

## **Response to Chair Letter and Sub-working Group Documents of the Working Group on Effective Treaty Implementation for CSP6 (April 2020)**

[ATT/CSP6.WGETI/2020/CHAIR/596/M2.LetterWorkPlans](#)

The COVID-19 crisis has created huge challenges for a business-as-usual approach to a vast array of intergovernmental agendas, including the management of the formal ATT process. In this context it is not surprising if the ATT Working Groups are struggling to achieve the originally-conceived level of progress, or if governments do not see this as a priority.

However, among the consequences of the wide-ranging challenges and severe stresses faced by states and societies around the globe is the risk that these could spur further violent conflict, increased criminality, illegitimate use of force and/or an inappropriate dependence on arms manufacture and sale to generate economic activity. All of which highlights the importance of pursuing measures that reduce the risk and level of proliferation and misuse of conventional arms.

With this in mind, while not forgetting the organisational and logistical challenges as remarked upon above, we are concerned that the latest WGETI documents suggest a significant loss of momentum. We therefore urge States Parties to redouble their efforts to expedite the work of the Working Groups and the formal ATT process, as part of a broader response to COVID-19 that protects and enhances human security.

### **Regarding Sub-working Group on Articles 6 and 7**

#### **The revised multi-year work plan**

##### ***Key concepts***

We are unclear of the relationship between topics 6 and 8 as they are to be addressed at the 2<sup>nd</sup> CSP7 Preparatory Meeting. In Topic 6 the facilitator will present the concept paper 'Unpacking key concepts' for discussion and consideration for endorsement. In Topic 8 the facilitator will present the revised draft of Chapter 1 of the Voluntary Guide, which is on 'key concepts', for review and comment. We are not clear of the distinction or the relationship between these two topics, which are to be held on the same day, either side of 90 minutes on 'mitigation measures'. Elaboration of this point would be welcome.

##### ***Articles 6 & 7***

There are several aspects to the different approaches to Articles 6 and 7, and the relationship between them that we find puzzling.

The discussions in respect of Chapter 3 of the Voluntary Guide (addressing Article 7) will occur prior to those relating to Chapter 2 (Article 6). It is not clear why this is the case given that the logical flow of the operative provisions of the ATT involves consideration as to whether the Article 6 Prohibitions

apply and then, if it determined they do not, moving on to conduct an export assessment based on the criteria within Article 7. We would argue for the following as a more logical sequencing for the discussion:

1. Article 6
2. Relationship between Article 6 and Articles 7, 8, 9 & 10
3. Article 7

We note also that only one hour is set aside for discussion of Article 7 (at the 1<sup>st</sup> CSP8 Preparatory meeting) during which the facilitator will present a preliminary draft of Chapter 3 for review and comment. This is the last and only time the Sub-working group will consider Article 7 until a draft of the whole Voluntary Guide is presented at the end of the 1<sup>st</sup> CSP9 Preparatory meeting for consideration of endorsement.

By contrast, across CSP8 and CSP9, five-and-a-half hours are set aside for consideration of Article 6, including four hours of discussion before the facilitator shares a draft. A further two hours provided for discussion of the relationship between Article 6 and other articles (at the 1<sup>st</sup> CSP8 Preparatory meeting).

We note the comment in the letter from the WGETI Chair of 20 January ([ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1](#)) of the intention to “[explore] States Parties’ understanding of the scope and implications of Article 6 in more detail, since the focus of the Sub-working group has thus far been on the implementation of Article 7”, however we feel Article 7 may benefit from some further exploration. The structure of Article 6 is straightforward, and there are a number of elements in Article 6 that are well understood already and which therefore should not need much time to address (for more on this see below). Article 7, by comparison, is structurally much more complicated and contains a number of terms and concepts that would benefit from more discussion and elaboration, especially in light of the forthcoming consideration of key concepts.

We would therefore encourage the Sub-working group to look again at the sequencing and the relative allocation of time to the different articles.

#### **Annex B: Revised draft elements of a voluntary guide to implementing Articles 6 & 7**

Saferworld welcomes the idea of the voluntary guide to assist States Parties in their implementation of these key articles of the Treaty. We encourage the Sub-working group to make this guide as ‘concrete’ as possible, i.e. to include practical guidance to help licensing authorities in their decision-making. In support of this objective, we urge the Sub-working group to avoid introducing ambiguity into aspects of international law that are already settled and well understood and to be wary of compiling long lists of possible interpretations and understandings of particular terms and concepts, as this we feel would do little to help authorities with relatively little experience looking to the guide to clarify their obligations and responsibilities.

As an overarching point, we see the questions frequently having a level of generality that is likely to make it hard for States Parties with relatively little experience of arms transfer licensing or with

limited administrative capacity in this issue area to engage in a meaningful way. We therefore face the likelihood that the voluntary guide will reflect the experiences and capabilities of relatively well-resourced and experienced states, and which might therefore be of limited value to exactly the States Parties who have most to gain from a well-targeted guide. We therefore urge the Sub-working group to give serious and extensive consideration as to how to avoid this outcome.

More specific comments on particular questions follow.

### *1. Key concepts*

Beyond the three concepts set out in the table beginning on p. 11 of the [ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1](#) ('facilitate', 'serious' and 'overriding') we would suggest that 'knowledge' and 'mitigation' are also terms a clear explanation of which would be helpful to effective treaty implementation. Having said that, it is not clear how the proposed approach – asking States Parties to each provide their own “explanation of their approach to the interpretation of each concept” (and in no more than 250 characters) – will realise this goal. An elaboration of what this section is trying to do and the process by which this will be achieved may be necessary.

### *2. Article 6 (Prohibitions)*

#### *a. What does 'shall not authorize any transfer' entail in the context of Article 6?*

It would be useful in the first instance to clarify that in this context the term 'shall not authorise' includes a positive obligation to refuse to permit and to work to prevent a transfer. There are for example currently many jurisdictions where it is not automatically illegal for an actor to export arms in breach of a UN arms embargo, because there is nothing in national law to that effect. Transfers may 'legally' take place, not because the government of the exporting territory authorises them or is in favour of them, but because they have no grounds under national law to prevent them. This situation clearly runs contrary to the object and purpose of the Treaty, a point which must be reinforced by this guidance.

Furthermore, in seeking to generate discussion, some additional guidance on elements to consider in response to this question may prove helpful, for example:

- Responding negatively to an initial enquiry concerning a possible transfer
- Refusing a transfer permit/licence
- Refusing transit to a shipment
- Deployment of enforcement measures to prevent a transfer.

#### *b. Who is responsible for determining whether a transfer should not be authorized in accordance with Article 6?*

A question about responsibility for authorising a transfer should not stop at identifying the ultimate decision-maker. It is worth considering the full range of actors involved in the assessment and decision-making process, their respective roles and responsibilities, and the relationships and hierarchies among them. The responsibilities of any commercial actors involved in the prospective transaction (e.g. manufacturer, broker etc.) may also be worth exploring.

*c. Article 6(1) i. Obligations under measures adopted by the United Nations Security Council and*

*d. Article 6(2) i. Relevant international obligations under international agreements*

In circumstances where this is straightforward, questions of this type could be better dealt with by the facilitator setting out settled understandings, with conversation restricted to questions of clarification. This will have the twin benefits of avoiding creating ambiguity and/or confusion where none exists, and allowing the Sub-working group to focus its attention where it is most needed.

*e. Article 6(3)*

*i. What constitutes 'knowledge' at the time of authorization?*

As noted above, the question of 'knowledge' deserves explication. We have argued that it merits attention as a 'key concept'. Fundamentally what is important is that it does receive due attention; its inclusion here however raises questions about what is meant by 'key concept'.

*ii. How is 'genocide' defined under international law?*

*iii. How are 'crimes against humanity' defined under international law?*

*iv. What are grave breaches of the Geneva Conventions of 1949?*

*v. What are 'attacks against civilian objects or civilians protected as such'?*

*and*

*vi. What other 'war crimes' may be included?*

We strongly urge that the treatment of these terms is reframed. They are all well understood in international law. We therefore recommend that the facilitator set out the definitions as known, and that discussion on these points be for clarification, and related to their application under the ATT. No useful purpose would be served by suggesting that the ATT might give opportunity to question well-established international law.

### *3. Article 7 (Export and Export Assessment)*

*a. What is the obligation in Article 7?*

This question feels broad and open-ended to the point where it is hard to know how to answer it or what purpose it serves. A generic answer might be that it is to prevent arms exports that while not prohibited under Article 6 would have a range of specified negative consequences, but an answer of this type would in essence do little more than paraphrase the language of Article 7 itself. If something of this nature is considered necessary, then better, we feel, for the facilitator to summarise his understanding of the article as a whole, which could provide the chapeau for what eventually follows (in the voluntary guide). The Sub-working group could then refine that summary/chapeau as necessary.

*b. Conducting risk assessments under Article 7*

*ii. Who conducts risk assessments?*

As for question 2.b. above, useful elaboration of this question would include an examination of the full range of actors involved in the assessment and decision-making process, their respective roles and responsibilities, and the relationships and hierarchies among them, including if applicable the

responsibilities of any involved commercial actors involved in the prospective transaction. Careful consideration should be given, however, to the way the collected information is used. Every country with a developed export control system will have its own idiosyncrasies, and merely collecting examples runs the risk of creating confusion rather than guidance. Critical to this proving useful will be a process of drawing out common themes and key elements that make up an effective national system (e.g. an understanding of the different types of necessary expertise, clearly defined functions for the different ministries/departments/agencies involved, clear lines of authority, clearly defined decision-making responsibilities etc.).

*iii. What criteria must be applied?*

- 1. Peace and security*
- 2. Serious violations of international humanitarian law*
- 3. Serious violations of international human rights law*
- 4. Offences under international conventions or protocols relating to terrorism*
- 5. Offences under international conventions or protocols relating to transnational organised crime*
- 6. Serious acts of gender-based violence or serious acts of violence against women and children*

The purpose and rationale behind this question is unclear. If the question is “which of the following list of criteria must be applied?” the answer is: all of them. A more useful question would be “How should the following criteria be applied?” It should be noted, however, that it is hard to foresee how the Sub-working group could provide meaningful answers to the question of “how” in the time set aside in the revised multi-year work plan.

*c. Mitigation measures*

While it is noted that there is a discussion on mitigation measures planned for the 2<sup>nd</sup> WGETI Preparatory meeting CSP7, some additional points of clarification could be useful here. This may include, for example, asking respondents to share:

- What they consider to be the purpose of mitigation measures?
- Under what circumstances would mitigation measures be explored?
- At what point would other states in the transfer chain (i.e. transit or importing states) be involved in discussions concerning mitigation measures?

It would also be extremely useful for States Parties to clarify that mitigation measures are actions taken that apply to a specific transfer in response to concerns raised after a standard risk assessment, rather than standard licensing procedures used routinely. For example, the use of end-use certificates, which is now long- and widely- established as routine, is not a mitigation measure.

*e. Information sharing*

*ii. What are the options for sharing information regarding export authorizations in the context of Article 7(6)?*

It might prove useful to add another question that is tightly tailored to the language of Article 7(6), i.e. what information should exporting States Parties make available to other involved States Parties on request? It might also be worth considering what type of information might be made

available to involved states that are not States Parties. In addition, we recommend that States Parties volunteer to share their experiences of this type of information-sharing.

#### *f. Reassessing export authorizations*

This is a very important issue for the Sub working-group to examine. If States Parties are to fully meet the object and purpose of the Treaty, they need to take extremely seriously the reference to reassessing an export authorisation if they subsequently become aware of new relevant information.

Depending on the national system, licences can remain extant for years, and the situation in the recipient state can change drastically after the licence is granted but before deliveries are made.

Given the importance of this issue, it would be helpful to elaborate some more specific questions.

First among these should be: Do you have the legal authority to:

- Reassess licence decisions subsequent to an initial authorisation, and
- To reverse initial authorisations (suspend or revoke licences) in light of new information?

Other questions could include:

- Under what circumstances can you suspend and/or revoke extant licences/authorisations? For example, some states may provide for this in the event a UN embargo is established, but not otherwise.
- Under what circumstances would you consider reassessing an authorisation? Under what circumstances would you not consider reassessing an authorisation?
- In the event of a reassessment, would the same standards be applied as for a new export?
- At what point would you inform the importing state of the decision to re-assess an authorisation?
- When would consultations with the importing state be appropriate?

### **Regarding Sub-working Group on Article 9**

The multi-year work plan for the Sub-working group on Article 9 appears to be a solid basis for addressing transit and transshipment under the ATT.

It would seem however that of the 'issues for consideration under the scope of Article 9' as set out in 'Attachment 1: Background paper on transit and transshipment' on p. 22 of the letter from the WGETI Chair of 20 January [ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1](https://www.wgeti.org/2020/CHAIR/584/M1.LetterWorkPlans.Rev1), questions 1 and 2 do not appear to feature in the work plan. These address themselves to: "common understandings under the term, 'appropriate measures to regulate'"; and "[h]ow these are covered within regulatory frameworks". There may be some value in spending some time addressing these 'higher order' questions before moving immediately to consider transit/transshipment separately according to mode of transport.

The ultimate objective of this multi-year interrogation of transit and transshipment is not clear. Nor are any expected outputs mentioned. It would be useful to have these elaborated when assessing the appropriateness of the proposed approach. For example, might the Sub-working group develop some kind of voluntary guidance as to how to regulate transit transshipment?

More specifically, it may be useful to draw attention to any distinctions made or that might be made between transit that involves the docking of ships or landing of aircraft as opposed to transit limited to passing through territorial seas or airspace.

Finally, we recommend including explicit reference to enforcement, e.g. interdiction of vessels/vehicles/aircraft and confiscation of cargo. And in this regard in particular (but not solely), an exploration of cooperation beyond information-sharing would be welcome.

### **Regarding Sub-working Group on Article 11**

It is disappointing that the latest revised multi-year work plan for this Sub-working group bears no changes to the previous version except that all work is pushed back by one set of Preparatory meetings. While acknowledging the challenges presented by COVID-19, this represents a significant loss of momentum for an issue widely regarded as being critical to preventing the proliferation and misuse of conventional arms.

This extends to the delivery of a paper outlining elements of a process for assessing the risk of diversion which was to have been circulated in advance of the 2nd series of CSP6 meetings (scheduled for April 2020) but which not now be circulated until an undetermined time in advance of the 1<sup>st</sup> week of Preparatory meetings for CSP7 (so potentially not until sometime in 2021).

Given the uncertainty over COVID-19 and the possibility that restrictions on international travel and face-to-face meetings could continue to a greater or lesser extent for a considerable period, we urge the Sub-working group on Article 11 to consider measures that could be taken to advance the discussion on diversion ahead of CSP6 and of the 1<sup>st</sup> week of Preparatory meetings next year. This could include in the first instance the circulation of the abovementioned paper at the earliest possible moment.