

Background Paper: Parameters

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Introduction

In the last few years, discussions on an Arms Trade Treaty (ATT) have raised a variety of questions on the criteria that States should apply when deciding whether to authorize arms transfers. Much guidance already exists on arms transfer criteria and how they can be applied. This background paper aims to explore the kinds of criteria that could be appropriate for an ATT, possible frameworks for their development, and considerations on how they would be implemented.

I. Which criteria should be applied in an ATT?

First, it is important to understand what is meant by "criteria". Criteria are the standards that States should apply when determining whether to authorize a transfer of arms. During the 2009 Open-ended Working Group (OEWG) and 2010 Preparatory Committee (PrepCom) discussions, States expressed the need for objective and non-discriminatory criteria.

Through both written submissions and oral statements made in recent ATT discussions, States and other interested actors have put forward many criteria, some more frequently than others. Below is a list of the most commonly proposed criteria for an ATT. The criteria below have been separated into three categories to allow for better understanding: criteria relating to express international obligations, criteria relating to likely post-transfer events and effects, and criteria relating to the expected user. Some criteria overlap or belong in more than one of these categories. The criteria and wording proposed are for purposes of illustration and do not mean to prejudice any decision reached by States during ATT negotiations.

A. Criteria relating to the transferring State's express international obligations

Express prohibitions on transfers of weapons in certain circumstances can already be found in the UN Charter and other treaties, and in customary international law. Criteria based on these existing express prohibitions could be formulated as follows:

"A State Party shall not authorize a transfer of arms that would violate its obligations under international law. These obligations include those arising under or pursuant to:

- a. the Charter of the United Nations (UN), including pursuant to decisions of the UN Security Council¹;
- b. international and regional treaties by which the State Party is bound²;

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¹ Pursuant to article 25 of the UN Charter, decisions of the UN Security Council are binding on all UN Member States. These can include decisions imposing arms embargoes. Article 2(4) of the UN Charter provides another example of an obligation that could preclude an arms transfer: A transfer of arms from one State to another or to persons in the territory of another State without that State's consent could amount to a violation of the prohibition of the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

² Obligations under international and regional treaties would include embargoes adopted by other international, regional and sub-regional organizations established pursuant to a treaty (for example by the European Union, the Organization of American States, ECOWAS). They can also arise from treaties that prohibit the transfer of certain weapons, such as the protocols to the 1980 Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, and the 2008 Convention on Cluster Munitions.

c. customary international law³."

B. Criteria relating to likely post-transfer events and effects

Many of the transfer criteria proposed by States look at what can be expected to happen after the weapons are transferred. A majority of these criteria aim to ensure that the transferred weapons are not used to commit or facilitate violations of international or domestic law.

1. Criteria relating to likely use

The criteria in this subcategory are among those most commonly suggested by States. They relate to the likely use of the weapons once they have been transferred, and could be formulated as follows:

"A State Party shall not authorize a transfer of arms when there are substantial grounds for believing there is a clear risk that the arms under consideration will be used to commit:

- a. a breach of the UN Charter or of customary international law⁴;
- b. serious violations of international human rights law⁵;
- c. serious violations of international humanitarian law applicable in international or non-international armed conflict⁶;
- d. genocide or crimes against humanity⁷;
- e. terrorist acts;
- f. violent, gender-based or organized crime."

2. Criteria relating to likely effects

This second subcategory relates to the likely effects that the transferred weapons would have in the country or region into which they are transferred. The criteria most commonly suggested by States could be formulated as follows:

"A State Party shall not authorize a transfer of arms when there are substantial grounds for believing there is a clear risk that the arms under consideration will:

³ For example, arms transfers to persons other than those exercising governmental authority may amount to a breach of the duty not to intervene in matters within the domestic jurisdiction of any State. The prohibition on the use of arms that are by nature indiscriminate or are of a nature to cause superfluous injury or unnecessary suffering is derived from universally accepted principles of international humanitarian law. Customary international humanitarian law also contains prohibitions on the use of certain specific weapons. Even though these prohibitions do not extend to the transfer of these weapons, allowing the transfer of prohibited weapons would be difficult to reconcile with the prohibition on their use and with States' general duty to ensure respect for international humanitarian law.

⁴ See above under section I.A.

⁵ Many of the rules of international human rights law that are of particular relevance to arms transfers are universal. The Universal Declaration of Human Rights encompasses fundamental rights that are so entrenched in international law that a failure to respect them would be considered unacceptable by virtually all States. Some examples of such violations could be torture or other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, and disappearances.

⁶ States transferring weapons need to evaluate the risk of "serious" violations of international humanitarian law (IHL). These are the violations that States have the obligation to investigate and for which they must prosecute or extradite suspects. Serious violations of IHL include the grave breaches found under the four Geneva Conventions of 1949 (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) and under Additional Protocol I of 1977 (Articles 11 and 85). According to customary IHL, serious violations of IHL constitute war crimes, which, in turn, have been listed under Article 8 of the Rome Statute of the International Criminal Court. While not all States are party to the Rome Statute, the list of war crimes under Article 8 does serve as a useful reference for acts that States have generally considered serious violations of customary international law.

⁷ The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide. A definition of crimes against humanity can be found in article 7 of the Rome Statute of the International Criminal Court. Other instruments also define crimes against humanity (see for example the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda).

- a. adversely affect internal, regional or international security and stability;
- b. provoke, prolong or exacerbate an armed conflict or aggravate existing disturbances and tensions;
- c. seriously impair poverty reduction or socio-economic development⁸;
- d. contribute to a destabilizing accumulation of arms;
- e. contribute to the displacement of people."

3. Considerations relating to the needs and practices of the countries involved in the transfer

States have also expressed the need to consider other factors relating to the recipient country. Without proposing any particular formulation, these considerations include:

- a. the transfer of arms to or through conflict zones;
- b. whether the proposed transfer and corresponding military expenditure exceeds the recipient state's legitimate security and defence needs and technical and economic capacity;
- c. whether an arms transfer would involve corrupt practices or corruption at any stage of the transfer⁹;
- d. whether the recipient exercises adequate national control of arms and complies with commitments in the field of non-proliferation, arms control and disarmament;
- e. the risk of diversion for unintended or unauthorised uses such as those mentioned in the above criteria or users such as armed groups, non-governmental bodies acting outside the law, persons designated as "terrorists" or criminals.

C. Criteria relating to the expected user

One criterion that has been proposed by many States relates to the denial of arms transfers to armed groups. It could be formulated as follows:

"A State Party shall not authorize a transfer of arms to non-State armed groups. "

The question of transfers to types of non-State actors could also be addressed in the scope of application of the Arms Trade Treaty.

II. What frameworks can be used to develop these criteria?

A. Sources of inspiration

The departure point in developing criteria should be the object and purpose of the ATT, which, in general terms, is to prevent the problems relating to the unregulated trade in conventional weapons. The "Goals and Objectives" text of the ATT Chairman's paper of July 22, 2010 highlights a number of key objectives of an ATT and serves as a useful starting point in identifying essential

⁸ According to OXFAM, "International transfers of conventional arms impair poverty reduction and socio-economic development when they contribute to armed crime, conflict, or serious violations of human rights, when they undermine post-conflict peacebuilding, or when they involve excessive unaccountable spending or corrupt practices." See Practical Guide: Applying Sustainable Development to Arms Transfer Decisions, Oxfam International Technical Brief, April 2009.

⁹ According to Transparency International, "Corruption damages the arms trade in two ways: Firstly, it inflates the cost and reduces the quality of the weapons which nations acquire to defend themselves. This undermines the promotion of "the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources" (UN-Charter, Art. 26). Secondly, corruption undermines the ability of states to control the diversion of weapons from their intended end-users within the country or abroad." See Transparency and the ATT – The case for a strong anti-corruption mechanism, Transparency International, 2010.

criteria. In fact, many of the criteria listed in the PrepCom Facilitator's July 2010 paper on "Standards and Criteria" already reflect the "Goals and Objectives" text.

Following UN General Assembly resolution A/RES/61/89 calling on the Secretary-General to "seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, and to submit a report on the subject...", around 100 States made submissions. Among these were States' views on desired criteria for an ATT. The United Nations Institute for Disarmament Research (UNIDIR) carried out a useful statistical analysis of these views and demonstrated which criteria were most cited as desirable in an ATT. Many of the criteria proposed in these views coincide with those set out in the PrepCom Facilitator's July 2010 "Standards and Criteria" paper.

In addition, several regional instruments¹⁰, some legally binding and some not, also set out various arms transfer criteria that can provide inspiration to States when elaborating criteria for an ATT.

B. Quality of information and degree of risk

The task of developing criteria is not limited to identifying the concerns that arms transfer decisions are intended to consider. It is also important to determine what information and what degree of risk are required to decide that a given criterion has not been met.

1. Quality of information

In formulating criteria, States will need to reflect on the quality of information required to find that a transfer does not meet a given criterion.

Some regional arms transfer instruments use wording such as "where it *deems* that there is a clear risk"¹¹ or "has *reason to believe*."¹² Others make no reference at all to the information required. The 2004 Draft Framework Convention on International Arms Transfers proposed by the Control Arms Campaign suggests this formulation: "in circumstances in which it *has knowledge or ought reasonably to have knowledge*."

States could also consider the "substantial grounds for believing" formulation found in international legal instruments governing the non-return of persons to authorities in whose hands they may face certain types of treatment. For instance, article 3(1) of the Convention against Torture says that "(n)o State Party shall expel, return ("refouler") or extradite a person to another State where there are *substantial grounds for believing* that he would be in danger of being subjected to torture." Article 16(1) of the Convention for the Protection of All Persons from Enforced Disappearance uses similar wording: "(n)o State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are *substantial grounds for believing* that he or she would be in danger of being subjected to enforced disappearance". The UN Human Rights Committee, in its General Comment No. 31, says that the "article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or

¹⁰ See for example the 2006 ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, the 2008 EU Council Common Position defining common rules governing the control of exports of military technology and equipment, the 2010 Central Africa Convention for the Control of Small Arms and Light Weapons, their Ammunition, Parts and Components that can be used for their Manufacture, Repair and Assembly, the 2003 Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, the 2005 Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, the 2005 Code of conduct of the States of Central America on the transfer of arms, munitions, explosives and related materiel, the 2000 Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons and the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons.

¹¹ The 2000 Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons; the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons

¹² The 2003 Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition

otherwise remove a person from their territory, where there are *substantial grounds for believing* that there is a real risk of irreparable harm."

Many States involved in recent ATT discussions have said clearly that any information forming the basis of a judgement on arms transfers should be obtained from reliable, credible sources, and should be objective.

2) Degree of risk

Where criteria would require an assessment of the likely use or effects of the arms that are eligible for transfer, States will need to formulate the level of risk needed to find that a transfer does not meet a given criterion.

Once again, regional arms transfer instruments contain wording such as: "Each participating State will avoid issuing licences for exports where it deems that there is a *clear risk* that (...)"¹³, "The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities *will, or seriously threaten to* (...)"¹⁴, "States Parties shall not authorize transfers which *are likely to be used* (...)"¹⁵, "Member States shall (...) deny an export licence if there is a *clear risk that* (...)"¹⁶

As seen above, international treaties on human rights also contain wording describing the risk that a person will face certain types of treatment upon being transferred: Article 3(1) of the Convention against Torture prohibits transferring a person "where there are substantial grounds for believing that *he would be in danger* of being subjected to torture." In its General Comment No.1, the UN Committee against Torture said that "the risk of torture must be assessed on grounds that *go beyond mere theory or suspicion*. However, the risk *does not have to meet the test of being highly probable*." Article 16(1) of the International Convention for the Protection of All Persons from Enforced Disappearance prohibits the transfer of a person "where there are substantial grounds for believing that he or she *would be in danger* of being subjected to enforced disappearance". In General Comment No. 31, the UN Human Rights Committee referred to an obligation not to transfer persons "where there are substantial grounds for believing that there is a *real risk* of irreparable harm."

The ICRC proposes that, to make a risk assessment, the current and past records of the recipient need to be examined. Isolated incidents of violations of international humanitarian law may not by themselves be considered a sufficient basis for denying an arms transfer. But, any sustained pattern of violations or any failure by the recipient to take appropriate steps to put an end to violations and to prevent their recurrence, should be a serious concern¹⁷.

Similarly, in reference to a "substantial risk" of serious violations of international human rights law, Amnesty International¹⁸ has said that "(a)n isolated incident may not be a sufficient basis for denying a transfer. However, where there is evidence of patterns, or where there is evidence that the recipient has not taken appropriate steps to end violations and prevent their recurrence, the likelihood of substantial risk becomes greater."

¹³ The 2000 Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons; the 2002 Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons

¹⁴ The 2003 Organization of American States Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition

¹⁵ The 2005 Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons

¹⁶ The 2008 EU Council Common Position defining common rules governing the control of exports of military technology and equipment

¹⁷ See ICRC's "Practical Guide" on applying international humanitarian law criteria in arms transfer decisions, 2007 at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0916>

¹⁸ See Amnesty International's Guide on "How to apply human rights standards in arms transfer decisions," 2008 at <http://www.amnesty.org/en/library/info/ACT30/008/2008/en>

Even though some ATT proponents will refer to a "clear" risk and others to a "substantial" risk, the above explanations of "clear" and "substantial" remain very similar and suggest that there may not be a difference in how these levels of risk are assessed in practice.¹⁹

III. How can criteria be applied?

Most States have said that it should be for each State Party to the ATT to apply the agreed transfer criteria each time it is considering whether to authorize a weapons transfer. It is interesting to note that the 2006 ECOWAS Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials foresees a different approach. It bans the transfer of small arms and light weapons but establishes an exemption procedure. Under this procedure, the President of the ECOWAS Commission will apply the transfer criteria and send a confidential reasoned opinion to Member States who will, by consensus, confirm or refuse this opinion.

States have also said that arms transfer requests should be assessed through an effective, case-by-case and objective inquiry relating to the specific weapons under consideration. They have insisted on the need for consistency, predictability and transparency in the application of transfer criteria. It is, however, inevitable that States will need to exercise some interpretation and judgement in applying agreed criteria. ATT criteria would not replace such judgement but would provide an agreed framework within which a State Party's judgement would be exercised.

Some other application-related questions have emerged during recent discussions: Which indicators should inform a given criterion assessment, and what should be the consequence if a proposed transfer does not meet a given criterion?

Specific guidelines on making systematic and objective risk assessments can be helpful tools in applying criteria. Guides already exist on the consideration of international human rights law, international humanitarian law, socio-economic development, diversion, corruption, and other criteria. The EU has adopted a User's Guide²⁰ for the application of the EU Common Position, and ECOWAS is in the process of developing its own guide. These guides propose various indicators for transferring States to evaluate before authorizing a transfer, as well as some sources of reliable information.

For the ATT to be truly effective, the application of transfer criteria will need to be consistent with the object and purpose of the ATT. As the "Goals and Objectives" text of the ATT Chairman's paper of July 22, 2010 states, an ATT will

"(p)revent international transfers of conventional arms that contribute to or facilitate: human suffering, serious violations of international human rights law and international humanitarian law, violations of UN sanctions and arms embargoes and other international obligations, armed conflict, the displacement of people, (...)"

It is only through a strict application of ATT criteria that States will be able to reach these and other important goals of an ATT.

Many States, NGOs and international organizations have argued that where there is a clear risk of serious violations of international human rights or humanitarian law with the weapons being transferred, any measure short of a denial of the arms transfer will undermine an ATT's objective of reducing human suffering. States should therefore exercise strict caution in applying ATT criteria to transfers that could put human lives at risk. In any event, express prohibitions on arms

¹⁹ On such differences of wording in the context of non-refoulement, Elihu Lauterpacht and Daniel Bethlehem have written that, "[i]n practical terms, however, it is not clear whether the differences in the various formulations will be material, particularly as the Human Right Committee, the European Court of Human Rights, and the Committee against Torture ... have all indicated in one form or another that, whenever an issue of refoulement arises, the circumstances surrounding the case will be *subjected to rigorous scrutiny*." See "The scope and content of the principle of non-refoulement : opinion", in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003.

²⁰ See 2009 EU User's Guide at <http://register.consilium.europa.eu/pdf/en/09/st09/st09241.en09.pdf>

transfers (such as those set out in section I.A. above) will also demand that a State deny an arms transfer.

Nevertheless, States may decide that not all criteria are of equal consequence. As seen in the preceding paragraph, if certain criteria are not met, States will refuse to authorize an arms transfer. But, when applying other criteria, States may take the criteria "into account" and exercise special caution and vigilance in authorizing transfers. It is also possible that States will want to apply exceptions to transfer criteria, for instance where their own national security is at stake. In order to remain true to the ATT's object and purpose, it will be important for States to limit the range of permitted exceptions and to apply them with the ATT's object and purpose always in mind.

In connection with a decision to authorize or deny a transfer, States can also choose to engage with potential arms recipients with a view to improving their ability to meet the criteria and therefore their eligibility to receive weapons. States could carry out training and capacity building in addition to a transfer of weapons or as a mitigating measure where an arms transfer is denied. This way, steps are taken to correct the circumstances that led to a denial.

Conclusion

In the development and application of arms transfer criteria, States should always keep in mind the object and purpose of the ATT, which is to prevent the problems relating to the unregulated trade in conventional weapons. States can refer to a variety of sources to help them identify appropriate criteria for arms transfers and choose their formulation. States will also need to decide what will be the consequence of finding that a requested arms transfer does not meet a given criterion. It is only by a strict and honest application of strongly formulated criteria that an ATT will become a credible instrument and achieve its core objectives.