

# A Global Arms Trade Treaty: What States Want

## Introduction

**The ATT is simply the right thing to do at this time, and it is in the best interest of all peoples the world over.**

- **Submission of Liberia**

**The establishment of common rules or principles for the international trade in conventional arms must be seen as a priority security challenge for all states.**

- **Submission of France**

**In recent years, the regional instability and humanitarian crisis fuelled by illicit trafficking and misuse of conventional arms...has become an issue of growing concern for the international community.**

- **Submission of China**

The idea of an Arms Trade Treaty (ATT) with principles based in international law was initiated by non-governmental organizations (NGOs) and then Nobel Peace Laureates in the 1990s and has gained significant ground in recent years. There is now considerable support amongst United Nations (UN) member states for a concerted effort to take this important initiative forward. On 6 December 2006 an overwhelming majority of UN member states voted to consider the question of a legally binding and universal ATT. Resolution 61/89, adopted in the UN General Assembly with the support of 153 states and only one state against, is a landmark step towards a more effective regulation of the international arms trade.<sup>1</sup> The vote is also a strong indication that the global political will now exists to address the irresponsible and poorly regulated trade in arms, a trade which fuels conflict, results in gross human rights abuses and serious violations of international humanitarian law (IHL), destabilises countries and regions and undermines sustainable development.

As a first step towards an ATT, UN Resolution 61/89 requested the UN Secretary-General to “seek the views of Member states on the feasibility, scope and draft parameters for a comprehensive, legally-binding instrument establishing common international standards for the import, export and transfer of conventional arms and to submit a report to the General Assembly at its sixty-second session.”

To date, some 97 states have submitted their views to the Secretary-General, making it the most successful exercise of its kind within the UN. The submissions reflect a strong consensus that achieving an ATT is an urgent global priority. It is clear that the need for common legally binding international standards for the import, export and transfer of conventional arms is now firmly on the international agenda. This political will must be galvanized and maintained through the work of the group of government experts (GGE), set to commence in 2008 and report to the UN General Assembly at its sixty-third session, to

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<sup>1</sup> See Appendix 1 for the full text of UN General Assembly Resolution 61/89 (UN Resolution 61/89).

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ensure the achievement of what is clearly the aim of a majority of states: a strong and effective ATT.

This paper provides an overview and analysis of the content of the states' submissions.<sup>2</sup> The paper will highlight the main views contained in the submissions as to the feasibility, scope and parameters of an ATT. This analysis starts from the assumption that an ATT needs to be universally fair and objective, and address the realities of globalised markets and assistance programs in conventional arms. Therefore, an ATT needs to be based upon the existing responsibilities of states under relevant international law.

Arising out of this analysis of state submissions, key points for consideration by the forthcoming GGE will also be outlined to assist in ensuring that an effective, comprehensive ATT can be achieved as soon as possible. The millions of people who suffer the daily effects of the irresponsible transfer, proliferation and blatant misuse of conventional arms, including small arms and light weapons, need a global ATT that helps save lives and protect livelihoods. It is vital that the forthcoming GGE grasps the opportunity to address this problem with urgency and to formulate clear proposals for an ATT that can be 'negotiated on a non-discriminatory, transparent and multilateral basis', as requested by the UN General Assembly, so that the international community can agree and benefit from a legally binding and universal Arms Trade Treaty as soon as possible.

### **UN General Assembly Resolution 61/89**

UN Resolution 61/89 reaffirmed the inherent right of all states to self-defence under Article 51 of the UN Charter and acknowledged that states can manufacture, import, export, transfer and retain conventional arms for their legitimate self-defence and security needs. The Resolution recognised that arms control, disarmament and non-proliferation are essential elements of maintaining international peace and security, and that with the rights to sell,

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<sup>2</sup> This paper provides analysis of 92 submissions publicly available at the time of writing and includes: Albania, Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Chile, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Djibouti, Democratic Republic of Congo (DRC), Denmark, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Mali, Malta, Mauritius, Mexico, Morocco, the Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea (Korea), Romania, Russian Federation (Russia), Samoa, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, the former Yugoslav Republic of Macedonia (Macedonia), Togo, Trinidad and Tobago, Turkey, United Kingdom of Great Britain and Northern Ireland (UK), Venezuela and Zambia. The views contained in the submission of the European Union (EU) (Germany on behalf of the European Union) are not included as all member states of the EU submitted their views to the UN Secretary-General. This analysis also takes account of the views on an ATT of the United States of America (USA) as set out in its recent public statements.

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acquire and possess weapons come the responsibilities and legal obligations that derive from the UN Charter and international law, including international human rights law, international humanitarian law and arms embargoes mandated by the UN Security Council.

The Resolution recognised that the absence of ‘common international standards on the import, export and transfer of conventional arms...is a contributory factor to conflict, the displacement of people, crime and terrorism’ and undermines, among others, peace, security, and sustainable development.’

The Resolution also acknowledged the existence of different initiatives at international, regional and sub regional levels ‘to enhance co-operation, improve information exchange and transparency and implement confidence-building measures’ with regard to the international arms trade – but the Resolution also noted the growing support across all regions for the conclusion of a legally-binding instrument with ‘common international standards for the import, export and transfer of conventional arms’. In addition, the role played by NGOs and civil society towards a responsible arms trade was recognised.

#### **States’ views on the need for an ATT**

States’ submissions reinforce the importance of acting now to secure an ATT. An overwhelming number of states expressed their support for the development of a comprehensive, legally binding instrument aimed at the establishment of common international standards for the export, import and transfer of conventional arms. Some 86 of the 92 submissions analysed either explicitly reiterated their support or provided views as to how this initiative could move forward.<sup>3</sup> As Portugal stated, “the time is ripe.” Slovakia described the ATT as “the next logical step”. Kenya asserted that “it is imperative that states take urgent action”. For Colombia, this is a “great opportunity which will enable real and significant progress to be made...”

A number of states reiterated their view as to the pressing need for an ATT by pointing to the role of the irresponsible trade in arms in fuelling conflict, causing violations of human rights and international humanitarian law, and impeding economic and social development opportunities. Austria’s views, which reflect a majority of submissions, expressed this near global sentiment:

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<sup>3</sup> See submissions from: Albania, Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, Czech Republic, DRC, Denmark, Djibouti, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Guatemala, Hungary, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malawi, Mali, Malta, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, Romania, Samoa, Senegal, Serbia, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Turkey, UK and Zambia.

“Every year, hundreds of thousands of people are killed because of the uncontrolled proliferation of arms. It is undisputed that the irresponsible trade in arms fuels human rights violations, destabilisation, crime, terrorism and conflict – with all its multifaceted consequences such as displacement, violations of international humanitarian law and poverty – thus being one of the biggest barriers to millions of people achieving their human rights and development opportunities in peace and security.”<sup>4</sup>

Many countries spoke of the impacts the uncontrolled arms trade have had within their own countries. Croatia referred to the direct effects of the arms trade in fuelling conflict:

“Aware of the threat posed by uncontrolled arms trade, particularly in light of the experience of the war it emerged from and the effects of the war on its society at large, the Republic of Croatia supports a universal legally binding instrument to regulate conventional arms in all aspects.”

States that are major arms producers have expressed their support for the establishment of an ATT. Brazil, as one of the world’s significant exporter of arms, stated:

“Brazil has been actively engaged in the discussions regarding a possible legally-binding instrument related to the trade in conventional arms, based on its concerns in relation to the negative human and material consequence of the uncontrolled circulation and illicit trade of such weapons.”

States that are not producers, manufacturers or exporters of conventional arms also support an ATT. Liberia, for example, recounted that:

“Liberia’s position to support an Arms Trade Treaty is informed by its recent history of more than 25 years of armed violence...The arms used in this violent crisis which eventually engulfed the Mano River Basin countries of Liberia, Sierra Leone, Guinea and later Côte d’Ivoire were not produced in our country. Yet, they were easily available even to children as young as 8 years old”

Malawi noted the destabilising effects of the arms trade by regional neighbours within its own borders:

“Malawi, though a peaceful country continues to experience an increase in small arms related crime. Malawi’s geographical position bordering countries that are suffering significantly under the effects of small arms and light weapons, make it a prime target

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<sup>4</sup> See also, for example, submissions from: Bosnia and Herzegovina, Cuba, Denmark, Finland, Canada, Costa Rica, Djibouti, Fiji, Liechtenstein, Hungary, Iceland, Italy, Japan, Kenya, Liberia, Lithuania, Luxembourg, Malawi, Mauritius, Mexico, Netherlands, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Senegal, Slovakia, Slovenia, South Africa, Spain, Togo and Trinidad and Tobago.

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for use and transit routes for arms trafficking with a subsequent risk that arms would be diverted... This means that much needed development and poverty reduction will continue to be undermined by crime, insecurity and increase the potential for violent conflict over resources.”

Other states noted the threat the arms trade poses to their fragile economic infrastructures. Fiji voiced its support for the ATT as an essential tool to help sustainable development:

“Fiji supports the call for a comprehensive Global Arms Trade Treaty and agree that the irresponsible and poorly regulated trade in arms...in developing economies like ours, undermines all genuine efforts towards sustainable development.”

Trinidad and Tobago agreed that small states are vulnerable:

“Trinidad and Tobago is a non-producer of firearms and the prevalence of firearms can only be attributed to the trans-shipment activities occasioned by the phenomenon of illegal diversion...Trinidad and Tobago is fully cognizant of the deleterious potential of the illicit movement of small arms and light weapons, among these...adverse effects on youth-at-risk...fragmentation of communities; compromises to personal, domestic and regional security; the fuelling of the drug trade...”

It is clear from the content of the submissions that a significant majority and diverse range of states believe that the irresponsible transfer of conventional arms is now a pressing global concern that must be addressed.<sup>5</sup> There is considerable state support for establishing effective

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<sup>5</sup> See, for example, submissions from: Albania (“Albania believes that the spread and misuse of conventional arms represents an international issue that is preoccupying the whole international community.”), Australia (“...irresponsible or illicit transfer of conventional arms ...is of such a grave and pressing concern that this can only be adequately addressed through the establishment of a legally binding, multilateral treaty.”), Canada (“The increasing globalization of the illicit international arms trade, and the lack of effective controls to stop it, and the consequent deleterious effects on sustainable development prospects, have raised a compelling argument in favour of a global system of controls that will comprehensively regulate all aspects of this trade.”), Costa Rica (“The arms trade has a devastating effect with more than 45 million people being affected every year by the consequences of war.”), Cyprus (“Cyprus supports the adoption of an international treaty to fight the illicit trade of arms...”), Ecuador (“Ecuador also believes that states should bear in mind that the adoption of an arms trade treaty would represent a significant global security and confidence-building measure.”), Finland (“This support [for the idea of an ATT] was based on our conviction that there is a humanitarian urgency for better regulation of the legal arms trade at the global level.”), France (“...it is essential to establish common rules or principles on the international trade in conventional arms as a priority security challenge...”), Georgia (“Further development of an effective and strong control mechanism of the international arms transfers is one of the principle priorities of the international community.”), Germany (“Germany believes that the unregulated and uncontrolled spread of conventional arms and ammunition poses a pressing task.”), Hungary (“Hungary attaches great importance to addressing the irresponsible and illegal forms of arms trade.”), Kenya (“The need to effectively control conventional

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common international standards for the import, export, and transfers of arms and a comprehensive and legally binding international instrument regulating the arms trade.

### **The need to close existing gaps and loopholes**

Many states are cognisant of the enormous steps taken at the national, regional and multilateral level since the early 1990's towards creating guidelines and principles on transfers of conventional arms.<sup>6</sup> Despite this progress, gaps and weaknesses remain in the majority of these arms transfer control systems, which often fail to fully reflect the obligations that states have under international law.<sup>7</sup>

This piecemeal approach is not sufficient for the effective regulation of the globalised arms trade. Several states drew attention to the fact that the arms industry operates in a global context, with weapons assembled with components from around the world.<sup>8</sup> For example, Spain noted that "...components are produced and assembled in different countries and the final manufacture is frequently delocalized. However the diversity of control levels makes it difficult to comprehensively address illicit and irresponsible transfers globally."

The existence of major loopholes in existing arms regulations allows the supply of conventional weapons, munitions and their components to be diverted to unauthorised users

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arms...is extremely urgent..."), New Zealand ("New Zealand believes that there is a growing need to consolidate into a single comprehensive legally binding instrument pre-existing controls over the international arms trade..."), Samoa ("The development of the treaty is a timely initiative..."), Spain ("...the international community should make an effort to establish an effective and legally binding control on arms trade."), Turkey ("A unified response by all states is what is needed...") and UK ("A failure to address the existing gaps in the control of this international trade would be a failure to take responsibility for the arms we allow to be traded into and out of our states or by our citizens.").

<sup>6</sup> See, for example, submissions from: Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Costa Rica, Cyprus, Djibouti, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Kenya, Latvia, Liberia, Lithuania, Macedonia, Malawi, Malta, Mauritius, Mexico, Netherlands, New Zealand, Niger, Pakistan, Paraguay, Peru, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, UK and Zambia.

<sup>7</sup> See, for example, submissions from: Canada ("We have clearly made progress in addressing key areas of concerns...But gaps remain. Most notably, there are a significant number of states that are not party to any regional or multilateral arms transfer control agreements."), Fiji ("There are a significant number of states that are not party to any regional or multi-lateral arms transfer control agreement.") Lithuania ("Current instruments and agreements...cover neither all aspects of the arms trade, nor in a sufficient or geographically wide manner.") and Peru ("There are various initiatives, both regional and global...However, in almost every case, there is a factor that weakens them: *they are non-binding*").

<sup>8</sup> See, for example, submissions from: Liberia ("Given the international nature of the arms trade, there is a need for an international, comprehensive and transparent framework for all states to conform to."), Mauritius ("...given the complex nature of the arms trade in an increasingly globalised environment, there is a need for an international, comprehensive and transparent framework for all states to follow."), and Nigeria ("In the face of an arms industry that operates globally, national or regional export control systems have become ineffective in controlling illicit transfers of conventional arms.").

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and embargoed destinations, as well as to parties breaching international law in armed conflict, and to those who use them to flagrantly violate human rights. This is a matter of concern for many states.<sup>9</sup> This situation is exacerbated by the fact that not all states are party to such agreements and guidelines, there are gaps and inconsistencies in their provisions, they are often not implemented in national law and if so implemented are poorly enforced.

For many states, the absence of commonly agreed laws to regulate the international conventional arms trade and the existence of inconsistencies and exploitable loopholes are key reasons for an ATT. Closing these loopholes and ensuring that all legitimate transfers are carried out from the same standard elaborated in a comprehensive legally binding instrument is expressed as being in the interest of all states.<sup>10</sup>

UN Resolution 61/89 maintains as its underlying logic that the gap between irresponsible and illegal transfers of conventional arms should be closed so that all irresponsible transfers are prohibited by states.<sup>11</sup> As Australia noted, rather than “creating restrictions in any state’s

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<sup>9</sup> See, for example, submissions from: Ecuador (“The current diversity of standards, at the national and international levels, for controlling the production, trade and transfer of arms demonstrates the need for universal, binding international standards that require states to observe a unified regulatory framework...”), Mexico (“All of these examples [existing instruments] are isolated efforts. Each one establishes different levels of obligations, refers to different types of arms, circumstances or subjects and sometimes covers different regions of the world. The international community has not so far managed to come up with an effective universal system for monitoring transfers of weapons.”), Mauritius (“Though a number of principles regulating arms transfers exist in legally binding sub regional, regional and international agreements, legislative gaps remain a source of major concern to member states.”) and Turkey (“An ATT should not conflict or diminish the importance of the existing document. On the contrary, the aim is to provide a legally binding instrument that would complement and strengthen the ongoing efforts and existing instruments. [An] ATT would bring universal standards...”).

<sup>10</sup> See, for example, submission from: Austria (“Closing the loopholes...should therefore be in the fundamental interest of all states.”), Greece (“Using common international standards will contribute to the elimination of loopholes and discrepancies in the field of implementation.”), Macedonia (“...there is a need for a global instrument, which will on one hand achieve universalization and on the other cover the existing gaps.”) and Malawi (“...many of these regional agreements are non-legally binding on states, and often contain weaknesses and loopholes that enable irresponsible and unwelcome transfers of weapons to the African continent to continue.”).

<sup>11</sup> The need to close this gap between irresponsible and illegal transfers was raised by a number of states in their submissions. See, for example, submissions from: Mexico (“The aim of a legally binding instrument to regulate the arms trade must be to prevent illicit trafficking in and irresponsible sales of arms.”), Morocco (“Establishment of a clear distinction between the legal arms trade, to which Governments have a right, and the illicit trade in these arms, the prohibition of which must be expressly stated and strengthened...”), Nigeria (“By establishing a precise, harmonized normative framework for state behaviour in the international arms market, the activities of illicit arms brokers, exporters and importers in destabilizing poor and weak states through armed conflicts and violent or organized crime, would be controlled.”), Peru (“There is an ever-widening gap between transactions conducted under legal controls and those part of the illegal trade...[t]he adoption of resolution 61/89 is an essential milestone on that road which will allow the necessary measures to be taken to slow the illegal arms

legitimate interest in producing, transferring or acquiring conventional arms, an effective Arms Trade Treaty will facilitate responsible arms transfers by raising barriers against illicit proliferation". This reflects the view of many states who recognise the need for a consistent and responsible global approach.<sup>12</sup> This objective, as some states expressed, must be achieved through a transparent framework. For example, Canada believes "that an Arms Trade Treaty will provide a transparent framework of universally applicable standards for States to follow". Australia stated that "in order to be effective, an Arms Trade Treaty requires a level of public transparency..." The DRC noted in its submission that "...the international nature of arms trading...calls for a comprehensive and transparent international system".

### **An ATT should be consistent with Article 51 of the UN Charter**

Over half of the submissions expressed the view that an ATT must be consistent with Article 51 of the UN Charter, which reflects the inherent right to self-defence and acknowledge that states may lawfully acquire legitimate arms for self-defence and security needs in accordance with international law and standards.<sup>13</sup> Equally, many states considered that an ATT should not curtail the capacity of all states to transfer, import and export and retain conventional arms

trade and support the producers of such goods in the exercise of greater control over their final destination."), Samoa ("There are important steps already in place towards regulating 'illicit' trade in weapons but equally important is the development of a precise and normative framework for 'licit' trade in conventional arms whose principles and objectives are incorporated in the new Arms Trade Treaty.") and Thailand ("...Thailand supports the idea of setting a common standard and practice at the global level to control arms transfers, in particular the irresponsible or illicit international transfers of conventional arms and their parts...").

<sup>12</sup> See, for example, submissions from: Fiji ("There are a significant number of states that are not party to any regional or multi-lateral arms transfer control agreement. A uniform global framework for such control is therefore a pressing priority."), Hungary ("...some documents have a regional approach, hence they are not universal, and their membership remains limited."), Indonesia ("The lack of global instruments on conventional weapons and small arms and lights weapons...indicates that there is a need for a universal, non-discriminatory and multilaterally negotiated instrument..."), Liberia ("...there remain serious gaps in international controls of the arms trade and variability in implementation of existing agreements. Given the international nature of the arms trade, there is a need for an international, comprehensive and transparent framework for all states to conform to."), Nigeria ("In the face of an arms industry that operates globally, national or regional export control systems have become ineffective in controlling illicit transfers of conventional arms.") and Trinidad and Tobago ("...it is as a consequence of ...limitations and gaps in the international regime that Trinidad and Tobago views the proposal of an Arms Trade Treaty as a positive development.").

<sup>13</sup> Some 57 submissions raised this. See submissions from: Albania, Algeria, Argentina, Australia, Austria, Bangladesh, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Colombia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Egypt, Estonia, Fiji, France, Germany, Hungary, India, Indonesia, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Mauritius, Netherlands, New Zealand, Norway, Pakistan, Paraguay, Poland, Portugal, Romania, Senegal, Serbia, Slovakia, South Africa, Spain, Sweden, Thailand, Turkey, UK and Zambia.

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for legitimate security and self-defence requirements.<sup>14</sup> The submissions also expressed the firm belief that those states that wish to do so should be able to develop their own defence manufacturing capabilities to meet their own legitimate defence needs and lawful exports.<sup>15</sup>

The view expressed by states that the objectives of an ATT should not conflict with states' rights to self-defence and legitimate conventional arms production and trade in recognition of Article 51 will need to be incorporated into an ATT alongside a recognition of other equally important obligations of states under the UN Charter (for example, Articles 1 and 55 relating to the principles and purposes of the UN and universal respect for human rights and fundamental freedoms). States, in their overwhelming support for UN Resolution 61/89 reaffirmed their respect for international law and UN Charter obligations, making them important benchmarks for an ATT.

### **An ATT based on existing international law**

Some states expressly noted that for an ATT to be effective it must be based on states' existing obligations under international law. For example, as Costa Rica noted, in order for an ATT to be effective it must be based on the "whole corpus of responsibilities assumed by states" under international law, including the UN Charter, respect for human rights and humanitarian law, and sustainable development. In the view of Canada and others, "states must be aware of, understand and adhere to their existing treaty obligations and customary international law".<sup>16</sup> In Argentina's opinion "...there is a need for a multilateral instrument that may identify common global standards so as to facilitate a common understanding of which factors and circumstances must be taken into account by the states when evaluating the authorizations of transfers of conventional weapons, in order to prevent their diversion to users or uses not authorized by the existing international law." New Zealand believes that "there is a growing need to consolidate into a single comprehensive legally binding instrument pre-existing controls over the international arms trade, both legally and non-legally binding".

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<sup>14</sup> See submissions from: Algeria, Brazil, Bosnia and Herzegovina, Colombia, Cyprus, Fiji, Indonesia, Italy, Indonesia New Zealand, Romania, Pakistan and UK.

<sup>15</sup> See, for example, submissions from: Indonesia ("States' right to participate in the legitimate international defence trade and industry should be protected."), Turkey ("...the Treaty should not undermine legal production and legal trade that is carried out in order to meet legitimate security and self-defence needs of states.") and UK ("States, if they wish, are able to participate in the legitimate international defence trade...").

<sup>16</sup> See, for example, submissions from: Niger ("An arms trade treaty cannot be effective unless it relies on the obligations incumbent on states under international law."), Switzerland ("Existing obligations under international law should not be undermined by an ATT.") and Trinidad and Tobago ("We, however, recognise that the ATT would not impose a completely new legal framework on state behaviour but would provide greater certainty to existing rules of international law through the force of a binding worldwide agreement.").

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States have legal obligations that must be met, including the duty of states to ensure that the legitimate trade and production of arms does not foster violations of international law and human rights. As South Africa stated, “While states have an undisputable right to acquire conventional weapons for self-defence and law enforcement purposes, they also have a responsibility to do everything in their power to ensure that arms transferred by them are not used to violate human rights, to undermine development or to commit acts of terrorism.” Sweden noted that “manufacturing and exporting of arms place heavy responsibilities on States, such as the strict observance of international law, including human rights and humanitarian law.”

A number of states emphasized the point that while an ATT should be its own legally binding treaty to regulate transfers of conventional arms in an independent manner, it should clarify, with respect to application to international arms transfers, commitments already assumed by states, *inter alia* under the UN Charter, the Geneva Conventions of 1949, the two International Covenants on human rights, and other widely supported principles of customary international law, such as those set out in the UN International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) as well as other emerging norms for arms transfers.<sup>17</sup>

It is also recognised by states, as in UN Resolution 61/89, that the primary responsibility for the establishment and implementation of an effective and responsible system to control international sales and transfers of conventional arms rests with states.<sup>18</sup> For example, Brazil noted, “...the application and enforcement of controls over transactions in such weapons and ammunition is a responsibility of States”. Israel stated that it “supports the imposition by states of strong and responsible controls on the import, export and transfers of arms” and “such sales and transfers of arms should be carried out with the utmost prudence and responsibility in order to prevent that such arms find their way to the hands of irresponsible recipients and end-users, be it states or non-state actors.”

### **States’ View on Assessing the Feasibility, Scope and Parameters of an ATT**

#### **FEASIBILITY**

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<sup>17</sup> See, for example, submissions from: Albania (“We believe that [an] ATT should take into consideration all obligations and/or engagements that all the United Nations member states have undertaken in such instruments including but not limited to: the Geneva Conventions, the two Human Rights Covenants as well as the principles established in the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts.”), Hungary (“While the new ATT could and should draw upon these instruments it should be adopted so as to regulate these matters in an authentic and independent manner”), Panama (“It is important to emphasize that such an international instrument would not establish a new set of standards but rather would reinforce existing principles of international law.”) and Switzerland (“Existing obligations under international law should not be undermined by an ATT.”).

<sup>18</sup> See, for example, submissions from: Argentina, Brazil, Colombia, and South Africa.

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There is significant and diverse global will to create an ATT. For some 21 states, the significant level of initial support for UN Resolution 61/89 was noted as a clear demonstration of the feasibility of an ATT.<sup>19</sup> As Malta stated “the overwhelming membership of the United Nations which sponsored, co-sponsored and supported UNGA resolution 61/89 is in itself a tangible proof that the majority of countries believe in the feasibility of achieving a legally binding instrument of an Arms Trade Treaty.” Portugal also affirmed its belief that an ATT is a feasible goal noting that the “approval of resolution 61/89...revealed a very significant critical mass of states from all regions of the world willing to take the first steps towards a legally binding Arms Trade Treaty.”

Another one of the main reasons given by states for the feasibility of an ATT is that numerous initiatives and mechanisms already exist at the international, multilateral, regional, and sub regional levels.<sup>20</sup> States believe that the existence of these agreements and guidelines demonstrates the achievability of common conventional arms trade agreements or principles and is a testament to the will of governments to engage in discussions on transfer controls.<sup>21</sup> It is further stated that the conclusion of these numerous regional and multilateral agreements over the past decade reflects a growing realisation that the problem of conventional arms proliferation can only be effectively addressed through collaboration among states based upon their existing international obligations.<sup>22</sup> From these various documents and guidelines, a solid foundation of fundamental principles exists from which to agree on common international standards.<sup>23</sup> The ATT will build on this foundation.

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<sup>19</sup> See, for example submissions from: Bulgaria, Bosnia and Herzegovina, Bolivia, Canada, Denmark, Djibouti, Ecuador, Hungary, Kenya, Latvia, Malawi, Malta, Mauritius, Netherlands, Portugal, Slovakia, Spain, South Africa, Sweden, Thailand and Zambia.

<sup>20</sup> See Appendix II for a complete list of existing international, multilateral, regional and sub-regional agreements, standards and guidelines mentioned by states in their submissions.

<sup>21</sup> See submissions from: Australia (“The principles of responsible arms transfers are not new: they are contained within the WMD export control regimes to which many states adhere and have underpinned a number of binding UN Security Council Resolutions.”), Argentina (“The existence of these instruments sheds a positive light on the feasibility of a legally binding international system...”), Austria (“These relevant initiatives underline the feasibility of a future ATT and provide for a patchwork basis that should be diligently and systematically assessed...”), and Mexico (“As diverse in nature as they may be, the existing instruments reflect the aim and intention of the international community to regulate and establish controls over the arms trade.”). See also, for example, submission from: Burkina Faso, Djibouti, Lithuania and Switzerland.

<sup>22</sup> See, for example, submissions from: Canada, Ecuador, El Salvador, Georgia, Liechtenstein, Niger and Slovakia.

<sup>23</sup> See, for example, submissions from: Colombia (“The feasibility of the arms trade treaty is ensured by its subject matter, which has already been validated by the relevant regional, sub regional, multilateral and international instruments that provide a solid basis for the negotiation of an arms trade treaty.”) Lithuania (“Current instruments and agreement represent vital building blocks for an arms trade control regime”), Ireland (“...the existing range of international and regional instruments...provides a solid basis for the elaboration of an effective, comprehensive, international instrument.”) and Zambia (“...[an ATT] would consolidate existing arms transfer principles...”). See also submissions from: Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Costa Rica, Czech

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Some states recommended that the GGE first make a full compilation of all the international instruments that directly or indirectly have application to transfers of conventional arms whether they are legally binding or not or adopted at the sub regional, regional, multilateral or global level. The GGE could then make a determination of the commonalities to gain an overview of widely accepted existing key principles.<sup>24</sup>

A further indicator as to the feasibility of an ATT is that to date, the process towards an ATT has been notable for its inclusiveness.<sup>25</sup> This is demonstrated by the active involvement of a diverse number of states, including several major arms producers and states that are neither arms producers nor suppliers, as well as parliamentarians, NGOs and civil society. As the Netherlands noted in its submission, the feasibility of an ATT is enhanced because “civil society organisations and the defence industry in many nations are supportive of this initiative.”

### Challenges

The challenges of moving forward towards a global Arms Trade Treaty are also recognised in a number of the submissions. China, for example, expressed “the necessity to negotiate a specific treaty...needs to be discussed in a comprehensive and cautious way by the international community.” States noted that the success of the ATT process is highly dependent on the political will of all states, including the major exporters, to constructively engage in this endeavour.<sup>26</sup> As the UK pointed out, there must be the will of a “wide range of states to enter genuinely into and conclude a negotiation on an instrument which meets their needs and the needs of states approaching the issue from a different perspective, i.e. the needs of customers and suppliers.” Many states recognise that while it will not be a simple task, there is significant will to achieve a universal treaty that ensures that all transactions involving conventional arms are subject to a prior assessment of risk.<sup>27</sup>

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Republic, Ecuador, Estonia, Fiji, Finland, Germany, Iceland, Ireland, Jamaica, Latvia, Liberia, Malawi, Netherlands, Norway, Paraguay, Portugal, Slovakia, Spain, Sweden, Thailand, and UK.

<sup>24</sup> See, for example, submissions from: Argentina, Austria, France and UK.

<sup>25</sup> For example, while the UN Secretary General has been consulting with all UN member states on the possible content of an ATT to which an unprecedented number of states responded, a parallel “Peoples Consultation” process was undertaken in over 50 countries around the world to give people and communities a forum to demand that their governments take swift action for tough international arms controls.

<sup>26</sup> See, for example, submissions from: Austria, Australia, Bosnia and Herzegovina, and Luxembourg.

<sup>27</sup> See, for example, submissions from: New Zealand (“States need to be encouraged to be ambitious in their expectations of an arms trade treaty which works in their broader interests for peace and security.”), Argentina, Austria, Bosnia and Herzegovina, Bulgaria, Canada, Denmark, Ecuador, Thailand and Zambia.

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One state, Venezuela, expressly stated that it does not support the initiative for an ATT considering that the focus should be on “greater efforts to achieve essential goals such as nuclear disarmament and elimination of the other categories of weapons of mass destruction.”

The United States of America (USA) did not provide the UN Secretary-General with its views but has stated that “the United States has taken a principled stance against supporting an ATT – not because we do not support the reduction of illicit arms transfers, but because we do not believe an international treaty is the right instrument to achieve that goal.”<sup>28</sup> The USA believes that to be effective, a system for controlling the transfer of conventional arms would have to include, at a minimum, a number of requirements, including, for example, written authorization (i.e. a license) for all export and brokering activities and senior level decisions on all arms transfer policies to ensure all exports are consistent with UN embargos and international commitments. Although such measures are similar to what many states would also like within an ATT, the current USA Administration takes the view that “many countries would be either unable or unwilling to implement such rigorous controls under an ATT”.<sup>29</sup> The USA is in a strong position to influence its partner states within such forums as the Wassenaar Arrangement<sup>30</sup> and the Organization for Security and Cooperation in Europe (OSCE)<sup>31</sup> to form a powerful alliance to strengthen states’ national export and import controls including through the establishment of an international treaty with common standards obliging all states to do so. Instead, the USA suggests that “each government should examine its existing arms transfer laws, regulations, and policies and take the necessary measures to strengthen them,”<sup>32</sup> without providing its views on possible common agreed standards.

India’s view is that it remains to be convinced that an ATT would provide a commonly agreed standard that would enhance the level of care exercised by states in the transfer of arms. India is “not convinced that it is the absence of common international standards on trade in conventional arms alone that results in irresponsible or illicit trade. Nor is the easy access that non-state actors, especially terrorists, continue to enjoy to weapons, ammunition and explosives attributable solely to the absence of a comprehensive, legally binding instrument establishing such international standards.” This is clearly a minority view. The majority of states believe that while the absence of an ATT is not the sole reason for easy access to conventional arms, the existence of a strong and comprehensive ATT will greatly reduce the

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<sup>28</sup> US Department of State response to US Coalition Letter to the State Department: Assessing the Feasibility, Scope and Parameters of an Arms Trade Treaty dated 12 April 2007.

<sup>29</sup> Ibid.

<sup>30</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (Wassenaar Arrangement) was established in 1996 “in order to contribute to regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations”. There are currently 40 participating states, including the USA.

<sup>31</sup> The Organization for Security and Co-operation in Europe (OSCE) is a regional security organization with 56 member states from Europe, Central Asia and North America.

<sup>32</sup> “US Position on Arms Trade Treaty”, PM Press Guidance, 14 May 2007.

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likelihood of conventional arms ending up in the hands of irresponsible end-users and help prevent such a destructive and negative trade.<sup>33</sup>

India further believes that an ATT is “premature” and that other efforts, such as the UN Program of Action to Prevent, Combat and Eradicate the Illicit in Small Arms and Light Weapons in All Its Aspects (UN Programme of Action), should be focused on instead. Egypt believes that any mechanism should be limited to illicit trafficking and that guidance should be taken from the “successful experience of the United Nations Programme to combat illicit trade in small arms and light weapons in regulating trade in conventional arms through a politically binding document, but not necessarily a legally binding convention.” The Russian Federation’s view is that “the focus of arms control work must be efforts to combat illegal arms transfers” and believes that the UN Programme of Action was the right approach, despite noting that disagreements among states made it difficult to achieve significant outcomes. Neither the Russian nor the Egyptian submissions make it clear how states are to address the illicit trade in conventional arms without first defining what is legal and in line with states’ existing obligations under international law.

Cuba expressed its concern that the treaty is potentially an opportunity to “globalize the narrow national agendas of any state with the aim of imposing national or regional doctrines, concepts and philosophies for political reasons or out of imperial desires”, expressing doubts that legally binding criteria can be achieved given the potential for subjective criteria-based assessment. Pakistan raised the need for balance and its concern that an “arms treaty which addresses the transfer of arms but not their development, production and deployment will be internationally inequitable against countries which do not themselves produce conventional armaments.”

These challenges and concerns raised by a small number of states primarily stem from the need to consider the various means available to address illegal and irresponsible conventional arms transfers as well as the roles of interested parties, including legitimate participants in the international conventional arms trade and major exporting states. But clearly these challenges are not insurmountable because an objective, legally binding, criteria-based assessment system based on international norms would permit responsible transfers. This has already been recognised as both a necessary and achievable objective by a majority of states.

<b>What states are saying:</b>
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<sup>33</sup> See, for example, submission from: Nigeria (“By establishing a precise, harmonized normative framework for state behaviour in the international arms market, the activities of illicit arms brokers, exporters and importers in destabilising [states]...would be controlled”). See also, for example, submissions from: Argentina, Australia, Austria, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Colombia, Croatia, Denmark, Czech Republic, Ecuador, Estonia, Fiji, Hungary, Iceland, Italy, Kenya, Liberia, Liechtenstein, Malawi, Malta, Netherlands, New Zealand, Paraguay, Samoa, Slovakia and South Africa.

**Feasibility**

- The significant level of initial support for UN Resolution 61/89 is a clear demonstration of states' belief in the feasibility of an ATT;
- The numerous existing initiatives and mechanisms pertaining to the control of conventional arms transfers already existing at the international, multilateral, regional, and sub regional levels cover a majority of states and demonstrate that more consistent, universally applicable common principles can be agreed;
- The solid foundation exists in international law from which to agree on common international standards for responsible transfers of conventional arms;
- There is a realization that the problem of irresponsible transfers of conventional arms in global markets can only be effectively addressed through collaboration among States and the creation of a legally-binding instrument with common standards;
- A key challenge will be to ensure that states maintain their genuine political will to achieve an effective ATT in the interests of all states, hence the need to deepen common understanding of the issues;
- The process towards an ATT must remain open, transparent and inclusive (especially including major conventional arms manufacturers and exporters).

**SCOPE**

The two main issues that need to be defined in the scope of an ATT are the types of conventional arms and the types of transfers to be covered under the definition of "import, export and transfer of conventional arms". To be effective, an ATT must cover the broadest range of conventional arms possible and the broadest definition of international transfers in the generic sense of the word. This is the view held by the majority of states in their submissions.

**Types of conventional arms covered by an ATT**

A majority of states believe that an ATT must cover "all conventional weapons,"<sup>34</sup> such as, but not limited to:

- Small arms and light weapons;
- Man Portable Air Defence Systems (MANPADS);

<sup>34</sup> Some 57 of the 92 submissions analysed stated this, including: Albania, Austria, Bangladesh, Belgium, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Djibouti, Estonia, Fiji, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Liberia, Luxembourg, Macedonia, Malawi, Malta, Mexico, Morocco, the Netherlands, New Zealand, Niger, Norway, Paraguay, Peru, Poland, Portugal, Romania, Senegal, Slovakia, South Africa, Spain, Sweden, Togo, UK and Zambia.

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- Main battle tanks;
  - Armoured fighting vehicles;
  - Combat aircraft;
  - Warships and conventionally armed missiles;
  - Ammunition (including explosives);
  - Parts and components.

The need to ensure a comprehensive weapons and munitions control list is a normal practice among most states. Ensuring a similar comprehensive list for an ATT is an area of suggested focus for the GGE. To avoid legal and technical uncertainties and for simplicity's sake, the use of existing multilateral and national control lists is widely suggested by states as the best way to create a comprehensive and detailed list of applicable arms for an ATT. Numerous states recommend adopting the categories of conventional arms established in the UN Register of Conventional Arms<sup>35</sup> as a starting point but note that this by itself would be inadequate. Many states suggest that the very limited number of categories covered by the UN Register should be expanded to include all types of conventional arms components and ammunition, and small arms and light weapons. The latter would ensure consistency with the UN Programme of Action, the International Tracing Instrument<sup>36</sup> and the UN Firearms Protocol.<sup>37</sup> The Wassenaar Arrangement Munitions List and the European Union (EU) Code of Conduct<sup>38</sup> Military List are also suggested as providing more comprehensive and precise specifications.<sup>39</sup> The GGE should consider recommending that the broadest list of conventional weapons, munitions and components be included in the ATT.

### **Dual use items and arms manufacturing equipment and technology**

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<sup>35</sup> The UN Register of Conventional Arms was established by UN General Assembly resolution 46/36 L in 1991. The Register comprises seven categories of major conventional arms, namely, battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships (including submarines) as well as missiles and missile launchers.

<sup>36</sup> International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, adopted by the UN General Assembly on 8 December 2005 (International Tracing Instrument).

<sup>37</sup> 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, adopted by the UN General Assembly on 8 June 2001 (UN Firearms Protocol).

<sup>38</sup> The European Union (EU) Code of Conduct for Arms Exports (EU Code of Conduct) was agreed to in May 1998 and seeks to create "high common standards" for all EU members to use when making arms export decisions and to increase transparency among EU states on all conventional arms exports.

<sup>39</sup> See, for example, submissions from: Australia, Argentina, Austria, Brazil, Croatia, Cyprus, Denmark, El Salvador, Finland, France, Germany, Hungary, Estonia, Fiji, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Kenya, Latvia, Liberia, Lithuania, Macedonia, Malawi, Malta, Mexico, New Zealand, Paraguay, Peru, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, UK and Zambia.

For a comprehensive and effective ATT, all components intended for weapons and munitions systems and other military and security equipment should be subject to strict transfer controls and included within the scope of conventional arms covered by the treaty. There is a clear recognition by a number of states that the trade in dual use components supplied for conventional arms is a major part of the global arms trade, and without the inclusion of these items within the scope of an ATT there would be a significant gap. Transfers of dual-use technologies, components and materials are already controlled under a number of multilateral agreements, including the Wassenaar Arrangement, the Missile Technology Control Regime,<sup>40</sup> the Nuclear Suppliers Group,<sup>41</sup> the Australia Group,<sup>42</sup> the Chemical Weapons Convention<sup>43</sup> and the EU Code of Conduct.

While some 13 states<sup>44</sup> expressly stated the need for the inclusion of dual use items intended for military, security or policing purposes within the scope of an ATT, a near equal number of states indicated that this is an area for further consideration by the GGE.<sup>45</sup> As noted by Hungary, “given the fact that dual-use items (which can be used for both civil and military purposes) could have relevance to [the] conventional arms trade the possibility of looking into this matter should not be ruled out.” One State, Brazil, expressly felt that dual use items should not be included as its “inclusion may cause undue negative impact on civilian applications of such dual use and technologies.”

The inclusion of licensed production, manufacturing equipment and technology are also issues raised by states in their submissions. Six states specifically raised these issues as ones that should be discussed further by the GGE,<sup>46</sup> while some 42 states expressed that an ATT should cover aspects of these areas as well.<sup>47</sup>

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<sup>40</sup> The Missile Technology Control Regime (MTCR) was established in 1987. It is an informal and voluntary association of countries “which share the goals of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction, and which seek to coordinate national export licensing efforts aimed at preventing their proliferation.” There are currently 34 participating countries.

<sup>41</sup> The Nuclear Suppliers Group (NSG) is a group of nuclear supplier countries which “seeks to contribute to the non-proliferation of nuclear weapons through the implementation of guidelines for nuclear exports and nuclear related exports.” There are currently 45 participating countries.

<sup>42</sup> The Australia Group (AG) was established in 1985 and is an informal forum of countries which, through the harmonisation of export controls, “seeks to ensure that exports do not contribute to the development of chemical or biological weapons.” There are currently 40 participating countries plus the European Commission.

<sup>43</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) entered into force on 29 April 1997 and currently has 182 states parties.

<sup>44</sup> See submissions from: Albania, Bangladesh, Burkina Faso, Colombia, Côte d’Ivoire, Fiji, Liberia, Netherlands, Niger, Paraguay, Peru, Togo and Zambia.

<sup>45</sup> See submissions from: Belgium, Bosnia and Herzegovina, Canada, Costa Rica, Hungary, Iceland, Japan, Norway, South Africa, Sweden and UK.

<sup>46</sup> See, for example, submissions from: Canada (“...the technology to produce and maintain such equipment and weapon parts are complex issues. Canada believes that the GGE to be established

The need to develop a way to ensure that new and emerging technologies for conventional arms are also covered without having to constantly amend the treaty is cited as an area of attention for the GGE.<sup>48</sup> Italy suggested that a review mechanism could be one possibility within the treaty to ensure regular review of the categories of arms included within the ATT.

### **Operational aspects of any proposed list**

With respect to any proposed list of applicability within an ATT, the new list will need to be operational from an industry point of view as well as for those officials who would be responsible for implementing their obligations under an ATT.<sup>49</sup> Common international

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should consider these matters carefully...”), Finland (“The inclusion of licensed production, export of serves and maintenance as well as intangible transfers of technology should be discussed.”), Germany (“Furthermore, the issue of intangible transfers of technology as well as licensing need to be considered in this context.”), Norway (“Also to be considered is technology to produce and maintain such equipment...and production technology.”), Spain (“At the same time, we shall consider the inclusion of the technology and the pieces or components that allow the manufacture of such weapons in order to avoid any possible loophole in the implementation of the Treaty. This is a complex question to address and therefore, the experts group shall pay special attention to it.”) and Sweden (“The issue of whether intangible transfers of technology should be included merits consideration.”).

<sup>47</sup> See, for example, submissions from: Albania (“technology used for the production of conventional arms”), Argentina (“technology associated with the manufacture and repair of such armament”), Austria (“manufacturing equipment as well as technology”), Brazil (“production under license”), Bulgaria (“production technology”), Burkina Faso (manufacturing technology), Colombia (“manufacturing technology”), Croatia (“technology”), Czech Republic (“...manufacturing equipment or relevant technology should also be included in the scope of the ATT.”), Denmark (“license production, and intangible transfers are important elements”), Ecuador (“transfer of technology for the production of arms”), Estonia (“transfers of technology”), France (“transfers of production capacity”), Turkey (manufacturing technology), Greece (“intangible transfers”), Hungary (“technology”), Iceland (“The treaty should cover technology transfers related to the manufacture, maintenance and use of conventional arms as well as production licensing.”), Ireland (“transfers of technology”), Italy (“manufacturing technology”), Japan, (“exclusive technologies related to arms production”), Kenya (“transfer of technology for the manufacture of such weapons”), Latvia (“related technology”), Lithuania (“The instrument may also cover...technologies.”), Malawi (“technology specifically designed for the manufacture of such weapons”), Malta (“technology specifically designed for the manufacture of such weapons”), Morocco (“technologies used for the manufacture of conventional weapons”), Romania (“components for the manufacture of such weapons”) and UK (technology to produce and maintain such equipment”). See also submissions from Bangladesh, Bosnia and Herzegovina, Costa Rica, Côte d’Ivoire, Fiji, Jamaica, Liberia, Netherlands, Niger, Paraguay, Peru, Portugal, Togo and Zambia.

<sup>48</sup> See, for example, submissions from: Turkey (“States should pursue a comprehensive, flexible and a forward-looking approach that would enable to address evolving situations due to technological situations in the future.”), Australia and Cyprus.

<sup>49</sup> France, for example, raised this concern.

standards will need to be set out in a way that is easily understood by industry and those responsible for regulating the conventional arms trade.<sup>50</sup>

### **Definition of “international transfers”**

The range of activities that fall within the scope of an ATT must be clearly and precisely defined in order for the instrument to be effective. There is broad consensus of the basic types of international transfers that should be included within an ATT.<sup>51</sup> These include:

- Imports;
- Exports and re-exports;
- Temporary imports and exports, re-exports;
- Transit/transshipment;
- Re-transfers.

Other more specific forms of international transfer and transactions cited by states for inclusion in an ATT are:

- Loans, gifts, temporary exports / imports for demonstration or exhibition;
- Any other form of transfer of material goods or credit or expertise;<sup>52</sup>
- Services and maintenance;<sup>53</sup>
- Rental and conveyance;<sup>54</sup>
- Transfers of intangible assets;<sup>55</sup>
- Brokered transactions.<sup>56</sup>

<sup>50</sup> See, for example, submissions from: France (“The new list will have to be: comprehensible and operational from the point of view of industry and the body responsible for arms control; clear to all; technically precise.”), Luxembourg: (“It should be drafted in intelligible and technically precise language that is readable by persons in the industry, by clients and by export control officials”) and UK (“Whatever the scope of items to be included, coverage and controls will need to be set out in a way which can be easily understood by industry and those responsible for regulating the arms trade.”)

<sup>51</sup> See, for example, submissions from: Argentina, Australia, Austria, Bosnia and Herzegovina, Bulgaria, Burundi, DRC, Côte d’Ivoire, Georgia, Czech Republic, Ecuador, El Salvador, Netherlands, Colombia, Switzerland (though not transshipment), Costa Rica, Croatia, Denmark, Estonia, Fiji, Finland, France, Hungary, Ireland, Italy, Latvia, Lithuania, Malawi, Malta, Mali, Mexico, Morocco and Norway, Poland, Serbia, Seychelles, South Africa, Togo and Turkey.

<sup>52</sup> See, for example, submissions from: Bangladesh, Bosnia and Herzegovina, Czech Republic (“technical assistance”), France and Malta, Mexico, Poland, Portugal (“technical assistance”), Serbia, Spain, Sweden, UK, and Zambia.

<sup>53</sup> See, for example, submissions from: Hungary and Finland.

<sup>54</sup> Submission of Mexico.

<sup>55</sup> Submission of France.

<sup>56</sup> See for example, the report and recommendations of the UN Group of Governmental Experts on the Prevention of Illicit Brokering of Small Arms and Light Weapons (GGE on Brokering of SALW), A/62/163, 27 July 2007.

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The GGE should consider recommending that the broadest definition of international transfer be included in the ATT. As Poland noted, “omitting one of these transactions could create loopholes that would be used to get round the treaty.”<sup>57</sup>

With respect to brokering, some 52 states felt that it must also be included as a form of transfer or transaction within the scope of an ATT.<sup>58</sup> As Trinidad and Tobago stated “their [arms brokers] activities remain largely unregulated by states, and even where national regulations exist there are important gaps or loopholes that make it possible for this lucrative business to flourish.” Korea noted that “numerous investigations suggest that brokering activities play a key role in facilitating the illicit transfer of arms to and from groups and persons who cannot or will not acquire them through legal means”, emphasizing the “need to control brokering activities in the field of conventional arms.” A number of states strongly urged that the work of the GGE on Brokering of Small Arms and Light Weapons (SALW) be considered by the GGE and encompassed into its own report.<sup>59</sup>

A number of states also recommended that the ATT should be confined to transfers moving from the territory of one state to that of another, and therefore it ought to apply to all aspects of the government-sanctioned trade in conventional arms. This would include: state to state; state to private end user; commercial sales; leases; and loans and gifts or any other form of transfer of material goods, or credit or expertise.<sup>60</sup>

On the issue of transfers to non-state armed groups, the six submissions that specifically raised this question<sup>61</sup> generally stated that there must be a prohibition of all arms transfers to

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<sup>57</sup> See also, for example, New Zealand (“It would be crucial to ensure that no opportunities are provided to states/weapons manufacturers/arms dealers to exploit loopholes that might enable arms to be trade illegally.”).

<sup>58</sup> See submissions from: Albania, Argentina, Australia, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Colombia, Côte d’Ivoire, Croatia, Czech Republic, Djibouti, Denmark, DRC, Ecuador, Estonia, Fiji, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Jamaica, Latvia, Liberia, Lithuania, Malawi, Mali, Malta, Mauritius, Morocco, Netherlands, New Zealand, Niger, Norway, Paraguay, Peru, Poland, Portugal, Korea, Romania, Senegal, Serbia, Seychelles, Slovakia, South Africa, Spain, Sweden, and Trinidad and Tobago. Egypt also noted the importance of addressing illicit brokering in its submission, stating: “It is important to address illicit brokering and follow established international standards in this matter.”

<sup>59</sup> See, for example, submissions from: Argentina, Australia, Bosnia and Herzegovina, Brazil, Costa Rica, Finland (“The discussion on the concept of brokering to be included in the Arms Trade Treaty should not preclude possible results on the issue in other relevant UN contexts.”), Germany, Italy, Malawi, Korea, Switzerland, and UK.

<sup>60</sup> See for example, submissions from: Argentina, Bangladesh, Bosnia and Herzegovina, Burkina Faso, Canada, Costa Rica, Côte d’Ivoire, Estonia, Fiji, Germany, Lithuania, Macedonia, Niger and Zambia.

<sup>61</sup> Submissions include: Liberia, Brazil (“The instrument must contain . . . a clear prohibition of transfers to unauthorized non-state actors.”), Turkey (“The main focus of the ATT should be the prevention of acquirement of arms and weapons by non-state actors.”). See also Cuba’s submission (“Cuba believes that a conventional arms trade treaty will be effective only if it expressly prohibits transfers to non-state actors.”) and India (“It is generally acknowledged that [the] illicit trade in conventional arms

armed groups, with the exception of those that are “authorized under international law”.<sup>62</sup> The inclusion of a limited and clear exception based within the parameters of existing international law is potentially one way of addressing the concerns of states that believe that an ATT must prohibit transfers to non-state armed groups.

### Exclusions from the definition of transfer

States agreed that an ATT should not apply to transfers made *within* the territory of a state. Furthermore, a number of submissions stated that an ATT must not impose restrictions on how arms may be acquired, held or used within a state’s territory,<sup>63</sup> where other limitations of international law and multilateral agreements already exist. It is also clear that an ATT must allow for flexibility for states to facilitate temporary export or import of certain goods, such as antique or sporting or hunting firearms used in legitimate activities. It should also respect the legitimate interests of firearms owners, producers and retailers.<sup>64</sup>

#### What states are saying:

##### Scope

- An effective ATT should include “all” conventional arms;
- To be comprehensive states also suggested the inclusion of licensed production, manufacturing equipment and technology for conventional arms;
- The list of conventional arms covered could be an amalgamation of existing UN Register of Conventional Arms, and Wassenaar and EU military lists with additions to include components, ammunition and small arms and light weapons;
- To avoid creation of loopholes, the forms of transfer should include the broadest definition possible with a large majority of states expressing the view that it should include: import, exports, re-export, temporary imports, exports, re-exports, transshipment, re-transfer. Other forms suggested include: loans, gifts, temporary exports/imports, services and maintenance and any other form of transfer of material good, credit or expertise;
- A majority of states believe that brokering activities or brokered transactions should be

contributes to its wanton dissemination to non-state actors and becomes an instrument in perpetrating armed violence by organized criminals or by terrorists.”). Israel noted the need for responsible controls to prevent arms getting into the hands of irresponsible end-users, be it state or non-state actors.

<sup>62</sup> International law requires that states respect the principles and purposes of the Charter of the United Nations. In the context of non-state armed groups, the Charter recognises the right of peoples under colonial or other forms of alien domination or foreign occupation to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination.

<sup>63</sup> See, for example, submissions from: Australia, Canada, Estonia, Finland, Italy, Luxembourg, Slovakia, Sweden, Macedonia and UK.

<sup>64</sup> See, for example, submissions from Australia, Bosnia and Herzegovina, Canada, Finland, Germany, Italy, Malta, New Zealand and UK.

included as a form of transfer and that consideration should be taken of the GGE on brokering of SALW;

- Transfers should be confined to those moving from the territory of one state to that of another.

## PARAMETERS

Key elements of an ATT will be an agreement on establishing legally binding minimum international standards that states agree to follow when considering international transfers of conventional arms. A major challenge for the GGE and for states will be the establishment of commonly agreed criteria that can be applied to such transfers.

NGOs advocating the establishment of an ATT have proposed a set of core ‘Global Principles for Arms Transfers’.<sup>65</sup> The Global Principles indicate what many NGOs consider to be the best framework for effective control of international transfers of all conventional arms and ammunition. These Global Principles include obligations based on relevant international law treaties and customary law, principles recognised by the United Nations, including international human rights law and international humanitarian law and the Articles on State Responsibility.

The Global Principles were noted by some states as providing a useful framework as a set of principles from which to begin negotiations.<sup>66</sup> As stated by Indonesia, “To start the process in the GGE, the ‘Global Principles for Arms Transfers’ can be used as a basis.” It is hoped that the Global Principles provide a solid framework that can encourage open and productive multilateral discussions. From the content of the submissions it is clear that this has already been the case. Amongst states there appears to be a significant level of agreement on the core content of an ATT.

The following section examines states’ submissions on the parameters of an ATT using the Global Principles as the framework for analysis, highlighting those areas where there is agreement by states and issues that the GGE might choose to consider in further detail.

### **Principle 1: Responsibility of States**

**All international transfers of arms and ammunition shall be authorized by every State with jurisdiction over any part of the transfer (including import, export, transit, transshipment and brokering) and carried out in accordance with**

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<sup>65</sup> *Compilation of Global Principles for Arms Transfers* (Revised and Updated) Published by Amnesty International, 2007 (Global Principles). Available in English, Spanish, French, Chinese, Portuguese, and Russian. Available at < [http://www.controlarms.org/find\\_out\\_more/](http://www.controlarms.org/find_out_more/)>.

<sup>66</sup> See, for example, submissions from: Bangladesh, Canada, Fiji and Japan.

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**national laws and procedures that reflect, at a minimum, states' obligations under international law.**

Principle 1 reflects the responsibility of states to regulate all international arms transfers within their jurisdiction and the requirement of all states to effectively licence, monitor and prevent the diversion of such arms transfers according to national laws, mechanisms and procedures in conformity with international law and standards. There is already considerable agreement on Principle 1 amongst states.<sup>67</sup> Brazil, for example, stated that “the instrument should include an obligation to adopt national implementation measures, in particular an adequate system of national laws and/or regulations and administrative procedures to exercise effective control over armaments...”

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<sup>67</sup> See also, for example, submissions from: Argentina (“Adoption of the criteria at the national level: establishment of transfer control systems...the instrument should provide for the adoption of legal and administrative mechanisms that will enforce the provisions at a national level...”), Colombia: (“States must be liable for all lawful transfers of arms within their jurisdiction and must regulate them.”), Cuba (“Cuba reiterates that, in order for a conventional arms trade treaty to be effective, each state must have adequate national controls and adopt concrete measures to strengthen and further develop their applicable internal laws and legal provisions.”), Fiji (“...a central tenet of the Arms Trade Treaty must be that states ensure that all international transfers of conventional arms relevant to their jurisdiction are subjected to strict controls and licensed according to internationally agreed standards of international law.”), Finland (“All transfers be authorized through a physical permit or licence.”), France (“France is of the opinion that the treaty should encourage the adoption of national export control systems which are consistent with international standards...”), Italy (“In principle all activities related to the transfer of arms should be subject to government regulation.”), Japan (“All international transfers of arms and ammunition shall be authorized by a recognised state.”), Lebanon (“Licensing of the arms trade in order to prohibit the modification of arms for other uses, halt the illicit trade therein and ensure against their falling into the hands of terrorists, and to combat the corruption and bribery associated therewith.”), Lithuania (“Establishing provisions that all international transfers of arms shall be authorized by a recognised state and carried out in accordance with national laws and procedures that reflect, as a minimum, states' obligations under international law.”), Malawi (“Malawi strongly believes that a central tenet of the ATT must be that states ensure that all international transfers of conventional arms relevant to their jurisdiction are subjected to strict controls.”), Morocco (“Introduction of a licensing system for all conventional arms transfers.”), Netherlands (“An ATT should oblige states to adopt and implement national legislation that provides the legal means to include the above criteria in the licensing process...”), Niger (“One of the central principles of an arms trade treaty must, however, be a requirement that states ensure the establishment of strict control over all international transfers of conventional arms...in conformity with the principles of international law.”), Paraguay (“The arms trade treaty should require states to authorize and effectively control international arms transfers to prevent them from diverted to the illicit market.”), Peru (“All transfers must be certified in advance.”), and Spain (“The text shall ensure that every transaction will be submitted to a previous evaluation of risks...”). See also submissions from: Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Burundi (“concept of authorization and control”) Côte d'Ivoire, Ecuador, El Salvador, Indonesia, Liberia, Mexico, Morocco, Panama, Serbia, South Africa, Trinidad and Tobago and Zambia.

Many submissions stated that national implementation must remain the sole responsibility of each member state<sup>68</sup> and that final decisions regarding the authorization of each transaction must lie within the competence of each state party. It is also clear from the submissions that such final decisions must be based on a case-by-case assessment of all transfer applications.<sup>69</sup>

The duty of states to prevent diversion of conventional arms in international transfers is raised in some 45 submissions.<sup>70</sup> As Egypt stated, “It is important to establish clear international principles and standards for regulating transfers of arms in order to prevent the diversion of arms into illegal trafficking.” Colombia held the view that that an ATT “must establish mechanisms for preventing arms, ammunition and explosives being diverted to illegal arms groups or non-governmental bodies acting outside of the law.” Clearly, within the scope of Principle 1, all arms transfer authorizations must be designed so as to reduce the possibility of diversion of arms and ammunition to unauthorized destinations and persons. Authorizations by states should not be granted if it is likely that the arms or ammunition will be diverted from their intended legal recipient and hence effective risk management mechanisms need to be in place in all national arms export/import operating systems.

Since national licensing authorities are required to assess transfer applications, the need for clear and operational criteria is also cited as an important area to consider.<sup>71</sup> The criteria must be easy to understand and administratively simple to implement.<sup>72</sup>

#### **What states are saying:**

<sup>68</sup> See, for example, submissions from: Estonia (“...the actual decisions on authorizing transactions should remain within the remit of individual states.”), Latvia (“It should remain the competence and responsibility of an individual state to take decisions on authorizations of transfers.”), and Poland (“The final decision authorizing transactions should though remain in the national scope of responsibility.”). See also submissions from: Australia, Cyprus, Ecuador, Fiji, Germany, Ireland, Kenya, Malawi, Malta, Spain and Zambia.

<sup>69</sup> See, for example, submissions from: Cyprus (“The final decision regarding the authorization of each transaction should be made on a case by case basis and it must continue to lie within the competence of each state party.”) and Portugal (“Decisions regarding the authorizations of each transaction should be made on a case by case basis and remain in the internal sphere of competence of individual member states.”). See also Austria and Malta.

<sup>70</sup> See, for example, submissions from: Argentina, Austria, Australia, Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Costa Rica, Colombia, Côte d’Ivoire, Cyprus, Denmark, Germany, Egypt, Ecuador, El Salvador, Fiji, Finland, France (“prevent misappropriation”), Germany, Greece, Italy, Jamaica, Latvia, Lithuania, Malawi, Mali, Malta, Mexico, Morocco, Netherlands, Niger, Nigeria, Paraguay, Portugal, Korea, Romania, Spain, Sweden, Togo, UK and Zambia.

<sup>71</sup> See, for example, submission of France.

<sup>72</sup> See, for example, submissions from New Zealand and UK (“...an instrument should also set out the basic practical mechanisms and guidance states should use when deciding on a case-by-case basis whether or not to allow a transfer. This does not need to be overly burdensome, but may set out, for example, the basic need to ensure all transfers are supported by appropriate documentation and that records must be kept of all transfers.”).

**Responsibility of states**

- There must be national provisions to ensure that each proposed transfer is assessed against agreed minimum criteria consistent with international law;
- The operational criteria of an ATT must be clear and administratively easy to implement;
- National authorities must assess transfers on a case-by-case basis;
- All transfer licensing decisions remain the sovereign right of all states;
- Decisions must be within the scope of minimum criteria set out in an ATT reflecting existing norms under international law.

**Principle 2: Express Limitations**

**Express prohibitions where states must not transfer arms in certain situations based on existing prohibitions on the manufacture, possession, use and transfer of arms including:**

- **UN Charter obligations: Security Council Arms embargoes, customary law prohibition on the threat or use of force in international relations, prohibition on the intervention in the domestic affairs of another state.**
- **Any other treaty to which a state is already bound;**
- **Universally accepted principles of international humanitarian law.**

Principle 2 encapsulates existing express limitations under international law on states' freedom to transfer and to authorize transfers of arms. It focuses on circumstances in which a state is already bound not to transfer arms as set out in express limitations in international law.

The clearest example of instruments that establish express limitations on international arms transfers are Security Council decisions imposing mandatory arms embargoes. Such decisions impose obligations on all United Nations Members. At present, UN Security Council arms embargoes are the only global, legally binding prohibitions on arms transfers.<sup>73</sup> However, as numerous sanctions committees and panels of experts report, arms embargo obligations are not universally and adequately enforced. The ease with which arms embargoes can be circumvented is one important reason for establishing an ATT and a number of states see an ATT as a means of increasing compliance with such embargoes. As Switzerland stated "An ATT should enhance respect for UN embargoes." Some 49

<sup>73</sup> The UN Firearms Protocol, a supplement to the July 2000 UN Convention against Transnational Organised Crime, also sets out legally binding prohibitions on transfers but is binding only on those states that are party to it, is restricted in scope to small arms and light weapons and does not apply to state-to-state transactions.

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submissions included the need for compliance with Security Council arms embargoes as a basic ATT criterion.<sup>74</sup>

In their recommendations for arms transfer criteria many states have identified the substantive provisions of Principle 2 as essential elements of an ATT. For example, many states agreed that one of the criterion to be included in assessing transfers is whether there will be a violation of UN Charter principles including the prohibition against the use or threat of force and the prohibition against intervening in the domestic affairs of other states, enshrined in Articles 2(4) and 2(7). These are key provisions in the UN's mandate to maintain international peace and security and form cornerstones of the UN Charter. States, in addition to specifically referring to Articles 2(4) and 2(7), use language such as "international customary law and principles recognised by the Charter", "obligations under the United Nations Charter", "maintenance of regional and international peace, security and stability" and "principles and provisions of the Charter" in setting out their suggested criteria for assessment of an arms transfer under an ATT.<sup>75</sup>

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<sup>74</sup> See submissions from: Albania, Argentina, Australia, Bangladesh, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Colombia, Croatia, Cyprus, Denmark, Czech Republic, Egypt, Estonia, Finland, France, Germany, Guatemala, Hungary, Iceland, Ireland, Italy, Japan, Kenya, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Malawi, Mali, Malta, Mauritius, Mexico, Morocco, Netherlands, Niger, Norway, Paraguay, Senegal, South Africa, Spain, Switzerland, Togo and UK.

<sup>75</sup> See submissions from: Albania ("When a country will make use of arms in order to threaten another country; When may be used to forcefully intervene in another country."), Argentina ("Compliance with the provisions of the United Nations Charter; Prohibition against the use or threat of the use of force and prohibition in the intervention in the domestic affairs of other states"), Australia ("...a transfer should also be denied if such transfer would be contrary to the UN Charter..."), Austria ("the maintenance of international peace and security"), Bangladesh ("Obligations under the UN Charter including...b) prohibitions on the threat or use of force; c) the prohibition on intervention in the internal affairs of another state."), Bosnia and Herzegovina ("commitments under the UN Charter"), Brazil ("Be used in violation of the provisions of the Charter of the United Nations related to the use of force;"), Bulgaria ("international security"), Ecuador ("relevant provisions of the Charter"), Italy ("The beach of international peace and security...should be regarded as core criteria in forbidding the transfer of arms."), Japan ("breaches of the UN Charter and customary law rules relating to the use of force"), Kenya ("Kenya is of the view that...the treaty should clearly spell out the responsibilities of states and the factors they should consider when deciding whether or not to allow a transfer. They should include ... international customary law and principles recognised by the United Nations."), Mali ("A transfer will not be authorized if such authorization violates...obligations under the United Nations Charter: ...prohibition of the use or threat of force; prohibition of interference in the internal affairs of another state;"), Malta ("As a minimum the following issues should be considered:...the maintenance of international and regional peace."), Pakistan ("Therefore, any such Treaty or agreement should be based on the following agreed principles: d) maintenance of regional and international peace, security and stability..."), Slovenia ("international peace and security"), Spain ("Spain suggests the definition of some common criteria...such as...the prohibition of the use or the threat of force; banning to intervene in the domestic affairs of another state."), UK ("commitments under the United Nations Charter...") and Zambia ("Breaches of the UN Charter and customary law rules relating to the threat or use of force."). See also submissions from: Burkina Faso, Cyprus, Czech Republic, Denmark, Estonia,

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States also referenced the need for a criterion requiring an assessment as to whether the transfer will breach obligations arising out of existing treaty commitments of states. This is widely accepted and uncontroversial, as states must comply with their existing treaty commitments. Submissions refer to prohibitions on arms transfers that arise in particular treaties.<sup>76</sup> As examples, numerous submissions specifically cited states' existing obligations under the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction and the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) and its Protocols.<sup>77</sup> Other submissions used more general language such as "existing international obligations of UN member states" which would, of course, include a state's existing treaty obligations.<sup>78</sup>

Also in the category of express limitations are long-established and widely accepted principles of international humanitarian law which prohibit the use of weapons that are of a nature to cause superfluous injury or unnecessary suffering or that are incapable of distinguishing between combatants or civilians. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

Many submissions stated that a transfer of conventional arms should be prohibited where the transfer will violate these universally accepted principles of international humanitarian law.<sup>79</sup> As Morocco stated, one of the parameters should be "integration of compliance with international humanitarian law into national legislation and international standards as basic

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Fiji, Germany, Greece, Ireland, Jamaica, Latvia, Netherlands, Poland, Portugal, Senegal, Sweden and Togo. India also noted in its submission that "in regulating the export of conventional arms, they [states] are required to take into account their obligations under international law, including the UN Charter..."

<sup>76</sup> See, for example, submissions from: Argentina, Bangladesh, Colombia, Fiji, Japan and Netherlands.

<sup>77</sup> See, for example, submissions from: Argentina, Bangladesh, Bosnia and Herzegovina, Costa Rica, Senegal and UK.

<sup>78</sup> See, for example, submissions from: Albania, Austria, Bosnia and Herzegovina, Bulgaria, Canada, Germany, Greece, Iceland, Ireland, Latvia, Macedonia, New Zealand, Niger, Norway, Portugal, Togo, UK and Zambia.

<sup>79</sup> See for example, submissions from: Albania, Australia, Austria, Bangladesh, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Colombia, Costa Rica, Cyprus, Denmark, Czech Republic, Ecuador, Estonia, Fiji, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Kenya, Lebanon, Liberia, Luxembourg, Macedonia, Malawi, Mali, Malta, Netherlands, New Zealand, Niger, Panama, Paraguay, Poland, Portugal, Senegal, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Togo, UK and Zambia. India also noted states' obligations under IHL: ("Furthermore, in regulating the export of conventional arms, they [states] are required to take into account their obligations under international law...including international humanitarian law.").

criteria for the review of decisions on arms transfers.” Norway submitted the view that a requisite consideration prior to authorization of a transfer should be the “risk of [the transfer] being used for violations on international humanitarian [laws].”

**What states are saying:**

**Express prohibitions**

- An ATT should set out criteria under which a state is expressly prohibited to transfer conventional arms as set out in existing international law;
- The majority of states referenced the need for criteria to assess whether a particular transfer of conventional arms would violate UN Charter principles, or be in breach of UN Security Council arms embargoes;
- Submissions refer to prohibitions on conventional arms transfers that arise in particular treaties as well as the obligation to consider whether the intended recipient can be expected to comply with international humanitarian law.

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

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

- A. Breaches of the UN Charter and customary law rules relating to the use of force**
- B. Gross violations of international human rights law;**
- C. Serious violations of international humanitarian law;**
- D. Acts of genocide or crimes against humanity;**

In Principle 3, limitations are based on the potential for misuse of the arms and munitions to be transferred. The international law obligation underpinning the responsibility of states to prohibit arms transfers under this Principle flows, in part, from the obligation of not to participate in the internationally wrongful acts of another state as set out in the International Law Commission’s Articles on State Responsibility. This principle is stated in Article 16 and reflects international customary law binding on all states.<sup>80</sup>

Many of the submissions recognised the relevant obligations contained in the Articles on State Responsibility, either explicitly by reference to the Articles themselves or implicitly in noting that states are obligated to assess the potential risk of misuse of a transfer from their jurisdiction.<sup>81</sup> These submissions expressed the view that where a state knows or should know

<sup>80</sup> In February 2007, the International Court of Justice (ICJ) in its judgment in the Bosnian genocide case confirmed that Article 16 is customary international law, therefore binding on all states.

<sup>81</sup> See, for example, submissions from: Albania, Argentina, Bangladesh, Bosnia and Herzegovina, Brazil, Burkina Faso, Burundi, Canada, Colombia, Costa Rica, Côte d’Ivoire, Fiji, Finland, Japan, Lebanon, Liberia, Mali, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Senegal, South Africa, Togo, Trinidad and Tobago, United Kingdom and Zambia.

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of circumstances creating a high risk that the transfer of arms will be used for violations of international law the transfer must be prohibited. For example, Trinidad and Tobago's submission noted this in stating that, "states have an obligation not to aid or assist another state in breaching international law". Argentina also stated that one of the fundamental objectives of an Arms Trade Treaty should be the "establishment of common criteria that may allow the national authorities...an easy identification of the circumstances and factors to be taken into account in order to prevent arms from being acquired by users or for uses forbidden under applicable international law."

### **Serious violations of international human rights law**

Two of the most fundamental elements of an ATT must be ensuring that states abide by their duty to avoid aiding gross violations of international human rights law and serious violations of international humanitarian law when making decisions about each and every transfer. This general obligation is also recognised in UNGA Resolution 61/89. Numerous research reports on major negative effects of the international arms trade show that without these human rights and humanitarian law provisions an ATT simply will not make a meaningful difference to the lives of the millions of people who suffer from the devastating consequences of poorly controlled conventional arms trading.<sup>82</sup>

In expanding on the duty to avoid aiding violations of international human rights law, the Global Principles elaborate that the standard is "gross" violations of human rights law. This standard is used to convey a sense of scale, evoking both the number of violations – amounting to a persistent pattern of abuse – and the gravity of their consequences for the victims. Such a standard would invoke a cessation in the transfer of conventional arms being used for such violations. This is a standard also recognised in submissions, such as in South Africa's which stated that "...criteria should include: whether the transfer would contribute to internal repression, including the systematic violation or suppression of human rights and fundamental freedoms." Brazil expressed that "serious and persistent" violations of human rights is an appropriate standard for inclusion in this criteria.

72 of the 92 submissions reviewed recognised the key importance of assessing the potential for a transfer to be used for at least certain abuses of human rights law. The language ranges from ensuring that the criteria take into account "respect for international law including international human rights law and international humanitarian law..." to an ATT that will assist in "the prevention of a breach of international humanitarian law [and] prevention of abuses of human rights."<sup>83</sup> Language in some submissions references the need to assess the

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<sup>82</sup> See, for example, "Arms Trade Treaty: No more arms for atrocities", Arias Foundation for Peace and Human Progress, Costa Rica, 2005; "Arms without Borders: Why a globalised trade needs global controls", Amnesty International, the International Action Network on Small Arms, and Oxfam International, October 2006.

<sup>83</sup> See submissions from: Australia ("An ATT should also take into account such factors as the...prevention of human rights abuses..."), Austria ("respect for ...human rights law"), Bangladesh

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potential risk of a transfer on human rights and humanitarian law.<sup>84</sup> Turkey, for example, stated that common export criteria would include “the respect for human rights” and Thailand asserts that the treaty should “acknowledge...international human rights law.”

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(“ATT must also reflect the obligations of states under the UN Charter to promote and observe human rights and fundamental freedoms.”), Bulgaria (“...basic standards to be met: international humanitarian law and international human rights law...”), Croatia (“Respect for human rights”), Cyprus (“factors that should be taken into consideration including international humanitarian and human rights law”), Denmark (“respect for international human rights law”), Czech Republic (“criteria...should include, *inter alia*:...respect for human rights and international humanitarian law”), Germany (“respect for international human rights law and international humanitarian law...”), Hungary (“criteria should in our view constitute the minimum core obligations for future states parties to the ATT when forming a judgment on arms transfer applications...: Respect for international law, including international human rights and humanitarian law in the country of final destination”), Ireland (“broad criteria to be applied in considering an application ... international human rights law”), France (“the respect of human rights”), Jamaica (“respect for human rights”), Kenya (“factors they should consider when deciding whether or not to allow a transfer.... respect for human rights and international humanitarian law”), Latvia (respect for...human rights law”), Luxembourg (“all international norms in the field of human rights”), Malta (“respect for...human rights law”), Mexico (“main criteria to be considered:...that human rights ...are respected”), Mauritius (“However, the ATT should at the same time clearly outline the States’ responsibilities and obligations...to promote and protect human rights.”), Paraguay (“The ATT should respect...international human rights law.”), Poland (“These standards could include threats to: - maintenance of international peace and security, - human rights, - international law, including international humanitarian law.”), Portugal (“respect for international humanitarian or human rights law”), Slovakia (“An ATT should reflect ...the obligation of states to promote and observe human rights and fundamental freedoms; and the obligation of states to ensure respect for the rules of international humanitarian law.”), Slovenia (“respect for...human rights”), Romania (“respect for the international obligations assumed by the United Nations member states, for the international humanitarian law and human rights law”), Sweden (“Sweden believes that the criteria should cover *inter alia* respect for international human rights law and international humanitarian law.”) Thailand (“...the treaty should acknowledge...international human rights law”) and Turkey (“Common export criteria ...would include: the respect for human rights.”). See also submissions from: Bolivia and Djibouti.

<sup>84</sup> See submissions from: Estonia (“human rights situation”), Greece (“Human rights violations in the importing country should be a negative factor for the implementation of the export.”), Iceland (“a risk assessment for potential violations of human rights”), Italy (“compliance with international human rights standards”), Liechtenstein (“One of the major parameters for the assessment of the potential risk of a transaction has to be the respect for international human rights and humanitarian law in the country of destination...”), Malawi (“ATT should establish minimum standards that states should have to take into account when considering whether or not to allow a transfer. Those standards should *inter alia* make reference to: Respect for international law, including the Charter of the United Nations, human rights law and international humanitarian law”), Netherlands (“...a state ...should consider whether the proposed transfer will, or will likely be used: to commit serious violations of international human rights law...”), Norway (“their risk of being used for violations of international humanitarian or human rights laws”), South Africa (“Whether the transfer would contribute to internal repression, including the systematic violation suppression of human rights and fundamental freedoms.”), Spain (“the effect on the respect of Human Rights and International Humanitarian Law in the country of final destination, with the aim of impeding abuses against such rights”), Switzerland (“All participating states should

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The clearest language states that an ATT should set out conditions where states are obligated to withhold their approval for a particular transfer where it would be used to commit violations of international humanitarian and human rights law.<sup>85</sup> For example, the UK held the

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evaluate the possible negative impacts of every arms transfer and renounce such transfers if one or several of the following criteria is fulfilled: ...Respect of Human rights and international humanitarian law in the receiving state is poor.”) and Trinidad and Tobago (“ensure that transferred arms are not ultimately delivered for use in human rights violations”). See also submissions from: Benin, Belgium, and Chile.

<sup>85</sup> See submissions from: Albania (“...the ATT should emphasize that countries should not allow arms transferring ...when the arms will be used to violate or oppress human rights...”), Argentina (“Risk of diversion of arms to uses forbidden by applicable international law including the rules of ... human rights.”), Bosnia and Herzegovina (“...whether the proposed transfer will be used in the commission of serious violations of international humanitarian or human rights law?”), Burundi (“Where the transfer would lead to a violation of human rights or international humanitarian law?”), Brazil (“...the instrument should include a provision requiring states to avoid authorizing transfers...in cases where...the transfer in question will be used for serious and persistent violations of human rights and international humanitarian law.”), Canada (“...will the arms be used for serious violations of international humanitarian or human rights law?”), Colombia (“prohibitions based on the likely use of arms, in particular when it is possible that the arms are going to be used to commit serious infringements of international human rights or humanitarian law?”), Costa Rica (“...examining whether that transfer will be used to commit serious violations of international humanitarian or human rights law.”), Fiji (“States shall not authorize international transfers of conventional arms where they will be used or are likely to be used for violations of international law, including: gross violations of international human rights law; serious violations of international humanitarian law, including the Geneva Conventions and Protocols; and crimes against humanity and genocide.”), Finland (“State parties should exercise special caution and vigilance in issuing licenses on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by competent bodies.”), Guatemala, based its position on the Central American Code of Conduct, which states “...transfers shall not be carried out from or to states which commit and/or sponsor human rights violations,” Japan (“States shall not authorise international transfers of arms where they will be used or are likely to be used for ... gross violations of international human rights law.”), Liberia (“the prohibition of international arms transfers if they are likely to be used to facilitate serious violations of human rights”), Lithuania (“Adopting national controls to deny transfer of conventional arms to states or entities violating human rights...”), Macedonia (“Transfer must not...[be used] for commission of serious violations of human rights law.”), Mali (“A transfer will not be authorized if the arms are intended to be used: to violate the rights and freedoms of person and populations.”), New Zealand (“conditions whereby states are obliged to withhold their approval for a particular arms transfer. Such conditions would include where the arms being traded are used to commit serious violations of international humanitarian or human rights law”), Niger (“States not to authorise international transfers...when such arms will be or maybe used to commit violations of international law, including c) serious violations of international human rights law”), Panama (“Prohibition of the use of arms to commit violations of human rights”), Peru (“An assessment will have to be made whether the transfer of weapons will have effects detrimental to the full observance of human rights...”), Senegal (“States shall not authorize the transfer of arms that are destined to be used for ...the infringement of human and peoples’ rights and freedoms or for the purpose of oppression.”), Serbia (“prohibitions of transfers that are likely to be used in serious breaches of human rights”), Togo

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view that a key consideration must be “whether the proposed transfer will... be used in the commission of serious violations of international humanitarian or human rights law.” Serbia expressed the view that there should be “prohibitions of transfers that are likely to be used in serious breaches of human rights” and Liberia’s submission stated that the ATT should include “the prohibition of international arms transfers if they are likely to be used to facilitate serious violations of human rights”.

Regardless of the variation of language used, it is clear that a majority of states believe that a key objective of an ATT must be respect for human rights and to ensure that transfers of conventional arms are not used to violate these rights.

One of the first steps should be to delineate the scope of human rights instruments to be recognised as relevant to an ATT. States have suggested in their submissions that this should include, for example, the Universal Declaration of Human Rights, the Convention against Torture, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>86</sup>

States referred to human rights violations within their own countries, highlighting the need for a complete inclusion of human rights instruments within the ATT. For example, Liberia cited the need for criteria to “prevent the transfer of arms that are likely to be accessible and easily used by children”, to which the Covenant on the Rights of the Child (CRC) would apply. Zambia stated that an ATT “should emphasize gender aspects as they relate to women and children who bear the brunt of small arms and light weapons misuse”, to which the Covenant on the Elimination of Discrimination against Women (CEDAW) should be considered. Clearly, in determining criteria relating to serious violations of human rights, the GGE and governments should ensure that the full scope of states’ human rights commitments are considered.<sup>87</sup>

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(“An arms transfer will not be authorised if the arms are destined to be used to: facilitate the commission of serious violations of human rights.”), UK (“The United Kingdom would suggest that the key considerations [to be considered] must be whether the proposed transfer will: Be used in the commission of serious violations of international humanitarian or human rights law.”) and Zambia (“Prohibit transfers that are likely to be used for serious violations of human rights on international humanitarian law.”). See also submissions from: Burkina Faso and Côte d’Ivoire.

<sup>86</sup> See, for example, submissions from: Argentina, Bangladesh, Bosnia and Herzegovina, Ecuador, Finland, Niger, UK and Zambia.

<sup>87</sup> Finland sets out the main human rights conventions that it believes should be discussed in connection with the inclusion of the human rights criterion in an Arms Trade Treaty as: the UN Universal Declaration on Human Rights, the ICCPR, ICESCR, CEDAW, CRC, the Convention Against Torture, and the Convention on the Elimination of All Forms of Racial Discrimination and their optional protocols. The International Convention for the Protection of All Persons from Enforced Disappearance and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families are also considered universal human rights conventions.

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One concern for states is that assessment criteria can be applied in an objective manner. Fortunately, assessments of the probability of “serious” violations of human rights facilitated by the use of conventional arms can be objectively determined with verifiable evidence relevant to specific instances. Some states raised the need for procedures to clearly establish the legitimate nature of a proposed transfer prior to authorisation. In order to be able to decide whether there is a significant risk that an item of conventional arms will probably be used in one of the prohibited ways (for example, for serious violations of human rights), states will need clear guidelines and procedures. The GGE should consider the need to establish indicators and procedures to enable states to make an objective determination of when there is a significant risk that a transfer would contribute to serious human rights violations and therefore not be authorised until that risk is removed. In this regard, it might be useful to consider national experiences and practices with regard to conventional arms exports.<sup>88</sup>

Argentina suggested that “the instrument should establish that before authorising a transfer, states should take the necessary measures in order to guarantee that the risks derived from such a transfer have been foreseen, insofar as is possible.” Finland’s submission suggested the need for case-by-case evaluation of transfers to countries where serious violations of human rights have been established by competent bodies. Finland also set out its view on state guidelines for determining when serious human rights violations have been established, suggesting the authoritative human rights bodies in the UN, including the Human Rights Council, the special procedures mechanisms and the various treaty bodies.

While the development of guidelines (such as those associated with the EU Code of Conduct) have been helpful in implementing various codes and agreements, the majority of submissions make it clear that a basic principle must be that unless a state is satisfied that a potential transfer of conventional arms would not breach international commitments, including serious violations of human rights law, the state should be required to refuse authorisation of the transfer.

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<sup>88</sup> For example, the draft USA Code of Conduct for Arms Transfers states these considerations: Sec. 3. “...”United States military assistance and arms transfers may not be provided to a foreign government...unless the President certifies to Congress for that fiscal year that such government meets the following requirements:...2) Respects human rights. – The government of the country: (A) does not persistently engage in gross violations of internationally recognised human rights, including: (i) extrajudicial or arbitrary execution (ii) disappearances; (iii) torture or severe mistreatment; (iv) prolonged arbitrary imprisonment; (v) systematic official discrimination on the basis of race, ethnicity, religion, gender, national origin, or political affiliation; and (vi) grave breaches of international laws of war or equivalent violations of the laws of war in internal armed conflicts; (B) vigorously investigates, disciplines, and prosecutes those responsible for gross violations of internationally recognised human rights; (C) permits access on a regular basis to political prisoners by international humanitarian organizations; (D) promotes the independence of the judiciary and other official bodies that oversee the protection of human rights; (E) does not impede the free functioning of domestic and international human rights organizations; (F) provides access on a regular basis to humanitarian organizations in situations of conflict or famine.”

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## Serious violations of International Humanitarian Law

65 of the 92 submissions analysed raised IHL considerations, affirming the belief of a majority of states that respect for international humanitarian law (IHL) is one of the fundamental criteria by which conventional arms transfer decisions should be assessed.<sup>89</sup> While a majority of states raise this in their submissions, an even greater number, the 194 states parties to the Geneva Conventions have already adopted this as Final Goal 2.3 at the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent, on 6 December 2003.<sup>90</sup> This is a clear indicator of states' views on the applicability of IHL to arms transfers.

As the International Committee of the Red Cross (ICRC) has stated, "When a state transfers military weapons or equipment, it is providing the recipient with the means to engage in armed conflict – the conduct of which is regulated by international humanitarian law. Under Article 1 common to the Geneva Conventions of 1949, states have an obligation to "respect and ensure respect" for international humanitarian law. To ensure that violations of international 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".<sup>91</sup>

The ICRC has proposed that all international and national standards of arms transfers should include a requirement to assess the recipient's likely respect for international humanitarian

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<sup>89</sup> See submissions from: Albania, Argentina, Australia, Austria, Bangladesh, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Colombia, Costa Rica, Côte d'Ivoire, Cyprus, Czech Republic, Denmark, Ecuador, Estonia, Fiji, Finland, France, Germany, Guatemala, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Kenya, Latvia, Lebanon, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malawi, Mali, Malta, Mexico, Morocco, Netherlands, New Zealand, Niger, Norway, Panama, Paraguay, Poland, Portugal, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, UK and Zambia. Some submissions, including for example, Jamaica, Canada, the UK, Ecuador, France and Sweden also made specific reference to the need to respect existing obligations under the Geneva Conventions.

<sup>90</sup> In 2003, the 194 states parties to the Geneva Conventions undertook to make respect for international humanitarian law as one of the fundamental criteria on which arms transfer decisions are assessed and to incorporate such criteria into national laws or policies and into regional and global norms on arms transfers.

<sup>91</sup> International Committee of the Red Cross, "*Arms Transfer decisions: applying international humanitarian law criteria*", May 2007. This document provides guidance to assist those involved in arms transfer decision-making by a list of proposed indicators to assess the risk that transferred arms or military equipment will be used in the commission of serious violations of international humanitarian law. The GGE might consider incorporating these guidelines in its final report. Finland also provides some ideas as to how to make a determination of risk that equipment might be used in the commission of serious violations of international humanitarian law, stating "Questions to be asked could include whether the recipient has ratified international humanitarian law instruments or made other formal engagements to apply the rules of international law; whether the recipient has trained its armed forces in the application of international humanitarian law and whether stable authority structures capable of ensuring respect for international humanitarian law exist in the area under control of the recipient."

law, and that transfers should not be authorized if there is a clear risk that the arms will be used to commit serious violations of this law.

Again, while the submissions raise the importance of international humanitarian law with varying language, the underlying message is that conventional arms transfers that are likely to be used for violations of IHL must be prohibited. Many submissions suggested that one of the criteria when considering transfers should be “respect for international humanitarian law”<sup>92</sup> Other submissions suggested “an Arms Trade Treaty should also take into account such factors as the prevention of a breach of international humanitarian law.”<sup>93</sup> Those states that most fully and accurately reflect their existing obligations in this respect explicitly call for a prohibition on a transfer where there is a significant risk that the arms will be used to commit serious violations of international humanitarian law.<sup>94</sup>

#### **What states are saying:**

##### **Risk of serious violations with the arms:**

- The vast majority of states believe the two fundamental elements of an ATT must be respect for international human rights law and international humanitarian law in all transfers of conventional arms;
- Those submissions that raise it suggest that the scope of human rights instruments that apply to human rights criteria should include the ICCPR, ICESCR, CAT, CERD, CEDAW and CRC and their optional protocols and the UN Universal Declaration of Human Rights;
- There is a need to ensure that criteria for authorizing transfers can be applied in an objective manner, highlighting the need for clear guidelines based on international law that define “serious violations”, and procedures to assess the risk of whether particular proposed transfers will probably contribute to such violations.

#### **Principle 4: Factors to be taken into account**

**States shall take into account other factors, including the likely use of the arms or ammunition before authorizing an arms transfer. States should not authorize the transfer if it is likely to:**

<sup>92</sup> See, for example, submissions from: Austria, Bulgaria, Chile, Cyprus, Czech Republic, Denmark, Germany, Ireland, Italy, Jamaica, Kenya, Luxembourg, Malawi, Malta, Morocco, Paraguay, Poland, Portugal, Slovakia, Slovenia, Sweden, Switzerland and Thailand.

<sup>93</sup> See, for example, submissions from: Australia, Argentina (“Risk of diversion of arms to uses forbidden by applicable international law, including the rules of IHL”), Canada, Costa Rica, Estonia, Hungary, Iceland, Liechtenstein, Macedonia, Mexico, New Zealand, Norway and Spain.

<sup>94</sup> See, for example, submissions from: Bangladesh, Bosnia and Herzegovina, Brazil, Burkina Faso, Burundi, Colombia, Côte d’Ivoire, Fiji, Finland, Guatemala, Japan, Lebanon, Liberia, Mali, Netherlands, Niger, Panama, Senegal, Serbia, Togo, Trinidad and Tobago, UK and Zambia.

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- A. Be used for or to facilitate terrorist attacks;**
  - B. Be used for or to facilitate the commission of violent or organized crime;**
  - C. Adversely affect regional security or stability;**
  - D. Adversely affect sustainable development;**
  - E. Involve corrupt practices;**
  - F. Contravene other international, regional, sub-regional commitments or decisions made or agreements on non-proliferation, arms control, and disarmament to which the exporting, importing, or transit states are party.**

Principle 4 identifies possible consequences of transfers and international obligations that states are required to take into account before authorizing a transfer of conventional arms and ammunition. It imposes a positive duty on states to address these issues and establishes a presumption against authorizing transfers where these consequences are deemed likely. These criteria appear in the various international, multilateral, regional and sub regional documents and guidelines on transfers, and they are now well established and widely accepted norms.

In their submissions, states have identified all these factors as criteria to include within an ATT.

#### **Used for or to facilitate terrorist attacks**

From the content of the submissions it is clear that the need to address global concerns of terrorist attacks is a pressing priority for states. Numerous submissions raise this concern. For example, Australia noted that the irresponsible or illicit transfer of conventional arms has a direct impact on...terrorism..." India stated in its submission that "It is generally acknowledged that [the] illicit trade in conventional arms contributes to its wanton dissemination to non-State actors and becomes an instrument in perpetrating armed violence by organized criminals or by terrorists." Pakistan maintained that "the right of each state to security", which would include security from terrorist attacks, must be a basic principle of any Arms Trade Treaty. Turkey emphasised that the development of legally binding common transfer criteria is "complementary to the efforts to combat terrorism." France stated that "combating illegal transfers and the irresponsible dissemination of conventional arms, together with the fight against terrorism, form the key challenges of security and defence to which the International Community must respond by equipping itself with appropriate control instruments."

In their recommendations for potential criteria, some 57 submissions raised the concern of terrorist acts and expressed that transfers should not be authorized where the arms are likely to be used to commit terrorist acts or to support or encourage terrorism, or where there is a risk of diversion of the transfers to be used for terrorist activities.<sup>95</sup> For example, Brazil

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<sup>95</sup> See submissions from: Albania, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic,

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suggested criteria for avoiding arms transfers that will “be used for the commission of terrorist acts and/or violent crime, as defined by relevant instruments adopted under the framework of the United Nations.”

It should be noted that, although there is yet no internationally agreed definition of “terrorism”, many states wish to prevent conventional arms transfers that stand a high risk of being used for armed “terrorist attacks” or “terrorist acts”.<sup>96</sup> Such attacks or acts should be understood generally in this context to mean acts which are prohibited under international law, such as deliberate attacks on civilians, indiscriminate attacks, hostage-taking, torture or deliberate and arbitrary killings, when the purpose of such an act, by its nature or context, is to intimidate a population or compel a Government or international organization to do or to abstain from doing any act.<sup>97</sup> The work of the GGE in this area can be informed by reference to the numerous conventions relating to specific acts associated with terrorism or terrorist attacks.<sup>98</sup>

### **Violent and/or organized crime**

Many states believe that a prohibition of arms transfers that are likely to be used in violent and/or organized crime should now be codified in an ATT. For example, Trinidad and Tobago in its submission noted that “instances of the use of small arms and light weapons in the commission of criminal acts in Trinidad and Tobago are considered to be on the increase in a growing number of areas, among these, drug-related violence, male dominated gang warfare with serious implications for the female populations, youth violence even in schools, organized crime, insurrection and random street violence against private citizens.” Colombia raised the point that “all states are exposed to different types of armed violence, be it rural, ethnic, religious, political, social or economic” and an ATT would need to create a viable framework to “ensure that states...can counter these manifestations of violence.” Clearly an

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Denmark, Ecuador, Estonia, Fiji, Finland, Georgia, Germany, Guatemala, Hungary, Iceland, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Latvia, Liberia, Lithuania, Macedonia, Mali, Malta, Mauritius, Netherlands, New Zealand, Niger, Nigeria, Norway, Paraguay, Poland, Portugal, Romania, Serbia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, Togo, Turkey, UK and Zambia.

<sup>96</sup> Footnote 19 of the Global Principles, 1997 states: “The absence of a globally agreed definition of “terrorism” suggests that the criteria in an ATT should focus on terrorist attacks and specific acts that are associated with “terrorism” or terrorist attacks.”

<sup>97</sup> See Report of the United Nations Secretary-General, “In larger freedom: towards development, security and human rights for all”, A/59/2005, at para . 91 where the Secretary-General calls “for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by existing conventions, any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a Government or an international organisation to do or abstain from doing any act.”

<sup>98</sup> For example: the International Convention for the Suppression of the Financing of Terrorism; International Convention for the Suppression of Terrorist Bombings Convention on the Marking of Plastic Explosives for the Purpose of Detection and others. For other relevant conventions see Annex II.

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ATT must strike a balance between prohibiting transfers of arms that are likely to be used in violent crime and ensuring, as Colombia expressed, that states are able to carry out their “responsibilities in term of protecting and providing security for its citizens.”

From as early as 1991, the United Nations General Assembly has called on its members to prioritize eradicating illicit arms trafficking in all kinds of weapons and military equipment, defining it as a “most disturbing and dangerous phenomenon” often associated with, *inter alia*, organised crime and mercenary activities.<sup>99</sup> This remains a high priority as some 42 submissions cite this as a necessary criterion within an ATT.<sup>100</sup>

### **Adversely affect regional security or stability**

The potential adverse impact on regional security or stability is widely recognised by states as a necessary criterion for states to factor into their transfer authorizations. For example, Niger’s submission noted the continued residual insecurity resulting from destabilizing accumulations of arms with roots in an armed rebellion in the early 1990s. Samoa stated that it knows “from grim experience the capacity of high powered weapons to destabilize communities when these weapons fall into the wrong hands.”

The need to refrain from excessive and destabilising accumulations of armament is noted in the 1996 UN Guidelines for International Arms Transfers<sup>101</sup> which provides that “states should recognise that...reducing those potentially negative aspects of the arms trade require reciprocal commitments by producer and recipient countries...by way of refraining from destabilizing accumulations of armaments. The Guidelines further state that producer/supplier and receiving states have responsibilities in exporting or importing conventional arms. Producing and supplying states have a responsibility to ensure that the quantity and level of sophistication of their arms exports do not contribute to instability and conflict in their regions. States receiving arms have an equivalent responsibility to seek to ensure that the quantity and the level of sophistication of their arms imports are commensurate with their legitimate self-defence and security requirements.<sup>102</sup> This responsibility was reiterated by Pakistan who noted, “militarily significant states and states with larger military capacities have a special responsibility in promoting agreements for regional security”.

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<sup>99</sup> See General Assembly Resolution A/RES/46/36 H, 1991.

<sup>100</sup> See submissions from: Argentina, Australia, Bangladesh, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Costa Rica, Côte d’Ivoire, Colombia, Cyprus, Ecuador, Estonia, Fiji, Finland, Georgia, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Kenya, Latvia, Liberia, Malawi, Mali, Mauritius, Netherlands, New Zealand, Niger, Nigeria, Norway, Poland, South Africa, Spain, Togo, Trinidad and Tobago, Turkey, UK and Zambia.

<sup>101</sup> UN Guidelines for International Arms Transfers Article, endorsed by the General Assembly in A/RES/51/47, paragraph 32. China noted the importance of the UN Guidelines for International Arms Transfers in its submission stating that “these guidelines are still of profound and practical guiding significance to all states.”

<sup>102</sup> UN Guidelines for International Arms Transfers, paragraphs 20 and 21.

These responsibilities, applicable to both exporting and importing states, are recognised by a significant number of states, as 50 submissions cited assessment of potential adverse impacts on regional security or stability as a factor for inclusion within an ATT.<sup>103</sup>

### **Adversely affect sustainable development**

In their submissions, many states noted their own experiences from armed conflict that have diverted resources and adversely affected their sustainable development efforts. For example, the government of Liberia stated that it inherited a situation where “the expending of scarce sub-regional, regional and international resources which could have gone for development on efforts to end the war and provide humanitarian assistance”. Its submission also noted that while 76 percent of its population lives below the poverty line, a significant amount of state resources must still be spent on peacekeeping and peace maintenance operations in the country today.” In Ecuador’s view “illicit trafficking is linked to poverty and underdevelopment.”

Other states recognise the futility of development assistance efforts against increased globalization of the illicit international arms trade.<sup>104</sup>

As a result, 43 states raised sustainable development as an important consideration for an ATT, with some submissions stating that at a minimum, an ATT should obligate states to consider the potential development impacts of arms transfers and to refuse authorizations where it is appropriate.<sup>105</sup> For example, the UK suggests that a key consideration for

<sup>103</sup> See, for example, submissions from: Albania (“when the arm’s transfer deteriorates the security situation in the region”), Australia (“prevention of a destabilising accumulation of arms”), Argentina (“Potential impact of transfers on internal or external conflicts or on peaceful dispute resolution.”), Brazil (“Other factors, such as possible impacts in regional strategic stability, may also be regarded as potentially relevant.”), Canada (“Will the transfer contribute to the destabilization of countries or regions?”), Costa Rica (“be used to provoke or exacerbate domestic or regional conflicts”), Finland (“whether the proposed transfer would...adversely affect regional stability and security”), Ireland (“maintenance of ...regional peace, security and stability”), Sweden (“security and stability”). See also submissions from: Austria, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Côte d’Ivoire, Cyprus, Czech Republic, Denmark, Fiji, France, Germany, Greece, Hungary, Iceland, Indonesia, Japan, Kenya, Latvia, Liberia, Lithuania, Macedonia, Malawi, Mali, Malta, Netherlands, New Zealand, Niger, Nigeria, Norway, Portugal, Romania, Serbia, South Africa, Spain, Switzerland, Togo, Trinidad and Tobago, Turkey, UK and Zambia.

<sup>104</sup> See for example, submissions from: Canada (“The increasing globalization of the illicit international arms trade, and the lack of effective export controls to stop it, and its consequent deleterious effects on sustainable development prospects have raised a compelling argument in favour of a global system of controls that will comprehensively regulate all aspects of this trade.”) and Switzerland (stated that one of the criteria should be an assessment of whether the “transfer will likely have a negative impact on development cooperation.”).

<sup>105</sup> See submissions from: Albania (“...the ATT should retain the obligations that derive from the UN Charter for all member states to promote and respect human rights – including civil rights, political, economic and socio-cultural rights, which are necessary for the sustainable development of a

country.”), Austria (“...the following core principles should be considered:...the promotion of sustainable development”), Bangladesh (“A transfer shall not be authorized if it is destined to (a) hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the states involved in the transfer.”), Bosnia and Herzegovina (“...whether the proposed transfer will:...Seriously undermine the economy or hamper the overall development of the importing state.”), Bulgaria (“human security and development”), Burundi (“Where the transfer would have a negative impact on cooperation, including cooperation for development”), Burkina Faso, Côte d’Ivoire, Cyprus (“...there are many factors that should be taken into consideration, including...sustainable development”), Czech Republic (“[the criteria] should include...promot[ion] of sustainable development”), Denmark (“These criteria should amongst other things take into account...sustainable development.”), Estonia (“The list of factors might include...effect on sustainable development”), Fiji (“prohibit transfers that are likely to adversely affect internal or regional security”), Germany (“Germany believes that these [criteria] should address...: the promotion of sustainable development.”), Iceland (“Factors to be taken into account...should include a risk assessment of...displacement of people and threats to sustainable development.”), Italy (“When considering arms transfers, however, more detailed criteria should be elaborated...such as: sustainable development, in particular when military expenditure exceeds the requirements for self defence...”), Japan (“States should not authorize the transfer if it is likely to: adversely affect sustainable development;”), Kenya (“ensuring better control of transfer which...undermin[e] sustainable development”), Liberia (“Impact of arms transfers on sustainable development”), Lithuania (“...the treaty shall aim to: adopt national controls to deny...transfers that would undermine...sustainable development”), Malawi (“The ATT should establish minimum standards...Those standards should make reference to: the impact that the transfer may have on have...sustainable development.”), Malta (“As a minimum the following issues should be considered: ...the promotion of sustainable development...”), Mauritius (“Mauritius strongly supports the strict control of transfers of conventional arms...undermining peace, reconciliation, safety, security, stability and sustainable development.”), Netherlands (“Other factors to be taken into account are whether the transferred arms will, or will likely...to seriously undermine the economy or hamper the sustainable development of the importing state.”), Niger (“An ATT should prohibit any transfer of conventional arms if: They will hold back sustainable development.”), Nigeria (“An ATT should ensure that arms exporters taken into account the effect that weapons they transfer could have on sustainable development...”), Norway (“Other factors ...might include: their potential for negatively affecting sustainable development.”), Panama (“respect for sustainable development and peaceful coexistence”), Peru (“Furthermore, the escalation of arms purchases affects a country’s developments plans...This factor should therefore be taken into account when conducting arms sales transactions, even when they are absolutely legal and transparent.”), Poland (“These standards could include threats to...sustainable development.”), Portugal (“As a minimum, the following issues could be considered:...the promotion of sustainable development”), Romania (“the promotion of sustainable development”), Slovenia (“Stability and development”), South Africa (“whether the transfer would have an impact on sustainable development”), Spain (“Spain suggests the definition of some common criteria ...such as: the impact on the sustainable development in order to avoid the deviation of the resources necessary for populations’ progress.”), Sweden (“Sweden believes that the criteria should cover...the impact on sustainable development.”), Switzerland (“Transfer is likely to have a negative impact on development cooperation.”), Togo (“An arms transfer will not be authorized if the arms are destined to be used to: prevent or hold back sustainable development.”), Trinidad and Tobago (“Trinidad and Tobago acknowledges the broader responsibilities and legal obligations of countries to ensure that transferred arms are not ultimately delivered ...for hampering economic growth and development.”), Turkey (“Common export criteria should be introduced ...that would include: the

importing and exporting states and for other states involved in the transfer of an item must include whether the proposed transfer will “seriously undermine the economy or hamper the overall development of the importing State.” Nigeria similarly expressed that “an ATT should ensure that arms exporters take into account the effect that weapons they transfer could have on sustainable development.” To this end, the GGE should explore methodologies to enable states to identify arms transfers of possible concern.<sup>106</sup>

### **Involve corrupt practices**

States’ submissions suggest two approaches with respect to corruption. The first is the inclusion of a criterion prohibiting a transfer if it is likely to involve corrupt practices at any stage. The second is the need for states to take measures to prevent and bring to justice those involved in corrupt practices in the transfer process.

With respect to the first approach, some 14 submissions specifically suggest including such a criterion.<sup>107</sup> For example, Liberia included an assessment as to whether there will be corrupt practices involved at any stage of the transfer as a factor to be taken into account when assessing a potential transfer. Bangladesh believes that a transfer should not be authorized if it is destined to “involve corrupt practices at any stage – from the supplier, through any middlemen/broker, to the recipient.” The UK, while not setting it out as a potential condition for states to apply when assessing a transfer, nevertheless states that a key goal in taking the ATT initiative forward is to ensure that “in the conduct of the arms trade States subscribe to the highest standards of good governance, including the need to tackle bribery and corruption.”

On the second approach, states have also raised the need for the ATT to include a clause that addresses corruption more broadly than in the context of a particular proposed transfer.<sup>108</sup> France, for example, suggests considering a clause on “combating the bribery of foreign public officials in the context of international commercial transactions, a clause which forms

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nature and cost of the arms in relation to the legitimate security and defence needs and to the diversion of human and economic resources to armaments.”), UK (“...whether the proposed transfer will:...Seriously undermine the economy or hamper the overall development of the importing state.”) and Zambia (“The ATT should also prohibit a transfer of conventional arms if it is likely to: adversely affect sustainable development.”).

<sup>106</sup> In this regard, the GGE might refer to the Control Arms publication “*Guns or Growth? Assessing the impact of arms sales on sustainable development*”, June 2004.

<sup>107</sup> See submissions from: Bangladesh, Burkina Faso, Côte d’Ivoire, Iceland, Japan, Lebanon, Liberia, Mali, Netherlands, Niger, Norway, Spain, Togo and Zambia.

<sup>108</sup> This would also be in line with states’ obligations under Article 9 of the widely ratified UN Convention Against Corruption which requires states to: “in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption.”

the subject matter of several existing instruments.<sup>109</sup>

**What states are saying:**

**Other factors**

- A large majority of states have identified the need for criteria to assess the potential impacts or uses of particular transfers for terrorist attacks, or violent and organised crime, or that may have adverse effects on regional security or stability especially through excessive accumulation of arms, as well as the harm caused by transfers involving corrupt practices;
- Despite the absence of a globally agreed definition of “terrorism”, an ATT should focus on preventing transfers of conventional arms that stand a high risk of being used in terrorist attacks and define such acts in terms of existing international law;
- Many states believe that an ATT, at a minimum, should obligate states to consider the potential impacts on sustainable development of conventional arms transfers and to refuse authorisations where it is appropriate.

**Principle 5: Transparency**

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

Principle 5 is a minimum requirement to increase transparency so as to help ensure compliance with Principles 1-4. Clearly an ATT will not function in an effective manner without clear reporting requirements.

In over half of the submissions, states identified transparency and the need for an information exchange mechanism as a core element of the future ATT, with some submissions emphasizing that States should report each international conventional arms transfer from and through their territory or subject to their authorization.<sup>110</sup> Brazil emphasised that “the

<sup>109</sup> Although none of the submissions stated any specific conventions, one example that the GGE might look at is the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in international Business Transactions, 21 November 1997. Article 1 states: Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary and other advantage...to a foreign public official in order to obtain or retain business or other improper advantage in the conduct of international business.

<sup>110</sup> Some 57 submissions raise transparency as an issue. For example, Finland (“...a mechanism is needed to ensure that information is readily accessible to all states.”), Lebanon (Suggests as one aspect of transparency the “international monitoring of arms-producing states”), Portugal (“Due consideration will also need to be given to an adequate information sharing mechanism that will ensure a transparent

instrument should also include mechanisms to monitor its implementation. Measures...should include, in particular, an obligation to submit annual reports on international transfers of conventional arms.” Argentina also stated “another core element of the future instrument would be the creation of a transparency mechanism through the exchange of information regarding the transfers of arms carried out by other states...” A global ATT could establish effective transparency procedures that could build confidence in the implementation of the treaty and encourage democratic oversight.

### **Verification and reporting mechanisms**

The need to explore all possible options for effective reporting mechanisms should be an area of focus for the GGE. Various suggestions for information mechanisms are suggested by a range of states in their submissions, each of which the GGE might consider. These include:

- Timely exchanges of information between states to ensure effective monitoring and enforcement of treaty obligations;<sup>111</sup>
- An independent and impartial central Registry of International Arms Transfers could be the depository of such reports and should issue a comprehensive annual report.<sup>112</sup>

application of the instrument...”), Senegal (“States should put in place mechanisms for the timely exchange of information.”) and UK (“To ensure states can be confident that agreed standards are adhered to, they must be applied in a transparent and accountable manner. There will therefore need to be a requirement that states share adequate information on the transfers that they approve.”). See also Argentina, Australia, Austria, Bangladesh, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Canada, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Fiji, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Liberia, Lithuania, Luxembourg, Malta, Mexico, Morocco, Netherlands, New Zealand, Niger, Norway, Paraguay, Romania, Samoa, Slovakia, Slovenia, South Africa, Spain, Switzerland, Togo, Trinidad and Tobago, Turkey and Zambia.

<sup>111</sup>See submissions from: Austria (“information sharing and reporting”), Bosnia and Herzegovina (“a requirements that States share adequate information”), Burundi (annual reports), Croatia (“the exchange of information helps to build confidence”), Cyprus, Denmark, Estonia (“an obligation to report regularly to a competent UN body about the destinations, actual nature and value of their arms exports”), Finland (“States parties would have an obligation to report regularly to a competent UN body about the destinations and values of their arms exports.”), France (“It [the treaty] could make obligatory the annual publications of national reports.”), Luxembourg (“national reports”), Germany, Italy (information sharing mechanisms”), Latvia (“information exchange mechanisms”), Netherlands (“State parties should report relevant, accurate and timely information.”), Macedonia (“the instrument must contain a requirement for the states to share adequate information”), New Zealand (An effective system of information exchange...with improve transparency.”), Norway (“mechanisms for information exchange, reporting and documentation”), Portugal, Serbia (“national annual reports”), Spain (“regular reports or declarations on the effective control of the transfers”), Turkey (“information exchange on imports, exports, and transfers”) and UK (“...a requirement that states share adequate information”).

<sup>112</sup> See submissions from: Bulgaria (“distribution of national reports in a harmonised form”), Portugal (“In principle, an international registry could collect national annual reports and compile an international annual report.”) and Togo (“submissions to the United Nations of national reports [and]

The existing United Nations Register on Conventional Arms is suggested as a possible model to serve the purposes of such a reporting mechanism within an ATT;<sup>113</sup>

- The mechanisms used by the Wassenaar Arrangement are also suggested as providing a basis upon which information sharing can be identified and framed;<sup>114</sup>
- Creation of a permanent or an ad hoc body to verify compliance and to serve as a point of contact for the submission of annual reports, exchange of information, and the provision of expert assistance;<sup>115</sup>
- The establishment of national contact and liaison points;<sup>116</sup>
- A system of inspection by peers of the control mechanisms;<sup>117</sup>
- A review process through regular meetings of state parties which would assess the operation of the treaty;<sup>118</sup>
- An area for the GGE to consider is the issue of reporting on refused transfers, given its particular sensitivity. Of the states that raised this issue, most believe that reporting on approved and denied transfers is the preferable approach.<sup>119</sup> Others

the annual publication of an international report”). See also submissions from: Brazil, Burundi, Burkina Faso, Bangladesh, France, Italy, Ireland and Lithuania.

<sup>113</sup> See submissions from: Argentina, Brazil, Estonia (suggests that states should have to report about the destinations, actual nature and value of their arms transfers), Finland, France, Germany, Hungary, Italy, Japan, Latvia, Liberia (proposes the inclusion of provisions similar to the ECOWAS Convention transparency clause requiring states to report their transfers, purchases and manufactures of arms), Lithuania, Malta, Netherlands, Senegal, South Africa and Switzerland. The experience of the Landmines Treaty could also provide useful guidance. Article 7 requires states parties to report to the UN Secretary General on steps taken to implement the treaty and then annual reporting requirements setting out required information that must be reported. If the UN Register were adopted as a model for reporting it would need to be expanded to encompass all the categories of conventional arms that might be covered in an ATT.

<sup>114</sup> Submission of Canada.

<sup>115</sup> See submissions from: El Salvador (suggests establishing “a monitoring committee”), Iceland (“A permanent institutional structure will be necessary for the effective implementation of an arms trade treaty.”), Serbia (“a permanent of an ad hoc body to verify compliance”), Senegal (“A structure established at the international, regional, sub regional or national levels could be responsible for monitoring and ensuring follow-up.”) and UK (“It may be decided that some kind of permanent or semi-permanent implementing body or secretariat is needed.”). Argentina suggests that given the need to prevent the establishment of “excessively expensive international institutions, a feasible alternative would be to use an existent office, within the scope of the UN Secretariat, with the power to coordinate and assist the states in the implementation of the provisions of the instrument.”)

<sup>116</sup> See submissions from: Colombia and Togo (“appoint a special rapporteur for each country...”).

<sup>117</sup> Submission of France. This is similar to Article 8 of the Landmines Treaty which provides for fact-finding missions to investigate potential violations of the treaty.

<sup>118</sup> See submissions from: Hungary, Argentina (a “follow-up mechanism”) and Senegal (“five year review conferences”).

<sup>119</sup> See submissions from: Bosnia and Herzegovina (“It would also be helpful for states to share information about transfers they do not allow.”), Canada, Croatia, France (“information could be exchanged on approved or rejected export licences...”), Ireland, Italy (“...to let other states know about transfers authorised as well as about denials”), Luxembourg (“...the granting or denial of export

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highlight the need for an effective system of information exchange that does not compromise commercial confidentiality with respect to legitimate transactions.<sup>120</sup>

### Sanctions mechanisms

Another issue raised by states in their submissions is the inclusion of penal and administrative sanctions for those acting in violation of the provisions of an ATT.<sup>121</sup> States suggest two levels at which this could occur. The first is at the national level. Legal review and redress of cases through national judicial procedures should be used where necessary since the treaty would need to be implemented in national law in every State ratifying it. National legislation should contain civil and criminal provisions for breaches of these national laws and where national transfer decisions violate the terms of the treaty they should be open to legal challenge within national courts and judicial procedures.<sup>122</sup>

The other level would be redress at the level of states party to the treaty. There is a need for an ATT to include a mechanism for setting out measures where there is a breach through a visible process designed to investigate in a timely manner any alleged breaches.<sup>123</sup> Spain

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licenses should be reported”), Macedonia (“approved and possibly refused transfers”), Malta, Netherlands, Portugal, Switzerland and UK (“authorised and denied reporting would be helpful”). Slovenia explicitly suggested “reports on the permitted conventional arms transactions”.

<sup>120</sup> See submissions from: Mauritius, New Zealand and Australia (“confidential information sharing”).

<sup>121</sup> See submissions from: Bangladesh (“States must agree to a monitoring and enforcement mechanism providing for prompt, impartial and transparent investigation of alleged violations of ATT, and to include appropriate penalties for offenders.”), Liberia (“appropriate sanctions for violators of the ATT”), Morocco (“...appropriate penalties for any violation of this treaty”), Netherlands (“Further consideration should be given to the matter of how to address possible violations of the ATT’s obligations...An ATT should also oblige states to make the unlicensed export of conventional arms a punishable offence under national criminal law...”), New Zealand (Breaches of the obligations and failures in compliance should also be addressed.) and Turkey (“Measures in case of a breach of treaty provisions.”).

<sup>122</sup> See, for example, submissions from: Brazil (“Penal and administrative sanctions for natural or legal persons acting in violation of the provisions of the instrument...”), Colombia (“The treaty...must require states to punish officials found guilty of involvement in illicit trafficking of arms and ammunition with penalties proportional to the seriousness of such offences.”), Hungary (“States Parties...should also undertake to adopt all necessary measures including legislative ones such as penal sanctions to prevent and suppress the violation of treaty norms by natural persons or legal entities.”), Lithuania (“Adopting national legislation and regulations to effectively control trade in arms, including establishing civil and criminal responsibility for breaches thereof.”), South Africa (“The ATT should also call on state parties to build in penalties (criminal or administrative) in their legislation to address violations...”) and Spain (“States should guarantee the prosecution of the offenders of the arms transfer control regulations established in accordance with the Treaty’s implementation, along their national legislation, imposing proportionate and deterrent administrative, civil and criminal sanctions.”).

<sup>123</sup> See submissions from: Bosnia and Herzegovina, Burkina Faso, Colombia, Costa Rica (“...the treaty should include...a system for investigation and punishing infringements. Likewise, measures should be envisaged for states that fail to comply with their obligations.”), Croatia (“It is also necessary to

suggests that the Treaty should identify a procedure allowing the detection of illegal operations and the adoption of the appropriate measures to correct them. The GGE should consider ways in which this could be achieved.<sup>124</sup>

#### **What states are saying**

##### **Transparency:**

- Transparency and the need for an information exchange mechanism that build confidence in the implementation of the ATT by all states parties are core elements;
- The GGE should explore all the possibilities of viable and effective transparency mechanisms including possible reporting procedures, meetings of state parties, and a body tasked with verifying compliance;
- The majority of states that raised it believe that reporting must also include denied transfers;
- An ATT should include penal and administrative sanctions for those acting in violation of its provisions.

#### **Principle 6: Comprehensive Controls**

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

- A. All import and export of arms and ammunition;**
- B. Arms and ammunition brokering activities;**
- C. Transfers of arms and ammunition production capacity;**
- D. The transit and transshipment of arms and ammunition.**

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

As noted already, a majority of states share the view that the establishment of a state licensing system is an elementary requirement for the control of all international transfers of conventional arms. States must maintain control of the flow of arms into and out of their

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envisage measures against the countries violating the established...standards.”), Estonia (“sees merit in the compliance mechanism for the Treaty”), Mauritius (“There must be provisions to adequately monitor compliance, including appropriate penal sanctions for violators of the ATT.”), Mali (“...it would be desirable to provide for sanctions against member states which violate the treaty.”), Peru (“[The treaty] must have a body to monitor its observance and potentially to receive complaints and impose sanctions.”), Spain, Switzerland (“An ATT should provide for sanctions in case of breach of the treaty.”) and UK.

<sup>124</sup> Mexico suggests that the GGE taken into account the UN handbook “Final Clauses of Multilateral Treaties” Section C “Settlement of Disputes”. Iceland suggests that sanction and compliance provisions of the Chemical Weapons Convention could be a useful model. South Africa also suggests that the mechanisms in the Chemical Weapons Convention as well as those in the Landmines Treaty be considered as potential models.

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territory by establishing and implementing national legislation that contains appropriate control mechanisms.<sup>125</sup> In this regard, the submissions identify four areas of concern that states believe should form a part of comprehensive controls: end-use mechanisms, marking and tracing, brokering arms transactions and prohibitions against re-exporting without authorization of the exporting State.

### **End-Use Mechanisms:**

A number of states want an ATT to stipulate appropriate measures to ensure that the arms reach and remain with the intended end-user.<sup>126</sup> The use of authenticated end-user certificates is seen as an essential measure to counter the illegal spread of arms. As Germany states “the international instrument needs to stipulate appropriate measures to ensure that the arms reach and remain with the intended end-user.” For South Africa, “a prerequisite for an effective control system is to place an obligation on the control authorities of State Parties to implement end-use and end-user assurances.” The GGE is recommended to consider the creation of an international system of end-use control including a standardized end-user certification process with agreed minimum levels of information that states must include on end-use and end-user certification to facilitate enforcement.<sup>127</sup>

### **Consideration that items are appropriately marked to ensure traceably:**

States have also raised the need for the ATT to include an obligation to ensure that all newly manufactured conventional arms are marked.<sup>128</sup> For example, Brazil suggested that this is done in accordance with the provisions of the International Instrument to Enable States to Identify and Trace in a Timely and Reliable Manner Illicit Small Arms and Light Weapons. Togo held the view that “arms transferred should have reliable markings.” Costa Rica believes that “marking and tracing initiatives need to be stepped up”. In conjunction with this states have suggested the need for detailed record keeping containing all relevant information relating to transfer to enable states to comply with their obligations as regards tracing of weapons.<sup>129</sup>

### **Brokering of international arms transactions:**

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<sup>125</sup> See Footnote 67.

<sup>126</sup> See, for example, submissions from: Argentina, Bangladesh, Burundi, Croatia, Ecuador, Germany, Greece, Italy, Mali, Romania, Serbia, Sweden, Seychelles, Togo and Turkey.

<sup>127</sup> See submissions from: Australia, Germany, Italy, Togo’s and Mali’s submissions suggest numerous details that could be included on an end user certificate and Serbia (“introduction of a binding standardized form”).

<sup>128</sup> See, for example, submissions from: Ecuador (“There should also be a marking system...”), Morocco (“Adoption of an international stamping or laser marking system for new arms...”), Colombia (An ATT must standardize marking rules...) and Turkey.

<sup>129</sup> See, for example, submissions from: Brazil, Burundi, UK, Brazil and Switzerland.

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As has been stated, 52 states' submissions held the view that the brokering of international conventional arms transactions must also be included in an ATT and therefore be subject to national laws, regulations and administrative procedures.<sup>130</sup> States also strongly urged that the work of the GGE on Brokering of SALW be considered by the GGE and encompassed into its own report. Some states proposed greater detail on the controls for brokered transactions including the need to register brokering agents.<sup>131</sup>

### **Prohibition against re-exporting without authorization:**

A number of submissions raised the need to include a prohibition against re-exporting without the express authorizing of the exporting country.<sup>132</sup> Given the nature of the conventional arms trade, some states consider that the control of re-exports by the original exporter is an important measure and included it within their views on the scope of transfers.

### **Building institutional capacity, cooperation and international assistance**

In line with the contents of Principle 6 and the need to ensure that comprehensive controls can be developed and implemented, a significant number of states have raised the need for institutional capacity building. The means for international assistance and co-operation will have to be considered where appropriate in order to allow full implementation of the ATT and to enhance its effectiveness. It is recognised that some states will require financial and technical assistance and the ATT should establish procedures for the assessment of such needs should assistance be requested.<sup>133</sup>

France suggested the inclusion of educational provisions to aid implementation and performance assessment. Included within this could be outreach-type workshops, training sessions for government experts in the field of customs and controls and exchanges of information on best practices. Italy and Turkey suggested ongoing capacity building programmes, on specific treaty implementation and general aspects of the arms trade. Togo

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<sup>130</sup> See footnote 58.

<sup>131</sup> See, for example, submissions from: Argentina and Senegal.

<sup>132</sup> See submissions from: Argentina, Croatia ("It is necessary to set up a universal end-use confirmation ... as a security against undesired re-export...") and El Salvador ("Exporting states as well as importing states should assume the obligation, and should undertake, to prevent the illegal re-export and illicit transit and retransfer of arms not covered by mechanisms and procedures for importing arms."). Submissions that include 're-export' as a form of transfer include, for example: Australia, Austria ("retransfer"), Burkina Faso, Côte d'Ivoire, Czech Republic, Denmark, Estonia, France, Georgia, Germany, Hungary, Ireland, Italy ("retransfer"), Latvia, Poland, Portugal, Romania, and South Africa.

<sup>133</sup> See submissions from: Argentina, Austria, Austria, Bosnia and Herzegovina, Colombia, Denmark, Ecuador, Estonia, Finland, Germany, Hungary, Indonesia, Kenya, Malawi, Malta, Morocco, Netherlands, New Zealand, Niger, Portugal, Samoa, Slovakia, South Africa, Spain, Togo, Turkey, UK and Zambia.

held the view that the treaty should promote programmes to “educate, inform and sensitize with regard to all aspects of the arms trade.”

### **Conclusions**

The submissions by states provide a comprehensive and detailed overview of state’s views as to the feasibility, scope and parameters of an ATT. It is clear that the majority of states believe that an ATT is a feasible goal for the international community, presenting an opportunity for real and significant progress to be made towards regulating the transfer of arms at the global level.

The following is a brief overview of the main areas of focus for the GGE as recommended by states in their submissions.

#### **Recommendations to the GGE:**

- Compile all the existing international instruments that directly or indirectly have application to international transfers of conventional arms, whether legally binding or not, or adopted at the sub-regional, regional, multilateral or global level. From there, a determination of the commonalities can be made to gain an overview of widely accepted existing key principles for such transfers for inclusion in an ATT;
- Consider how to develop the most comprehensive list of conventional arms for inclusion within an ATT: the use of existing lists such as the UN Register of Conventional Arms, the Wassenaar and European Union military control lists provide a basis for creating a comprehensive control list for an ATT, noting the need to include components, ammunition, and small arms and light weapons;
- Include transfers of licensed production in an ATT and consider how to ensure emerging technologies are covered without needing to amend the treaty;
- Review the possible inclusion of dual use items and manufacturing equipment and technology, taking into account that the majority of states support their inclusion within the scope of an ATT;
- Determine the definition of “transfer” to ensure that all transactions are covered to avoid creating possible loopholes;
- Include brokered transactions in an ATT and to this end the work of the recent GGE on Brokering of small arms and light weapons should be taken into account;
- Consider the development of a clear and objectively applied procedure in an ATT for establishing whether it is likely that a particular proposed transfer of conventional arms would be used to contribute to or facilitate gross violations of

international human rights or serious violations of international humanitarian law;

- The work of the GGE in developing criteria to prohibit transfers that are used or are likely to be used for terrorist attacks can be informed by reference to the numerous conventions relating to specific acts associated with terrorism or terrorist attacks;
- The GGE should explore methodologies to enable states to identify conventional arms transfers of concern for their potential negative impacts on sustainable development efforts;
- The development of a transparency mechanism to promote confidence in the implementation of an ATT requires the GGE to consider the full range of possible reporting and compliance mechanisms. The GGE should also consider what type of information should be reported by states under a transparency mechanism such as the inclusion of denied transfers;
- Institutional capacity building is an area that is vital to the successful implementation of the various provisions of the ATT. Procedures to promote international assistance should be explored in some depth by the GGE.

With these recommendations, states have provided the GGE with a detailed road map towards the creation of a universally fair and objective ATT, based on existing responsibilities of states under international law. It is hoped that this analysis will assist the forthcoming GGE in determining the key points arising from states' submissions so as to ensure that an effective and comprehensive ATT can be established. This is a vital opportunity for the GGE to grasp, with urgency and clarity, to lay the groundwork for an ATT that can be 'negotiated on a non-discriminatory, transparent and multilateral basis' in order to fulfil the terms of UN General Assembly Resolution 61/89. If the GGE report is sufficiently constructive, it could lead to the establishment by the UN General Assembly of an Open Ended Working Group in 2009 to negotiate the terms of a global Arms Trade Treaty so that the international community can agree and benefit from such a Treaty as soon as possible, hopefully by the year 2010.

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