

Progressing Towards an Arms Trade Treaty

**Report written with the support of
the
Norwegian Ministry of Foreign Affairs**

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ISBN: 978-82-7288-258-6

Executive Summary

In December 2006, 153 member states of United Nations General Assembly voted in favour of resolution 69/81, initiating a process towards the creation of an Arms Trade Treaty (ATT). The significant support for the idea of an international, legally binding ATT provides a unique window of opportunity for the global community to create a comprehensive and effective treaty on the transfer of conventional arms.

An ATT would distinguish itself from existing international arms controls agreements in a number of ways. Among other things, it would specify and codify the application of existing treaty law, consolidate a number of disparate areas of arms regulation, offer criteria for risk assessment for states to follow, and focus on the potential impact of arms transfers by its end-use or the end-user.

Progress towards an ATT can be seen as part of a broader change in how the international community defines and addresses common security challenges. It is clear that for a significant number of states the development of an ATT must unfold through a process that addresses human rights. This represents an increased understanding among states of the intimate connections between human rights and arms transfer issues. Moreover, the international community is increasingly aware of the link between state security and fundamental *human* security. An ATT should respond to this trend by emphasizing the centrality of human rights as a normative objective within an arms control framework.

While states generally agree on the importance of human rights as a criterion within an ATT assessment process, some states have raised concerns about how risk assessment processes for human rights violations can be achieved. Risk assessment requires that states consider potential end uses or users of a transfer and evaluate possible outcomes to determine how great a risk is associated with a given transfer. While states might voice concerns about how such a system would work in practice, criterion-based risk assessment is not unprecedented, and has been achieved in other areas of international law. Useful analogies to an ATT can be drawn from the fields of human rights, environmental and trade law.

Arguments against the necessity or desirability of an ATT are generally related to the perceived pre-maturity of the initiative, or doubts about the additional impact of an ATT given the already existing body of treaties and regulations on international arms transfers. But these mechanisms, even if applied to their full potential, do not provide the level of predictability and harmonisation in international arms transfers that an ATT could achieve. An ATT will complement and add strength to existing arrangements and tie them to other aspects of international law, especially human rights law. Clearly this is the view of a majority of states who believe that a legally binding treaty grounded in human rights and other international law norms is both a necessary and achievable objective.

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Introduction

The idea of an Arms Trade Treaty (ATT) has gained significant ground in recent years. This progress reflects an expanded understanding of arms control itself and an increased recognition of the need to link the global arms trade directly to contemporary humanitarian and human-rights standards and to states' legal responsibilities under those standards.

Achieving an ATT is dependent on the legal and normative basis for such a treaty, and on the political willingness of states to commit to it. This report addresses some of the distinctive features of an ATT initiative in order to clarify the legal and political bases for such a treaty, describing the shift from state focused security to a more human rights orientation. The report also provides suggestions for a possible structure of a future treaty advancing the argument that an ATT should have a firm foundation in human rights law. The nexus between human rights obligations and risk assessment in arms transfers is elaborated and the use by states of risk assessment systems in other areas of international law is described. Finally, this report addresses some of the challenges facing the treaty initiative from political opponents and sceptics.

The Objectives of an Arms Trade Treaty

The main objective of an ATT is to create a comprehensive and legally binding international mechanism for ensuring a more responsible legal trade in conventional arms. The process towards such a treaty provides an opportunity for the global community to create a framework for transfers of conventional arms that incorporates existing international law and principles of human rights under one comprehensive normative structure.

An effective ATT would establish legally binding international principles to govern the transfer of conventional arms and set out a practical mechanism for their application. Many conventional weapons have legal uses for military, police and security purposes. States are also entitled to develop manufacturing capabilities to meet their own legitimate defence needs and lawful export demand.¹ An ATT would not preclude states from engaging in legitimate trade in arms and can be compatible with states' existing legal rights to manufacture, sell, and acquire arms.

Despite their legitimate uses, however, there is enormous scope for all conventional weapons to be used illegally or contrary to established international norms and standards. It is now widely acknowledged by states that illicit² arms transfers fuel conflict, cause violations of human rights and international humanitarian law, and impede economic and social development.³ Creating a more responsible legal trade in conventional arms therefore requires balancing the rights of states to sell, acquire and possess weapons, with their responsibilities and legal obligations under the UN Charter and international law, including international human rights law, international humanitarian law and arms embargoes mandated by the UN Security Council.

¹ Article 51 of the UN Charter reflects states' right to self-defence: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...."

² Illicit is taken to refer to transfers which are not in themselves narrowly defined as illegal, but which contravene principles and intentions of international law, including customary law and soft law.

³ See UN General Assembly Resolution A/61/89 (Resolution 61/89), which recognises "that the absence of common international standards on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development". See also, e.g., Security Council Resolutions S/RES/1209 (1998), on stemming the illicit arms flow to and in Africa; S/RES/1612 (2005) on children and armed conflict; S/RES/1467 (2003), on the proliferation of small arms and light weapons and mercenary activities; S/RES/1738 (2006) on the protection of civilians in armed conflict; and General Assembly Resolutions A/RES/61/76, on consolidation of peace through practical disarmament measures, and A/RES/60/61 on the relationship between disarmament and development.

Given the nature of this trade and the diverse body of international law governing it, an ATT will need to bring together existing laws and norms to create a comprehensive regulatory framework for the transfer of conventional arms. This framework should identify states' responsibilities and obligations while ensuring that their ability to legally sell, acquire and possess arms is not undermined. It would set out standards by which authorization of potential transfers of conventional arms would be assessed to ensure that they are in conformity with states' existing obligations under international law.

States' Support for an Arms Trade Treaty

States have already expressed wide interest in concluding such a treaty. In December 2006, 153 members of the United Nations (UN) General Assembly acknowledged in Resolution 61/89 “the growing support across all regions for concluding a legally binding instrument negotiated on a non-discriminatory, transparent and multilateral basis, to establish common international standards for the import, export and transfer of conventional arms.”⁴ The large number of states that voted in favour of Resolution 61/89⁵ suggests widespread concern for the issue at stake and a willingness to address the poorly regulated trade in arms through a legally binding treaty.

Members of the UN Security Council have since joined in expressing support;⁶ in the General Assembly⁷ and its First Committee (Disarmament and International Security), renewed statements have lent weight to the vote.⁸ These developments further indicate a growing will to regulate arms transfers through a comprehensive international treaty.

Resolution 61/89 gave a clear mandate for initiating the treaty-making process. The resolution requested canvassing the views of UN member states on the feasibility, scope, and parameters of an arms trade treaty, thus transferring the ATT issue from the few initiating states to a broader diplomatic realm. Such a process of formal consultation brings a greater number of states into the agenda-setting process and provides more transparency for discussion of states' views. The consultation process resulted in an unprecedented number of states submitting their views⁹ and over 90 states affirming the feasibility of an ATT.

⁴ UN General Assembly Resolution A/61/89, 6 December 2006. While General Assembly resolutions are not legally binding, they can be normative, reflecting establishment of customs, standards, and guidelines for appropriate behaviour by states. Further, the Resolution had the support of 111 “co-sponsoring” states, and thus had a significant degree of legitimacy even before the vote in the General Assembly.

⁵ 153 states voted in favour of the resolution, one against and 24 abstaining.

⁶ See, e.g., statement by Japan calling for an arms trade treaty to end irresponsible transfers (Security Council Debate on the Protection of Civilians in Armed Conflict, SC/9174, 20 November 2007). Japan was a member of the Security Council in this period. Of the permanent members, the UK has long been among the strongest supporters for an ATT.

⁷ See, e.g., statements during 62nd session of the General Assembly General Debate: by the European Union (25 September 2007), Finland (26 September), Lithuania (26 September), the United Kingdom (27 September), Bulgaria (28 September), Iceland (28 September), Romania (28 September), Moldova (1 October), Lesotho (1 October), Costa Rica (2 October) and Jamaica (2 October). Texts at: < <http://www.un.org/webcast/ga/62/>>.

⁸ See, e.g., statements to the First Committee on Disarmament and International Security, 4 October – 2 November 2007 by Sierra Leone, Gabon, Senegal, Denmark, New Zealand, Niger, Norway, Surinam, and Bolivia. Texts at < <http://www.un.org/ga/first/62/documentation.shtml>>.

⁹ 98 states and 2 regional organisations made submissions. Submissions are available at: http://disarmament.un.org/cab/ATT/Views_Member_States.html.

Secondly, the resolution requests that the UN Secretary-General establish a Group of Governmental Experts (GGE) to examine the issues and report to the General Assembly for consideration at its 63rd session. Based on the consultation process and the subsequent report of the GGE, it is now up to UN member states to move the process forward.¹⁰ If the GGE report is sufficiently constructive, it could lead to the establishment by the UN General Assembly of an Open Ended Working Group in 2009 to negotiate the terms of a global ATT.

Broad support for Resolution 61/89 thus reflects states' acknowledgment of the urgency of controlling the international flow of conventional arms and presents a window of opportunity to advance the application of international law. It has been argued that historically such progressive developments, especially in humanitarian and human rights law, happen within short spans of time when the political situation is at its most conducive.¹¹ This present window of opportunity ought to be exploited while the number of states supporting the initiative is significantly strong to produce a comprehensive and effective treaty.

¹⁰ Though beyond the scope of this paper, it should be noted that there are alternatives to the UN treaty-making process. Independent multilateral negotiations can also establish treaties, as seen for example in the so-called "Ottawa process" that led to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on their Destruction (the Landmines Convention), 1997. This type of multilateral treaty-making does not involve any particular process. An initiative is taken by a state or a group of states, followed by diplomatic efforts to include others and by debates over formulations, and eventually a treaty is ready for signature and ratification. We claim no preference for either model, and it is clear that both have achieved positive results.

¹¹ See, e.g., the discussion on "world time" in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, *The Power of Human Rights. International Norms and Domestic Change*, Cambridge University Press, Cambridge 1999.

Distinctive Features of an Arms Trade Treaty

By creating such a comprehensive regulatory framework, an ATT would distinguish itself from existing international arms controls agreements in a number of ways. Among other things, it would specify and codify the application of existing treaty law, consolidate a number of disparate areas of arms regulation, offer criteria for risk assessment for states to follow, and focus on the potential impact of arms transfers.

Existing international treaties and conventions tend to address either categories of weapons of mass destruction or specific types of conventional arms. Treaties on weapons of mass destruction, by seeking to ban or prevent the spread of a particular category of weapon,¹² are a reflection of the fact that biological, chemical and nuclear weapons have dominated the arms control discourse since Second World War. An ATT would encompass a range of conventional weapons, complementing the regulations in place for weapons of mass destruction. Furthermore, unlike some current conventional arms controls, an ATT would not be limited to banning or constraining the use of specific types of conventional weapons, as is the purpose of the Convention on Certain Conventional Weapons (CWC)¹³ and the Landmines Convention.¹⁴ An ATT would regulate aspects of transfers of conventional arms, and thus move beyond the more restrictive scope of existing arms control treaties and conventions.

An ATT would also address a significant gap within existing multilateral agreements on arms transfers and disarmament. The current body of multilateral agreements and regulations addresses various forms of arms control. For example, existing agreements

¹² These include the Treaty on the Non-Proliferation of Nuclear Weapons; the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1993 (the Chemical Weapons Convention); and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 1975.

¹³ The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (the Conventional Weapons Convention or CWC) aims to identify specific types of weapons or uses that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately. There are five protocols: Protocol I: Non-Detectable Fragments; Protocol II: Mines, Booby Traps and Other Devices; Protocol III: Incendiary Weapons; Protocol IV: Blinding Laser Weapons; Protocol V: Explosive Remnants of War.

¹⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on their Destruction (the Landmines Convention), 1997. See also the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

place restraints on nuclear weapons, materials and activities,¹⁵ limit development of new types of warfare,¹⁶ and regulate aircraft observation flights.¹⁷ While there are a number of treaties dealing with conventional arms transfers, these focus on controlling illicit manufacture of and trafficking in small arms and light weapons only (SALW).¹⁸ But there is no international treaty focusing on the transfer or movement of conventional arms more broadly around the globe.

In addition to these legally binding treaties, there are a number of national, regional and multilateral guidelines and principles that address transfers of conventional arms.¹⁹ These are not legally binding, however, and states themselves recognise that there are loopholes and gaps in their application.²⁰ The differing strength of these control mechanisms and the fact that not all states are party to such agreements, means that they lack the international scope of an ATT.

An ATT would thus differ in substance and scope from these agreements and treaties, and would fill a gap in the array of existing multilateral treaties, guidelines, non-binding agreements and so on. It would centralise the regulation of the arms trade in one treaty, focus on transfers of conventional arms, and apply equally to all states involved in any part of a transfer.

It is important to note that an ATT would also be conceptually different from current treaties in that it would provide a practical mechanism for states to assess whether to authorize an arms transfer based on existing criteria under international law. While this

¹⁵ See, e.g., treaties creating geographic nuclear –weapon-free zones such as the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, 1995 and the Antarctic Treaty, 1959.

¹⁶ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977.

¹⁷ Treaty on Open Skies, 2002.

¹⁸ These include the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials; The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunitions, supplementing the United Nations Convention against Transnational Organized Crime; Protocol on the control of firearms, ammunition and other related material in the Southern African Development Community, 2001. The Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunition and Related Materials bans transfers of small arms and light weapons between ECOWAS member states, with limited exceptions.

¹⁹ See, e.g., the European Union Code of Conduct on Arms Exports, 1998; Organisation for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons, 2000; and the Code of Conduct of the States of Central America (SICA) on the Transfer of Arms, Munitions, Explosives and Related Materiel, 2005.

²⁰ Resolution 61/89 also recognised this gap, stating that the absence of “common international standards on the import, export and transfer of conventional arms...is a contributory factor to conflict, the displacement of people, crime and terrorism”.

requires recognition that decisions about the authorisation of transfers must lie within the competence of each state party, an ATT would ensure that all legitimate transfers were carried out according to the same legally binding standard. For this reason, a workable ATT requires a regulatory framework with an objective criteria-based assessment system.

Given the range of harm conventional arms can cause, an ATT should preferably require states not only to ensure compliance with their existing treaty commitments, but also to address the potential impact of a particular transfer, based on its use or user. Where there is a clear risk of a negative outcome from a particular transfer of conventional arms, the transfer should be prohibited.

Criteria for determining the legality or associated risks of a transfer of conventional arms would be based on international norms and commitments already assumed by states under, *inter alia*, the UN Charter, the Geneva Conventions of 1949, the two international covenants on human rights,²¹ other widely supported principles of customary law, and other emerging norms for arms transfers. These areas of international law already define the normative responsibilities of states concerning the transfer of conventional arms.

An ATT would focus on the global movement of conventional arms through various forms of “transfer”²², recognizing that responsibility for arms transfers does not fall solely on exporters. A treaty could potentially establish the responsibility of all states with jurisdiction over any part of a transfer, and could create a framework for the range of states’ legal obligations before a transfer was authorised.

²¹ International Covenant on Economic, Social and Cultural Rights, December 16, 1966 and International Covenant on Civil and Political Rights, December 16 1966.

²² The Panel of Governmental Technical Experts appointed to advise on the establishment of the UN Register in 1992 provided a description of transfers as: “International arms transfers involve, in addition to the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment.” Report of the Governmental Technical Experts on the Register of Conventional Arms, annexed to General Assembly, *Report on the Register of Conventional Arms*, UN document A/47/342, 14 August 1992, para. 10.

Progress Towards an Arms Trade Treaty: From Security to Human Rights

Progress towards an ATT can be seen as part of a broader change in how the international community defines and addresses common security challenges. From a traditional state-security framework, the focus has gradually shifted to humanitarian concerns. This opens the possibility of broader regulation of the arms trade by emphasising the human rights of potential victims of illegal or irresponsible arms transactions.²³

The military security of the state has been the traditional focus of arms control discussions, and these have led to a range of treaties that prioritize threats to the state and related security concerns. A number of important treaties have emerged from this traditional framework. The Conference on Disarmament, for example, an independent body that negotiates treaties relevant to international peace and security, has generated the Nuclear Non Proliferation Treaty, the Biological Weapons Convention, the Chemical Weapons Convention, and the Test Ban Treaty. These treaties are primarily products of a concept of security focusing on external threats to states and, in particular, on threats posed by other states.

Within the last decade, arms control objectives have gradually broadened to include concerns beyond state security. The 1997 Landmines Convention is often described as a landmark in states' approaches to addressing a global concern, representing a significant shift from the traditional state-security focus to one inclusive also of a human security or humanitarian approach.²⁴ Initially this issue involved a perceived balancing of military interests and concern for civilian well-being, but the importance of this equation diminished as knowledge of the human cost increased. Ultimately the value of producing and using landmines was outweighed by the humanitarian value of banning and removing them.

The Landmines Convention prompted other initiatives with humanitarian perspectives at the international level, including the establishment of Protocol V of the CWC on explosive remnants of war and the current efforts to ban cluster munitions. These

²³ For more discussion see, e.g., J. Borrie and V. Martin Randin, eds, *Alternative approaches in multilateral decision making: disarmament as humanitarian action*, UNIDIR, 2005; J. Borrie and V. Martin Randin, eds, *Thinking Outside the Box in Multilateral Disarmament and Arms Control Negotiations*, UNIDIR, 2006.

²⁴ See, e.g., Robert J. Mathews and Timothy L.H. McCormack, "The Influences of Humanitarian Principles in the Negotiation of Arms Control Treaties", *International review of the Red Cross* 81, 834, June 1999, 331-52; Don Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, Thomas J. Watson Jr. Institute for International Studies, Occasional Paper 42, 2000.

achievements can be seen to fall more within the scope of a humanitarian perspective under “international humanitarian law” which, in keeping with universally accepted principles of customary law, creates prohibitions on arms that cause superfluous injury or unnecessary suffering or cannot distinguish between combatants and civilians.

Notwithstanding the seminal influence of the Landmines Convention, concerns about national security continue to provide the impetus for existing arms control mechanisms. States have been prompted to consider the limitations of this security-based framework owing to the shortcomings evident in existing regulatory processes and conventions. But while the Landmines Convention and other initiatives demonstrate an increasing awareness of and commitment to humanitarian principles, they do not explicitly promote the importance of human rights principles in the way an ATT with the attributes envisioned in this paper could do.

Before adoption of Resolution 61/89 and initiation within the UN of a process towards an ATT, two other multilateral initiatives to establish controls on transfers of conventional arms were taken. The more significant of these has been the “UN Global Conference on Illicit Trade in Small Arms and Light Weapons in all its aspects”, held in 2001.²⁵ Participating states reached consensus on a document (UN Programme of Action or PoA)²⁶ that contains limited commitments to implement regulatory measures at the national, regional and global levels. These include state commitment at the national level to put in place adequate laws, regulations and administrative procedures to exercise effective control over the production, export, import, transit or retransfer of small arms and light weapons within each state’s area of jurisdiction. At the global level states agreed, *inter alia*, to “co-operate with the United Nations system to ensure the effective implementation of arms embargoes”.²⁷

The PoA has a number of shortcomings as a framework for enhancing legal and responsible transfers of conventional arms. It deals with only one category of conventional arms - small arms and light weapons - and focuses on addressing “illicit trade”. The PoA also does not legally bind states to implement the numerous commitments they have made. Furthermore, while the PoA addresses particular aspects of the trade in small arms and light weapons, including effective weapons collection and destruction programs, demobilisation and reintegration processes, and law enforcement

²⁵ Two meetings of states have subsequently been held, in 2003 and 2005. A Review Conference was held in 2006.

²⁶ Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects [PoA], UN Document A/CONF.192/15.

²⁷ PoA Part II, para. 32.

efforts, it does not contain adequate provisions to assist in regulating the *authorised* trade in small arms and light weapons.²⁸ Another problem is that the PoA has a very strong arms control focus but a very weak normative framework: while the PoA has elements of a “humanitarian approach”,²⁹ human rights are not mentioned once in the text.

The other significant development in recent years in the area of controls on the transfer of conventional arms is the coming into force of the UN Protocol against the Illicit Manufacturing and Trafficking of Firearms, Their Parts and Components and Ammunition (UN Firearms Protocol). The protocol was negotiated as a supplement to the UN Convention Against Transnational Organised Crime. Like the PoA, which focuses on “illicit trade”, this initiative emerged from a global crime control framework. It was drafted by the UN Crime Commission in Vienna and is part of the UN’s transnational organised crime strategy. While this is an important development, it did not emerge from a human-rights framework and is thus unsurprisingly limited in its normative scope.

Thus, existing mechanisms such as the UN Programme of Action and the UN Firearms Protocol continue to prioritize arms control rather than humanitarian concerns. However, it has become increasingly clear that the contemporary process of developing an ATT will emerge from a human-rights framework rather than from a traditional arms-control framework. This shift reorients the purpose and broadens the scope of regulating the arms trade.

The shift is noticeable in a number of ways. First, there has been an institutional recognition within the UN of the need to focus specifically on the human rights impact of the availability and misuse of arms. This is evident in the creation of the position of Special Rapporteur for the Prevention of Human Rights Violations Committed with

²⁸ The extent of reference to the authorised transfers of small arms and light weapons is contained in PoA, Part II para. 11 where states commit themselves “To assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade”.

²⁹ The only mention of humanitarian concerns is in the Preamble. See PoA, Part I para. 5: “Recognizing that the illicit trade in small arms and light weapons in all its aspects sustains conflicts, exacerbates violence, contributes to the displacement of civilians, undermines respect for international humanitarian law, impedes the provision of humanitarian assistance to victims of armed conflict....”

Small Arms and Light Weapons.³⁰ Part of the mandate of the Special Rapporteur is to examine the arms trade in the context of human rights.³¹

There has also been a change of emphasis in the views expressed by governments. After the vote on Resolution 61/89 in December 2006 the British foreign minister stated that although there had not yet been agreement on standards for distinguishing between responsible and irresponsible transfers, the criteria should include a potential importer's "respect for human rights".³² In recent debates within the General Assembly First Committee, states have voiced the need for an ATT because the impact of "reckless arms transfers was particularly damaging in developing countries...where it diverted resources from poverty alleviation and other development work;"³³ an ATT was "one of the core issues at the nexus of development, human rights and security." Other states have supported both the need for strong provisions on human rights law within an ATT³⁴ and the concept that "human rights norms should form the basis of any such effort".³⁵ Recognition of the link between human rights and security, by bodies that have traditionally focused on the latter, indicates the broadening scope of arms control that has been under way for some years. An ATT could encompass a normative human-rights framework, supplement both the PoA and the UN Firearms Protocol, and consolidate state interest and humanitarian concern in a balanced manner.

In submissions to the UN secretary general as to the feasibility, scope and parameters of an ATT (as requested by Resolution 61/89), a majority of states agreed that a key objective of a treaty must be respect for human rights, which includes ensuring that transfers of conventional arms are not used to violate these rights.³⁶ The content of the submissions makes it clear that for a significant number of states the development of an ATT must unfold through a process that addresses human rights through arms control. This represents an increased understanding among states of the intimate connections

³⁰ In April 2003 the UN Commission on Human Rights endorsed the decision of the Sub-Commission on the Promotion and Protection of Human Rights to appoint a Special Rapporteur.

³¹ See, e.g., Progress Report of Barbara Frey, Special Rapporteur on the prevention of human rights violations committed with small arms and light weapons, 21 June 2004, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2004/37.

³² Wade Boese, "Arms trade treaty effort endorsed", *Arms control today*, December 2006: <http://www.armscontrol.org/act/2006_12/ArmsTradeTreaty.asp>.

³³ Sixty-second General Assembly First Committee, "Irresponsible weapons transfers, soaring death toll from small arms, light weapons underscores 'pressing need' for arms trade treaty, Disarmament Committee told", UN document GA/DIS/3350, 23 October 2007.

³⁴ *Ibid* (statement by Denmark).

³⁵ *Ibid* (statement by Senegal).

³⁶ See *A Global Arms Trade Treaty: What States Want: An Analysis of States' Submissions by the ATT NGO Steering Committee*, October 2007 (Amnesty International Index: POL 34/004/2007); and Sarah Parker, *States' Views on an Arms Trade Treaty*, UNIDIR, 2007. Both reports note that human rights criteria are the most mentioned by states.

between human rights and arms transfer issues. Moreover, the international community is increasingly aware of the link between state security and fundamental *human* security. An ATT would respond to this trend by emphasizing the centrality of human rights as a normative objective within an arms control framework.

The Structure of an Arms Trade Treaty

The essence of an ATT is a legal framework with clear and comprehensive norms, and with domestic obligations to be executed by participating states in conformity with those norms. Accordingly, the foundation of this framework would be the responsibility of parties to the treaty effectively to licence, monitor, and prevent arms transfers according to national laws, mechanisms and procedures that conform with international law and standards.³⁷ This should include case-by-case assessment of transfer licence applications, effective end-user controls, conditions for re-transfer, and other licensing provisions. In many cases, states will already have their own laws, regulations and procedures governing arms transfers; it is essential that these reflect states' obligations under international law. States that do not have appropriate legislation regulating arms transfers must be obliged to enact relevant legal provisions to meet this essential requirement.³⁸

Such a foundation is necessary because strong and effective domestic regulation is the most meaningful mechanism for regulating transfers. This process would include incorporation into a domestic decision-making procedure of well established and legally binding norms as well as newly emerging norms that apply to conventional arms transfers.

States recognize that the primary responsibility for establishing and implementing an effective and responsible system to control international sales and transfers of conventional arms rests with them.³⁹ Although participating governments might agree on the normative content of a treaty, it is likely that their decisions in internalising and enforcing that content will vary. While such differences are to be expected, this should not hinder the process of reaching agreement on the content of the principles nor on the implementation of national legislation containing those principles.

Progress towards an ATT requires a legal structure that combines a framework built around clear norms with concrete, conforming domestic obligations by the participating nations. The two fundamental aspects of an ATT are therefore a system of licensing (or “internalisation” of the agreed norms through a licensing procedure) and a system of assessment against agreed criteria that the licensing process is based on.

³⁷ For a discussion of national implementation of other arms control treaties, see Angela Woodward, “National implementing laws for arms control and disarmament treaties”, *Verification yearbook* 2003, 152-68.

³⁸ This is also a commitment for states under the PoA, though it is not legally binding.

³⁹ This is recognised in Resolution 61/89.

Human Rights as a Fundamental Criterion for Inclusion in an Arm Trade Treaty

The core of an ATT is the set of criteria upon which states would base their licensing assessment. These criteria or norms already exist in a number of established guidelines, agreements, and texts at the multilateral, regional and sub-regional levels and have been identified in a range of regional agreements and guidelines on conventional arms.⁴⁰ An ATT builds upon these existing legal guidelines and structures, but should move beyond them in formalising the central role of human rights as a fundamental criterion by which states can regulate the trade in arms.

States often describe these texts as “building blocks” of an ATT because they contain the norms that states have already agreed are critical in assessing transfer licensing applications. These norms include respect for UN arms embargoes and UN Charter obligations; compliance with existing treaty obligations; and prohibiting transfers where there is a risk of diversion, where the transfer is likely to be used for terrorist attacks or for violent or organised crime affecting regional stability, or where the transfer would adversely affect sustainable development. However, as already stated, international human rights law is seen as the most important criterion for states. The inclusion of international human rights law is crucial as this body of law defines a significant part of the normative responsibilities of States with regard to the transfer of conventional arms.

The importance of linking the work of an ATT to a human rights framework is evident from the historical record, which reveals connections between the arms trade and gross violations of human rights. There is now a considerable body of scholarly and other literature documenting this link.⁴¹ As stated by the Special Rapporteur on the prevention

⁴⁰ These include, e.g., the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and other Related Materials (CIFTA), 1997; European Union Code of Conduct on Arms Exports, 1998; Organisation for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons, 2000; Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies Best Practice Guidelines for Exports of Small Arms and Light Weapons, 2002; Organisation of American States (OAS) Inter-American Convention on Transparency in Conventional Weapons, 2002; OAS Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, 2003; OSCE Handbook on Best Practices on Small Arms and Light Weapons, 2003; Nairobi Protocol on Small Arms and Light Weapons, 2004; Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, 2005; Code of Conduct of the States of Central America (SICA) on the Transfer of Arms, Munitions, Explosives and Related Materiel, 2005; Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, 2006.

⁴¹ Negative impacts are well documented. See Robert Muggah and Erica Berman, *Humanitarianism Under Threat: The Humanitarian Impacts of Small Arms and Light Weapons*, Geneva, Small Arms Survey, 2001; Barbara Frey, *Small Arms and Light Weapons: The Tools Used to Violate Human Rights*, Disarmament

of human rights violations committed with conventional weapons (referring here to small arms and light weapons), “the guarantees of human security and human rights articulated in international law are the building blocks of international security that States must recognise and enforce if the world is to move towards the genuine protection of human rights and peace and development which depend upon human rights.”⁴²

The inclusion of human rights criteria is a fundamental principle on which an ATT must be based. It is clear that for the majority of States, a key norm to be included within an ATT is safeguarding human rights, which a regulated arms trade will help to ensure. As noted above, state security concerns have been increasingly linked to the need to safeguard human rights. Therefore, an effective ATT must explicitly establish the status of human rights as the fundamental normative criterion to guide the regulation of the arms trade.

State Obligations with Regard to International Human Rights and Arms Transfers

The normative development in the field of international security is a promising step towards safeguarding human rights. Regardless of this trend, however, states already have legal obligations under international human rights law that are directly applicable to transfers of conventional arms. These obligations apply to exporting, importing, and transit states and to any state with jurisdiction over a transfer of conventional arms.

In the last fifty years the corpus of international human rights law has achieved a level of acceptance and recognition unmatched in many other areas of international law.⁴³ Important developments relevant to regulating the arms trade have been clearly established as uncontested principles of international law. A state’s treatment of its own

forum 3, 2004, 37; *The Impact of Guns on Women’s Lives*, Control Arms Publication, 2005; Virginia Gamba, *Controlling the Proliferation of Weapons*, African security review 5, 4, 1996; Rachel Stohl, *Under the Gun: Children and Small Arms*, *ibid*, 11, 3, 2002; Peter Cross, Catherine Flew and Andrew Mclean, *Evidence and Analysis: Tackling the Availability and Misuse of Arms in Africa*, Saferworld Publication, September 2004; Lerna K. Yanik, *Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations*, Human rights quarterly 28, 2006, 357-88.

⁴² Barbara Frey, *Specific Human Rights Issues: Progress Report of Barbara Frey, Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Light Weapons*, Commission of Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2004/37, 21 June 2004, 8.

⁴³ Louis Henkin has described human rights as the “only political-moral idea that has received universal acceptance”: *The Age of Rights*, Columbia University Press, New York 1990, ix.

citizens is no longer solely a matter of domestic jurisdiction.⁴⁴ Human rights law obliges states to act to promote and protect the rights of their citizens, thus constraining rather than negating state sovereignty.

The centrality of human rights both in the UN and in international law generally derives from its constitutional underpinning in the UN Charter. UN treaty instruments and bodies that address human rights issues are created pursuant to the charter. The Charter specifically requires member states to promote the full range of human rights, including “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁴⁵ The Charter also requires member states to “take joint and separate action”⁴⁶ in cooperation with the UN to promote human rights. The promotion and protection of human rights is thus one of the “ends” or reasons for the establishment of the United Nations,⁴⁷ and by virtue of their participation in the UN all members have implicitly recognised the underlying centrality of human rights to promoting international peace and security.

Every UN member state is a party to one or more of the seven major human rights treaties. Currently there are more than one hundred international treaties on the protection of human rights. In the UN Charter, the Universal Declaration of Human Rights (UDHR), and the 1993 Vienna Declaration on Human Rights, as well as in numerous other UN instruments, all 192 UN member states have committed themselves to recognising inalienable human rights as part of general international law. In addition, most states recognize human rights in their respective constitutions as limiting government powers, in some cases also with explicit references to human rights as legal restraints on the collective exercise of government powers in international organizations.⁴⁸

Universal participation in the international human rights treaty system, coupled with the active involvement of virtually all states, individually and collectively, to promote and protect human rights through the United Nations and regional human rights systems in Africa, the Americas and Europe, demonstrates that human rights law is so widely and consistently accepted by states that it applies to the full range of states’ activities. The UN treaty system definitively establishes the legitimacy of international interest in the

⁴⁴ Kurt Mills, *Reconstructing Sovereignty: A Human Rights Perspective*, Neth. Hum. Rts. Q. 15, 1997, 276. See also Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, Oxford 1996, 117-165.

⁴⁵ Article 55 (c) of the UN Charter.

⁴⁶ Article 56 of the UN Charter.

⁴⁷ The term “human rights” appears in the UN Charter in Paragraph 2 of the Preamble, Article 1(3), Article 13(1)(b), Arts. 55 and 56, Article 62(2), and Article 68.

⁴⁸ See, e.g., Article 11 of the European Union (EU) Treaty.

protection of human rights. Through treaty monitoring systems, international supervision is seen as valid by states and states have accepted that they are accountable to international authorities for domestic acts affecting human rights. The treaty standards are the benchmark for assessment.

In addition to their primary obligations to respect and ensure the promotion of human rights pursuant to both customary and treaty law, states also have a “secondary” responsibility with respect to human rights. This obligation is to provide no aid or assistance to facilitate commission of an internationally wrongful act by another state. This would include provision of material aid to a state that uses that aid to commit human rights violations.⁴⁹

The strength of the human rights system and its application to a wide range of global issues coupled with the universal acceptance by states of human rights obligations negates any arguments put forward to suggest that human rights criteria should not be included within an ATT. Suggestions that governments remain “sovereign” and that the right to self defense is a principle of international law that effectively trumps all others have no legal foundation. Given the enormous body of international law and practice, it is difficult to see such arguments as more than a pretext for non-compliance with human rights obligations, from the observance of which states derive legitimacy. These principles enshrined in customary and treaty-based international law constrain all other national and international rights, including participation in the conventional arms trade.⁵⁰

⁴⁹ This obligation derives from Article 16 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility). The Commentary provides: “The obligation not to provide aid or assistance to facilitate the commission of an internationally wrongful act by another State is not limited to the prohibition on the use of force. For instance, a State may incur responsibility if it assists another State to circumvent sanctions imposed by the United Nations Security Council (See, e.g., Report by President Clinton, *A.J.I.L.*, vol. 91 (1997), p. 709.) or provides material aid to a State that uses the aid to commit human rights violations. In this respect, the United Nations General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations (*Report of the Economic and Social Council, Report of the Third Committee of the General Assembly*, draft resolution XVII, 14 December 1982, A/37/745, p. 50.). Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct.” Draft Article with Commentary, Article 16, para. 9, pg. 158-159. See also, Barbara Frey, Small arms and light weapons: the tools used to violate human rights’, *Disarmament Forum*, Vol. 3 2004: “Under the IL Draft Articles serious violations of human rights, especially those constituting a consistent pattern of gross and reliably attested human rights violations are internationally wrong acts that should prohibit arms exports to that state” (pg 44).

⁵⁰ Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights Into the Law of Worldwide Organizations: Lessons from European Integration*, *European Journal of International Law*, 2002, 621.

Objective Risk Assessment

While states generally agree on the importance of human rights as a criterion within an ATT assessment process, some have expressed concern that such a criterion is unlikely to be applied objectively. Some states have raised doubts about how risk assessment processes for human rights violations can be achieved within the ATT framework. In this regard, a number of states have noted the need for procedures to clearly establish the legitimate nature of a proposed transfer prior to its authorisation. In order to decide whether there is significant risk that an item of conventional arms might be used in a prohibited way (for example, for serious violations of human rights), states need clear guidelines and procedures.

Such risk analysis is required because of the many uses, both legal and illegal, to which conventional arms can be put. Risk assessment therefore requires that states consider potential end uses of a transfer and evaluate possible outcomes to determine how great a risk is associated with a given transfer. While states might voice concerns about how such a system would work in practice, criterion-based risk assessment is not unprecedented, and has been achieved in other areas of international law.

Other Existing Risk Assessment Systems in International Law

States have already demonstrated that the operation of risk assessment systems is feasible in other forums. These systems can be found in several areas of international law, including human rights law, environmental law, and trade law. The wide use of objective risk assessment in these areas suggests that some of its underlying regulatory principles can be applied to the arms trade.

This is not to suggest that any existing treaties are analogous to an ATT, but rather to demonstrate that in other areas of international law and practice states have recognised the feasibility of creating legal frameworks that require objective assessment of risk. These examples further demonstrate that such frameworks have been implemented effectively in practice, lending weight to an ATT with effective, enforceable transfer criteria.

i. Human rights conventions

Human rights law provides a conceptual framework for both analysing policies and practices in the trade of conventional arms and for undertaking assessments in the authorisation process of a transfer. Human rights assessments can use the norms and

standards of human rights treaties and identify universal social, economic, cultural and political indicators of minimum standards. International human rights law conventions already require a system of objective risk assessment. Two conventions provide particularly useful models of the type of criteria-based systems that states have previously agreed to: the Convention against Torture (CAT) and the 1951 Refugee Convention. Both conventions require states to perform an assessment to determine whether or not there is “substantial risk.”⁵¹

These standards are similar to that envisioned for an ATT, as well as to those already in many national laws and in multilateral, regional and sub-regional agreements and documents. According to these standards, states assessing risks associated with a particular transfer of conventional arms are required to consider whether the arms might be used to commit gross violations of human rights law. For example, the OSCE Document on Small Arms and Light Weapons, the European Union Code of Conduct and the ECOWAS Convention on Small Arms and Light Weapons require assessing a “clear risk” of potential outcomes, including serious violations of human rights, prior to authorisation of a transfer.⁵²

Risk assessment under human rights treaties also requires states to consider the particular circumstances of the person in question, including his or her credibility and, in some cases, the claims of the receiving state. An ATT would analogously require states to look closely at the types of conventional arms in question, their potential use and the credibility of the proposed recipient. Experience under the CAT and the Refugee Convention demonstrates that states already look closely at other states’ human rights practices before reaching a decision on what action to take. The CAT requires state parties to determine whether there are “substantial grounds” to suspect a risk of torture if an individual is expelled or returned to another state,⁵³ thus imposing an obligation to conduct a “meaningful assessment” of any such claim.⁵⁴

Under the CAT, risk assessment requires considering, among other things, human rights practices of the state in question. Although assessment is never foolproof, the combination of a clear standard (“substantial risk”), Committee jurisprudence interpreting

⁵¹ In both conventions the assessment concerns whether an individual can be returned to his or her country of origin. See Article 3 of the CAT and Article 33 of the Refugee Convention.

⁵² OSCE Document on Small Arms and Light Weapons, Section III, A(2)(b)(i) and EU Code of Conduct, Criterion 2 (a).

⁵³ Article 3 of the CAT states: No State party should 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.

⁵⁴ See *Jabari v. Turkey*, European Court of Human Rights, Judgment of 11 July 2000.

states' obligations, and other commentary provides states acting in good faith with the guidance needed to arrive at a decision.

The Committee against Torture, the body tasked with monitoring states' implementation and compliance with their obligations under the treaty, interpreted Article 3 in a Comment issued in 1997.⁵⁵ This provided guidance of particular relevance to an ATT. First is an elaboration on the concept of "risk". The Comment states:

[B]earing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture...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.

It is useful to conceptualise a future ATT's standard of risk similarly: risk must be beyond suspicion, but need not be "highly probable".

The Comment also provided a partial list of questions a state party might consider in determining a risk of torture. While the substance of these is irrelevant to risk assessment under an ATT, this list demonstrates that objective standards can be devised and that questions relevant to applying those standards can be developed. A similar pattern of analysis can be created for an ATT; the use of indicators in a process of risk assessment, or measurement of impact, or assessment of human rights situations is well established.⁵⁶

Article 3 of the European Convention on Human Rights and Fundamental Freedoms contains similar provisions⁵⁷ and the requirement of an assessment of "risk".⁵⁸ The jurisprudence of the European Court of Human Rights also sets out valuable indicators for risk that could be applied under an ATT. For example, the court has stated that an assessment of risk must be based on facts known at the time the assessment takes place,⁵⁹

⁵⁵ Committee Against Torture, General Comment on the Implementation of Article 3 in the context of Article 22 of the Convention Against Torture (UN Doc. CAT/C1XX/Misc.1, 1997).

⁵⁶ See, e.g., M. Green, *What we talk about when we talk about indicators: current approaches to human rights measurements*, UNDP, International Anti-Poverty Law Centre, 1999; M. Radstaake and D. Bronkhorst, *Matching practice with principles. Human rights impact assessment: EU opportunities*, HOM, Utrecht, 2002; UNDP, *Indicators for human rights based approaches to development in UNDP programming: a user's guide*, New York, 2006.

⁵⁷ Article 3 states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".

⁵⁸ The European Court of Justice has stated that under the European Convention on Human Rights, contracting states have the general obligation not to deport a person if substantial grounds have been shown for a belief that the person would be exposed to a real risk of torture, or inhuman or degrading treatment. See, for example, *HLR v France*, European Court of Human Rights, Judgment of 27 April 1997.

⁵⁹ *Cruz Varas and others v. Sweden*, European Court of Human Rights, Judgment of 20 March 1991.

the assessment must be based on relevant evidence,⁶⁰ and that current conditions are decisive.⁶¹ The European Court of Human Rights, like the Convention against Torture, also requires that the risk be “real”.⁶² There is no precise definition in the Convention’s case law of what constitutes “real” risk, but the court has established while “mere possibility” is not enough,⁶³ certainty is not required.⁶⁴

Such a standard is applicable in an ATT. As in human rights law, the standard is not perfect identification of risk. Case law demonstrates that the process of assessment is as important as the outcome, meaning that states must first engage in a meaningful process of assessment, and in doing so must look at relevant and reliable evidence prior to making a decision on how to act. This is transferable to a situation of arms transfer where the state needs to make a sound assessment of risk related to the proposed transfer before deciding whether a transfer authorisation can be given.

ii. Environmental law

States use risk assessment in environmental law for both domestic and international decision-making. The main principle developed in this area, known as the “precautionary principle”, is helpful for establishing risk assessment guidelines for an ATT based on possible and plausible outcomes.

The precautionary principle emerged from concerns about treatment of the environment and impacts on human health,⁶⁵ but it has broader applications. In essence, the principle provides a decision-making framework for reducing harm that could result from certain actions. The “precautionary principle” requires that decision-making include measures to avoid or diminish unacceptable harm that might result from a particular action,⁶⁶ and is thus a way of acknowledging potential foreseeable outcomes in order to ensure that

⁶⁰ *HLR v France*, European Court of Human Rights, Judgment of 27 April 1997.

⁶¹ *Thampibillai v The Netherlands*, European Court of Human Rights, Judgment of 17 February 2004.

⁶² CAT General Comment 1 (1997), *Soering v the United Kingdom*, European Court of Human Rights, Judgment of 7 July 1989, para. 86, *Shamayev and 12 others v. Russia*, European Court of Human Rights, Judgment of 12 April 2005.

⁶³ *Vilvarajah and others v. The United Kingdom*, European Court of Human Rights, Judgment of 30 October 1991, para. 111.

⁶⁴ *Soering v. The United Kingdom*, European Court of Human Rights, Judgement of 7 July 1989, para. 94.

⁶⁵ The 1992 Rio Declaration, the outcome document of the United Nations Conference on Environment and Development, is an early statement of the precautionary principle in international law.

⁶⁶ Katie Steele, *The Precautionary Principle: A New Approach to Public Decision Making?*, Law probability and risk, 1, March 2006, 19-31.

unacceptable harm does not result.⁶⁷ This has gained support as a higher order legal principle by the international community.

While the application of the precautionary principle has been limited to public policy decision-making affecting human health and the environment, the literature provides recommendations relevant for decision-making processes within the framework of an ATT.

First, the precautionary principle requires that potential outcomes or risks be assessed before a decision is taken. An ATT structure would largely reflect such an approach, because one of the main objectives of an ATT is to ensure that state parties turn their attention to a range of potential outcomes that might arise from a particular transfer of conventional arms. States have recognised the principle in this regard. In its initial views on an ATT, for example, Argentina suggested that “the instrument [the ATT] should establish that before authorising a transfer, states should take the necessary measures in order to guarantee that the risks derived from such a transfer have been foreseen, insofar as is possible.”⁶⁸

Secondly, the literature on the precautionary principle notes that there is always an infinite range of possible outcomes, some more plausible than others.⁶⁹ Academics have noted that if the precautionary principle is to prove useful for decision-making, discretion will be needed in terms of which potential outcomes of an action should be taken into account. ATT stakeholders must therefore negotiate criteria for determining what would constitute plausible threats associated with an action.

An ATT requires a similar process for determining assessment criteria. This is especially important in light of the extensive obligations that states already have under international law. Existing obligations were established by treaty and customary law, as well as under principles recognised by the United Nations, including international human rights law, international humanitarian law, and the Articles on State Responsibility. These

⁶⁷ This is in line with the view of the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), a body of UNESCO. The commission is mandated to formulate principles that could provide decision-makers with criteria other than the purely economic.

⁶⁸ Reply of the Argentine Republic to the Secretary-General’s request for views pursuant to paragraph 1 of General Assembly Resolution 61/89. Text at: <http://disarmament.un.org/UNODA_Web_Docs/CAB/ATT/ArgentinaE.pdf>.

⁶⁹ The literature on the precautionary principle is extensive. General works include Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, New York, 2002; Tim O’Riordan, James Cameron and Andrew Jordan, eds. *Reinterpreting the Precautionary Principle*, London, 2001; David Freestone and Ellen Hey, eds. *The Precautionary Principle and International Law: The Challenge of Implementation*, International Environmental Law and Policy Series, vol. 31. The Hague: Kluwer Law International, 1996.

obligations must be consolidated in comprehensive but succinct criteria to ensure effective application. Indeed one of the fundamental objectives of an ATT should be to establish common criteria enabling national authorities to identify circumstances and factors preventing arms from being acquired by users or for uses forbidden under international law. In this regard, experience from the application of the precautionary principle in other areas could be particularly relevant.

iii. WTO and global health standards

Members of the World Trade Organisation (WTO)⁷⁰ have also agreed to a similar system of risk assessment. For example, the Sanitary and Phytosanitary Agreement (SPS Agreement)⁷¹ is a WTO initiative from the Uruguay Round that sets out requirements with respect to food safety standards. While the SPS Agreement is grounded in assessments based on “scientific principles,”⁷² Article 5 requires states to ensure that SPS measures are based on a risk assessment. Some analogies can be made to an ATT.

Decisions of the dispute resolution body of the WTO interpreting the SPS agreement can offer insights into risk assessment that are applicable to an ATT risk assessment process. In the *Hormones* case,⁷³ for example, the appellate body reviewed the procedure of risk assessment undertaken by the EC in its decision to ban American beef. In its decision the appellate body held that the information base relied on - in this case scientific studies - must have “specificity,” linking evidence and particular risk; that the risk assessment threshold should not be set in a way that frustrates the ability of governments to meet their responsibilities to protect their citizens; and held that ultimately the decision on risk would rest on government as part of its responsibilities to citizens.

The appellate body further suggested that scientific risk assessments could include practical material considerations that relate directly to the social responsibilities of governments:

It is essential to bear in mind that the risk that is to be evaluated is not only risk ascertainable in a scientific laboratory under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual

⁷⁰ The WTO Agreement was concluded in 1994 and came into force at the beginning of 1995.

⁷¹ WTO Agreement on the Application of Sanitary and Phytosanitary Measures.

⁷² Article 2.2 of the SPS Agreement requires members to base any new SPS measures on “scientific principles” and to ensure that any SPS measure is not taken without “sufficient scientific evidence.”

⁷³ *EC-Measures concerning meat and meat products (hormones)*, Report of the Appellate Body, WT/DS26/AB/R, 16 January 1998.

potential for adverse effects on human health in the real world where people live and work and die.

Some states have raised concerns that the ATT might be used as a tool for political decision-making and the possibility of assessment based on subjective criteria. As noted in discussions on the ATT, the assessment process cannot degenerate into a checklist of “good” and “bad” governments. Such politicisation would undermine the “inclusive and non-discriminatory ethos” of the initiative.⁷⁴ The WTO experience of requiring specificity is therefore useful. Criteria-based risk assessments must draw upon an information base that is specific to the risk measured. In assessing whether a clear risk exists that a transfer of conventional arms might be used for gross violations of human rights law, there must be specific information linking convincing evidence to the risk.

An ATT must also consider the practical realities in which states operate and make decisions. This is particularly relevant in instances where importing states must undertake assessments prior to authorizing an import licence. Any realistic risk assessment system will need to account for the existing social responsibilities of states; a state has a responsibility to provide effective law enforcement and protection to its citizens. An effective regulatory mechanism must account for these responsibilities while determining whether they are carried out in accordance with a state’s obligations under international law and without adversely affecting its citizens.

Summary of Risk Assessment

Based on state practice in other areas of international law, it is clear that operative risk assessment systems are feasible within an ATT. The examples cited demonstrate that risk assessment frameworks can be implemented effectively in practice, lending weight to the case for an ATT with effective, enforceable transfer criteria.

In establishing whether there is a “clear” or “real” risk that transferred conventional arms will be used for serious violations of human rights law these other areas of international law provide useful guidance. The case law and state practice reveal a number of relevant lessons for an ATT.

- There is a positive obligation on States to conduct a ‘meaningful risk assessment’;

⁷⁴ Paul Cornish, *An International Arms Trade Treaty: Building Consensus and Making it Work*, Proceedings on a Conference held at the Royal College of Defence Studies, London, 5 June 2007.

- A clear standard, state practice, the use of indicators, commentary and guidelines offers states acting in good faith with enough specific guidance to arrive at a decision;
- The standard is not perfect identification of “risk”. Risk should 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 and certainly is not required;
- Risk assessment can only be realistically based on facts known at the time that assessment takes place and must be based on relevant evidence;
- There should be some level of “specificity,” in that there must be a link between the evidence used for the risk assessment and the particular risk;
- Criteria-based risk assessments must draw upon an information base that is specific to the risk being measured;
- Risk assessment must also be cognisant of the practical realities in which states operate and make decisions.

Challenges to the Arms Trade Treaty Process

Having considered arguments for both the necessity of an ATT and its relation to existing human rights law, this report briefly examines the arguments of states that oppose the initiative, including arms supplying states, not least because the support of some supplier states is necessary to ensure the success of the treaty initiative.

A few arms-supplying states that have expressed scepticism about the desirability or feasibility of the initiative may serve as examples.⁷⁵ The main arguments against an ATT are based on a belief that existing instruments are sufficient, and doubts that a new treaty would add anything of value to the existing body of regulations and guidelines on arms transfers. Some of the submissions carrying these arguments were entirely devoid of references to the ATT initiative and of views on its possible feasibility, scope and parameters, implying that the international arms trade does not require any additional regulation beyond what is already in place. By insisting on the sufficiency of existing regulations, some states exclude themselves from participating in the present debate by signalling that they find it irrelevant. This could present challenges, for example for the work of the GGE, as this process moves forward given the consensus based nature of the UN system. However, the insufficiencies of the existing treaties and arrangements as illustrated above should be clear, making this argument unsustainable in the long run.

Some states express the view that existing arrangements and programmes could have ameliorated the problem of the proliferation of conventional arms, but these have had limited success. This has led to the conclusion that international efforts need to focus on the illicit arms trade rather than on the state sanctioned trade. Several aspects of this rationale are problematic. The failure to reach consensus at the 2006 Review Conference of the PoA is taken as indicating the complexities of the arms trade issue and the premature nature of an ATT. This position calls for a cautious approach to further development of international regulation of the arms trade, and suggests a strengthening of existing agreements before developing new ones. It also suggests a preference for addressing the illicit trade only. It reserves concern for the illicit production and sale of arms without recognising the role of the state-sanctioned market in diversion to black markets as well as direct sales to end-users who violate accepted international norms. However, such a position fails to make it clear how states are to address the illicit trade in conventional arms without first defining what is legal and in line with states' existing obligations under international law. The general impression left by these positions is one

⁷⁵ See submissions of states pursuant to Resolution 61/89 including, for e.g., submissions of Russia, India, Pakistan, Egypt, and China. The USA did not make a submission.

of caution and pessimism: they reflect a distrust in the efficiency of the PoA and other efforts in conventional arms control, and see these apparent weaknesses as a sign that the world is not ready to take up the control of legal conventional arms transfers if it cannot cooperate adequately in limiting the illicit arms market.

These challenges have to be taken seriously since they represent the concerns of stakeholders about the feasibility and desirability of an ATT. Still, some inherent problems associated with these arguments should be addressed for the sake of clarity. One of the views expressed by sceptic states as discussed above, suggests that existing international regulations are sufficient for the control of international arms transfers. This position has merit insofar as the ATT initiative is indeed built on existing international undertakings. But these efforts, even if applied to their full potential, do not provide the level of predictability and harmonisation in international arms transfers that an ATT could achieve. Further, there is at present no legally binding instrument to regulate state-sanctioned arms transfers; this report has pointed out how an ATT will fill existing gaps in the array of international arms control treaties.

Opposition from important supplier states will not necessarily halt or impede the treaty process as clearly a majority of states believe that a legally binding treaty grounded in human rights and other international law norms is both a necessary and achievable objective. Neither will such opposition necessarily impede the effectiveness of an eventual ATT. As has been demonstrated in other treaty regimes, norm-forming behaviour is created and influences even those states that are not party to a treaty. For example, evidence from the Landmine Convention and the subsequent drop in the production and use of anti-personnel mines strongly suggests that that treaty has exercised influence beyond the ratifying states.

Conclusion

We are facing a window of opportunity when it may be possible to regulate the trade in conventional weapons in a way that will take into account humanitarian and human rights concerns, and states' right to export arms. One of the most important goals in creating a comprehensive international legal regime for arms transfers is to find common ground on a set of criteria for considering the legality of any given arms transfer. In this paper we have shown the desirability and legal logic of building such a regime on existing principles of human rights. The legal framework for an ATT already exists in a combination of arms control agreements, human rights texts, humanitarian law, customary law and legal opinions by competent international bodies. The authors hope that this report may contribute to a balanced and informed debate in furtherance of the ATT process.