

ACADEMY BRIEFING No. 3

The Arms Trade Treaty (2013)

June 2013

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Introduction

Academy Briefings are prepared by staff at the Geneva Academy of International Humanitarian Law and Human Rights (the Geneva Academy), together with selected outside experts, to inform government officials, officials working for international organizations, non-governmental organizations (NGOs), and legal practitioners about the legal implications of important contemporary issues.

This Briefing reviews the text of the Arms Trade Treaty, which was adopted by the United Nations (UN) General Assembly on 2 April 2013 after seven years of discussions and negotiation, and opened for signature on 3 June 2013 at the UN in New York. This Briefing summarizes the process that led to the formal adoption of the text and then comments briefly on the provisions of the treaty¹ in three sections:

- Its title, preamble, and principles,
- Its core provisions, and
- Its final provisions.²

¹ The text of the treaty is highlighted in blue.

² A detailed legal commentary on the treaty provisions, written by Professor Andrew Clapham, the Academy's Director, Dr Stuart Casey-Maslen, Dr Gilles Giacca, and Sarah Parker, Senior Researcher at the Small Arms Survey, will be published before the end of 2014 by a leading academic publisher.

The negotiation of the Arms Trade Treaty

The road to the UN Arms Trade Treaty (ATT) was long and, at times, somewhat tortuous. In 2006, under Resolution 61/89, the Assembly had recognized that ‘the absence of common international standards on the import, export and transfer of conventional arms’ was a ‘contributory factor to conflict, the displacement of people, crime and terrorism’ and that it undermined peace, reconciliation, safety, security, stability, and sustainable development.³ It called on the UN Secretary-General to establish a group of governmental experts to examine, beginning in 2008, ‘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’.⁴

The Group of Governmental Experts met for three sessions in 2008.⁵ It recommended ‘further consideration’ of efforts to address the international trade in conventional arms within the UN ‘on a step-by-step basis in an open and transparent manner’.⁶ In response to this recommendation, the UN General Assembly decided to establish an Open-ended Working Group, which held two substantive sessions in 2009. On 2 December 2009, the General Assembly adopted Resolution 64/48, which called for ‘a United Nations Conference on the Arms Trade Treaty to meet for four consecutive weeks in 2012 to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms’. The resolution was adopted by 151 votes to 1 with 20 abstentions.⁷

In accordance with Resolution 64/48, four preparatory committee meetings were held between 2010 and February 2012.⁸ The resolution specified

that the UN Conference on the Arms Trade Treaty would be ‘undertaken in an open and transparent manner, on the basis of consensus, to achieve a strong and robust treaty’.⁹

The four-week Diplomatic Conference, held at the UN in New York from 2 to 27 July 2012 under the Presidency of Ambassador Roberto Garcia Moritán of Argentina, ended without a treaty being adopted. Differences between more progressive ‘like-minded’ states and so-called ‘sceptics’ proved difficult to bridge, although it was calls for more negotiating time on the final day of the Diplomatic Conference by the United States of America (USA) and then the Russian Federation that directly prevented an agreement. Delegations had been presented with a comprehensive draft treaty text by the President on 26 July 2012.¹⁰

On 24 December 2012, by 133 votes to nil with 17 abstentions, the UN General Assembly adopted Resolution 67/234, in which the Assembly decided to convene another diplomatic conference ‘in order to finalize the elaboration of the Arms Trade Treaty’. This ‘final’ session of the diplomatic conference would be governed by the rules of procedure adopted on 3 July 2012, which required agreement ‘by consensus’.¹¹

In accordance with the resolution, the Final United Nations Conference on the Arms Trade Treaty was convened at UN Headquarters in New York from 18 to 28 March 2013. The Conference was opened by the UN High Representative for Disarmament Affairs, after which Ambassador Peter Woolcott of Australia was elected its President. Daniel Prins of the UN Office for Disarmament Affairs was appointed Secretary-General.

³ UN General Assembly Resolution 61/89, adopted on 6 December 2006 by 153 votes to 1 (the USA) with 24 abstentions, ninth preambular paragraph.

⁴ *Ibid.*, §2.

⁵ The Group of Governmental Experts met at UN Headquarters in New York on 11–15 February, 12–16 May, and 28 July–8 August 2008. An Academy Briefing on the July 2012 draft Arms Trade Treaty is available on the Academy website at: www.geneva-academy.ch.

⁶ ‘Report of the Group of Governmental Experts to examine 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’, UN doc. A/63/334, 26 August 2008, §27.

⁷ Zimbabwe voted against the resolution, while Bahrain, Belarus, Bolivia, China, Cuba, Egypt, India, Iran, Kuwait, Libya, Nicaragua, Pakistan, Qatar, the Russian Federation, Saudi Arabia, Sudan, Syria, the United Arab Emirates, Venezuela, and Yemen abstained.

⁸ Under paragraph 6 of the Resolution, the Assembly decided to ‘consider the remaining sessions of the Open-ended Working Group in 2010 and 2011 as a preparatory committee for the United Nations Conference on the Arms Trade Treaty’. The meetings were held at the UN in New York on: 12–23 July 2010; 28 February–4 March 2011; 11–15 July 2011; and (for procedural matters, particularly the rules of procedure for the diplomatic conference) 13–17 February 2012.

⁹ UN General Assembly Resolution 64/48, §4.

¹⁰ UN Conference on the Arms Trade Treaty, UN doc. A/CONF.217/CRP.1, 26 July 2012.

¹¹ UN General Assembly Resolution 67/234, §2.

Under the presidency of Ambassador Woolcott, delegations worked efficiently and constructively and it seemed that agreement was well within reach. The President appointed facilitators to conduct informal meetings on different aspects of the treaty, as follows:

- Ambassador Mari Amano (Japan): brokering.
- Ambassador Paul Beijer (Sweden): scope.
- Mr. Roberto Dondisch (Mexico): diversion.
- Mr. Bouchaib Eloumni (Morocco): preamble; principles; object and purpose.
- Ambassador Dell Higgie (New Zealand): general implementation; relationship with other international agreements.
- Ambassador Paul van den IJssel (Netherlands): record-keeping; reporting.
- Ambassador Federico Perazza (Uruguay): final provisions.
- Mr. Zahid Rastam (Malaysia): transit or trans-shipment.
- Ambassador Riitta Resch (Finland): other considerations.
- Ms. Shorna Kay Richards (Jamaica) and Ms. Michelle Walker (Jamaica): prohibitions.
- Mr. Rob Wensley (South Africa): international cooperation; international assistance.

The President prepared three draft treaty texts during the Conference, the last of which he circulated on 27 March. This text was the strongest draft treaty text produced during the negotiation process and became the treaty text. The following day (the final day of the conference) it became clear that three states were planning to block consensus. In an evening of high drama, the President put his final draft text of the Arms Trade Treaty¹² to the

conference, and made clear his expectation that any state wishing to oppose adoption of the draft text would need to do so unambiguously. In the end, three states formally opposed adoption: Iran, the Democratic People's Republic of Korea, and Syria. Once again, the UN diplomatic conference would end without an agreement to adopt an ATT. This time, however, in the words of United Kingdom Ambassador Jo Adamson, success was merely 'postponed'.¹³ On 2 April 2013, the text of the Arms Trade Treaty was formally adopted by the UN General Assembly by an overwhelming margin,¹⁴ thereby becoming the latest treaty to be added to the corpus of international weapons law.

In accordance with its Article 21, the ATT was opened for signature at the UN in New York on 3 June 2013. During the day, a total of 67 states signed the ATT: Albania, Antigua and Barbuda, Argentina, Australia, Austria, the Bahamas, Belgium, Belize, Benin, Brazil, Burkina Faso, Burundi, Chile, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, the Dominican Republic, Estonia, Finland, France, Germany, Grenada, Greece, Guyana, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, the Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Mali, Malta, Mauritania, Mexico, Montenegro, Mozambique, the Netherlands, New Zealand, Norway, Palau, Panama, Portugal, Romania, St Lucia, St Vincent and the Grenadines, Senegal, the Seychelles, Slovenia, Spain, Suriname, Sweden, Switzerland, Tanzania, Togo, Trinidad and Tobago, Tuvalu, Uruguay, and the United Kingdom. As of 11 June 2013, a further five states had signed the treaty (El Salvador, Liberia, Rwanda, Slovakia, and St Kitts and Nevis), bringing the total number of signatories to 72. Among others, Poland, Samoa, South Africa, and the United States of America have stated their intention to sign the treaty in the coming months.

¹² 'Annex: The Arms Trade Treaty', President's Non Paper, 27 March 2013, available at: [www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_\(ATT_Final_Conference\).pdf](http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_(ATT_Final_Conference).pdf).

¹³ Statement to the final plenary of the Final United Nations Conference on the Arms Trade Treaty, 28 March 2013.

¹⁴ Resolution 67/234B was adopted by a recorded vote of 154 in favour to 3 against, with 23 abstentions. Voting in favour were: Afghanistan, Albania, Algeria, Andorra, Antigua and Barbuda, Argentina, Australia, Austria, Azerbaijan, Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Bhutan, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, El Salvador, Eritrea, Estonia, Ethiopia, Finland, the former Yugoslavia, Republic of Macedonia, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Monaco, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, South Sudan, Spain, Suriname, Sweden, Switzerland, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, and Zambia. Voting against were the Democratic People's Republic of Korea, Iran, and Syria. Abstaining from the vote were: Angola, Bahrain, Belarus, Bolivia, China, Cuba, Ecuador, Egypt, Fiji, India, Indonesia, Kuwait, Lao People's Democratic Republic, Myanmar, Nicaragua, Oman, Qatar, Russian Federation, Saudi Arabia, Sri Lanka, Sudan, Swaziland, and Yemen. Absent from the vote were: Armenia, Cape Verde, Dominican Republic, Equatorial Guinea, Kiribati, Sao Tome and Principe, Sierra Leone, Tajikistan, Uzbekistan, Vanuatu, Venezuela, Viet Nam, and Zimbabwe.

The Title, Preamble, and Principles

The title of the Treaty

'The Arms Trade Treaty'

The proposed title of the treaty directly reflects the title and the mandate of UN General Assembly Resolution 64/48. No formal negotiations on the title took place during the first or final diplomatic conferences, even though it might be considered contentious in two respects. First, it refers to 'arms' in general rather than the narrower 'conventional arms',¹⁵ which was the mandate of Resolution 64/48. Second, it referred to 'trade' rather than the potentially broader term 'transfer'. Trade is generally defined as 'the action of buying and selling goods and services', whereas transfer, which is commonly used in disarmament treaties, would generally also include gifts, leases, and loans. Ultimately, the precise scope of the term 'trade' was left deliberately ambiguous in the ATT.¹⁶

The preamble of the ATT

The States Parties to this Treaty ...

Have agreed as follows:

The preamble to an international treaty typically sets out its background and purpose, although a treaty is not legally required to do so,¹⁷ or even to include a preamble (beyond a statement that the states parties 'have agreed as follows').¹⁸

The ATT preamble consists of 17 paragraphs covering a range of subjects and issues, notably: the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion; the importance of addressing the humanitarian impacts of misuse of conventional arms; the role that regional organizations, industry, and NGOs can play in facilitating effective implementation of the treaty; and the normative context of the ATT, including the purposes and principles of the UN as set out in the 1945 Charter of the United Nations (UN Charter). The preamble also refers to other relevant instruments, such as the 2001 Firearms Protocol¹⁹ and the 2001 UN Programme of Action on Small Arms and Light Weapons.²⁰

Guided by the purposes and principles of the Charter of the United Nations,

The purposes and principles of the UN are set out, respectively, in Articles 1 and 2 of the UN Charter (see Text Box 1 overleaf). The 1996 UN Disarmament Commission's Guidelines on International Arms Transfers imply that limitations on arms transfers can be discerned in the principles and purposes of the UN Charter.²¹

Recalling Article 26 of the Charter of the United Nations which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources,

¹⁵ Conventional arms are generally understood to include all arms other than weapons of mass destruction. See, for example, US Department of Defense (DoD), *DoD Dictionary of Military Terms*, as amended through 31 October 2009, p. 122. Weapons of mass destruction are defined by the DoD as 'chemical, biological, radiological, or nuclear weapons capable of a high order of destruction or causing mass casualties'. *DoD Dictionary of Military Terms*, as amended through 15 April 2013, accessed at: http://www.dtic.mil/doctrine/dod_dictionary/. This latest edition of the *DoD Dictionary* no longer includes a definition of the term 'conventional arms'.

¹⁶ See Article 2(2) and the accompanying commentary.

¹⁷ See, for example, A. Aust, *Modern Treaty Law and Practice*, Second Edn, Cambridge University Press, Cambridge, 2007, p. 425.

¹⁸ The four 1949 Geneva Conventions, for example, do not include any other preambular language than this simple statement.

¹⁹ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. The Protocol was adopted without a vote by UN General Assembly Resolution 55/255 on 31 May 2001, and entered into force on 3 July 2005.

²⁰ Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, UN doc. A/CONF.192/15, available at: <http://cns.miiis.edu/inventory/pdfs/aptsarms.pdf>.

²¹ §8. The Guidelines were an outcome of the UN Disarmament Commission's 1996 substantive session on 22 April–7 May 1996. They were endorsed by the General Assembly in its Resolution 51/47B.

Box 1. The purposes and principles of the UN

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organisation and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organisation is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from 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.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

This paragraph refers to Article 26 of the UN Charter²² that calls for ‘the least diversion for armaments of the world’s human and economic resources’.²³ The principle of least diversion of resources has been reiterated in many guidelines and principles relating to arms export control at international or regional level.²⁴ As set out in Article 1(1) of the UN Charter (see Box 1), one of the purposes of the UN is to establish and maintain international peace and security. Practice within the UN has confirmed the connection between regulation of arms on one hand, and maintenance of international peace and security on the other.²⁵

Underlining the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts,

Although there was widespread support for greater efforts to prevent the illicit trade in conventional arms and their diversion from the licit to the illicit market, the term ‘illicit’ is not defined in the ATT. In ordinary parlance, illicit means ‘forbidden by law, rules, or custom’.²⁶ Under the 1996 UN Disarmament Commission Guidelines on International Arms Transfers, illicit arms trafficking ‘is understood to cover that international trade in conventional arms which is contrary to the laws of States and/ or international law’.²⁷ Under this broad definition, illicit transfers would include those outlawed by customary international law, treaty law, and relevant national laws.

The 2001 Firearms Protocol defines both illicit manufacturing and illicit trafficking.²⁸ The definition

of illicit manufacturing includes those firearms that are manufactured or assembled ‘[w]ithout a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place’ and requires licensing or authorization of the manufacture of parts and components to ‘be in accordance with domestic law’.²⁹ Illicit trafficking refers, inter alia, to the transfer of firearms from or across the territory of one state party to another state party ‘if any one of the States Parties concerned does not authorize it in accordance with the Protocol’.³⁰ The Protocol therefore distinguishes lawful or authorized (licit) transfers from ones that are unlawful or unauthorized (illicit).³¹

States disagreed as to whether the treaty should refer to unauthorized end ‘use’ or unauthorized end ‘user’. The former would seek to prevent unlawful use of arms by any recipient; the latter would cover, in particular, the provision of arms to (unauthorized) armed non-state actors.³² The transfer of conventional arms to armed groups continues to be controversial. The reference to ‘end users, including in the commission of terrorist acts’ was added during the March 2013 diplomatic conference. The treaty’s failure to prohibit all arms transfers to (unauthorized) armed non-state actors was one of the main reasons put forward by a number of states for abstaining or voting against the ATT in the UN General Assembly.

Recognizing the legitimate political, security, economic and commercial interests of States in the international trade in conventional arms,

Almost every State is engaged in the trade in conventional arms (whether as importer or exporter,

²² The provision reads as follows: ‘In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments’.

²³ In 2008, the President of Costa Rica stated that ‘the least diversion of resources’ meant finding alternatives to excessive military spending that do not damage security, one of these alternatives being the strengthening of multilateralism. Oscar Arias Sanchez, President of Costa Rica and President of the UN Security Council, 19 November 2008. See further, G. Giacca and T. Karimova, ‘The Implications of Economic and Social Rights for Arms Acquisitions’, in S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, Cambridge University Press, forthcoming, 2013.

²⁴ See, for example, the Wassenaar Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW); and the Organization for Security and Co-operation in Europe (OSCE) Principles Governing Conventional Arms Transfers.

²⁵ H. J. Schütz, ‘Article 26’ in B. Simma *et al.* (eds.), *The United Nations Charter – A Commentary*, Oxford University Press, Oxford, 2012, pp. 855–70.

²⁶ Oxford English Dictionary, ‘illicit’, accessed 1 May 2013.

²⁷ §7. The UN Disarmament Commission Guidelines were endorsed by the UN General Assembly in §3 of its Resolution 51/47B, adopted without a vote on 10 December 1996.

²⁸ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime.

²⁹ 2001 Firearms Protocol, Article 3(d).

³⁰ *Ibid.*, Article 3(e).

³¹ See, similarly, the 1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials.

³² At least one state was also believed to fear that the term ‘unauthorized end user’ might imply that a gun ‘user’ would require to be authorized.

or both). Its annual value is estimated to be in the tens of billions of US dollars, which explains the reference to 'economic and commercial interests'. The reference to 'legitimate' political and security 'interests of states' presumably recognises the interest of states in importing weapons for defence, law enforcement, and peacekeeping operations.

Reaffirming the sovereign right of any State to regulate and control conventional arms exclusively within its territory, pursuant to its own legal or constitutional system,

This preambular paragraph reiterates that regulation and control of conventional arms inside a territory fall outside the purview of the Treaty.³³ The ATT does not govern purely domestic trade in conventional arms, or their transfer, sale, movement, change of ownership, or control, within countries.

Acknowledging that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

This paragraph refers to three 'pillars' of the UN: peace and security, development, and human rights. In UN General Assembly Resolution 64/48, states acknowledged that 'peace and security, development and human rights are the foundations for collective security'.³⁴ The text of this preambular paragraph draws on Paragraph 9 of the 2005 World Summit Outcome document.

Recalling the United Nations Disarmament Commission Guidelines for international arms transfers in the context of General Assembly resolution 46/36H of 6 December 1991,

The UN Disarmament Commission's Guidelines on international arms transfers were an outcome of the Commission's substantive session on 22 April–7 May 1996 and were formally endorsed by the General Assembly in Resolution 51/47B.³⁵ According to the Guidelines:

11. Licit transfers of conventional arms can be addressed, inter alia, through national legislative and administrative actions and increased transparency. The objective in the case of illicit arms trafficking must be the eradication of this phenomenon.

The Guidelines indicate that, in their efforts 'to control their international arms transfers and to prevent, combat and eradicate illicit arms trafficking', states should 'bear in mind' the following principles:

15. States should recognize the need for transparency in arms transfers.

16. States should recognize the responsibility to prohibit and eradicate illicit arms trafficking and the need for measures to achieve this end, taking into account the inherently clandestine nature of this traffic.

17. States, whether producers or importers, have the responsibility to seek to ensure that their level of armaments is commensurate with their legitimate self-defence and security requirements, including their ability to participate in United Nations peacekeeping operations.

18. States have responsibilities in exercising restraint over the production and procurement of arms as well as transfers.

19. Economic or commercial considerations should not be the only factors in international arms transfers. Other factors include, inter alia, the maintenance of international peace and security and efforts aimed at easing international tensions, promoting social and economic development, peacefully resolving regional conflicts, preventing arms races and achieving disarmament under effective international control.

20. Arms producing or supplier States have a responsibility to seek to ensure that the quantity and level of sophistication of their arms exports do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.

21. States receiving arms have an equivalent responsibility to seek to ensure that the quantity and level of sophistication of their arms imports are commensurate with their legitimate self-defence and security requirements and that they do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.

³³ This paragraph reflects the language of the seventh preambular paragraph of UN General Assembly Resolution 64/48: 'Acknowledging also the right of States to regulate internal transfers of arms and national ownership, including through national constitutional protections on private ownership, exclusively within their territory'.

³⁴ Third preambular paragraph.

³⁵ UN General Assembly Resolution 51/47B, adopted on 10 December 1996 without a vote, §3.

22. International arms transfers should not be used as a means to interfere in the internal affairs of other States.

Noting the contribution made by the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, as well as the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons,

The 2001 UN Programme of Action (PoA)³⁶ was adopted in New York in July 2001 at the UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, in accordance with UN General Assembly Resolution 54/54V. A political instrument that addresses the problem of illicit transfer of small arms, it sets out a range of measures that states can take to manage all aspects of the problem, including control of small arms transfers, regulation of small arms brokering, management of stockpiles, and the marking and tracing of small arms.³⁷

The 2001 Firearms Protocol entered into force on 3 July 2005.³⁸ Article 2 states that: ‘The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition’. Its control measures and normative provisions cover numerous aspects of the small arms issue, but it does not apply to state-to-state transactions or to state transfers where the application of the Protocol would prejudice a state party’s right ‘to take action in the interest of national security consistent with the Charter of the United Nations’ (Article 4).

UN General Assembly Resolution 60/81 called on all states to implement the International Tracing Instrument (ITI).³⁹ A reference to the ITI was added to the preamble during the March 2013 negotiations at the suggestion of several states. This non-legally-

binding instrument defines small arms tracing as ‘the systematic tracking of illicit small arms and light weapons found or seized on the territory of a State from the point of manufacture or the point of importation through the lines of supply to the point at which they became illicit’ (§5).⁴⁰ The ITI does not apply to ammunition.

Recognizing the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms,

One of the main reasons why an ATT was considered necessary is that transferred conventional arms are often used to violate human rights, commit serious violations of international humanitarian law, or destabilize countries or regions. Conventional arms may be procured legally or illegally. In some instances, a transfer is not illegal under national law because a state has not established a national control mechanism to assess the legality (and legitimacy) of a proposed export. In such circumstances the trade can be said to be ‘unregulated’. Individuals and armed groups (and, on occasion, states) may seek to procure weapons from the illicit market if they do not believe they can buy them legally.

Bearing in mind that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict and armed violence,

This paragraph contains the only mention in the treaty of the term ‘armed violence’,⁴¹ which presumably covers situations outside of armed conflict. The impact of weapons on the lives and well-being of women is clear and significant. In a preambular paragraph to UN Security Council Resolution 1325 on women, peace, and security, the Council expressed its concern that:

civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements.

³⁶ Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

³⁷ Saferworld, ‘UN Programme of Action’, undated.

³⁸ As of 15 May 2013, 98 states were party to the Protocol. None of the five permanent members of the UN Security Council had ratified the Protocol and only China and the United Kingdom had signed it.

³⁹ UN General Assembly Resolution 60/81: ‘The illicit trade in small arms and light weapons in all its aspects’, adopted without a vote on 8 December 2005.

⁴⁰ With a view to identifying and tracing illicit small arms and light weapons, states have made commitments relating to weapons marking (§§7–10), record-keeping (§§11–13), and tracing cooperation (§§14–23).

⁴¹ See, e.g., <http://www.genevadeclaration.org>.

The Council recognized ‘the consequent impact this has on durable peace and reconciliation’.⁴² According to one commentator, ‘the ways in which conventional arms and ammunition facilitate violence against women is a cross-cutting issue’:

To put it simply, it would not be possible to rape women in front of their communities and families, on such a large scale in much of the world’s conflicts if there weren’t such a wide availability of small arms and light weapons. In non-conflict or post-conflict situations such as Haiti and the Balkans, small arms facilitate widespread sexual and domestic violence. To protect women’s rights, the relevant binding international instruments covering gender-based violence, including rape and sexual violence, must now be applied in arms transfer decisions.⁴³

The paragraph also highlights the plight of children. Children who are victims or perpetrators of armed violence have been the object of a number of UN Security Council resolutions, including Resolution 1612 (2005).⁴⁴ The lighter weight of modern small arms, particularly assault rifles, has meant that minors can be engaged as fighters by government armed forces and non-state armed groups. As a result, all children are put at risk in situations of armed conflict.⁴⁵

Recognizing also the challenges faced by victims of armed conflict and their need for adequate care, rehabilitation and social and economic inclusion,

Norway, supported by a number of other states, canvassed for a substantive provision that would encourage states parties to the ATT to support the care, rehabilitation, and reintegration of victims of armed conflict or armed violence. This preambular paragraph reflects Norway’s concern for victims, but ensuring their care, rehabilitation, and reintegration is not among the substantive obligations of states parties under the ATT, and the reference is limited to victims of armed conflict, even though the humanitarian goal of the treaty clearly encompasses all victims of armed violence. The previous preambular paragraph does include a reference to armed violence, which is not included in the UN Security Council Resolution 1325 on women, peace and security, which only refers to armed conflict.

Emphasizing that nothing in this Treaty prevents States from maintaining and adopting additional effective measures to further the object and purpose of this Treaty,

Since it was understood that some states would want to restrict arms transfers even in situations allowed by the eventual treaty, this paragraph recognizes that, via national policies or laws, states have the right to place additional restrictions on transfers of weapons. In this sense, the ATT creates a ‘floor not a ceiling’ with respect to national policies and laws.

Some importing states argued for the opposite approach. It was even suggested that an exporting state should be obliged to permit an arms export, provided the application satisfied the ATT’s export criteria and the export created no risks that the treaty was designed to prevent. This proposal did not find consensus.

Mindful of the legitimate trade and lawful ownership, and use of certain conventional arms for recreational, cultural, historical, and sporting activities, where such trade, ownership and use are permitted or protected by law,

Canada, the USA, and several other states were concerned that the ATT might impinge on the legitimate trade in conventional arms or the procurement of weapons for civilian ownership and use, including in hunting, shooting, or sports events.⁴⁶ This preambular paragraph recognizes that the treaty is not intended to interfere with such trade, ownership, or use.

Mindful also of the role regional organizations can play in assisting States Parties, upon request, in implementing this Treaty,

The question of whether entities other than states should be entitled to adhere to the Treaty was debated but no consensus was reached. The European Union (EU) and the Economic Community of West African States (ECOWAS), along with their respective member states, proposed that the Treaty should be open to regional integration organizations, as the UN Convention against Transnational Organized Crime and its Protocols are (for example, the 2001 Firearms Protocol).⁴⁷

⁴² UN Security Council Resolution 1325, adopted on 31 October 2000, Preambular Paragraph 4.

⁴³ Rebecca Gerome, ‘The Arms Trade Treaty: Why Women?’, IANSA Women’s Network, undated but 2011.

⁴⁴ The resolution established a UN-led monitoring and reporting mechanism (MRM). The MRM systematically documents and reports on six ‘grave violations’ against children in armed conflict.

⁴⁵ See, for example, ‘UN Study on the Impact of Armed Conflict on Children’, UN doc. A/51/306, 26 August 1996, §27.

⁴⁶ Concern was expressed that the treaty might impede individuals from crossing borders with sporting weapons to participate in competitions. Rifles are used in the Winter Olympics, for instance, as part of cross-country skiing events.

⁴⁷ See 2000 UN Convention against Transnational Organized Crime, Article 36(2).

However, the inclusion of a regional economic integration organisation (REIO) clause was strongly opposed by a number of UN member states, notably China, in part because the EU imposes an arms embargo on China.

Recognizing the voluntary and active role that civil society, including non-governmental organizations, and industry, can play in raising awareness of the object and purpose of this Treaty, and in supporting its implementation,

The idea of an ATT can be traced back to the work of Nobel Peace Laureates, supported by civil society organizations around the world.⁴⁸ Under preambular paragraph 9 to UN General Assembly Resolution 64/48, states took note of ‘the role played by non-governmental organizations and civil society to enhance cooperation, improve information exchange and transparency and assist States in implementing confidence-building measures in the field of responsible arms trade’. Given the generally poor record of state-based treaty monitoring and compliance mechanisms in ensuring effective disarmament, the role of civil society in monitoring and promoting the implementation of an ATT could be significant. The reference to industry was added in the final text of this preambular provision and reflects the important influence that industry, and corporate social responsibility standards, may have in this area.

Acknowledging that regulation of the international trade in conventional arms and preventing their diversion should not hamper international cooperation and legitimate trade in materiel, equipment and technology for peaceful purposes,

One of the fears of certain developing states was that Western exporting states would seek to use an ATT to maintain technological advantages in areas that go beyond conventional weapons themselves. This paragraph reflects that concern. Moreover, many items can have ‘dual use’, in other words may be used for military or peaceful purposes.

Emphasizing the desirability of achieving universal adherence to this Treaty,

Universal adherence to any multilateral treaty is an important goal. A state may adhere formally

(through signature and ratification or accession) or informally (by stating its intention to comply with some or all of a treaty’s provisions).

The principles of the ATT

The inclusion of principles in the preambular section to the treaty was quite contentious as a number of states argued for the principles to be included in an operative provision. International treaties are not required to elaborate such ‘principles’. There was no precedent to have principles in the preamble of a treaty, so this was a novel element. The inclusion of a reference to international human rights law (in the fifth paragraph of the principles section) is also significant.

Determined to act in accordance with the following principles;

Under Article 5(1) of the ATT, states parties are required to implement the treaty ‘in a consistent, objective and non-discriminatory manner’ while ‘bearing in mind’ the principles set out in what is still effectively a preamble. Some of the enunciated principles go far beyond the scope of the ATT. While not binding in themselves, elements of these principles are derived from treaty law or customary law that impose binding obligations on states (for example, the general prohibition on the inter-state use of force and on intervention, the obligation to settle disputes by peaceful means, and the duty to respect human rights and humanitarian law).

Principles

– *The inherent right of all States to individual or collective self-defence as recognized in Article 51 of the Charter of the United Nations;*

In international law, the ‘inherent’ right⁴⁹ of all states to individual or collective self-defence is one of two cornerstone exceptions to the general prohibition on the inter-state use of force under international law.⁵⁰ According to Article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has

⁴⁸ See, for example, Sarah Masters, ‘The Arms Trade Treaty: why women?’, *openDemocracy*, 19 May 2011.

⁴⁹ The word ‘inherent’ implies a pre-existing right that is customary in nature. See, for example, International Court of Justice, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)*, Judgment (Merits), 27 June 1986, §176 (hereafter, *Nicaragua case*).

⁵⁰ The UN Charter contains only two exceptions to the prohibition of force, namely Security Council enforcement action pursuant to Chapter VII of the UN Charter, and the right to individual and collective self-defence. For the lawful exercise of self-defence under international law, see, for example, Andrew Clapham, *Brierly’s Law of Nations*, Seventh Edn, Oxford University Press, Oxford, 2012 (hereafter, *Brierly’s Law of Nations*), pp. 472–84; and A. Cassese, *International Law*, Second Edn, Oxford University Press, Oxford, 2005, pp. 354–66.

taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

- The settlement of international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered in accordance with Article 2 (3) of the Charter of the United Nations;

The peaceful settlement of disputes is a customary rule and arguably a general principle of international law. Peaceful means include arbitration and judicial settlement, for example by recourse to the International Court of Justice (ICJ).⁵¹

- Refraining in their international relations from 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 in accordance with Article 2 (4) of the Charter of the United Nations;

The prohibition on the threat or use of force against the territorial integrity or political independence of any state, as set out in Article 2(4) of the UN Charter, is a norm of customary international law and therefore binding on all states.⁵²

- Non-intervention in matters which are essentially within the domestic jurisdiction of any State in accordance with Article 2 (7) of the Charter of the United Nations;

This principle, set out in Article 2(7) of the UN Charter, was reaffirmed in the UN General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. This considered that:

the progressive development and codification of the following principles: ... (c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter, so as to secure their more effective application within the international community, would promote the realization of the purposes of the United Nations.

Under the principle of non-intervention, the Declaration included the following paragraph:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.⁵³

In light of this, the transfer of arms to a non-state armed group in another state could amount to a violation of the non-intervention rule. This issue was addressed by the ICJ in the 1986 *Nicaragua* case.⁵⁴ The Court concluded that the USA had violated the customary international law rule on non-intervention by 'training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua'.⁵⁵

- Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights;

Common Article 1 of the 1949 Geneva Conventions makes it a duty of all states parties to respect and ensure respect for each of the four Geneva Conventions 'in all circumstances', an obligation that extends to all those over whom they have authority. Every UN member state is party to the Geneva Conventions, which are generally agreed

⁵¹ Brierly's *Law of Nations*, pp. 408–49.

⁵² See *ibid.*, p. 451.

⁵³ See Chatham House, 'The Principle of Non-Intervention in Contemporary International Law: Non-Interference In a State's Internal Affairs Used to be a Rule of International Law: Is It Still?', A summary of the Chatham House International Law discussion group meeting held on 28 February 2007', undated but 2007. At: <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il280207.pdf>.

⁵⁴ ICJ, *Nicaragua* case.

⁵⁵ *Ibid.*, §292, *dispositif* 3.

to represent customary international law. The same language is included in 1977 Additional Protocol I (governing international armed conflict), to which 173 states had adhered as of 15 May 2013, though not 1977 Additional Protocol II (governing certain non-international armed conflicts meeting specific criteria).⁵⁶ The ICRC has argued that:

To ensure that violations of humanitarian law are not facilitated by unregulated access to arms and ammunition, arms transfer decisions should include a consideration of whether the recipient is likely to respect this law.⁵⁷

States have supported similar positions at the three International Conferences of the Red Cross and Red Crescent between 2003 and 2011.

The obligations to respect human rights are formulated variously in the relevant treaties. Human rights obligations apply not only domestically (within national territory), but also, in certain circumstances, extraterritorially.

It is common to analyse human rights obligations in terms of three forms of duty: the duty to respect rights (that is, not to interfere with their enjoyment), the duty to protect (especially from interference by third parties), and the duty to fulfil (which requires taking positive measures to ensure their enjoyment). It has been argued that the obligation not to transfer arms when a substantial risk exists that their use will cause violations of human rights is akin to the principle of *non-refoulement*, which prohibits states from returning individuals to a country where they face a significant risk of torture.⁵⁸ In any event, as the explanation of the next principle makes clear, states are prohibited under international law from assisting other states to violate international human rights law.

- The responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems;

This principle asserts that each state has a responsibility to ‘effectively regulate and control international transfers of conventional arms’, as well as a ‘primary responsibility’ to establish and

implement a national export control system. The source of these obligations is uncertain. Of course, states need to regulate arms transfers if they are to honour customary or treaty prohibitions on the transfer of specific weapons.

The notion of state responsibility under international law is set out by the International Law Commission (ILC) in its 2001 Articles on State Responsibility for Internationally Wrongful Acts.

- The respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms;

This principle refers to the ‘legitimate interests’ of states to acquire conventional weapons ‘for self-defence and for peacekeeping operations’ and to ‘produce, export, import and transfer conventional arms’. It is notable that the term ‘interest’, rather than ‘right’, is used. A preambular paragraph in General Assembly Resolution 64/48 acknowledged the ‘right of all States to manufacture, import, export, transfer and retain conventional arms for self-defence and security needs and in order to participate in peace support operations’.⁵⁹ The inclusion of the words ‘export’ and ‘import’ would seem superfluous given the reference to ‘transfer’.

- Implementing this Treaty in a consistent, objective and non-discriminatory manner,

The obligation to implement the treaty in a ‘consistent’ as well as in an ‘objective and non-discriminatory’ manner is further reiterated in core provisions of the text that relate to general implementation of the treaty and export assessment.⁶⁰ This principle can be seen as an ambitious attempt to make the arms trade an apolitical issue. It is nevertheless unrealistic to expect that states will not consider political factors when they take decisions on arms transfers. Indeed, states remain generally free to choose to whom they sell or transfer arms, and political allegiances may be expected to influence their decision-making. Nonetheless, the need for objectivity or consistency of conduct is a reasonable aim. It would require, for instance, that each state should establish, and consistently apply, detailed guidelines for determining whether proposed arms transfers are lawful or unlawful under an ATT.

⁵⁶ See International Committee of the Red Cross (ICRC), List of treaty adherence, available at: <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

⁵⁷ ICRC, *Arms Transfer Decisions, Applying international humanitarian law criteria*, Geneva, May 2007, p. 3.

⁵⁸ See ‘Arms’, in Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, Oxford University Press, Oxford, 2005, p. 13.

⁵⁹ Fourth Preambular Paragraph.

⁶⁰ See Article 5(1) on implementation and Article 7 on export and export assessment.

The Core Provisions

Article 1. Object and Purpose

The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

Overall, the normative effect of Article 1 is unclear, except insofar as it might assist in the interpretation of other provisions in the treaty.

The concept ‘object and purpose’ is a term of art in the law of treaties, and the notion has significant implications for signatory states or states parties to any given treaty.⁶¹ Under Article 18 of the 1969 Vienna Convention on the Law of Treaties, a state is obliged to refrain from acts that would defeat the object and purpose of a treaty when it has signed the treaty or has expressed its consent to be bound by the treaty (pending the treaty’s entry into force). Reservations that are incompatible with a treaty’s object and purpose are prohibited (Article 19(c)). According to Article 31(1), a treaty must be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. These obligations and prohibitions reflect customary law. A treaty’s object and purpose are typically discerned from its title and preamble as well as the context of the negotiations.

Article 1 sets out in more general terms the goals and objectives of the treaty. It would also, however, provide guidance as to the interpretation of the object and purpose under the Vienna Convention with respect to this treaty. Some wanted an ATT to cover ‘illicit’ transfers only, whereas the majority sought to regulate all transfers, aiming to restrict transfers to states that would use the arms transferred in a lawful manner.

Article 1 is divided into two parts. The first part describes the ‘object’⁶² of the treaty (sub-paragraphs (a) and (b)), while the second sets out its ‘purpose’⁶³ (sub-paragraphs (c), (d), and (e)). Thus, development of the highest possible common international standards for regulating the conventional arms trade and preventing illicit trade is a goal of the treaty; and its purpose is to: contribute to international and regional peace, security, and stability; reduce human suffering; and promote cooperation, transparency, and responsible action by states parties, thereby building confidence between them. Only one of the three pillars of the UN previously cited — peace and security — is explicitly mentioned in Article 1, although the two others (human rights and development) might be implicit in the notion of ‘reducing human suffering’ in sub-paragraph (d), which otherwise remains rather general.

Much of the text of Article 1 reflects one of the preambular paragraphs in the General Assembly Resolution that called for the elaboration of an ATT. Under Resolution 64/48, states had recognized:

that the absence of commonly agreed international standards for the transfer of conventional arms that address, inter alia, the problems relating to the unregulated trade of conventional arms and their diversion to the illicit market is a contributory factor to armed conflict, the displacement of people, organized crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable social and economic development.⁶⁴

⁶¹ The precise nature, role, and application of the notion can generate uncertainty. See, for example, R. Gardiner, *Treaty Interpretation*, Oxford University Press, Oxford, 2008, p. 190; and I. Buffard and K. Zemanek, ‘The Object and Purpose of a Treaty: An Enigma?’, *Austrian Review of International & European Law*, Vol. 3 (1998), p. 311.

⁶² The word ‘object’ is generally defined as ‘goal, purpose or aim’. <http://oxforddictionaries.com/>.

⁶³ The word ‘purpose’ is generally defined as ‘the reason for which something is done or created or for which something exists’. <http://oxforddictionaries.com/>.

⁶⁴ Twelfth Preambular Paragraph.

Article 2. Scope

The scope of the treaty was a central focus of the negotiations, along with prohibitions and criteria for denying authorisation to transfer. The General Assembly Resolution establishing the negotiations had called for the treaty simply to cover ‘the transfer of conventional arms’.⁶⁵

1. This Treaty shall apply to all conventional arms within the following categories:

- (a) Battle tanks;
- (b) Armoured combat vehicles;
- (c) Large-calibre artillery systems;
- (d) Combat aircraft;
- (e) Attack helicopters;
- (f) Warships;
- (g) Missiles and missile launchers; and
- (h) Small arms and light weapons.

However, though the ATT does not apply to all conventional weapons, its scope is nonetheless extremely broad.⁶⁶ It covers ‘all conventional arms’ within eight categories of weapons listed in paragraph 1: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; and small arms and light weapons. As noted above, conventional arms, which are not defined in the treaty itself (or elsewhere in international law), can best be defined as ‘all arms other than weapons of mass destruction’.⁶⁷ Weapons of mass destruction are usefully defined by the United States Department of Defense (DoD) as ‘chemical, biological, radiological, or nuclear weapons capable of a high order of destruction or causing mass casualties’.⁶⁸

The eight categories listed reflect the seven categories covered by the UN Register of Conventional Arms (UNROCA) plus small arms and light weapons — an optional eighth category under the Register. In accordance with Article 5(3) of the ATT, national definitions of any of the seven categories ‘shall not cover less than the descriptions used in the United Nations Register of

Conventional Arms at the time of entry into force of this Treaty’. For the category of small arms and light weapons, national definitions ‘shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty’.⁶⁹

Battle tanks

Currently, the UNROCA describes ‘battle tanks’ as tracked or wheeled self-propelled armoured fighting vehicles with high cross-country mobility and a high level of self-protection, weighing at least 16.5 metric tons (unladen), with a high-muzzle-velocity direct fire main gun of at least 75 millimetres calibre.

Armoured combat vehicles

Armoured combat vehicles are ‘tracked, semi-tracked or wheeled self-propelled vehicles, with armoured 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 millimetres calibre or a missile launcher’.

Large-calibre artillery systems

Large-calibre artillery systems are described under the UNROCA as ‘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 calibre of 75 millimetres and above’.

Combat aircraft

Combat aircraft are ‘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 defence or reconnaissance missions’. According to the UNROCA, ‘[t]he term “combat aircraft” does not include primary trainer aircraft, unless designed, equipped or modified as described above’. As

⁶⁵ UN General Assembly Resolution 64/48, §4.

⁶⁶ Moreover, Article 5(3) of the treaty, discussed further below, specifically ‘encourages’ states parties to apply the treaty provisions to the ‘broadest range of conventional arms’.

⁶⁷ See, for example, US Department of Defense (DoD), *DOD Dictionary of Military Terms*, as amended through 31 October 2009, p. 122.

⁶⁸ *DOD Dictionary of Military Terms*, as amended through 15 April 2013, accessed at: http://www.dtic.mil/doctrine/dod_dictionary/. This latest edition of the DoD Dictionary no longer includes a definition of the term ‘conventional arms’.

⁶⁹ These would include the 2001 Firearms Protocol and the 2005 International Tracing Instrument.

discussed in the Group of Governmental Experts on the UNROCA, the category of combat aircraft covers unmanned aerial vehicles (more commonly known as drones) as well as piloted aircraft.

Attack helicopters

Attack helicopters are described as ‘rotary-wing aircraft designed, equipped or modified to engage targets by employing guided or unguided anti-armour, 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’. Although it is not explicit, it is assumed that this category would similarly cover unmanned aerial vehicles as well as piloted helicopters that otherwise fit the description.

Warships

Warships are described as ‘vessels or submarines armed and equipped for military use with a standard displacement of 750 metric tonnes or above, and those with a standard displacement of less than 750 metric tonnes, equipped for launching missiles with a range of at least 25 kilometres or torpedoes with similar range’.

Missiles and missile launchers

According to the UNROCA, missiles and missile launchers are guided or unguided rockets, ballistic or cruise missiles capable of delivering a warhead or weapon of destruction to a range of at least 25 kilometres, and means designed or modified specifically for launching such missiles or rockets, if not covered by the above six categories. The category of missile and missile launchers includes remotely piloted vehicles with the characteristics of missiles as defined above, but does not include ground-to-air missiles. The category also includes Man-Portable Air-Defence Systems (better known as MANPADS).

Small arms and light weapons

In accordance with Article 5(3) of the ATT, national definitions of small arms and light weapons ‘shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty’. The two most relevant instruments would be the 2001 Firearms Protocol and the ITI. According to Article 3(a) of the 2001 Firearms Protocol:

‘Firearm’ shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas.

This definition is broad, covering any standard handgun, rifle, or machine gun (other than antique firearms or their replicas), including firearms that are automatic or semi-automatic.⁷⁰ In addition to firearms as traditionally understood, this definition focuses on the *process* of firing — the method used to propel the projectile — rather than the (likely) *outcome*. As a result, some ‘less-lethal’ weapons would be covered by the ATT, but not others.⁷¹

A more all-encompassing definition of small arms and light weapons is set out in Article 4 of the 2005 International Tracing Instrument:

For the purposes of this instrument, ‘small arms and light weapons’ will mean any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas. Antique small arms and light weapons and their replicas will be defined in accordance with domestic law. In no case will antique small arms and light weapons include those manufactured after 1899:

(a) ‘Small arms’ are, broadly speaking, weapons designed for individual use. They include, *inter alia*, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns;

⁷⁰ An automatic weapon is one that continues firing as long as the trigger is depressed, while a semi-automatic weapon discharges each time the trigger is pulled.

⁷¹ For example, the Attenuating Energy Projectile L60A1 (a less-lethal round currently used by the United Kingdom) would be covered, because it is fired by means of an explosive charge; but weapons that use alternative methods to expel projectiles, such as compressed gas, would not. Weapons that are potentially excluded include: high-powered air rifles; Taser projectile electric-shock devices (which are nonetheless classified as firearms under domestic law in England and Wales); millimetre-wave weapons; dazzling lasers; and FN Herstal’s FN 303 multi-shot kinetic impact launcher.

(b) ‘Light weapons’ are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres.

The reference in the ITI to a ‘lethal’ weapon is intended to exclude ‘less-lethal’ weapons that, as noted above, fall within the definition of firearm set out in the 2001 Firearms Protocol.

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

According to paragraph 2, the terms ‘trade’ and ‘transfer’ are deemed to be synonyms for the purpose of the ATT. Both terms explicitly include export, import, transit, trans-shipment, and brokering.

‘Export’ covers the sending of weapons abroad. ‘Import’ covers reception of weapons from abroad. It is not settled whether the application of ‘import’ and ‘export’ is restricted to sales or leases (exchange of arms in return for money) or also covers gifts and (free) loans. If possible, this issue should be clarified by a decision at the first Conference of States Parties.

‘Transit’ covers the temporary passage of arms across the territory of a state en route to another destination. ‘Trans-shipment’ is the transfer of a shipment from one carrier (or more commonly one vessel) to another during transit.⁷²

‘Brokering’ is not defined under international law but is generally understood to be the negotiation of an arms deal by an agent or intermediary, an activity that would typically involve remuneration. Both ‘broker’ and ‘brokering’ are found in the 2001 Firearms Protocol, but neither term is defined. In paragraphs 8 and 9 of their report, the UN Group of Governmental Experts on illicit brokering in small arms and light weapons stated in 2007 that:

8. A broker in small arms and light weapons can be described as a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of small arms and light weapons in return for some form of benefit, whether financial or otherwise.

9. Within the context of these intermediary activities involving small arms and light weapons, a broker might: (a) Serve as a finder of business opportunities to one or more parties; (b) Put relevant parties in contact; (c) Assist parties in proposing, arranging or facilitating agreements or possible contracts between them; (d) Assist parties in obtaining the necessary documentation; (e) Assist parties in arranging the necessary payments.⁷³

Arms brokers may be natural persons (one or more individuals) or legal persons (one or more companies).⁷⁴ A state must interpret and apply the treaty in good faith and therefore shall not use this provision to circumvent prohibitions on transfer. The provision will also allow for cross border movement of arms for the purpose of repairs

3. This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party’s ownership.

Paragraph 3 specifies that the ATT does not apply to the international movement of conventional arms by a state party or on its behalf (by a company, for example), where the movement of arms is for that state party’s own use, and while the arms concerned remain under that state party’s ownership. Therefore, if a state sends arms abroad to its own forces, no transfer occurs; but if ownership of the arms is then passed on to another state, this act would constitute a transfer.

Article 3. Ammunition/ Munitions

Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2

⁷² See, for example: <http://www.businessdictionary.com/definition/transshipment.html#ixzz24eUgyCAc>.

⁷³ ‘Report of the Group of Governmental Experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons’, UN doc. A/62/163, 30 August 2007.

⁷⁴ See, for example, B. Wood, ‘The Prevention of Illicit Brokering of Small Arms and Light Weapons: Framing the Issue’, Chapter 1 in *Developing a Mechanism to Prevent Illicit Brokering in Small Arms and Light Weapons — Scope and Implications*, UN Institute for Disarmament Research (UNIDIR), 2007, p. 1.

(1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions.

The issue of whether the ATT would cover ammunition was highly contentious. The USA in particular, but also a number of other states, including Russia, was strongly opposed to their inclusion, whereas many states considered it was essential if the purpose of reducing human suffering were to be achieved. Article 3 contains a number of obligations in this regard. First, each state party must establish and maintain a national control system to regulate the export of ammunition and munitions that fall within the purview of the provision. It must then apply the provisions relating to prohibited transfers (Article 6) and denial of authorization of proposed exports (Article 7) in the same way that it would with respect to other conventional arms within the scope of the ATT. The words ‘prior to authorizing’ must therefore be read to mean ‘in any decision whether or not to authorize a proposed transfer’.

One state would not accept the formulation ‘Ammunition and munitions’. No definition of ammunition or munition exists in international law and different states (and their armed forces) understand the terms differently.⁷⁵ The inclusion of both terms was intended to ensure that the terms have broad reference. The only restriction is that the devices must be fired, launched, or delivered by any of the conventional arms covered under Article 2(1) of the treaty. This covers, for example, bombs, shells, missiles, or bullets, but would not necessarily include manually positioned landmines or grenades thrown by a person. (It would cover mines that are delivered remotely or grenades fired from a grenade launcher.) The provision in Article 3 would also appear to cover tear gas canisters or shells fired from a gun or launcher.⁷⁶

Article 4. Parts and Components

Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and

shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.

A similar provision to Article 3, this provision requires each state party to establish and maintain a national control system to regulate, in this case, the export of parts and components. It must then apply the provisions relating to prohibited transfers (Article 6) and denial of authorization of proposed exports (Article 7) in the same way that it would with respect to other conventional arms within the scope of the ATT.

Article 4 applies to any export of parts and components ‘where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2(1)’. The general obligation of states parties to any international treaty to implement that treaty in good faith⁷⁷ prevents a state party to the ATT from circumventing its international legal obligations by sending a number of separate shipments of parts and components for a conventional weapon falling under Article 2. Parts and components should not be confused with munitions or ammunition, covered in Article 3, and it seems clear that Article 4 does not extend to parts and components of a munition or item of ammunition.

Article 5. General Implementation

1. Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, bearing in mind the principles referred to in this Treaty.

This provision, requiring state parties to implement the ATT in a ‘consistent, objective and non-discriminatory manner’, reiterates the injunction to avoid politics in arms transfer decisions. It remains unclear, however, to what extent this provision could be practically actionable were a state party to treat two similar states or situations in a different manner.

2. Each State Party shall establish and maintain a national control system, including a national control list, in order to implement the provisions of this Treaty.

⁷⁵ Some consider that ammunition includes munitions, while others hold that ammunition refers primarily to bullets, and that shells, bombs, mines, and similar weapons are munitions. The DOD appears to prefer the former interpretation since it defines field artillery to include ‘ammunition ... involved in the use of cannon, rocket, or surface-to-surface missile launchers’. At: http://www.dtic.mil/doctrine/dod_dictionary/data/f/4147.html.

⁷⁶ Tear gas is not a ‘weapon of mass destruction’ so can be considered a conventional weapon.

⁷⁷ This obligation, known as *pacta sunt servanda*, is codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties, and is customary law binding on all states.

Paragraph 2 is a core provision of the ATT. It requires each state party to 'establish and maintain a national control system' to give effect to the treaty's obligations. Such a control system is essential if a state party is to apply effectively the prohibitions and authorization denials specified under Articles 6 and 7.⁷⁸ The ATT does not specify a 'one-size-fits-all' system for the national control regime; each state party has considerable latitude regarding its form, structure, and legislative underpinning, although paragraph 5 below requires states to designate 'competent national authorities in order to have an effective and transparent national control system regulating the transfer' of all conventional arms covered under Article 2(1) and items covered under Articles 3 and 4.

Paragraph 2 also states that national control lists are to be an important element of the national control system. The lists will define which conventional arms are covered by the national control system in accordance with Article 2 and paragraph 3 of Article 5.

3. Each State Party is encouraged to apply the provisions of this Treaty to the broadest range of conventional arms. National definitions of any of the categories covered under Article 2 (1) (a)-(g) shall not cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of this Treaty. For the category covered under Article 2 (1) (h), national definitions shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty.

As discussed above with respect to Article 2(1), this paragraph stipulates the minimum content of every national control list. These should, at minimum, adopt the 'descriptions' used by UNROCA of the seven existing categories 'at the time of entry into force' of the ATT. With respect to small arms and light weapons, control lists should adopt the descriptions used in relevant UN instruments (also as they may exist 'at the time of entry into force' of the ATT).

4. Each State Party, pursuant to its national laws, shall provide its national control list to the Secretariat, which shall make it available to other States Parties. States Parties are encouraged to make their control lists publicly available.

Each State Party is obliged to provide its national control list to the treaty secretariat (see Article 18), which will make it available to other states parties.

States parties are encouraged, but are not required, to make their control lists publicly available. The words 'pursuant to its national laws' are presumably intended to allow a state to keep confidential certain technical military information on individual weapons or weapons systems. Consonant with Article 27 of the 1969 Vienna Convention on the Law of Treaties, however, national laws cannot be cited as a justification for simply refusing to provide a national control list.⁷⁹

5. Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2 (1) and of items covered under Article 3 and Article 4.

This provision is more clearly drafted than its counterpart in the July 2012 draft ATT. The final text nevertheless deleted 'all' before 'measures', which potentially weakens the provision's scope and impact. There could be some overlap between this paragraph and Article 14 (Enforcement) as it is unclear what the difference between the two provisions will be in practice.

The term 'necessary' reflects the different situation of states parties. Landlocked states and island states may need to take different measures with regard to transits, for instance. Measures that states need to take to implement the ATT include the adoption of legislation, creation of administrative structures, and provision of appropriate resources, enabling them to ensure control over international arms transfers, exchange relevant information with partner states, and address measures to prevent diversion.

The second part of the provision obliges each state party to designate competent national authorities with respect to the national control system. The term 'competent' may be understood to cover the notions of capability or mandate (or both). The reference to an 'effective' national control system presumably implies possession of relevant capacities and authority to function. The application of 'transparent' is harder to discern, because it is not clear who should benefit from it: citizens, industry, or other states.

The control authority of a national control system is usually a governmental agency under the political supervision of a ministry, an inter-ministerial agency,

⁷⁸ As described above, the fifth principle set out in ATT's section on principles referred to the 'responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems'.

⁷⁹ Article 27 stipulates that a state party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

or an agency independent of the government but under the state's jurisdiction. Its main tasks are to collect, verify and analyse information, assess and decide on transfer requests, overview compliance with its decisions, and assure coordination with other state organs. Other competent national authorities often include border control and police forces, while judicial bodies may play a major role in enforcing national legislation and regulating or enforcing the actions of state agencies.

6. Each State Party shall designate one or more national points of contact to exchange information on matters related to the implementation of this Treaty. Each State Party shall notify the Secretariat, established under Article 18, of its national point(s) of contact and keep the information updated.

To facilitate exchange of information on treaty implementation, each state party is required to designate a national point (or points) of contact and to notify the treaty secretariat of its decisions. Until the secretariat is established (by a decision of the first Conference of States Parties), information should presumably be sent to the provisional secretariat.

National control authorities are likely to be the best points of contact because they are at the centre of national control systems. The UNROCA, the 2001 UN Programme of Action on Small Arms (Article II, paragraph 6), the 2001 Firearms Protocol (Article 13, paragraph 2), and the 2005 International Tracing Instrument (Paragraph 25), already foresee the establishment of national contact points.

Article 6. Prohibitions

A number of states have called this article the 'heart' of the treaty. It prohibits any transfer of conventional arms — or their ammunition/munitions, parts or components — if the transfer would violate a state party's obligations with regard to Security Council arms embargoes, or obligations under treaties to which it is a party, or if the state party 'has knowledge at the time of authorization' that the arms or items would be used to commit genocide, crimes against humanity, or certain war crimes.

1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if

the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.

Under Article 25 of the UN Charter, and 'in accordance with' the UN Charter, each UN member state is required to 'accept and carry out the decisions of the Security Council'. Under Article 41 (contained in Chapter VII of the Charter), the Council 'may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations...' An arms embargo is therefore a complete or partial interruption of economic relations with respect to the transfer of weapons. Since each UN member state is already required to respect a Security Council embargo, this provision reiterates an existing obligation. The language also implies that measures other than arms embargoes adopted by the Security Council under Chapter VII can be relevant here.

As of May 2013, the following Chapter VII arms embargoes were in force: Cote d'Ivoire (since November 2004: Resolution 1572); DPR Korea (since October 2006: Resolution 1718); DR Congo (non-state armed groups only) (since July 2003: Resolution 1493); Eritrea (since December 2009: Resolution 1907); Iran (since December 2006: Resolution 1737); Iraq (non-state armed groups since 2004) (since August 1990: Resolution 661); Lebanon (non-state armed groups) (since August 2006: Resolution 1701); Liberia (non-state armed groups since 2009) (since November 1992: Resolution 788); Libya (since February 2011: Resolution 1970); Somalia (since January 1992: Resolution 733); Sudan (Darfur region) (since July 2004: Resolution 1556); *al-Qaeda* and associated individuals and entities (since January 2002: see UN Security Council Resolution 1390); and the Taliban (since January 2002: Resolution 1390).⁸⁰

2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

⁸⁰ Stockholm International Peace Research Institute, 'Arms Embargoes Database', undated but accessed 18 May 2013. At: <http://www.sipri.org/databases/embargoes>.

Certain transfers are prohibited under the ATT if they violate a state party's existing international obligations. This prohibition covers an ATT state party's obligations under other relevant treaties to which it is a party, but does not take account of prohibitions under customary international law, which continue to apply independently of the ATT. International humanitarian law and disarmament treaties have been adopted that prohibit the transfer of anti-personnel mines,⁸¹ cluster munitions,⁸² anti-vehicle mines (insofar as they are 'designed or of a nature to cause superfluous injury or unnecessary suffering'),⁸³ and blinding laser weapons.⁸⁴ However, landmines and blinding laser weapons do not fall within the scope of the ATT. The 2001 Firearms Protocol does not clearly prohibit trafficking, but requires states parties to criminalize illicit trafficking in firearms, their parts and components, and ammunition.

The scope of 'relevant international obligations under international agreements to which it is a Party' is potentially very broad. The term 'in particular' signals that the provision covers more general international and regional instruments in addition to those that directly address the transfer of, or illicit trafficking in, conventional arms. Arguably, therefore, Article 6(2) could incorporate human rights treaties to which a state party to the ATT is a party; such a reading would appear to be consistent with principles 5 and 6 of the preambular section of the ATT. This possibility was specifically mentioned in a joint declaration delivered by Mexico on behalf of 98 States after the ATT's adoption at the UN General Assembly. Norway noted that the provisions on transfers were designed to address serious violations of all obligations under international instruments, which clearly included human rights obligations, and prohibited transfers

that would be used to commit genocide, crimes against humanity, or war crimes.⁸⁵

3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Article 6(3) is potentially one of the most important provisions in the ATT and the success of its implementation will be one of the main yardsticks by which the treaty as a whole will be judged. It requires an ATT state party to refuse to authorise a proposed transfer of conventional arms covered by Article 2(1), or items covered by Articles 3 or 4, where it has knowledge,⁸⁶ at the time an authorization to transfer is sought, that these would be used to commit genocide, crimes against humanity, or certain war crimes.

Genocide

Genocide was proclaimed a crime under international law by UN General Assembly Resolution 96 (I) in 1946 and formally prohibited in the 1948 Genocide Convention.⁸⁷ Its prohibition was recognised as a general principle of law in 1951⁸⁸ and has attained the status of a norm of *jus cogens* ('assuredly the case with regard to the prohibition of genocide', in the words of the ICJ).⁸⁹ Acts of genocide may be committed in time of 'peace' as well as in situations of armed conflict.⁹⁰

⁸¹ See 1997 Anti-Personnel Mine Ban Convention, Article 1. Under Article 3 of this treaty, transfer of anti-personnel mines is permitted only for the purpose of destruction or for training in mine clearance. See also Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (1996 Amended Protocol II) to the Convention on Certain Conventional Weapons (CCW), Article 8(1).

⁸² 2008 Convention on Cluster Munitions, Article 1. Under Article 3 of this treaty, transfer of cluster munitions for the purpose of destruction is permitted.

⁸³ 1996 CCW Amended Protocol II, Article 8(1)(a). Article 8(1)(b) prohibits the transfer of any mines to unauthorized non-state entities.

⁸⁴ CCW Protocol on Blinding Laser Weapons (Protocol IV), adopted on 13 October 1995, Article 1.

⁸⁵ Statement of Norway to the UN General Assembly, 2 April 2013.

⁸⁶ 'Has knowledge' is not defined in the ATT. However, the 1998 Rome Statute of the International Criminal Court (ICC Statute), defines knowledge (for the purpose of determining *mens rea* with regard to individual criminal responsibility for an international crime) as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. ICC Statute, Article 30(3). With respect to the notion of knowledge, see also the general comments included in the Elements of Crimes adopted by the States Parties to the ICC Statute.

⁸⁷ 1948 Convention on the Prevention and Punishment of the Crime of Genocide. See, for example, Paola Gaeta (ed.), *The UN Genocide Convention, A Commentary*, Oxford University Press, Oxford, 2009.

⁸⁸ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, p. 12.

⁸⁹ *Case Concerning Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, §64; see R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Second Edn, Cambridge, 2010, p. 204.

⁹⁰ *Ibid.*, p. 206.

In its *Nuclear Weapons Advisory Opinion*, the ICJ cited the definition of the crime of genocide that is set out in Article 2 of the 1948 Convention, which is considered to have attained customary law status:⁹¹

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Crimes against humanity

Crimes against humanity are crimes that ‘shock the conscience of humanity’. They are committed knowingly by the perpetrator as part of a widespread or systematic attack against a civilian population. Acts constituting crimes against humanity include: murder, extermination, enslavement, forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts.⁹² As with genocide, crimes against humanity can be committed in or outside a situation of armed conflict.

War crimes

War crimes are serious violations of international humanitarian law that occur during international armed conflicts or armed conflicts of a non-international character. Not all war crimes are specifically covered by Article 6(3), which makes

reference to three types of war crime: those constituting grave breaches of the 1949 Geneva Conventions; ‘attacks directed against civilian objects or civilians protected as such’; and other war crimes that are defined by international agreements to which a state is party.

Grave breaches of the 1949 Geneva Conventions include certain violations⁹³ against protected persons, for example, civilians in the power of the enemy, wounded or shipwrecked combatants, or prisoners of war. They apply only to situations of international armed conflict.

The phrase attacks against civilian objects or civilians ‘protected as such’ is not found elsewhere in international humanitarian law. Article 51(2) of 1977 Additional Protocol I provides that: ‘The civilian population as such, as well as individual civilians, shall not be the object of attack’.⁹⁴ The words ‘protected as such’ signal that civilians who participate directly in hostilities are excluded from protection under this provision. The qualifier ‘protected as such’ applies only to civilians and not to civilian objects.

The reference to war crimes ‘defined by international agreements’ covers, for states that are parties to the relevant treaties, inter alia, grave breaches under 1977 Additional Protocol I, and all war crimes included in the Statute of the International Criminal Court (ICC). For states that are not party to the ICC, war crimes are also identified in other treaties such as the 1907 Hague Regulations or 1977 Additional Protocol II. In its statement after the ATT’s adoption, for example, Switzerland declared that war crimes ‘encompass, among others, serious violations of Common Article 3 to the 1949 Geneva Conventions — instruments that enjoy universality’. Serious violations of Common Article 3, which applies in non-international armed conflicts, include violations against ‘persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds, detention, or any other cause’.⁹⁵

⁹¹ See, for example, Antonio Cassese, *International Criminal Law*, Second Edn, Oxford University Press, Oxford, 2008, p. 57.

⁹² ICC Statute, Article 7(1)(a)–(k).

⁹³ Under 1949 Geneva Convention IV, for example, such acts are ‘wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’. 1949 Geneva Convention IV, Article 147.

⁹⁴ See further A. Clapham, ‘The Arms Trade Treaty: A Call for an Awakening’, *European Society of International Law*, Vol. 2, Issue 5. At: <http://www.esil-sedi.eu/node/329>.

⁹⁵ Acts constituting serious violations are: ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’. Common Article 3 to the four 1949 Geneva Conventions.

Article 7. Export and Export Assessment

Along with Article 6, this provision forms the centrepiece of the treaty. If an export is not prohibited under Article 6, an exporting state party must, before deciding whether or not to authorize a proposed export of conventional arms (or ammunition/munitions, parts or components), assess the risk that the export concerned would undermine peace and security or be used to commit or facilitate a serious violation of international humanitarian or human rights law, or acts constituting terrorism or a transnational organized crime. The provision states that an exporting state shall refuse authorization if its assessment concludes that the risk of negative consequences (as listed in the ATT) is ‘overriding’.

Termed ‘criteria’, ‘parameters’, or ‘national assessment’ in earlier drafts of the ATT, the article sets out the conditions under which a state party must not authorize a proposed export of conventional arms. Significantly, it does not cross-reference or link to other transactions covered by the ATT: import, brokering, transit or trans-shipment. As noted above, whether ‘export’ covers gifts or free loans was left deliberately ambiguous. On the basis of *pacta sunt servanda* (the duty to apply and implement a treaty in good faith), it is nevertheless clear that no state party could simply avoid its obligations under the treaty by listing all its transfers of conventional arms as ‘gifts’.

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to:
 - (i) commit or facilitate a serious violation of international humanitarian law;
 - (ii) commit or facilitate a serious violation of international human rights law;
 - (iii) commit or facilitate an act constituting an offence under international conventions or relating to terrorism to which the exporting State is a Party; or

(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

Each state party is required to determine whether a proposed export of conventional arms would contribute to, or undermine, peace and security. This provision remains extremely contentious. Read in concert with the remainder of Article 7, it appears to create a significant potential loophole because a transfer that would otherwise be unlawful under the article might nevertheless be authorized ‘legally’ if a state party claims to have determined that its effect on peace and security would be positive — whether or not its determination is objective or reasonable. This potential problem is not currently confined to threats to international peace and security, but may extend to what a state party considers a threat to its own peace and security.

Factors to take into account in making an ‘objective and non-discriminatory’ assessment might include: the type and quantity of weapons to be exported; their normal and reasonably foreseeable uses; the general situation in the country of final destination and its surrounding region; the intended end-user; actors involved in the export; and the intended route of the export. The reference to paragraph 1 of Article 8 obliges national control authorities to take into account information provided by the importing state, thereby including the importing state in a certain manner in the assessment process and promoting an objective and non-discriminatory decision.

Assessment must include consideration of whether the arms proposed for export *could* be used to commit or facilitate a serious violation (singular) of international humanitarian law or international human rights law, an act of terrorism or transnational organized crime, or, in accordance with paragraph 4, serious acts of gender-based violence or serious violations against children.

This formulation is perhaps a little strange in that any weapon *could* be used to violate international law. A better formulation might have been to require states to assess the likelihood of a weapon being so used. This language would also have linked more logically with paragraph 3 of the provision. In addition, there is an evident overlap between Article 6(3) and Article 7(2), since any proposed export that would be prohibited under Article 6(3) would also constitute a serious violation of international humanitarian law or international human rights law. It was made explicit in the final text of the ATT that Article 7 only applies if the export has not already been prohibited under Article 6.

What is a serious violation of international humanitarian law?

The International Committee of the Red Cross (ICRC) has asserted that ‘war crimes’ and ‘serious violations of international humanitarian law’ are synonyms.

They can take place in international or non-international armed conflicts. Violations are serious, and are war crimes, if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian objects or infrastructure) or if they breach important values.

The majority of war crimes involve death, injury, destruction, or unlawful taking of property. However, acts can amount to war crimes because they breach important universal values, even without direct physical harm to persons or objects. Such acts include, for example, mistreatment of corpses and military recruitment of children under 15 years of age.

Serious violations of international humanitarian law are:

- grave breaches as specified under the four 1949 Geneva Conventions (Articles 50, 51, 130, and 147 of Conventions I, II, III, and IV, respectively);
- serious violations of Common Article 3 to the 1949 Geneva Conventions;
- grave breaches as specified under Additional Protocol I of 1977 (Articles 11 and 85);
- war crimes as specified under Article 8 of the ICC Statute;
- other war crimes in international and non-international armed conflicts under customary law.⁹⁶

In both international armed conflicts and non-international armed conflicts, such violations include: deliberate attacks on the civilian population; attacks that fail to distinguish between military objectives and civilians and civilian objects (indiscriminate attacks); attacks that would cause harm to civilians or civilian objects that is excessive in relation to the expected concrete and direct military advantage (disproportionate attacks); and violence against detainees (whether they are civilians or captured fighters/combatants).

The scope of the notion of a serious violation of international humanitarian law is broader than the scope of Article 6(3), because there is no limitation to ‘war crimes as defined by international agreements’ to which the exporting state is a party. If an act is likely to contravene international humanitarian law to the extent that it represents a serious violation, this is sufficient to trigger the consequences set out in paragraphs 2 and 3 of Article 7. There must merely be a potential causal link between the arms or ammunition/munitions to be transferred and the IHL violation(s).

What is a serious violation of international human rights law?

There is no consensus as to what constitutes a serious violation of international human rights law. Its meaning should be viewed under the scope of the four-step process that will be required to decide whether this provision applies in a specific case. First, there must be a violation. An arms transfer can potentially affect enjoyment of the following human rights that are protected by international treaty and, to a certain extent, customary international law:

- the right to life (including assassinations, other forms of murder, enforced disappearance, and genocide);
- the right to freedom from torture and other forms of cruel, inhuman, or degrading treatment;
- the rights to liberty and security of person;
- the right to freedom from slavery;
- the right to freedom of thought, conscience, and religion;
- the rights to freedom of assembly and of expression; and, potentially,
- the rights to health, education, food, and housing.⁹⁷

Second, the state will have to decide whether the particular violation is serious. The qualifying word ‘serious’ can be taken either to indicate the type of human right in question or the gravity of the violation.

It seems clear that acts that violate human rights that are *jus cogens* (peremptory norms of international law) constitute serious violations of international human rights law. Although the precise

⁹⁶ Statement of the ICRC to the United Nations Diplomatic Conference on the Arms Trade Treaty, New York, 12 July 2012. See also ‘What are “serious violations of international humanitarian law”? Explanatory Note’, available at <http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

⁹⁷ See further in A. Bellal, ‘Arms Transfers and International Human Rights Law’, Chapter 15 in S. Casey-Maslen (ed.), *Weapons under International Human Rights Law*, Cambridge University Press, forthcoming, 2013; and G. Giacca and T. Karimova, ‘The Implications of Economic and Social Rights for Arms Acquisitions’, Chapter 16 in *ibid.*

content of such norms is not agreed in the practice of states, in jurisprudence, or among scholars, one can safely assume that the rights to freedom from torture, slavery, enforced disappearance, and arbitrary deprivation of life belong to this category. However, the term ‘serious violations of international human rights law’ can probably also be applied to violations of sufficient gravity of all ‘fundamental’ human rights, including the right to peaceful assembly, the rights to liberty and security, and arguably core socio-economic rights (such as the rights to education and health).

Indeed, with respect to rights that are not *ius cogens*, there may be a higher threshold to cross. Such rights might need to be violated grossly or systematically. Terms such as ‘gross’, ‘gross or systematic’, or ‘gross and systematic’ have been widely used, especially with respect to duties of remedy and reparation.⁹⁸ In the words of one commentator, the term ‘gross human rights violations’ has been employed ‘not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity’.⁹⁹ Such references include a ‘collective’ element, in that several victims are involved or abuses occur repeatedly across time or space.

Criterion two of the 1998 European Union Code of Conduct on Arms Exports (which was made binding on member states in 2008) covers ‘serious violations of human rights’. Introducing the parameters that EU member states use to assess violations, the user’s guide to the Code of Conduct says:

Violations do not have to be systematic or widespread in order to be considered as ‘serious’ for the Criterion Two analysis. According to Criterion Two, a major factor in the analysis is whether the competent bodies of the UN,¹⁰⁰ the EU or the Council of Europe have established that serious violations of human rights have taken place in the recipient

country. In this respect it is not a prerequisite that these competent bodies explicitly use the term ‘serious’ themselves; it is sufficient that they establish that violations have occurred.¹⁰¹

Third, as with international humanitarian law, a potential causal link must be shown between the arms or ammunition/munitions in question and the incidence of rights violation(s).

Within the ATT framework, states parties may usefully refer to the findings of competent bodies, including relevant UN agencies, though it is for exporting states, acting in good faith, to make the final assessment.

This will also be useful for the final step where the state will have to decide whether there is an overriding risk that the arms will be used to commit or facilitate serious violations of international human rights law.

What terrorist offences are covered?

Sub-paragraph (iii) covers acts, committed by means of a conventional weapon provided by the exporting state, that would constitute an offence under a treaty relating to terrorism to which the exporting state is party. Of particular importance in this regard would be the 1997 Terrorist Bombings Convention.¹⁰² Under Article 2(1) of that Convention:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

(a) With the intent to cause death or serious bodily injury; or

⁹⁸ See, for example, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 16 December 2005. Section 502B of the US 1961 Foreign Assistance Act, as amended, states: ‘For the purposes of this section—(1) the term “gross violations of internationally recognized human rights” includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, ... and other flagrant denial of the right to life, liberty, or the security of person.’ Sec. 502B, 1961 Foreign Assistance Act, as amended, p. 233. The same section refers to ‘extrajudicial killings, torture, or other serious violations of human rights’. *Ibid.*, p. 231.

⁹⁹ Cherif Bassiouni, ‘Report on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms’, UN doc. E/CN.4/1999/65, §65.

¹⁰⁰ Reference is made to the UN General Assembly (including country-specific resolutions); the UN Security Council; the Human Rights Council; ECOSOC; the Office of the High Commissioner for Human Rights (OHCHR); the UN Special Procedures and other mandate-holders; and the UN Treaty Bodies. *User’s Guide to the EU Code of Conduct on Arms Exports*, 3 July 2007, Annex III.

¹⁰¹ *Ibid.*, Section 3.2.6.

¹⁰² 1997 International Convention for the Suppression of Terrorist Bombings. Other relevant treaties would include the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the 1979 International Convention against the Taking of Hostages; and the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

However, under Article 19(2), the acts of armed forces *in bello* and certain acts covered by international human rights law are explicitly excluded from the purview of the Convention.¹⁰³

What acts constituting transnational organized crimes are covered?

Sub-paragraph (iv) refers to acts that constitute an offence under international conventions or protocols relating to transnational organized crime to which the exporting state is a party. Relevant international instruments are the UN Convention against Transnational Organized Crime and its related Protocols. The acts covered are: serious crimes; participation in an organized criminal group; laundering of the proceeds of crimes and corruption;¹⁰⁴ trafficking in persons;¹⁰⁵ smuggling of migrants;¹⁰⁶ and illicit manufacturing and trafficking in firearms.¹⁰⁷

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

As part of their export assessment, having examined the criteria under Paragraph 1, national control authorities must consider whether appropriate measures could be undertaken to mitigate risks they identify that exported weapons might be used to violate international law. In so doing, states parties are free to decide whether they act and what they do. Numerous measures are theoretically available to them, though in practice the choices of an exporting state will often be constrained by its resources. Certain measures require cooperation between the exporting and importing state, which is reflected in the reference to confidence-building measures and jointly developed or agreed programmes. Since risk mitigation measures may lead to a positive export assessment, they are usually in the interest of both exporting and importing states. However, they may

be perceived by an importing state as interference in its domestic affairs.

Specific examples of risk mitigation measures include: end-user certificates that confirm that transferred items will not be re-exported without the agreement of the exporting state or used in a manner other than that described in the certificate; post-delivery and post-shipment verifications by the exporting state; capacity building, for example to improve the physical security and stockpile management of exported arms; and training in human rights and international humanitarian law. These examples indicate the presence of two different approaches to risk mitigation. Some measures take the form of systematic due diligence (end-user certificates, for example), while others reduce a specific risk (capacity-building projects). With the latter, a challenge remains that considerable time will often elapse between an export assessment, the execution of mitigation measures, and their practical effects. When evaluating the legality of a proposed export, the impact of risk mitigation measures must therefore be assessed cautiously.

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

Paragraph 3 is at the heart of Article 7 (and the controversy surrounding it) because it addresses the point of decision. Having conducted steps one and two (risk assessment and mitigation), national control authorities must determine whether the risks that have been identified can be mitigated sufficiently to make them less than ‘overriding’. The formulation ‘if ... the exporting state party determines’ clearly grants significant discretion to exporting states parties but, in accordance with the principle of good faith, their decisions must be reasonable and should certainly not be manifestly unfounded.

The text of paragraph 3 states that, if an ‘overriding risk’ of negative consequences exists (as detailed in paragraphs 1(a) and (b)), namely consequences that do not contribute to peace and security, the state party shall not authorize the export. In addition, Article 11(2) calls on states to assess the risk of

¹⁰³ Article 19(2) provides that: ‘The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.’

¹⁰⁴ 2000 UN Convention against Transnational Organized Crime, Article 3.

¹⁰⁵ 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3.

¹⁰⁶ 2001 Protocol against the Smuggling of Migrants by Land, Sea and Air, Article 3.

¹⁰⁷ 2001 Firearms Protocol, Article 3.

diversion. Although Article 7(3) does not include this risk explicitly, it should presumably be part of risk assessment at this stage.

What is ‘overriding’ risk?

While the legal consequence of ‘shall not authorize’ is clear, the meaning of ‘overriding risk’ is not self-evident, and it is not a clear or established concept in international law. The Oxford English Dictionary defines the verb ‘override’ as ‘to be more important than’, and ‘overriding’ as ‘more important than any other considerations’. Arguably, this implies that a national control authority must balance the predictable positive and negative consequences of arms exports (provided the risk is not one that is already prohibited under Article 6(2) or 6(3)).

During the negotiations, persistent attempts were made to replace ‘overriding’ by ‘substantial’, in order to avoid balancing and create a clear red line defined by the negative consequences set out in paragraph 1. These attempts were unsuccessful. The term has been translated in the French version of the ATT as ‘prépondérant’ (predominant, overriding) and, similarly, in the Spanish version as ‘preponderante’. This said, states parties may still interpret the provision broadly, applying absolute rather than relative concepts. Addressing the General Assembly after the ATT’s adoption, New Zealand stated that it would interpret ‘the concept of “overriding” risk’ as a ‘substantial’ risk, for example. Other suggestions for the meaning of the term ‘overriding’ are that it means ‘more likely than not’.

The reasoning behind this controversial concept is that sometimes the expected positive effects of arms transfers, coupled with the effect of any relevant and available risk mitigation measures, may outweigh their possible misuses (as outlined in paragraph 1). Examples would include assisting people to defend themselves against genocide or crimes against humanity, or to exercise their right to self-determination when attacked by an oppressive state. However, as Andrew Clapham has cautioned: ‘Such reasoning comes very close to consequentialist reasoning claiming that the “end justifies the means”’. In turn this flies in the face of the theory and practice of human rights.¹⁰⁸

4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of

the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

When making its assessment, an exporting State Party is required, in accordance with paragraph 1 of Article 7, to take into account the risk that arms, ammunition/munitions, or parts or components covered by the treaty will be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. Because no agreement on terminology was reached during the negotiations, especially with respect to the use of the term ‘gender’, paragraph 4 refers to gender-based violence and to violence against women and children. These elements clearly overlap.

From a chronological point of view, the provision in paragraph 4 seemingly intervenes after national control authorities, in accordance with paragraph 3, have decided to authorize or refuse permission to export. At the same time, the reference ‘in making this assessment’ indicates that the risks to women and children described in the paragraph must be taken into account by the assessment foreseen in paragraph 1, and should be considered when a final decision on export is made. The question then arises: what are the legal consequences of determining that these risks exist? *Must* states parties always consider measures to mitigate these risks to women and children or deny exports based on this provision if risks are considered to exist?

Regrettably, the answer appears to be no, not always. States parties have an obligation to refuse a proposed export if they identify an overriding risk of the negative consequences foreseen in paragraph 1, not those covered by paragraph 4. Of course, many acts of gender-based violence or acts of violence against women and children will be serious violations of international humanitarian law or serious violations of international human rights law.¹⁰⁹ They may also be offences under international conventions or protocols on terrorism, or transnational organized crime, to which the exporting state is a party. Where this is so, paragraph 3 applies.

5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or

¹⁰⁸ Andrew Clapham, ‘The Arms Trade Treaty: A Call for an Awakening’, *European Society of International Law*, Vol. 2, Issue 5. At: <http://www.esil-sedi.eu/node/329>.

¹⁰⁹ This would arguably include certain acts by non-state armed groups outside a situation of armed conflict as defined by international humanitarian law.

of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

This paragraph obliges states parties to deliver export authorizations in a detailed and timely manner. Authorizations are not required to take a printed form, and electronic authorizations may be acceptable. Details should presumably include exactly what may be exported, when, and to whom. They should clearly delimit the rights of agents involved in the export, and authorize arrangements for subsequent control by foreign authorities.

Information that is commonly contained in export authorizations includes: the type, quantity, price and weight of the exported items; the production site of the exporter; the state of final destination, including the address of the importer; an indication of temporal validity; and the seal and address of the issuing national control authority. As exports without a valid authorization would violate the ATT, these documents must be issued before the export occurs, so that the actors concerned can execute the relevant actions.

6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

In order to establish effective international control of the arms trade, and especially to prevent and combat diversion, importing and transiting or trans-shipping states may request information on export authorizations from the exporting state. The provision explicitly permits states to limit the information they provide ('subject to national laws, practices, or policies), in order to protect their security or commercial interests. The information to be provided may be: a copy or excerpt of the export authorization; information on involved actors; intended routes of the transfer; or execution or planned risk mitigation measures.

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

Export authorizations are valid for a certain period, usually for one to five years, but are sometimes renewed automatically if not used and if no change of circumstance has occurred. States parties are therefore encouraged to reassess authorization if new information indicates that the situation in the state of final destination or its surrounding region has changed or generated important risks.

Reassessment may lead a state to suspend or revoke its export authorization, but it is under no obligation to do so. It may also consult with the importing state, but again is not required to do so.

Article 8. Import

Article 8 is a counterpart to the obligations imposed on exporting or transferring states, recognizing that importing states have corresponding obligations. The underlying reasoning of this provision is that state parties should control imports of arms and ammunition, but should have flexibility in deciding how control should be achieved. The relative vagueness of the provision reflects the fact that international arms acquisitions and their handling are strongly linked to state sovereignty.

1. Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7. Such measures may include end use or end user documentation.

As a corollary to the chapeau of Article 7, paragraph 1, this provision advocates that states provide information during the export assessment so that decisions can be 'objective and non-discriminatory' and based on a range of relevant sources. Since it is generally in the interest of importing states to provide information to exporting states, in order to achieve a positive export assessment, exporting states are expected to take the initiative in requesting information.

Shared data may be: general information on the situation in the importing country or its surroundings; practical information, for example on the end user; or, as suggested in the second sentence, end use or end user documentation. Though the second sentence suggests only end-use or end-user certification may be provided, the mention of these instruments could be a step towards universalizing their acceptance and use. In practice, importing states sometimes refuse to commit to stringent end-use or end-user certification.

2. Each importing State Party shall take measures that will allow it to regulate, where necessary, imports under its jurisdiction of conventional arms covered under Article 2 (1). Such measures may include import systems.

Although paragraph 2 establishes an obligation on states parties, there remains a strong emphasis on national sovereignty. It affirms that a state party

must take measures that permit it to regulate arms imports under its jurisdiction, where necessary. Measures to 'regulate' imports are not necessarily as stringent as measures to 'control' imports. In addition, 'where necessary' seems to allow importing states parties a measure of discretion. For instance, a state party remains free not to control imports if its national legislation guarantees, at minimum, that the state authorities know who holds which arms and are able to prevent diversion.

The second sentence of paragraph 2 indicates that import systems *may* be established and maintained in order to control imports. This seems to act as a limited exception to the requirements set out in Article 5(2). In practice, export control authorities often also assume control over imports, using general licences or a simple registration of importers, and criteria such as internal security concerns, to make assessments. It must also be noted that paragraph 2 only applies to items covered under Article 2(1), not to ammunition/munitions or parts and components under Articles 3 and 4. This limitation is particularly regrettable given that the provision already grants states parties considerable flexibility in regulating imports.

3. Each importing State Party may request information from the exporting State Party concerning any pending or actual export authorizations where the importing State Party is the country of final destination.

Paragraph 3 allows an importing state that is the final destination of an arms transfer to request information from an exporting state party concerning the status of the transfer in question. Such information may be useful to the importing state, for example if it needs to plan arms acquisitions (or amend its plans). Article 8(3) should be read in conjunction with Article 7(6) whereby each exporting State 'shall make available appropriate information about the authorisation in question, upon request, to the importing state...subject to its national laws, practices or policies.' Thus, the exporting state is not strictly obliged to provide information before the decision to authorise (or not to authorise) the export is made.

Article 9. Transit or trans-shipment

Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law.

Today, many states do not control transits and trans-shipments (hereafter, referred to collectively as transits) of conventional arms, although the international flow of arms is tremendously significant. Article 9 reflects the principle that exporting states are primarily responsible for the assessment of arms transfers, but highlights nonetheless that transiting states too have international legal responsibilities. Where necessary and feasible, state parties must 'regulate' (that is, not 'forcibly control') transits under their jurisdiction, namely when arms cross their territory. The phrase 'where necessary' indicates that states parties may sometimes reasonably conclude that transits do not need specific regulation. This might be so, for instance, if transits are covered by the country's national import and export controls.

The phrase 'where feasible' highlights that many states face practical (logistical and commercial) difficulties in exercising effective control over all their territory, which may include large spaces of territorial sea or long unguarded land borders. Instruments for controlling transits are influenced by whether the arms are being moved by land, air, or sea. States are often interested in knowing and checking what items are transiting by land or air. However, effective control of movements by air is only possible if planes are obliged to land. Given the huge volume of goods transferred by sea, states frequently lack the information or resources they need to inform themselves of, and check, all transits of conventional arms.

Moreover, measures that states parties take when they exercise their national sovereignty must respect relevant international law, including the right of innocent passage under the 1982 Convention on the Law of the Sea, and their obligations under the 1944 Convention on International Civil Aviation (better known as the Chicago Convention). Like the treaty's provisions on imports and brokering, this article only covers items that fall under Article 2(1) of the ATT.

Article 10. Brokering

Each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.

The provision on brokering requires states parties to take measures to regulate brokering that occurs within their jurisdiction, but stipulates that these are to be 'pursuant to' national legislation. It is important to control brokering activities in order to prevent actors from negotiating under one state's jurisdiction arms transfers that occur under the jurisdiction of another state or states. Brokering and its control become even more important where exporting, transiting or importing states do not have effective national control systems.

The provision reflects the general difficulties of controlling brokering effectively. However, it sets a standard that is lower than the commitments in other, albeit non-binding, instruments.¹¹⁰ Nor, as noted above, does it define 'brokering'.¹¹¹ Limited by their own national legislation, states parties are required only to regulate brokering, rather than effectively control it.

As suggested by the second sentence of the paragraph, national regulation may include mandatory registration of brokers or individual authorization. The former leads to general oversight of persons and entities engaged in brokering and, if registration requires assessment of the person or entity, to general control over who may engage in relevant activities. Even though it is practically very difficult to prevent brokers from engaging in relevant activities, individual authorization creates conditions for determining the legality of a broker's actions.

The provision refers to the state party's jurisdiction, thereby engaging the principle of territoriality. Nationals acting abroad are therefore not covered. Note that the provision only applies to items covered under Article 2(1) of the ATT.

Article 11. Diversion

According to Article 1, an objective of the ATT is to prevent and eradicate the illicit trade in conventional arms and prevent their diversion. Since diversion of arms to unintended end users endangers international peace, security, and stability and leads to (preventable) human suffering, the ATT contains a separate provision that establishes ways and means to prevent and react to diversion, while avoiding the highly controversial concept of unauthorized non-state actors and leaving room for end user and end use control. The provision reflects the reality that all states parties are concerned by diversion, whether of exports, imports, or transit shipments, and consequently seek to address and prevent it. In this area, cooperation among states is of utmost importance. However, due to strong objections from one state, the provision on diversion only applies to arms covered by Article 2(1) of the ATT.

1. Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion.

States parties involved in an arms transfer (export, import, and transits) must take appropriate measures to prevent diversion. There is no international legal definition of diversion. The Small Arms Survey has described the concept as follows:

The term 'diversion' refers to a breakdown in the transfer control chain such that, either before or after arriving at their intended destination, exported weapons are transferred to unauthorized end-users or used in violation of commitments made by end-users prior to export.¹¹²

Diversion therefore occurs when arms are transferred to third states, foreign entities, or internal actors without the consent of the exporting state, for whatever reason. The negotiation of the ATT clearly demonstrated that the term covers more than diversion to the illicit market, as some states had suggested. In fact, it most frequently occurs as a result of weak or absent stockpile management and security. For this reason, and given that the following paragraph sets out the relevant obligations for exporting states, the obligation described in this paragraph is particularly applicable to importing states.

¹¹⁰ See, for instance, Article 15 of the 2001 Firearms Protocol or Point 14 of the UN Programme of Action on Small Arms.

¹¹¹ See the commentary on Article 2(2) above for a brief discussion of the notion of broker and brokering.

¹¹² 'Who's buying? End User Certification', in *Small Arms Survey 2008: Risk and Resilience*, Cambridge University Press, Cambridge, 2008, p. 156.

Measures by importing states to prevent diversion may include: effective export controls to avoid re-export; stringent supervision of state authorities that hold arms, and private entities and persons that hold arms; effective physical security and stockpile management; and requests for international assistance in capacity-building according to Article 16(1). As a corollary to the second sentence of Article 8(1) as well as Article 11(2), commitment to end-user or end-use certification by an importing state also represents a confidence-building measure that has constructive effects.

2. The exporting State Party shall seek to prevent the diversion of the transfer of conventional arms covered under Article 2 (1) through its national control system, established in accordance with Article 5 (2), by assessing the risk of diversion of the export and considering the establishment of mitigation measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.

Contrary to the general obligation set out in paragraph 1, paragraph 2 requires an exporting state party to prevent diversion by means of its national control system, by assessing risk, and by implementing mitigation measures. This implies that prevention of diversion is an element of the mandatory export control mechanism that each state party is expected to establish under Article 7. Although neither paragraph 1 nor paragraph 3 of Article 7 mentions diversion explicitly, it is logical to consider this risk during export assessments because it might justify a refusal to authorize, as foreseen in the second sentence of this provision. The risk of diversion may be assessed based on the characteristics of the arms, the actors involved, and the planned transfer route, as well as the record of the state of final destination.

As a corollary to Article 7(2), exporting states are required explicitly to consider mitigation measures, such as confidence-building measures or jointly developed and agreed programmes. Other prevention measures mentioned include: examination of the parties involved in the export; requests for additional documentation, certificates, and/or assurances; and denials of export requests. End-use and end-user certification and assurances

provide an undertaking that transferred items will not be re-exported without the agreement of the exporting state or used in a manner that is not authorized. Their content may vary, but they often include similar information to export authorizations.¹¹³ Such certificates and assurances are requested by exporting states and issued by importing states, although they rarely have a formal legal status.

Post-delivery and post-shipment verifications are additional measures that may be taken to prevent diversion. In the case of post-delivery verification, the exporting state checks whether exported items have reached their intended final destination. Post-shipment verifications check whether exported arms continue to remain in the state of final destination. Both measures require the full cooperation of the importing state. As underlined in this provision and as further reflected in Article 16(1), jointly developed and agreed programmes (such as capacity building in physical security and stockpile management) also help to prevent diversion.

3. Importing, transit, trans-shipment and exporting States Parties shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of the transfer of conventional arms covered under Article 2 (1).

Articles 15 and 16 establish rules for international cooperation and assistance among states parties to promote effective implementation of the treaty. As a complement to Article 15(4), Article 11(3) highlights the importance of cooperation and information exchange among all states parties involved in an arms transfer, but at the same time conditions this by referring to 'national legislation' and using the phrase 'where appropriate and feasible'. The underlying reasoning is that security or commercial interests, limited resources, or bureaucratic obstacles may render cooperation and information exchange difficult. To prevent diversion effectively, however, it is crucial to share a broad spectrum of information.

4. If a State Party detects a diversion of transferred conventional arms covered under Article 2 (1), the State Party shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion. Such measures may include alerting potentially affected States Parties, examining diverted shipments of such conventional arms covered under Article 2 (1), and taking follow-up measures through investigation and law enforcement.

¹¹³ The OSCE has developed a standard template of end user certification for small arms and light weapons, available at: <http://www.osce.org/fsc/83178>. Interesting studies on end user certifications are 'Who's buying? End User Certification', in *Small Arms Survey 2008, op. cit.*, pp. 155–81; and *Study on the Development of a Framework of Improving End-Use and End-User Control Systems*, UNODA Occasional Paper No. 21, December 2011.

Paragraph 4 requires that state parties take appropriate action when they detect diversion. The provision does not limit the obligation to states parties involved in the transfer in question, but is applicable to all states parties. According to the provision, such measures may include alerting potentially affected states parties, examining diverted shipments, and taking follow-up measures through investigation and law enforcement. Investigations that states parties jointly commission can share information and discuss measures to avoid further diversion.

If a state party is involved because the diverted arms were originally exported from its territory, it may reassess the relevant export authorization under Article 7(7) and decide to suspend or revoke the authorization in question or other export authorizations involving the recipient state or other actors at fault. When assessing further exports, experience and fresh information must be considered and acted upon in an objective manner.

5. In order to better comprehend and prevent the diversion of transferred conventional arms covered under Article 2 (1), States Parties are encouraged to share relevant information with one another on effective measures to address diversion. Such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion.

States parties are encouraged to cooperate closely, to share experiences and lessons learned, and potentially develop best practices and common strategies on how to prevent diversion. Illicit activities on which it is specifically desirable to share information include: corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, and destinations used by organized groups engaged in diversion.

6. States Parties are encouraged to report to other States Parties, through the Secretariat, on measures taken in addressing the diversion of transferred conventional arms covered under Article 2 (1).

In order to establish a high standard of transparency with regard to actions that states parties undertake to address diversion, this paragraph encourages states to communicate relevant information to other states parties via the treaty secretariat. A description of measures taken, links to transfers authorized by other states parties, and measures applied with regard to the state at the heart of the

problem may be of particular interest to other states parties. Article 13(2) contains an almost identical rule and the second sentence of Article 13(1) already establishes a general obligation to report on measures undertaken to implement the treaty. Why this duplication exists is not immediately obvious.

Article 12. Record keeping

1. Each State Party shall maintain national records, pursuant to its national laws and regulations, of its issuance of export authorizations or its actual exports of the conventional arms covered under Article 2 (1).

Each state party is required to maintain records of its export authorizations or actual exports of conventional arms covered by the treaty. However, the authorisation of an export may occur a considerable time before shipment and often an authorization is not used in full; the reference to the exporting state party's national laws and regulations limits the extent of this obligation; and the provision only covers conventional arms under the scope of the ATT and does not cover ammunition/munitions or parts and components.

2. Each State Party is encouraged to maintain records of conventional arms covered under Article 2 (1) that are transferred to its territory as the final destination or that are authorized to transit or trans-ship territory under its jurisdiction.

Under paragraph 2, each state party is encouraged (but not required) to maintain a record of the conventional arms covered by the treaty that are transferred to its territory as the final destination, or that are authorized to transit across territory under its jurisdiction.

3. Each State Party is encouraged to include in those records: the quantity, value, model/type, authorized international transfers of conventional arms covered under Article 2 (1), conventional arms actually transferred, details of exporting State(s), importing State(s), transit and trans-shipment State(s), and end users, as appropriate.

Paragraph 3 indicates what a state party is 'encouraged' to include in its records: the quantity, value, and model/type of authorized transfers of conventional arms covered under the treaty; the conventional arms actually transferred; details of the exporting state or states, the importing state or states, and the transit or trans-shipment state or states; and end users. However, the provision does not specify the minimum content of records.

4. Records shall be kept for a minimum of ten years.

In accordance with paragraph 4, all records made in accordance with Article 12 must be retained by the state party for at least 10 years. While the 2001 Firearms Protocol (for example) requires states parties to retain records for 10 years, more recent instruments, such as the 2005 International Tracing Instrument, oblige states to keep records indefinitely, 'to the extent possible'. Section IV(12) of the International Tracing Instrument states:

From the time of the adoption of this instrument, records pertaining to marked small arms and light weapons will, to the extent possible, be kept indefinitely, but in any case a State will ensure the maintenance of:

- (a) Manufacturing records for at least 30 years; and
- (b) All other records, including records of import and export, for at least 20 years.

Article 13. Reporting

1. Each State Party shall, within the first year after entry into force of this Treaty for that State Party, in accordance with Article 22, provide an initial report to the Secretariat of measures undertaken in order to implement this Treaty, including national laws, national control lists and other regulations and administrative measures. Each State Party shall report to the Secretariat on any new measures undertaken in order to implement this Treaty, when appropriate. Reports shall be made available, and distributed to States Parties by the Secretariat.

On becoming a party to the ATT, each state is required to provide an initial report to the secretariat, within one year, which describes the measures it has undertaken to implement the treaty. The report must include national laws, national control lists, and other relevant regulations and administrative measures. Subsequently, each state party must report to the secretariat on any new measures it has undertaken to implement the ATT, as and when appropriate. Reports will be made available, and distributed to other states parties by the secretariat.

2. States Parties are encouraged to report to other States Parties, through the Secretariat, information on measures taken that have been proven effective in addressing the diversion of transferred conventional arms covered under Article 2 (1).

States parties are also encouraged (but not required) to report to other states parties, through the secretariat, on measures they have taken that have proved effective in addressing the diversion

of transferred conventional arms falling under the scope of the ATT.

3. Each State Party shall submit annually to the Secretariat by 31 May a report for the preceding calendar year concerning authorized or actual exports and imports of conventional arms covered under Article 2 (1). Reports shall be made available, and distributed to States Parties by the Secretariat. The report submitted to the Secretariat may contain the same information submitted by the State Party to relevant United Nations frameworks, including the United Nations Register of Conventional Arms. Reports may exclude commercially sensitive or national security information.

Each state party is required to submit an annual report to the secretariat by 31 May, covering the preceding calendar year, 'concerning the authorization or actual exports or imports of conventional arms' under the scope of the treaty. Reports do not, therefore, need to cover ammunition/munitions or parts or components. No minimum requirements are stipulated with regard to their content. In addition, each report may 'exclude commercially sensitive or national security information': however, this does not mean that states parties can evade the obligation to report altogether. Vigilance will be needed to ensure this is not used as a loophole.

Article 14. Enforcement

Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.

Domestic enforcement of the ATT is important to the overall effectiveness of the treaty. The ATT places on states parties the legal responsibility to ensure that its provisions are correctly implemented in their national legal systems. The duty is laid down in general terms in Article 5, and is potentially broad in scope, but does not necessarily require that states parties enact penal sanctions for violations. There is a general obligation to 'take measures necessary' to implement the treaty (Article 5(5)) as well as 'establish and maintain' a national control system (Article 5(2)).

For the purposes of Article 5, states parties are responsible for implementing the treaty within their borders or in areas under their jurisdiction. It is irrelevant whether a prohibited activity is carried out by a third party, such as a private person, or is not perpetrated by a state agent. The obligations assumed by states parties, notably under Article 5, mean that they are held accountable for failure to exercise due diligence in supervising

implementation or take effective action against entities that breach the ATT.

Article 14 is general in nature in that national authorities determine what measures are 'appropriate' to enforce national laws and regulations that concern implementation of the ATT.

Article 15. International Cooperation

The final sentence of Article 1 of the treaty refers to the aim of 'Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties'. One view voiced during the negotiation of the ATT was that implementation of the treaty was 'inseparable' from action at international level, through cooperation and assistance. In fact, the provisions in Article 15 are fairly generic, largely hortatory, and overlap.

1. States Parties shall cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty.

Paragraph 1 sets out the general principle that states parties should cooperate when implementing the treaty. There is no settled definition of 'cooperation' in international treaties or decisions,¹¹⁴ and none is included in the ATT. The Conference of State Parties (Article 17) and the Treaty Secretariat (Article 18) can be seen as cooperation mechanisms.

2. States Parties are encouraged to facilitate international cooperation, including exchanging information on matters of mutual interest regarding the implementation and application of this Treaty pursuant to their respective security interests and national laws.

Under paragraph 2, states parties are encouraged to facilitate international cooperation, including by exchanging information on matters of mutual interest regarding the implementation and application of the ATT, 'pursuant to their respective security interests and national laws'. This rather vague provision is only hortatory and seems to overlap significantly with paragraph 3.

3. States Parties are encouraged to consult on matters of mutual interest and to share information, as appropriate, to support the implementation of this Treaty.

Under paragraph 3, states parties are encouraged to consult on matters of mutual interest and to share information that supports implementation of the ATT. During negotiation of the treaty, states accorded considerable importance to cooperation between states and sharing of best practices.

4. States Parties are encouraged to cooperate, pursuant to their national laws, in order to assist national implementation of the provisions of this Treaty, including through sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms covered under Article 2 (1).

Paragraph 4 links to Article 11 on diversion, calling for information sharing on illicit activities and actors.

5. States Parties shall, where jointly agreed and consistent with their national laws, afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty.

Under paragraph 5, where they agree to do so, 'and consistent with their national laws', states parties will afford one another 'the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant' to the ATT. This paragraph covers transfers of arms that violate national laws, including through brokers.

6. States Parties are encouraged to take national measures and to cooperate with each other to prevent the transfer of conventional arms covered under Article 2 (1) becoming subject to corrupt practices.

During the negotiation, it was frequently asserted that transfers of arms are often associated with corruption. However, several states objected strongly when proposals were made to include corruption among the justifications for denying authorization under Article 7. This paragraph on cooperation to prevent corruption is the remaining vestige of that discussion.

7. States Parties are encouraged to exchange experience and information on lessons learned in relation to any aspect of this Treaty.

Finally, states parties are encouraged to exchange experience and information on lessons learned in relation to all aspects of the ATT. For example, states parties might share what they have learned about establishing effective national control mechanisms.

¹¹⁴ Edward McWhinney, 'The Concept of Cooperation', in M. Bedjaoui (ed.), *International Law: Achievements and Perspectives*, Martinus Nijhoff Publishers, 1991, p. 424.

Article 16. International Assistance

1. In implementing this Treaty, each State Party may seek assistance including legal or legislative assistance, institutional capacity-building, and technical, material or financial assistance. Such assistance may include stockpile management, disarmament, demobilization and reintegration programmes, model legislation, and effective practices for implementation. Each State Party in a position to do so shall provide such assistance, upon request.

This article examines how states may seek or offer international assistance. Under paragraph 1, a state party 'in a position to do so' is required to provide assistance, if requested. This formulation was used in both the 1997 Anti-Personnel Mine Ban Convention¹¹⁵ and the 2008 Convention on Cluster Munitions,¹¹⁶ as well as in political instruments such as the 2001 UN Programme of Action on Small Arms¹¹⁷ and the International Tracing Instrument.¹¹⁸ No minimum level of assistance is stipulated and the phrase 'in a position to do so' has not been construed to require that any (and every) request must receive a favourable response.

2. Each State Party may request, offer or receive assistance through, inter alia, the United Nations, international, regional, subregional or national organizations, non-governmental organizations, or on a bilateral basis.

Paragraph 2 merely reiterates the fact that any state party is entitled to request, offer, or receive assistance, bilaterally or through a variety of organizations, mechanisms or fora (including the UN, international, regional, sub-regional and national organizations, and NGOs).

3. A voluntary trust fund shall be established by States Parties to assist requesting States Parties requiring international assistance to implement this Treaty. Each State Party is encouraged to contribute resources to the fund.

States parties are obliged to establish a voluntary trust fund to assist requesting states parties who require international assistance to implement the ATT. Each state party is encouraged, but not required, to contribute to the fund.

¹¹⁵ Article 6.

¹¹⁶ Article 6.

¹¹⁷ Section III(3).

¹¹⁸ Section 6, §§27–28.

The Final Provisions

In the words of Anthony Aust, the final provisions (more commonly termed ‘final clauses’) of a treaty ‘can be a painful trap for the unwary’.¹¹⁹ In general, the final provisions in the draft ATT are reasonably drafted, and the March 2013 diplomatic conference significantly improved the July 2012 draft of the ATT.

Article 17. Conference of States Parties

The Conference is tasked with determining its own rules of procedure, and Article 17 includes no provision on decision-taking (other than for the adoption of the rules of procedure themselves). The text makes no reference to discussion of compliance with the treaty by individual states parties, although this might be covered by subparagraph (a) of paragraph 4.

It is helpful to allow the Conference to authorize subsidiary bodies. Other humanitarian and disarmament treaties, notably the 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions, set up informal intersessional Standing Committees to assist with treaty implementation; these proved to be valuable mechanisms.

1. A Conference of States Parties shall be convened by the provisional Secretariat, established under Article 18, no later than one year following the entry into force of this Treaty and thereafter at such other times as may be decided by the Conference of States Parties.

It is becoming standard practice to hold annual meetings of states parties to discuss the implementation of a humanitarian or disarmament treaty. According to paragraph 1, the first ‘Conference of States Parties’ will be convened by a provisional secretariat, established under Article 18, within one year following entry into force of the ATT. Thereafter, a permanent secretariat will convene meetings ‘at such other times as may be decided by the Conference of States Parties’.

2. The Conference of States Parties shall adopt by consensus its rules of procedure at its first session.

One of the first tasks of the first meeting of the Conference of States Parties will be to adopt ‘by consensus’ rules of procedure governing its work.

3. The Conference of States Parties shall adopt financial rules for itself as well as governing the funding of any subsidiary bodies it may establish as well as financial provisions governing the functioning of the Secretariat. At each ordinary session, it shall adopt a budget for the financial period until the next ordinary session.

The absence of a (common) costs provision from the ATT’s final clauses explains why the first Conference of States Parties will need to discuss who will pay for the meetings as well as any other ‘subsidiary bodies it may establish’. Each meeting of the Conference of States Parties will have to ‘adopt a budget for the financial period until the next’ such meeting. It is not settled in advance who will pay or how, hardly a satisfactory approach.

4. The Conference of States Parties shall:

(a) Review the implementation of this Treaty, including developments in the field of conventional arms;

(b) Consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular the promotion of its universality;

(c) Consider amendments to this Treaty in accordance with Article 20;

(d) Consider issues arising from the interpretation of this Treaty;

(e) Consider and decide the tasks and budget of the Secretariat;

(f) Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of this Treaty; and

(g) Perform any other function consistent with this Treaty.

Paragraph 4 lists (exhaustively) the functions of the Conference of States Parties. It will:

- review the ATT’s implementation, ‘including developments in the field of conventional arms’;
- consider and adopt recommendations on implementation and operation, and in particular on how to promote universality;
- consider amendments to the ATT in accordance with Article 20;

¹¹⁹ Anthony Aust, *Modern Treaty Law and Practice*, Second Edn, Cambridge University Press, Cambridge, 2007, p. 434.

- consider issues arising from interpretation of the treaty;
- consider and decide on the tasks and budget of the secretariat;
- consider establishing subsidiary bodies 'as may be necessary to improve the functioning' of the ATT; and
- perform any other function consistent with the ATT.

This last item can be considered a 'catch-all', intended to give states parties some flexibility.

5. Extraordinary meetings of the Conference of States Parties shall be held at such other times as may be deemed necessary by the Conference of States Parties, or at the written request of any State Party provided that this request is supported by at least two-thirds of the States Parties.

So-called 'extraordinary meetings' of the Conference of States Parties will be held 'at such other times as may be deemed necessary by the Conference of States Parties', or at the written request of any state party if the request is supported by at least two-thirds of states parties (presumably counted at the time the request is made).

Article 18. Secretariat

There was no requirement under treaty law for the ATT to establish a secretariat, but in recent years disarmament treaties have tended to do so. Sometimes a secretariat has been created by treaty (the 1992 Chemical Weapons Convention, for example);¹²⁰ more often one has been created subsequently by states parties (the 1972 Biological Weapons Convention, the 1980 Convention on Certain Conventional Weapons, the 1997 Anti-Personnel Mine Ban Convention, or the 2008 Convention on Cluster Munitions).

1. This Treaty hereby establishes a Secretariat to assist States Parties in the effective implementation of this Treaty. Pending the first meeting of the Conference of States Parties, a provisional Secretariat will be responsible for the administrative functions covered under this Treaty.

This paragraph formally establishes a secretariat to support states parties in the 'effective' implementation of the treaty. Pending the first meeting of the Conference of States Parties, which will occur within one year of entry into force of the

treaty, in accordance with Article 17(1), a provisional secretariat will be responsible 'for the administrative functions' that the permanent secretariat will fulfil. These administrative functions presumably include the circulation of state party reports, establishing and circulating to states parties the list of national points of contact, and facilitating the work of the first Conference of States Parties. Other tasks, such as promoting international cooperation and matching offers and requests for assistance to implement the treaty, will fall outside such administrative functions.

When this report was completed, it was not known where the provisional or permanent secretariat would physically be located.

2. The Secretariat shall be adequately staffed. Staff shall have the necessary expertise to ensure that the Secretariat can effectively undertake the responsibilities described in paragraph 3.

Paragraph 2 is rather vague. It affirms that staffing of the secretariat will be 'adequate' and that staff will possess the 'necessary expertise to ensure that the secretariat can effectively undertake the responsibilities described in paragraph 3'. Given the nature of those responsibilities, competencies should presumably include administration and capacity-building, and diplomatic, legal, and technical skills.

3. The Secretariat shall be responsible to States Parties. Within a minimized structure, the Secretariat shall undertake the following responsibilities:

- (a) Receive, make available and distribute the reports as mandated by this Treaty;
- (b) Maintain and make available to States Parties the list of national points of contact;
- (c) Facilitate the matching of offers of and requests for assistance for Treaty implementation and promote international cooperation as requested;
- (d) Facilitate the work of the Conference of States Parties, including making arrangements and providing the necessary services for meetings under this Treaty; and
- (e) Perform other duties as decided by the Conferences of States Parties.

Article 18 foresees three explicit roles for a secretariat: to support the organisation of the Conference of States Parties and other meetings held under the ATT; to assist in matching offers and requests for international cooperation and

¹²⁰ The Organisation for the Prohibition of Chemical Weapons (OPCW), for example, was set up under the 1993 Chemical Weapons Convention because it was essential to verify internationally (and independently) that states complied with its obligations.

assistance; and to circulate relevant documentation, as noted above. The secretariat might also be given other duties by the Conferences of States Parties.

Article 19. Dispute Settlement

1. States Parties shall consult and, by mutual consent, cooperate to pursue settlement of any dispute that may arise between them with regard to the interpretation or application of this Treaty including through negotiations, mediation, conciliation, judicial settlement or other peaceful means.

Peaceful means of dispute settlement are an important element in any international treaty. Disputes may arise with regard to a treaty's interpretation (what its provisions mean) and its application (how its provisions are to be implemented in practice). Given that arms transfers may violate the treaty, a dispute settlement clause is important.

Paragraph 1 obliges states parties to consult, and, by mutual consent, to cooperate to settle any dispute that may arise between them with regard to interpretation or application of the treaty. A non-exhaustive list of possible dispute settlement mechanisms is provided: negotiation, mediation, conciliation, judicial settlement, and other peaceful means.

Where two or more ATT states parties are party to a dispute and have accepted the jurisdiction of the International Court of Justice for their disputes under Article 36(2) of the ICJ Statute, the Court will have jurisdiction to hear the dispute without the need for further consent.¹²¹

Article 17(4)(d) stipulates that one of the tasks of the Conference of States Parties is to consider issues arising from interpretation of the ATT.

2. States Parties may pursue, by mutual consent, arbitration to settle any dispute between them, regarding issues concerning the interpretation or application of this Treaty.

In addition to the dispute settlement mechanisms foreseen in paragraph 1, paragraph 2 suggests that, again by mutual consent, states parties may consider 'arbitration'. It is not known why this

possibility was not merely added to the list of possible options in paragraph 1.

Article 20. Amendments

1. Six years after the entry into force of this Treaty, any State Party may propose an amendment to this Treaty. Thereafter, proposed amendments may only be considered by the Conference of States Parties every three years.

Any state party may propose any amendment to the ATT but may not do so until six years have passed since its entry into force. A reason for waiting six years before amendments can be considered is presumably to allow time for states parties to implement the treaty and consider any lessons learned before trying to amend it. As a result of this provision, this is a treaty that can adapt to changing circumstances and realities. Presumably a state party may propose more than one amendment at a time and other states parties may also put forward amendments at the same time. Thereafter, the Conference of States Parties will consider proposed amendments (presumably by any state party) at intervals of three years.

2. Any proposal to amend this Treaty shall be submitted in writing to the Secretariat, which shall circulate the proposal to all States Parties, not less than 180 days before the next meeting of the Conference of States Parties at which amendments may be considered pursuant to paragraph 1. The amendment shall be considered at the next Conference of States Parties at which amendments may be considered pursuant to paragraph 1 if, no later than 120 days after its circulation by the Secretariat, a majority of States Parties notify the Secretariat that they support consideration of the proposal.

A proposed amendment made in accordance with paragraph 1 must be submitted in writing to the treaty secretariat established in accordance with Article 18. The secretariat will circulate the proposal to all states parties at least 180 days before the next meeting of the Conference of States Parties (see Article 17). This Conference will consider a proposal if, no more than 120 days after it has been circulated, a majority of states parties have notified the secretariat that they support its consideration (not necessarily its content).

¹²¹ This covered the following 69 states as of 20 May 2013: Australia, Austria, Barbados, Belgium, Botswana, Bulgaria, Cambodia, Cameroon, Canada, Costa Rica, Côte d'Ivoire, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Egypt, Estonia, Finland, Gambia, Georgia, Germany, Greece, Guinea, Guinea-Bissau, Haiti, Honduras, Hungary, India, Ireland, Japan, Kenya, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Mauritius, Mexico, the Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, Poland, Portugal, Senegal, Slovakia, Somalia, Spain, Sudan, Suriname, Swaziland, Sweden, Switzerland, Timor-Leste, Togo, Uganda, United Kingdom, and Uruguay.

3. The States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall, as a last resort, be adopted by a three-quarters majority vote of the States Parties present and voting at the meeting of the Conference of States Parties. For the purposes of this Article, States Parties present and voting means States Parties present and casting an affirmative or negative vote. The Depositary shall communicate any adopted amendment to all States Parties.

States parties are obliged to make 'every effort' to achieve consensus on each amendment. If all efforts at consensus have been exhausted, and no agreement is reached, as a last resort an amendment will be adopted if three-quarters of the states parties present and voting at the Conference of States Parties support it. The term 'present and voting' makes clear that only states parties which are present and which vote for or against the proposal will be counted; states parties that abstain will not be counted for this purpose. The Depositary, and not the secretariat, is specifically required to communicate any adopted amendment to all states parties.

4. An amendment adopted in accordance with paragraph 3 shall enter into force for each State Party that has deposited its instrument of acceptance for that amendment, ninety days following the date of deposit with the Depositary of the instruments of acceptance by a majority of the number of States Parties at the time of the adoption of the amendment. Thereafter, it shall enter into force for any remaining State Party ninety days following the date of deposit of its instrument of acceptance for that amendment.

Any amendment adopted in accordance with the procedure set out in this Article will enter into force ninety days after the date of deposit with the Depositary of instruments of its acceptance by a majority of the states parties counted at the time the amendment was adopted. At that date, it will enter into force only for each state party that has deposited its instrument of acceptance for the amendment. Subsequently, it will enter into force for any other state party ninety days after that state has deposited its instrument of acceptance for that amendment.

Article 21. Signature, Ratification, Acceptance, Approval or Accession

1. This Treaty shall be open for signature at the United Nations Headquarters in New York by all States from 3 June 2013 until its entry into force.

In accordance with this Article, the ATT was opened for signature at the UN in New York on 3 June 2013. As noted on page 6 above, 67 states signed the ATT on 3 June and five states signed in the following days, bringing the total to 72 signatories as of 11 June.

2. This Treaty is subject to ratification, acceptance or approval by each signatory State.

Any signatory state wishing to become a party to the ATT must ratify, accept, or approve the treaty. It is possible for a state to sign and then ratify the ATT on the same day. A state may also apply Articles 6 and 7 of the treaty provisionally, in accordance with Article 23.

3. Following its entry into force, this Treaty shall be open for accession by any State that has not signed the Treaty.

It is only possible to accede to the ATT once it has entered into force. Before that date, therefore, any state wishing to become a party must sign and then ratify, accept, or approve the treaty.

4. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

All instruments of ratification, acceptance, approval, or accession must be deposited with the Depositary of the ATT, namely, as set out in Article 27, the UN Secretary-General.

Article 22. Entry into Force

1. This Treaty shall enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary.

The ATT will enter into force 90 days after the day on which the 50th state deposits its instrument of ratification, acceptance, or approval with the UN Secretary-General.

2. For any State that deposits its instrument of ratification, acceptance, approval or accession subsequent to the entry into force of this Treaty, this Treaty shall enter into force for that State ninety days following the date of deposit of its instrument of ratification, acceptance, approval or accession.

Once the ATT has entered into force, any state that deposits its instrument of ratification, acceptance, approval, or accession with the UN Secretary-General will become a party to the treaty 90 days after the date of deposit.

It is not entirely clear what will happen to any signatory state that deposits its instrument of ratification, acceptance, or approval with the UN Secretary-General after the deposit of the 50th ratification, acceptance, or approval, but before the entry into force of the ATT. This lacuna was raised by the Drafting Committee; however, a decision was taken not to change the text of the treaty. It is assumed that any such state will become a party to the treaty 90 days after the date of deposit.

Article 23. Provisional Application

Any State may at the time of signature or the deposit of its instrument of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.

When signing, ratifying, accepting, approving, or acceding to the ATT, a state may declare that it will apply its key elements provisionally (Article 6: prohibitions; and Article 7: export assessments and denials). This is a broad and valuable opportunity for states whose ratification process may be prolonged or delayed.

Several recent humanitarian and disarmament treaties (notably the 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions) offered the option of provisional application, but did so only to ratifying states for the period until the treaty entered into force. Article 25 of the 1969 Vienna Convention on the Law of Treaties foresees the possibility of provisional application but only until entry into force of the treaty as a whole.

Article 24. Duration and Withdrawal

The provisions on duration and withdrawal are relatively standard.

1. This Treaty shall be of unlimited duration.

This paragraph states that the treaty has no time limitation.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty. It shall give notification of such withdrawal to the Depositary, which shall notify all other States Parties. The notification of withdrawal may include an explanation of the reasons for its withdrawal. The notice of withdrawal shall take effect ninety days after the receipt of the notification of withdrawal by the Depositary, unless the notification of withdrawal specifies a later date.

Paragraph 2 allows any state party to withdraw from the ATT upon formal notification to the Depositary (the UN Secretary-General). This notification may include the reasons for withdrawal but is not obliged to do so. Withdrawal may take effect not less than 90 days after the Depositary receives the notification of withdrawal. (The notification may specify a later date for the withdrawal to become effective.)

3. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Treaty while it was a Party to this Treaty, including any financial obligations that it may have accrued.

Paragraph 3, affirming that a state party will remain responsible for its financial and substantive obligations for the period during which it is a state party, could usefully have been set out in more detail, in a broader provision that specifically examined costs.

Article 25. Reservations

1. At the time of signature, ratification, acceptance, approval or accession, each State may formulate reservations, unless the reservations are incompatible with the object and purpose of this Treaty.

Customary international law permits reservations to be formulated unless they are incompatible with the object and purpose of a treaty; this provision reaffirms that position.

2. A State Party may withdraw its reservation at any time by notification to this effect addressed to the Depositary.

At the July 2012 diplomatic conference, the UN Secretariat requested the inclusion of paragraph 2 to ensure that a reservation could always be withdrawn by the relevant state party. In March 2013, the requirement was added that the notification be addressed to the UN Secretary-General as treaty Depositary.

Article 26. Relationship with other international agreements

1. The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with this Treaty.

Considerable concern has been expressed about Article 26, which was highly controversial in the negotiations. A far broader provision was included as the first sentence of Article 5(2) in the July 2012 draft ATT. Had this been included in the adopted ATT, it would have created a huge potential loophole. France was one of the leading advocates for its inclusion.

The provision as finally adopted permits states parties to adopt treaties and other agreements governing the trade in conventional arms, provided that these are consistent with the obligations set out in the ATT. Adherence to any such treaty or agreement by an ATT state party that contravened or undermined in any way the obligations set out in the Arms Trade Treaty would amount to a violation of this provision and implicate the international responsibility of that state.

2. This Treaty shall not be cited as grounds for voiding defence cooperation agreements concluded between States Parties to this Treaty.

This provision was also debated very actively and its import was disputed. It was included as the second sentence in Article 5(2) of the July 2012 draft ATT, especially at the behest of India. The provision as adopted states that the ATT 'shall not be cited as grounds for voiding defence cooperation

agreements concluded between States Parties to this Treaty'. The words 'contractual obligations under', between 'voiding' and 'defence cooperation agreements', were deleted from the July 2012 text.

Some have feared that this provision is a major loophole in the ATT. However, this is primarily a civil litigation issue relating to financial penalties. The provision, as adopted, means that a state party to the ATT may not void a contract with another state party purely on the grounds that a proposed export of conventional arms would violate its international legal obligations under the ATT. It can of course suspend or terminate any contract but may suffer financial consequences if it cannot cite other non-ATT related grounds as justification, unless it can claim sovereign immunity or unless the contract or agreement allows it to do so without financial penalty. The provision does not negate the State Party's central obligations under the ATT. Any state that adheres to a future ATT would therefore be wise to include the substantive criteria set out in Article 6 and 7 in each of its arms transfer contracts.

Article 27. Depositary

The Secretary-General of the United Nations shall be the Depositary of this Treaty.

This provision is standard in multilateral treaties.

Article 28. Authentic Texts

The original text of this Treaty, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

This provision is standard in multilateral treaties.

Done at New York, this second day of April, two thousand and thirteen.

The text of the draft ATT submitted to the UN General Assembly referred to the treaty being 'done' (i.e. adopted) on 28 March 2013 (the final day of the Final UN Diplomatic Conference). It was subsequently amended in accordance with Operative Paragraph 2 of UN General Assembly Resolution 67/234 B of 2 April 2013 to reflect the fact that adoption by the diplomatic conference had not been possible on that date owing to the objections of Iran, DPR Korea, and Syria.

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