

# Assessing the feasibility, scope and parameters of an Arms Trade Treaty (ATT): An NGO perspective<sup>1</sup>

## Preface

Member States of the United Nations (UN) have initiated a process to develop an international legally-binding Arms Trade Treaty (ATT) to regulate international transfers of conventional arms. The purpose of this paper is to make recommendations on the feasibility, scope and draft parameters for a comprehensive treaty. As such, it should be of assistance to States preparing to submit their views to the UN Secretary-General as mandated by UN General Assembly (GA) Resolution 61/89. The deadline for the submission of views to the UN Secretary General is 30 April 2007. We urge all States to engage fully with the ATT process as soon as possible. If they wish, States can request that the future UN Group of Governmental Experts (GGE) further examine the issues raised in this paper.

This paper argues that for an ATT to be comprehensive and effective, it must be based on States' existing obligations under international law. The content of these obligations are found in a variety of international standards and instruments including: international and regional treaties, declarations and resolutions of the United Nations and other multilateral and regional organisations, and model regulations intended for national legislation. From these principles and documents, a series of clear obligations and emerging norms can be derived. These can be summarised as follows:

1. States are responsible for and must authorise all arms transfers that are relevant to their jurisdiction;
2. States must assess all arms transfers, taking into account the following criteria:
  - **Express prohibitions** where States must not transfer arms in certain situations;
  - Prohibitions on transfers based upon the **likely use of the weapons**, in particular whether the weapons are likely to be used to commit serious violations of international human rights law or international humanitarian law;
  - **Other factors and emerging norms** that must be considered when assessing arms transfers.
3. A monitoring and enforcement mechanism must exist, providing for prompt, impartial and transparent investigation of alleged violations of an ATT and appropriate penalties for offenders.

An ATT should reflect the inherent right of all States to self-defence under Article 51 of the UN Charter and acknowledge the right of all States to acquire legitimate arms for self-defence and security needs in accordance with international law and standards. An ATT must also reflect the obligation under the UN Charter of States to promote and observe human rights and fundamental freedoms – including civil, political, economic, social and cultural rights – all of which are necessary for sustainable development. There is also a universal obligation on States to ensure respect for the rules of international humanitarian law. Without the inclusion of these elementary principles an ATT will simply not be effective.

## Introduction

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<sup>1</sup> This briefing paper has been prepared and endorsed by the ATT Steering Committee of NGOs. Committee members include: Africa Peace Forum, Amnesty International, Arias Foundation, Friends Committee on National Legislation, Instituto Sou da Paz, International Action Network on Small Arms, Nonviolence International, Oxfam International, Project Ploughshares, Saferworld, Schweitzer Institute, Caritas Internationalis, Viva Rio, Women's Institute for Alternative Development.

On 6 December 2006, the United Nations General Assembly voted in favour of taking first steps towards a legally-binding Arms Trade Treaty (ATT) to establish 'common international standards for the import, export and transfer of conventional arms'. The UN Resolution 61/89, adopted with the resounding support of 153 countries, is a landmark step towards a more effective regulation of the international arms trade.<sup>2</sup>

Irresponsible and poorly regulated trade in arms fuels conflict, results in gross human rights abuses and serious violations of international humanitarian law (IHL), destabilises countries and regions and undermines sustainable development. For many years, NGOs from around the world have raised awareness of the devastating impacts of poorly regulated arms transfers. In excess of a thousand people die each day as a result of armed violence with many more injured, displaced and traumatised. Whilst men are the main perpetrators and victims of armed violence, women and children suffer disproportionately from the destruction that attends the proliferation and misuse of conventional arms. Livelihoods are destroyed. Prospects for sustainable development are undermined. Insecurity is a fact of life for the millions who live in fear of armed violence. This has led many NGOs and governments to call for a global approach to controlling the arms trade.

Resolution 61/89 is welcomed by NGOs and other civil society groups who see this achievement as an important outcome of their international campaign for an ATT and the result of constructive dialogue and partnership between themselves and a significant number of governments.

An increasing number of governments are now vocal supporters of an ATT. Many more have expressed their willingness at the UN General Assembly to start the official negotiation process that will lead to an ATT. However, much still needs to be done before the support of the majority of UN member States translates into an effective international legally-binding treaty. The mutual benefits of constructive and sustainable partnerships between civil society, governments and various UN bodies will need to be pursued further.

### **Overview of Resolution 61/89**

Resolution 61/89 reaffirms the inherent right of all States to self-defence under Article 51 of the Charter and acknowledges the right 'of all States to manufacture, import, export, transfer and retain conventional arms for self-defence and security needs'. The Resolution recognises that arms control, disarmament and non-proliferation are essential elements of maintaining international peace and security, and that with the rights to sell, acquire and possess weapons come the responsibilities and legal obligations that derive from the Charter of the United Nations and international law, including international human rights law, international humanitarian law and UN arms embargoes.

The Resolution acknowledges the existence of different initiatives at international, regional and sub regional levels 'to enhance co-operation, improve information exchange and transparency and implement confidence-building measures' with regard to the international arms trade. The role played by non-governmental organizations and civil society towards a responsible arms trade is also recognized.

The Resolution explicitly stresses the need 'to develop common international standards on the import, export and transfer of conventional arms'. The Resolution recognizes that the absence of such standards 'is a contributory factor to conflict, the displacement of people, crime and terrorism' and undermines, among others, peace, security, and sustainable development.

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<sup>2</sup> A full list of the 153 states that voted in support of UN Resolution 61/89 can be found online at <http://www.iansa.org/un/ATTvotes.htm>.

The Resolution notes the growing support across all regions for the conclusion of a legally-binding instrument that establishes 'common international standards for the import, export and transfer of conventional arms'.

The Resolution sets out two main requests to the Secretary General that will be crucial to formulating clear proposals for an ATT that can be 'negotiated on a non-discriminatory, transparent and multilateral basis'. Most relevant for the purposes of this paper is the request to the Secretary-General to:

- *seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally-binding instrument establishing common international standards for the import, export and transfer of conventional arms, and to submit a report to the General Assembly at its sixty-second session*

In addition, the Resolution requests the Secretary General to establish a geographically balanced group of governmental experts (GGE) to explore the same set of issues. The GGE is to commence its work in 2008 and will report to the UN General Assembly at its sixty-third session.

### **The feasibility of an ATT**

An ATT is feasible, as it would build on arms transfer principles that are now firmly established. Over the past decade, a significant amount has been achieved at the sub regional, regional and multilateral level to develop common standards for the regulation of international arms transfers. In particular, the Americas, Europe and Sub-Saharan Africa have adopted a number of comprehensive arms transfer control agreements.<sup>3</sup> Whilst these agreements vary in their formulation and application, collectively they represent vital building blocks for a future ATT.

In 2006 the Economic Community Of West African States (ECOWAS) agreed a Convention on Small Arms and Light Weapons (SALW), Their Ammunition and Other Related Material. The Convention sets out a ban on all international small arms transfers except those required for legitimate self-defence and security needs, or for peace support operations. Exemption requests are submitted to the ECOWAS Executive Secretary by Member States, and there are stringent procedures for determining whether a transfer shall or shall not be authorized. Decisions of the ECOWAS Executive Secretary are based on the application of a comprehensive set of criteria reflecting many of States' existing obligations under international law, including:

- Member States' obligations under the Charter of the United Nations – including:
  - Binding resolutions of the United Nations Security Council such as those imposing arms embargoes;
  - The prohibition on the use or threat of use of force;

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<sup>3</sup> These include, for example: Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials (CIFTA), 1997; European Union Code of Conduct on Arms Exports, 1998; Organisation for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons, 2000; Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies Best Practice Guidelines for Exports of Small Arms and Light Weapons, 2002; Organisation of American States (OAS) Inter-American Convention on Transparency in Conventional Weapons, 2002; OAS Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, 2003; OSCE Handbook on Best Practices on Small Arms and Light Weapons, 2003; Nairobi Protocol on Small Arms and Light Weapons, 2004 and Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, 2005; Code of Conduct of the States of Central America (SICA) on the Transfer of Arms, Munitions, Explosives and Related Materiel, 2005; Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons their Ammunition and Other Related Materials, 2006.

- The prohibition on intervention in the internal affairs of another State.
- Universally accepted principles of international humanitarian law;
- Any other treaty or decision by which the Member States are bound.

In addition, a transfer shall not be authorised if the arms are destined to be used:

- For the violation of international humanitarian law or infringement of human and peoples' rights and freedoms, or for the purpose of oppression;
- For the commission of serious violations of international humanitarian law, genocide or crimes against humanity;
- To worsen the internal situation in the country of final destination, in terms of provoking or prolonging armed conflicts, or aggravating existing tensions;
- To carry out terrorist acts or support or encourage terrorism;
- Other than for the legitimate defence and security needs of the beneficiary country.

Further, a transfer shall not be authorised if it is destined to:

- Be used for or to facilitate the commission of violent or organized crime;
- Adversely affect regional security; endanger peace, contribute to destabilising or uncontrolled accumulations of arms or military capabilities into a region, or otherwise contribute to regional instability;
- Hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the states involved in the transfer;
- Involve corrupt practices at any stage – from the supplier, through any middlemen or brokers, to the recipient.

Finally the ECOWAS Convention stipulates that a transfer shall not be authorised if it is likely to be diverted, within the transit or importing country or be re-exported, to unauthorized uses or users or into the illicit trade.

In December 2005, the States belonging to the Central American Integration System (SICA) concluded an agreement on the regulation of international arms transfers with the adoption of the Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Materiel. State parties to the SICA Code of Conduct agree that transfers of conventional, non-conventional, small and light weapons, ammunition, explosives and other related material shall not be carried out to States which act in contravention of a range of international legal obligations and norms including:

- Committing or sponsoring crimes against humanity or human rights violations or committing serious violations of the laws and customs of war;
- Preventing their citizens from choosing their representatives through free, fair and periodic elections by secret ballot;
- Restricting the right of their citizens to express their political views through freedom of expression, the dissemination of ideas and information, and the right of assembly, association and organization, including the establishment of political parties;
- Failing to comply with relevant regional or international agreements on arms embargoes or other sanctions;
- Failing to report the totality of their arms transfers to the United Nations Register of Conventional Arms;
- Being involved in an armed conflict, unless that conflict is recognized to be an act of self-defence;
- Promoting nationalist, racial or religious hatred that incites to discrimination, hostility or violence, or that incites individuals to overthrow their Government or the Government of another country;
- Being involved in actions or practices that might lead to a significant number of displaced persons or refugees;

- Failing to comply with international agreements and instruments on terrorism and related acts.

Of the existing regional and multilateral arms transfer control agreements, the 2005 Best Practice Guidelines associated with the Nairobi Protocol on SALW, are the most comprehensive and most closely reflect States' existing obligations under international law. The Guidelines stipulate criteria that State Parties to the Nairobi Protocol should adopt for arms transfers, including:

States parties shall not authorise transfers which would:

- i) Violate their direct obligations under international law including:
  - Obligations under the UN Charter and decisions of the UN Security Council – including UN arms embargoes;
  - The prohibition on the use or threat of force;
  - The prohibition on intervention in the internal affairs of another State;
  - Any other treaty or legal obligations to which a State is bound;
  - The prohibitions on arms transfers that arise in particular treaties which a State is party to;
  - Universally accepted principles of international humanitarian law;
  - The prohibition on the use of arms that cause superfluous injury or unnecessary suffering;
  - The prohibition on weapons that are incapable of distinguishing between combatants and civilians.
- ii) States parties shall not authorise transfers that are likely to be used:
  - To violate or suppress human and peoples' rights;
  - For the commission of serious violations of international humanitarian law;
  - In acts of aggression against another State or population;
  - To aggravate existing tensions in the country of final destination;
  - To carry out terrorist acts;
  - Other than for the legitimate defence and security needs of the recipient country.

In addition States subscribing to the Nairobi Best Practice Guidelines should not authorize transfers if they are likely to:

- Be used for or to facilitate the commission of violent crimes;
- Be used in the commission of serious violations of international humanitarian law, applicable in international or non-international armed conflict;
- Be used in the commission of genocide or crimes against humanity;
- In acts of aggression against another State or population, threatening the national security or territorial integrity of another State;
- Adversely affect regional security;
- Adversely affect sustainable development;
- Involve corrupt practices at any stage;
- Contravene other international, regional or sub-regional commitments or agreements on non-proliferation, arms control and disarmament.

In December 2002, the Wassenaar Arrangement adopted a set of Best Practice Guidelines for Exports of SALW. Participating States affirm that they will apply strict controls over small arms exports and they will avoid issuing licences for export where there is a clear risk that the small arms in question might contravene their international commitments, including UN arms embargoes; prolong or aggravate an existing armed conflict; be used in repression or the violation or suppression of human rights and fundamental freedoms; or endanger peace

or regional stability. The document also calls on States to take into account the risk of diversion or re-export of weapons when evaluating licence requests.

In 2000 the Organization for Security and Cooperation in Europe (OSCE) agreed to a Document on Small Arms, which includes a set of common export criteria. States commit to avoid approving exports where there is a clear risk that the small arms in question might be used in human rights abuses, to prolong conflicts, to contribute to regional instability, or to facilitate organized crime, or be diverted or re-sold for these purposes. The OSCE also adopted in December 2003 its Handbook on Best Practices on SALW, which affirms that small arms exports should not occur without a licence from the State. It encourages States to include in contracts or end-use certificates a clause prohibiting the diversion or re-export of weapons, at least without prior permission of the original exporter. The issuance of licences should be avoided where, for example, there is clear risk that the arms or associated technology might be used for the violation or suppression of human rights or contravene international commitments including Security Council sanction decisions.

The 1998 European Union (EU) Code of Conduct on Arms Exports seeks to create "high common standards" for all EU members to use when making arms export decisions and to increase transparency among EU States on all conventional arms exports. EU States pledge not to approve arms exports in certain instances, including where the sale would violate the exporting State's commitments under the UN Charter or specific arms control agreements. Export licences should also be denied where there is a clear risk that the weapons will be used for internal repression, to provoke or prolong armed conflict or used aggressively against another country, amongst other criteria.

The EU Code of Conduct also incorporates a set of detailed "Operative Provisions" which facilitate the implementation of the Code and encourage a level of consistency in the interpretation of the Code's criteria. Two of the most significant elements of the Operative Provisions are the denial notification mechanism, whereby any Member State denying a licence must notify all EU Member States of this decision, and the consultation mechanism which is invoked when another Member State wishes to consider approving a transaction which is "essentially identical" to one already the subject of an export licence denial. To increase transparency, the EU Code's Operative Provisions also provide for the compilation of an Annual Report on Member States arms exports.

The conclusion of a plethora of sub regional, regional and multilateral agreements to control the international transfer of conventional arms over the past decade reflects the growing realisation that the problem of such arms proliferation can only be effectively addressed through collaboration among States based upon the existing obligations of states. This applies both to those States involved in transferring arms internationally (such as those participating in the Wassenaar Arrangement) and those States affected by the impact of conventional arms proliferation and misuse. Further, a commitment to a global treaty to control the international transfer of conventional arms has been made by a significant number of Southern States by virtue of the November 2005 Commonwealth Heads of Government statement in which 38 Heads of Government "noted the proposal for the development of common international standards for the trade in all conventional weapons and added their support to calls for work on such a treaty to commence at the UN."<sup>4</sup>

Overall, existing sub regional, regional and multilateral instruments for the control of international transfers of conventional arms address a similar range of concerns, including the need to:

- Establish clear national procedures for regulating international transfers of arms

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<sup>4</sup> Commonwealth Heads of Government Statement, November 2005, available at [http://www.thecommonwealth.org/document/147565/chogm\\_2005\\_final\\_communiq.htm](http://www.thecommonwealth.org/document/147565/chogm_2005_final_communiq.htm)

- Prevent and combat illicit arms transfers;
- Respect UN arms embargoes;
- Prevent diversion to proscribed groups, such as those who commit terrorist or criminal acts;
- Prohibit transfers that violate obligations under international law;
- Prohibit transfers that are likely to be used for serious violations of human rights or international humanitarian law;
- Prohibit transfers that are likely to be used to commit crimes against humanity or acts of genocide;
- Prohibit transfers that adversely affect sustainable development;
- Prohibit transfers that are likely to adversely affect internal or regional security.

The overriding need to ensure respect for human rights and international humanitarian law in all arms transfers is particularly clear. Under the Principles and Purposes of the UN Charter all Member States have an obligation to encourage and promote universal respect for, and observance of, human rights and fundamental freedoms. Human rights include not only civil and political rights, but also economic, social and cultural rights – all of which are necessary for sustainable development.<sup>5</sup> Crucially, through their participation in regional and multilateral arms transfer control agreements, 118 States have already explicitly recognized that transfers of conventional arms (including SALW) should be refused where there is a risk that they will contribute to serious breaches of human rights or gross violations of international humanitarian law. Moreover, in 2003, 191 States Parties to the Geneva Conventions undertook to make respect for international humanitarian law as one of the fundamental criteria on which arms transfer decisions are assessed and to incorporate such criteria into national laws or policies and into regional and global norms on arms transfers.<sup>6</sup>

This level of existing agreement amongst a large number of States provides an important foundation for the development of an ATT which is reflective of States' core obligations under international law. Moreover, the recent conclusion of a legally-binding agreement on arms transfers by ECOWAS, the movement in the EU towards adopting the EU Code as a legally-binding instrument, together with the commitments contained in Section II, Paragraph 11 of the UN Small Arms Programme of Action<sup>7</sup> are a clear indication of the increasing recognition amongst States that arms transfer controls should be rooted in international law.

Despite this progress, there remain gaps and weaknesses in the majority of regional and multilateral arms transfer control agreements, with attendant principles varying in formulation, failing to fully reflect the obligations that States have under international law and often being poorly enforced. Furthermore, there are a significant number of States that are not party to any regional or multilateral arms transfer control agreement. A global framework for arms transfer control is therefore a pressing priority.

While the need for agreement on global standards for control of the conventional arms trade is obvious, it is equally clear that such an agreement is feasible. States have already demonstrated through their collective work to address weapons of mass destruction that global agreements can be reached on the issue of weapons transfers. Moreover, the level of

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<sup>5</sup> Universal human rights are enshrined in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and subsequent treaties and standards.

<sup>6</sup> Section 2.3.1, Agenda for Humanitarian Action, adopted by the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, Geneva, 2-6 December 2003.

<sup>7</sup> Section II, Paragraph 11 of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 2001: States undertake "to assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade. Likewise, to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit, for the transfer of all small arms and light weapons, with a view to combating the illicit trade in small arms and light weapons." UN Document A/CONF.192/15, available at <http://disarmament.un.org/cab/poa.html>

co-operation sub regionally, regionally and multilaterally in the field of conventional arms control is significant and growing. Finally, the vote on ATT Resolution 61/89 in the UN General Assembly makes clear that the overwhelming majority of States believe that the time for an ATT is now.

### Scope of an ATT

States have the right to acquire conventional arms for legitimate self-defence and law-enforcement needs in accordance with international law and standards. Resolution 61/89 acknowledges that this right is also accompanied by responsibilities. An ATT should not minimize or detract from this fundamental right of States but must recognize that there are other obligations that States have with respect to their transfers of arms.

An ATT should identify core substantive obligations that reflect existing international legal commitments on the part of States to:

- Prevent threats to the peace of the international community;
- Ensure respect for the laws of war; and
- Co-operate in the protection and fulfilment of human rights.

Accordingly, the use of conventional arms by States must comply *inter alia* with international standards including those set by the United Nations Charter, the Geneva Conventions of 1949 (which also cover the actions of armed groups in a conflict) and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials of 1990.

Crucially, these responsibilities also extend to the *transfer* of conventional weapons. An ATT should reflect the scope of these obligations.

The clearest example of restrictions on transfers of weapons is the imposition by the UN Security Council of arms embargoes on states and armed groups. Such decisions impose obligations on all United Nations Members.<sup>8</sup> There are also other international instruments that establish prohibitions on the *transfer* of particular types of weapons or munitions, such as anti-personnel landmines.<sup>9</sup> There are instruments that totally prohibit a particular *kind* of weapon, such as biological weapons.<sup>10</sup> The prohibition of a weapon or munition necessarily implies a prohibition on its transfer. A further group of international instruments impose an absolute prohibition on the use of particular types of weapons or munitions, for example, weapons with non-detectable fragments.<sup>11</sup> A blanket prohibition on the use of a weapon or munition must also imply a prohibition on the transfer of such a weapon or munition.

There are also limitations on the transfer of conventional arms which flow from the use or the likely use of such arms in particular circumstances. The responsibility of a State in such cases flows from its obligation, under international law, to not knowingly aid or assist another State in the commission of an unlawful act.<sup>12</sup> Where a State has knowledge that weapons or

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<sup>8</sup> UN Security Council arms embargoes have been imposed on States (for example, Liberia, Sierra Leone, The Sudan, Rwanda) and non State armed groups (for example, the Taliban, Al-Qaida, the RUF in Sierra Leone, UNITA in Angola, and various warlords and clan factions in Somalia).

<sup>9</sup> The 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction provides *inter alia* that States Parties shall never under any circumstances “transfer to anyone, directly or indirectly, anti-personnel mines” (Article 1(b)). This is a binding legal obligation on States that are parties to the Convention. See also, 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980 Conventional Weapons Convention).

<sup>10</sup> 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.

<sup>11</sup> Protocol I (Non Detectable Fragments Protocol) to the 1980 Conventional Weapons Convention.

<sup>12</sup> The principle is expressed in Article 16 of the United Nations International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts* of 2001 which were commended to Governments by a resolution of the General

munitions would be or would be likely to be used in breach of some fundamental principle of international law, the responsibility of the authorising State is to prohibit the proposed transfer. For example, where a State has knowledge that a transfer of weapons would be, or would be likely to be, used in the commission of genocide or of crimes against humanity, or in the commission of serious violations of international humanitarian or human rights law, the transferring State in question would itself commit an unlawful act, and be in violation of its international obligations, if it authorised the transfer in question.

The increasing globalisation of the international arms trade and its deleterious effects on sustainable development prospects has raised compelling arguments in favour of a global system of controls that comprehensively regulate all aspects of this trade. In order to be an effective global instrument, the ATT will need to comprise a comprehensive system to control the cross-border movement of all conventional arms and associated equipment. This should cover the import, export, transit and trans-shipment and brokerage of all conventional arms including:

- heavy weapons;
- small arms and light weapons;
- parts and components for the afore-mentioned;<sup>13</sup>
- munitions including ammunition and explosives;<sup>14</sup>
- technology used for manufacturing conventional arms;
- weapons used for internal security;<sup>15</sup> and
- dual-use goods intended for military, security or policing [MSP] purposes.<sup>16</sup>

Moreover, it is now widely recognised that in order to curb the illicit trade in arms, all government-sanctioned trade in arms must be clearly defined and properly regulated according to objective common standards based upon relevant principles of international law. Thus, to be lawful, it is not enough that an arms transfer is sanctioned by all States (exporting, importing and transit) involved in the transaction. It is through the codification of States existing responsibilities under international law and implementation through national laws, regulations and procedures that the appropriate distinction between illicit and licit trade will become clear, and the diversion and persistent misuse of arms surrounding the 'grey market' can be overcome. It is therefore essential that the ATT apply to all aspects of the government-sanctioned trade in conventional arms. This includes:

- state-to-state;
- state-to-private end-user;
- commercial sales;
- leases; and
- loans or gifts or any other form of transfer of material goods or credit or expertise.

One of the main objectives of an ATT is the development of fundamental criteria to ensure responsible international transfers of conventional arms. This would ensure that all weapons

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Assembly of 12 December 2001 (A/RES/56/83, 12 December 2001). Article 16 provides: "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>13</sup> Parts and components should be included in the Treaty to ensure that the Treaty's requirements could not be circumvented by simply disassembling armaments and transferring their constituent parts.

<sup>14</sup> Controlling munitions including ammunition and explosives will be a vital part of any efforts to limit the negative impact of weapons proliferation and, in particular, where proliferation has already taken place.

<sup>15</sup> Weapons used for internal security should be included within the scope of the ATT since misuse of these weapons is a common source of serious human rights violations.

<sup>16</sup> Dual-use goods are items that can be employed for military, security and policing purposes as well as for civilian purposes and should also be included within the scope of the ATT if they are intended for use by a military, security or police end-user or within or in conjunction with conventional weapons or internal security equipment. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies incorporates restrictions on the transfer of dual use items and a mechanism for the notification of transfers and denials. See [www.Wassenaar.org](http://www.Wassenaar.org)

and munitions transferred end up in the hands of responsible end-users. In determining what the criteria should be, States must respect and balance UN Charter principles and other international law including the principle of non-interference in the internal affairs of States with the right of peoples to take legitimate action to realise their inalienable right to self-determination.

## **Parameters of an ATT**

UN Resolution 61/89 also requires Member States to submit their views on draft parameters of an ATT. Key elements of an ATT will be an agreement on establishing legally-binding international standards which States agree to follow. An ATT should crystallize, in the context of international arms transfers, commitments already assumed by States *inter alia* under the United Nations Charter, the Geneva Conventions of 1949, the two International Covenants on human rights, other widely supported international conventions, and established principles of customary international law as reflected, for example, in the UN International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts*. Using existing international law as its foundation, an ATT needs to set out clearly the conditions which States must apply when considering any international transfers of conventional arms.

A diverse group of non-governmental organisations,<sup>17</sup> with the support of legal and policy advisors, have proposed a set of core Global Principles for Arms Transfers (see Annex 1) which draw upon existing sub regional, regional and multilateral instruments for arms transfer control as well as States' obligations under international law as they relate to international arms transfers.<sup>18</sup> The Global Principles include obligations based on relevant international treaties and international customary law, principles recognised by the United Nations, including international human rights law and international humanitarian law, and the Articles on the Responsibilities of States for Internationally Wrongful Acts. Accordingly these Global Principles outline the conditions under which arms transfers should or should not be permissible and they provide the bedrock for an effective ATT. Six key principles are set out, as follows:

### **1. National licensing** (See Annex I, Principle 1)

A central tenet of the ATT must be that States ensure that all international transfers of conventional arms relevant to their jurisdiction are subjected to strict control and licensed according to internationally agreed standards of international law. All States are required to effectively license, monitor and prevent the diversion of such arms transfers according to national laws, mechanisms and procedures in conformity with international law and standards. This should include for case-by-case assessments of transfer licence applications, effective end user controls, conditions for re-transfer and other key licensing provisions. In many cases, States will already have national laws, regulations and procedures governing arms transfers; it is essential that these reflect States obligations under international law and in particular the requirement that arms transfers be prohibited if the weapons are likely to be used to commit serious violations of human rights or international humanitarian law. States that do not have appropriate legislation regulating arms transfers must be required to institute relevant legal provisions in order to conform to this essential requirement.

### **2. Express limitations**<sup>19</sup> (See Annex I, Principle 2)

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<sup>17</sup> See footnote 1.

<sup>18</sup> See also booklet entitled *Compilation of Global Principles for Arms Transfers*, Arms Trade Treaty Steering Committee, 2006

<sup>19</sup> Existing express limitations under international law on States' freedom to transfer and to authorize transfers of arms. These focus on those circumstances in which a State is already bound not to transfer arms, as set out in expressed prohibitions in international law.

These are the circumstances under which a State is obligated not to transfer conventional arms internationally, as set out in existing international law:

- A. Obligations under the Charter of the United Nations – including binding resolutions of the Security Council, such as those imposing arms embargoes<sup>20</sup>; the prohibition on the threat or use of force<sup>21</sup>; the prohibition on intervention in the internal affairs of another State<sup>22</sup>;
- B. Any other treaty or decision by which a State is bound, including embargoes, adopted by relevant international, multilateral, regional, and sub-regional organisations to which a State is party;
- C. Legal instruments with express prohibitions on transfers of particular weapons or outright prohibition of a particular weapon, e.g. the 1997 Convention on the Prohibition of Anti-Personnel Mines and 1980 Convention on Certain Conventional Weapons (CCW) which prohibits the use of certain conventional weapons<sup>23</sup>;
- D. Prohibition on all weapons under international humanitarian law that are of a nature to cause superfluous injury or unnecessary suffering<sup>24</sup>; and the prohibition on weapons that are incapable of distinguishing between combatants and civilians<sup>25</sup>.

### 3. Limitations based on use or likely use (See Annex 1, Principle 3)

Under international law, States must not knowingly aid or assist another State in the commission of an unlawful act.<sup>26</sup> States shall not authorise international transfers of conventional arms where they will be used or are likely to be used for violations of international law, including:

- E. Breaches of the UN Charter and customary law rules relating to the threat or use of force<sup>27</sup>;
- F. Gross violations of international human rights law<sup>28</sup>;
- G. Serious violations of international humanitarian law, including the Geneva Conventions and Protocols<sup>29</sup>;

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<sup>20</sup> Security Council decisions to impose arms embargoes are taken under Chapter VII of the UN Charter and are binding on all Members of the UN.

<sup>21</sup> One of the cornerstones of the UN Charter is the prohibition on the threat or use of force – enshrined in Article 2 (4).

<sup>22</sup> As expressed in Article 2(7) of the UN Charter.

<sup>23</sup> The most recent conventions expressly prohibit not only the use of weapons but also their transfer.

<sup>24</sup> As expressed in Article 35(2) of Additional Protocol I to the Geneva Conventions.

<sup>25</sup> As codified in Articles 48, 51(2) and 52(2) of Additional Protocol I to the Geneva Conventions and Article 13(2) of Additional Protocol II.

<sup>26</sup> The responsibility of exporting States to prohibit arms transfers under this heading flows from the obligation not to participate in the internationally wrongful acts of another State. See footnote 12.

<sup>27</sup> This would include breaches of the prohibition on the threat or use of force in international relations as set out in Article 2(4) of the UN Charter and *inter alia* in the UN General Assembly Declaration of Principles of International Law (A/RES/265 (XXV), 1970).

<sup>28</sup> Under Articles 1, 55 and other articles of the UN Charter all Member States have an obligation to encourage and promote universal respect for, and observance of, human rights and fundamental freedoms. Serious violations of human rights are widely understood as gross or systematic violations of the prohibition of:

- torture and other cruel, inhuman and degrading treatment or punishment;
- summary or arbitrary executions;
- disappearances;
- arbitrary detentions and violations of other rights set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights and regional human rights instruments such as the 1950 European Convention for the Protection of Fundamental Rights and Freedoms, the 1969 American Convention on Human Rights and the 1980 African Charter on Human and Peoples' Rights.

## H. Crimes against humanity and genocide<sup>30</sup>.

### 4. Other factors that must be taken into account (See Annex 1, Principle 4)

Numerous regional, multilateral and international instruments require States to take into account other factors before authorising an international transfer of conventional arms, including the recipient country's record of compliance with commitments and transparency in the field of non-proliferation, arms control, and disarmament. States should not authorise a transfer of conventional arms if it is likely to:

- Be used for or to facilitate terrorist attacks<sup>31</sup>;
- Be used for or to facilitate the commission of violent or organised crime;<sup>32</sup>
- Adversely affect regional security or stability;<sup>33</sup>
- Adversely affect sustainable development;<sup>34</sup>
- Involve corrupt practices;<sup>35</sup>
- Contravene other international, regional, or sub-regional commitments or decisions made, or agreements on non- proliferation, arms control, and disarmament to which the exporting, importing, or transit states are party.

An ATT that fully reflects these principles would greatly assist States in identifying those circumstances whereby international transfers of conventional arms should or should not be authorised because of their human cost or the risks that they would be diverted to proscribed users.

### 5. Monitoring and enforcement of an ATT (See Annex 1, Principles 5 and 6)

Codifying and developing existing international legal standards into a global treaty on international transfers of conventional arms and obliging States to ensure that these are fully reflected in their national legislation, regulations and administrative procedures is crucial to any global strategy to tackle the proliferation and misuse of conventional arms. Yet these steps will, on their own, be insufficient to prevent the continuing proliferation and misuse of conventional arms and to reduce the attendant levels of human suffering. The measure of success or failure of an ATT will also rest on the extent to which States are committed to, and take steps at the national level to ensure, full implementation of such a global treaty. It will also depend upon whether States promptly and impartially investigate alleged violations of the provisions of an ATT and take appropriate remedial action. The development of associated mechanisms, including timely exchanges of information between States, for

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<sup>29</sup> Serious violations of international humanitarian law includes grave breaches of the 1949 Geneva Conventions as well as violations of fundamental principles of international humanitarian law contained in other standard-setting multilateral agreements and in customary international law. This provision is consistent with the existing obligation to respect and ensure respect for international humanitarian law.

<sup>30</sup> Genocide is defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>31</sup> The term "terrorist attacks" should be understood generally in this context to mean acts which are prohibited under international law, such as deliberate attacks on civilians, hostage taking, torture or arbitrary killings, when the purpose of such an act is to intimidate a population or to compel a government or international organisation to do or to abstain from doing any act.

<sup>32</sup> The United Nations has consistently linked illicit arms trafficking with violent and organised crime. The United Nations Guidelines for International Arms Transfers suggest States implement national laws to delineate legal possession and to criminalise illegal possession of weapons.

<sup>33</sup> The EU Code of Conduct, the OSCE Document on Small Arms and Light Weapons, the Wassenaar Best Practice Guidelines for Exports of Small Arms and Light Weapons, and the Guidelines for the Nairobi Protocol include this as a factor to be considered, recognising that arms producing or supplying States have a responsibility to ensure that arms transfers do not contribute to instability and conflict.

<sup>34</sup> Numerous regional agreements and the UN Charter recognise the need to achieve effective limitations on conventional weapons to ensure that the largest amount of resources possible is devoted to economic and social development.

<sup>35</sup> The UN Convention against Corruption entered into force on 14 December 2005 and requires State parties to take necessary steps to establish procurement systems that are competitive, transparent and prevent corruption.

effective monitoring and enforcement of the ATT, will be crucial. In particular, there must be mechanisms for prompt, impartial and transparent investigation of alleged violations of the Treaty.

States will need to ensure the prosecution of offenders so their national legislation subjects violations of arms transfer controls, as set out in an ATT, to proportionate and dissuasive criminal, civil and administrative sanctions that are broadly similar across states. This would serve as a deterrent to those involved in illegal and irresponsible arms transfers and who may operate using entities in different countries and so would help promote effective and common compliance and enforcement of the provisions of an ATT. It will be critical that states' discretionary powers under domestic law and their international obligations under an ATT to identify, prosecute and sanction offenders are exercised rigorously.

The ATT should also encompass a mechanism for increasing transparency and accountability in the international transfer of conventional arms so as to build confidence in the effective implementation of the global treaty on the part of States. In this regard, as proposed in the Global Principles for Arms Transfers<sup>36</sup>, States should submit comprehensive national annual reports on the international transfer of all conventional weapons and munitions, as defined above under the Treaty, to an international registry, which would then publish a comprehensive, international annual report. States should recognise the possibility of enhancing the existing UN Register on Conventional Arms for these purposes.

Many governments have made a commitment under regional and multi-lateral arms export control regimes to consider the impact of arms exports on importer countries' sustainable development before authorising such transfers. However the majority of states are still failing to respect these commitments.<sup>37</sup> The ATT should therefore also oblige exporting states to thoroughly assess the impact of international transfers of conventional arms on sustainable development, using an agreed, transparent methodology, with a presumption against authorisation if the transfer is likely to have an adverse affect. International NGOs have already proposed an objective method for states to identify when such arms transfers would be of concern.<sup>38</sup>

## Conclusion

Considering the danger posed to states and their populations by the persistent and flagrant misuse of weapons and munitions and at a time when the conventional arms trade has become increasingly global and differentiated in nature, no country is immune from the risks of conventional arms proliferation. States must therefore assist each other in preventing all types of conventional weapons, munitions, components, dual use items and technology from falling into the wrong hands. A comprehensive global ATT based upon relevant principles of international law and standards should be the cornerstone of such a coordinated international effort.

To be effective, an ATT must be objective and allow for legitimate international transfers of conventional arms required for States' self defence and law enforcement needs in accordance with international law and standards. But to help reduce the proliferation and misuse of armaments, it must also incorporate operative provisions for the authorization of international transfers that reflect States' existing obligations under relevant international law.

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<sup>36</sup> Principle 5 – Transparency.

<sup>37</sup> Control Arms (June 2004) *Guns or Growth? Assessing the impact of arms sales on sustainable development*. p.36

<sup>38</sup> *Ibid.*p55

An effective ATT must not dilute such obligations or contain ambiguous language that leads to different interpretations by states of those obligations.

Only such a global Arms Trade Treaty will overcome the current piecemeal approach of states attempting to use variable national and regional instruments to control international transfers of conventional arms and provide all states with the strong common international standards necessary to ensure a responsible arms trade. With the consequent reduction in the number of cases of weapons and munitions being diverted to those who undermine human, national and international security, such an ATT will greatly benefit not only those communities, states and regions where arms proliferation and misuse are widespread, but would also improve the prospects for increased security worldwide.

## Compilation of Global Principles for Arms Transfers

The following Principles bring together States' existing obligations in respect of international transfers of arms and ammunition. The Principles are proposed by a diverse group of non-governmental organisations. The Principles reflect the content of a variety of international instruments including: international and regional treaties, declarations and resolutions of the United Nations and other multilateral and regional organisations, and model regulations intended for national legislation. Some of the Principles reflect customary and treaty law, while others reflect widely accepted emerging norms. The compilation indicates the best general rules for effective control of international transfers of all conventional arms and ammunition. The rules reflect States' obligations under international law while also recognising States' right to legitimate self defence and law enforcement in accordance with international standards.

### *Principle 1: Responsibilities of states*

**All international transfers of arms and ammunition shall be authorised by all States with jurisdiction over any part of the transfer (including import, export, transit, trans-shipment and brokering) and carried out in accordance with national laws and procedures that reflect, as a minimum, States' obligations under international law. Authorisation of each transfer shall be granted by designated State officials in writing only if the transfer in question first conforms to the Principles set out below in this instrument and shall not be granted if it is likely that the arms or ammunition will be diverted from their intended legal recipient or re-exported contrary to the aims of these Principles.**

### *Principle 2: Express limitations*

**States shall not authorise international transfers of arms or ammunition that violate their expressed obligations under international law.**

These obligations include:

- A. Obligations under the Charter of the United Nations – including:
  - a. binding resolutions of the Security Council, such as those imposing arms embargoes;
  - b. the prohibition on the threat or use of force;
  - c. the prohibition on intervention in the internal affairs of another State.
- B. Any other treaty or decision by which that State is bound, including:
  - a. Binding decisions, including embargoes, adopted by relevant international, multilateral, regional, and sub-regional organisations to which a State is party;
  - b. Prohibitions on arms transfers that arise in particular treaties which a State is party to, such as the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its Protocols, and the 1997 Convention on the Prohibition of Anti-Personnel Mines.
- C. Universally accepted principles of international humanitarian law – including:
  - a. The prohibition on the use of arms that are of a nature to cause superfluous injury or unnecessary suffering;

- b. The prohibition on weapons or munitions incapable of distinguishing between combatants and civilians.

*Principle 3: Limitations based on use or likely use*

**States shall not authorise international transfers of arms or ammunition where they will be used or are likely to be used for violations of international law, including:**

- A. breaches of the UN Charter and customary law rules relating to the use of force;
- B. gross violations of international human rights law;
- C. serious violations of international humanitarian law;
- D. acts of genocide or crimes against humanity;

*Principle 4: Factors to be taken into account*

**States shall take into account other factors, including the likely use of the arms or ammunition, before authorising an arms transfer, including the recipient's record of compliance with commitments and transparency in the field of non-proliferation, arms and munitions control, and disarmament.**

States should not authorise the transfer if it is likely to:

- A. be used for or to facilitate terrorist attacks
- B. be used for or to facilitate the commission of violent or organised crime;
- C. adversely affect regional security or stability;
- D. adversely affect sustainable development;
- E. involve corrupt practices;
- F. contravene other international, regional, or sub-regional commitments or decisions made, or agreements on non-proliferation, arms control, and disarmament to which the exporting, importing, or transit States are party;

*Principle 5: Transparency*

**States shall submit comprehensive national annual reports on all their international arms and ammunition transfers to an international registry, which shall publish a compiled, comprehensive, international annual report. Such reports should cover the international transfer of all conventional arms and ammunition including small arms and light weapons.**

*Principle 6: Comprehensive Controls*

**States shall establish common standards for specific mechanisms to control:**

1. all import and export of arms and ammunition;
2. arms and ammunition brokering activities;
3. transfers of arms and ammunition production capacity; and
4. the transit and trans-shipment of arms and ammunition.

**States shall establish operative provisions to monitor enforcement and review procedures to strengthen the full implementation of the Principles.**