive obligation to *regulate* exports and *abstain* from those that contribute to human right violations in the importing country. *The primacy of human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.*³⁹ The Sub-Commission

³⁹ United Nations Economic and Social Council, *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR 52nd Session, U.N. Doc. E/CN.4/Sub.2/2000/13, 2000

on Promotion and Protection of Human Rights has recognised the centrality and primacy of human rights obligations in all areas of governance and development, including international and regional trade...⁴⁰ Acknowledging this fact, *The General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.*⁴¹

Arms trade if abused has the potential to effect human rights such as the right to life, the right to freedom from torture, cruel, inhuman and degrading treatment, right to liberty and security of person, right to freedom of thought, conscience and religion, the right to protest, freedom of assembly and expression.⁴² The right to life, dignity of the human person, the prohibition of torture, cruel, inhuman or degrading treatment are recognised as peremptory norms or jus cogens norms from which no derogation is permissible under international law.⁴³ *In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.*⁴⁴ Article 41(1) of the articles on state responsibility requires States to cooperate to put an end to serious breaches.⁴⁵ The commentary to the article states that *...special obligations of cooperation in putting an end to an unlawful situation arise in the case of serious breaches of obligations under peremptory norms of general international law.*⁴⁶ Thus, there is a positive obligation on States to take measures to prevent breaches of peremptory norms. Even if violations do not meet the threshold of peremptory norms, lower thresholds to protect human rights have been set by the following instruments and expert opinions.

The Arms Trade Treaty (*Hereinafter* ATT), adopted by the UN General Assembly on 2 April, 2013 and having 130 State signatories (including The Republic of Korea and Turkey) recognises the need of precautionary and pro-active State conduct when human rights may be in jeopardy. One of the objects of this Treaty is to *Establish the highest possible common international standards for regulating or improving the regulation of the international trade*

⁴⁰ United Nations Economic and Social Council, Sub-Commission on Promotion and Protection of Human Rights, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, U.N. Doc. E/CN.4/Sub.2/ RES/1998/12, 1998; *Report of the Sub-Commission on its 50th Sess.*, U.N. ESCOR, 50th Sess., U.N. Doc. E/CN.4/Sub.2/1998/45, 1998, 39

⁴¹ Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, Draft Resolution XVII (A/37/745), 14/12/1982, 50.

⁴² *Supra* n.24, 469-70

⁴³ Examples include prohibition of genocide, aggression, slavery, racial discrimination, torture.

⁴⁴ *Barcelona Traction (Belgium v Spain)*, Second Phase, 1970, International Court of Justice, para 33; See M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, Clarendon Press, 1997

⁴⁵ *Supra* n.38

⁴⁶ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 148

in conventional arms,⁴⁷ for the purpose of *Contributing to international and regional peace, security and stability; Reducing human suffering; and Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms...* Article 3 requires *Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2(1)* . This covers tear gas canisters or shells fired from a gun or launcher.⁴⁸ Under article 7(1) a State must *under its jurisdiction and pursuant to its national control system... assess the potential that the conventional arms or items: (a) would contribute to or undermine peace and security or (b) could be used to (ii) commit or facilitate a serious violation of international human rights law...* There is no universally agreed definition of what constitutes a serious violation of human rights. Violations of fundamental human rights such as the right to peaceful assembly, even if not peremptory norms can still be considered serious if the breach is systematic or gross depending on the *manner* and *intensity* with which the violation takes place.⁴⁹ A gross or systematic breach would take place for instance when the violations have affected several people or are carried out for a long period of time. The 1998 European Union Code of Conduct on Arms Exports, made binding in 2008, says a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe have established that serious violations of human rights have taken place in the recipient country. If upon an assessment under article 7(1) of the ATT, an overriding risk is found, the exporting State shall not authorize the export. In the present case, the ECHR has held that the arbitrary, systemic and protracted violations by Turkey (as put forth in Part III), have led to serious violations of human rights. The ATT, thus recognizes the responsibility of States to regulate the international trade in conventional arms and the positive obligation to implement national control systems for such regulation,⁵⁰ in order to protect human rights. South Korea being a signatory to the ATT ought to have regulated the export of tear gas to Turkey, by its domestic manufacturers and in light of the serious violations, prohibited it.

⁴⁷ *The Arms Trade Treaty*, Academy Briefing No.3, Geneva Academy of International Humanitarian Law and Human Rights, June 2013, 21, [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf), last visited 6December2015; Best defined as all arms other than weapons of mass destruction , US Department of Defense (DoD), DOD Dictionary of Military Terms, as amended through 31/10/2009, 122

⁴⁸ *Ibid*

⁴⁹ United Nations Economic and Social Council, *Report on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, UN doc. E/CN.4/1999/65, 1999, para 65

⁵⁰ United Nations General Assembly, *Final United Nations Conference on the Arms Trade Treaty*, 27/3/2013, A/CONF.217/2013/L.3, 2013, 3

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has called upon States (a) To introduce strict controls on the export of other security and law enforcement equipment to help ensure that it is not used to inflict torture or ill-treatment. Such controls should include an effective governmental export licensing system, which includes end-user certificates that are guaranteed by the recipient Government, and end-use monitoring by independent organizations; (h) To introduce legislation to control and monitor the activities of private providers of military, security and police services to ensure that they do not facilitate or perpetrate torture.⁵¹ In line with such suggestions, South Korea should put in place domestic checks such as end-user certificates and legislation monitoring private exporters.

The European Commission's proposal of a Council Regulation Concerning trade in certain equipment and products which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment sought to control trade in equipment that was lawful but nonetheless could be used for the purpose of torture or capital punishment. Tear gas would fall under such a classification as its regulated use is lawful, but if used arbitrarily or excessively it could result in torture. The proposal established that *EU Governments would be required to strictly control the trade in such equipment and refuse to authorize their transfer to any law enforcement authorities that have practiced torture within the previous five years, or where there are reasonable grounds to suspect or believe that the law enforcement authority concerned is committing or tolerating acts of torture.*⁵² The proposal thereby establishes the primacy of protecting human rights while engaging in tear gas trade.

The draft framework convention on international arms transfers (25 May 2004) in article 3 states: *A Contracting Party shall not authorize international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be...used in the commission of serious violations of human rights...*

The Government of Germany indicated to the Special Rapporteur on Torture via a letter dated 3 January, 2002 that *...countries that violate human rights mainly use devices for torture which normally serve legitimate purposes. Danger of misuse results from the way in which such devices are employed.* To avoid such misuse, German export control legislation does

⁵¹ United Nations Economic and Social Council, Commission on Human Rights 61st session, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* E/CN.4/2005/62, 15/12/2004,11

⁵² *Supra* n.49 section (2), 9, 35

not grant authorisations unless safe end use is expected such as use that excludes human right violations.⁵³

The provisions of the international law instruments and State practice discussed above, require proactive conduct by the exporting state to assess the impacts of its exports, identify risks and regulate trade accordingly. There is a growing acknowledgement of the underlying fundamental concept of protection of human rights over and above commercial or any other interests. Requirements of such proactive conduct imply that there should be a sense of duty and responsibility on the part of exporting states under human right norms.

B. Extraterritorial Obligations

States have a duty to ensure the *universal* protection of human rights.⁵⁴ In the Wall case, the International Court of Justice held that rights and obligations under the ICCPR apply extraterritorially.⁵⁵ Therefore, a State should have a responsibility to prevent exports even if the human right violations taking place are beyond its own borders. The principles of the UN Disarmament Commission's Guidelines on international arms transfers states inter alia that *Economic or commercial considerations should not be the only factors in international arms transfers...*⁵⁶ and that *...States have a responsibility to seek to ensure...their arms exports do not contribute to instability and conflict in their regions or in other countries and regions...*⁵⁷

With the advent of globalisation, the activities of one State have an undeniable impact on several other States and their socio-economic conditions. Consolidating the law relating to extraterritorial obligations of States and filling in the gap towards achieving universal protection of human rights in the midst of the adverse effects of globalisation, The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (*Hereinafter* Maastricht Principles), were adopted by a group of 40 international law and human rights experts on 28 September 2011 in Maastricht, the Netherlands. Its general principles state that *States have obligations to respect, protect and fulfill human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.* The scope of such obligations extends to

⁵³ United Nations Economic and Social Council, Commission on Human Rights 59th session, E/CN.4/2003/69, 13/1/2003, 12, 30

⁵⁴ Charter of the United Nations; Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625, 1970

⁵⁵ Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, 9/7/2004, International Court of Justice, para 107-111

⁵⁶ *The UN General Assembly Guidelines on International Arms Transfers*, Council on Foreign Relations, 3/5/996, para 19

⁵⁷ *Ibid* 20

situations where a) the State can exercise effective control or authority b) Its acts or omissions bring about foreseeable effect on the enjoyment of such rights, within or outside its territory c) where the State through its legislative, executive, judicial branches can take measures and exercise influence to realise such rights. It defines extraterritorial obligations as (a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally. States must assess the extraterritorial impacts of their practices and undertake preventive measures. The rationale seems simple human right obligations cannot be interpreted so as to allow a State party to perpetrate violations on the territory of another State, which it could not perpetrate on its own territory.⁵⁸ Today, a more functional approach to the obligations of states is recognised in international human rights forums rather than a primarily territorial obligation.⁵⁹ Thus, states must comply with their international human rights obligations in any action they take that may affect the human rights of individuals even when they take actions that have an extraterritorial effect. This suggests that South Korea has a duty to abstain from exports that would further human right violations in Turkey. The protection of human rights is essentially universal in nature and States have a duty to protect such rights of all the world's citizens, not just its own nationals.

C. State Responsibility should arise even in the case of export by Private Corporations/non state actors

The export of tear gas to Turkey was by a private company and not by the Republic of Korea itself. In principle, a State is not responsible for the acts of non-state actors. In light of this, could South Korea still be responsible for wrongful conduct? Today, in many countries manufacturers or suppliers are not required to have an export license, even if the end-user in the importing country has a documented record of using such equipment to commit torture.⁶⁰ Although, a State is not in principle responsible for private conduct, a lack of due diligence may render it so.⁶¹ Human rights as a fundamental concept have to be protected by all States.

⁵⁸ *Issa and Others v. Turkey*, 16/11/2004, European Court of Human Rights, para 66-71

⁵⁹ Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 2004, 6

⁶⁰ *Supra* n.49 section (2), 26

⁶¹ Alexander Kees, *Responsibility of States for Private Actors*, Max Planck Encyclopedia of Public International Law (MPEPIL), March 2011, para 3

International Conventions oblige states to ensure , protect , or secure rights.⁶² This reflects a positive obligation of States to prevent violation of rights by taking the necessary precautionary measures. The concept of due diligence can be understood as what a responsible State ought to do under normal conditions in a situation with its best practicable and available means, to fulfilling its international obligation.⁶³ Given the hostile conditions prevailing in Turkey, South Korea should have exercised due diligence and abstained from permitting the supply of tear gas. If a state fails to show due diligence in attempting to prevent or respond to the violation of international law, *it is not the private conduct itself but the insufficient effort to prevent or respond to it that might generate its international responsibility.*⁶⁴

The purpose of due diligence is to identify and mitigate or prevent harm. The degree of due diligence required will vary according to the circumstances⁶⁵ and the level of protection provided by applicable norms. The risk of persistent breach of fundamental human rights in Turkey warrants a high degree of due diligence on the part of the Republic of Korea and an action to ban the export of tear gas. The Human Rights Committee has stated that States must take appropriate measures or exercise due diligence to prevent, punish, investigate or redress the harm caused by the acts of private companies or their staff that impair human rights and a failure to do so will give rise to a violation of the ICCPR by the State party.⁶⁶ Although, there may not be a precise consensus as to what constitutes due diligence in such cases, basic and reasonable measures must not be forgone.

The inadequacy of domestic legislation resulting in oversight or a lack of background vetting by the State can be considered to be a failure of due diligence.⁶⁷ Even if States do not directly control the private exporters, but rather give a quiet nod to risk prone or abusive conduct...can generate state responsibility for lack of due diligence...⁶⁸ The EU Code of Conduct on Arms Exports, proposes to exercise special caution and vigilance in issuing licenses, on a case-by-case basis and taking account of the nature of the equipment to countries where serious violations of human rights have been established... In the Maastricht

⁶² International Covenant on Civil and Political Rights, 1996, article 1(2), American Convention on Human Rights 1978, article 1; European Convention on Human Rights, 1950, article 1

⁶³ Hanqin Hue, *Transboundary Damage in International Law*, Cambridge University Press, 2003, 163; Dupuy, Pierre, *Due diligence in the International Law of Liability in Legal Aspects of Transfrontier Pollution*, OECD, 1977, para 13

⁶⁴ Herbert W. Briggs, *The Law of Nations*, New York: Appleton-Century-Crofts, 1947, pp. 866-871

⁶⁵ Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces*, 88 *RdC II*, 1955, 278

⁶⁶ *Supra* n.59, para 8

⁶⁷ Schlesinger, *Final Report of the Independent Panel to Review DoD Operations 2004*, www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf, Last visited 6December2015

⁶⁸ Lehnardt, *Private Military Companies and State Responsibility*, IILJ, 2007/2, 20 Working Paper

Principles, States have an obligation to regulate non-state actors to ensure that they do not nullify or impair the enjoyment of economic, social and cultural rights. This includes taking administrative, legislative, investigative and adjudicatory measures.⁶⁹ Similar obligations to act with caution and carry out regulation are found in the ATT, the draft framework convention on international arms transfers and in the comments of the Special Rapporteur on torture, as discussed in Part V (A).

Operational Principles of the UN Guiding Principles on Business and Human Rights require States to Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights... It must be kept in mind that States cannot relinquish their international obligations by privatizing services that impact human rights. States should exercise adequate oversight in order to meet their international human right obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon enjoyment of human rights. Moreover, if a State is not required to regulate private conduct it could conveniently evade responsibility for its own acts by attributing conduct to a private actor.

The UN Guiding Principles on Business and Human Rights state in the foundational principles that States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights *through out* their operations. Recent trends, as evidenced by national due diligence practices, the Guiding Principles and also OECD Guidelines, extend due diligence obligations beyond the boundaries and jurisdiction of a State.⁷⁰ States have a duty to regulate private conduct even if the harm is caused to persons or other legal interests within the territory of another State.⁷¹ Even in the EU, national Courts of Member States can hear cases of corporations domiciled in EU even if the damage has occurred outside their territory.⁷² The underlying philosophy is simple a State must prevent its territory from being used to cause harm on another State s territory.⁷³ The basic measures taken by a State may include - mandating assessments of the

⁶⁹ The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETOs, January 2013, 9, 24 http://www.etoconsortium.org/nc/en/library/maastrichtprinciples/?tx_drblob_pi1%5BdownloadUid%5D=23, last visited 6December2015

⁷⁰ O. Shutter, A. Ramasastry, M. Taylor, R. Thompson, *Human Rights Due Diligence: The Role of States*, December 2012, 51

⁷¹ Ian Brownlie, *System of the Law of Nations: State Responsibility*, 1983,165

⁷² *Brussels I Regulation*, Council Regulation (EC) No 44/2001 2001 O.J. (L 12) 1, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do%3Furi%3DOJ:L:2001:012:0001:0023:en:PDF>, last visited 6December2015

⁷³ Committee on Economic, Social and Cultural Rights, *General Comment No. 15*, U.N. Doc. E/C.12/2002/11, 26/11/2002, para 31 - specifically in regard to corporations: States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat

impacts of transactions, identifying steps for mitigating or preventing such impacts, requiring regular due diligence reports to be submitted and accordingly adopting policies, regulations, legislations and enforcement measures that are effective in addressing the risk of business involvement in gross human right abuses.⁷⁴

All states...have a general duty to ensure respect for ... human rights law. Regulating the export of services that may result in the use of force may contribute to promoting respect for international law by controlling who exports what services and where they are exported to...⁷⁵ Therefore, whether the export is by State authorities or private actors, there is a responsibility of States to take the necessary, reasonable and precautionary measures to protect human rights.

VI. CONCLUSION

Although, South Korea's responsibility under the articles of state responsibility may seem unclear, recent international law instruments, extraterritorial obligations and due diligence requirements discussed above, recognise the primary duty of States to maintain peace, stability and respect for the human person and indicate that the Republic of Korea does have a duty under international law to regulate its export of tear gas to Turkey. To prevent further exports of arms to countries where the arms would be used for internal repression, it is vital that the National Assembly passes the amendment bill in the near future.⁷⁶ Even if legislative enactments could not have practically been an immediate solution, South Korea having knowledge of the grossly unlawful use of tear gas by Turkey should have exercised due diligence and immediately issued a ban on the export from its territory in order to comply with international law trends and extraterritorial obligations. According to the Defense Acquisitions Program Administration (DAPA), South Korea's military exports have grown

under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant. ; Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, U.N. Doc. E/C.12/2011/1, 20/5/2011, para 5

⁷⁴ United Nations Human Rights Office of the High Commissioner, New York and Geneva, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04, 2011, pp 8,9 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, last visited 6December2015

⁷⁵ Michael Cottier, *Elements for Contracting and Regulating Private Security and Military Companies*, International Review of the Red Cross, Volume 88 No 863, September 2006, 653

⁷⁶ *Korean Officials Reiterate Ban On Tear Gas Exports To Bahrain*, Bahrain Watch, 26/3/2014, <https://bahrainwatch.org/blog/2014/03/26/korean-officials-reiterate-ban-on-tear-gas-exports-to-bahrain/>, last visited 6December2015

10 fold in the past decade, totaling just over \$2.3 billion in 2012.⁷⁷ Such a rapid expansion of arms and munitions sales without any regard for the purposes they may be used for appears to be inconsistent with principles of international law. The situation is not only confined to Turkey. Systemic violations have taken place out of arbitrary use of tear gas in Egypt, Bahrain⁷⁸, and in the West Bank by Israeli forces.⁷⁹ Human rights advocates have called upon USA and Europe - the predominant suppliers of ammunition to these areas - to stop supplying tear gas canisters in light of the atrocities being committed.⁸⁰ In order to fulfill primary international law obligations, States must enforce positive, precautionary and proactive measures at the domestic level. This article asserts that in an age of expanding globalisation and interconnectedness, international human right obligations of a State must be interpreted to give rise to the duty of a State to regulate and abstain from exports that are likely to be used to commit human right violations in another territory, thereby addressing a gap in the realisation of universal protection of human rights. Human right obligations although a traditional and fundamental concept, mandate a progressive interpretation in order to ceaselessly protect human beings living in a constantly evolving world.

⁷⁷ Strother, *South Korea Looks to Increase Arms Exports*, Voice of America, 15/11/2013 <http://www.voanews.com/content/s-korea-looks-to-increase-arms-exports/1790882.html>, last visited 6December2015

⁷⁸ *Report of the Bahrain Independent Commission of Inquiry*, Bahrain Independent Commission of Inquiry, 23/11/2011

⁷⁹ *Crowd Control: Israel's Use of Crowd Control Weapons in the West Bank*, B tselem, January 2013, *US-made tear gas becomes fatal ingredient of protests*, The National, 18/12/2011, *Israeli soldiers continue firing tear gas canisters directly at human targets, despite the army's denials*, B tselem, 22/4/2012, *Israeli forces fire tear-gas and stun grenades on Palestinian journalists during World Press Freedom Day march*, Mondoweiss, 4/5/2015, <http://mondoweiss.net/2015/05/grenades-palestinian-journalists>, last visited 6December2015,

⁸⁰ *Trigger-happy Israeli army and police use reckless force in the West Bank*, Amnesty International, 27/2/2014; *Egypt's Human Rights Abuses: Made in USA?* Amnesty International, 30/10/2013; *US sent 600,000 tear gas canisters to Israel, says new report*, The Electronic Intifada, 9/12/2012