

ACADEMY BRIEFING No. 2

The Draft Arms Trade Treaty

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Contents

Introduction	3
1. The need for an arms trade treaty	5
2. Preliminary discussions and the negotiation of the draft Arms Trade Treaty	7
3. The Title, Preamble, and Principles	9
A. The title of the draft Treaty	9
B. The preamble of the draft Treaty	9
C. Principles of the draft Treaty	14
The Core Provisions	19
Article 1. Goals and objectives	19
Article 2. Scope	20
A. Covered Items	20
B. Covered Activities	20
Article 3. Prohibited transfers	22
Article 4. National Assessment	24
What is a serious violation of international humanitarian law?	24
What is a serious violation of international human rights law?	25
What terrorist offences are covered?	25
Article 5. General Implementation	26
Article 6. Export	28
Article 7. Import	29
Article 8. Brokering	29
Article 9. Transit and Transshipment	30
Article 10. Reporting and Record-Keeping	31
Article 11. Enforcement	32
The Final Provisions	33
Article 12. Secretariat	33
Article 13. International Cooperation	33
Article 14. International Assistance	34
Article 15. Signature, Ratification, Acceptance, Approval, or Accession	34
Article 16. Entry into Force	34
Article 17. Provisional Application	35
Article 18. Duration and Withdrawal	35
Article 19. Reservations	35
Article 20. Amendments	35
Article 21. Conference of States Parties	36
Article 22. Dispute Settlement	36
Article 23. Relations with States not party to this Treaty	37
Article 24. Relationship with other instruments	37
Article 25. Authentic Texts and Depositary	37
Concluding remarks	39

Introduction

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

This Briefing reviews the formal draft of the Arms Trade Treaty, which was presented to the United Nations (UN) Conference on the Arms Trade Treaty (ATT Conference) on 26 July 2012.¹ This Diplomatic Conference ended without agreement and did not

adopt either this or an amended text. It did not even agree on steps that should follow the Conference. This Briefing summarizes and discusses the process that led to the ATT Conference and assesses its inability to adopt an arms trade treaty within the initially allotted timeframe. It then comments on the provisions of the draft Treaty in three sections:

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

A set of conclusions and recommendations for future action complete the Briefing.

¹ [‘The draft of the Arms Trade Treaty’](#), UN Conference on the Arms Trade Treaty, UN doc. A/CONF.217/CRP.1 of 26 July 2012.

1. The need for an arms trade treaty

The global trade in conventional arms is worth tens of billions of dollars each year, while many other weapons are transferred by means of gifts, leases, or loans. Putting the value of the arms trade and broader military expenditure into context, the UN Secretary-General observed during the July 2012 ATT Conference that 60 years of UN peacekeeping operations have cost less than six weeks of current military spending.²

The transfer of conventional weapons has a major impact on recipient nations. According to the Ministers for Foreign Affairs of France, Germany, and the United Kingdom, and the Minister for Trade of Sweden, each year millions of people around the world suffer directly or indirectly as a result of poor regulation of the arms trade and illicit trafficking of arms, while hundreds of thousands of people are killed or injured by conventional arms.³ We can add that this suffering results especially from the ammunition and munitions fired from small arms or light weapons, whether in armed conflict or other situations of armed violence. Most of the acts that cause these deaths and injuries violate

prevailing norms, because they violate international law governing law enforcement or the conduct of hostilities, or national criminal law. As the UN Office for Disarmament Affairs (ODA) has stated: ‘In all parts of the world, the ready availability of weapons and ammunition has led to human suffering, political repression, crime and terror among civilian populations’.⁴

An eclectic array of national, regional international instruments governs the transfer of certain weapons.⁵ Nevertheless, in the view of the UN, the absence of a global, legally-binding framework for regulating the international trade in conventional arms ‘has obscured transparency, comparability and accountability’.⁶ In his opening address to the ATT Conference, the UN Secretary-General said that it was ‘a disgrace’ that no multilateral treaty ‘of global scope’ addresses conventional arms transfers. He further stated that tackling the threat of conventional weapons ‘should not be an unconventional act by the international community’.⁷

² UN Department of Public Information (DPI), ‘[Secretary-General, in Remarks to Conference on Arms Trade Treaty, Calls Absence of Global Instrument Dealing with Conventional Weapons “a Disgrace”](#)’, UN doc. SG/SM/14394, 3 July 2012.

³ W. Hague, L. Fabius, G. Westerwelle, and E. Björling, ‘[Why this arms trade treaty is essential](#)’, *Guardian*, 2 July 2012.

⁴ ODA, ‘[About the Arms Trade](#)’, undated but accessed 19 August 2012.

⁵ Certain international or regional treaties prohibit the transfer of weapons as part of a comprehensive prohibition (for example of anti-personnel mines, cluster munitions, biological weapons and chemical weapons, or, within the ECOWAS region, small arms), while regional and multilateral instruments address the transfer of conventional arms (for example, the EU Common Position and the Wassenaar Arrangement).

⁶ ODA, ‘[About the Arms Trade](#)’, undated but accessed 19 August 2012. The UN General Assembly Guidelines on International Arms Transfers were an outcome of the UN Disarmament Commission’s 1996 substantive session, on 22 April–7 May 1996.

⁷ (DPI), ‘Secretary-General, in Remarks to Conference on Arms Trade Treaty, Calls Absence of Global Instrument Dealing with Conventional Weapons “a Disgrace”’, *op. cit.*

2. Preliminary discussions and the negotiation of the draft Arms Trade Treaty

In 2009, the UN 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’.⁸ The resolution was adopted by 151 votes to 1 with 20 abstentions.⁹

The possibility of a UN Arms Trade Treaty had already been under discussion within the General Assembly for several years. 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.¹⁰ 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’.¹¹

The Group of Governmental Experts (GGE) met for three sessions in 2008.¹² One recommendation of its report was that ‘further consideration of efforts within the United Nations to address the international trade in conventional arms is required on a step-by-step basis in an open and transparent manner’.¹³ In response to this recommendation, the UN General Assembly decided to establish an Open-ended Working Group, which held

two substantive sessions in 2009. From 2010 its sessions were transformed into preparatory committees for the ATT Conference.¹⁴

In accordance with Resolution 64/48, four preparatory committee meetings were held between 2010 and February 2012.¹⁵ 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’.¹⁶

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 agreement. Differences between more progressive ‘like-minded’ states and so-called ‘sceptics’ proved difficult to bridge, although it was primarily the United States of America (USA) that scuppered chances of an agreement when, on the final day of the Diplomatic Conference, it called for ‘more time’¹⁷ to assess the provisions of a comprehensive draft treaty text tabled by the President on 26 July 2012.¹⁸ Russia also called for more time, suggesting that a further three weeks were needed. Once the two largest arms-exporting states had declared they were not ready to adopt a text, the draft’s fate was sealed. States had begun seriously considering the document of 26 July, and had proposed a number of amendments, but none was reflected formally in any subsequent draft.

Perhaps the greatest stumbling block to an agreement had been the inclusion in Resolution 64/48, at the USA’s insistence, of a requirement that

⁸ UN General Assembly Resolution 64/48, adopted on 2 December 2009 by 151 votes to 1 with 20 abstentions, §4.

⁹ 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.

¹⁰ UN General Assembly Resolution 61/89, adopted on 6 December 2006 by 153 votes to 1 (the USA) with 24 abstentions, ninth preambular paragraph.

¹¹ *Ibid.*, §2.

¹² The GGE met at United Nations Headquarters in New York on 11-15 February, 12-16 May, and 28 July-8 August 2008.

¹³ ‘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.

¹⁴ Under §6 of UN General Assembly Resolution 64/48, 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’.

¹⁵ 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) 13–17 February 2012.

¹⁶ UN General Assembly Resolution 64/48, §4.

¹⁷ See, for example, G. Nystuen, ‘[The ATT – A Predictable Failure](#)’, *Arms Control Law*, 21 August 2012; and ADH Bloggers, ‘[The Arms Trade Treaty: So Near and Not So Far](#)’, 27 July 2012.

¹⁸ UN Conference on the Arms Trade Treaty, doc. A/CONF.217/CRP.1 of 26 July 2012.

the negotiations in the UN Diplomatic Conference be undertaken ‘on the basis of consensus’.¹⁹ Given that member states disagreed about the desirability, let alone the normative content, of such a treaty, it had been widely feared that the stated aim of achieving a ‘strong and robust’ treaty would be undermined by this precondition, and so it proved. Although there were, and are, many nuances in states’ positions, broadly speaking those states inimical to a treaty tended to prefer a text that would focus only on the illicit trade in a limited number of weapons (notwithstanding the absence of a clear definition of *illicit*), while those that sought comprehensive regulation typically stressed the need to regulate all international transfers of conventional arms to ensure that they were *responsible*. Little narrowing of differences on this (and many other issues) occurred during the ATT Conference.

No rolling or draft treaty text was made available to the Diplomatic Conference. A Chair’s paper was presented to states during the preparatory committees,²⁰ but this was not intended to be the text of a draft treaty and merely reflected the

views the Chair had heard or received during the preparatory committees’ deliberations. A revised version of the paper (the President’s paper) was presented to the Diplomatic Conference on 3 July.²¹ Delegations’ statements continued to be general in nature.

The opening of the Conference was delayed as a result of a dispute regarding the status of the delegation of Palestine at the Conference. When the Conference eventually adopted its rules of procedure, these required agreement on substantive issues by consensus but permitted decisions relating to procedural matters to be adopted by a two-thirds majority, if all efforts at consensus had failed.²² Two main committees were established to consider the various elements of a treaty in parallel sessions.²³

A formal draft text was circulated on the day before the Conference was due to close, but was not accepted by participating states. This text, ‘The draft of the Arms Trade Treaty’ of 26 July 2012, is the subject of our analysis. In the commentary that follows, the text of this draft is highlighted in red.

¹⁹ UN General Assembly Resolution 64/48, §5.

²⁰ [Chairman’s Draft Paper of 14 July 2011](#).

²¹ [President’s Discussion Paper of 3 July 2012](#).

²² See Rules 33 and 34, [Rules of Procedure](#), UN Conference on the Arms Trade Treaty, doc. A/CONF.217/L.1 of 3 July 2012.

²³ Main Committee 1 addressed: the preamble and principles; goals and objectives; and criteria/parameters. Main Committee 2 covered: scope; implementation and an implementation support unit; and final clauses. Committee 1 was chaired by Ambassador Bouchaib Eloumni of Morocco and Committee 2 by Ambassador Paul van den Ijssel of the Netherlands.

3. The Title, Preamble, and Principles

A. The title of the draft Treaty

'The Arms Trade Treaty'

The proposed title of the draft Treaty directly reflected the title and the mandate of UN General Assembly Resolution 64/48 and would have clearly fulfilled the desire for a 'legally binding instrument'. No formal negotiations on the title took place during the Diplomatic Conference, even though it might be considered contentious in two respects. First, it referred to 'arms' in general rather than the narrower 'conventional arms',²⁴ which was the mandate of Resolution 64/48.²⁵ Second, it referred to 'trade' rather than the potentially broader term 'transfer'.²⁶ Trade is generally defined as 'the action of buying and selling goods and services',²⁷ whereas transfer would generally also include gifts, leases, and loans.²⁸

B. The preamble of the draft Treaty

The States Parties to this Treaty ... Have agreed as follows:

The preamble of an international treaty typically sets out the background and purpose of the treaty although it is not legally required to do so,²⁹ nor even that it include a preamble (beyond a statement that the states parties 'have agreed as follows').³⁰ The draft Treaty text of 26 July 2012 moved the section on principles from the body of the document, where they had been placed in an informal draft submitted to the Diplomatic Conference by its President on 24 July, to a form of preamble. This appears to have been done to reduce the risk that the principles might be applied as norms to the Treaty, either

expanding or restricting the legal force of its substantive provisions.

Whether entities other than states should be entitled to adhere to the Treaty remains an unresolved issue. The European Union (EU) and its member states proposed that regional economic integration organisations should be entitled to ratify it. This was opposed by China (among other states), in part because the EU imposes an arms embargo on China. The Economic Community of West African States (ECOWAS) has also shown an interest in adhering to the future treaty.

Guided by the Purposes and Principles of the Charter of the United Nations

The purposes and principles of the UN are respectively set out in Articles 1 and 2 of the UN Charter.³¹ (See Text Box 1.)

The UN Disarmament Commission's Guidelines on International Arms Transfers argue that limitations on arms transfers can be found (by implication) in the principles and purposes of the UN Charter.³²

Recalling that the Charter of the United Nations promotes the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources;

As noted above, one of the purposes of the UN is the establishment and maintenance of international peace and security.³³ Article 26, a provision that is often quoted but rarely applied, states:

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

²⁴ Conventional arms are generally understood to include all arms other than biological, chemical, and nuclear weapons. See, for example, US Department of Defense (DoD), *DOD Dictionary of Military Terms*, as amended through 31 October 2009, p. 122. The latest edition of the DoD Dictionary (as amended through 15 July 2012) no longer includes a definition of the term.

²⁵ UN General Assembly Resolution 64/48, esp. §§2, 3, 4.

²⁶ The many NGOs that spurred on the negotiating process focused on the humanitarian impacts of irresponsible transfers; 'trade' regulation could be seen to be more closely aligned with concepts of fair trade and the avoidance of tariffs.

²⁷ Oxford English Dictionary, 'trade', accessed 21 August 2012, definition 1.

²⁸ See, for example, S. Maslen, *Commentaries on Arms Control Treaties, Volume I: Anti-Personnel Mine Ban Convention*, Oxford University Press, Oxford, 2004, p. 128, §2.61.

²⁹ See, for example, A. Aust, *Modern Treaty Law and Practice*, Second Edn, Cambridge University Press, Cambridge, 2007, p. 425.

³⁰ The four 1949 Geneva Conventions, for example, do not include any other preambular language.

³¹ Signed on 26 June 1945 in San Francisco, at the conclusion of the UN Conference on International Organization, the UN Charter entered into force on 24 October 1945.

³² §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.

³³ UN Charter, Article 1(1).

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.

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.

Underlining the need to prevent, combat and eradicate the illicit trade of conventional arms and to prevent their diversion to the illicit market and for unauthorized end use;

As noted above, the term 'illicit' is not formally defined in the draft Arms Trade Treaty. In ordinary parlance, illicit means 'forbidden by law, rules, or custom'.³⁴ 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'.³⁵ Under this broad definition, illicit transfers would include those outlawed by

³⁴ Oxford English Dictionary, 'illicit', accessed 21 August 2012.

³⁵ §7. They were endorsed by the General Assembly in its Resolution 51/47B, adopted without a vote on 10 December 1996, §3.

customary international law, treaty law, and relevant national laws.

The 2001 Firearms Protocol defines both illicit manufacturing and illicit trafficking.³⁶ 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'.³⁷ 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'.³⁸ Thus, the Protocol distinguishes lawful or authorized (i.e. licit) transfers from ones that are unlawful or unauthorized (i.e. illicit).³⁹ It follows from this definition that 'unauthorized' transfers may not be 'illegal': in the absence of a system for licensing or authorizing transfers, for example, no legal basis exists for saying a transfer is illegal.

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

As noted above, the arms trade has a value of tens of billions of dollars annually, which explains the reference to 'economic and commercial rights' in the preambular paragraph. The reference to 'legitimate' political and security rights and interests of states presumably encompasses the interest of states in importing weapons for defence, law enforcement, and peacekeeping operations.

Reaffirming the sovereign right and responsibility of any State to regulate and control transfers of conventional arms that take place exclusively within its territory, pursuant to its own legal or constitutional systems;

This preambular paragraph reiterates that, where a transfer of conventional arms occurs within the same territory, it falls outside the purview of the Treaty.⁴⁰ As explained below, however, the term 'transfer', although not defined directly, includes export, import, brokering, transit, and transshipment. The reference to transfer 'exclusively within its territory' seems to imply that when a change of ownership is purely domestic, it does not constitute a transfer for the purposes of this Treaty.⁴¹ It would be preferable to amend this preambular paragraph by replacing the word 'transfers' with 'sale or movement' or even 'trade' (which would be consistent with the reference in preambular paragraph 13 to 'legitimate trade' for sporting purposes).

Recognizing that development, human rights and peace and security, which are three pillars of the United Nations, are interlinked and mutually reinforcing;

The sixth preambular paragraph refers to three 'pillars' of the UN: development, human rights, and peace and security. The term 'pillar' is not used in the UN Charter, although, in their statements to the UN General Assembly in December 2006, Secretaries-General Kofi Annan and Ban Ki-Moon both stressed the 'indissoluble links uniting security, development and human rights as the three pillars of the United Nations, without any one of which world peace will not be achieved'.⁴² Under the third preambular paragraph in General Assembly Resolution 64/48, states acknowledged that 'peace and security, development and human rights are the foundations for collective security'.

Recalling the United Nations Disarmament Commission guidelines on international arms transfers adopted by the General Assembly;

These guidelines on international arms transfers were an outcome of the UN Disarmament Commission's 1996 substantive session on 22 April–7 May 1996 and, as noted above, were formally endorsed by the General Assembly in Resolution 41/75B. According to the Guidelines:

³⁶ 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.

³⁷ 2001 Firearms Protocol, Article 3(d).

³⁸ *Ibid.*, Article 3(e).

³⁹ See, similarly, the 1997 Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials.

⁴⁰ It reflects the language in 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.

⁴¹ Compare Article 2, paragraph 8, of the 2008 Convention on Cluster Munitions: "'Transfer' involves, in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions...". See similarly Article 2, paragraph 4 of the 1997 Anti-Personnel Mine Ban Convention.

⁴² DPI, 'General Assembly Pays Tribute to Secretary-General Kofi Annan, Administers Oath of Office to Successor Ban Ki-Moon', UN doc. GA/10556, New York, 14 December 2006.

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.⁴³

The primary guidelines that states should ‘bear in mind’ in their efforts ‘to control their international arms transfers and to prevent, combat and eradicate illicit arms trafficking’, are as follows:

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.

22. International arms transfers should not be used as a means to interfere in the internal affairs of other States.⁴⁴

Noting the contribution made by the 2001 UN Programme of Action to preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects, as well as the 2001 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 2001 UN Programme of Action⁴⁵ was adopted in New York on 9–20 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. It is 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.⁴⁶

The 2001 Firearms Protocol entered into force on 3 June 2005.⁴⁷ 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 multiple 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’.⁴⁸ To date, the

⁴³ UN Guidelines on International Arms Transfers, §11.

⁴⁴ *Ibid.*, §§15–22.

⁴⁵ Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.

⁴⁶ Saferworld, ‘UN Programme of Action’, undated.

⁴⁷ As of 21 August 2012, there were 95 states parties to the Protocol. None of the five permanent members of the UN Security Council had ratified the Protocol and only China and the UK had signed it.

⁴⁸ Article 4.

Firearms Protocol is the only legally binding global instrument addressing the issue of small arms.⁴⁹

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

The supply of weapons illegally is a major concern. Individuals and groups (and, on occasion, states) will seek to procure weapons illegally if they do not believe they can buy them legally. Failure by governments to oversee weapons transfers (rendering the transfer ‘unregulated’) is considered an additional concern, because companies that manufacture arms are able in theory to sell their products to any company or state. This said, few major exporting states fail in practice to regulate to some degree weapons transfers by companies within their jurisdiction. Of greater concern are the transfers that governments formally authorize, notably to regimes that systematically or frequently violate fundamental human rights.

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

Norway sought on several occasions, without much success, to win support for a provision that would encourage states parties to an ATT to support the rehabilitation of victims of armed conflict or armed violence. This preambular paragraph reflects Norway’s concern for victims of conventional weapons, but is weak because it does not ask signatories to take any action to meet victims’ needs. Moreover, it is limited to armed conflict even though the humanitarian goal of the Treaty would clearly encompass all victims of armed violence.

Bearing in mind that women and children are particularly affected in situations of conflict and armed violence;

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,

and [recognized] the consequent impact this has on durable peace and reconciliation.⁵⁰

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.⁵¹

Children are both victims and perpetrators of armed violence. The lighter weight of modern small arms has meant that minors can be engaged as combatants by government armed forces and non-state armed groups, since they are able to carry and fire assault rifles like the AK-47. As a result, all children have become potential targets in situations of armed conflict.⁵²

Emphasizing that nothing in this Treaty prevents States from exercising their right to adopt additional and more rigorous measures consistent with the purpose of this Treaty;

Since it was understood that no adopted treaty would restrict arms transfers to the extent that some states want, this paragraph recognizes that, via national policies or laws, such states may wish to place additional restrictions on transfers of weapons. In this sense, the ATT was to be a ‘floor not a ceiling’ with respect to national policies and laws.

Some importing states argued for virtually an opposite approach. It was 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. Not surprisingly, this argument did not win favour with exporting countries, who wish to preserve their sovereign right to deny a transfer on whatever grounds they choose.

49 ODA, ‘[Firearms Protocol, Background](#)’, undated but accessed 21 August 2012.

50 UN Security Council Resolution 1325 (Women, Peace and Security), adopted 31 October 2000, Preambular Paragraph 4.

51 Rebecca Gerome, ‘[The Arms Trade Treaty: Why Women?](#)’, IANSA Women’s Network, undated but 2011.

52 See, e.g., ‘[UN Study on the Impact of Armed Conflict on Children](#)’, UN doc. A/51/306, 26 August 1996, §27.

Taking note of the legitimate trade and use of certain conventional arms, inter alia, for recreational, cultural, historical, and sporting activities and lawful ownership where such ownership and use are permitted and protected by law;

Canada, the USA, and several other states were concerned that the ATT would somehow impinge on weapon collecting (for display in museums, for example), or the procurement of weapons for civilian ownership and use, for instance in hunting, shooting or sports events.⁵³ A concern was also expressed about the impact of the Treaty on the possibility to cross borders with sporting weapons to participate in competitions abroad and then return home with those weapons.

Recognizing the active role that non-governmental organizations and civil society can play in furthering the object and purpose of this Treaty;

According to civil society, the idea of an ATT originated from Nobel Peace Laureates, supported by civil society organizations across the world.⁵⁴ Under a preambular paragraph in 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’.⁵⁵ Given the generally poor record of state-based treaty monitoring and compliance mechanisms, the role of civil society in monitoring and promoting the implementation of an ATT would clearly be significant.

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

One of the fears of developing states is that developed 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. Read more broadly, it can also be understood to say that transfers of technology or equipment, including

weapons, should not be hampered when they will be used to maintain peace, domestically or abroad.

C. Principles of the draft Treaty

Guided by the Purposes and Principles of the Charter of the United Nations, States Parties, in promoting the object and purpose of this Treaty and implementing its provisions, shall act in accordance with the following principles:

The inclusion of principles in the draft ATT was largely (albeit surprisingly) uncontentious. There is, however, no requirement that the body of an international treaty should contain ‘principles’. The draft ATT of 26 July 2012, in contrast to the President’s Paper of 24 July, included the principles with the preamble, making it clear that the body of the agreement — and therefore its substantive provisions — followed, but did not include the principles themselves.⁵⁶ They are therefore part of the context of the Treaty, which aid an understanding of its object and purpose, but do not create substantive obligations.

1. The inherent right of all States to individual or collective self-defence;

The ‘inherent’ right⁵⁷ of all states to individual or collective self-defence is one of two cornerstone justifications for the use of force under the law of nations.⁵⁸ 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 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.

⁵³ Rifles are used in the Winter Olympics, for instance, as part of cross-country skiing events.

⁵⁴ See, for example, Sarah Masters, ‘The Arms Trade Treaty: why women?’, *openDemocracy*, 19 May 2011.

⁵⁵ Ninth Preambular Paragraph.

⁵⁶ In the President’s draft of 24 July 2012, the principles were the first provisions of the treaty.

⁵⁷ The word ‘inherent’ implies a pre-existing right and one that is customary in nature. See, for example, International Court of Justice (ICJ), *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. USA)*, Judgment on the Merits, 27 June 1986, §176.

⁵⁸ For the lawful exercise of self-defence under international law, see, for example, A. 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.

Article 51 is relevant to the international arms trade because, in order to exercise its right of self-defence, a state may need to procure conventional weapons from other states or from companies outside its jurisdiction. Although no explicit statement to this effect is to be found anywhere in the draft Treaty, it is generally accepted that states are under no obligation to sell or otherwise transfer, but possess an unfettered right to seek to procure, unless the transfers in question are prohibited by international law, for example following a UN Security Council resolution adopted under Chapter VII of the UN Charter which prohibited such transfers.

2. The settlement of international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

The peaceful settlement of disputes is the corollary of the general prohibition on the use of force by states. Dispute resolution by means of armed violence is unlawful. Peaceful means include arbitration and judicial settlement, for example via recourse to the International Court of Justice.⁵⁹

3. To 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;

The prohibition on the threat or use of force against the territorial integrity or political independence of any state was included in Article 2, paragraph 4 of the UN Charter and now reflects customary law.⁶⁰

4. Non-intervention in matters which are essentially within the domestic jurisdiction of any State;

This principle was reflected 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.⁶¹

5. The duty to respect and ensure respect for international humanitarian law and to respect and ensure 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 Conventions 'in all circumstances'. With the exception of South Sudan (which only became a state in July 2011), every UN member state is party to the Geneva Conventions which are generally agreed to represent customary international law. The same language is included in 1977 Additional Protocol I, which has been adhered to by 172 states, though not in 1977 Additional Protocol II.⁶² 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.⁶³

The obligations to respect human rights are formulated variously in the relevant treaties. Human rights obligations under customary law are primarily applicable by states within their national territory,

⁵⁹ *Brierly's Law of Nations, op. cit.*, pp. 408–49.

⁶⁰ See *ibid.*, p. 451.

⁶¹ See further '[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', Chatham House.

⁶² International Committee of the Red Cross (ICRC), list of adherence believed correct as of 23 August 2012. Available at: <http://www.icrc.org/ihl.nsf>.

⁶³ ICRC, *Arms Transfer Decisions, Applying international humanitarian law criteria*, Geneva, May 2007, p. 3.

but some authorities and states consider that, in specific circumstances such as control over territory or individuals, they apply more widely.⁶⁴ It is increasingly common to analyse the human rights obligations of states in terms of three forms of duty: the duty to *respect* rights (i.e. 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 can be likened to the principle of non-refoulement, which prohibits states from returning individuals to a country where they risk being tortured.⁶⁵ In any event, as explained with regard to principle 6 below, states are prohibited under international law from assisting other states in violating international human rights law.

Under a preambular paragraph in General Assembly Resolution 64/48, states reaffirmed ‘respect for international law, including international human rights law and international humanitarian law’.⁶⁶

6. The responsibility of all States, in accordance with their respective international obligations, to effectively regulate and control international transfers of conventional arms, as well as the primary responsibility of all States in establishing and implementing their respective national export control systems;

This principle asserts that each state has a duty 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. It can be argued that states are bound to regulate arms transfers if they are to honour treaty prohibitions on the transfer of certain conventional weapons; the notion of ‘primary responsibility’ with respect to national

export control systems is unclear, but can be taken to mean that there is no ‘one-size-fits-all’ approach to national export control systems.

The notion of responsibility might be understood to reflect the international obligation of every state not to aid or assist another state to violate international law. The international law on this topic is set out by the International Law Commission (ILC) in its Articles on State Responsibility for Internationally Wrongful Acts (2001 Articles on State Responsibility). According to Article 16 of these Articles:

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

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

(b) the act would be internationally wrongful if committed by that State.

7. States Parties should respect the legitimate interests of States to acquire conventional weapons for legitimate self-defence and 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 legitimate self-defence and peacekeeping operations’ and to ‘produce, export, import and transfer conventional arms’. It is notable that the term ‘interest’ is used, rather than ‘right’. 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’.⁶⁷

⁶⁴ According to one recent Handbook from the School of the US Army, for example:

IHRL [international human rights law] established by treaty generally only binds the State in relation to persons within its territory and subject to its jurisdiction, and tends to be more aspirational. IHL based on CIL [customary international law] binds all States, in all circumstances, and is thus obligatory. For official U.S. personnel (i.e., ‘State actors’ in the language of IHRL) dealing with civilians outside the territory of the United States, it is CIL that establishes the human rights considered fundamental, and therefore obligatory.

Maj. Sean Condon (ed.), *Operational Law Handbook*, International and Operational Law Department, The Judge Advocate General’s Legal Center and School and of the US Army, Charlottesville, Virginia, 2011, p. 43.

⁶⁵ See ‘Arms’, in Susan Marks and Andrew Clapham, *International Human Rights Lexicon*, Oxford University Press, Oxford, 2005, p. 13.

⁶⁶ Seventh Preambular Paragraph. In September 2012, the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law adopted a Declaration that included the following statement:

We emphasize the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind.

‘Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels’, 19 September 2012, §6.

⁶⁷ Fourth Preambular Paragraph.

The inclusion of the words ‘export’ and ‘import’ would seem superfluous given the reference to ‘transfer’. The reference to ‘legitimate’ self-defence reflects customary law requirements for determining the lawfulness of self-defence. In particular, states are required to ensure that their actions taken in self-defence are necessary and proportionate.⁶⁸

8. The necessity to implement this Treaty consistently and effectively and in a universal, objective and non-discriminatory manner.

This principle can be seen as a — presumably doomed — attempt to make the arms trade an

apolitical issue. It is unreasonable to expect that states will not take political factors into account when they take decisions on arms transfers. States remain generally free to choose to whom they sell or transfer arms, and political allegiances may be expected to remain factors in their decision-making. Nonetheless, the need for objectivity (or consistency of conduct) is a justified and 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.

⁶⁸ See A. Cassese, *International Law*, Second Edn, *op. cit.*, p. 355; and *Brierly's Law of Nations*, pp. 480–84.

The Core Provisions

Article 1. Goals and objectives

The goals and objectives of the Treaty are:

- a. For States Parties to establish the highest possible common standards for regulating or improving the regulation of the international trade in conventional arms; and
 - b. To prevent, combat and eradicate the illicit trade in conventional arms and their diversion to the illicit market or for unauthorized end use;
- in order to:
- c. contribute to international and regional peace, security and stability;
 - d. Prevent the international trade in conventional arms from contributing to human suffering; and
 - e. Promote cooperation, transparency and responsibility of States Parties in the trade in conventional arms, thus building confidence among States Parties.

As with principles, treaties are not required to contain goals and objectives. Indeed, in most cases these may be discerned from a treaty's title and its preamble. The normative effect of including goals and objectives is also unclear, except that they potentially assist interpretation of other articles (notably, in the ATT's case, Article 5, paragraph 1). Nonetheless, the intent of an ATT was regularly debated during both the preparatory committees and the ATT Conference, without achieving consensus. As noted above, some states wanted the Treaty to cover 'illicit' transfers only, whereas the majority sought to regulate all transfers, and in effect restrict transfers to states that were responsible and would demonstrably use arms in a legitimate manner.

Much of the text of Article 1 was derived from the General Assembly Resolution that mandated the

elaboration of an ATT. Thus, under a preambular paragraph in Resolution 64/48, states 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.⁶⁹

The final preambular paragraph of the Resolution declared that states were '[m]indful of the need to prevent the diversion of conventional arms, including small arms and light weapons, from the legal to the illicit market'.⁷⁰

On one interpretation, the structure of the provision might be construed to imply that sub-paragraphs (a) and (b) are the goals of the ATT, and sub-paragraphs (c), (d), and (e) its objectives. If such is the case, it probably makes more sense to do the reverse. The development of standards and the prevention of illicit trade are objectives that aim to contribute to the goals of: international and regional peace, security, and stability; preventing human suffering; and promoting cooperation, transparency, responsibility and trust in and between states. Alternatively, each paragraph might be understood as both a goal and an objective.

The text refers to trade not transfer, in accordance with the title of the Treaty, but without defining the term. It also refers to 'unauthorized end use' without specifying how (and which) states may lawfully determine what is and is not authorised. Following the presentation of the draft ATT to participating states, an informal group was constituted to discuss whether the phrase should refer to unauthorized end 'use' or unauthorized end 'user'. The former would presumably prevent unlawful use of arms by recipients; the latter would potentially cover, *inter alia*, the provision of arms to armed non-state actors.⁷¹

⁶⁹ Twelfth Preambular Paragraph.

⁷⁰ Sixteenth Preambular Paragraph.

⁷¹ The USA was also believed to fear that the term 'unauthorized end user' might imply that a gun 'user' would require to be authorized.

Article 2. Scope

A. Covered Items

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

- 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.

2. Each State Party shall establish or update, as appropriate, and maintain a national control list that shall include the items that fall within paragraph 1 of this article, as defined on a national basis and, at a minimum, based on relevant United Nations instruments. Each State Party shall publish its control list to the extent permitted by national law.

The scope of the future treaty was one of the major areas of difference among states participating in the negotiations. The General Assembly Resolution establishing the negotiations had called for the treaty to cover ‘the transfer of conventional arms’.⁷² This broad phrase would cover all weapons other than biological, chemical, and nuclear weapons, in line with states’ general understanding of the term.⁷³ Its scope under the draft ATT is significantly narrower than that. It does not include, *inter alia*, the following:

- military vehicles (unless they are both armoured and designated for combat);
- military training aircraft;
- military transport aircraft;
- munitions, such as mines, that do not serve as ammunition for the eight categories set out in Article 2, sub-paragraph A(1);
- so-called ‘less-lethal’ weapons, such as tasers, millimetre-wave weapons, dazzling or even blinding lasers; and (by virtue of the mandated limitation to conventional weapons)
- non-conventional weapons commonly used in riot control, such as tear gas, or other chemical agents.

The draft ATT does cover unmanned aerial vehicles (more commonly known as drones) and submarines (which are a form of warship). Under Article 6, export of ammunition (not defined) and parts and components is also brought within the ambit of the Treaty. The ammunition issue was one of the critical issues during negotiations, and it is likely to be so again in the next session.

Given that these are the exact categories covered by the UN Register of Conventional Arms, it could be argued that their definition should be guided — or even constrained — by the definitions set out in the Register (see Text Box 2). However, though it is likely that states parties to an ATT will be guided by these definitions in practice, the draft ATT does not explicitly say that they are authoritative. This is an area of great concern as the scope of the Treaty may be significantly reduced by the discretion apparently accorded to states parties in their implementation of Article 2.

To avoid future doubt, if it is not feasible to define the categories of weapons covered by the ATT, a Meeting of States Parties to the eventual ATT could usefully help to elaborate more sophisticated generic definitions.

B. Covered Activities

3. This Treaty shall apply to those activities of the international trade in conventional arms set out in articles 5, 6, 7, 8 and 9, hereafter referred to as “transfer,” for the conventional arms covered under the scope of this Treaty.

4. This Treaty shall not apply to the international movement of conventional arms by a State Party or its agents for its armed forces or law enforcement authorities operating outside its national territories, provided the conventional arms remain under the State Party’s ownership.

There is a fear that use of the term ‘trade’ in an ATT could exclude gifts, loans, or leases of weapons, thereby creating a huge potential loophole under the future treaty that those not acting in good faith could exploit. Under sub-paragraph B(3), and by reference to Articles 6, 7, 8, and 9, the ATT covers export, import, brokering, transit, and transshipment under the generic term of transfer.⁷⁴ Nowhere is it specified that financial consideration must be involved, and the general understanding of the term transfer under disarmament treaties is broad, as noted above.

⁷² UN General Assembly Resolution 64/48, §4.

⁷³ Regrettably, the draft ATT did not contain a simple definition of ‘conventional arms’.

⁷⁴ The reference to Article 5 in Paragraph B(3) seems redundant as it does not describe activities.

Box 2. Definitions of weapons categories under the UN Register of Conventional Arms

Battle tanks. 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 weight, with a high muzzle velocity direct fire main gun of at least 75 millimetres calibre.

Armoured combat vehicles. 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. 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. 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. The term 'combat aircraft' does not include primary trainer aircraft, unless designed, equipped or modified as described above.

Attack helicopters. 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.

Warships. 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.

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

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

Small arms. Revolvers and self-loading pistols; rifles and carbines, sub-machine guns; assault rifles; and light machine guns.

Light weapons. Heavy machine guns; hand-held underbarrel and mounted grenade launchers; portable anti-tank guns; recoilless rifles, portable anti-tank missile launchers and rocket systems; and mortars of calibres less than 75mm.

A broad interpretation of transfer for the purposes of the draft ATT is buttressed by sub-paragraph B(4), which specifies that the Treaty does not apply to the international movement of conventional arms by a state party or its agents for its armed forces or law enforcement authorities operating outside its national territory, 'provided the conventional arms remain under the State Party's ownership'. Many of these 'movements', for instance in connection with peacekeeping operations, would be without

a direct financial component; yet it was deemed necessary to include such an exclusion in the draft treaty text. It is therefore our understanding that Article 4 implies that transfer covers 'international movement' generally, and is interpreted broadly.

More specifically, export covers sending weapons abroad (whether or not in exchange for money) whereas import covers receiving weapons from abroad (again, whether or not in exchange for

money). Brokering, which is not defined under international law,⁷⁵ is generally understood to be the negotiation of an arms deal by an agent or intermediary — an activity that would typically involve remuneration.⁷⁶ Arms brokers may be natural persons (i.e. one or more individuals) or legal persons (i.e. one or more companies). Transit covers the temporary passage of arms across the territory of a state en route to another destination. Transshipment is the transfer of a shipment from one carrier, or more commonly from one vessel, to another when in transit.⁷⁷

Article 3. Prohibited transfers

Certain transfers are prohibited under the draft ATT because they would violate a state party's existing international obligations. In that respect, this provision would not add substantively to existing international law, although it would help to clarify and remind a state of its existing obligations. Furthermore, a breach of these obligations additionally becomes a breach of the Treaty.

1. A State Party shall not authorize any transfer of conventional arms 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.....' Thus, an arms embargo is a complete or partial interruption of economic relations. Since each UN member state is already constrained to respect a Security Council embargo, this provision reiterates an existing obligation.

2. A State Party shall not authorize any transfer of conventional arms within the scope of this Treaty if the transfer would violate its relevant international obligations, under international agreements to which it is a Party, in particular those relating to the international transfer of, or illicit trafficking in, conventional arms.

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 Arms Trade Treaty. International humanitarian law and disarmament treaties have been adopted that prohibit the transfer of anti-personnel mines,⁷⁸ cluster munitions,⁷⁹ anti-vehicle mines (insofar as they are 'designed or of a nature to cause superfluous injury or unnecessary suffering'),⁸⁰ and blinding laser weapons.⁸¹ The 2001 Firearms Protocol does not clearly prohibit trafficking, but requires states parties to criminalize

⁷⁵ 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 state:

Brokering

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.

'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.

⁷⁶ 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.

⁷⁷ See, for example: <http://www.businessdictionary.com/definition/transshipment.html#ixzz24eUgyCac>.

⁷⁸ See Article 1, 1997 Anti-Personnel Mine Ban Convention. Under Article 3 of this treaty, transfer of anti-personnel mines for the purpose of destruction is permitted. See also Article 8(1), 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).

⁷⁹ Article 1, 2008 Convention on Cluster Munitions. Under Article 3 of this treaty, transfer of cluster munitions for the purpose of destruction is permitted.

⁸⁰ CCW Amended Protocol II on mines, booby-traps, and other devices, adopted on 3 May 1996.

⁸¹ CCW Protocol on Blinding Laser Weapons (Protocol IV), adopted on 13 October 1995.

illicit trafficking in firearms, their parts and components, and ammunition.⁸²

3. A State Party shall not authorize a transfer of conventional arms within the scope of this Treaty for the purpose of facilitating the commission of genocide, crimes against humanity, war crimes constituting grave breaches of the Geneva Conventions of 1949, or serious violations of Common Article 3 of the Geneva Conventions of 1949.

This provision was reportedly put forward by the USA. It is more narrowly drafted than extant customary law in a number of ways. First, it only covers situations where the *purpose* of the transfer is to facilitate commission of genocide, crimes against humanity, or war crimes. As Mexico stated during the ATT Conference, no government will frame a transfer in those terms, so, as drafted, the provision could be considered largely without practical effect. It may have been taken from Article 25, paragraph 3(c) of the 1998 Rome Statute of the International Criminal Court (ICC), which provides that 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court' if that person:

For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

The requirement of intent is, however, only applicable for one sub-paragraph of the aiding and abetting provision in the ICC and does not represent the only *mens rea* test for that Court, nor does it reflect customary law according to which the standard is one of knowledge.⁸³ As the Special Court for Sierra Leone has observed: 'Although the lending of practical assistance, encouragement, or moral support must itself be intentional, the intent to commit the crime or underlying offence is not required'.⁸⁴ The standard for individual criminal responsibility under the ICC Article 25(3)(c) is higher than the standard for state complicity in genocide, or indeed for inter-state complicity in any violation of international law.⁸⁵ Thus, for example, in the case brought by Bosnia and Herzegovina against Serbia and Montenegro, the International Court of

Justice (ICJ) set out a threshold to find complicity in genocide by a state:

There cannot be a finding of complicity against a State unless at the least its organs were aware that genocide was about to be committed or was under way, and if the aid and assistance supplied, from the moment they became so aware onwards, to the perpetrators of the criminal acts or to those who were on the point of committing them, enabled or facilitated the commission of the acts. In other words, an accomplice must have given support in perpetrating the genocide with full knowledge of the facts.⁸⁶

In this regard, Article 41, paragraph 2 of the ILC's 2001 Articles on State Responsibility prohibits states from rendering aid or assistance in maintaining situations created by a serious breach of a peremptory norm of international law. The concept of aid or assistance presupposes that a state has 'knowledge of the circumstances of the internationally wrongful act'. There is, however, 'no need to mention such a requirement in article 41, paragraph 2, as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State'.⁸⁷

Second, limiting war crimes to grave breaches of the 1949 Geneva Conventions or serious violations of Common Article 3 to those Conventions would exclude most violations that occur during the conduct of hostilities, such as targeting the civilian population.

Switzerland put forward drafting suggestions in the plenary to strengthen the provision and bring it into line with states existing obligations under customary international law:

A State Party shall not authorize a transfer of conventional arms within the scope of this Treaty **where such acts would amount to aid or assistance** in the commission of genocide, crimes against humanity, war crimes **including those** constituting grave breaches of the Geneva Conventions of 1949, or serious violations of Common Article 3 of the Geneva Conventions of 1949.

⁸² Article 5(1)(b), 2001 Firearms Protocol.

⁸³ See, e.g., in this regard, Amb. David Scheffer, *Amicus Curiae* brief for United States Supreme Court, *Kiobel v. Royal Dutch Petroleum*, 13 June 2012, pp. 32–7.

⁸⁴ Special Court for Sierra Leone, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, 18 May 2012, §487.

⁸⁵ See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 16, UN doc. A/56/10.

⁸⁶ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, §432; see also §§ 420–1.

⁸⁷ ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 41, commentary, 2001, UN doc. A/56/10 at p. 115.

This language would cover all war crimes, both in international and non-international armed conflict. Most importantly, it would cover the effects of indiscriminate or disproportionate attacks on the civilian population.

Article 4. National Assessment

This provision forms the centrepiece of the Treaty, despite its inopportune rephrasing as ‘national assessment’. Termed ‘criteria’ or ‘parameters’ in the earlier draft texts, it sets out the conditions under which a state party should permit or refuse to permit an export of conventional arms. Significantly, it does not currently cross-reference or link to other transactions covered by the Treaty: import, brokering, transit or transshipment.

1. In considering whether to authorize an export of conventional arms within the scope of this Treaty, each State Party shall assess whether the proposed export would contribute to or undermine peace and security.

Each state party is required to determine whether a proposed export of conventional arms would contribute to, or undermine, peace and security. This provision was and remains extremely contentious. Read in concert with the remainder of Article 4, 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 positive⁸⁸ – whether or not its determination is objective or reasonable. This exception to the requirement for denial is not currently limited to threats to international peace and security.

2. Prior to authorization and pursuant to its national control system, the State Party shall assess whether the proposed export of conventional arms could:

- a. be used to commit or facilitate a serious violation of international humanitarian law;
- b. be used to commit or facilitate a serious violation of international human rights law; or
- c. be used to commit or facilitate an act constituting an offense under international conventions and protocols relating to

terrorism to which the transferring State is a Party.

A national assessment must also be conducted to determine whether the arms proposed for export (in other words, not transfer) could be used in the commission of a serious violation (singular) of either international humanitarian law or international human rights law or to commit an act of terrorism. This formulation is strange in that any weapon *could* be used in violation of international law. A better formulation would require states to assess the likelihood of a weapon being so used, which would also link more logically with paragraph 5 of this provision.

In addition, to avoid doubt, it would be better to say that Article 4 would enter into play only if a transfer were not prohibited under Article 3. There is an evident overlap between Article 3, paragraph 3, and Article 4, paragraph 2. It should not be possible to authorize a transfer that fails the criteria set out in the sub-paragraphs of Article 3.

What is a serious violation of international humanitarian law?

The ICRC has asserted that serious violations of IHL and war crimes are one and the same:

‘Serious violations of international humanitarian law’ are ‘war crimes,’ and the two terms are interchangeable. The majority of these offences involve death, injury, destruction or unlawful taking of property. They include but are not limited to ‘grave breaches’ as specified under the four Geneva Conventions of 1949 and their Additional Protocol I of 1977. But the grave breaches specified in these instruments only arise in international armed conflicts. War crimes also include the offences defined in article 8 of the Rome Statute of the International Criminal Court, which can occur in both international and non-international armed conflicts.⁸⁹

According to the same note by the ICRC additional war crimes under customary law do not appear in the Rome Statute.⁹⁰ Serious violations of international humanitarian law amounting to war crimes, in international armed conflicts and in armed conflicts of a non-international character,

⁸⁸ The President’s draft treaty text of 24 July only referred to consideration of whether the proposed export would *contribute* to peace and security. A number of states, including Nigeria and Uruguay, had suggested changing ‘contribute to peace and security’ to ‘be used to undermine peace and security’.

⁸⁹ [Statement of the ICRC to the United Nations Diplomatic Conference on the Arms Trade Treaty](#), New York, 12 July 2012.

⁹⁰ See, for example, ICRC, ‘[What are “serious violations of international humanitarian law”?](#)’, Explanatory Note, New York, July 2012; and J.-M. Henckaerts, and L. Doswald-Beck, *Customary International Humanitarian Law – Volume 1: Rules*, Oxford University Press, Oxford, 2005.

would include deliberate attacks on the civilian population, indiscriminate attacks, attacks that caused harm to civilians or civilian objects that was disproportionate in relation to expected military advantage, and violence against detainees (whether they are civilians or captured combatants).

What is a serious violation of international human rights law?

There is no settled agreement on exactly what constitutes a ‘serious violation’ of international human rights law. The content of ‘serious violation’ might be determined in terms of the violated right or the nature of the violation, or both. What is probably undisputed is that acts that violate human rights that are *jus cogens* (peremptory norms of international law), such as the rights to freedom from arbitrary deprivation of life, torture, slavery, or enforced disappearances, constitute serious violations of international human rights law. However, the term can probably be applied to violations of all ‘fundamental’ human rights, such as the right to peaceful assembly, the rights to liberty and security, and arguably also the rights to education and health. With respect to human rights that are not generally considered ‘fundamental’, violations might have to be gross to be serious.

What terrorist offences are covered?

Sub-paragraph (c) covers acts, by means of a conventional weapon provided by the exporting state, which would constitute an offence under a treaty relating to terrorism to which the *transferring* state is party. Of particular importance in this regard would be the 1997 Terrorist Bombings Convention.⁹¹ Under Article 2, paragraph 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
- (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, paragraph 2, of the Convention:

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.

3. In making the assessment, the exporting State Party shall apply the criteria set out in paragraph 2 of this article consistently, and in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State.

Again, this provision seeks to remove the element of politics from the ‘risk’ assessment. It was included in response to concerns that the notion of human rights would be used in a selective way. The exporting state is required to take into account information provided by the importing state.

4. In assessing the criteria set out in paragraph 2 of this article, the exporting State Party may also take into consideration the establishment of risk mitigation measures, including confidence-building measures and jointly developed programmes by the exporting and importing States.

According to this provision, the exporting state party *may* take into account ‘risk mitigation measures’ that reduce the likelihood that transferred weapons will be used in a manner that would violate international law. Such measures might set conditions on future military (or economic) cooperation, or include diplomatic assurances, training, and the like.

5. If, after conducting the assessment called for in paragraph 1 and 2 of this article, and after considering the mitigation measures provided for in paragraph 4 of this article, the State Party finds that there is an overriding risk of any of the consequences under paragraph 2 of this article, the State Party shall not authorize the export.

If an exporting state party determines that there is an ‘overriding risk’ that weapons may be used to commit or facilitate a serious violation of international humanitarian or human rights law, or to commit or facilitate an act of terrorism in accordance with paragraph 2(c), it must not

⁹¹ International Convention for the Suppression of Terrorist Bombings (1997). Other relevant treaties would include the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); the International Convention against the Taking of Hostages, (1979); and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).

authorize the proposed export. Based on the text of paragraph 5, the term ‘overriding’ might imply that the risks in paragraph 2 are to be compared with the potential impact of the transfer on peace and security.⁹²

On one view, this provision is balanced because it establishes a reasonably high but not impossible threshold for authorising a proposed export. It means that where, for example, a government is fighting against a widespread terrorist threat, but its counterterrorism efforts are not unblemished from a human rights perspective, there may be grounds for authorizing the transfer to that government. Similarly, only in exceptional circumstances will a transfer to an armed non-state actor (ANSA), such as a rebel group, be permissible under an ATT, but such circumstances might exist, for example where the ANSA is fighting on behalf of people against whom the state authorities are committing crimes against humanity or even genocide, even though some members of the ANSA are likely to engage in conduct that is unlawful under applicable international humanitarian and human rights law.

However, this reading of the provision would create a very significant loophole in the Treaty. The formulation ‘overriding risk’ implies that an exporting state will ask whether the risk that the transferred arms could or will be used to violate human rights overrides or outweighs other considerations, including the recipient state’s legitimate need for the arms, applying some form of hierarchy or prioritisation. In the earlier President’s paper, the term ‘substantial risk’ was used: that threshold required exporting states to ask ‘how likely is it that the arms will be used to commit or facilitate a human rights violation?’ It focused on the magnitude of the risk. The margin of discretion accorded by the new wording is such that an exporting state could almost always find a reason to authorize a transfer — and would probably refuse to disclose the reasons for doing so, based on ‘overriding’ national security considerations. Such a level of discretion would drive a coach and horses through one of the aims of an ATT, which is to prevent the transfer of arms where there is a real risk that they would contribute to human suffering.

An alternative reading would be that the term ‘overriding’ simply refers to the level of risk of adverse consequences. To remove ambiguity, however, it would be preferable to replace ‘overriding’ with ‘substantial’ or ‘clear’,⁹³ or, if it

is deemed essential to set a very high threshold, ‘overwhelming’.

6. Each State Party, when considering a proposed export of conventional arms under the scope of this Treaty, shall consider taking feasible measures, including joint actions with other States involved in the transfer, to avoid the arms:

- a. being diverted to the illicit market or for unauthorized end use;
- b. being used to commit or facilitate gender-based violence or violence against children;
- c. being used for transnational organized crime;
- d. becoming subject to corrupt practices; or
- e. adversely impacting the development of the importing State.

Paragraph 6 obliges each state party to *consider* (but do no more than consider) taking ‘feasible’ measures to prevent the proposed export of arms from producing outcomes (a) to (e). However, states are not under any obligation to assess the risk of such outcomes; the text does not define or identify what ‘measures’ states should take to avoid diversion or misuse; and the addition of ‘feasible’ further weakens their responsibility. Moreover, the effect of including subparagraph b in Article 4, paragraph 6, could arguably be worse than not mentioning the criterion at all, because it could imply that a state is not bound to deny a transfer even when an overriding risk exists that the arms in question would be used to commit gender-based violence or violence against children (under paragraphs 2 and 5 of Article 4).

Article 5. General Implementation

This provision addresses the ‘general implementation’ of the Treaty. It would benefit from serious revision because it contains duplication, at least one potentially huge loophole, and unnecessary ambiguities.

1. Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, in accordance with the goals and objectives of this Treaty.

⁹² Or potentially other factor(s); the link to paragraph 1 is implicit, not explicit.

⁹³ The EU Common Position uses the words ‘clear risk’ that the arms ‘might be used’ to commit serious violations of international humanitarian law (see Criterion 2). The Wassenaar Best Practice Guidelines on SALW exports use the same language (‘clear risk’).

The words ‘objective and non-discriminatory’ appear here for the third time in the draft ATT.⁹⁴ This provision reiterates the call that states parties should avoid politics in their arms transfer decisions, and it remains unclear what effect such a provision would have in practice.

2. The implementation of this Treaty shall not prejudice obligations undertaken with regard to other instruments. This Treaty shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements concluded by States Parties to this Treaty.

The first sentence of this provision is potentially the greatest loophole in the entire treaty. It appears to allow a state party to balance, prioritise, or contract out of its obligations, and to decide, for example, that a state-to-state contract to sell or otherwise transfer conventional arms will override the obligations in Article 4 and potentially even Article 3 of the draft ATT. In response to serious concern expressed by Switzerland and others in the plenary, India proposed to delete the first sentence of this provision if the text of Article 6, paragraph 3, was also deleted.

The second sentence of paragraph 2 has also aroused controversy. The provision states that the ATT ‘shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements concluded by States Parties to this Treaty’. This could be construed to mean that a state party to the ATT may not void a contract with another state party on the grounds that a proposed export of conventional arms would violate its obligations under the ATT.⁹⁵ It can of course suspend or terminate any contract, but may suffer financial consequences unless it can claim sovereign immunity. This is therefore primarily a civil litigation issue relating to financial penalties, not a major loophole in the ATT as some have feared. Nonetheless, any state that adheres to a future ATT would be wise to include the substantive criteria set out in Article 3 and 4 in each of its arms transfer contracts. For the avoidance of any doubt, the deletion of all of paragraph 2 of Article 5 would be preferable.

3. Each State Party shall take all appropriate legislative and administrative 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 international transfer of conventional arms.

Notwithstanding the awkward drafting of this provision, it is essential to require each state party to take ‘all appropriate legislative and administrative measures necessary to implement the provisions’ of the ATT. However, this provision clearly overlaps with Article 11 and the precise relationship between the two provisions is not immediately obvious. The inclusion of the word ‘all’ is positive, although its juxtaposition to the word ‘appropriate’ is unfortunate. (Who determines what is appropriate – the state party alone?) A better, and simpler, formulation of the first part of the sentence might be:

Each State Party shall take all necessary legislative, administrative, and other measures to implement this Treaty, including the imposition of penal sanctions for violations of Articles 3 and 4.

The second part of the sentence is also poorly drafted, although the call for a national control system is again important. A better and simpler formulation might be:

... and shall establish an effective and transparent national control system, including by designating or establishing a competent national authority, to regulate the transfer of conventional arms.

4. Each State Party shall designate one or more national points of contact to exchange information on matters related to the implementation of this Treaty. A State Party shall notify the secretariat, established under article 12, of its national point(s) of contact and keep the information updated.

The obligation to designate a national point of contact for treaty implementation is welcome.

5. States Parties involved in an international transfer of conventional arms shall, in a manner consistent with this Treaty, take appropriate measures to prevent diversion to the illicit market or for unauthorized end use.

Paragraph 5 of Article 5 should be compared with paragraph 6 of Article 4. They do not appear to be fully consistent with each other. In Article 4, states parties are required only to ‘consider taking feasible measures’ to ensure that arms they propose to transfer are not diverted to the illicit market or for unauthorized end use. Here, states parties are required to ‘take appropriate measures’ to achieve the same ends. A requirement to take ‘appropriate’ measures is stronger than a requirement to

⁹⁴ See Principle 8 and Article 4(3).

⁹⁵ Of course, applicable *national* law, or the actual contractual provisions, could contain valid grounds for voiding contractual obligations under defence cooperation agreements.

'consider' taking 'feasible' measures. Stating that measures should be taken 'in a manner consistent with this Treaty' does not clarify the confusion.

6. If a diversion is detected, the State or States Parties that made the detection may notify the State or States Parties that could be affected by such diversion, to the extent permitted in their national laws, in particular those States Parties that are involved in the transfer or may be affected, without delay.

When diversion occurs, paragraph 6 allows a state party to inform another affected state party or states parties, though it does not oblige it to do so. It would be preferable to replace 'may' with 'shall' or 'should' and to clarify that the provision applies also to states that are not party to the Treaty.

Article 6. Export

To clarify which prohibitions or obligations will apply to specific aspects of transfer, Article 6 addresses export. Although the term is not defined, under international law 'export' is generally understood to mean the transfer of goods or services (in this case, the physical movement of arms) from the territory of one state to the territory of another, regardless of any financial consideration. It therefore includes gifts, leases, and loans, as well as sales. There is no firm evidence (notwithstanding serious doubts expressed by some civil society organisations) that 'export' has been given a narrower meaning in the draft ATT.

1. Each exporting State Party shall conduct national assessments, as detailed in paragraphs 1, 2, 3, 4, and 5 of article 4 and taking into account the considerations as detailed in paragraph 6 of article 4, whether to authorize the export of conventional arms under the scope of this Treaty under its jurisdiction. Each State Party shall apply articles 3 and 4, taking into account all relevant information.

This provision appears to duplicate the provisions of Articles 3 and 4. It is, however, narrower than Article 3, which uses the word 'transfer' and not merely 'export' as in Article 4. It also refers to assessments in paragraph 5 of Article 4 when in fact this provision deals with authorization of transfer. It does, however, require that an assessment of the risk set out in paragraph 6 of Article 4 be conducted, thereby adding a valuable substantive obligation.

2. Each State Party shall take measures to ensure all authorizations for the export of conventional arms under the scope of this Treaty are detailed and issued prior to the export. Appropriate information

about the export in question shall, upon request, be made available to the importing, transit and transshipment State Parties, in accordance with national laws.

The first sentence of paragraph 2 is potentially dangerous because it implies that a state party only has to 'take measures to ensure' rather than 'ensure' that necessary authorizations are issued prior to export. The deletion of the words 'take measures to' is recommended. The provision then obliges states to make 'appropriate information' available 'to the importing, transit and transshipment State [sic] Parties'. Again, it is unclear what 'appropriate information' implies or who decides what is appropriate. The term 'in accordance with national laws' is potentially ambiguous, but should not be taken to mean that national laws would override the obligation; it could limit the content of the information provided. In addition, the obligation to disclose information is imposed on states parties, rather than all states.

3. If, after an authorization has been granted, a State Party becomes aware of new relevant information that causes it to reassess that there is an overriding risk of any of the consequences of paragraphs 1, 2, 3, 4, and 5 of article 4, the State Party may suspend or revoke the authorization.

When the conditions described arise, states are under no obligation to suspend or revoke an authorization; they may do so. As noted above, India proposed to delete both this provision and the first sentence of Article 5, paragraph 2. Article 6, paragraph 3 is also problematic because it implies that states are not bound to suspend a transfer that would facilitate the acts described in Article 4, paragraph 6 (including gender-based violence, violence against children or transnational organised crime).

4. Each State Party shall establish and maintain a national control system to regulate the export of ammunition for conventional arms under the scope of this Treaty, and shall apply article 3, and paragraphs 1, 2, 3, 4, and 5 of article 4 prior to authorizing any export of ammunition.

The inclusion of ammunition in the Arms Trade Treaty was a key demand of many, particularly African, states. This provision applies the Treaty's prohibitions and criteria to ammunition, including the obligation to conduct an assessment of the risks set out in paragraph 2 of Article 4. At the same time, ammunition is not defined. It would be better to include ammunition (and munitions) in Article 2. Furthermore, as currently drafted, paragraph 3 of Article 6 would also not apply to ammunition.

5. Each State Party shall establish and maintain a national control system to regulate the export of parts and components, to the extent necessary, for the conventional arms under the scope of this Treaty, and apply article 3 and paragraphs 1, 2, 3, 4, and 5 of article 4 prior to authorizing any export of those parts and components.

This provision extends the treaty's obligations in Articles 3 and 4 to parts and components of conventional arms covered by the Treaty. The inclusion of 'to the extent necessary' may temper the extent of the obligation. Furthermore, as currently drafted, paragraph 3 of Article 6 would not apply to parts and components.

Article 7. Import

Article 7 is potentially a useful counterpart to the obligations imposed on exporting or transferring states. Although some of the text is unnecessarily weak, it helpfully recognizes that importing states have obligations with respect to the arms trade, and in particular have a duty to prevent diversion of arms' imports to unlawful uses or users.

1. Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, in accordance with its national laws, to the exporting State Party to assist the exporting State Party in its national assessment.

Paragraph 1 is a corollary to Article 4, especially paragraph 3, which requires the exporting state to take into account information provided by the importing state.

2. Each importing State Party shall put in place adequate measures that will allow them to regulate, where necessary, imports of conventional arms under the scope of this Treaty. Each importing State Party shall also adopt appropriate measures to prevent the diversion of imported conventional arms under the scope of this Treaty to the illicit market or for unauthorized end use.

Paragraph 2 sets out two main obligations. The first is that importing as well as exporting states must put in place adequate measures (but which are not defined) that will allow them to regulate imports of conventional arms under the scope of the Treaty. The second is that each importing state party must adopt 'appropriate measures to prevent diversion ... to the illicit market or for unauthorized end use' of imported conventional arms covered by the ATT. Although the word 'appropriate' is weaker than 'necessary', this is a substantive obligation.

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

Paragraph 3 allows each importing state to 'request information' from an exporting state party concerning pending proposed transfers. Since the exporting state is not obliged to provide the information requested, however, it is hard to see what purpose this provision serves other than to restate the obvious. Even without such a provision, a state can always request information from another state.

A potential obligation that is missing in the draft text is the obligation on importing states to notify the exporting state if they re-export or retransfer the arms they have imported. Such a provision exists in the Programme of Action on Small Arms, which stipulates that participating states undertake:

To make every effort, in accordance with national laws and practices, without prejudice to the right of States to re-export small arms and light weapons that they have previously imported, to notify the original exporting State in accordance with their bilateral agreements before the retransfer of those weapons.⁹⁶

Article 8. Brokering

Each State Party shall take the appropriate measures, within its national laws, to regulate brokering taking place under its jurisdiction for conventional arms under the scope of this Treaty. Such controls may require brokers to register or obtain written authorization before engaging in brokering transactions.

This weak provision only requires states parties to take 'the appropriate measures, within its national laws, to regulate brokering' that occurs within its jurisdiction. An example of such a measure (now called a control) that states may (but are not required to) adopt is the imposition on brokers of an obligation to register or obtain written authorization prior to engaging in brokering. This is hardly a far-reaching duty. Nothing in the text prevents brokers from circumventing the obligations set out in the Treaty, nor is there any obligation to adopt legislation to cover the acts of nationals abroad. According to two experts:

⁹⁶ Paragraph 13, 2001 Programme of Action on Small Arms.

The way unscrupulous arms brokers contribute to the proliferation of weapons around the world and the threat they therefore pose to peace, security and development have clearly been demonstrated in a series of reports by the United Nations and nongovernmental organisations since the late 1990s.

Arms brokering basically means facilitating and organising transactions via types of payment or payment in kind, and is perfectly legal in and of itself. When insufficiently regulated or not regulated at all, however, there is little to prevent legal arms brokers (also known as ‘intermediaries’) from slipping into illicit arms dealing. Moreover, arms brokers have developed the ability to get round existing controls by abusing the differences in countries’ legal systems or by operating from countries where there are weak controls or no controls at all. Poor regulation, or lack of regulation on arms brokering is therefore now seen by national and international fora as a serious gap in the fight against arms trafficking.⁹⁷

Brokering is therefore a major problem, because brokers in one state’s jurisdiction (where legal controls are weak) may negotiate arms deals between parties located in the jurisdiction of other states. In addition, the draft Treaty does not define the term.⁹⁸ Finally, the draft provisions on brokering are less detailed than commitments in other, albeit non-binding, documents. For example, Article 15 of the Firearms Protocol stipulates:

1. With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:
 - (a) Requiring registration of brokers operating within their territory;
 - (b) Requiring licensing or authorization of brokering; or
 - (c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.

2. States Parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol.

Paragraph 14 of the Programme of Action affirms that participating states undertake:

To develop adequate national legislation or administrative procedures regulating the activities of those who engage in small arms and light weapons brokering. This legislation or procedures should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State’s jurisdiction and control.

Article 9. Transit and Transshipment

1. Each State Party shall adopt appropriate legislative, administrative or other measures to regulate, where necessary and feasible, conventional arms covered by this Treaty that transit or transship through its territory.

The transit and transshipment of conventional weapons pose difficult regulatory challenges.⁹⁹ Nevertheless, this provision is rather weak. Paragraph 1 requires each state party to adopt ‘appropriate legislative, administrative or other measures’ to regulate conventional arms covered by the ATT that transit or transship through its territory. It does not require states to ensure that their ATT obligations under Articles 3, 4, and 5 are not circumvented, and further weakens the extent of their obligations by adding the caveat ‘where necessary and feasible’.

2. Importing and exporting States Parties shall cooperate and exchange information, where feasible and upon request, to transit and transshipment States Parties, in order to mitigate the risk of diversion.

⁹⁷ V. Moreau and H. Anders, *Arms brokering controls and how they are implemented in the European Union*, GRIP, Brussels, 2009, p. 5.

⁹⁸ See the commentary on Article 2B above for a brief discussion of the notion of broker and brokering.

⁹⁹ In the Chair’s earlier draft texts, states were required to apply the criteria or parameters to the transit of arms (as well as the import), not just the export of conventional arms. Many transit states oppose this proposal on a number of grounds, however: that it is not feasible commercially, that is logistically challenging, and on the basis that most transit states do not currently have such systems in place.

This provision also seems unnecessarily weak. To reduce the risk of diversion, states are obliged to exchange information but only “where feasible” (not even “to the extent possible”), which in practice implies little specific obligation. In addition, the text should say ‘with’, not ‘to’, transit states.

Article 10. Reporting and Record-Keeping

The obligation to record and report authorizations of transfers of conventional arms is an important component of both treaty implementation and confidence-building among states parties. As with many other provisions, however, both the reporting and record-keeping obligations are significantly weakened by qualifying phrases.

1. Each State Party shall maintain national records, in accordance with its national laws and regulations, of the export authorizations or actual exports of the conventional arms under the scope of this Treaty and, where feasible, details of those conventional arms transferred to their territory as the final destination or that are authorized to transit or transship territory under its jurisdiction.

Each state party is required to maintain records of the export authorizations or actual exports of conventional arms covered by the Treaty. It would be preferable to replace ‘or’ with ‘and’ as the time between export authorisations and actual exports may be significant and the situation in the importing state may have changed markedly. Moreover, the extent of this obligation is somewhat limited by the reference to the state party’s national laws and regulations.

The reference to ‘conventional arms under the scope of this Treaty’, here and in Article 10, paragraph 5 below, coupled with the exclusion of ammunition and parts and components from Article 2 of the Treaty (Scope), may be construed in such a way that the obligation to maintain national records of authorizations or actual exports, and to report on these, does *not* apply to transfers of ammunition and parts and components. Such an outcome would accommodate the USA’s argument that it is not feasible to include ammunition in an ATT, because the scale of the trade (which annually far exceeds the trade in conventional arms) makes it impossible to report on ammunition transfers. However, this argument is not generally considered persuasive since it is only authorisations that must

be reported, and a single licence can cover many millions of rounds of ammunition.

2. Such records may contain, inter alia, quantity, value, model/type, authorized international transfers of conventional arms under the scope of this Treaty, conventional arms actually transferred, details of exporting State(s), importing State(s), transit and transshipment State(s) and end users, as appropriate. Records shall be kept for a minimum of ten years, or longer if required by other international obligations applicable to the State Party.

Paragraph 2 refers to what records *may* contain. It does not specify even a minimum content. The only substantive requirement is that states should keep records for a minimum of ten years (or longer if it is necessary to comply with other international obligations). While the Firearms Protocol (for example) requires states parties to retain records for ten years, more recent instruments, such as the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (International Tracing Instrument),¹⁰⁰ oblige states to keep records indefinitely, to the extent possible. Section IV, paragraph 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.

Accordingly, requiring in an ATT that states parties retain records for a minimum of 10 years could represent a retrogression of international standards.

3. Each State Party may report to the secretariat, when appropriate, any actions taken to address the diversion of conventional arms to the illicit market or for unauthorized end use.

Paragraph 3 makes it possible for a state party to report to the treaty secretariat any actions that are taken (presumably by the state in question) to address the diversion of conventional arms to the illicit market or for unauthorized end use. States are under no obligation to report.

¹⁰⁰ The International Tracing Instrument is a non-legally binding instrument governing small arms and light weapons that was adopted by the UN General Assembly on 8 December 2005.

4. Each State Party shall, within the first year after entry into force of this Treaty for that State Party, provide an initial report to the secretariat of relevant activities undertaken in order to implement this Treaty, including national laws, regulations and administrative measures. States Parties shall report on any new activities undertaken in order to implement this Treaty, when appropriate. Reports shall be made available and distributed to States Parties by the secretariat.

Within a year after becoming party to the ATT, each state must provide an initial report to the secretariat of relevant activities (it has) undertaken to implement the Treaty, including the adoption or existence of national laws, regulations and administrative measures. Subsequently, and 'when appropriate', each state party is required to report on 'new activities' it has undertaken for the purpose of implementing the Treaty. The treaty secretariat is required to distribute the reports to the other states parties. The content of the provision could be made clearer. For example, states parties are currently required to report on new activities 'when appropriate'; their responsibility would be more explicit if they were required to report on new activity that has been undertaken or completed 'within a reasonable period of time'. Furthermore, it is not clear whether the term 'shall be made available' means 'shall be made public'.

5. Each State Party shall submit annually to the secretariat by 1 July a report for the preceding calendar year concerning the authorization or actual transfer of conventional arms under the scope of this Treaty. 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 1 July, covering the preceding calendar year, 'concerning the authorization or actual transfer of conventional arms under the scope of this Treaty'. Reports do not, therefore, need to cover ammunition. No minimum requirements are stipulated with regard to their content. In addition, each report may 'exclude commercially sensitive or national security information': this is potentially an important loophole.

Article 11. Enforcement

Each State Party shall adopt appropriate national measures and policies as may be necessary to enforce national laws and regulations and implement the provisions of this Treaty.

As noted above, the relationship between this provision and Article 5, paragraph 3, is not entirely clear. The provision does not require states to apply penal sanctions to enforce the ATT, merely such 'appropriate national measures and policies as may be necessary to enforce national laws and regulations and implement the provisions of this Treaty'. A distinction appears to be drawn between measures and policies, whereas Article 5, paragraph 3, refers only to measures. It would help if Article 11 said 'that implement' instead of 'and implement'. Overall, however, a better formulation might be:

Each State Party shall adopt such legislation as may be necessary, including the imposition of penal sanctions, to prevent and suppress activities prohibited to a State Party under this Treaty that are undertaken by persons or on territory under its jurisdiction or control.

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’.¹⁰¹ In general, the final provisions in the draft ATT are reasonably drafted, though some concerns remain, notably regarding the procedure for treaty amendment. In addition, funding arrangements for the treaty’s supporting body, meetings, and mechanisms are not clearly defined.

Article 12. Secretariat

The draft ATT foresees that a secretariat will be created to support the Treaty’s implementation, even though delegates to the Conference have still to discuss the need for a secretariat in detail. In other instances, secretariats have been created to meet specified needs. 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 that states complied with it. Similarly, an Implementation Support Unit (ISU) was created for the 1997 Anti-Personnel Mine Ban Convention because there was concern that the UN might weakly support the treaty since it had been negotiated outside the UN system; states placed the ISU outside the treaty framework. Discussions continue on a proposal to form an ISU for the 2008 Convention on Cluster Munitions.

1. This Treaty hereby establishes a secretariat to assist States Parties in the effective implementation of this Treaty.
2. The secretariat shall be adequately staffed. Staff shall have the necessary expertise to ensure the secretariat can effectively undertake the responsibilities described in paragraph 3 of this article.
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 in this Treaty;
 - b. Maintain and distribute regularly 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 mandated by this Treaty.

Article 12 foresees three explicit roles for a secretariat: to support the organisation of treaty meetings (a task which other disarmament treaties normally give to the UN Office for Disarmament Affairs (ODA)); assist in matching offers and requests for international cooperation and assistance (though other treaties tend to do this by means of bilateral discussions and informal and formal meetings of states parties); and to circulate documents (again, a task normally given to ODA).

Article 13. International Cooperation

1. States Parties shall cooperate, as appropriate, to enhance the implementation of this Treaty, consistent with their respective security interests and national laws.
2. Each State Party is encouraged to facilitate international cooperation, including the exchange of information on matters of mutual interest regarding the implementation and application of this Treaty in accordance with its respective security interests and national legal system.
3. Each State Party is encouraged to consult on matters of mutual interest and to share information, as appropriate, to support the implementation of this Treaty.
4. Each State Party may cooperate, as appropriate, in order to enforce the provisions of this Treaty, including sharing information regarding illicit activities and actors to assist national enforcement and to counter, prevent and combat diversion to the illicit market or for unauthorized end use, in accordance with national laws. States Parties may also exchange experience and information on lessons learned in relation to any aspect of this Treaty, to assist national implementation.

Article 13 obliges states parties to engage in international cooperation. With respect to information exchange, it merely encourages states parties to undertake the activities listed.

¹⁰¹ A. Aust, *Modern Treaty Law and Practice*, Second Edn, Cambridge University Press, Cambridge, 2007, p. 434.

Article 14. International Assistance

1. In implementing this Treaty, each State Party may seek, inter alia, legal or legislative assistance, institutional capacity building, and technical, material or financial assistance. Each State Party in a position to do so shall, upon request, provide such assistance.

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

3. States Parties may also contribute resources to a voluntary trust fund to assist requesting States Parties requiring such assistance to implement the Treaty. The voluntary trust fund shall be administered by the secretariat under the supervision of States Parties.

Remarks similar to those made above could be applied to Article 14 which addresses the possibility for states to 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 Convention and the 2008 Convention on Cluster Munitions. 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.

Article 15. 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 and shall remain open for signature until its entry into force.

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

3. This Treaty shall be open for accession by any State that has not signed the Treaty.

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

The ATT would be open for signature at the UN — though no opening date for such signature is specified — and would remain open until the Treaty entered into force. In accordance with standard practice, each signatory state may ratify, accept, or approve its adherence in order to become a state party. Non-signatory states may accede directly at any time, including while the Treaty is still open for signature. Instruments of ratification, acceptance, approval, or accession must be deposited with the depositary, which appears to be the UN Secretary-General (see Article 25).

Article 16. Entry into Force

1. This Treaty shall enter into force ninety days following the date of the deposit of the sixty-fifth instrument of ratification, acceptance, approval or accession with the depositary.

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

In accordance with Article 16, 65 states must adhere to the Treaty to trigger its entry into force, which would occur 90 days after the 65th ratification, acceptance, approval, or accession. States that adhere after the Treaty's entry into force will become a party 90 days after they have deposited the necessary documents. This is a high threshold, matched by the 1993 Chemical Weapons Convention. The 1997 Anti-Personnel Mine Ban Convention required 40 ratifications, while the 2008 Convention on Cluster Munitions required 30. The Geneva Conventions entered into force after only two ratifications. It had been proposed, notably by Iran and others, that a qualitative threshold should be added. This would have stipulated, for example, that the Treaty would enter into force once the ten largest exporters of conventional arms had ratified. Fortunately, the draft does not include such a proposal.

Article 17. Provisional Application

Any State may at the time of its ratification, acceptance, approval or accession, declare that it will apply provisionally articles 3 and 4 of this Treaty pending its entry into force for that State.

When adhering to the ATT, a state may declare that it will apply many of its key elements provisionally (though not the provisions relating to ammunition or parts and components). This is generally desirable, given the high number of ratifications required to trigger entry into force. Several recent humanitarian and disarmament treaties (notably the 1997 Anti-Personnel Mine Ban Convention and the 2008 Convention on Cluster Munitions) also offered the option of provisional application.

Article 18. Duration and Withdrawal

1. This Treaty shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty. It shall give notice of such withdrawal to the depositary, which shall notify all other States Parties. The instrument of withdrawal shall include an explanation of the reasons motivating this withdrawal. The instrument of withdrawal shall take effect ninety days after the receipt of the instrument of withdrawal by the depositary, unless the instrument of withdrawal specifies a later date.
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 the Treaty, including any financial obligations that may have accrued.

The provisions on duration and withdrawal are relatively standard. 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 be set out in more detail, in a broader provision that specifically examined costs.

Article 19. Reservations

1. Each State Party may formulate reservations, unless the reservation is incompatible with the object and purpose of this Treaty.
2. Reservations may be withdrawn at any time.

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. A more restrictive clause, that for instance excluded reservations with respect to Articles 2, 3, and 4, would potentially ensure that the Treaty would be applied more consistently among states parties. The UN secretariat requested the inclusion of paragraph 2 to ensure that a reservation could always be withdrawn by the relevant state party.

Article 20. Amendments

1. At any time after the entry into force of this Treaty, a State Party may propose an amendment to this Treaty.
2. Any proposed amendment shall be submitted in writing to the secretariat, which shall then circulate the proposal to all States Parties, not less than 180 days before the next meeting of the Conference of States Parties. The amendment shall be considered at the next Conference of States Parties if a majority of States Parties notify the secretariat that they support further consideration of the proposal, no later than 120 days after its circulation by the secretariat.
3. Any amendment to this Treaty shall be adopted by consensus of those States Parties present at the Conference of States Parties. The depositary shall communicate any adopted amendment to all States Parties.
4. A proposed amendment adopted in accordance with paragraph 3 of this article shall enter into force for all States Parties to the Treaty, upon deposit with the depositary of the instruments of acceptance by a majority of States Parties at the time of the adoption of the amendment. Thereafter, it shall enter into force for any remaining State Party on the date of deposit of its instrument of acceptance.

The possibility of amendment is often included in a multilateral treaty. In the draft ATT, amendments can only be adopted by consensus by states parties participating in a Conference of States Parties.

Article 21. Conference of States Parties

1. A Conference of States Parties shall be convened no later than one year following the entry into force of this Treaty. The Conference of States Parties shall adopt rules of procedure and rules governing its activities, including frequency of meetings and rules concerning payment of expenses incurred in carrying out those activities.

2. The Conference of States Parties shall:

- a. Consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular the promotion of its universality;
- b. Consider amendments to this Treaty;
- c. Consider and decide the tasks and budget of the secretariat;
- d. Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of the Treaty; and
- e. Perform any other function consistent with this Treaty.

3. If circumstances merit, an exceptional meeting of States Parties may be convened if required and resources allow.

It is standard practice to hold annual meetings of states parties to discuss the implementation of a disarmament treaty. The absence of a costs provision from the ATT's final clauses explains why the first Conference of States Parties would need to discuss who would pay for the meeting; this is hardly a satisfactory approach. The Conference is also tasked with determining its own rules of procedure, and includes no provision on decision-taking. The text makes no reference to discussion of individual state party compliance with the Treaty, although this might fall within sub-paragraph (a) of paragraph 2.

It is helpful to allow the establishment of 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.

Article 22. Dispute Settlement

1. States Parties shall consult and cooperate to settle any dispute that may arise between them with regard to the interpretation or application of this Treaty.

2. States Parties shall settle any dispute between them concerning the interpretation or application of this Treaty through negotiations, mediation, conciliation or other peaceful means of the Party's mutual choice.

3. States Parties may pursue, by mutual consent, arbitration to settle any dispute between them, regarding issues concerning the implementation of this Treaty.

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 proposed arms transfers may occur in violation of the Treaty, a dispute settlement clause is important. Some states feared that a denial of a transfer might be contested in the International Court of Justice. That fear could be addressed by the inclusion of a limiting reservation when adhering to the Treaty. In general, exporting states do not wish to see any constraints imposed on their sovereign right to choose whether to sell arms to any other state.

A standard dispute resolution provision could usefully be included. It might mirror Article 20 of the 1997 Terrorist Bombing Convention:

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.

3. Any State which has made a reservation in accordance with paragraph 2 of the present article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Paragraph 2 of draft Article 22 should refer to Parties' rather than Party's.

Article 23. Relations with States not party to this Treaty

States Parties shall apply articles 3 and 4 to all exports of conventional arms within the scope of this Treaty to States not party to this Treaty.

It is logical that an exporting state party should apply Articles 3 and 4 to all importing states, not merely to states parties. States should also be required to extend these obligations to proposed transfers of ammunition, parts, and components.

Article 24. Relationship with other instruments

States Parties shall have the right to enter into agreements in relation to the international trade in conventional arms, provided that those agreements are compatible with their obligations under this Treaty and do not undermine the object and purpose of this Treaty.

Considerable concern has been expressed about Article 24, notably by civil society organisations. The meaning of the provision is widely disputed, which strongly suggests that it should be redrafted. In our view, Article 24 permits states parties to adopt treaties and other agreements, other than the ATT, with respect to the international trade in conventional arms, provided that these 'are compatible with their obligations' under the ATT and do not undermine its object and purpose. This does not appear to create major problems because it does not add to or subtract from rights or obligations under the ATT or undermine the Treaty's effect.

Article 25. Authentic Texts and Depositary

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.

Inexplicably, the drafters of the proposed ATT did not prepare separate provisions on authentic texts and on the depositary, although it is standard practice to do so. The draft merely requires the text of the Treaty to be deposited with the UN Secretary-General. It would be far better to state, in a separate article, that the UN Secretary-General is the Treaty's depositary.

Concluding remarks

At the time of writing, it seems that a two-week diplomatic conference, under the July 2012 conference rules of procedure, is likely to be convened under UN auspices in the spring of 2013 in fulfilment of a new General Assembly resolution. Many challenges must be overcome in order to secure the adoption of an effective ATT.

Indeed, the draft ATT should not be adopted as it stands, because it is flawed. In addition to many small shortcomings of drafting, the following five core issues need to be addressed:

- Under Article 3 on prohibited transfers, paragraph 2 should be redrafted to include customary international law by deleting the phrase ‘under international agreements to which it is a Party’.
- Under Article 3 on prohibited transfers, paragraph 3 should be redrafted to reflect the international law standard of knowledge rather than purpose in order to prevent the

transfer of arms that will likely be used to commit genocide, crimes against humanity, or (any) war crimes where the transferring state has knowledge that the arms are likely to be so used.

- The term ‘overriding’ in Article 4, paragraph 5, should be replaced to ensure that the standard does not depend on interpreting an ill-defined notion of peace and security.
- Article 5, paragraph 2 as a whole (or at least the first sentence) should be deleted.
- Ammunition and munitions should be included within the scope of the Treaty in Article 2.

It would be useful to clarify that the definition of trade/transfer includes gifts, leases, or loans. Finally, the 2013 Diplomatic Conference should consider the possibility of reintroducing an anti-circumvention clause in the ATT, and a clause covering technology transfer.

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