

ATT EXPERT GROUP

Implementing the ATT: Undertaking an arms transfer risk assessment

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Introduction

As elaborated in Article 1 (Object and Purpose), the Arms Trade Treaty (ATT) is founded on the need *inter alia* to strengthen international peace and security, to reduce human suffering and to promote responsibility in the global arms trade. Central to these goals is the requirement under Article 6 (Prohibitions) and Article 7 (Export and Export Assessment) to explore and evaluate the potential consequences that may arise from a proposed export of arms listed under Article 2(1) and of their parts and components (Article 3) and their ammunition (Article 4). Article 11 (diversion) is another key operative provision of the ATT; implementation of this Article is crucial to ensuring that arms are not diverted to unauthorised end-users and/or put to unauthorised end-use.

Irrespective of their situation, the requirement to undertake a risk assessment under ATT Article 7 falls to all ATT States Parties considering the export of conventional arms under Article 2(1) or items under Articles 3 or 4; this remains the case whether the export of arms is an everyday or a very infrequent occurrence. A diversion risk assessment is also required under Article 11.

Whereas conducting a risk assessment is an established feature of the arms export decision-making process in most states that manufacture and trade in arms, even for these States Parties the ATT may provide additional obligations or it may frame existing obligations in an unfamiliar way.

On the other hand, for States Parties with limited involvement in the international arms trade, applying Articles 6, 7 and 11 may present a number of new challenges. Nevertheless, any state with an army or an armed police force is a potential exporter of second-hand/surplus arms and therefore needs, at a minimum, a good understanding of how to carry out an effective risk assessment.

This briefing is aimed primarily towards states with little experience in this field. It is intended as a contribution towards the development of a wider understanding of the arms export risk assessment process and provides specific guidance on how this can be operationalised.

This paper focuses mainly on export risk assessment given that this is mandatory under Article 7 of the ATT. However, it is worth noting that a risk assessment can also be a useful tool in other arms transfer contexts, for example where arms are in-transit from, or to, a country of concern; or where arms are being imported by a private entity; or where arms brokering activities are taking place within national jurisdiction. In such cases, the methodology outlined below may prove relevant and useful in assisting states in arriving at a decision on whether or not to authorise an arms transfer.

Section 2 begins by examining the process whereby an export application is verified in all its aspects – including the types of goods for export, the documentation that is

provided in support and the identity and *bona fides* of all parties to the transfer. Section 3 considers how to prepare for a risk assessment by checking that the export is not prohibited and outlining a range of entities that may be a source of useful information in undertaking an arms export risk assessment. Section 4 discusses how to apply the export criteria within ATT Article 7 and 11 to an arms export, including relevant factors and considerations that should be taken into account and covering key concepts that are flagged within the export risk assessment process. Section 5 concludes with an outline of how arms transfer assessment and decision-making can be systematised at national level.

In addition there are four annexes to the briefing: Annex 1 contains a hypothetical case study where arms transfer criteria are applied to a fictitious scenario; Annex 2 sets out a model for an export licence application form; Annex 3 provides a model for an export licence; and Annex 4 contains a model for an end-user certificate.

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The export application process

Under the ATT, States Parties must take measures to control the export of conventional arms listed in Article 2(1) of the Treaty and also of parts and components (Article 3) and ammunition (Article 4). These export control measures should form part of the national conventional arms transfer control system¹ which includes a control list (as required under Article 5(2)) and should include an export risk assessment, as set out in Article 7. This assessment should be carried out by the competent national authorities (established as per Article 5(5)). In addition it should:

- take place at the export application stage, that is, before any decision is taken whether to authorise an export
- be based on credible information provided by credible and authoritative sources
- be a central part of any decision to authorise or refuse an export

Export application procedure

The first step in the process of legally exporting any goods or technologies is to check whether the items in question require export authorisation by consulting the national control list that all ATT States Parties are obliged to have, covering, at a minimum, those items set out in Articles 2(1), 3 and 4 of the Treaty. In practice, an effective export control system will regulate *inter alia* the international transfer of all conventional arms, their ammunition and parts and components. If the prospective exporter has any doubts as to whether the items require export authorisation (i.e. if the items have an applicable control list 'rating') they should err on the side of caution and seek clarification from the relevant authorities before proceeding.

Where an export authorisation is required, the prospective exporter should follow an established application procedure and submit the request in writing to the competent national authorities on paper and/or online. The application procedure must require the applicant to provide information detailing all aspects of the proposed export, together with relevant supporting documentation. This should include, at a minimum:

- Name, address and contact details of exporter and date of application
- Name, address and contact details of the manufacturer or owner (if different from the exporter) of the items

¹ For a detailed description of what should be included in any national arms transfer control system see *Implementing the ATT: Essential elements of an effective arms transfer control system* <https://www.saferworld.org.uk/downloads/pubdocs/egai-briefing-no.5.pdf>

- Model, type, number, quantity, value, control list reference² of the items
- Details of the specifications of the items including whether they are designed or modified for military use
- An assurance that the items are not intended for use in connection with weapons of mass destruction (WMD)
- Name, address and contact details of consignee (person or company to whom the items will be delivered)
- Name, address and contact details of any brokering agent involved in the transaction
- Name, address and contact details of end-user
- A detailed description of the item's intended end-use, including whether the item will be incorporated into another system and/or whether it will be used in the overseas production of other controlled items
- Submission of supporting documentation – including details of the technical specification of the equipment; an end-user certificate (EUC) which incorporates an undertaking from the recipient that the items will not be used in connection with WMD and will not be re-exported without prior written consent of the original exporting state; and a copy of the contract between supplier and recipient

In addition the following information may be requested which, if unavailable during the licensing process, should be provided before the goods are exported:

- Means of shipment of the goods (air, sea, land transport)
- Name, address and contact details of any shipping/air freight/road freight agents or companies involved in arranging or conducting the physical the transfer of the items
- Information on the route of the export, including transit points

[See Annex 2 for a sample export licence application form, Annex 3 for a sample export licence and Annex 4 for a sample EUC.]

Verification of documentation and information

Once submitted, all information provided as part of an export application should be checked and verified as fully accurate by competent national authorities before a risk assessment is undertaken. If the information provided is insufficient or unclear, the prospective exporter should be asked for clarification and/or elaboration. If this is inadequate, then the export should be refused.

Verification of the information provided as part of the export application process can be undertaken by a range of means, including by:

- reviewing open-source (including online) information
- making contact with the individuals, companies and agencies named on the application
- contacting the competent authorities with jurisdiction over the activities of the prospective importer/shipping agent/broker
- contacting relevant consignees and/or end-users
- enlisting consular assistance abroad to conduct checks on relevant individuals/companies

Of particular importance is the requirement to authenticate the EUC that is provided by the prospective end-user of the items in question. Forged and inauthentic EUCs remain a weak link in the arms export control process; accordingly particular care should be taken to ensure that the end-use documentation provided is authentic, is

² As well as requiring the establishment of a national control system Article 5(2) requires States Parties to establish a national control list. Any application to export an item on the control list should include the relevant control list reference.

provided by an appropriate agency, and is signed by an individual with the appropriate responsibility. Such checks will need to be undertaken by means of direct enquiries with the end-user and/or the competent authority responsible for issuing the EUC. In addition, efforts should be made, where possible, to check the *bona fides* of any intermediaries or third parties to the transfer – such as any arms brokering agent, logistics manager, shipping agent/company or consignee – in order ensure that they are of good standing and are not known to have engaged in arms diversion, illicit trafficking or other illegal activities.

Where checks are required in respect of entities involved in the proposed arms export chain, a first step will be to check the authenticity of relevant parties by reviewing open-source information which is available on the internet or in publicly-available documentation. Where such sources prove insufficient or lack clarity, further steps should be taken. This could involve contacting trusted partners in relevant authorities (such as intelligence agencies) or in the private sector who may be able to comment on the *bona fides* of those involved. Consular assistance in the country where relevant parties are based could yield important information; where an exporting state has no consular presence in the destination country for an arms transfer, it may be possible to seek assistance from partner states with appropriate representation. In addition, it may also be possible to approach trusted contacts within government, multilateral organisations or the private sector with a request for any relevant information they may have concerning the actors involved in the proposed arms transfer.

If, after the necessary checks have been carried out, the documentation and/or the information therein cannot be fully verified and authenticated and/or the *bona fides* of all key actors involved in the proposed arms export cannot be assured, then the application should be refused.

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Preparing for a risk assessment

Checking against ATT prohibitions

Assuming the information provided during the export application process can be verified, the supporting documentation is authenticated, and the *bona fides* of all relevant actors is assured, the competent authorities of the potential exporting state should then take steps to ensure that the proposed transfer of arms or related items is not prohibited under international law. Under ATT Article 6 three categories of prohibitions are specified as applying to transfers (that is, import, export, transit/transshipment and brokering) of arms and items covered by Articles 2(1), 3 and 4. The Article 6 provisions establish that States Parties shall not authorise the transfer of conventional arms if:

- the transfer would violate obligations emanating from the UN Security Council under Chapter VII of the UN Charter, in particular arms embargoes³
- the transfer would violate obligations arising from international agreements to which they are a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms⁴
- the state has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party⁵

In addition to observing these binding prohibitions, the competent authorities of a prospective exporting state will also need to ensure that the transfer is not prohibited unilaterally, for example on national security grounds or because of national foreign policy considerations. If any of these prohibitions or those of Article 6 are found to apply, export authorisation should be refused.

³ Details of the UN Security Council Sanctions Committees and information on the full range of UN Security Council sanctions is found at <http://www.un.org/sc/committees/>; the EU has a website that provides a 'Sanctions Map' of all relevant UN and EU sanctions; the Stockholm International Peace Research Institute (SIPRI) arms embargo database is found at <http://www.sipri.org/databases/embargoes/>; the *Groupe de recherche et d'information sur la paix et la sécurité* (GRIP) French-language embargoes database is found at <http://www.grip.org/fr/node/1558>

⁴ This suggests only legally-binding international instruments are relevant (where 'international' applies to agreements between two or more states). At the global level this would include, at a minimum: the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol), supplementing the UN Convention against Transnational Organised Crime https://treaties.un.org/doc/source/RecentTexts/18-12_c_E.pdf; the 1997 Anti-Personnel Mine Ban Convention <http://www.apminebanconvention.org/>; and the 2008 Convention on Cluster Munitions <http://www.clusterconvention.org/>

⁵ For more information on the application of IHL obligations in the arms transfer decision making process, see *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria ? a Practical Guide*, ICRC, September 2017 <https://www.icrc.org/en/publication/0916-arms-transfer-decisions-applying-international-humanitarian-law-criteria#>

Should a State Party conclude that the above-mentioned prohibitions do not apply then, in the case of exports of conventional arms and items listed under ATT Articles 2(1), 3 and 4, a risk assessment must be undertaken as per the provisions of Article 7⁶; additionally the risk of diversion must be assessed consistent with the provisions of Article 11⁷.

Information gathering

The fundamental basis of any risk assessment is good quality and relevant information. In addition to the information gathered in the process of verifying the details of a licence application and any supporting documentation and checking the *bona fides* of those that will be involved in any arms transfer, detailed and accurate information should be sought in relation to:

- the type of equipment for export, its capabilities, uses and the ease with which it could be modified, for example to carry machine guns or missiles
- the nature, behaviour and situation of the end-user

Information should be gathered from a wide variety of sources to provide the basis for balanced decision-making and valid outcomes. Relevant information may well be sketchy or fragmentary, not least because questions about transfer, ownership, management and use of arms are often regarded as sensitive and may be seen as involving matters of confidentiality or national security. Consulting multiple sources can also help address bias, partiality and potential errors or misinformation.

There is already a substantial body of accepted good practice in the conduct of arms transfer risk assessments that suggests drawing on a wide range of established sources including:

- competent United Nations bodies
- Europol or Interpol
- the International Committee of the Red Cross (ICRC) and other international or regional organisations
- relevant government departments and institutions, including intelligence services
- counterparts from relevant authorities of other states
- diplomatic missions of the exporting state, and potentially of partner states
- research and academic institutions
- humanitarian and human rights NGOs and other civil society organisations (local and international)
- media (specialised and general, traditional and social⁸)

Within most of these categories there is a wide range of viable sources. States must make their own decisions over what is relevant and appropriate, taking into account issues such as objectivity, non-discrimination, scope of coverage, credibility, rigour and diversity. States should also be consistent in their approach and should not praise the utility of or rely on sources in one context only to question them in another.

⁶ As noted above, while ATT Article 7 obliges States Parties to undertake an assessment of exports of conventional arms covered under Articles 2.1, 3 and 4, states are free to carry out an assessment in relation to transit/transshipment, brokering and even imports of conventional arms and related items in addition.

⁷ While ATT Article 11 refers only to items covered in Article 2.1, a comprehensive export control system will consider the risk of diversion associated with the export, import, transit/transshipment and brokering of all conventional arms and related items.

⁸ In recent years, digital social media has given previously unimaginable access to conflict zones and trouble spots, and has become a useful source of information with a huge range of potential applications. It can however be fundamentally misleading and so in the context of arms export licensing requires careful checking.

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Conducting an ATT export risk assessment

Key concepts within the ATT export risk assessment

The outcome of any export risk assessment under the ATT will rest, in part, on the interpretation of certain key concepts set out within Articles 7 and 11. However, some of these concepts are relatively underdeveloped, particularly in the field of multilateral arms transfer control agreements. As a result, they merit some discussion in order to promote common understandings and consistent implementation.

'Potential'/'would be used'/'could be used'

All of the export criteria listed under Article 7(1) of the ATT require an assessment of the 'potential' use of items that are being considered for export. This suggests a focus upon the risk or prospect of a particular outcome arising from an export of conventional arms. In respect of Article 7(1)(a) the requirement is that the exporter consider the '*potential that the conventional arms or items ... would contribute to or undermine peace and security*'; however, the provisions of Article 7(1)(b) require consideration of the '*potential that the conventional arms or items ... could be used*' in certain undesirable ways. It is debatable whether there is any material difference between the use of 'would' and 'could' in these contexts. When these terms are taken in isolation, the use of 'would' suggests a higher level of certainty. However, as both terms are explicitly linked to the 'potential' or risk of a particular consequence, for the purpose of licensing decision-making the distinction between 'would' and 'could' becomes almost insignificant. It is therefore suggested that a coherent approach is one that assesses the risk of a given outcome in each case.

'Facilitation'

With regard to the consequences relating to human rights, international humanitarian law, terrorism, organised crime, gender-based violence and violence against women and children set out in Article 7(1)(b)i. to iv. and Article 7(4) (see below), authorities must assess not only the risk that arms under ATT Article 2(1) or items under ATT Articles 3 and 4 could be used to commit the stated violations or acts, but that they could be used to facilitate these violations or acts. This broadens considerably the scope and application of the criteria. It means that an assessment must not rest solely on the arms or items being used directly to commit the violations or acts listed; rather an assessment should also consider that the possession and availability of the arms or items in question may materially assist actors in the commission of violations or

proscribed acts. States may also wish to consider whether the export of certain arms or items help to create the climate, conditions or circumstances that enable violations or proscribed acts to be carried out (see discussion under Article 7(1)(b)ii below).

‘Mitigation’

Articles 7(2) and Article 11 both oblige States Parties to consider taking steps to mitigate risks associated with proposed arms exports. The prominence of diversion mitigation within Articles 7(2) and 11 is a reflection of concerns on the part of importing states operating in good faith that, should significant risks be identified in relation to a specific transfer of conventional arms, exporters may for a variety of reasons – such as cost or convenience – prefer to refuse the transfer rather than work with the importer to identify and implement the necessary provisions that would help reduce the risks to an acceptable level. The introduction of Treaty language on risk mitigation was seen by some states as a way of encouraging meaningful dialogue between exporters and importers on the issue of risk mitigation and thereby promoting a balanced approach in the application of the Treaty.

Depending on the circumstances, a number of mitigation options may present themselves, some of which could also be seen as standard good practice. For example:

- placing explicit limitations on the end uses or end-users of the items
- improving certification and verification procedures
- including a no-re-export clause as a condition of the export authorisation
- requiring or providing physical security measures for arms in-transit
- agreeing terms to allow for post-delivery inspection of the items
- improving physical security and stockpile management in the recipient country
- providing human rights or other training to end-users

Exporting States Parties, it should be noted, are obliged only to *consider* establishing mitigation measures; there is no obligation to *implement* any such measures regardless of the options that exist. It is also important to note that it is the effect of mitigation measures and not just their identification or implementation that is critical to any decision to authorise or refuse an export. Where mitigation measures have, or are likely to have, little impact and do not reduce the identified risks to a low level, the export should be refused. In this regard, the implementation of any mitigation measures or joint programmes must be followed by a full risk assessment before any final decision is taken to authorise an export of conventional arms under the Treaty. In addition, efforts should be made to carry out follow-up checks post-export so as to assess the actual impact of any measures, which could then help to inform subsequent licensing decisions.

‘Overriding’

Further to the assessment to be undertaken in Article 7(1), and taking into account any mitigation measures that may have been undertaken pursuant to Article 7(2), Article 7(3) requires that an exporting State Party must determine whether there is an ‘overriding risk’ of any of the negative consequences outlined in Article 7(1). If such a risk is determined then the proposed export must not be authorised.

While the ATT does not define ‘overriding risk’ and there is little guidance in international practice on how to measure this, a number of legal interpretations are emerging from interpretive declarations submitted with ATT ratifications. New Zealand signalled that they interpret the term to mean a ‘substantial risk’. Switzerland declared that ‘overriding risk’ ‘encompasses ... an obligation not to authorise the export whenever the State Party concerned determines that any of the negative consequences

set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered'. A threshold of risk that is 'substantial' or 'more likely to materialise than not' both provide additional guidance on how States Parties might assess the magnitude of the risk before an export is authorised. Although not the subject of an official interpretive statement on the matter, following entry into force of the ATT, EU Member States have made it clear that they consider Article 7 to be consistent with their 'clear risk' threshold beyond which they will not authorise exports of conventional arms. Other approaches to the application of Article 7(3) have advocated first assessing whether the prospective export would make a lawful positive contribution to peace and security, and then assessing whether there are any negative consequences that would 'override' that lawful positive contribution, in which case the export would not be authorised.⁹

Applying the ATT risk assessment criteria to a proposed arms export

As noted above, two key considerations should guide an assessment of the risks associated with any transfer of conventional arms: the nature of the equipment and the nature of the recipient. A risk assessment must therefore consider the situation, attitudes, behaviour, and standing of the stated end-user alongside the end-user's previous record as a responsible (or otherwise) importer of military or security equipment; it should also consider how the specific equipment being considered for export may be used by the recipient. Repeated instances of past or recent problematic behaviour would obviously give rise to greater concern than sporadic or isolated events.

Given that authorisations may be valid for a period of years, and the items themselves may typically have a shelf-life of many years, a thorough assessment cannot be solely historical; it should also look to the likelihood of internal or external stresses and to how those might impact upon the end-user's behaviour in the foreseeable future. Depending on conclusions reached, exports to a specific end-user of particular types of equipment for certain purposes could be approved, while exports of other types of equipment may be refused.

The following represents a step-by-step analysis of the normative provisions of Article 7 and Article 11 in an effort to highlight the key considerations that should shape the decision on whether a particular export application should be authorised or refused.

Article 7(1)(a) – Peace and Security

Article 7(1)(a) requires States Parties to '*assess the potential that the conventional arms or items [covered under Articles 2(1), 3 and 4] would contribute to or undermine peace and security*'. Further, Article 7(3) requires that '*after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences [in Article 7(1)] the exporting State Party shall not authorize the export*'.

The international legal context of peace and security is defined by the UN Charter and is elaborated primarily in decisions (Resolutions) of the UN Security Council¹⁰; these decisions have extended the concept of peace and security to include human security issues.

Under the ATT, exporting states are to assess the risks of harm to peace and security, as well as the possibility of a positive contribution; this should be considered in terms of the global, regional and/or national context of the end-user. Moreover, given that

⁹ Applying the Arms Trade Treaty to Ensure the Protection of Human Rights, Amnesty International, op. cit. pp. 19–20. <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>

¹⁰ UN Security Council Resolutions can be found at <http://www.un.org/en/sc/documents/resolutions/>

building peace and security is a long-term project going beyond any short-term imperative – such as to respond to a crisis – the impact of an arms export on peace and security should also be considered beyond the immediate and more obviously foreseeable circumstances to include the potential longer-term implications of an arms transfer. It is worth remembering that while peace and security take a long time to build, they can be destroyed extremely quickly.

An assessment under Article 7(1)(a) will therefore require consideration of how the arms or items in question will impact upon ongoing and potential threats to peace and security within the recipient state and surrounding region – including the possibility that the recipient state itself or elements thereof may pose a threat to regional or international peace and security. Each export will also need to be assessed, not just in its own right, but as part of any broader trends in military acquisitions¹¹ and any developing national, regional or international security dynamics.¹²

Owing to the all-encompassing nature of the peace and security element of the export risk assessment, all proposed exports of the arms and items listed in Articles 2(1), 3 and 4 – from aircraft and naval vessels down to small arms and ammunition – should be evaluated with equivalent rigour prior to any decision being taken.

In assessing the implications of an arms transfer for peace and security, key questions to be asked in respect of the political and security situation of the end-user country and its attitude towards its neighbours and the international community include:

- Is the end-user situated in a country where there is active conflict or significant tensions? What are the medium- and long-term trends in these contexts?
- Is the end-user situated in a country with an extant armed insurgency or a serious threat of such?
- Is the end-user situated in a region where there is active conflict or significant tension and, if so, is the end-user known to be supporting or encouraging one group or faction? What are the medium- and long-term trends in these contexts?
- Does the end-user country enjoy positive relationships with neighbouring countries?
- Is the end-user country involved in any border/resource disputes?
- What is the end-user country's record of compliance with international law and norms including UN arms embargoes?
- How have the authorities in the end-user country dealt with pressing political, social or economic problems?
- Is there a good track record of free and fair elections and the orderly transfer of power in the end-user country? If not, what are the risks that a change of government or leadership would produce significant political and social upheaval?
- Does the military play an influential role in the politics of the end-user country?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the impact of a particular arms transfer on peace and security. Relevant sources of information that will enable consideration of these issues are listed in Section 3 above and in footnotes.

¹¹ Sources of information on military acquisitions include organisations and publications such as: the Stockholm International Peace Research Institute (SIPRI) <https://www.sipri.org/>; the International Institute for Strategic Studies' Military Balance and Strategic Survey <https://www.iiss.org/>; specialised defence-sector media such as *Janes Defense News* <http://www.janes.com/defence/>; *Defense News* <https://www.defensenews.com/>; the UN Register of Conventional Arms <https://www.unroca.org/>; and States Parties Annual Reports under the ATT <http://www.thearmstradetreaty.org/index.php/en/2017-01-18-12-27-42/reports>. There is also now the option of using news-accumulation websites, which search the internet for pages based on search terms set by the user – examples include Google News and NewsNow.

¹² Information regarding security dynamics may be available through internal government sources, however relevant deliberations of the UN Security Council and other UN institutions and agencies may also be useful. Specialist academics and associated publications, research institutes, NGOs and specialist and general media may also be useful. Indices relating to conflict and instability have been developed by NGOs such as the Institute for Economics and Peace's *Global Peace Index* <http://visionofhumanity.org/#/page/indexes/global-peace-index> and Fund for Peace's *Fragile States Index* <http://library.fundforpeace.org/fsi>

Article 7(1)(b)i – International Humanitarian Law

Under Article 7(1)(b)i States Parties to the ATT must ‘*assess the potential that the conventional arms or items [covered under Articles 2(1), 3 and 4] could be used to commit or facilitate a serious violation of international humanitarian law (IHL)*’.¹³ Further, Article 7(3) requires that ‘*after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences [in Article 7(1)] the exporting State Party shall not authorize the export*’.

IHL governs the conduct of armed conflict – both international and non-international. It places restrictions on how, and with what means, conflict is prosecuted and includes protections for civilians and other non-combatants. Irresponsible arms transfers can fuel violations of IHL including deliberate targeting of civilians, civilian targets and other non-combatants such as prisoners of war; actions that result in indiscriminate or disproportionate harm to civilians, civilian targets and other non-combatants; the use of proscribed weaponry (such as landmines and cluster munitions); and the use of excessive or indiscriminate force. While Article 6(3) establishes a prohibition on the transfer of ATT-listed items that would be used to violate specific categories of IHL, the obligations cited therein that are applicable to all ATT States Parties are not exhaustive and omit, for example, reference to the detailed list of war crimes specified under Article 8.2 of the Rome Statute of the International Criminal Court.¹⁴ In this regard, the scope of application of Article 7(1) (b)ii extends beyond that of Article 6(3) in that it does not seek to place limitations upon what should be considered as a violation of IHL.

Whereas the ATT does not prohibit the supply of arms to parties to a conflict *per se*, the inherent risk of IHL violations occurring in any armed conflict cannot be ignored, and the conduct of the combatants becomes critical. The risk of exported arms contributing to such violations is therefore particularly acute where the end-user state is directly or indirectly party to an active conflict, or is at risk of becoming so involved.

Even if the risk of a particular type of weapon or weapons system being used to *commit* violations of IHL is relatively low, Article 7(1) (b)i requires consideration of the possibility that the weapons subject to assessment could be used to *facilitate* violations of IHL. Accordingly, any ATT State Party contemplating authorising exports covered by ATT Articles 2(1), 3 or 4 to a state that is involved in an armed conflict will therefore need to consider, very carefully, the way in which the conflict is being prosecuted and the risk of becoming complicit in violations of IHL by supplying arms to protagonists. Moreover, if a potential recipient is situated in a region where tensions are rising, the risk of their becoming involved in open hostilities should also be considered.

In assessing the implications of an arms transfer for IHL, key questions to consider¹⁵ should include:

- Has the government of the end-user country, or those acting in cooperation with them, been accused by an international body, such as the UN, or by credible non-government agencies of committing violations of IHL?
- Has the government of the end-user country failed to take action to prevent violations being committed by its nationals or on its territory?

¹³ For a discussion of what constitutes a serious violation of international humanitarian law, see ‘*What are ‘serious violations of international humanitarian law’? Explanatory note*’, ICRC, <https://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>

¹⁴ Rome Statute of the International Criminal Court 17 July 1998, as amended, pp. 5–10, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

¹⁵ For a more in depth discussion of how to assess IHL considerations in the context of arms exports see:
Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria? a Practical Guide, ICRC op. cit.
User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment op. cit.
Applying the Arms Trade Treaty to Ensure the Protection of Human Rights, Amnesty International, op. cit.

- Has the government of the end-user country failed to investigate and/or prosecute violations allegedly committed by its nationals or on its territory?
- What is the government of the end-user country's record in cooperating with others including states, tribunals and the International Criminal Court regarding investigation and prosecution of IHL violations?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the impact of a particular arms transfer on international humanitarian law. Relevant sources of information that will enable consideration of these issues are listed in Section 3 above and in footnotes.

Article 7(1)(b)ii – International Human Rights Law

Under Article 7(1)(b)ii States Parties to the ATT must '*assess the potential that the conventional arms or items [covered under Articles 2(1), 3 and 4] could be used to commit or facilitate a serious violation of international human rights law (IHRL)*'.¹⁶ Further, Article 7(3) requires that '*after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences [in Article 7(1)] the exporting State Party shall not authorize the export*'.

The international trade in arms can impinge upon a wide range of human rights as enshrined in Treaty and customary international law. Every arms export risk assessment carried out by an ATT State Party must therefore consider any credible and authoritative reports of serious human rights violations by government agencies or those acting on their behalf within the end-user state. In addition any such State Party must also take into account the broader human rights context within the end-user state. This should include *inter alia*: any limits to fundamental freedoms¹⁷; the use of excessive force in response to peaceful and legitimate protest¹⁸; unfair or discriminatory treatment of minorities; a lack of application of due process in the legal system; cruel, inhuman or degrading treatment of prisoners; and conduct of security forces that falls below international standards¹⁹. The competent authorities of the prospective exporting state should consider whether the arms or items to be exported would exacerbate such concerns. Even if investigations conclude that the reports have been overstated, it will still be important to consider potential future risks, for example, whether a deteriorating internal security situation is likely to provoke a violent or repressive government response. In such a context an assessment of the robustness of governance and accountability structures would be useful.

Within the scope of the ATT, the types of equipment most frequently relevant to IHRL violations are small arms and light weapons and their ammunition, and armoured vehicles. However, in keeping with Article 5(3) of the ATT which urges States Parties '*to apply the provisions of the Treaty to the broadest range of conventional arms*' all conventional weapons are of potential concern and should be subject to careful pre-export assessment. As well as the risk that items would themselves be used directly to commit violations, Article 7(1)(b)ii requires consideration of the possibility that the weapons could be used to *facilitate* violations of IHL. This could involve protecting or enhancing the overall operational capacity of the end-users in the way that armoured personnel carriers may be used to transport security forces that are known to be

¹⁶ For a discussion of what constitutes a serious violation of international human rights law, see *What amounts to a serious violation of international human rights law*, Geneva Academy, August 2014 https://www.geneva-academy.ch/joomla-tools-files/docman-files/Publications/Academy%20Briefings/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf

¹⁷ According to the UN 'fundamental freedoms' include: freedom from fear, freedom from want, freedom of speech and freedom of thought, conscience and religion. See <https://www.un.org/sustainabledevelopment/blog/2015/12/fundamental-freedoms-inalienable-and-inherent-now-and-always-un-says-on-human-rights-day/>

¹⁸ See, for example, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials <https://www.un.org/ruleoflaw/files/BASICP-3.PDF>

¹⁹ *Ibid.*

engaged in serious IHRL violations or that surveillance and communications equipment may enable them to identify targets.

In assessing the implications of an arms transfer for IHRL, key questions to consider²⁰ should include:

- Are fundamental rights and freedoms such as freedom of speech, religion, and the right to peaceful protest guaranteed and upheld in the country of end-use?
- Is there an independent judiciary and a legal system based on due process?
- Are the authorities of the end-user country, the security forces or those acting in cooperation with them known to use torture or cruel, inhuman, or degrading treatment? Do extrajudicial executions occur?
- Are human rights violators brought to justice?
- Are the authorities inclined to respond to protest with excessive force?
- What are the main challenges facing the government in the end-user country? How likely is it that they will be met in a non-repressive way?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the impact of a particular arms transfer on human rights. Relevant sources of information that will enable consideration of these issues are listed in Section 3 above and in footnotes.

Article 7(1) (b)iii – Terrorist Offences

Under ATT Article 7(1)(b)iii States Parties must ‘*assess the potential that the conventional arms or items [covered under Articles 2(1), 3 and 4] could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party.*’ Further, Article 7(3) requires that ‘*after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences [in Article 7(1)] the exporting State Party shall not authorize the export.*’

The lack of a universally-accepted definition of the terms ‘terrorism’ or ‘terrorist’ means that the ATT applies to those areas where there is international agreement, namely relevant conventions or protocols. Most such instruments relate to offences concerning the safety of civil aviation and maritime activities and terrorist acts that employ particular tools or *modus operandi* such as the taking of hostages or carrying out bombings.

The UN Security Council has passed numerous resolutions relating to terrorism;²¹ significant among them is Resolution 1373 (2001) which established the Counter Terrorism Committee.²² Subsequently, in 2006, the UN General Assembly agreed on a ‘Global Counter-Terrorism Strategy’ in the form of a Resolution and a Plan of Action which is reviewed every two years.

Considering that Article 7 requires an exporting State Party to assess the *potential* that exports of arms or items covered by Articles 2(1), 3 or 4 could be used to *commit* or *facilitate* acts of terrorism, in practice this implies a broad consideration of the issue. This will mean giving due consideration as to whether the prospective recipient is a

²⁰ For a more in depth discussion of how to assess human rights considerations in the context of arms exports see: *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria ? a Practical Guide*, ICRC op. cit.

User’s Guide to Council Common Position 2008/1944/CFSP defining common rules governing the control of exports of military technology and equipment, Council of the European Union, 20 July 2015, pp 40–73 <http://data.consilium.europa.eu/doc/document/ST-10858-2015-INIT/en/pdf>

Applying the Arms Trade Treaty to Ensure the Protection of Human Rights, Amnesty International, February 2015 <https://www.amnesty.org/download/Documents/ACT3000032015ENGLISH.PDF>

²¹ See <http://www.un.org/en/sc/ctc/resources/res-sc.html>

²² Website of the Counter Terrorism Committee <https://www.un.org/sc/ctc/>

known supporter of groups that have committed terrorist acts or if the recipient has been directly implicated in such acts as defined by existing international instruments.

In assessing the implications of an arms transfer in respect of terrorist acts key questions to consider include:

- Has the government of the end-user country directly engaged in terrorist activities?
- Is the government of the end-user country known to have given political, material or financial support to groups that have committed terrorist acts?
- Does the government of the end-user country tolerate the existence, in their territory, of entities with links to groups that have committed terrorist acts?
- Does the government of the end-user country have a permissive attitude to the diversion or re-export of arms to groups that are known to have committed terrorist acts?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the impact of a particular arms transfer in respect of terrorist acts. Relevant sources of information that will enable consideration of these issues are listed in Section 3 and in footnotes.

Article 7(1) (b)iv – Transnational Organised Crime

Under ATT Article 7(1) (b)iv States Parties must ‘*assess the potential that the conventional arms or items [covered under Articles 2(1), 3 and 4] could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party*’. Further, Article 7(3) requires that ‘*after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences [in Article 7(1)] the exporting State Party shall not authorize the export*’.

‘Transnational organised crime’ refers to a wide range of criminal activities by groups operating internationally, including trafficking in illegal drugs, people, endangered species, timber, oil and firearms, as well as cyber-crime and money laundering. Corruption – particularly systemic corruption – can also be viewed as part of this matrix.

The principal international instrument in this field is the UN Convention against Transnational Organised Crime, together with Protocols on Trafficking in Persons, Especially Women and Children, on Smuggling of Migrants, and on Illicit Manufacturing and Trafficking of Firearms.²³ Organisations such as Global Witness²⁴ and Transparency International²⁵ also provide an important source of information and analysis in this field.

Considering that Article 7(1)(b)iv requires an exporting State Party to assess the *potential* that arms or items covered by Articles 2(1), 3 or 4 could be used to *commit* or *facilitate* organised crime, in practice this implies a broad consideration of the issue. Although it might be difficult to draw an explicit link between a particular arms transfer and particular criminal acts, arms transfers can create a permissive environment in which organised crime may flourish. Systemic corruption can facilitate this²⁶ where government agencies and officials are either directly involved in organised crime or where a ‘blind eye’ is turned to the activities of criminal groups. Accordingly, the *bona fides* of those elements of governments that are party to an arms transfer – whether as importer, exporter, transit or transshipment state or as a locus for the operation of

²³ UN Convention against Transnational Organised Crime <http://www.unodc.org/unodc/treaties/CTOC/>

²⁴ See <https://www.globalwitness.org/>

²⁵ See <https://www.transparency.org/>

²⁶ For a good indication of corruption levels world-wide see Transparency International’s Corruption Perception Index https://www.transparency.org/news/feature/corruption_perceptions_index_2016

arms brokers – should come under scrutiny in this context. States Parties should also consider how arms exports may fuel transnational organised crime in a broad context, including by ascertaining whether or not the prospective recipient is a known supporter of organised crime or has been directly or even indirectly implicated in such activities.

In assessing the implications of an arms transfer in respect of organised crime, key questions to consider include:

- Is the government of the end-user country regarded as having a poor record in terms of corruption?
- Is the government of the end-user country known to have links with organised criminal groups/networks?
- Does the government of the end-user country tolerate the existence, in their territory, of organised criminal groups/networks?
- Does the government of the end-user country have full control of and accountability for the actions of its law enforcement and security agencies?
- Are the security and law enforcement agencies of the end-user country known to have been significantly infiltrated by rogue or criminal elements?
- Does the government of the end-user country have a permissive attitude to the diversion or re-export of arms to organised groups/networks?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the impact of a particular arms transfer in respect of transnational organised crime. Relevant sources of information that will enable consideration of these issues are listed in Section 3 above and in footnotes.

Article 7(4) – Gender-based Violence or Serious Acts of Violence Against Women and Children

Under ATT Article 7(4), in conducting their assessment States Parties must ‘*take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4, being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children*’.

It is important to note that gender-based violence (GBV) is committed against women and girls, and men and boys. In addition to rape and other sexual violence it may also include non-sexual attacks. Violence against women is defined as that which is ‘directed against a woman because she is a woman or that affects women disproportionately’.²⁷ Violence against children constitutes ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’.²⁸

While falling under the general rubric of IHRL and IHL violations, there have been heightened concerns in recent years regarding GBV and violence against women and children. Whereas Article 7(4) does not explicitly require an exporting State Party to refuse an export where there is a risk of serious acts of GBV or violence against women and children, these acts constitute crimes under IHL and/or IRHL and they should therefore be considered at least as seriously as any other risk factor assessed under Article 7(1)(b)i or Article 7(1)(b)ii.

Moreover, considering that Article 7(4) requires an exporting State Party to take into account the risk that the arms or items could be used to *commit* or *facilitate* serious acts of GBV or violence against women and children, even where an arms export may

²⁷ Committee on the Elimination of Discrimination Against Women (CEDAW Committee), General Recommendation 19, <http://www.un.org/womenwatch/daw/cedaw/>

²⁸ UN Convention on the Rights of the Child, General Comment 13, <http://www.unicef.org/crc/?sissr=1>

not be used *directly* in the commission of such acts it should be recognised that the presence of arms can make such violence – and in particular sexual violence – much more likely and more serious.

In assessing the implications of an arms transfer in respect of serious acts of GBV or violence against women and children, key questions to consider include:

- Has the government of the end-user country, or those acting in cooperation with them, been accused by an international body, such as the UN, or by credible non-government agencies of committing serious acts of GBV or serious acts of violence against women and children?
- Has the government of the end-user country, or those acting in cooperation with them, been accused by an international body, such as the UN, or by credible non-government agencies of recruiting child soldiers?
- Has the government of the end-user country failed to take action to prevent serious acts of GBV or serious acts of violence against women and children being committed by its nationals or on its territory?
- Has the government of the end-user country failed to investigate and/or prosecute serious acts of GBV or serious acts of violence against women and children allegedly committed by its nationals or on its territory?
- What is the government of the end-user country's record in cooperating with others including states, tribunals and the International Criminal Court regarding investigation and prosecution of serious acts of GBV or serious acts of violence against women and children?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the impact of a particular arms transfer in respect of serious acts of gender-based violence or serious acts of violence against women and children. Relevant sources of information that will enable consideration of these issues are listed in Section 3 above and in footnotes.

Article 11(2) – Diversion

Under ATT Article 11(2) States Parties must ‘seek to prevent the diversion of the transfer of conventional arms covered under Article 2 (1) through its national control system ... by assessing the risk of diversion of the export and considering the establishment of mitigation measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.’

Diversion of arms transfers occurs when authorised transfers of arms are either delivered to unauthorised end-users (contrary to the terms of the transfer), are re-transferred to unauthorised end-users by an approved end-user, or are put to unauthorised uses by an approved end-user. As such, preventing diversion of arms exports through a rigorous risk assessment is a key function of the ATT. Proscribed end-users and states with a poor record of compliance with IHRL and IHL finding it difficult to obtain arms through legitimate channels may instead seek to enlist assistance from those prepared to obtain arms on their behalf before either diverting a shipment en route or taking possession of the arms and re-exporting them.

Exporting states should therefore assess *inter alia* whether the prospective end-user has both a *legitimate need* for and the capacity to use the arms or items in question. If the answer in either case is “no” and no other explanation can be found for the purchase, this would suggest a heightened risk of diversion. Moreover, if the exporting

state does not have confidence in the recipient state possessing the necessary infrastructure and procedures to ensure effective stockpile management and secure storage of the arms or items then, again, diversion risks are likely to be greater.

As noted in Section 2, a prospective exporting state needs to have in place procedures to verify with confidence that all documentation provided as part of the export application is genuine and gives full details of the end-user and end-use as well as of intermediaries – such as relevant consignees and arms brokering agents. Exporting authorities should also have complete confidence that the information provided is accurate and should take steps to ensure the *bona fides* of all of those involved in the transfer. Particular care should be taken when considering the export of arms to an end-user based in an unstable region where IHRL and/or IHL violations are frequent, where levels of violent crime are high, where terrorist acts are frequent or where there are states or groups subject to arms embargoes. There is little point in taking rigorous measures to prevent arms being directly exported to countries and end-users of concern if similar care is not taken to ensure that arms exports are not diverted to such entities.

If a clear diversion risk is identified, States Parties should take a very cautious approach and if the end-user cannot demonstrate that adequate safeguards are in place then the prospective exporting state should refuse the export.

In assessing the risks of diversion associated with an arms transfer, key questions to consider include:

- Is the government of the end-user country known to have participated previously in the diversion of arms to unauthorised end-users?
- Are any intermediaries, for example arms brokering or shipping agents, known to have participated previously in the diversion or illicit trafficking of arms?
- Does the intended end-user have a clear and legitimate requirement for the arms or items in question?
- Are the arms or items by their very nature likely to be at risk of diversion (for example because they are easily transportable or in high demand)?
- Are the arms or items consistent, or at least interoperable, with the existing stocks of the buyer?
- If the arms or items are high-tech in nature, does the intended end-user have the capacity to use them properly and responsibly?
- Does the end-user have the capability to ensure safe storage and management of the equipment when it is not in use?

Finding satisfactory answers to these and other related questions will be key to arriving at a conclusion regarding the risks of an arms transfer being diverted. Relevant sources of information that will enable consideration of these issues are listed in Section 3 above and in footnotes.

5

The systematisation of the risk assessment process

In order for ATT States Parties to be able to implement the key operative provisions of the Treaty effectively, notably Articles 6, 7 and 11, each must have in place a comprehensive national arms transfer control system which has the export risk assessment process at its core. Most States Parties that have significant arms manufacturing capacity have such systems and processes in place. However, it is equally incumbent upon States Parties with little or no arms manufacturing capacity to have the capability to conduct an export risk assessment. This can present a significant challenge for States Parties that may for example only be called upon to authorise the export, most likely of surplus military equipment, once every few years.

If States Parties with limited involvement in the arms trade are to be in a position to conduct an effective arms export risk assessment, capacity and knowledge needs to be built within national institutions. This should include the creation of the following:

A written guide that explains who is responsible for an export/transit/transshipment/brokering assessment and how it should be undertaken, setting out, step-by-step, the questions that should be addressed and the process that should be followed in order to obtain relevant answers, including information sources to be consulted. This guide could include much of what is set out above, tailored to each individual State Party's particular circumstances, for example, by addressing relevant national, regional and international obligations and how they impinge upon the state's freedom to export arms.

An interdepartmental or inter-ministerial committee involving all relevant government departments/agencies (such as the Ministries of Foreign Affairs, Interior, Trade and Defence (or their equivalents), Customs and Border Agencies, the National Security Agency and relevant intelligence agencies) that can be asked to provide expert input into the risk assessment process. Each of these departments/agencies will have their own perspectives on the risks and potential consequences associated with an arms export in terms of the importing state, its regional neighbours and/or the wider international community; all such perspectives should be taken into account in arriving at an arms transfer decision.

A process for arriving at an arms transfer decision should be clearly set out ensuring that all relevant actors have full and proper understanding of their respective roles. Taking into account the role of an inter-departmental/inter-ministerial committee in

feeding into any arms transfer risk assessment, a clear procedure should be established for arriving at a decision, including clarity regarding who has ultimate authority. Options could include: a system of veto where all agencies in the inter-departmental/inter-ministerial discussions are allowed to refuse an authorisation; a situation where only certain ministries or agencies can refuse authorisation; a process whereby all relevant ministries/agencies have a say and the decision is made according to the majority view; or a system whereby a particular ministry or agency can make the decision in respect of certain types of transfer (export/import/transit/transshipment/brokering) and/or in respect of certain types of goods (military items/police items/dual-use items).

The creation of a database that can serve as a record – and institutional memory – of all arms transfer assessments that are undertaken and of the final licensing decisions. In addition to its utility for future risk assessments, such a database can also enhance the provision or sharing of information to international partners as necessary. Alongside details of all previous cases (including where specific problems or issues have arisen), this database could provide a list of relevant documents, websites and media sources and a list of organisations, entities, agents and agencies – both governmental and external – that may be approached in order to verify the information provided in an export application (see Section 2 above).

The development of expertise among key personnel responsible for undertaking an export risk assessment and processing export applications. Every effort should be made to access training opportunities at home and abroad so that key personnel may see first-hand how export licensing works in other national contexts, thus enabling a consistent and effective approach to be adopted domestically. Such training should be repeated regularly – at least annually – in order to ensure that relevant personnel can refresh their skills and knowledge.

A commitment to ensuring an effective hand-over process when relevant personnel depart their post. One of the biggest challenges faced by states, regardless of circumstance, is the skills and knowledge gap that is often created when government personnel depart or are rotated out of post. To ensure that critical knowledge and expertise is not lost it is vital that opportunity and the resources are provided to allow for effective hand over from the outgoing to the incoming official and to enable adequate training of all officials responsible for scrutiny of export licences. The maintenance of the database referred to above can also be useful in this context.

ANNEX 1: Illustrating the risk assessment process: a hypothetical case-study¹

Background

Trudatia is an ATT State Party. It is a relatively stable country but is situated in an unstable region characterised by conflict and insurgency. Trudatia has not experienced significant levels of armed violence for more than a decade. However, several neighbouring countries are facing a threat from one or more non-state armed groups (NSAG). Trudatia has played an important role within the wider region, sending troops to take part in a UN peacekeeping mission to Fontain (which is not a party or signatory to the ATT) in order to support the implementation of a peace agreement which has followed the ending of a brutal five-year long civil war. The peacekeeping mission is now being scaled back, and Trudatia is rotating most of its personnel home.

Scenario

Trudatia is considering the export of 50 armoured vehicles to Fontain. Prior to giving its approval, the Trudatian authorities must check that the export is not prohibited under ATT Article 6. If this concludes that the export is not prohibited, Trudatia must then undertake a risk assessment in accordance with Articles 7 and 11.

Key Information

Type of equipment: 50 Armoured Combat Vehicles (ACVs) manufactured in 1997

Type of transaction: Export

Origin of equipment: The ACVs were originally gifted to the Trudatian Army in order to fulfil a peacekeeping mission in Fontain. Trudatia has decided that they no longer require the vehicles now their peacekeeping role has largely ended.

End-user: The Fontain Army. Trudatia is keen to sell the vehicles in order to fund other equipment acquisitions on their part. They are proposing to sell the ACVs at a reduced price to the newly established Fontain Army, which has received training from inter alia Trudatian peacekeeping forces (see below).

Implications: Although the ACVs will not cross an international border, under ATT Article 2 this transaction would constitute an export because there is a transfer of ownership of the vehicles from one State Party to another state. In which case, assuming that the transfer is not prohibited under ATT Article 6, the Trudatian authorities must conduct a risk assessment in accordance with Articles 7 and 11 of the ATT.

Key questions to consider

1) Does the Fontain Army have a legitimate requirement for 50 ACVs?

Fontain is a large country with extensive borderlands; accordingly the army could be considered as having the need for troop-carrying vehicles. Whether these vehicles should be ACVs, and whether they require as many as 50 is, however, subject to question. One consideration that may impact on a decision is whether Fontain has any

¹ This fictitious case study should be read in conjunction with the discussion of how an arms export risk assessment can be undertaken as set out in the main body of this briefing.

threats in its borderland areas that might necessitate deployment of a large number of ACVs. If such threats were to exist it could be argued that the ACVs might make a positive contribution towards maintaining peace and security. However, any such contribution would be overridden should there be judged to be a risk of the ACVs being used to commit or facilitate violations of international human rights law or international humanitarian law (see also 4 below).

2) How stable is the country and the new Government of Fontain?

An assessment should be made of the risks that the country may not yet be stable and that conflict might resume. If the new government has support and representation from all key stakeholders within the country as well as popular support, it may be considered relatively stable for the time being. Nevertheless there can be no guarantee that this will continue into the medium or longer term. More information will be required regarding the prospects for the peace agreement and the attitudes of those who lead the government and the armed forces of Fontain.

3) What is the new government's attitude towards human rights and the treatment of minorities?

If the new government is demonstrating respect for the rights of all citizens, including minorities, then this will be a positive note. Should a new constitution, for example, be mooted in order to enshrine principles of equality and fundamental freedoms, this could help provide additional reassurance. On the other hand, if the nascent government and new army is not representative of the population at large and significant sources of grievance exist – at least in parts of the country – the potential for unrest may exist along with a negative response from the new government and army.

4) Is the Fontain Army sufficiently trained to use these vehicles responsibly?

The ACVs are 20 years old and so are not considered to be a very high-tech piece of equipment. Some minimal further training may be required to enable the new Fontain Army to operate the vehicles.

However, consideration should also be given to the question of whether the new Fontain Army can be trusted to use the ACVs responsibly. The absence of any real track record of compliance with international human rights/humanitarian norms and standards on the part of the new Fontain Army means that this is likely to be a difficult question to answer definitively, though if there is continuity of personnel then past behaviour may give some indication of the risks involved; certainly in the short term, training in this area is not likely to guarantee adherence to such norms and standards.

Moreover, given the requirement to consider whether arms exports '*could be used to commit or facilitate*' certain violations listed under ATT Article 7, it should also be considered whether use of the ACVs by the Fontain Army might lead to the use of other military equipment (for example small arms or light weapons) in breach of human rights or humanitarian law or other ATT criteria.

5) Is there a risk that the ACVs might be re-exported/diverted to an end-user in another country?

Consideration would need to be given to the ongoing unstable situation in the region and the demand that may exist for ACVs on the part of a variety of actors, particularly those embroiled in conflict. In particular the relationship between the Fontain Government and military with any embargoed entity should be considered. If the Fontain Government is generally supportive of an embargoed entity who is, itself, seeking to acquire armoured vehicles then there could be a significant risk of diversion.

Reaching a decision

In order to make a proper export assessment more information will need to be gathered regarding the prospects for the peace agreement, the internal situation, and the current situation regarding the armed forces of Fontain. Such information might be obtained from:

- other Trudatian government departments with knowledge of Fontain
- the Trudatian embassy in Fontain
- the UN peacekeeping mission in Fontain
- reliable and impartial government sources within the region in question – particularly in states that are party to the ATT
- local and international NGOs, including those supporting security sector reform, demining and humanitarian efforts on the ground
- international NGOs with a particular focus and expertise in relation to the region in question
- the Trudatian trainers of the Fontain Army

In addition it would be important to ensure that any conditions applied by the country that gifted Trudatia the armoured vehicles with regard to re-export are met. Regardless of whether there are any explicit restrictions or conditions of this type, Trudatia should as a matter of good practice advise the original gifting country of its intentions and secure its approval.

The final decision would be based on consideration of all material facts and of the information received from a variety of sources including those mentioned above. Much is likely to depend on whether such a transfer is deemed likely to support or threaten the potentially fragile peace in Fontain.

ANNEX 2: Sample Export Licence Application Form

Section 1: Exporter details

Name	
Address	
Telephone	
Mobile	
Email address	
Website	
Nature of business	

Section 2: Details of manufacturer or supplier of items (if different from exporter)

Name	
Address	
Telephone	
Mobile	
Email address	
Website	
Nature of business	

Section 3: Details of items for export

Type of item	
Part number (<i>if applicable</i>)	
Control list reference	
Weight	
Quantity (<i>number of items</i>)	
Value	
Description of use(s) for item	

Section 4: Items specifications/uses

Are the items designed or modified for military use?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Are the items designed or modified for development or production of military items?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Are the items designed or modified for use in relation to cryptography or cryptographic functions?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Are the items designed or modified for use in nuclear, chemical, or biological programmes?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Are the items to be incorporated into military equipment?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Are the items to be incorporated into a plant or system for production of military equipment?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)

Section 5: End-use details

Have you been informed by government that the items are, or may be intended, in part or in their entirety, for use in connection with nuclear, chemical or biological weapons or their means of delivery?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Do you know or do you have grounds for suspecting that the items are, or may be intended, in part or in their entirety, for use in connection with nuclear, chemical or biological weapons or their means of delivery?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
If the items have been previously imported from another country/ jurisdiction, have you complied with the terms of any end-use and/or re-export restrictions imposed by the original exporting authority?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Other (please give details)
Please provide a detailed description of the end-use of the items including, where applicable, details of products manufactured, maintained or repaired using the goods to be exported.	

Section 6: Details of consignee(s) (please provide details of all consignees separately)

Name of consignee	
Type of consignee	<input type="checkbox"/> Government <input type="checkbox"/> Commercial <input type="checkbox"/> Private <input type="checkbox"/> Other (please give details)
Type of business (<i>please give details</i>)	
Address	
Telephone	
Website	

Section 7: Details of ultimate end-user(s) (please provide details of all end-users separately)

Name of end-user	
Type of end-user	<input type="checkbox"/> Government <input type="checkbox"/> Commercial <input type="checkbox"/> Private <input type="checkbox"/> Other (please give details)
Type of business (<i>please give details</i>)	
Address	
Telephone	
Website	
Address where items will be kept (<i>if different from end-user address</i>)	

Section 8: Details of other third parties (please provide separate details of all intermediaries – including agents, brokers, distributors etc.)

Name of intermediary	
Type of intermediary	<input type="checkbox"/> Government <input type="checkbox"/> Commercial <input type="checkbox"/> Private <input type="checkbox"/> Other (please give details)
Type of business (<i>please give details</i>)	
Nature of role in transaction/export (<i>please give details</i>)	
Address	
Telephone	
Website	

Section 9: Transportation of items

How are the goods to be transported to their destination? (<i>please tick all that apply</i>)	<input type="checkbox"/> By Air <input type="checkbox"/> By Road <input type="checkbox"/> By Rail <input type="checkbox"/> By Sea <input type="checkbox"/> Other (please give details)
Please provide details of any individuals or entities involved in the transportation of the goods (<i>when known</i>)	Name
	Address
	Telephone
	Email address
	Website
	Nature of business
Please provide details of the transportation route (<i>when known</i>)	
Please provide details of relevant transit authorisations (<i>when known</i>)	

Section 10: Supporting documentation

Please provide the following documentary information either electronically or in hard copy form:

- A copy of the contract between exporter and consignee/end-user
- Information detailing the technical specification of the items
- End-user documentation relating to the export of the items in question
- Any transit authorisations that are obtained

ANNEX 3: Sample Export Licence

Exporting country:	
Export licence type:	Export licence number:
Date of issue:	Date of expiry:
Recipient country:	End-use country:

Government agency authorising:	
Point of contact:	Email, telephone:

Exporter details

Name	
Address	
Telephone	
Email address	

Consignee details

Name	
Address	
Telephone	
Email address	

End-user details

Name	
Address	
Telephone	
Email address	

Details of carrier

Name	
Address	
Telephone	
Email address	
Mode of transportation of items	
Details of transportation route	

Details of items

Type of item	
Control list reference	
Weight	
Quantity (<i>number of items</i>)	
Value	
Type of export	<input type="checkbox"/> Permanent <input type="checkbox"/> Temporary

Additional information

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Conditions

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Signature of authorised official
Title, name and position/rank of signer

ANNEX 4: Sample End-User Certificate (EUC)

[To be completed and printed on official headed paper of the end-user]

In accordance with the regulations of [insert name of government authorising the export] which state that granting of an individual export licence is dependent on the presentation of an EUC,

We/I certify that the items detailed as follows:

Description of items:
Quantity/weight of items:
Value of items:

which have been supplied by

Name and address of supplier:

EITHER

will remain in

Name of end-user country:

AND

will only be used for

Description of end-use of items:

OR

consistent with the issued authorisation, will only be re-exported (after integration) to

Name of country of final destination:

We/I further certify that:

- we/I will not, temporarily or permanently, re-export, sell, lease out, lend or donate the above-listed items, whether in whole or in part, to any third party without the prior written consent of the export authority of [insert name of government authorising the export]
- the above-listed items will not be used in the commission of serious violations of international human rights law or of international humanitarian law or in connection with the manufacture, possession transfer, or use of weapons of mass destruction or their means of delivery
- we/I will provide to the export authority of [insert name of government authorising the export] evidence of the correct delivery of the above-listed items
- the authorities of [insert name of government authorising the export] have the right to verify the location and end-use the above-listed items at any time of their choosing.

Place:	Date:
Signed:	
Title, name and position/rank of signer in block capital letters:	
Company stamp/official seal	

Saferworld

Saferworld is an independent international organisation working to prevent violent conflict and build safer lives. We work with people affected by conflict to improve their safety and sense of security, and conduct wider research and analysis. We use this evidence and learning to improve local, national and international policies and practices that can help build lasting peace. Our priority is people – we believe in a world where everyone can lead peaceful, fulfilling lives, free from fear and insecurity.

We are a not-for-profit organisation with programmes in nearly 20 countries and territories across Africa, the Middle East, Asia and Europe.

ATT Expert Group

The ATT Expert Group is convened by Saferworld. Its purpose is to help develop common understandings among government and civil society experts from all world regions on issues relevant to ATT implementation, with a view to promoting progressive interpretation of the Treaty's provisions and the development of a robust ATT regime.

As of August 2018 the ATT Expert Group has met on seven occasions – in London, November 2013; Stockholm, May 2014; Berlin, July 2014; San José, Costa Rica, March 2015; Accra, November 2015; Amsterdam, November 2016; and Waterloo, Canada, May 2018. This briefing is based upon discussions that took place at these meetings. The views and ideas expressed herein should not be taken as reflecting the official view of those States or individual experts that have participated in this process.

SAFERWORLD

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