

## Background Paper: Scope

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### The UN Register as a basis for the ATT?

One of the most challenging aspects in the development of an ATT is determining the scope of the Treaty – what it will actually cover and include. This has two parts – the weapons included and the activities covered. To date, discussion on scope has focused on the potential for the ATT to be based on the seven categories of major conventional arms in the UN Register of Conventional Arms, plus Small Arms and Light Weapons (SALW) – what we've come to know as "7+1". An alternative package including Ammunition has also been discussed, referred to as "7+1+1". At first sight this appears to be logical, convenient and relatively comprehensive. But this is not entirely the case.

This paper considers each of the Categories from the UN Register: providing their current UN definition (*in Italics*) and suggesting obvious omissions that are potentially relevant to an ATT. The paper also briefly lists other articles (e.g. parts and components, ammunition/munitions) that would not fit within 7 expanded categories, but where their omission might undermine the purpose of the treaty. In addition, the paper provides a list of types of transfers, looking beyond the scope of the Register's current definition and, where these are less easily understood, a brief explanation is provided (e.g. Foreign Licensed Production). The final section proposes an option for handling the complex issue of categories of equipment and definitions (posing a question for implementation and transparency discussions). In this context, the paper also assumes that the categories would be defined broadly under a chapeau e.g. "specially designed or modified for military use."

### Does the UN Register go far enough?

The UN Register, mandated in 1991, is the only global transparency instrument for transfers (exports and imports) of seven categories of major conventional arms:

- I. Battle Tanks;
- II. Armored Combat Vehicles;
- III. Large-caliber Artillery Systems,
- IV. Combat Aircraft,
- V. Attack Helicopters;
- VI. Warships (including submarines);
- VII. Missiles and Missile-Launchers.

At a secondary level, the Register also seeks a range of *Additional Background Information* including information on SALW transfers, using a standardized reporting form similar to the existing 7 Categories. ***Background on the origins of the UN Register and its subsequent development is provided at Annex A.***

It is logical and convenient to look to the UN Register for inspiration, as it has been accepted within the UN and has a 20 year history of serving as a transparency and confidence building mechanism. But the scope of the Register, by virtue of its original focus on offensive systems, falls short of what would be required for an ATT to be effective and useful.

### What's Missing from the Register?

The Register is an excellent starting point to develop the scope of the ATT. However, in general, the Register does not have an obligation to report on entire groups of conventional arms, including: small arms and light weapons; mortars and artillery systems below 75mm; missiles below 25km in range; logistic vehicles including bridge layers and tank transporters, some armored fighting vehicles without organic weapons above 12.5mm or a missile launcher, many military aircraft and helicopters which can perform reconnaissance, electronic warfare and command and control missions; many military transport aircraft and transport helicopters; military air-to-air refueling aircraft; warships and submarines below 500 tons (without organic missiles of more than 25km range) and ammunition relevant to these systems and parts and components. In short, examining each category in greater detail allows us to identify the deficiencies in the Register categories. And, with this fuller understanding of the Register categories inclusions and omissions, we can identify ways in which the categories could be expanded to better fit the needs of the ATT.

**I. Battle Tanks:** *Tracked or wheeled self-propelled armored fighting vehicles with high cross-country mobility and a high-level of self-protection, weighing at least 16.5 metric tons unladen weight, with a high muzzle velocity direct fire main gun of at least 75 millimeters caliber.*

Omissions:

None, assuming other military vehicles would be captured under Category II.

Recommendation: In order to clarify the scope of the category the title should simply be amended to **'Tanks'**.

**II. Armored Combat [Military] Vehicles:** *Tracked, semi-tracked or wheeled self-propelled vehicles, with armored protection and cross-country capability, either: (a) designed and equipped to transport a squad of four or more infantrymen, or (b) armed with an integral or organic weapon of at least 12.5 millimeters caliber or a missile launcher.*

Omissions:

- **Recovery vehicles, tank transporters, amphibious and deep water fording vehicles; armored bridge-launching vehicles;**
- **Tracked, semi-tracked or wheeled self-propelled vehicles, with or without armored protection and cross-country capability, specially designed, or modified and equipped:**
  - **With organic technical means for observation, reconnaissance, target indication, and designed to perform reconnaissance missions,**
  - or**
  - **with integral organic technical means for command and control,**
  - or**
  - **with integral organic electronic and technical means designed for electronic warfare,**
  - or**
  - **for the transport of personnel.**

Major weapons systems cannot effectively operate without the associated Combat Support and Logistics capabilities. The effectiveness of combat equipment (e.g. Main Battle Tanks) is increased significantly by the ability to move them quickly to the battlefield; bridge-laying equipment and deep-water fording vehicles can allow physical barriers to deployment, such as rivers to be easily crossed. Recovery vehicles are

essential if heavy armored fighting vehicles become unserviceable through mechanical failure or physical obstruction: allowing them to be quickly recovered and returned to action. Although many of these systems are not 'high-tech', they can be of equal significance to the main weapon systems themselves.

The acquisition of systems specially designed or modified and equipped to conduct reconnaissance, target indication, command and control and/or transportation can add significantly to the operational effectiveness of existing combat capabilities. These systems may not be capable of transporting a squad of four or more infantrymen, nor be equipped with an integral weapon of more than 12.5mm (many such vehicles will merely be equipped with heavy machine guns for self-defense purposes only, e.g. 7.62mm General Purpose Machine Gun - GPMG) or nothing at all, but their acquisition significantly assists main weapon systems on the battlefield.

Recommendation: In order to capture a wider range of relevant equipment, the Category name could be amended to **'Military Vehicles'** and include the range of weapons described above.

**III. Large Caliber Artillery Systems:** *Guns, howitzers, artillery pieces, combining the characteristics of a gun or a howitzer, mortars or multiple-launch rocket systems, capable of engaging surface targets by delivering primarily indirect fire, with a caliber of 75 millimeters and above.*

Omissions:

- **Artillery systems between 50-75mm**

Significant weapon types with offensive capability within the ranges 50-74, e.g. 60 mm mortars and 70mm Multiple Rocket Launchers are not currently included in the Register. If the Category was further reduced to include systems below 50mm, anti-aircraft guns and 40mm light support weapons would be included. However, lowering the threshold below 50mm would require examination of the relationship with SALW. It's also important to note that systems between 50-75mm will not primarily deliver 'indirect fire', this caveat from the Register definition would need to be removed.

- **Gun carriers and tractors specially designed for towing artillery;**

The ability to move artillery systems quickly to and around the battlefield is increasingly seen as a significant factor in the moves towards maneuver warfare. Gun carriers and tractors allow for more effective use of artillery by getting it to the right place at the right time, and, with high-mobility vehicles often through difficult terrain. The relationship with vehicles in Category II (Military Vehicles) should be examined.

Recommendation: In order to capture a wider range of relevant equipment, the Category name could be amended to **'Artillery Systems'**, and include the weapon systems described above, as in most cases militaries do not consider 50mm as 'Large Caliber'.

**IV. Combat Aircraft:** *Fixed-wing or variable-geometry wing aircraft designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction, including versions of these aircraft which perform specialized electronic warfare, suppression of air defense or reconnaissance missions. The term "combat aircraft" does not include primary trainer aircraft, unless designed, equipped or modified as described above.*

Omissions:

- **Fixed-wing or variable geometry wing aircraft, including UAVs, that are not versions of Combat Aircraft, including primary trainer aircraft, which are designed, equipped or modified to perform specialized electronic warfare, suppression of air defense, or reconnaissance missions;**
- **Fixed-wing or variable geometry wing aircraft, including primary trainer aircraft, which are designed, equipped or modified to perform command and control, air-to-air refueling, transport of personnel or airdrop missions;**

The UN Register definition prescribes versions of combat aircraft that perform specialized electronic, suppression of air defense and reconnaissance missions. In this case, not all but only versions of combat aircraft are included and air refueling aircraft are specifically excluded. Similar problems apply to the definition of Attack Helicopters (Category V).

Aircraft, whether versions of combat aircraft or not, which carry out reconnaissance, command or transport of personnel, electronic warfare etc. could add considerable offensive capabilities to armed forces. The acquisition of aircraft designed or modified to airdrop troops or military equipment allows rapid deployment and insertion of armed infantry. Military transport aircraft enable front-line forces to be rapidly reinforced or supplied with munitions and equipment.

Aircraft designed or modified to fly aerial refueling missions enhance the effectiveness of existing aircraft assets: enabling increased range and duration of missions, and by increasing the weapons payload that may be carried. Greater aircraft range can increase not only the number of strategic military objectives available to an aggressor in a neighboring territory, but possibly also the number of countries which can be targeted.

Primary trainer aircraft of any kind would need to be included if they are designed, equipped or modified to perform missions as described above.

These definitions would also include UAVs, where these are not versions of combat aircraft, but perform the specialized military roles defined above. Under the present Register definition, UAVs designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction, so-called Unmanned Combat Aerial Vehicles (UCAVs) would be caught.

Recommendation: in order to capture a wider range of relevant equipment, the Category name could be amended to **'Military Aircraft'** and include weapons described above.

**V. Attack Helicopters:** *Rotary-wing aircraft designed, equipped or modified to engage targets by employing guided or unguided anti-armor, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons, including versions of these aircraft which perform specialized reconnaissance or electronic warfare missions.*

Omissions:

- **Rotary-wing aircraft, including UAVs, which are designed, equipped or modified to perform reconnaissance, target acquisition (including and-submarine warfare), electronic warfare and communications;**
- **Rotary-wing aircraft which are designed, equipped or modified to perform command and control, mine laying missions, or transport of personnel.**

Military helicopters, whether versions of Attack Helicopters or not, which carry out reconnaissance, command and control, electronic warfare etc. could add considerable offensive capabilities to armed forces. Although they have a shorter range than larger aircraft, similar reasons for inclusion apply to helicopters equipped to perform transport tasks. Acquisition of such a capability allows rapid deployment and insertion of personnel. In addition, transport helicopters equipped to perform transport tasks allow rapid movement and deployment of personnel, associated vehicles and lightweight artillery pieces into areas unsuitable for fixed-wing aircraft.

A refined category could also include rotary wing UAVs, where these are not versions of combat helicopters, but perform the specialized military roles. Under the present Register definition, only UAVs designed, equipped or modified to engage targets by employing guided or unguided anti-armor, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons, UCAVs would be caught. Category VII captures Remotely Piloted Vehicles (RPVs) designed or modified specifically for launching missiles and rockets in Category VII.

Recommendation: in order to capture a wider range of relevant equipment, the Category name could be amended to **'Military Helicopters'** and include the weapons described above.

**VI. Warships [Naval Vessels]:** *Vessels or submarines armed and equipped for military use with a standard displacement of 500 metric tons or above, and those with a standard displacement of less than 500 metric tons, equipped for launching missiles with a range of at least 25 kilometers or torpedoes with similar range.*

Omissions:

- **Vessels or submarines with a standard displacement of 150 metric tons or more;**
- **Surface effect vessels (fully skirted) – e.g. Hovercraft;**
- **Surface effect vessels (rigid sidewalls);**
- **Naval vessels, inflatable craft and submersible vehicles.**

Vessels below 500 tons are increasingly more capable than their predecessors and in some cases possess or exceed the firepower of larger combatants of an earlier generation. Although these “smaller” vessels may not have the extreme range capability of the blue water’ vessels held by some of the world’s established navies, within their own regions they still have the capacity to project significant naval power. This can be a threat both to coastal regions and narrow straits, endangering both naval and commercial/civilian shipping, within this context it is worth noting that most naval conflicts that have occurred since 1900 have been within 90 nautical miles of land.

Many smaller vessels would be included, because of the range of their missiles or torpedoes, but this will not always be the case. Many capable missiles e.g. Sea Skua have a range of only 15km. Vessels of this type would thus not be captured by the existing UN category. Moreover, a vessel can be manufactured first without missiles, delivered, and then armed with them at a later date: ‘fitted for but not with’.

Minehunters and minesweepers also possess unique capabilities. These vessels, often below the 500 ton threshold, have both a defensive and offensive role and can be used

either to clear sea channels of an aggressor's mines in coastal waters or those laid by a defensive party in advance of offensive operations.

With advances in technology, a competitive market and the increasing effectiveness of fast attack craft of much lower tonnage, the trend of procuring smaller more capable units (hovercraft, lightweight inflatable and smaller submersible vessels) is expected to continue.

Recommendation: In order to capture a wider range of relevant equipment, the Category name could be amended to '**Naval Vessels**' and include the systems described above.

**VII. Missiles and Missile Launchers:** *(a) Guided or unguided rockets, ballistic or cruise missiles capable of delivering a warhead or weapon of destruction to a range of at least 25 kilometers, and means designed or modified specifically for launching such missiles or rockets, if not covered by categories I through VI. For the purpose of the Register, this subcategory includes remotely piloted vehicles with the characteristics for missiles as defined above but does not include ground-to-air missiles.*

*(b) Man-Portable Air-Defense Systems (MANPADS).*

Note: For reporting purposes MANPADS are broadly defined as surface-to-air missile systems designed to be man-portable and carried and fired by a single individual and; other surface to air missile systems designed to be operated and fired by more than one individual acting as a crew and portable by several individuals. MANPADS should be reported if the MANPAD system is supplied as a complete unit, i.e. the missile and launcher/Grip Stock form an integral unit. In addition, individual launching mechanisms or grip-stocks should also be reported. Individual missiles, not supplied with a launching mechanism or grip stock need not be reported.

Omissions:

- **Missiles of below 25km range;**
- **Ground-to-air missiles (note: MANPADS are already covered by the Register definition).**

Missile systems of all ranges and types can provide a key combat capability for air, ground or naval support to offensive operations. Unmanned airborne vehicles, including RPVs, can increase the effectiveness of all parts of a military force by facilitating long-range reconnaissance, target acquisition, designation and weapons guidance (including artillery). Such a capability potentially enables enemy assets and troops to be attacked at greater ranges before they themselves can be used effectively.

Recommendation: The weapons described above should be included in the category.

**Small Arms and Light Weapons (SALW):**

The UN Register does not currently include SALW as part of its official reporting requirements. From 2003, information on transfers of SALW was requested as part of Additional Background Information and, following the review of the Register in 2006, States in a position to do so were encouraged to provide SALW data in a standardized form similar to the seven categories.

Under the Register framework, there is no agreed definition for SALW. However, a useful starting point for States is the UN ODA Guidelines for reporting SALW transfers, which states:

....it is for each State to decide what to report according to their own situation. In order to fulfill the purposes of the Register, however, and bearing in mind its focus on military weapons, man-portable weapons made or modified to military specification for use as lethal instruments of war should be reported. With regard to **Small arms**, this can include those weapons intended (i.e. transferred) for use by individual members of armed forces, such as revolvers and self-loading pistols; rifles and carbines; sub-machine guns; assault rifles; and light machine guns. With regard to **Light Weapons**, this can include those weapons intended for use by several members of armed forces serving as a crew, such as heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-tank guns; recoilless rifles; portable launchers of anti-tank missile and rocket systems; and mortars of calibers less than 75mm.

Recommendation: SALW should be included as a separate category in the scope of the ATT using the ODA reporting guidelines as a basis.

### **What additional elements should be considered?**

During the July 2010 ATT Prepcom, the Facilitator's summary of the discussions on Scope identified the following additional items to be considered in the Scope of an ATT:

- *Parts and Components*
- *Ammunition and Munitions*
- *Explosives*
- *Other military systems(electronics, computers, telecommunications, information security, sensors and lasers, transportation and training devices)*
- *Dual-Use Items*
- *Defence Services (to develop, manufacture, repair the above systems)*
- *Technology to Manufacture, modify or repair the above systems)*

In order for States to consider these elements in the scope of the ATT, they must be examined and, in some cases, described in greater detail.

**Parts and Components:** Three scenarios must be considered for the movement of parts and components.

1. Through the supply chain for manufacture (machining and finishing) toward incorporation into a final defense product.
2. Through the supply chain for incorporation into a final defense product under a collaborative defense program.
3. Through the supply chain for repair, overhaul and upgrade of existing defense products;

These three movements represent the vast majority (by volume) of licensable defense products – far more than the main equipment themselves. An ATT cannot ignore the possibility of parts and components for conventional arms being shipped for subsequent assembly, without their transfer being scrutinized and authorized in the same way the final item. However, where a defense program exists between partner nations, where the transfer of main equipment has already been authorized, or the supply chain is in support

of a national program, clearly there should be significant relief from overly burdensome licensing processes. However, under an ATT Governments could be required to maintain control, and the ability to stop such transfers if circumstances change and the transfer would breach the provisions of an ATT. An ATT must, however, allow for Global/General licensing provisions, including between ATT Parties, in order that the global supply chain is not seized.

States will also have to consider whether it is possible to provide sufficient clarity of definition for parts and components, avoiding the prospect of every nut and bolt being subjected to detailed scrutiny. The term 'specially designed for' as a chapeau to the section on Scope may provide a solution.

**Ammunition and Munitions:** Guided and unguided rockets and MANPADS are included within the existing Register definition in Category VII. A broader ATT-specific definition requires clarification as the terms tend to be used interchangeably. **"Military munitions"** could be taken to mean all ammunition, including confined gaseous, liquid and solid propellants, explosives, pyrotechnics, smokes and incendiaries, including bulk explosives, rockets guided and ballistic missiles, bombs, warheads, shaped charges, mortar rounds, artillery ammunition, bomblets, minelets and terminally guided projectiles (including dispensers), small arms ammunition, grenades, mines, torpedoes, depth charges, demolition charges and devices thereof (fuzes, sensors and initiation devices). This would not normally include ammunition crimped without a projectile (blanks), dummy ammunition with a pierced powder chamber, cartridges for signaling, bird scaring or lighting of gas flares at oil wells.

Explosives can, in this context, also be considered to be part of Munitions. More broadly, distinguishing between civil and military explosives is particularly difficult.

### **Types of Transfers**

Once the items to be covered by an ATT have been agreed upon, we can turn our attention to the ways in which those items are transferred. Looking to the Register for inspiration can in this case be problematic as well. Agreement on a common definition of a transfer in the context of the UN Register has been complicated by differing national practices regarding implementation of rules, regulations and procedures for exports and imports. Therefore, the description of a transfer contained in the report of the 1992 Panel of Governmental Technical Experts, reaffirmed by subsequent Groups of Governmental Experts, remains the guideline for reporting transfers (Resolution A/49/316, para. 42). Under the Register, international arms transfers involve, in addition to the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment.

In the context of discussions during the Open-Ended Working Group (OEWG) and PrepCom the following activities have been identified as potentially falling into scope:

Import, Export, Re-export, Temporary Re-export, Transshipment, Transit, Brokering, Artisanal Manufacture, Technology Transfer, Manufacture under Foreign License, Leases, Loans, Gifts, Technical Assistance, Promotion and, Research, Financing, Training.

Whilst some of these concepts have already been discussed in depth it is worth providing a brief insight into Manufacture under Foreign License.

**Foreign Licensed Production:** Often defined as: *A direct commercial arrangement between a company in one country and a foreign government, international organization,*



*or foreign company, providing for the transfer of production information which enables the foreign government, international organization, or commercial producer to manufacture, in whole or in part, an item of defense equipment. A typical license production arrangement would include the functions of production engineering, controlling, quality assurance and determining of resource requirements. It may or may not include design engineering information and critical materials production and design information. A licensed production arrangement is normally accomplished under the provisions of a license agreement, commonly judged against similar or the same criteria as the transfer of the defense equipment itself.*

The practice of foreign licensed production is not uncommon and, for the purposes of an ATT could be considered to have the same effect as the transfer of the equipment itself. Indeed the effect can be greater if the foreign manufacturer is unconstrained by government to government assurances on re-export or re-transfer provisions on the equipment and technology. Such assurances may be part of the obligations under an ATT, and could provide additional assurances if foreign licensed production is in an ATT signatory State. Licensed Production could also involve the transfer of technology by intangible means and this would, potentially, need to be within the ATT's scope.

**Items not in the Scope of an ATT:** The following items and activities have been identified as not being within scope, and therefore should be explicitly referenced as not being within the ambit of the treaty in a section on "Exceptions":

- Internal Transfers
- National ownership and regulation of weapons
- Sporting and hunting rifles for recreational purposes
- Antique weapons

### **How to reflect Scope of Weapons in an ATT?**

Quite simply, attempting to define detailed lists of categories of equipment, parts and components in the body of the treaty text will present enormous challenges for the negotiation process and subsequent review. Whilst it is also a question of implementation, this paper suggests the emphasis might be better on simplicity and clarity. The body of the treaty text dealing with scope could refer to broad categories of equipment and types of transfers. For example:

### **Scope – arms**

1. *For the purposes of this Treaty, arms shall include those items specially designed for military use as follows:*

- *Tanks*
- *Vehicles*
- *Artillery Systems*
- *Aircraft*
- *Helicopters*
- *Vessels*

- *Missiles and Missile Launchers*
- *Small Arms and Light Weapons*
- *Ammunition and Munitions for the above*

This could be supplemented by an Annex where more detailed, illustrative lists of equipment and technology could be provided. Many such lists exist and have been the result of lengthy, multilateral efforts to define export controls.

States would be obliged to exercise appropriate export and import controls over the range of equipment within the broad categories elaborated in the text of the treaty. They would do so according to their national legislation, administrative procedures and practices. The specifics of coverage could be guided by the Annex of illustrative equipment and technology. The Annex would provide a more effective mechanism for regular review to keep pace with developments in technology. Technical adjustments could be made every year through annual meetings of States outside of the formal Treaty review process. Monitoring, verification and transparency mechanisms could assist in guiding States Parties' legislation so they can ensure they have comprehensive coverage and would aid the provision of assistance to states seeking cooperation, and those wishing to adhere to the treaty. States Parties' judgment at review conferences of the effectiveness of the treaty's implementation over time could also guide review of the Annex, which would not, necessarily, demand or suggest amendment to the broader categories in the treaty itself.

## ANNEX A

### **Background: The Origins and Development of the UN Register of Conventional Arms**

Since the Register was established soon after the Gulf War of 1991, the overwhelming emphasis at that time was on major conventional weapons. The uncontrolled and non-transparent trade in large weapon-systems had fuelled tension and armed conflict in the region. Specifically, the focus in the late 1980s and early 1990s was on weapon-systems capable of conducting large-scale offensive operations across international borders. The Register was also shaped by the CFE Treaty of 1990, between NATO and the then Warsaw Pact, which dealt with major conventional arms.

This emphasis in the late '80s and early '90s was also reflected in two General Assembly resolutions: the process that led to the agreement to establish a UN Register was triggered by General Assembly resolution A/43/75 I, entitled "International arms transfers", adopted in December 1988. That resolution, calling for "more openness and transparency with regard to world-wide arms transfers", was not specific to any class of weapons. Indeed, its conviction that "arms transfers **in all their aspects** deserve serious consideration by the international community" serves as a useful reminder as to the arguments case made for an Arms Trade Treaty. Resolution A/46/36 L of December 1991, under which the Register was established, also reiterated this specific point.

The General Assembly clearly had a view to addressing the broadest range of conventional arms, but consensus was only achievable on a more limited selection. In this context and, looking to the future, the so-called "founding-fathers" of the Register acknowledged that the Register's scope should be subject to regular review so that issues of expansion, or further technical adjustments to its existing categories, could be examined in order to enhance its confidence-building role.

The review process has continued to examine the issue of expansion of scope in relation to major conventional weapons. It was not until small arms and light weapons began to impact significantly on the global disarmament agenda in the late 1990s that the subject also became an important part of the Register's review process. From 2003, information on transfers of SALW was also requested as part of Additional Background Information and, following the review of the Register in 2006, States in a position to do so were encouraged to provide SALW data in a standardized form similar to the seven categories. The 2009 Group of Governmental Experts, established to review the Register was unable to reach consensus on the inclusion of an eighth category.

Other provisions of the 1991 resolution have provided a basis for reviewing the Register's scope to consider other types of conventional arms. Perhaps the most relevant part of that resolution in this regard is its operative paragraph 4, which reiterates the 1988 conviction that arms transfers **in all their aspects** deserve serious consideration by the international community, inter alia, because of:

- (a) Their potential effects in further destabilizing areas where tension and regional conflict threaten international peace and security and national security;
- b) Their potentially negative effects on the progress of the peaceful social and economic development of all peoples; and
- (c) The danger of increasing illicit and covert arms trafficking.

Clearly, the foregoing criteria apply not only to **major** conventional weapons as currently defined in the Register, but also to other systems used by the states including small arms and light weapons.

This demonstrates the international community's attention to the issue of arms transfers and how, arguably, the UN Register, despite modest expansion of its scope over the last three reviews, has yet to encompass the full range of conventional arms that are relevant to the international community's concerns.

It has been said that: ***“The focus is on weapons indispensable for surprise attacks and large-scale offensive military actions. These weapons systems are relatively easy to identify, define, record and monitor”***. In this case, the current scope of the UN Register reporting categories would appear to be too narrow to fulfill the purposes of an ATT, which would be broader than preventing ***“surprise attacks and large-scale offensive military actions”***. There is potentially a large gap.

# Background Paper: Parameters

Breakout Session: Stuart Room, Park Plaza Hotel

29 September 2010

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## Introduction

In the last few years, discussions on an Arms Trade Treaty (ATT) have raised a variety of questions on the criteria that States should apply when deciding whether to authorize arms transfers. Much guidance already exists on arms transfer criteria and how they can be applied. This background paper aims to explore the kinds of criteria that could be appropriate for an ATT, possible frameworks for their development, and considerations on how they would be implemented.

## I. Which criteria should be applied in an ATT?

First, it is important to understand what is meant by "criteria". Criteria are the standards that States should apply when determining whether to authorize a transfer of arms. During the 2009 Open-ended Working Group (OEWG) and 2010 Preparatory Committee (PrepCom) discussions, States expressed the need for objective and non-discriminatory criteria.

Through both written submissions and oral statements made in recent ATT discussions, States and other interested actors have put forward many criteria, some more frequently than others. Below is a list of the most commonly proposed criteria for an ATT. The criteria below have been separated into three categories to allow for better understanding: criteria relating to express international obligations, criteria relating to likely post-transfer events and effects, and criteria relating to the expected user. Some criteria overlap or belong in more than one of these categories. The criteria and wording proposed are for purposes of illustration and do not mean to prejudice any decision reached by States during ATT negotiations.

### A. Criteria relating to the transferring State's express international obligations

Express prohibitions on transfers of weapons in certain circumstances can already be found in the UN Charter and other treaties, and in customary international law. Criteria based on these existing express prohibitions could be formulated as follows:

"A State Party shall not authorize a transfer of arms that would violate its obligations under international law. These obligations include those arising under or pursuant to:

- a. the Charter of the United Nations (UN), including pursuant to decisions of the UN Security Council<sup>1</sup>;
- b. international and regional treaties by which the State Party is bound<sup>2</sup>;

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\* Legal Adviser at the International Committee of the Red Cross (ICRC) based in Geneva, Switzerland. The author has prepared this paper for the Boston Symposium on the ATT. This paper does not necessarily represent the views of the ICRC on each of the issues addressed.

<sup>1</sup> Pursuant to article 25 of the UN Charter, decisions of the UN Security Council are binding on all UN Member States. These can include decisions imposing arms embargoes. Article 2(4) of the UN Charter provides another example of an obligation that could preclude an arms transfer: A transfer of arms from one State to another or to persons in the territory of another State without that State's consent could amount to a violation of the prohibition of the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>2</sup> Obligations under international and regional treaties would include embargoes adopted by other international, regional and sub-regional organizations established pursuant to a treaty (for example by the European Union, the Organization of American States, ECOWAS). They can also arise from treaties that prohibit the transfer of certain weapons, such as the protocols to the 1980 Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, and the 2008 Convention on Cluster Munitions.

c. customary international law<sup>3</sup>."

## **B. Criteria relating to likely post-transfer events and effects**

Many of the transfer criteria proposed by States look at what can be expected to happen after the weapons are transferred. A majority of these criteria aim to ensure that the transferred weapons are not used to commit or facilitate violations of international or domestic law.

### 1. Criteria relating to likely use

The criteria in this subcategory are among those most commonly suggested by States. They relate to the likely use of the weapons once they have been transferred, and could be formulated as follows:

"A State Party shall not authorize a transfer of arms when there are substantial grounds for believing there is a clear risk that the arms under consideration will be used to commit:

- a. a breach of the UN Charter or of customary international law<sup>4</sup>;
- b. serious violations of international human rights law<sup>5</sup>;
- c. serious violations of international humanitarian law applicable in international or non-international armed conflict<sup>6</sup>;
- d. genocide or crimes against humanity<sup>7</sup>;
- e. terrorist acts;
- f. violent, gender-based or organized crime."

### 2. Criteria relating to likely effects

This second subcategory relates to the likely effects that the transferred weapons would have in the country or region into which they are transferred. The criteria most commonly suggested by States could be formulated as follows:

"A State Party shall not authorize a transfer of arms when there are substantial grounds for believing there is a clear risk that the arms under consideration will:

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<sup>3</sup> For example, arms transfers to persons other than those exercising governmental authority may amount to a breach of the duty not to intervene in matters within the domestic jurisdiction of any State. The prohibition on the use of arms that are by nature indiscriminate or are of a nature to cause superfluous injury or unnecessary suffering is derived from universally accepted principles of international humanitarian law. Customary international humanitarian law also contains prohibitions on the use of certain specific weapons. Even though these prohibitions do not extend to the transfer of these weapons, allowing the transfer of prohibited weapons would be difficult to reconcile with the prohibition on their use and with States' general duty to ensure respect for international humanitarian law.

<sup>4</sup> See above under section I.A.

<sup>5</sup> Many of the rules of international human rights law that are of particular relevance to arms transfers are universal. The Universal Declaration of Human Rights encompasses fundamental rights that are so entrenched in international law that a failure to respect them would be considered unacceptable by virtually all States. Some examples of such violations could be torture or other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, and disappearances.

<sup>6</sup> States transferring weapons need to evaluate the risk of "serious" violations of international humanitarian law (IHL). These are the violations that States have the obligation to investigate and for which they must prosecute or extradite suspects. Serious violations of IHL include the grave breaches found under the four Geneva Conventions of 1949 (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) and under Additional Protocol I of 1977 (Articles 11 and 85). According to customary IHL, serious violations of IHL constitute war crimes, which, in turn, have been listed under Article 8 of the Rome Statute of the International Criminal Court. While not all States are party to the Rome Statute, the list of war crimes under Article 8 does serve as a useful reference for acts that States have generally considered serious violations of customary international law.

<sup>7</sup> The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide. A definition of crimes against humanity can be found in article 7 of the Rome Statute of the International Criminal Court. Other instruments also define crimes against humanity (see for example the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda).

- a. adversely affect internal, regional or international security and stability;
- b. provoke, prolong or exacerbate an armed conflict or aggravate existing disturbances and tensions;
- c. seriously impair poverty reduction or socio-economic development<sup>8</sup>;
- d. contribute to a destabilizing accumulation of arms;
- e. contribute to the displacement of people."

### 3. Considerations relating to the needs and practices of the countries involved in the transfer

States have also expressed the need to consider other factors relating to the recipient country. Without proposing any particular formulation, these considerations include:

- a. the transfer of arms to or through conflict zones;
- b. whether the proposed transfer and corresponding military expenditure exceeds the recipient state's legitimate security and defence needs and technical and economic capacity;
- c. whether an arms transfer would involve corrupt practices or corruption at any stage of the transfer<sup>9</sup>;
- d. whether the recipient exercises adequate national control of arms and complies with commitments in the field of non-proliferation, arms control and disarmament;
- e. the risk of diversion for unintended or unauthorised uses such as those mentioned in the above criteria or users such as armed groups, non-governmental bodies acting outside the law, persons designated as "terrorists" or criminals.

### **C. Criteria relating to the expected user**

One criterion that has been proposed by many States relates to the denial of arms transfers to armed groups. It could be formulated as follows:

"A State Party shall not authorize a transfer of arms to non-State armed groups. "

The question of transfers to types of non-State actors could also be addressed in the scope of application of the Arms Trade Treaty.

## **II. What frameworks can be used to develop these criteria?**

### **A. Sources of inspiration**

The departure point in developing criteria should be the object and purpose of the ATT, which, in general terms, is to prevent the problems relating to the unregulated trade in conventional weapons. The "Goals and Objectives" text of the ATT Chairman's paper of July 22, 2010 highlights a number of key objectives of an ATT and serves as a useful starting point in identifying essential

<sup>8</sup> According to OXFAM, "International transfers of conventional arms impair poverty reduction and socio-economic development when they contribute to armed crime, conflict, or serious violations of human rights, when they undermine post-conflict peacebuilding, or when they involve excessive unaccountable spending or corrupt practices." See Practical Guide: Applying Sustainable Development to Arms Transfer Decisions, Oxfam International Technical Brief, April 2009.

<sup>9</sup> According to Transparency International, "Corruption damages the arms trade in two ways: Firstly, it inflates the cost and reduces the quality of the weapons which nations acquire to defend themselves. This undermines the promotion of "the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources" (UN-Charter, Art. 26). Secondly, corruption undermines the ability of states to control the diversion of weapons from their intended end-users within the country or abroad." See Transparency and the ATT – The case for a strong anti-corruption mechanism, Transparency International, 2010.

criteria. In fact, many of the criteria listed in the PrepCom Facilitator's July 2010 paper on "Standards and Criteria" already reflect the "Goals and Objectives" text.

Following UN General Assembly resolution A/RES/61/89 calling on 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 on the subject...", around 100 States made submissions. Among these were States' views on desired criteria for an ATT. The United Nations Institute for Disarmament Research (UNIDIR) carried out a useful statistical analysis of these views and demonstrated which criteria were most cited as desirable in an ATT. Many of the criteria proposed in these views coincide with those set out in the PrepCom Facilitator's July 2010 "Standards and Criteria" paper.

In addition, several regional instruments<sup>10</sup>, some legally binding and some not, also set out various arms transfer criteria that can provide inspiration to States when elaborating criteria for an ATT.

## **B. Quality of information and degree of risk**

The task of developing criteria is not limited to identifying the concerns that arms transfer decisions are intended to consider. It is also important to determine what information and what degree of risk are required to decide that a given criterion has not been met.

### **1. Quality of information**

In formulating criteria, States will need to reflect on the quality of information required to find that a transfer does not meet a given criterion.

Some regional arms transfer instruments use wording such as "where it *deems* that there is a clear risk"<sup>11</sup> or "has *reason to believe*."<sup>12</sup> Others make no reference at all to the information required. The 2004 Draft Framework Convention on International Arms Transfers proposed by the Control Arms Campaign suggests this formulation: "in circumstances in which it *has knowledge or ought reasonably to have knowledge*."

States could also consider the "substantial grounds for believing" formulation found in international legal instruments governing the non-return of persons to authorities in whose hands they may face certain types of treatment. For instance, article 3(1) of the Convention against Torture says that "(n)o State Party shall expel, return ("refouler") or extradite a person to another State where there are *substantial grounds for believing* that he would be in danger of being subjected to torture." Article 16(1) of the Convention for the Protection of All Persons from Enforced Disappearance uses similar wording: "(n)o State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are *substantial grounds for believing* that he or she would be in danger of being subjected to enforced disappearance". The UN Human Rights Committee, in its General Comment No. 31, says that the "article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or

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<sup>10</sup> See for example the 2006 ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, the 2008 EU Council Common Position defining common rules governing the control of exports of military technology and equipment, the 2010 Central Africa Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair and Assembly, the 2003 Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, the 2005 Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, the 2005 Code of conduct of the States of Central America on the transfer of arms, munitions, explosives and related materiel, the 2000 Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons and the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons.

<sup>11</sup> The 2000 Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons; the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons

<sup>12</sup> The 2003 Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition



otherwise remove a person from their territory, where there are *substantial grounds for believing* that there is a real risk of irreparable harm."

Many States involved in recent ATT discussions have said clearly that any information forming the basis of a judgement on arms transfers should be obtained from reliable, credible sources, and should be objective.

## 2) Degree of risk

Where criteria would require an assessment of the likely use or effects of the arms that are eligible for transfer, States will need to formulate the level of risk needed to find that a transfer does not meet a given criterion.

Once again, regional arms transfer instruments contain wording such as: "Each participating State will avoid issuing licences for exports where it deems that there is a *clear risk* that (...)"<sup>13</sup>, "The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities *will, or seriously threaten to* (...)"<sup>14</sup>, "States Parties shall not authorize transfers which *are likely to be used* (...)"<sup>15</sup>, "Member States shall (...) deny an export licence if there is a *clear risk that* (...)"<sup>16</sup>

As seen above, international treaties on human rights also contain wording describing the risk that a person will face certain types of treatment upon being transferred: Article 3(1) of the Convention against Torture prohibits transferring a person "where there are substantial grounds for believing that *he would be in danger* of being subjected to torture." In its General Comment No.1, the UN Committee against Torture said that "the risk of torture must be assessed on grounds that *go beyond mere theory or suspicion*. However, the risk *does not have to meet the test of being highly probable*." Article 16(1) of the International Convention for the Protection of All Persons from Enforced Disappearance prohibits the transfer of a person "where there are substantial grounds for believing that he or she *would be in danger* of being subjected to enforced disappearance". In General Comment No. 31, the UN Human Rights Committee referred to an obligation not to transfer persons "where there are substantial grounds for believing that there is a *real risk* of irreparable harm."

The ICRC proposes that, to make a risk assessment, the current and past records of the recipient need to be examined. Isolated incidents of violations of international humanitarian law may not by themselves be considered a sufficient basis for denying an arms transfer. But, any sustained pattern of violations or any failure by the recipient to take appropriate steps to put an end to violations and to prevent their recurrence, should be a serious concern<sup>17</sup>.

Similarly, in reference to a "substantial risk" of serious violations of international human rights law, Amnesty International<sup>18</sup> has said that "(a)n isolated incident may not be a sufficient basis for denying a transfer. However, where there is evidence of patterns, or where there is evidence that the recipient has not taken appropriate steps to end violations and prevent their recurrence, the likelihood of substantial risk becomes greater."

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<sup>13</sup> The 2000 Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons; the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons

<sup>14</sup> The 2003 Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition

<sup>15</sup> The 2005 Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons

<sup>16</sup> The 2008 EU Council Common Position defining common rules governing the control of exports of military technology and equipment

<sup>17</sup> See ICRC's "Practical Guide" on applying international humanitarian law criteria in arms transfer decisions, 2007 at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0916>

<sup>18</sup> See Amnesty International's Guide on "How to apply human rights standards in arms transfer decisions," 2008 at <http://www.amnesty.org/en/library/info/ACT30/008/2008/en>

Even though some ATT proponents will refer to a "clear" risk and others to a "substantial" risk, the above explanations of "clear" and "substantial" remain very similar and suggest that there may not be a difference in how these levels of risk are assessed in practice.<sup>19</sup>

### **III. How can criteria be applied?**

Most States have said that it should be for each State Party to the ATT to apply the agreed transfer criteria each time it is considering whether to authorize a weapons transfer. It is interesting to note that the 2006 ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials foresees a different approach. It bans the transfer of small arms and light weapons but establishes an exemption procedure. Under this procedure, the President of the ECOWAS Commission will apply the transfer criteria and send a confidential reasoned opinion to Member States who will, by consensus, confirm or refuse this opinion.

States have also said that arms transfer requests should be assessed through an effective, case-by-case and objective inquiry relating to the specific weapons under consideration. They have insisted on the need for consistency, predictability and transparency in the application of transfer criteria. It is, however, inevitable that States will need to exercise some interpretation and judgement in applying agreed criteria. ATT criteria would not replace such judgement but would provide an agreed framework within which a State Party's judgement would be exercised.

Some other application-related questions have emerged during recent discussions: Which indicators should inform a given criterion assessment, and what should be the consequence if a proposed transfer does not meet a given criterion?

Specific guidelines on making systematic and objective risk assessments can be helpful tools in applying criteria. Guides already exist on the consideration of international human rights law, international humanitarian law, socio-economic development, diversion, corruption, and other criteria. The EU has adopted a User's Guide<sup>20</sup> for the application of the EU Common Position, and ECOWAS is in the process of developing its own guide. These guides propose various indicators for transferring States to evaluate before authorizing a transfer, as well as some sources of reliable information.

For the ATT to be truly effective, the application of transfer criteria will need to be consistent with the object and purpose of the ATT. As the "Goals and Objectives" text of the ATT Chairman's paper of July 22, 2010 states, an ATT will

"(p)revent international transfers of conventional arms that contribute to or facilitate: human suffering, serious violations of international human rights law and international humanitarian law, violations of UN sanctions and arms embargoes and other international obligations, armed conflict, the displacement of people, (...)"

It is only through a strict application of ATT criteria that States will be able to reach these and other important goals of an ATT.

Many States, NGOs and international organizations have argued that where there is a clear risk of serious violations of international human rights or humanitarian law with the weapons being transferred, any measure short of a denial of the arms transfer will undermine an ATT's objective of reducing human suffering. States should therefore exercise strict caution in applying ATT criteria to transfers that could put human lives at risk. In any event, express prohibitions on arms

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<sup>19</sup> On such differences of wording in the context of non-refoulement, Elihu Lauterpacht and Daniel Bethlehem have written that, "[i]n practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Right Committee, the European Court of Human Rights, and the Committee against Torture ... have all indicated in one form or another that, whenever an issue of refoulement arises, the circumstances surrounding the case will be *subjected to rigorous scrutiny*." See "The scope and content of the principle of non-refoulement : opinion", in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003.

<sup>20</sup> See 2009 EU User's Guide at <http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>

transfers (such as those set out in section I.A. above) will also demand that a State deny an arms transfer.

Nevertheless, States may decide that not all criteria are of equal consequence. As seen in the preceding paragraph, if certain criteria are not met, States will refuse to authorize an arms transfer. But, when applying other criteria, States may take the criteria "into account" and exercise special caution and vigilance in authorizing transfers. It is also possible that States will want to apply exceptions to transfer criteria, for instance where their own national security is at stake. In order to remain true to the ATT's object and purpose, it will be important for States to limit the range of permitted exceptions and to apply them with the ATT's object and purpose always in mind.

In connection with a decision to authorize or deny a transfer, States can also choose to engage with potential arms recipients with a view to improving their ability to meet the criteria and therefore their eligibility to receive weapons. States could carry out training and capacity building in addition to a transfer of weapons or as a mitigating measure where an arms transfer is denied. This way, steps are taken to correct the circumstances that led to a denial.

## **Conclusion**

In the development and application of arms transfer criteria, States should always keep in mind the object and purpose of the ATT, which is to prevent the problems relating to the unregulated trade in conventional weapons. States can refer to a variety of sources to help them identify appropriate criteria for arms transfers and choose their formulation. States will also need to decide what will be the consequence of finding that a requested arms transfer does not meet a given criterion. It is only by a strict and honest application of strongly formulated criteria that an ATT will become a credible instrument and achieve its core objectives.

# Background Paper: Implementation

Breakout Session: Beacon Hill Room, Park Plaza Hotel

29 September 2010

**Roy Isbister, Saferworld**

## Introduction

Once the principles, objectives, scope and parameters of an Arms Trade Treaty (ATT) are agreed, implementation of the Treaty will be critical to its effectiveness and utility. It is thus crucial that the structures and mechanisms established by the Treaty both facilitate implementation and ensure states can be held to account for any failure to meet their treaty commitment.

While much is still to be determined, there is wide agreement that the ATT will be implemented at the national level, with decisions on transfers made by individual States. There is little or no appetite for licensing or authorization decisions to be taken by a supranational body. Therefore all States will require a national system for the control of international transfers of conventional arms. Yet many States currently have relatively underdeveloped national arms transfer control systems and may find it difficult to immediately meet their ATT obligations. The links to international structures and mechanisms that support national implementation and enable and facilitate access to appropriate assistance will therefore be critical.

International mechanisms and structures will further support Treaty implementation if they also *inter alia* facilitate meaningful reporting, information-sharing and record-keeping, discussion regarding compliance issues, dispute resolution, and ongoing Treaty review and development.

The national and international levels are thus the two equally-critical sides of the ATT-implementation coin. This paper addresses each in turn.

## National measures<sup>1</sup>

The ATT will spell out the range of items and activities subject to its provisions, and the parameters/criteria to be followed in determining whether to authorize or refuse any prospective international transfer that falls within its remit. Because individual States will implement these provisions and make the decisions on individual transfers at the national level, an effective national system will have to provide for the following:

- a system of licensing/authorization—States should not make such decisions arbitrarily; they will need to establish a system of control that enables case-by-case decision-making on an informed, consistent, reasonable and defensible basis, in accordance with criteria/parameters outlined in the Treaty;
- rigorous enforcement— States must ensure that they are able to effectively enforce their national arms transfer controls in line with their obligations under

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<sup>1</sup> This section draws extensively on Anne-Charlotte Merrell Wetterwik, Rachel Stohl, Roy Isbister and Elizabeth Kirkham, 'National implementation of the proposed Arms Trade Treaty: A practical guide', *Center for International Trade & Security, Oxfam GB and Saferworld*, July 2010, <http://www.saferworld.org.uk/smartweb/resources/view-resource/457>.

the Treaty. A system that is not enforced or indeed is unenforceable will soon be discredited and will be increasingly ignored;

- outreach/communication—information sharing both within the government as well as to external partners will assist in implementation of an existing system as well as in identifying where there are implementation challenges that require assistance.

It should be noted that although all national systems will need to address each of these elements, there is no 'one size fits all' solution. States should base their systems on the extent and nature of their arms trading, their system of government, technological infrastructure, capacity, and legal tradition. It would, for example, make no sense for a small state with very little involvement in arms transfers to adopt a system identical in every particular way to the world's largest conventional arms exporters. The Treaty will therefore have to be flexible enough to allow for different approaches while setting out clearly the underlying obligations that must be met. The ATT should be viewed as a floor, not a ceiling; the Treaty will set out minimum standards, but States will have the option of implementing additional or tighter controls at the national level.

#### *Licensing/authorization*

The range of equipment and the types of transfers and activities subject to control, and the range of criteria or parameters against which potential transfers are to be assessed, all of which will be established in the ATT, will have to be set out in national law.

The national system will need to establish the institutional arrangements for the administration and implementation of the licensing system, with functions, procedures and decision-making responsibilities clearly delineated among the relevant governmental agencies. Decisions about prospective transfers should be objectively informed, using reliable and credible sources. States will also be obliged to honor any provisions in the ATT with regard to procedural matters. These could relate to, for example, the issuance of and verification of end-use(r) certificates, or the application of post-transfer controls such as post-delivery verification or re-export restrictions.

Record-keeping will also need to be organized at the national level; with entities undertaking controlled activities legally obliged to make the necessary information available to the government. In addition, it will fall to national governments to make relevant information about the system (e.g. the laws, policies, control lists etc.) publicly available in a timely manner and accessible format. Detailed information about transfers approved or refused should also be published wherever possible.

#### *Enforcement*

National governments will be responsible for ensuring that offences established under the Treaty are offences in national criminal and civil law. Once again, States will need to establish which institutions are responsible for the different aspects of enforcement, and the procedures to be followed. Enforcement will need to be a consideration at all stages of the transfer process, including from licence application through physical screening at external borders to possible follow-up by diplomatic posts in the recipient State. Appropriate penalties and sanctions will need to be established in national law. Information-sharing and publicity with regard to enforcement needs to be balanced

against data-protection and privacy laws, possible commercial issues, and national-security issues, but it can be important in gathering meaningful intelligence, securing prosecutions and in deterring others from attempting to violate the law.

#### *External communication*

It is incumbent upon national authorities to ensure that entities operating within their jurisdiction that are engaged in activities subject to control (e.g. exporters) understand their obligations, both for the sake of fairness and to safeguard against inadvertent breaches of the national laws that are established under the Treaty. Information-sharing by national authorities may be required by the Treaty regarding national laws and procedures, transfers made or refused, problematic end-users or difficulties with implementation at the national level. As a general rule, such communication can be expected to improve the general quality of decision-making, demonstrate compliance with the Treaty, and facilitate provision of assistance in implementation where required.

#### **International elements of implementation**

The ATT, as a global treaty, will also need to establish international structures and mechanisms to provide for, at a minimum, peer-group review of and assistance with implementation. States currently with relatively rudimentary national systems may struggle initially to meet their newfound obligations. Thus, the long-term credibility of the Treaty and the prospects for effective arms transfer controls will be improved if the ATT contains mechanisms that enable and facilitate access to assistance. International measures are also necessary to fulfill the standard treaty functions of developing shared understandings across the international community of acceptable practice, providing a forum within which States' decision-making under the Treaty can be explored and allowing for ongoing responses to changes in the external environment.

There are any number of ways in which the international aspects to treaty implementation can be organized. They will be contingent on the content of the other aspects of the Treaty, and there will be a complex interplay among them. However, there are certain elements or building blocks that are fundamental to effective implementation and thus will need to be considered, and which will require certain institutional arrangements or structures to be put in place, including:

- reporting, information-sharing and transparency;
- monitoring, clarifying and verifying compliance;
- dispute management and resolution;
- co-operation and assistance.

This list is not exhaustive, but highlights the areas where the particularities of the arms trade are likely to create the most need for detailed consideration. Examination of each of these elements should focus on how best they can be organized to encourage, assist and ensure compliance with the Treaty. These subject areas are also co-dependent; the approach to any one will have implications for the consideration of all the others. Proposals for institutional arrangements to address these elements follow.

#### *Reporting, information-sharing and transparency;*

Regular (annual) reports by States on implementation are essential and will be at the heart of information-sharing and transparency under the ATT. Such national reports,

which will need to be submitted to a central institutional structure (for more on this, see the section on *Institutional arrangements* below), should contain information on the existing national system (including laws, procedures and processes), any steps taken or planned to implement the Treaty, along with reference to implementation assistance requested, received, offered or provided. Reports will also need to include information on licences/authorizations granted and refused, and on transfers made, under the Treaty. States should also consider sharing information that would assist others in their implementation efforts, e.g. on problematic actors or trade routes, on tracing requests and outcomes, on breaches of the Treaty, on prosecutions under relevant national laws. Information on other related arms issues, although not necessarily falling within the scope of the ATT, might also be supplied on a voluntary basis as a confidence-building measure (for example, information on non-transfer-based procurement and arms holdings). Wherever possible, information shared under the Treaty should be placed in an easily accessible format in the public domain (including online).<sup>2</sup>

#### *Monitoring, clarifying and verifying compliance*

National reports and information-sharing will be useful compliance-verification tools. There will, however, inevitably be times when States may want more information, or where they may have queries about particular transfers or about certain aspects of another State's national system or Treaty implementation. The ATT should therefore establish States' right to raise queries or concerns, and codify procedures for dealing with such cases. Wherever possible such matters should be handled by the States concerned, however the Treaty will have to provide for those circumstances where initial exchanges fail to resolve the situation, or where the question under review requires broader engagement (for more on this, see the section on *Institutional arrangements* below).

#### *Dispute management and resolution*

The ATT will have to address those situations where, following clarification, States remain in dispute over specific transfers or particular aspects of Treaty implementation. There may be circumstances where the States concerned can themselves suggest dispute resolution procedures, or matters may be addressed by a broader Treaty body for mediation, negotiation or arbitration. It may also be the case that ultimately a dispute is referred to an external institution such as the International Court of Justice, the UN General Assembly or the UN Security Council.

It should be noted that where disputes arise over (perceived) capacity to effectively implement the Treaty, the most appropriate resolution strategies may be through co-operation and assistance mechanisms (see below), rather than through dispute-settlement procedures.

#### *Co-operation and assistance*

The Treaty will be implemented nationally, and no State should be obliged to offer or accept assistance. Nevertheless, one of the most valuable consequences of an ATT

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<sup>2</sup> For more on reporting under an ATT, see Paul Holtom, 'What kind of reporting mechanism could be used in an ATT?', *Stockholm International Peace Research Institute*, September 2010.

should be that it legitimizes and provides a much more effective mechanism for States to identify, request, receive and provide assistance in developing effective national systems for international arms transfer control. States should therefore ensure that Treaty provisions in this issue area are particularly robust. Co-operation and assistance should address all aspects of arms transfer controls, including legislation and regulation, licensing procedures, enforcement (including specific investigations, tracing requests, etc.), reporting and information-sharing, training of personnel, information-technology support. The Treaty should be flexible in terms of how co-operation and assistance might be advanced. For example, it should facilitate State interaction on a bilateral or regional basis where States so choose. However, consideration should also be given to establishing a specific mechanism designed to assist with identification of need and provision of co-operation and assistance (see below).

#### *Institutional arrangements*

To be effective, an ATT will require a number of specific institutional structures, both permanent (or semi-permanent), and convened at particular moments for strictly limited duration. Certain implementation functions of an ATT—for example reporting, and co-operation and assistance—will require permanent institutional structure and capacity if the issues raised above are to be managed appropriately.

#### Secretariat

Robust implementation will require a dedicated Secretariat. To guarantee clarity of purpose this would ideally be an independent institution established by the Treaty, however thought would need to be given to how it might interact with other related bodies or functions (e.g. the UN Register of Conventional Arms). It would be charged with *inter alia*:

- providing advice on, assisting production of and compiling national reports;
- providing administrative support to other Treaty institutions and mechanisms (for example Meetings of States Parties and Review Conferences—see below);
- providing routine technical support on Treaty implementation to States Parties, and operating as clearing house for requests for information, points of clarification, etc. (from governments but also from other stakeholders such as media, non-governmental organizations);
- acting as a repository for Treaty-relevant information provided by States or other credible parties. This could include, for example, information on actors of concern, diversion risks, embargo breaches etc.;
- functioning as a clearing house for requests for and offers of assistance;
- providing advice to governments wishing to become States Parties to the ATT.

#### Committee of experts

Meaningful co-operation and assistance will also benefit from strong institutional support. Some of this function can be provided by a Secretariat, for example by acting as a repository for requests for and offers of assistance. However, there is a strong case for establishing an additional permanent or semi-permanent body, established by the Treaty and with a limited, rotating membership approved by all States Parties, which could go further and assess States' national implementation, identify gaps and recommend



priorities for action to address those gaps. In this context, the 1540 Committee<sup>3</sup> could provide a useful reference point for discussion. Such a body might also serve other functions, such as:

- answering interpretive questions from States Parties of a technical nature, for example concerning Treaty scope;
- providing an opinion where States have been unable to bilaterally resolve concerns over compliance;
- suggesting options/making recommendations regarding future changes to the Treaty or its annexes or protocols, especially where these are of a technical nature.

#### Meetings of States Parties and Review Conferences

In addition to these ongoing institutions, annual Meetings of all States Parties (MSP) and five-yearly Review Conferences would be fundamental to effective implementation and to ensure ongoing meaningful participation by all States Parties.

The MSP would consider a range of issues including:

- the operation and status of the Treaty;
- any matters arising from its implementation;
- procedural, technical, or administrative changes to the Treaty;
- requests for clarification of compliance;
- outstanding compliance issues;
- the endorsement of members of and the work of the aforementioned committee of experts (should one be established).

The Review Conferences would *inter alia* review ATT operation and status, consider the need for substantive amendment to the Treaty or the elaboration of additional protocols, and assess the need for further MSP.

#### **Conclusion**

Responsibility for Treaty implementation rests with individual States. Each must ensure it is capable of and committed to meeting its Treaty obligations. However, many States will be approaching ATT implementation with underdeveloped national transfer control systems. Each will approach the ATT with different needs and capacities, and with varying implementation-support needs. All these factors present considerable implementation challenges. It is therefore incumbent on States to keep these complexities in mind as they negotiate a Treaty that is practical, enforceable, and can achieve the objectives for which it has been proposed.

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<sup>3</sup> See the 1540 Committee: Security Council Committee established pursuant to resolution 1540, <http://www.un.org/sc/1540/>.

# Background Paper: Transparency

**Paul Holtom, Stockholm International Peace Research Institute**

## **What kind of reporting mechanism could be used in an ATT?**

An ATT reporting mechanism should ideally build upon, learn from and strengthen existing reporting mechanisms on transfer control systems and international arms transfers at the global, regional and national levels. Thus, the main aim of this paper is to highlight the types of information that are already exchanged through intergovernmental transparency mechanisms on transfer control systems and actual transfers of conventional arms munitions, ammunition and military equipment, or made available unilaterally by national governments, in order to facilitate discussion on how the ATT could help to encourage and promote transparency in the global arms trade.

The aims, scope and coverage of an ATT will determine the format and types of information to be provided to an ATT reporting mechanism.<sup>i</sup> However, an examination of the functioning and shortcomings of existing global, intergovernmental and national reporting mechanisms on international transfers of conventional arms, as well as the UN Group of Governmental Experts study 'Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms' ('Ways and Means Study'), allows this paper provide:

- A brief overview of different potentially relevant reporting mechanisms;
- Suggestions for reporting categories for, and types of information to be provided to, an ATT reporting mechanism; and
- Some general considerations for an ATT reporting mechanism.

The suggestions for reporting categories and types of information given in the chart below draw upon existing intergovernmental reporting mechanisms, information released by governments for domestic and international audiences and suggestions in the 'Ways and Means Study.' Under an ATT, States could be *called upon*, *requested*, *invited* or *encouraged* to report information to these categories. Under each category heading, it has been noted whether such information has been provided by intergovernmental or national reporting mechanisms, as not all UN Member States provide this information for all categories, and possible types of information to be reported upon have also been listed. While the suggestions for categories and types of information listed in the chart below relate to those that should ideally be made available for confidence-building and to assess compliance with a future ATT, it arguably remains the case that:

'The most important criteria for the choice of types of information are political acceptability and relevance for the achievement of transparency'<sup>ii</sup>

## Overview of existing reporting mechanisms on conventional arms transfers and transfer controls

### **Global**

- *UN Register of Conventional Arms*
- *National legislation on transfer of arms, military equipment and dual-use goods and technology*
- *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*

### **Other intergovernmental reporting mechanisms**

There are a number of intergovernmental reporting mechanisms aimed at controlling arms transfers, combating illicit trafficking and prohibiting transfers of certain conventional weapons. The following are a selection of intergovernmental agreements and conventions that contain provisions on transparency, reporting mechanisms and intergovernmental information exchanges:

- *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997)*
- *Convention on Cluster Munitions (2008)*
- *ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and other Related Materials (2006)*
- *EU, Code of Conduct on Arms Exports (1998) / Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment (2008)*
- *Inter-American Convention on Transparency in Conventional Weapons Acquisitions (1999)*
- *OSCE Document on Small Arms and Light Weapons (2000)*
- *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*

### **National**

- *National reports on arms exports*
- *Ministry of Defence publications, including defence white papers, defence reviews, national security strategies, arms procurement plans*

**Chart 1. Suggestions for reporting categories and types of information to be provided for an ATT reporting mechanism**

Category	Intergovernmental reporting measures	National reporting measures	Suggested information to be provided
1. National transfer control system	States can report to a range of UN instruments on national transfer controls: (a) the annual exchange of National Legislation on Transfer of Arms, Military Equipment and Dual-Use Goods and Technology; (b) implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; <sup>iii</sup> (c) background information submissions to the UN Register of Conventional Arms (UN Register); and (d) particular and general measures undertaken to implement and enforce selected UN arms embargoes (e.g. DPRK, Eritrea and Iran and for certain actors in DRC and Sudan). <sup>iv</sup>	States provide information on their transfer control legislation and competent authorities in: (a) national reports on arms transfers (national reports) and (b) on government websites.	(a) Activities subject to transfer controls (export, import, transit, transshipment, brokering, transportation); (b) licensing procedures including the criteria for assessing license applications; (c) end-use/user documentation requirements; (d) the national control list; (e) explanations of particular licensing decisions; and (f) sanctions for violations.
2. Arms procurement plans	Several states have submitted defence white papers as part of their background information submissions to the UN Register and several regional organisations also encourage such exchanges (e.g. Association of South East Asian Nations, Organisation of American States).	States publish defence white papers and security strategies or concepts, some of which provide information on arms procurement plans. <sup>v</sup> Some states also publicly announce arms procurement programmes in government documents, websites or media interviews.	(a) Procurement time frame; (b) description of arms; (c) quantity of items; and (d) projected cost of the procurement programme.
3. Data on orders	Several states include information on orders in their submissions to the UN Register.	Some states provide information on orders in government documents or websites (e.g. Ministry of Defence).	(a) Producer and supplier; (b) recipient and end-user; (c) non-state entities involved in the transaction: producers,

			brokers, transporters, financial agents; (d) date of: order, licence application, licence granted, licence refused, and deliveries; (e) description of arms, components, knowledge or services: control list category, description, model, age; (f) quantity of items; (g) financial value and (h) financial arrangement: offsets, subsidies, export credits, credit arrangement, barter, gift.
4. Data on transfer licences issued and denied	There are several intergovernmental reporting mechanisms for information on transfer licence applications and denials (e.g. the European Union (EU) information exchange on export licences and the Economic Community of West African States (ECOWAS) information exchange on exemptions from the ECOWAS Convention on Small Arms and Light Weapons).	Since 1990, 32 states have provided information on licences granted for exports, imports, transit/transshipment, brokering and brokering-related services in a national report. <sup>vi</sup>	See category 3
5. Data on deliveries	States are requested to submit information to the UN Register on transfers of weapons that fall within the parameters of the Register's seven categories and are also invited to submit information on transfers of SALW. Intergovernmental reporting mechanisms for deliveries of conventional weapons also exist in several regions and export control regimes (e.g. Organisation of American States; Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies).	A number of states provide information on deliveries in their national reports, with the level of detail provided comparable with that for information on licences.	See category 3
6. Data on co-	States are neither requested nor invited to	Some states provide information on	See category 3

, licensed and multinational production	provide this information to the UN Register, but some information can be found in submissions on procurement from domestic production.	co-production, licensed production and multinational production in their national reports.	
7. Data on procurement through national production	States are invited to provide information to the UN Register on procurement through national production for its seven categories. Intergovernmental reporting mechanisms also provide for information exchanges on procurement (e.g. Conventional Forces Europe Treaty, Inter-American Convention on Transparency in Conventional Weapons Acquisitions).	Some information on procurement from national production can be found in updates on national arms procurement programmes and plans or via Ministry of Defence publications.	(a) Producer; (b) end-user; (c) description of items: control list category, description, model; (d) quantity of items
8. Data on holdings	States are invited to provide information to the UN Register on holdings for its seven categories. Intergovernmental reporting mechanisms also have information exchanges for holdings (e.g. Conventional Forces Europe Treaty; the Moscow Agreement).	Some information on holdings can be found via Ministry of Defence publications.	(a) Description of items: control list category, description, model; (b) quantity of items: total holdings, in service, designated surplus and destroyed
9. Data on seizures of illicitly trafficked arms and prosecutions	There are a few mechanisms for exchanging information on illicitly trafficked arms at the international level and several regional and sub-regional initiatives for combating organised crime that also exchange information on seizures of illicitly trafficked arms. (e.g. Interpol, Organisation for Security and Cooperation in Europe, Southeast Europe Cooperative Initiative (SECI) Regional Center for Combating Transborder Crime)	Some states provide information on seizures and prosecutions in their national reports.	(a) Seizures of illicitly trafficked arms, munitions and ammunition; (b) individuals or corporations convicted for arms trafficking; (c) routes used for illicit trafficking and information on embargo violations; (d) transport companies involved in illicit or destabilizing transfers; (e) and non-State entities that are or may be attempting to acquire MANPADS. <sup>vii</sup>

## General considerations for an ATT reporting mechanism

The types of categories and information to be provided to an ATT reporting mechanism should assist states in meeting the aims of an ATT. One can assume that these aims will include commitments to the promotion of international peace and security. A transparency mechanism is an important confidence-building measure for promoting international peace and security. Therefore relevant and detailed information should be reported to demonstrate good will, increase mutual trust and help reduce tensions under an ATT. States are currently requested or invited to provide information on transfer controls and arms transfers to the UN annually; other intergovernmental and unilateral reporting mechanisms take place monthly or quarterly. Discussions relating to an ATT reporting mechanism could offer an opportunity for consolidating reporting on transfer control systems and international arms transfers.

Another aim of an ATT will be to ensure universal state party participation. State capacity could pose a challenge for some states to implement obligations under an ATT. Therefore reporting upon progress and obstacles in implementation could help to identify areas for international cooperation and assistance to be rendered. Assistance may be required in some cases to help compile national reports on implementation and also to report information for confidence-building purposes. Other challenges could include lack of political will, concerns regarding the relevance of reporting categories for national security and reporting fatigue. It is worth considering lessons learned from other reporting mechanisms to help overcome such obstacles.

While states under a number of intergovernmental reporting mechanisms exchange information in confidence, information provided to the UN on conventional arms is also made available for public scrutiny. This is already the case with information for categories 1, 5, 7 and 8 above. Are there categories or types of information that should remain confidential (for example some of the information that could be exchanged under category 9)?

Existing UN reporting mechanisms utilise mandatory and voluntary reporting requirements, distinguishing within particular reporting mechanisms on whether to 'call upon', 'request', 'invite' or 'encourage' states to report for certain categories and types of information. Should an ATT reporting mechanism also introduce a 'hierarchy' among the categories to be reported upon? And if so, which categories should require mandatory reporting?

It would appear that a standardised reporting template is a useful tool for states reporting to UN instruments. At the same time, a standardised reporting template does not address all of the technical challenges that states face in the collection and exchange or publication of information. It should also not preclude states from providing either partial reports, or reports that provide more information than requested by the standardised reporting template. This also relates to the level of detail that is required for information to be meaningful and useful for confidence-building and assessing implementation of an ATT. What are the legitimate security and commercial considerations that could limit the level of detail provided?

## Endnotes

<sup>i</sup> Para 105, United Nations, Report of the Secretary General, Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms, UN General Assembly, Forty-sixth session, General and Complete Disarmament: International Arms Transfers, UN Document A/46/301, 9 Sept. 1991, p. 38.

<sup>ii</sup> Report of the Secretary General, Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms, UN General Assembly, Forty-sixth session, General and Complete Disarmament: International Arms Transfers, UN Doc. A/46/301, 9 Sept. 1991, Para 116.

<sup>iii</sup> United Nations General Assembly Resolution 57/66, 30 December 2002, Art. 2; United Nations Programme of Action Implementation Support System: <<http://www.poa-iss.org/reporting/>>.

<sup>iv</sup> For recent examples, see: UN Security Council Resolution 1857 (2008), UN Doc. S/RES/1857, 22 Dec. 2008, para. 7 (DRC); UN Security Council Resolution 1874 (2009), UN Doc. S/RES/1874, 12 Jun. 2009, para. 22 (DPRK); UN Security Council Resolution 1891 (2009), UN Doc. S/RES/1891, 13 Oct. 2009, para. 5 (Sudan); UN Security Council Resolution 1907 (2009), UN Doc. S/RES/1907, 23 Dec. 2009, para. 20 (Eritrea); UN Security Council Resolution 1929 (2010), UN Doc. S/RES/1929, 9 Jun. 2010, para. 31 (Iran).

<sup>v</sup> Military Education Research Library Network, <<http://merln.ndu.edu/whitepapers.html>>.

<sup>vi</sup> Bromley, M. and Holtom, P., 'Appendix 7.C. Transparency in arms transfers', SIPRI Yearbook 2010: Armaments, Disarmament and International Security (Oxford University Press: Oxford, 2010), p. 325.

<sup>vii</sup> Based on: Organisation of American States (OAS), Inter-American Convention against the Illicit Manufacturing and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials Approved during the First Plenary Session held on November 13, 1997; OSCE Document on SALW, 2000, p. 9; Wassenaar Arrangement, Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS), Andean Plan to Prevent, Combat and Eradicate Illicit Trade in Small Arms and Light Weapons in all its Aspects, 25 June 2003; Agreed at the 2003 Plenary and amended at the 2007 Plenary; Decision No. 3/04, OSCE Principles for Export Controls of Man-Portable Air Defence Systems (MANPADS), FSC.DEC/3/04, 26 May 2004; Wassenaar Arrangement, 'Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons (SALW) through Air Transport, Agreed at the 2007 Plenary; OSCE DECISION No. 11/08, Introducing Best Practices to Prevent Destabilizing Transfers of Small Arms and Light Weapons Through Air Transport and on an Associated Questionnaire, FSC.DEC/11/08, 5 November 2008.