



Dear all,

The Working Group on Effective Treaty Implementation (WGETI) held its first meeting in the context of the preparatory process for CSP9 on 14-15 February 2023. This meeting focused its attention on three priority issues, namely implementation of ATT Articles 6 & 7 (Prohibitions & Export and Export Assessment), Article 9 (Transit or trans-shipment), and Article 11 (Diversion). The Sub-working Groups on Articles 6 & 7 and Article 9 had a joint meeting because of coinciding topics in their multi-year workplans. The Sub-working Group on Article 11 discussed the topic of post-delivery cooperation, in accordance with the decision at CSP8 to prolong the mandate of this Sub-working Group for one additional year for that purpose.

During these discussions, we were able to move forward on our important task of discussing draft elements for possible voluntary guides on Articles 6&7 and Article 9. We also had good exchanges on the further role of the ATT framework regarding post-delivery cooperation and touched upon the way forward for the Working Group.

The second meeting of the WGETI will seek to build on and take forward the discussions of the February meeting. The three Sub-working Groups will meet separately, followed by a general discussion on the way forward. Accordingly:

1. **Ambassador Ignacio SÁNCHEZ DE LERÍN** of Spain will continue to facilitate the work on Articles 6&7;
2. **Mr. Rob WENSLEY** of South Africa will continue to facilitate the work on Article 9; and
3. **Ambassador Ignacio SÁNCHEZ DE LERÍN** of Spain will continue to facilitate the work on Article 11 (as an interim arrangement, because, at the time of the meeting, no eligible and willing State Party had been secured to assume the role of Facilitator on this topic).

Objectives and preparation for the WGETI meeting in May

The second meeting will first seek to finalize the draft elements for Chapter 2 of the possible voluntary guide on Articles 6&7 and for the voluntary guide Article 9 in the respective Sub-working Groups. The Sub-working Group on Articles 6&7 will continue its discussions on the basis of its multi-year workplan and the Sub-working Group on Article 11 will conclude its work with considering operational steps to introduce and implement post-delivery cooperation, and a last exchange of national experiences and practices regarding post-delivery cooperation and diversion prevention measures in general. The Working Group as a whole will seek to identify the priority topics and working methods for the Working beyond CSP9 with a view to present a proposal to the forthcoming Conference.

In preparation for the May meeting, the facilitators have prepared a workplan for the respective session, which include summaries of the meetings in February as well as a description of the key issues that each sub-working group will address. Where appropriate, the facilitators have also prepared draft agendas, revised elements and/or background papers. These can be found herewith as Annexes A, B

and C and their respective attachments. These work plans cover both organizational and substantive elements of the work ahead. A draft proposal on the forthcoming topics and working methods of the Working Group will be circulated at a later stage.

Participants in the WGETI are invited to rely on these documents in preparing for the WGETI meeting and are strongly encouraged to participate actively in the respective sessions.

Programme of Work for the WGETI Sub-working Groups

The second meeting of the WGETI will take place on 09 – 10 May 2023. The WGETI has been given three three-hour sessions (nine hours) to conduct its meetings, which will be allocated as follows:

Table 1. Schedule of WGETI Sub-working Group Meetings (May 2023)

	Tuesday	Wednesday
10:00 – 13:00	WGETI Sub-working Group on Articles 6&7	WGETI Discussion on forthcoming topics and working methods
15:00 – 16:30	WGETI Sub-working Group on Article 9	WGTU
16:30 – 18:00	WGETI Sub-working Group on Article 11	

I look forward to working closely with all of you in steering our work towards a successful CSP9.

Yours sincerely,

Ambassador Ignacio SÁNCHEZ DE LERÍN
Permanent Representative of Spain to the Conference on Disarmament
Chair of the ATT Working Group on Effective Treaty Implementation

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ANNEX A

WORK PLAN SUB-WORKING GROUP ON ARTICLES 6 & 7

Tuesday, 09 May 2023, 10:00-13:00

Introduction

1. The first Chair of the Working Group on Effective Treaty Implementation (WGETI), Ambassador Sabrina DALLAFIOR of Switzerland, established the Sub-Working Group on Articles 6&7 (Prohibitions & Export and Export Assessment) at the commencement of the preparatory process for the Fourth Conference of States Parties (CSP4) to the Arms Trade Treaty (ATT) in January 2018, and appointed Sweden to facilitate the work of the Sub-working Group in the lead up to CSP4 and CSP5. The Sub-working Group made significant progress during its first two years of work, and identified many areas to take forward (see paragraph 22(c) of the Report to the Fifth Conference of States Parties (CSP5) ([ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1](#)) presented by the Chair of the WGETI to CSP5).
2. The next Chair of the WGETI, Ambassador Jang-keun LEE of the Republic of Korea, appointed Spain, who nominated Ambassador Ignacio SÁNCHEZ DE LERÍN, to facilitate the work of the Sub-working Group on Articles 6&7 at the commencement of the preparatory process for CSP6. His successor, Ambassador Sang-beom LIM, re-appointed Ambassador Ignacio SÁNCHEZ DE LERÍN for the CSP7 and CSP8 cycles.
3. As the new Chair of the WGETI, Ambassador Ignacio SÁNCHEZ DE LERÍN has, after consultation with the CSP9 President, decided to continue facilitating the discussions in the Sub-working Group during the CSP9 cycle.

First CSP9 meeting of the Sub-working group

4. During the joint meeting of the Sub-working Groups on Articles 6 & 7 and Article 9 on 14 February 2023, the Facilitator on Articles 6 & 7 introduced the possible draft elements for Chapter 2 (Article 6: Prohibitions) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7. These elements were drafted to reflect and build on the views exchanged during the meetings of the WGETI Sub-working Group on Articles 6 and 7 in the CSP8 cycle.
5. In the open discussion that followed, all the participants who intervened found the draft chapter a valuable and accessible document which provides a good overview of all the key issues and reflects the discussions that were conducted in the Sub-working Group. In that respect, it can be an important tool for capacity-building. Participants also acknowledged the explicit mention in the draft chapter that it is not the purpose of the voluntary guide to prescribe, create new norms and standards or establish an agreement on a single interpretation of the Article 6 obligations, nor to reinterpret established definitions. A few participants made suggestions on the draft text, in particular regarding the sections on genocide and crimes against humanity and States Parties' due diligence obligations in that regard.
6. Following the discussions on their respective draft elements, the Facilitator on Articles 6 & 7 and Article 9 jointly commenced discussions on the relationship between Articles 6 &7 and Article 9, as well between these Articles and several other Articles in the Treaty (as provided in the respective multi-year workplans of both Sub-Working Groups).

7. Participants exchanged views based on the questions that were included in the Facilitators' background paper on the topic. Some participants explained how they apply Articles 6 & 7 in their national risk assessments and highlighted the importance of also subjecting ammunition and parts and components to the export assessment in Article 7 and to measures that allow prohibiting their export, import, transit, trans-shipment and brokering contrary to Article 6.

8. As very few participants intervened on this topic, the Facilitators encouraged participants to provide answers to the questions in writing, via e-mail to the ATT Secretariat.

9. Subsequently, some participants also addressed the way forward for the Working Group, now that the multi-year workplans on Articles 9 and 11 have come to an end. They indicated that next to examining technical issues, the Working Group should invest more time on practical and inclusive discussions and exchanges, focused on how States Parties fulfil the Treaty obligations in their daily practice, with concrete examples and attention to cooperation between States. This should include the obligations in Articles 6&7 and Article 9.

Second CSP9 meeting of the Sub-working group

10. The second meeting of the Sub-Working group will first consider the revised draft elements for Chapter 2 (Article 6 (Prohibitions) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7 (topic 10 of the multi-year workplan). In that regard, the revised draft includes new elements about the relationship between Article 6 and other Treaty articles. After this, the meeting will explore the obligation in Article 7(2) for exporting States Parties to 'consider whether there are measures that could be undertaken to mitigate risks identified' when conducting assessments in accordance with Articles 7.1(a) and (b) as well as Article 7.4 (topic 11 of the multi-year workplan).

11. Attachment 1 provides an agenda for the Sub-Working group session of 09 May 2023. Attachment 2 is the revised list of possible draft elements for Chapter 2 (Article 6 (Prohibitions) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7. Attachment 3 provides a background paper to facilitate the discussion about mitigating measures. Participants are encouraged to consider these draft documents in advance of the Sub-Working group meeting and participate actively in the discussion.

ATTACHMENT 1

**DRAFT AGENDA FOR THE MEETING OF
THE SUB-WORKING GROUP ON ARTICLES 6&7
(EXTRACT OF MULTI-YEAR WORKPLAN)**

Tuesday, 09 May 2023, 10:00-13:00

Topic 10: Voluntary Guide – Draft Elements of Chapter 2 (Article 6 (Prohibitions)) (continued...)

Introduction by facilitator

Open discussion

The Facilitator will present the revised draft elements for Chapter 2 (Article 6 (Prohibitions)) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7, derived from the views exchanged during the discussions held so far during the meetings of the WGETI Sub-working Group on Articles 6 and 7. Participants will have the opportunity to review and comment on the draft elements.

Topic 11: Article 7(2) - Mitigation measures

This discussion will explore the obligation in Article 7(2) for exporting States Parties to ‘consider whether there are measures that could be undertaken to mitigate risks identified’ when conducting assessments in accordance with Articles 7.1(a) and (b) as well as Article 7.4. The discussion will focus on State practice with respect to the following aspects:

- What do states believe constitute “mitigation measures”?*
- What do states consider the purpose of mitigation measures?*
- Under what circumstances would mitigation measures be explored?*
- What kind of mitigation measures could an exporting state take under consideration in order to avoid the specific negative consequences in Article 7 (1)?*
- At what point would other states in the transfer chain (i.e. transit or importing states) be involved in discussions concerning mitigation measures?*
- What do states view as the roles of different parties (exporting State, importing State, exporters and/or industry) with regard to mitigation measures?*
- What considerations might be taken into account when developing and applying mitigation measures?*
- Do states have public examples of mitigation measures being applied effectively or not (whether by ATT States Parties or not)?*
- What ‘confidence-building measures’ have States undertaken to mitigate risks?*
- What ‘jointly developed and agreed programmes’ have been developed or adopted by export and importing States to mitigate risks?*
 - o What are the practicalities of developing and implementing such programmes?*
 - o What are the characteristics/elements or prerequisites for successful programmes (i.e. those that have mitigated identified risks)?*
- How do States determine when/that an identified risk has been adequately mitigated?*

The discussion will be kicked off with an expert presentation on this topic by the Small Arms Survey.

ATTACHMENT 2

**ELEMENTS OF A VOLUNTARY GUIDE TO IMPLEMENTING ARTICLES 6 & 7
OF THE ARMS TRADE TREATY**

Draft Chapter 2 – Prohibitions

Revised draft

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Background

1. On 15 February 2022 and 26 April 2022, the ATT Working Group on Effective Treaty Implementation (WGETI) Sub-working Group on Articles 6&7, facilitated by Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain, discussed the obligations in Article 6 of the Treaty, as contemplated in the [multi-year workplan](#) for the Group. This discussion followed the earlier discussions in the Sub-working Group in the context of the “methodology exercise” for unpacking key concepts in Articles 6 and 7 of the Treaty, which formed the basis for [draft Chapter 1 \(Key concepts\) of the proposed Voluntary Guide to assist States Parties in implementing Articles 6 and 7](#). In line with the multi-year workplan, it was noted at CSP8 that the views exchanged during the discussions on the Article 6 obligations would form the basis for a list of possible draft elements for Chapter 2 (Article 6 – Prohibitions) of the proposed Voluntary Guide.

2. In line with the overall goal of the Voluntary Guide, the aim of the discussions and the list of possible draft elements on the Article 6 obligations was to provide a picture of how States Parties approach the implementation of these obligations. In that regard, this chapter builds on draft chapter 1, which provided an overview of national practices with respect to the interpretation of key concepts in Articles 6&7, including the jurisprudence and ongoing legal discussions which surround some of these key concepts. The chapter also attempts to operationalize the obligations in Article 6 to support the practice of arms transfer decision-making. Just like draft chapter 1, this chapter does not intend to prescribe, create new norms and standards or establish an agreement on a single interpretation of the Article 6 obligations, nor to reinterpret established definitions. Where legally binding definitions apply this is explicitly mentioned as such.

3. The discussions were held on the basis of guiding questions provided by the Facilitator, which also provide the structure of the draft elements below. These draft elements were drafted to reflect and build on the interventions of participants during the relevant discussions of the Sub-working Group and the expert presentation provided by the International Committee of the Red Cross (ICRC) on the concept of “knowledge” and other terms in Article 6 (3) of the Treaty, taking into account the elements included in draft chapter 1 and previous work of the WGETI. In that respect, it is noted that throughout the discussions on the guiding questions, interventions were made by States and Non-Governmental Organisations, as well as the ICRC.

Treaty text

4. The text of Article 6 is recited below to help readers/users situate the specific elements of the Article 6 obligations that were discussed in the WGETI. These elements are highlighted in the text.

ARTICLE 6 – PROHIBITIONS

1. A State Party **shall not authorize any transfer** of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate **its obligations under measures adopted by the United Nations Security Council** acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant **international obligations under international agreements** to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has **knowledge at the time of authorization** that the arms or items would be used in the commission of **genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.**

What does ‘shall not authorize any transfer’ entail in the context of Article 6?

5. The phrase ‘shall not authorize any transfer’ is not defined in the Treaty. In their interventions during the discussions on this topic, States Parties focused on the aspect that the obligations in Article 6 extend to all the types of transfer covered under Article 2 (1), namely export, import, transit, trans-shipment and brokering. States Parties also indicated that in their national control system, an export involves the transfer of title to and control over the arms in addition to the physical movement of the arms.

6. Factoring in their general obligation in Article 5 (2) to establish and maintain a national control system in order to implement the provisions of the Treaty, and Articles 2, 3 and 4, it entails that as part of their national control system, States Parties cannot allow any export, import, transit, trans-shipment and brokering shipment under its jurisdiction of conventional arms covered under Article 2 (1) of the Treaty and of items covered under Article 3 or Article 4 that is prohibited in paragraphs 1 to 3 of Article 6.

What ‘obligations under measures adopted by the United Nations Security Council’ are covered under Article 6(1)?

7. This question was partially addressed within the ATT process as part of the discussions in the WGETI during the CSP4 cycle on [possible voluntary guiding and supporting elements in implementing obligations under article 6 \(1\)](#). The document with these elements was welcomed by States Parties at CSP4 as a living document of a voluntary nature and is available in the *Tools and Guidelines* section of the ATT website at <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

8. The use of the phrase “*in particular arms embargoes*” indicates that the obligation in Article 6 (1) applies to arms embargoes as well as all other binding measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations. It therefore applies to all binding economic sanctions regarding the relevant State and designated individuals and entities, which concern the export, import, transit, trans-shipment and brokering of the conventional arms covered under Article 2 (1) of the Treaty and/or of items covered under Article 3 or Article 4. In that respect, it is not necessary that the measures in question are explicitly designated as an “arms embargo”, which is not defined in the Treaty or the UN Charter, neither in international law in general.

9. The abovementioned document also includes instructions on how to apply the obligation in Article 6 (1) in practice and where to find the relevant measures.

What ‘international obligations under international agreements’ are ‘relevant’ under Article 6(2)?

10. This question was already addressed within the ATT process as part of the discussions in the Working Group on Transparency and Reporting (WGTR) during the CSP6 and CSP7 cycles on the review of the ATT Initial Reporting Template. In the relevant section about the implementation of Article 6 (Prohibitions), the amended Initial Reporting Template that was endorsed and recommended for use at CSP7 contains a reference to a non-exhaustive list of examples of the international agreements which States Parties have reported 'are relevant' to Article 6(2) in their Initial Reports. The list is maintained by the ATT Secretariat, and will be updated every time a new State Party includes one or more agreements in its Initial Report which were not yet mentioned. The list is available in the *Tools and Guidelines* section of the ATT website at <https://www.thearmstradetreaty.org/initial-report-list-of-examples-for-q-2-b-2-c.html>.

11. In their interventions during the discussions on this topic, States Parties and other stakeholders referred to a mixture of agreements, including but not limited to the UN Charter, the Convention on Certain Conventional Weapons (CCW), the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines, the Convention on Cluster Munitions, the UN Convention against Transnational Organized Crime and its Firearms Protocol, the UN Convention against Corruption and several human rights treaties.¹

12. In respect of these listed agreements, it needs to be noted that States Parties only need to take into account those agreements that it itself is a Party to. The listed agreements are merely examples which States Parties provided as relevant on the basis of their own practice and international commitments.

What constitutes 'knowledge at the time of authorization' under Article 6(3)?

13. The concept of 'knowledge at the time of authorization' is already addressed in draft chapter 1 of this Voluntary Guide, which includes an overview of national practices with respect to the interpretation of this concept, which were submitted by States Parties in the context of the "methodology exercise" for unpacking key concepts in articles 6 and 7 of the Treaty.

14. Subsequent to the completion of the "methodology exercise", the interpretation of the term 'knowledge' in international law was also addressed in the aforementioned expert presentation of the ICRC. On the basis of its overview, the ICRC recommends that "*the term 'knowledge' in Art. 6.3 should be interpreted objectively to include what a State Party can normally be expected to know, based on information in its possession or reasonably available to it*".

15. Concerning practical implementation and application, the ICRC holds the position that "*A State Party must deny a transfer under Art. 6.3 if it has substantial grounds to believe, based on information in its possession or that is reasonably available to it, that the weapons would be used to commit genocide, crimes against humanity or war crimes*". States Parties need to make a prospective assessment of the future behaviour of a recipient, how ~~they are~~ ~~he is~~ likely to behave and how the arms to be transferred will likely be used. Next to present circumstances and reasonable expectations, this can be based on the historic behaviour, yet without any requirement of evidence beyond reasonable doubt of past crimes. Also taking into account States' due diligence requirements of international law, States have an obligation to actively seek out information to make their assessment.

¹ Mention was also made of States' obligations under customary international law, but as Article 6 (2) only refers to States' international obligations under international *agreements*, customary law obligations are outside the scope of Article 6 (2).

16. Concerning relevant sources of States Parties' 'knowledge', intelligence and information exchange between States were mentioned, and reference was made to sources listed in two other WGETI documents, the previously mentioned document with on [possible voluntary guiding and supporting elements in implementing obligations under Article 6 \(1\)](#) and the [list of possible reference documents to be considered by States Parties in conducting a risk assessment under Article 7](#) (both welcomed at CSP4).

17. As indicated in the WGETI Chair's report to CSP8, during the discussions following the expert presentation, States Parties shared their approaches to interpreting the term 'knowledge' under Article 6(3), whether it encompasses 'actual' and 'constructive' knowledge, what level of knowledge is contemplated, and the extent to which there is a common view on this. It was put forward by intervening State Parties that only a 'constructive' knowledge standard, as presented by the ICRC, is in line with the object and purpose of the Treaty, arguing that absolute certainty will rarely be obtained. It was also pointed out that most respondents in the "methodology exercise" apply a 'constructive' knowledge standard. Other participants asserted that the Treaty requires the 'actual' knowledge standard as a minimum. It is noted in this context that States Parties also need to respect the parameters of their relevant underlying obligations (see paragraphs 20 and 30 about the Genocide Convention and the Geneva Conventions).

How is 'genocide' defined under international law?

18. This question was addressed in the aforementioned expert presentation of the ICRC, with intervening States Parties subsequently indicating that this guide should not redefine the existing definition.

19. The crime of "genocide" is defined in Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"). This definition is considered to have the status of customary international law. That entails that this definition is binding on all States, regardless whether they are a Party to the Genocide Convention or not.

Box X. 'Genocide' (Article II Genocide Convention)

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

20. In terms of the practical application of the obligation in Article 6 (3), States Parties will need to comply with the parameters of their general obligation to prevent genocide, laid down in Article I of the Genocide Convention. In reference to the parameters set out by the International Court of Justice (ICJ) in

the case on the application of the Genocide Convention, this entails that States Parties must refrain from authorizing and must take all measures within their power to need to halt arms transfers from the moment that they are aware *or should normally be aware* that acts of genocide are occurring or that there exists a serious danger of genocide occurring imminent and that the arms in question would be used in the commission of to commit these acts.²

21. In order to establish the occurrence or imminent danger of acts of genocide, the ICRC referred to two important elements in its presentation: 1) genocide can be committed in and outside the context of armed conflict and both by State and non-state actors; and 2) in addition to the occurrence of the above acts, States Parties need to establish the specific intent to destroy, in whole or in part, the national, ethnical, racial or religious group, as such. Concerning the latter, the aforementioned ICJ case on the application of the Genocide Convention refers to a concerted plan or a consistent pattern of conduct which could only point to the existence of such specific intent.

22. To make the determination in the practical context of an upcoming arms transfer, coordination between different State authorities is likely required. The elements mentioned in paragraphs 15 and 16 above are relevant in this regard.

How are ‘crimes against humanity’ defined under international law?

23. The prevention and punishment of crimes against humanity has been under consideration by the International Law Commission since 2013.³ Its 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity, submitted to the UN General Assembly, provides the following definition in Article 2⁴:

Box X. ‘Crimes against humanity’ (Article 2 Draft articles on Prevention and Punishment of Crimes Against Humanity)

1. For the purpose of the present draft articles, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

² ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, § 432: “By contrast, a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.”.

³ See https://legal.un.org/ilc/texts/7_7.shtml.

⁴ See https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. *This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law.*

24. In their interventions during the discussions on this topic, States Parties also referred to the definition of crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court (ICC).⁵ It needs to be noted, however, that this definition in the ICC Statute specifically concerns the jurisdiction of the ICC and the establishment of individual criminal responsibility, and does not concern the establishment of state responsibility for crimes against humanity. The ICC Statute is also only binding on ICC States Parties. The same proviso applies to the definition of genocide in Article 6 of the Rome Statute.

25. Just like genocide, crimes against humanity can be committed in and outside the context of armed conflict and both by State and non-state actors. Unlike in the case of genocide, crimes against humanity do not need require the specific intent mentioned in paragraph 21~~States Parties do not need to recognize a specific intent on behalf of the recipient to determine that crimes against humanity are occurring or imminent.~~

26. In line with the definition above in the Draft Articles on Prevention and Punishment of Crimes Against Humanity, as well as the Rome Statute, the ICRC emphasized in its expert presentation a few key elements of crimes against humanity, namely that the above acts need to be~~that States Parties do need to establish that the above acts which are occurring or imminent are:~~ 1) committed as part of a *widespread or systematic* attack directed against any civilian population; and 2) *multiple* and committed pursuant to or in furtherance of a *State or organizational policy* to commit such. These requirements essentially exclude spontaneous or isolated acts of violence from constituting crimes against humanity (which does not exclude that such acts could constitute war crimes if committed in the context of armed conflict).

27. The widespread or systematic attack requirement is not cumulative, meaning that the attack does not need to be widespread and systematic for the committed acts to constitute crimes against humanity. The commentaries to the aforementioned Draft Articles elaborate on the meaning of these terms in reference to the jurisprudence of the ICTY, ICTR and the ICC. In short, “widespread” involves factors such as the large scale of the attack (in acts and/or area) and the number of victims, which are assessed case-by-case. For an attack to be “systematic”, factors such as the organized nature or a regular pattern of acts are relevant.

28. The distinct State or organizational policy requirement essentially requires a link between the widespread or systematic acts of violence and the State or an organization (i.e. an organized non-state actor). Its scope and standard of proof are debated. For the purpose of this voluntary guide, it suffices to refer to the guidance on this in the commentaries to the relevant Draft articles and the Elements of Crimes of the Rome Statute.⁶ The latter indicate that a “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population. The Elements further specify that a policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action. The commentaries to the abovementioned Draft articles also elaborate on this topic, referring to the Elements of Crimes of the Rome Statute and the jurisprudence of the International

⁵ See <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

⁶ Elements of Crimes, <https://www.icc-cpi.int/publication/elements-crimes>, page 3.

Criminal Court, as well as the jurisprudence of the ICTY and previous work of the ILC. In doing so, it also recalls the ILC's 1996 draft Code of Crimes against the Peace and Security of Mankind, which required that the abovementioned acts were committed "*in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group*".⁷ It is important to note for assessment purposes that regardless a policy requirement does not entail proof that a formal policy was established or promulgated; a policy can also be deduced from circumstantial elements such as the way in which acts occur, a regular pattern, their repetition and preparatory activities.

What are 'grave breaches of the Geneva Conventions of 1949'?

29. Grave breaches of the Geneva Conventions of 1949 are already mentioned in draft chapter 1 of this Voluntary Guide, as States included them in their description of what they consider 'serious violations of International Humanitarian Law (IHL)' to cover. In that regard, grave breaches of the Geneva Conventions of 1949 are the serious violations of IHL included in respectively Articles 50 of Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, Article 130 of Geneva Convention (III) on Prisoners of War, and Article 147 of Geneva Convention (IV) on Civilians. Annex A of draft chapter 1 contains the full text of these provisions.

30. In terms of the practical application of the obligation in Article 6 (3), the ICRC indicated in its expert presentation that States Parties will need to take into account their underlying general obligation to ensure respect for the Geneva Conventions in all circumstances, laid down in Article 1 common to the Geneva Conventions. In that respect, the (updated) Commentary to Article 1 explicitly mentions the context of arms transfers as an illustration of the negative obligation not to encourage, nor aid or assist in violations of the Convention.⁸ It indicates that common Article 1 requires High Contracting Parties to refrain from transferring weapons if there is an *expectation, based on facts or knowledge of past patterns*, that such weapons would be used to violate the Conventions. In terms of their positive obligation to prevent violations, the Commentary to Article 1 identifies this as a due diligence obligation to act if there is a foreseeable risk that violations will be committed and to prevent further violations in case they have already occurred. It should be noted that this obligation concerns all violations of the Conventions, not only grave breaches.

What are 'attacks directed against civilian objects or civilians protected as such'?

31. The phrase "attacks directed against civilian objects or civilians protected as such" is part of a three-part enumeration of serious violations of international humanitarian law in Article 6 (3), in between "grave breaches of the Geneva Conventions of 1949" and "other war crimes as defined by international agreements to which [the transferring State Party] is Party".

32. The exact phrase by itself is not taken from any international legal instrument on international humanitarian law, but recalls the wording of Articles 51(2), 52(1) and 85 (3) of Additional Protocol (I) to

⁷ 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity with commentaries, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf; page 38.

⁸ Geneva Convention (III) of 12 August 1949 relative to the Treatment of Prisoners of War, commentary of 2020, article 1 : respect for the convention, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=24FD06B3D73973D5C125858400462538#83_B.

the Geneva Conventions. The acts described in these articles are grave breaches of Additional Protocol (I) to the Geneva Conventions, applicable to international armed conflicts, but also constitute war crimes in international and non-international armed conflicts under customary international law.

33. It should be noted that these provisions do not explicitly include the phrase “directed against” that is used in Article 6 (3). This phrase is nevertheless mentioned in the definition of crimes against humanity, which involves a widespread or systematic attack *directed against* any civilian population (see above). In that context, the commentaries to the abovementioned Draft articles on Prevention and Punishment of Crimes Against Humanity cite case law of the ICTY, stating that “the phrase “directed against” requires that civilians be the *intended primary target* of the attack, rather than *incidental victims*”.⁹ Further elaboration clarifies, however, that taking into account several factors, also attacks which fail to discriminate between military objectives and civilians (indiscriminate attacks) or are disproportionate in terms of the incidental damage to civilian objects or the injury to civilians (disproportionate attacks) can give rise to the inference of direct attacks on civilians. Consistent with that position, the ICRC mentioned in its expert presentation that in the ICRC’s view, “*depending on circumstances, [also] indiscriminate attacks and disproportionate attacks could qualify as attacks directed against civilian objects or civilians protected as such*”.

Box X. Attacks [directed against] civilian objects or civilians in Additional Protocol (I) to the Geneva Conventions

Article 51 (2):

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Article 52 (1):

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

Article 85 (3)

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

(a) making the civilian population or individual civilians the object of attack;

(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);

⁹ 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity with commentaries, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_7_2019.pdf; page 34.

What other 'war crimes' may be included?

34. This question was already partially addressed in draft chapter 1, which includes States' descriptions of what they consider serious violations of IHL to cover (for clarity, war crimes are serious violations of IHL that entail individual criminal responsibility). In that respect, Draft chapter 1 also includes an annex with the text of all the provisions of the Geneva conventions and the Rome statute that define /are relevant to 'serious violations of international humanitarian law'. In that list, "*other war crimes*" are then those that are not 'grave breaches of the Geneva Conventions of 1949' or 'attacks against civilian objects or civilians protected as such'. It should be noted, however, that Article 6(3) specifically refers to other war crimes '*as defined by international agreements to which [the State Party in question] is a Party*'. This excludes those that are *only* war crimes under customary international law.

35. During the 26 April 2022 meeting of the WGETI Sub-working Group on Articles 6&7, the ICRC also addressed this topic. The ICRC recommended that States Parties adopt a broad scope of war crimes to implement Article 6 (3) and referred to ~~the Commentary to Convention (III) relative to the Treatment of Prisoners of War and~~ Rule 156 in the ICRC study on customary international humanitarian law. Some States parties apply Article 6 (3) to all war crimes, even As indicated if, the war crimes included in this Rule that are *only* war crimes under customary international law go beyond the mandatory scope of Article 6 (3).¹⁰

Relationship between Article 6 and Articles 7, 8, 9 and 10

Relationship between Article 6 and Article 7

36. Articles 6 and 7 both include requirements concerning the substance or material scope of States Parties' export controls, i.e. circumstances that should be subject to control (and prevented), and assessment criteria to apply. Although some provisions in these articles refer to similar elements, the obligations in both articles are very different in nature. Article 6 involves absolute prohibitions, whilst Article 7 requires a risk assessment, weighing several factors, as well as the mandatory consideration of mitigating measures. In that respect, while States Parties can apply Articles 6 and 7 jointly in one assessment, they need to respect the different nature of these respective obligations. If a State Party establishes that one of the prohibitions in Article 6 is applicable, it needs to simply halt the export; there is no question of taking into account certain other considerations or considering mitigating measures as there is when conducting the risk assessment under Article 7.

37. During the dedicated discussion on the relationship between Treaty articles, limited interventions were made on this particular topic. These mostly referred to the national risk assessment process and relevant information, such as documentation that is used for public safety purposes. One State Party explained that the prohibitions in Article 6 and the export risk assessment criteria in Article 7 are integrated jointly in its national legislation. Another State Party highlighted the importance of also subjecting ammunition and parts and components to the export assessment in Article 7.

¹⁰ These war crimes do remain relevant for the implementation of Article 7(1)(b)(i). This provision requires exporting States Parties to assess the potential that the conventional arms or items could be used to commit or facilitate a serious violation of international humanitarian law. This obligation applies to all war all war crimes in international and non-international armed conflicts, both under conventional and customary international humanitarian law.

Relationship between Article 6 and Articles 8, 9 and 10

38. Unlike Article 7 on Export and Export Assessment, Articles 8, 9 and 10 all lack any guidance concerning the substance or material scope of States Parties' import, transit and trans-shipment and brokering controls. They do not refer to circumstances that should be subject to control (and prevented), nor to any assessment criteria to apply. In that regard, the fact that Article 6 also applies to those types of transfers is crucial in terms of understanding the required minimum scope of States Parties' import, transit and trans-shipment and brokering controls. It means that, as a minimum, States Parties will have to regulate import, transit and trans-shipment and brokering in order to fulfil its obligations under Article 6, and that the measures undertaken also have to extend to ammunition/munitions, as well as parts and components (because unlike Articles 8, 9 and 10, Article 6 does not only refer to conventional arms covered under Article 2 (1), but also to the items covered under Articles 3 and 4). The importance of Article 6 for the implementation of Articles 8, 9 and 10 is also acknowledged in the ATT Initial Reporting Template, which systematically includes the question whether the national control system includes measures to prevent imports, transit and trans-shipment and brokering in violation of Article 6.¹¹

39. During the dedicated discussion on the relationship between Treaty articles, also few participants intervened on this topic. Those who did, focused on the relationship between Article 6 and Article 9; those exchanges are reflected in the voluntary guide to implementing Article 9. Concerning the relationship between Article 6 and Articles 8 and 10, one State Party did explain that it applies exactly the same assessment criteria to brokering as it does to export, referring to both Article 6 and 7, and that these criteria are also applied to import of ammunition/munitions, as well as parts and components.

Concluding remarks

36-40. As indicated above, these draft elements were drafted to reflect and build on the interventions of participants during the discussions of the WGETI Sub-working Group on Articles 6&7 on 15 February 2022 and 26 April 2022, and the expert presentation provided by the International Committee of the Red Cross (ICRC) on the concept of "knowledge" and other terms in Article 6 (3) of the Treaty. They also take into account the elements included in draft chapter 1 and previous work of the WGETI.

37-41. In line with the intention of the voluntary guide, no definitive recommendations or conclusions on the application of the prohibitions in Article 6 are included. This is not a norm setting exercise on how to apply the Treaty's obligations, neither does it intend to reinterpret established definitions in international law. It needs to be noted, however, that these prohibitions mostly relate to concepts and obligations that are enshrined in other international agreements or even customary international law. In that respect, when States Parties apply the prohibitions in Article 6 in practice, they are expected to comply with their relevant underlying obligations.

¹¹ This concerns the revised Initial Reporting Template, endorsed and recommended for use at CSP7.

ATTACHMENT 3

BACKGROUND PAPER ON MITIGATING MEASURES

Background

A. Multi-Year Work Plan for the WGETI Sub-Working Group on Articles 6&7 – Topic 11: Article 7(2) – Mitigation measures¹²

This discussion will explore the obligation in Article 7(2) for exporting States Parties to ‘consider whether there are measures that could be undertaken to mitigate risks identified’ when conducting assessments in accordance with Articles 7.1(a) and (b) as well as Article 7.4. The discussion will focus on State practice with respect to the following aspects:

- *What do states believe constitute “mitigation measures”?*
- *What do states consider the purpose of mitigation measures?*
- *Under what circumstances would mitigation measures be explored?*
- *What kind of mitigation measures could an exporting state take under consideration in order to avoid the specific negative consequences in Article 7 (1)?*
- *At what point would other states in the transfer chain (i.e. transit or importing states) be involved in discussions concerning mitigation measures?*
- *What do states view as the roles of different parties (exporting State, importing State, exporters and/or industry) with regard to mitigation measures?*
- *What considerations might be taken into account when developing and applying mitigation measures?*
- *Do states have public examples of mitigation measures being applied effectively or not (whether by ATT States Parties or not)?*
- *What ‘confidence-building measures’ have States undertaken to mitigate risks?*
- *What ‘jointly developed and agreed programmes’ have been developed or adopted by export and importing States to mitigate risks?*
 - o What are the practicalities of developing and implementing such programmes?*
 - o What are the characteristics/elements or prerequisites for successful programmes (i.e. those that have mitigated identified risks)?*
- *How do States determine when/that an identified risk has been adequately mitigated?*

B. Relevant provisions in Article 7 of the Treaty

Paragraph 1

[...] [E]ach exporting State Party, prior to authorization of the export [...], shall [...] assess the potential that the conventional arms or items:

- a) would contribute to or undermine peace and security;*
- b) could be used to:*
 - i) commit or facilitate a serious violation of international humanitarian law;*

¹² The multi-year workplan is available on the *Tools and Guidelines* page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

- ii) *commit or facilitate a serious violation of international human rights law;*
- iii) *commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or*
- iv) *commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.*

Paragraph 2

The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

Paragraph 3

If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

Paragraph 4

The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

Introduction

1. As a complement to the questions above, this background paper aims to facilitate and focus the discussion on the obligation in Article 7 (2) by outlining how this obligation fits within the Treaty and within the ongoing discussions in the WGETI Sub-working Groups, as well as by pointing out existing views and contributions on this topic from States Parties and other ATT stakeholders.

2. The aim of the discussion is to identify national approaches that could provide elements for the relevant chapter 3 of the proposed Voluntary Guide to assist States Parties in implementing Articles 6&7. This is in line with the overall aim of the proposed Voluntary Guide to provide a picture of how States Parties approach the implementation of the obligations in Articles 6&7, not to prescribe, create new norms and standards or establish an agreement on a single interpretation of these obligations. In that respect the Facilitator encourages all participants to use the questions above and the elements below in preparing for the discussion in May, and also welcomes any written input via e-mail to Facilitator and the ATT Secretariat.

Focus on mitigating the risk of international law violations

3. The discussion on mitigating measures in this Sub-working Group focuses on the risks that States Parties identify when conducting export assessments in accordance with Articles 7 (1) and Article 7(4). These mostly concern potential abuse or misuse of the conventional arms or other items by the intended recipient or end-user.

broadly

4. The risk of diversion will not be addressed as such. Measures to mitigate the risk of diversion have been extensively discussed in the Sub-Working Group on Article 11 and are also incorporated in the document with Possible Measures to Prevent and Address Diversion, which was welcomed at CSP4.¹³

¹³ This document is available on the Tools and Guidelines page of the ATT website: <https://www.thearmstradetreaty.org/tools-and-guidelines.html>.

These possible measures include and build on elements mentioned in Article 11, including prevention measures such as examining parties involved in the export, requiring additional documentation, certificates, assurances and not authorizing the export. Currently, the specific diversion risk mitigating measure of post-delivery cooperation is still under consideration in the Sub-Working Group on Article 11.

5. To not duplicate the past and present discussions in the Sub-Working Group on Article 11, States Parties are requested to focus their responses to the questions on the relevant risks under Articles 7 (1) and 7(4), broadly spoken the risk of international law violations, in particular those related to peace and security, human rights, international humanitarian law, terrorism and transnational organized crime, and NOT the risk of diversion. This goes with the understanding, nevertheless, that that the risks under Articles 7 (1) and 7(4) are sometimes linked with a risk of diversion and therefore the measures undertaken to mitigate the risk of diversion can be relevant to mitigate the risks under Articles 7 (1) and 7(4).

GBV and violence against women and children

6. The multi-year workplan includes a reference to Article 7(4), directing the Sub-working Group to explore possible measures to mitigate the risk conventional arms or other items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. This is in line with the decision of States Parties at CSP5 that the WGETI should consider “*encourag[ing] States Parties to provide information on their national practices relating to “mitigating measures” in the context of Article. 7(4): what these can be and how they are implemented*”. That task was part of a broader package that followed from discussions on different aspects of gender and gender-based violence related issues in the context of the ATT, which was the priority theme of CSP5.¹⁴ In this context, participants are specifically encouraged to present their views and practices on mitigating risks related to GBV and violence against women and children.

State practice from Initial Reports

7. To generate discussion, it is useful to look at what States Parties have reported on this topic in their Initial Reports.¹⁵ In the Initial Reporting Template, in section 3 on Exports, question F poses the following question: *If a risk is identified, does the State ever consider whether there are measures that could be undertaken to mitigate identified risks [Article 7(2)]? (If ‘Yes’ please give examples when mitigation measures are considered and the types of risk mitigation measures that are most often used).*¹⁶

8. Currently, 86 States Parties have submitted their Initial Report, of which 80 have used the Initial Reporting Template as a basis.¹⁷ Of those 80 States Parties, 42 have ticked “yes” to the relevant question

¹⁴ See in that regard the CSP5 Final Report and the CSP5 President's Non-Paper on Gender and GBV, both available in the *Conference documents* section of the CSP5 page of the ATT website: <https://www.thearmstradetreaty.org/conference-documents-csp-5.html>.

¹⁵ Initial Reports that have been made publicly available can be consulted on the dedicated page of the ATT website: <https://www.thearmstradetreaty.org/initial-reports.html?templated=209839>. States Parties can consult Initial Reports that have not been made publicly available in the Restricted Area of the ATT website.

¹⁶ The Initial Reporting Template is available on the *Reporting Requirements* page of the ATT website: <https://www.thearmstradetreaty.org/reporting.html>. For clarity, before an amended template was adopted at CSP7, this concerned question G, which was as follows: “*The national risk assessment procedure includes the consideration of risk mitigation measures that could be undertaken to mitigate identified risks [Article 7(2)]. (if ‘Yes’ please elaborate below, including an indication of types of risk mitigation measures that are most often used)*”.

¹⁷ This number of 80 States Parties also includes the States Parties that have used the so-called “Baseline Assessment Questionnaire” of the Arms Trade Treaty-Baseline Assessment Project (ATT-BAP) for their Initial Report (available at <http://www.armstrade.info/the-survey/>). This questionnaire formed the blueprint for

and 32 ticked “no”, sometimes with the clarification that the question is not applicable to their situation. Five States Parties using the Initial Reporting Template did not answer the relevant question, while one report was not clear. Some States Parties provided examples of possible mitigating measures, which mostly relate to end-user documentation, end-user assurances and post-delivery cooperation.

Food-for-thought from other sources

9. Next to Initial Reports from States Parties, also good practice and other documents from the broad range of ATT stakeholders provide food-for-thought for the discussion of mitigating measures. Below a non-exhaustive overview of input from various stakeholders is provided, which participants can consider in preparing for the meeting.

10. The UN Office for Disarmament Affairs (UNODA) addresses mitigating measures in its ATT Implementation Toolkit, which provides examples of confidence-building measures and jointly developed and agreed programmes.¹⁸ Many examples are diversion-related: i) an undertaking by the importing State not to re-export or re-transfer in a manner that would run counter to the provisions of the ATT; ii) provision of information on weapons or items stolen, lost or otherwise unaccounted for; iii) post-delivery monitoring/cooperation programmes; and iv) joint programmes to enhance the capacity of importing States to control weapons and prevent their diversion. Examples that relate more to the risks under Article 7 (1) and 7 (4) are the following: i) a declaration by the importing State of intended use of the transferred weapons or items, accompanied by the undertaking/assurance/guarantee not to use them for other purposes; ii) disclosure by the importing State of its records regarding observation of relevant international human rights law, international humanitarian law, international conventions or protocols relating to terrorism and to transnational organized crime; iii) enhancement of transparency on military matters; and iv) joint programmes to enhance the implementation by importing State of, and compliance with, relevant international human rights law, international humanitarian law, international conventions or protocols relating to terrorism and to transnational organized crime.

11. The Geneva Centre for Security Policy (GCSP), in addressing the measure of end-user certificates, incorporated in the abovementioned document with Possible Measures to Prevent and Address Diversion, writes that *“a few states explicitly mention in the end-user certificates that the weapons cannot be used for committing certain violations of international human rights and humanitarian law”*. It adds that *“other than that, States rarely use measures specifically and directly addressed to mitigate risks listed in Article 7, such as Security Sector Reform or training in international humanitarian law, due to the limited resources typically available”*. It also points out that *“another point made during the treaty negotiations was that mitigation measures that take the form of training courses rarely have observable effects until long after a license is issued, and sometimes may not have sustainable effects at all”*.¹⁹

12. The latter was also addressed by the ICRC, indicating that *“specific risk-mitigation measures could include training by the exporting State of the recipient’s armed and security forces in IHL and human rights”*, but that *“the ability of training to effectively offset the risk of violations will depend on the*

the Initial Reporting Template and included a comparable question. Also note that of these 80 States Parties, 17 did not make their Initial Report publicly available.

¹⁸ UN Office for Disarmament Affairs (UNODA), ATT Implementation Toolkit, Module 6 – Export, 18, available at <https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2015/08/2015-08-21-Toolkit-Module-6.pdf>.

¹⁹ Geneva Centre for Security Policy (GCSP), “Prohibitions and Export Assessment: Tracking Implementation of the Arms Trade Treaty”, Geneva Paper 23/19, March 2019, 14, available at <https://www.gcsp.ch/publications/prohibitions-and-export-assessment-tracking-implementation-arms-trade-treaty>.

circumstances, including the time lapse between the training and its practical effects". Next to a reference to post-delivery cooperation, the ICRC also made the general point that risk mitigation measures "*must be assessed cautiously in terms of what is realistically achievable in the circumstances to offset the risk of violations*"; *they can be a positive tool as long as they are timely, robust and reliable, and as long as the exporter and importer have the capacity to effectively implement them, and do so in good faith*". Regarding assurances provided by the recipient, the ICRC indicated that these "*should be viewed against its policies and practices and in any case do not replace the exporting State's obligation under Article 7 to carry out a thorough assessment of the proposed export of arms or related items*".²⁰

13. The EU's User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, mentions that "*mitigating factors such as improved openness and an on-going process of dialogue to address human rights concerns in the recipient state may lead to the possibility of a more positive assessment*", adding that "*it is important to recognise that a lengthy passage of time since any highly publicised instances of repression in a recipient state is not on its own a reliable measure of the absence of clear risk*"; "*there is no substitute for up-to-date information from reliable data sources if a proper case-by-case assessment is to be made*".²¹

14. Specifically concerning Gender-Based Violence (GBV), Control Arms gives as an example of a possible mitigation measure "*an importing state's agreement to provide gender sensitivity training to its family court judges, [...] in a state where prosecution of domestic abusers is notoriously low*", albeit pointing out that "*this measure alone would not in itself sufficiently mitigate the risk of GBV as a serious human rights violation*".²² Control Arms also mentions as a method to identify possible mitigation measures for GBV-related risks examining the recipient State's obligations under relevant instruments and look at causes and remedies for types of arms-related GBV that might be indicated in shadow reports and recommendations, given the concrete example of the reporting procedures under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²³ Small Arms Survey similarly advises States Parties to look at measures that the recipient State is taking itself to prevent and respond to patterns of serious acts of GBV, such as: i) *changing national legislation to include GBV offences and provide for appropriate sanctions*; ii) *designing and implementing strategies to address GBV committed by police, armed forces, and security forces members*; iii) *training military and criminal justice stakeholders to deal with incidents of GBV*; iv) *creating a government agency, institution, or ombudsperson to combat and prosecute GBV*; and v) *developing information management systems or databases that, among other things, include GBV-related information*.²⁴ Small Arms Survey does note reports that question the

²⁰ ICRC, "Understanding the ATT from a humanitarian perspective", 2016, 38, available at <https://www.icrc.org/en/publication/4252-understanding-arms-trade-treaty-humanitarian-perspective>. The concerns expressed by the ICRC and GCSP are also addressed in Casey-Maslen, Clapham, Giacca, Parker, "The Arms Trade Treaty: A Commentary", Art.7 Export and Export Assessment, 2016, 274, 7.88 et seq, available at <https://opil.ouplaw.com/display/10.1093/law/9780198723523.001.0001/law-9780198723523>.

²¹ User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 2019, 49, available at <https://www.consilium.europa.eu/media/40659/st12189-en19.pdf>.

²² Control Arms, "Interpreting the Arms Trade Treaty: International Human Rights Law and Gender-Based Violence in Article 7 Risk Assessments", 2019, 10, available at <https://controlarms.org/wp-content/uploads/2019/04/Interpreting-the-Arms-Trade-Treaty-ver-1.pdf>.

²³ Control Arms, "How to use the Arms Trade Treaty to address Gender-Based Violence: A Practical Guide for Risk Assessment", 2018, 17, available at https://controlarms.org/wp-content/uploads/2018/08/GBV-practical-guide_ONLINE.pdf.

²⁴ Small Arms Survey, "At Whose Risk? Understanding States Parties' Implementation of Arms Trade Treaty Gender-based Violence Provisions", 2022, 7, available at

effective implementation and enforcement of such measures, as well as the need to monitor and evaluate their impact, and mentions that interviewed officials were sceptical about the use of mitigation measures in general and consider the abovementioned measures more as relevant information than as mitigating measures.

Role of industry

15. In line with the priority theme of the CSP9 President, participants are encouraged to consider the role of industry actors in mitigating risks in terms of new technologies, information exchange between industry actors and competent authorities and industry's due diligence requirements.

Concluding remarks

16. As indicated in the introduction, the Facilitator conducts this discussion to identify national approaches that could provide elements for the relevant chapter 3 of the proposed Voluntary Guide to assist States Parties in implementing Articles 6&7. These elements will only be presented during the first meeting of the Sub-working Group in the CSP10 cycle. In that respect, all participants making oral interventions during the meeting are encouraged to also submit their views and comments in writing, via e-mail to the Facilitator ATT Secretariat, before or after the meeting.

ANNEX B

WORK PLAN SUB-WORKING GROUP ON ARTICLE 9

Tuesday, 09 May 2023, 15:00-16:30

Introduction

1. The then Chair of the WGETI, Ambassador Jang-keun LEE of the Republic of Korea, established the Sub-Working Group on Article 9 (Transit and trans-shipment) at the commencement of the preparatory process for CSP6 in December 2019, and appointed South Africa, who nominated Mr. Rob WENSLEY to facilitate the work of the Sub-working Group in the lead up to CSP6. His successor, Ambassador Sang-beom LIM, re-appointed Mr. Rob WENSLEY to facilitate the work of the Sub-working Group in the lead up to CSP7 and CSP8. The current Chair of the WGETI, Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain, subsequently re-appointed Mr. WENSLEY for the CSP9 cycle.

First CSP9 meeting of the Sub-working group

2. During the joint meeting of the Sub-working Groups on Articles 6 & 7 and Article 9 on 14 February 2023, the Facilitator on Article 9 gave an overview of the discussions in his Sub-working Group and presented the first draft elements for a possible voluntary guide on the implementation of Article 9. These elements reflect and build on the discussions during the various sessions of the Sub-working Group, the background papers and the expert presentations that kicked-off every session, as well as the relevant international and regional instruments and reference documents which experts and participants directed attention to.

3. The Facilitator also explained that the Group has reached the end of its multi-year workplan, but that the workplan provides participants with a possibility to propose to hold further discussions (during the CSP9 cycle) on new topics or on topics that have not been fully explored. Since no delegation/participants has made such proposals so far, the Facilitator concluded that the Sub-working Group will wrap up its work in this cycle. The Facilitator is nevertheless still open to receive written proposals ahead of the meeting of the Sub-working Group in May.

4. During the open discussion that followed, intervening participants commended the draft elements for the clear manner in which they explain complex concepts, which makes the voluntary guide useful tool to support implementation of Article 9. In doing so, participants emphasized the importance of strengthening transit controls, while respecting the different realities various States Parties face. Participants also acknowledged the importance of outreach and support to private sector actors that are active in transit and trans-shipment. Some participants only had limited comments on the draft text, with suggestions to add some additional international instruments in certain sections that may be deemed relevant and to slightly expand the text on jurisdiction.

5. In the joint discussion on the relationship between Articles 6 & 7 and Article 9, as well between these Articles and several other Articles in the Treaty, participants exchanged views based on the questions that were included in the Facilitators' background paper on the topic.

6. On the relationship between Articles 9 and 11, participants emphasized the importance of information exchange and other forms of cooperation between different government departments or

agencies and between States, including on enforcement. In that regard, examples of regional cooperation were given. One State Party also addressed the topic of record-keeping, indicating that it keeps records on all types of transfer.

7. As very few participants intervened on this topic, the Facilitators encouraged participants to provide answers to the questions in writing, via e-mail to the ATT Secretariat.

Second CSP9 meeting of the Sub-working group

12. The second and final meeting of the Sub-Working group will consider the revised draft elements of the proposed Voluntary Guide to implementing Articles 9, including the new elements about the relationship between Article 9 and other Treaty articles. The revised draft elements are included in Attachment 2. Participants are encouraged to consider these elements in advance of the Sub-Working group meeting and participate actively in the discussion.

13. Following this discussion, the Facilitator will open the floor for any other business participants still want to raise concerning transit and trans-shipment and the relevant Article 9 of the Treaty. Participants are informed nevertheless informed that a discussion on the forthcoming topics and working methods of the WGETI is scheduled for the Working Group's Wednesday morning session.

ATTACHMENT 1

DRAFT AGENDA FOR THE MEETING OF THE SUB-WORKING GROUP ON ARTICLE 9

Tuesday, 09 May 2023, 15:00-16:30

1. Revised elements of a voluntary guide to implementing article 9 of the Arms Trade Treaty

Introduction by Facilitator

Open discussion

The Facilitator will present the revised draft elements for a possible voluntary guide on the implementation of Article 9, deriving from the views exchanged during discussions during the February meeting of the Sub-working Group. Participants will have the opportunity to review and comment on the revised draft elements.

2. Any other business

The Facilitator will give participants the opportunity to raise any other business concerning transit and trans-shipment, taking into account that a discussion on the forthcoming topics and working methods of the WGETI is scheduled for the Working Group's Wednesday morning session.

ATTACHMENT 2

ELEMENTS OF A VOLUNTARY GUIDE TO IMPLEMENTING ARTICLE 9

REVISED DRAFT

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Background

1. At the Fifth Conference of States Parties to the ATT (CSP5), the Conference endorsed the recommendation of the Chair of ATT Working Group on Effective Treaty Implementation (WGETI) for the Working Group to initiate work on Article 9 (transit and trans-shipment) in the intersessional period of CSP6 and to develop a medium-term workplan to that effect, bearing in mind the draft list of proposed topics and elements for consideration in Annex E of the Chair's Report to CSP5. For that purpose, the WGETI Sub-working Group on Article 9 was established, facilitated by Mr. Rob WENSLEY of South Africa. Following discussions during the Sub-working Group's first meeting on 4 February 2020, a multi-year work plan was eventually welcomed by States Parties via silence procedure in March 2021 as a living document of a voluntary nature.²⁵

2. The Sub-working Group began its substantive work in the intersessional period of CSP7 with discussions dedicated to the various topics in the multi-year plan, which focused on the exchange of national approaches and the exploration of common practices with a view to the possible development of a compendium of national practice and/or voluntary guide. These discussions were systematically held on the basis of guiding questions and relevant input in background papers prepared by the Facilitator, and kicked off by one or more expert presentations on the topic at hand. Following the sessions of the Sub-working Group during the intersessional period of CSP8, the Conference noted the conclusion of the WGETI Chair in his Chair's Report to CSP8 that the Facilitator of the Sub-working Group would begin his work on draft elements for a possible voluntary guide on the implementation of Article 9, deriving from the views exchanged during discussions thus far.

3. In line with this conclusion, the draft elements below are structured according to the list of topics in the multi-year work plan of the Sub-working Group on Article 9. They were drafted to reflect and build on the interventions of participants during the various sessions of the Sub-working Group, the background papers and expert presentations that kicked-off every session, as well as the relevant international and regional instruments and reference documents which experts and participants directed attention to.

4. Throughout the sessions, interventions were made by States, UN agencies, Non-Governmental Organisations and industry.

The following expert presentations kicked off the different sessions:

1. Dr. Paul HOLTOM, Small Arms Survey - [Article 9 - Transit and Transshipment provisions in initial reports](#)
2. Dr. Diederik COPS, Flemish Peace Institute - [Transit controls of military goods in seven European countries](#)
3. Prof. dr. Anna PETRIG, University of Basel - [Article 9 ATT - A Law of the Sea Perspective](#)
4. Dr. Julia HÖRNIG, Erasmus University Rotterdam - [Transport and Transit of Arms by Road and Air](#)
5. Dr. Julia HÖRNIG, Erasmus University Rotterdam - [Transport and Transit of Arms by Sea](#)
6. Mr. Richard PATTERSON, Firearms and Ammunition Import/Export Roundtable – *An industry perspective*²⁶

²⁵ Multi-year Workplan for the WGETI Sub-working Group on Article 9 (Transit or trans-shipment), available at: [https://www.thearmstradetreaty.org/hyper-images/file/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20\(19%20Feb%202021%20cl\)/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20\(19%20Feb%202021%20cl\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20(19%20Feb%202021%20cl)/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20(19%20Feb%202021%20cl).pdf).

²⁶ This presenter did not use a PowerPoint presentation or other documentation for his presentation.

5. A non-exhaustive overview of the international and regional instruments as well as reference documents that were mentioned during the discussions and presentations is included in [Annex A](#) (building further on the lists included in the background papers that guided the discussions in the Sub-working Group).

6. The overall aim of this voluntary guide is to provide a picture of how States Parties approach the implementation of the obligations in Article 9 of the Treaty, also in relation to other articles, as well as to provide some understanding of the key concepts in the Article and the legal and policy discussions surrounding those concepts. It is not the purpose of the voluntary guide to prescribe, create new norms and standards or establish an agreement on a single interpretation of the Article 9 obligation, nor to reinterpret established definitions. Where legally binding definitions are applicable, this is explicitly mentioned as such.

Treaty text

7. The text of Article 9 is included below to help readers/users situate the key concepts in the context in which they appear in the Treaty. The text of other relevant articles is included in [Annex B](#).

ARTICLE 9 – TRANSIT OR TRANS-SHIPMENT

Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law.

National approaches to the terms ‘transit’ and ‘trans-shipment’

8. States Parties approaches on this topic were not addressed in the background paper and the expert presentation on transit and trans-shipment provisions in initial reports because the Initial Reporting Template does not explicitly deal with transit and trans-shipment definitions. The expert presentation did refer to the section on this topic in the Small Arms Survey’s *“The Arms Trade Treaty: A Practical Guide to National Implementation”*.²⁷ The presentation emphasized in that regard that the terms transit and trans-shipment are rarely defined in treaties because there is no consensus on their scope; it made reference to the simple meaning of transit as “passing through a place” and to the definition of trans-shipment in the amended International Convention on the Simplification and Harmonization of Customs Procedures (also known as the Revised Kyoto Convention), which alludes to a transfer from the importing means of transport to the exporting means of transport.

9. The reference to simplicity was also reflected in the interventions of States Parties about their national definitions of transit and trans-shipment. All intervening States Parties shared broad definitions, without references to specific customs procedures as part of those definitions. The common ground was the simple reference to **a movement through the (customs) territory of goods that are not destined for the local market, but for a destination outside the (customs) territory**. Such broad definitions allow States Parties to capture all potentially unlawful transactions within the scope of their transit and trans-shipment regulations.

10. The interventions further demonstrated that States do not consider transit and trans-shipment as different types of transfers, but that **trans-shipment is regarded as an element or sub-component of transit**: it is simply transit that involves transferring goods from one transportation vessel to another.

²⁷ This guide is available at <https://www.smallarmssurvey.org/resource/arms-trade-treaty-practical-guide-national-implementation>.

11. Some States apply the same regulatory measures to transit with or without trans-shipment, while others apply different measures. For the latter group, the element of trans-shipment is a very relevant factor when they consider which type of regulatory measures to apply to different forms and situations of transit. This was discussed more extensively during the different sessions on regulatory measures.

12. By way of illustration, the box below contains a sample of definitions of transit and trans-shipment in instruments that deal with the transfer of arms or related goods.

Box. Definitions of transit and trans-shipment in strategic goods related instruments

International definitions

[Decision of the Conference of the States Parties to the Chemical Weapons Convention on guidelines regarding declaration of import and export data for schedule 2 and 3 chemicals](#)

‘transit operations’ [...] shall mean the physical movements in which scheduled chemicals pass through the territory of a state on the way to their intended state of destination. Transit operations include changes in the means of transport, including temporary storage only for that purpose’

[UN Modular Small-arms-control Implementation Compendium \(MOSAIC\) 01.20: Glossary of terms, definitions and abbreviations](#)

transit: “movement of goods across the territory of a State as part of a transfer between two other States, including the transloading of the goods at the points of entry into and exit from the transit State” (transloading is understood as “transferring goods from one transportation vessel to another”, which includes “transfers from one mode of transportation to another (e.g. from ship to truck) and transfers between different vessels of the same mode of transportation (e.g. from one ship to another)”

transshipment: “transport of goods to an intermediate location outside the exporting and importing States, where they are loaded to a different transport vessel and transported to their final destination (or additional point of transshipment) without crossing the territory of the State in which the transloading takes place (NOTE: Transshipment usually takes place in transport hubs at ports and often takes place within designated customs areas, which are not subject to customs checks or duties.)”

Regional definitions

[User's Guide to the European Union Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment](#)

Transit': movements in which the goods (military equipment) merely pass through the territory of a Member State

- 'Transshipment': transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport

[Regulation \(EU\) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items \(recast\)](#)

‘transit’ means a transport of non-Union dual-use items entering and passing through the customs territory of the Union with a destination outside the customs territory of the Union where those items: (a) are placed under an external transit procedure according to Article 226 of the Union Customs Code and only pass through the customs territory of the Union; (b) are trans-shipped within, or directly re-exported from, a free zone; (c) are in temporary storage and are directly re-exported from a temporary storage facility; or (d) were brought into the customs territory of the Union on the same vessel or aircraft that will take them out of that territory without unloading;

Phrases ‘under its jurisdiction’ and ‘through its territory in accordance with international law’

13. The phrases ‘under its jurisdiction’ and ‘through its territory (in accordance with international law)’ delineate the scope of the obligation in Article 9 in a cumulative manner. States Parties need to regulate transit and trans-shipment that is both ‘under its jurisdiction’ and occurs ‘through its territory’. The Treaty therefore does not *oblige* States Parties to regulate transit and trans-shipment outside their territory, even if it involves vessels that are under their jurisdiction. [This does not affect the applicability of other international obligations](#) (see paragraph 22).

14. What is considered the “territory” of a State is not defined in the Treaty. During the presentation on this topic, it was explained that on the basis of general international law, including the Convention on International Civil Aviation (also known as the Chicago Convention) and the United Nations Convention on the Law of the Sea (UNCLOS), the State territory extends to all its land territory, its internal waters (including seaports), its territorial sea and the airspace above these land and maritime zones (it does not extend to the so-called exclusive economic zone or the high seas). This entails that the obligation in Article 9 intrinsically covers transit and trans-shipment by land, water and air; the Treaty itself does not differentiate between them. Based on their specific characteristics, national considerations or international obligations, States may opt to treat them differently (see paragraph 27).

15. The term jurisdiction is also not defined in the Treaty. Under general international law, State jurisdiction relates to the authority of a State to prescribe rules, to enforce those rules and to adjudicate cases concerning those rules. Concerning the regulation of transit and trans-shipment through the State territory, the expert presentation on this topic made it clear that States Parties in principle have full jurisdiction to prescribe and enforce regulatory measures, but that certain limits arise from international law.

16. Focusing on transit by water, the presentation addressed limitations concerning transit through the internal waters (including ports) and the territorial sea of a State.

17. Concerning the internal waters and ports, few limitations apply. The main restriction is that States cannot enforce their regulations against sovereign immune vessels, which are war ships and ships used only on government non-commercial service. Such vessels cannot be subject to onboard search or inspection. States will usually not exercise their jurisdiction towards vessels in their internal waters and ports if the issue at hand concerns internal affairs of the ship that do not affect their interests. It could be argued, however, that violations of the Treaty do not constitute “internal affairs of the ship”. Lastly, States need to apply their measures in a non-discriminatory manner. In that regard, for all vessels that are not sovereign immune vessels, States can apply a wide array of measures to enforce its transit and trans-shipment regulations in their internal waters, for example setting conditions for port entry, denial of

landing, trans-shipment or processing of cargo, denial of use of other port services, boarding and inspection and detention until compliance with the relevant regulations.

18. Concerning transit through the territorial sea, the so-called “right of innocent passage” applies, a rule of customary international law codified in Article 17 of the UNCLOS. The right of innocent passage limits the right of States – or the methods they use – to enforce its transit regulations against foreign ships that continuously and expeditiously pass through their territorial sea, provided that this passage is “innocent”, as described in Article 19 of the UNCLOS, and takes place “in conformity with [the UNCLOS] and with other rules of international law”. The scope of this limitation is not beyond debate. The expert presentation put forward that under international law, the mere fact of having arms on board does not render passage not innocent, but that the meaning of “conformity with [...] international law” is not clear, and that the requirements of the rule arguably leave room for States to include certain considerations concerning the application of the ATT and UNSC arms embargoes when they work out their regulatory and enforcement measures regarding transit through the territorial sea. As a minimum, States Parties need to be able to interdict transit – including through the territorial sea – that would be in violation of the prohibitions in Article 6 of the Treaty, most notably if a UN Security Council arms embargo would be violated or if the State has knowledge that the arms or items would be used in the commission of genocide, crimes against humanity or war crimes (see paragraph 49 *et seq.* on the relationship with Article 6).²⁸ Yet, in doing so, taking into account the right of innocent passage, States Parties should adapt their controls to avoid undue interference with genuine innocent passage, for example by focusing on ad hoc controls and inspections in case of a reasonable suspicion of an illicit transfer rather than systematic licensing obligations.

19. It should be noted that this right of innocent passage only applies to transit through the territorial sea and not to transit through the internal waters and ports. It is also noted that a similar concept does not apply to the national airspace (see paragraph 39).

20. It should be borne in mind that the phrase ‘in accordance with international law’ does not only refer to international law *limitations* on States Parties’ authority to prescribe and/or enforce transit and trans-shipment controls, but also to their international law *obligations* to do so. For example, States Parties which are also a party to the UN Firearms Protocol will need to take into account the obligations regarding transit in Articles 10 and 11 of the Protocol.

21. During the discussion on this topic, intervening States Parties mentioned that their transit controls only extend to transit on their territory. They pointed to a number of options for transit control, such as general customs control, systematic and ad hoc inspections, and prior notifications allowing to inspect or seize cargo.

22. On the obligations of flag States, the expert presentation emphasized that even though Article 94 of the UNCLOS requires States to exercise jurisdiction over their ships, these ships are not considered part of the territory of the State. This entails that Article 9 of the Treaty does not oblige States Parties to regulate their vessels in transit, because the Treaty only requires States Parties to regulate transit or trans-shipment “through its territory”. This does not affect the applicability of other international obligations. During the discussions it was pointed out, however, that States Parties which are also party to the UN Firearms Protocol do have certain obligations regarding cases where their vessels are involved in illicit transit of firearms outside of their territory, as it is understood that the obligation in Article 11 of the

²⁸ This topic was also addressed in the Small Arms Survey’s Practical Guide to National Implementation of the ATT, previously mentioned in paragraph 8.

Protocol to take appropriate measures to increase the effectiveness of import, export and transit controls extends to their extraterritorial jurisdiction.

Measures to regulate the transit and trans-shipment of arms

23. In line with the multi-year workplan, the Sub-working Group dedicated separate sessions to measures to regulate the transit and trans-shipment of arms according to the mode of transport, by land, air and sea. The interventions of States Parties during these sessions demonstrated, however, that the mode of transport is generally not the ultimate conclusive factor in differentiating the types of control measures that States Parties apply to transit and trans-shipment of arms. For that reason, this section addresses measures to regulate the transit and trans-shipment of arms in general first, regardless of the mode of transportation, before going into the relevant specifications of transit and trans-shipment by land, air and sea.

24. The presentation on transit and trans-shipment provisions in initial reports and subsequent interventions of States Parties demonstrated that it is generally understood that States Parties need to regulate all these forms of transit, but that in requiring “*appropriate measures where necessary and feasible*”, the Treaty allows flexibility and variation based on States Parties’ national situation, provided that they comply with the limitations and obligations of international law, as well as other articles of the Treaty, in particular Article 6. As Article 6 applies to all types of transfer mentioned in Article 2 (2), including transit and trans-shipment, as a minimum States Parties will have to regulate transit and trans-shipment in order to fulfil its obligations under Article 6. This topic, the material scope of the Treaty’s transit and trans-shipment obligations, was not explored in full during the sessions on regulatory measures, but forms part of the discussion on the relationship between Article 9 and other Articles (see paragraph 49 *et seq.*).

25. Concerning practical measures and options, in every session the following aspects were systematically addressed: the general options and common practices for regulating transit and trans-shipment, the specific forms of regulatory measures that States Parties take and the government departments and agencies that are involved in implementing these regulatory measures. In their interventions States Parties also addressed the different parties/entities involved in transit and trans-shipment that are responsible for compliance with their regulations. Overall reference can be made to the check list that was part of the expert presentation on transit and trans-shipment provisions in initial reports, and that was taken from the transit and trans-shipment section in the Small Arms Survey’s “*The Arms Trade Treaty: A Practical Guide to National Implementation*” (see box below). This section also provides extensive guidance on all these aspects.

Box. Possible checklist for the regulation of transit / trans-shipment

- Definition of transit and trans-shipment
- Feasible control measures in accordance with international law
- Defined scope for regulated items
- Responsibility for compliance with regulations
- Assessment criteria for authorization
- Effective administrative provisions
- Robust enforcement regime (i.e. sanctions, interagency cooperation, powers to interdict, suspend a shipment, training, outreach)

Expert presentation by Dr. Paul HOLTOM, Small Arms Survey: [Article 9 - Transit and Transshipment provisions in initial reports](#) (taken from Small Arms Survey's "[The Arms Trade Treaty: A Practical Guide to National Implementation, 2016](#)")

26. On the topic of regulatory measures, the interventions during the different sessions demonstrated that States Parties combine a range of tools to regulate transit and trans-shipment, in line with the flexibility that the Treaty provides. The most commonly used tool is the prior authorization requirement, sometimes in the form of different types of licences with varying degrees of control. This is often combined with exemptions from authorization, prior notification requirements and/or ad hoc controls for certain circumstances. Some States Parties integrate these controls in their general customs control system. Some States Parties also only allow specifically registered actors to carry out transit and trans-shipment operations.

27. States Parties differentiate their controls on the basis of a number of factors. One factor concerns the international law limitations mentioned above, which might entail that a systematic licence requirement is not feasible and ad hoc controls such as the right to temporally seize and inspect shipments might be more appropriate. At the same time, also international law obligations might play a role, such as the abovementioned UN Firearms Protocol. States Parties also mentioned other factors, such as the element of trans-shipment, where different measures are applied depending on whether the arms are trans-shipped from one means of transport to the other, or stay on board throughout the whole transit phase. States Parties also indicated that certain activities or purposes are exempt from transit and/or trans-shipment obligations, such as hunting, sport shooting or movements of arms owned by (friendly) armed forces or security personnel. The expert presentation of the Flemish Peace Institute also mentioned the type of military goods, the countries of destination or of origin of the controlled goods as factors that are used by States to differentiate their transit and trans-shipment controls. [States mostly use such exemptions and simplified procedures for low-risk transfers, which states generally consider unproblematic in light of Articles 6, 9 and 11 of the Treaty, for example, where based on a relationship of trust \(confidence\) between the states involved.](#)

28. In order to apply these measures in practice, State Parties require the relevant parties in the transfer to provide information on forthcoming transits and trans-shipments that they have made subject to their control. During the session, reference was made to a wide range of information, including copies of export, import and other transit authorizations (or alternatives), packing lists, contracts, invoices, information on the means of transport and the actors involved, relevant transport documentation and contact details of relevant authorities.

29. On the topic of relevant government departments and agencies, the presentation on transit and trans-shipment provisions in initial reports demonstrated that in most States Parties multiple ministries and government agencies are involved in the regulation of transit and trans-shipment. Explicit reference was made to: 1) the ministries of Defence, Interior and Public Security (including police); 2) the ministries of Business, Economy, Finance and Trade (including customs); 3) the ministry of Foreign Affairs; and 4) the export (transfer) control agency. This was also reflected in the interventions of States Parties during the different sessions. The customs authorities are often at the forefront of transit and trans-shipment controls, but usually there is inter-agency cooperation, involving some or all of the authorities mentioned above. Sometimes different authorities are competent for different types of transit (land, air and sea).

30. Inter-agency cooperation does not only concern the decision-making process for approving or denying transactions, but also the enforcement of regulatory measures. This includes monitoring transactions and exchanging relevant information between relevant departments and agencies.

31. On the topic of which parties/entities are (legally designated as) responsible for compliance with transit and trans-shipment regulations, intervening States Parties pointed out that transit and trans-shipment generally involves a wide range of parties which may or may not be established in the transit state. In that respect, States Parties often do not (only) hold the exporter responsible for compliance with their transit and trans-shipment regulations, but also the carrier, as well as logistical actors that are involved in the transit State itself. It is noted that this differs from transport law, which was the focus of the expert presentations on transit and trans-shipment of arms by land, air and sea. As indicated in the expert presentation, in the context of transport law, the focus is primarily on the relationship between the seller/shipper and the carrier, in which the former has the duty to provide the latter with all the necessary information, documents and licences, while the latter has duties of care concerning the cargo, including the storing, stowage and loading of goods (see paragraphs 33 and 41).

32. One specific issue that was included in the multi-year work plan, but was not extensively addressed during the sessions on regulatory measures concerns the implications of free trade / free movement of goods zones. While the background paper for the session on transit by land named a free trade area as one of the examples that States Parties included in their initial reports of circumstances where transit and/or trans-shipment is permitted without regulation or under a simplified procedure, during the sessions, one State Party shared that conventional arms are restricted goods and are not subject to the principles of free trade and are subject to specific rules.²⁹

Overview of options for regulating transit and trans-shipment cited in interventions and expert presentations			
<i>Regulatory (control) measures</i>	<i>Relevant factors to differentiate controls</i>	<i>Relevant government departments and agencies</i>	<i>Responsible parties</i>
prior authorization (different types of licences)	international law limitations and obligations	Various ministries, including ministries of Foreign Affairs, Defence, Interior and Public Security (including police)	Exporter
prior notification	element of trans-shipment	various ministries including Business, Economy, Finance and Trade (including customs)	Carrier
ad hoc controls	type of items	various ministries including Foreign Affairs	logistical actors (e.g. freight forwarder)
	countries of destination or of origin of	export (transfer) control agency	
	specific purposes (e.g. hunting or sport shooting)		

²⁹ To illustrate, the issue of free-trade zones is addressed in the Best Practice Guidelines for Transit or Trans-shipment of the Wassenaar Arrangement (<https://www.wassenaar.org/app/uploads/2019/consolidated/01Best-Practice-Guidelines-for-Transit-and-Trans-shipment.pdf>). These guidelines provide that the authority to stop, inspect and seize a shipment, as well as legal grounds to dispose of a seized shipment should extend fully to activities taking place in special Customs areas located within a sovereign state's territory, such as free-trade zones, foreign trade zones and export processing zones.

Measures to regulate the transit and trans-shipment of arms by land

33. The background paper for the session on this topic listed a number of examples of international and regional instruments governing transit and transportation of goods by road and rail, of which most were also addressed in the kick-off expert presentation. These are included in [Annex B](#). None of these instruments specifically address transit and trans-shipment regulations, nor conventional arms. As indicated in the expert presentation, these agreements concern transport law and deal with the obligations and rights of parties to a transport contract, on issues such as documentation, labelling, packaging, storing and the duty of care during transport.

34. The significance of these instruments for the practical implementation of the ATT and regulating (the permissibility of) transit and trans-shipment of conventional arms is therefore limited. Also the types of actors that are responsible to comply with arms transfer regulations might be different or broader than those who are responsible under (private) transport law.

35. One possibly relevant element could be the documentation that must accompany the goods during transport according to these instruments. Detailed descriptions of cargo that are required for safety purposes might in some circumstances be a source of information for arms transfer control authorities as a basis for risk assessments and to conduct ad hoc inspections. In that regard, it could be opportune for States to have communication and cooperation between their authorities in charge of the implementation of the ATT and transit controls and those involved in relevant road safety procedures. In this context, the expert presentation on this topic referred to certain dangerous goods regulations that are relevant for the transport of ammunition. While the presentation remarked that ammunition, regulated in Article 3 of the Treaty, is not directly included in the material scope of Article 9, States Parties should still take this into account, as ammunition is included in the scope of Article 6, which applies to all types of transfer, including transit and trans-shipment (see paragraph 49 *et seq.*).

36. Following the expert presentation, States Parties focused on the general transit and trans-shipment measures as described above. In terms of international and regional agreements, mention was made of the ECOWAS Convention on Small Arms and Light Weapons, which includes transit and trans-shipment as well as “transport” in its definition of transfer. The Convention provides a system of a general transfer ban and possible exemption requests that are processed via the ECOWAS Secretariat. Also the Central African Convention for the Control of Small Arms and Light Weapons was mentioned. This convention also includes transit and “transport” in its definition of transfer and requires authorization for all types of transfer. Both conventions are regional examples of positive international law obligations States Parties need to take into account when regulating transit and trans-shipment. On this subject, States Parties also referred to *bilateral* treaties that concern transit of goods through their territory.

Measures to regulate the transit and trans-shipment of arms by air

37. The background paper for the session on this topic listed a number of examples of international instruments governing transit and transportation of goods by air, of which most were also addressed in the expert presentation.

38. The focus in both was on the Chicago Convention, in reference to its articles 3 and 6 and to article 4 (6) of its Annex 17. The articles in the Convention clarify the following elements: 1) the Convention only applies to civil aircraft; 2) state aircraft, such as aircraft used in military services, can only fly over the territory of another State or land thereon with authorization by special agreement or otherwise; and 3)

States cannot use civil aviation for any purpose inconsistent with the aim of the Convention. The article in the Annex concerns measures to take relating to cargo to ensure a secured transport chain. Additionally, also Annex 18 to the Convention was mentioned, which deals with the safe transport of dangerous goods by air.

39. None of these articles specifically address transit and trans-shipment regulations and conventional arms. As with the abovementioned instruments governing transit and transportation by land, their significance for regulating (the permissibility of) transit and trans-shipment of conventional arms is limited. States Parties could nevertheless consider the information-sharing requirements concerning transport of dangerous goods as a source of information for transit and trans-shipment of goods within the scope of the relevant regulations, namely ammunition (see paragraph 35). Additionally, concerning all conventional arms within the scope of the Treaty, States Parties should also note Article 35 of the Chicago Convention, however, as explained in the box below.

Box. Munitions of war or implements of war on board of aircraft engaged in international navigation

Article 35a of the Chicago Convention explicitly provides that *“no munitions of war or implements of war may be carried in or above the territory of a State in aircraft engaged in international navigation, except by permission of such State”*. This provision entails that for transit by air there is no “right of innocent passage” under international law as there is for transit through the territorial sea.

Concerning the scope of “munitions of war or implements of war”, the article provides that *“each State shall determine by regulations what constitutes munitions of war or implements of war for the purposes of this Article, giving due consideration, for the purposes of uniformity, to such recommendations as the International Civil Aviation Organization may from time to time make”*.

Since this provision is directly relevant for the regulation of transit of conventional arms, it could be opportune for States Parties to foresee some type of coordination between their authorities in charge of the implementation of the ATT and those in charge of the implementation of the Chicago Convention.

40. In their interventions following the expert presentation on this topic, none of the intervening States Parties specifically addressed the abovementioned instruments or any other topic specific to transit by air.

Measures to regulate the transit and trans-shipment of arms by sea

41. The expert presentation on this topic addressed a number of international and regional instruments on transport by sea, with a focus on private transport law and its so-called “Hague Visby Rules”.³⁰ These instruments do not specifically address transit and trans-shipment regulations, nor conventional arms; they mostly regulate the relationship between the seller/shipper and the carrier vis-à-vis the transport, including loading and discharge. In that specific context the seller/shipper has the duty to provide the latter with all the necessary information, documents and licences. Interventions following the expert presentation demonstrated, however, that in States Parties’ transit and trans-shipment regulations also other actors bear responsibility for compliance, including the carrier and certain logistical actors (see paragraph 31 above and the section on the role of the private sector below).

³⁰ The basic document of these *Hague-Visby Rules* concerns the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, known as the *Hague Rules*. The Convention was amended by the so-called *Visby Protocol* of 23 February 1968.

42. On this topic of relevant actors, the issue was raised in the discussion that despite rules on the training of crew in maritime transport regulations, the personnel of carriers often lack sufficient training, which disables them from carrying out basic controls and hampers compliance. This was further addressed in the session on the role of the private sector.

43. Concerning regulatory measures on maritime transport, mention was made of instruments such as the International Maritime Dangerous Goods (IMDG) Code and the aforementioned UNCLOS. In that respect, the expert presentation returned to the topic of transit restrictions and the right of innocent passage. The presentation emphasized the right of the coastal state to regulate non-innocent passage and to stop, inspect and divert vessels from the territorial sea, also indicating that UN Security Council's arms embargoes must enjoy preference over innocent passage (in reference to article 103 of the UN Charter). One intervening State Party subsequently indicated that not all transit operations are subject to prior authorization, but that the custom authorities control all flows and can intervene. Similar to the aforementioned dangerous goods regulations on land and air transport, the IMDG code was raised in the expert presentation as only relevant for transport of ammunition (see paragraphs 35 and 39).

Box. Deviation of original itinerary / unscheduled transit

The expert presentation also addressed the special issue of deviation, where a ship changes its scheduled itinerary *en route* and performs an unscheduled transit through the territorial waters (sea and/or internal waters) of a State, either due to an emergency or for unforeseen circumstances (for example to pick up extra cargo). The question was raised whether such passage is considered "diversion" if the ship is carrying conventional arms and had not previously obtained a transit authorization from that State.

The expert presentation addressed the topic from the transport law perspective, in reference to the "Hague Visby Rules" and the International Code for the Security of Ships and of Port Facilities (ISPS). The presentation indicated that in the specific transport law context, a "reasonable deviation" is not deemed an infringement, but also that the international code for the security of ships and of port facilities (ISPS) includes "*preventing the introduction of unauthorized weapons, incendiary devices or explosives to ships or port facilities*" in its functional requirements.

In terms of transit and trans-shipment regulations, regardless of any classification of such deviation as "diversion", it should be noted that States Parties cannot discriminate between ships that make a scheduled stop, which was part of their initial itinerary, and ships that have changed their itinerary *en route* for unforeseen circumstances. If they have arms on board, these ships need to be subject to the States' transit and trans-shipment regulations in an equal manner. In line with the flexibility that Article 9 provides, this does not mean that in practice States have to necessarily sanction every specific instance where an unscheduled transit happens contrary to their transit regulations, but, as a minimum, they will need to apply regulatory measures to ensure their compliance with Articles 6 of the Treaty and their other relevant international obligations.

The role of the private sector in the transit and trans-shipment of arms

44. The role of the private sector was first addressed in Sub-working Group in the general presentation of the Flemish Peace Institute – in reference to its research report on transit – pointing to the variety of actors involved in transit and trans-shipment operations and their responsibility to comply with transit regulations. During the different sessions on regulatory measures, several States Parties subsequently referred to the responsibility of various actors in the transit and trans-shipment phase next to the exporter and the carrier. The box below contains an overview of such actors, based on a similar box

in the Small Arms Survey's *"The Arms Trade Treaty: A Practical Guide to National Implementation"*, which was the background of the export presentation of the Small Arms Survey in the Sub-working Group (see paragraph 8).

Box. Examples of actors involved in transit and trans-shipment operations

Carrier or transport service provider: the company that transports the goods for the exporter; in cases of trans-shipment, two or more carriers may be involved, such as a shipping company followed by an airline.

Customs broker, customs agent, or clearing agent: the company that is contracted to fulfil customs obligations on behalf of the exporter or the importer.

Freight forwarder: the company that is contracted by the exporter to organize the shipment of goods to the importer. This service comprises all related procedures, in some cases including customs formalities. In general, the forwarder does not move the goods directly, but contracts a carrier. In cases of trans-shipment, a freight forwarder will be responsible for carrying out the operation of trans-shipment. The forwarder may also involve other parties in these processes.

Shipping agent: the representative of the carrier with whom the customs broker and the freight forwarder deal.

45. A common challenge that was raised in the presentations and interventions was that these actors sometimes lack an adequate understanding of their transit and trans-shipment obligations. For logistical actors it was also raised that they not always have an understanding of indicators that could point to suspicious transactions. Contributing factors to this are a general lack of compliance awareness and cooperation between actors involved in a transfer, as well as the complexity of the regulations and the divergence between States. The latter was also highlighted in the industry presentation in this session, which focused on the exporter perspective and pointed to the impact on the legal trade, as some carriers are hesitant to accept conventional arms as cargo.

46. In that respect, a common recommendation from the presentation and interventions is to establish close cooperation between the competent authorities and these various actors through systematic outreach, monitoring and assistance. In addition, States Parties can also partner with representative organisations of such actors. Furthermore, States Parties also need to impel actors involved in arms transfers to share the necessary information with each other in order to comply with transit and trans-shipment obligations.

47. Recommendations to this effect were also made in the context of the Sub-working Group on Article 11, where the role of transit and trans-shipment states in preventing diversion was examined (see box).

Box. Possible measures towards the private sector in background paper on the role of transit and transshipment states in preventing diversion:

"Awareness-raising and due diligence requirements towards freight forwarders, shipping agents, customs agents and carriers etc., to help them become partners in preventing or detecting diversion: E.g., a prior authorization requirement for service providers that want to handle transit operations involving the transport of arms."

48. Awareness-raising of this kind is an important basic function of the competent authorities, but is also often referred to in the context of enforcement. That is because the criminal and administrative liability of involved actors is at stake and outreach efforts seek to enhance compliance. At the same time, these actors also have a role to play in risk assessment of the enforcement authorities, for example through effective information-sharing.

Relationship between Article 9 and other Articles

Relationship between Article 9 and Article 6

49. The relationship between Article 9 and Article 6 was already partially explored during the different sessions about regulatory measures. This is reflected above, in paragraphs 18 and 24. The latter paragraph emphasizes that Article 6 applies to all types of transfer mentioned in Article 2 (2), including transit and trans-shipment, and therefore, as a minimum, States Parties will have to regulate transit and trans-shipment in order to fulfil their obligations under Article 6. Paragraph 18 focuses on the specific topic of transit through the territorial sea and the limitations on States' power to intervene flowing from the so-called right to innocent passage; it emphasizes that, as a minimum, States Parties need to be able to interdict transit – including through the territorial sea – that would be in violation of the prohibitions in Article 6 of the Treaty, most notably if a UN Security Council arms embargo would be violated or if the State has knowledge that the arms or items would be used in the commission of genocide, crimes against humanity or war crimes.³¹

50. The relationship between Article 9 and Article 6 is also important in terms of the items that should be subject to the required controls. Whilst Article 9 only refers to conventional arms covered under Article 2 (1), the prohibitions in Article 6 also apply to the items covered under Article 3 (Ammunition/Munitions) and Article 4 (Parts and Components).

48-51. During the dedicated discussion on the relationship between Article 9 and Article 6, a few States Parties referred to elements of their national approach to applying the prohibitions in Article 6 to transit and trans-shipment. They indicated that their control regimes allow all flows to be subject to control, systematically or ad hoc. States Parties could apply exactly the same assessment criteria to transit and trans-shipment as they do to export, referring to both Article 6 and 7, with some exceptions. These exceptions would relate to forms of transit *without trans-shipment*, such as overflight. These controls would be confined to preventing the transits that are prohibited under Article 6. In practice, the national legislation would then contain the prohibitions in Article 6 as the (legal) basis for ad hoc transit controls.

Relationship between Article 9 and Articles 7 (6) and 11

52. The relationship between Article 9 and Article 11, as well as the specific provision in Article 7 (6), was already explored in the Sub-Working Group on Article 11 (Diversion) during the CSP8 cycle. In that respect, reference can be made to the background paper on the role of transit and trans-shipment states in preventing diversion which informed those discussions.³²

³¹ For clarity, on this topic the draft elements further specify that, taking into account the right of innocent passage, States Parties should adapt their controls to avoid undue interference with genuine innocent passage, for example by focusing on ad hoc controls and inspections in case of a reasonable suspicion of an illicit transfer rather than systematic licensing obligations.

³² This paper was included as Attachment 2 of Annex C in the WGETI Chair Letter and Sub-Working Group documents for the 15-16 February 2022 WGETI meeting

53. Concerning the general obligation in Article 11 (1) for all States Parties involved in arms transfers to take measures to prevent diversion, the bulk of the challenges and measures included in the background paper concerned the enforcement of States Parties' transit and trans-shipment regulations, as well as compliance by private actors. This was also the focus of the discussions in the Sub-Working Group on Article 11. An overview of these exchanges is included in the report of the WGETI Chair to CSP8.

54. Concerning information-exchange referred to in Article 7 (6) and Article 11 (3) of the Treaty, the background paper identified as a practical challenge the difficulty for transit States to rely on exporting States to systematically provide data about the shipment to the transit State. It included as an example the fact that information on the means and route of transport is not always known at the licensing stage (as transportation is often only secured *after* obtaining the export licence) and may be subject to change.

55. Concerning the obligation in Article 11 (3) for importing, transit, trans-shipment and exporting States Parties to cooperate and exchange information in order to mitigate the risk of diversion, the background paper provided a number of recommendations that go further than the provision of documentation by the exporting State to the transit or trans-shipment State in advance of the export. These are the following:

- i. Exporting States should alert transit and transshipment States in advance of shipments that are legal and properly authorised (advanced notification), so transit states are in a better position to focus their attention and resources on those shipments that have not been pre-notified or which may raise suspicion;³³*
- ii. Exporting States should alert transit and transshipment States when they are aware of diversion risks associated with a particular shipment in transit;*
- iii. All States involved in a transfer should, in accordance with national laws, share intelligence information gathered through national and regional networks and operations; etc.*

56. Due to the fact that transit control involves actors other than those in the exporting and importing State, operational cooperation and information exchange is of vital importance. An additional consideration is the link between Article 9 and Articles 11 (4) and (5), which respectively encourage States Parties, inter alia, to share information regarding illicit activities and oblige States Parties to assist each other in investigations, prosecutions and judicial proceedings concerning violations of arms transfer-related regulations. If a State Party identifies possible illicit activities or actors in another State Party, that State Party should be systematically informed, so that investigations can be opened in that jurisdiction as well. In this context, regional cooperation fora could also play a facilitating role.

(ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs). In terms of measures, the paper drew on the preceding paper titled 'Possible measures to prevent and address diversion', which was welcomed at CSP4 and is available in the Tools and Guidelines section of the ATT website.

³³ In this context, as an example, reference can be made to Article 10 (2) (b) of the UN Firearms Protocol. This provision provides that *before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State Party shall verify that, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.* This is naturally only an obligation for States Parties that are also Party to the UN Firearms Protocol and limited to firearms, their parts and components and ammunition.

Relationship between Article 9 and Article 12 (2)

49-57. Article 12 (2) encourages States Parties to maintain records of conventional arms that are authorized to transit or trans-ship territory under its jurisdiction. This could include establishing and maintaining a registry of all types of transfers, including transit and trans-shipment.

Conclusion

58. As explained in paragraph 6, the aim of this voluntary guide is to provide a picture of how States Parties approach the implementation of the obligations in Article 9 of the Treaty and to provide some understanding of the key concepts in this Article. It is not its purpose of to prescribe, create new norms and standards or establish an agreement on a single interpretation of the Article 9 obligation, nor to reinterpret established definitions.

59. Nevertheless, the presentations and exchanges that underpin this guide have shed a clear light on many relevant aspects of transit- and trans-shipment control and the related Treaty obligations, as well as their practical implementation in States Parties' national control systems. This makes this Guide a useful instrument for all States that need to introduce transit and trans-shipment controls in accordance with the Treaty or intend to update their existing controls.

60. The substantive focus of this Guide was outlined in the multi-year workplan of the Sub-working Group on Article 9, as welcomed at CSP7. This does not mean that all relevant issues concerning transit and trans-shipment controls have been addressed. As demonstrated throughout the Guide, many cross-cutting issues are highly relevant for transit and trans-shipment controls, in particular enforcement and international cooperation. In that respect, transit and trans-shipment need to remain an important focus of attention beyond this Guide, whenever States Parties will explore these cross-cutting issues further within the ATT framework. For these discussions to be useful in practice, it will also be important to involve the relevant private sector actors, especially the types identified in paragraph 44, as well as international organisations or bodies which deal with similar or related issues, such as the World Customs Organisation, Interpol, the UN Office on Drugs and Crime, the World Shipping Council and the International Air Transport Association.

ANNEX A. CITED INTERNATIONAL AND REGIONAL INSTRUMENTS AND REFERENCE DOCUMENTS

National approaches to the terms 'transit' and 'trans-shipment'

1. Instruments and documents cited in expert presentation by dr. Paul Holtom, Small Arms Survey - [Article 9 - Transit and Transshipment provisions in initial reports](#)
 - ❖ International instruments
 - [International Convention on the Simplification and Harmonization of Customs Procedures \("Revised Kyoto Convention"; 2008\)](#)
 - ❖ Best practice and reference documents
 - [Small Arms Survey, The Arms Trade Treaty: A Practical Guide to National Implementation \(2015\)](#)
2. Instruments and documents cited in expert presentation by dr. Diederik Cops, Flemish Peace Institute - [Transit controls of military goods in seven European countries](#)
 - ❖ Regional instruments
 - [EU Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment](#)
 - [EU User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment \(2019\)](#)
 - ❖ Best practice and reference documents
 - [Flemish Peace Institute, Under the radar: Transit of military goods – from licensing to control \(2022\)](#)

Phrases 'under its jurisdiction' and 'through its territory in accordance with international law'

1. Instruments and documents cited in expert presentation by prof. dr. Anna Petrig, University of Basel - [Article 9 ATT - A Law of the Sea Perspective](#)
 - ❖ International instruments
 - [United Nations Convention on the Law of the Sea \("UNCLOS"; 1982\)](#)
 -

Measures to regulate the transit and trans-shipment of arms by land

1. Examples of international and regional instruments governing transit and transportation (Annex A of the background paper on measures to regulate the transit and trans-shipment of arms by land and air, attached to [ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs](#))
 - ❖ International instruments relevant to transportation by road
 - [Convention on the Contract for the International Carriage of Goods by Road \("CMR"; 1956\)](#)
 - [Protocol to the Convention on the Contract for the International Carriage of Goods by Road \(1978\)](#)
 - ❖ Regional instruments relevant to transportation by road
 - [ECOWAS Convention Regulating Inter-State Road Transportation between ECOWAS Member States \(1982\)](#)
 - [ECOWAS Convention relating to Inter-States Road Transit of Goods \(1982\)](#)

- [OAS Agreement on the Adoption of the Inter-American Manual on Traffic Control Devices for Streets and Highways \(1979\)](#)
 - [Inter-American Convention on Contracts for the International Carriage of Goods by Road \(1989\)](#)
 - [European Agreement concerning the International Carriage of Dangerous Goods by Road \("ADR"; 1957\)](#)
 - [Intergovernmental Agreement on the Asian Highway Network \(2003\)](#)
 - ❖ International instruments relevant to transportation by rail
 - [International Convention to Facilitate the Crossing of Frontiers for Goods Carried by Rail \(1952\)](#)
 - [Convention on International Customs Transit Procedures for the Carriage of Goods by Rail under Cover of SMGS Consignment Notes \(2007\)](#)
 - [United Nations Convention on International Multimodal Transport of Goods \(1980; not in force\)](#)
 - ❖ Regional instruments relevant to transportation by rail
 - [Agreement on International Railways in the Arab Mashreq \(2003\)](#)
2. Additional instruments and documents cited in expert presentation by dr. Julia Hörnig, Erasmus University Rotterdam - [Transport and Transit of Arms by Road and Air](#)

- ❖ International instruments
 - [UN Firearms Protocol supplementing the UN Convention against Transnational Organized Crime \(2001\)](#)
- ❖ Regional instruments
 - [EU Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community](#)
 - [EU Regulation No 258/2012 of the European Parliament and of the Council of 14 March 2012](#)
- ❖ Best practice and reference documents
 - [Wassenaar Agreement Compendium of Best Practice Documents](#)

Measures to regulate the transit and trans-shipment of arms by air

1. Examples of international and regional instruments governing transit and transportation (Annex A of the background paper on measures to regulate the transit and trans-shipment of arms by land and air, attached to [ATT/CSP8.WGETI/2022/CHAIR/713/M1.LetterSubDocs](#))
- ❖ International instruments relevant to transportation by air
 - [Convention for the Unification of Certain Rules relating to International Carriage by Air \("Warsaw Convention"; 1929\)](#)
 - [Convention for the Unification of Certain Rules Relating to International Carriage by Air \("Montreal Convention"; 1999\)](#)
 - [Convention on International Civil Aviation \("Chicago Convention"; 1944\)](#)
 - ❖ Best practice and reference documents
 - [Wassenaar Arrangement Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons \(SALW\) through Air Transport \(2007\)](#)
 - [Wassenaar Arrangement Elements for Controlling Transportation of Conventional Arms Between Third Countries \(2011\)](#)

2. Additional instruments and documents cited in expert presentation by dr. Julia Hörnig, Erasmus University Rotterdam - *Transport and Transit of Arms by Road and Air*

- ❖ International instruments relevant to transportation by air
 - [*IATA Dangerous Goods Regulations \("IATA DGR"\)*](#)
- ❖ Regional instruments relevant to transportation by air
 - [*EU Commission Regulation No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation \(EC\) No 216/2008*](#)
 -

Measures to regulate the transit and trans-shipment of arms by sea

1. Instruments and documents cited in expert presentation by dr. Julia Hörnig, Erasmus University Rotterdam - *Transport and Transit of Arms by Sea*

- ❖ International instruments relevant to transportation by sea
 - *"Hague-Visby Rules"*
 - [*International Convention for the Unification of Certain Rules of Law relating to Bills of Lading \(1924\)*](#)
 - [*Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading \(1968\)*](#)
 - [*United Nations Convention on the Carriage of Goods by Sea \(1978\)*](#)
 - [*International Convention for the Safety of Life at Sea \("SOLAS" 1974\)*](#)
 - [*International Convention on Arrest of Ships \(1999\)*](#)
 - [*International Maritime Dangerous Goods Code \("IMDG Code"; 2020\)*](#)
- ❖ Regional instruments relevant to transportation by sea
 - [*European Union Customs Code \(2013\)*](#)

ANNEX B. OTHER RELEVANT ARTICLES OF THE TREATY**ARTICLE 2 – SCOPE**

1. *This Treaty shall apply to all conventional arms within the following categories: (a) Battle tanks; (b) Armoured combat vehicles; (c) Large calibre artillery systems; (d) Combat aircraft; (e) Attack helicopters; (f) Warships; (g) Missiles and missile launchers; and (h) Small arms and light weapons.*
2. *For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as transfer.*
3. *This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party's ownership.*

ARTICLE 5 (3) – GENERAL IMPLEMENTATION

3. *Each State Party is encouraged to apply the provisions of this Treaty to the broadest range of conventional arms. [...]*

ARTICLE 6 – PROHIBITIONS

4. *A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.*
5. *A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.*
6. *A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.*

ARTICLE 7 (6) – EXPORT AND EXPORT ASSESSMENT

6. *Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.*

ARTICLE 11 (1) AND (3) – DIVERSION

1. *Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion.*

3. *Importing, transit, trans-shipment and exporting States Parties shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of the transfer of conventional arms covered under Article 2 (1).*

ARTICLE 12 (2) – RECORD-KEEPING

2. *Each State Party is encouraged to maintain records of conventional arms covered under Article 2 (1) that are transferred to its territory as the final destination or that are authorized to transit or trans ship territory under its jurisdiction.*

ARTICLE 15 – INTERNATIONAL COOPERATION

1. *States Parties shall cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty.*
2. *States Parties are encouraged to facilitate international cooperation, including exchanging information on matters of mutual interest regarding the implementation and application of this Treaty pursuant to their respective security interests and national laws.*
3. *States Parties are encouraged to consult on matters of mutual interest and to share information, as appropriate, to support the implementation of this Treaty.*
4. *States Parties are encouraged to cooperate, pursuant to their national laws, in order to assist national implementation of the provisions of this Treaty, including through sharing information regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms covered under Article 2 (1).*
5. *States Parties shall, where jointly agreed and consistent with their national laws, afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty.*

ANNEX C**WORK PLAN SUB-WORKING GROUP ON ARTICLE 11**

Tuesday, 09 May 2023, 16:30-18:00

Introduction

1. The WGETI Sub-working group on Article 11 (Diversion) was established by the WGETI Chair after consideration of recommendations and decisions of the Fourth Conference of States Parties (CSP4). Article 11 (Diversion) is recognized as one of the key objectives of the Arms Trade Treaty (ATT).

First CSP9 meeting of the Sub-working group

2. The Facilitator started the meeting of the Sub-working Group on 15 February 2023 by explaining that the session would focus on the topic of post-delivery cooperation, in line with the decision of CSP8 to extend the work of the Sub-working Group on by one additional year for this purpose. Participants were asked to identify which specific topics regarding post-delivery cooperation they still wanted to discuss further during this CSP9 cycle, and which possible outcomes they would still want to achieve for CSP9. Reference was made to the recommendations and suggestions in the working paper on post-delivery cooperation that the CSP8 President submitted to the Conference last year. To inform the discussion, the Stockholm International Peace Research Institute (SIPRI) was invited to present their recent paper to the Sub-working Group, which deals with multilateral steps for debating and enabling adoption and use of post-delivery on-site inspections.

3. The presentation raised a number of challenges that could be addressed within the ATT framework, such as the variety of terms referring to post-delivery on-site inspections and discrepancies in the meaning attached to those. This affects the core requirements for effective post-delivery cooperation, namely building trust, confidence, cooperative relationships. The presentation also highlighted the relevant role ATT bodies can continue to play to allow exchanges on the use and value of post-delivery on-site inspections and other post-delivery measures, as well as on possible links with (assistance on) Physical Security and Stockpile Management of arms (PSSM).

4. The presentation triggered several questions, for example, on the use of tabletop exercises to identify the potential need and challenges of States regarding post-delivery cooperation, and the role of PSSM. Intervening participants agreed that the basis for an effective post-delivery on-site inspections and other post-delivery measures is a relationship of cooperation and mutual trust between the exporting and importing States. In terms of further work, some participants expressed their openness to develop more guidance on this topic, while others emphasized the continuing need to exchange national experiences and practices, including sharing information from concrete cases of post-delivery cooperation. In that respect, participants acknowledged the role of the Diversion Information Exchange Forum, while also more open discussions could be useful.

Second CSP9 meeting of the Sub-working group

5. In view of limited interventions on this topic during the February meeting, the Facilitator decided to make the suggestion of voluntary guidance on the introduction and implementation of post-delivery cooperation in concrete terms. In that respect, in line with the background paper that

was circulated during the February meeting and the few comments about guidance, attachment 2 contains a proposal to use the practice recommendations from the CSP8 President's working paper about post- delivery controls and coordination and include the operational steps therein as an Annex in the document with Possible Measures to Prevent and Address Diversion.

6. Next to the consideration of this proposal, the Facilitator will give participants the opportunity to exchange current national experiences and practices regarding post-delivery cooperation, as well as any other measures which States Parties have undertaken to prevent diversion. The Facilitator reminds participants in that regard that such policy exchanges were the key purpose of this Sub-working Group.

7. Concerning the way forward of diversion-related policy exchanges, participants are informed that a discussion on the forthcoming topics and working methods of the WGETI is scheduled for the Working Group's Wednesday morning session.

ATTACHMENT 1

**DRAFT AGENDA FOR THE MEETING
OF THE SUB-WORKING GROUP ON ARTICLE 11**

Tuesday, 09 May 2023, 16:30-18:00

1. Proposal for inclusion of operational steps in Diversion Prevention Measures document

The Facilitator will present the proposal of including operational steps for the introduction and implementation of post-delivery cooperation as an Annex in the document with Possible Measures to Prevent and Address Diversion. The Facilitator will subsequently seek the views of participants whether this proposal can be a deliverable for CSP9.

2. National experiences and practices regarding post-delivery cooperation and other diversion prevention measures

The Facilitator will give participants the opportunity to exchange current national experiences and practices regarding post-delivery cooperation, as well as any other measures which States Parties have undertaken to prevent diversion.

ATTACHMENT 2**PROPOSAL: OPERATIONAL STEPS FOR THE INTRODUCTION AND IMPLEMENTATION OF POST-DELIVERY COOPERATION
(ANNEX I TO POSSIBLE MEASURES TO PREVENT AND ADDRESS DIVERSION)****Introduction**

The document with Possible Measures to Prevent and Address Diversion, welcomed by the Conference at CSP4, makes reference to post-delivery checks as one of the measures that exporting States can take to prevent diversion in the third stage of the transfer chain (at or after importation / post-delivery). The topic of post-delivery cooperation between exporting and importing States subsequently became the priority theme of the German CSP8 Presidency. In that context, the CSP8 President presented a working paper to the Conference which provided a comprehensive toolbox on the topic, which, inter alia, included operational steps for the introduction and implementation of post-delivery cooperation.³⁴ During the CSP9 cycle, the topic of post-delivery cooperation was considered further in the WGETI Sub-working Group on Article 11. During those discussions, some participants suggested that it would be useful to include these operational steps as an Annex in the document with Possible Measures to Prevent and Address Diversion.

As elaborated below, the operational steps concern the following aspects of the introduction and implementation of post-delivery cooperation: 1) political commitment and buy in; 2) structure, organisation and staff; 3) legal considerations; 4) communication with importing States; 5) pre-control phase – preparation of individual controls; 6) control phase – conducting controls; and 7 post-control phase.

In accordance with the main document with Possible Measures to Prevent and Address Diversion, the list presents a voluntary, non-exhaustive overview of practical steps which States Parties may draw from, where relevant, useful and feasible within the available resources of each State. They are to be understood only as suggested options for the implementation of the general obligation of States Parties to prevent diversion in Article 11 (1) of the Treaty and the specific obligation of exporting States Parties to do so by assessing the risk of diversion of exports and considering the establishment of mitigation measures. In Article 11 (2). The suggestions are not intended to reinterpret, add to, or derogate from relevant obligations in any way.

Political commitment and buy in

1. Consider States that have already introduced post-delivery cooperation in order to learn from their experiences.
2. Carry out an initial pilot phase of post-delivery cooperation in order to gain first-hand experience and to test domestic decision-making and coordination structures or identify the optimal structures, then subject the results to an internal evaluation process before more formal structures are established.
3. Establish a dialogue with exporters and parliaments to explain the motivation for post-delivery cooperation as well as its limitations.

³⁴ The working paper is available at <https://www.thearmstradetreaty.org/conference-documents-csp8> (CSP8 President).

4. Develop an initial general policy paper.
5. Define the scope of controls, in geographical terms and in terms of the items subject to control. Focusing on final and complete products may be useful as it may be difficult to trace and control components or assemblies that are to be incorporated into weapons systems abroad; a risk-guided approach could focus on those items that are most likely to be diverted.

Structure, organisation and staff

1. A standardised procedure is helpful to guide the inter-agency process for the checks to be performed in any given year.
2. A specialised unit could be established, for example within the licensing authority.
3. Staff should be identified in part based on the following skills that may be useful: flexibility, multilingualism, diplomatic competence, intercultural understanding, legal knowledge, technical understanding and possibly an enforcement background.
4. Special guidance documentation could be drawn up for embassy personnel.
5. Possible indicators for risk-based selection criteria could be based on the destination country, the items in question (some items are more likely to be diverted than others) or the scope of the delivery. The selection may also be guided by the time that has elapsed since the initial delivery or the number of on-site visits to a particular end-use destination in the past. Guidance can be provided by embassy personnel, intelligence or media reports or as a result of information-sharing among State Parties.
6. The visit needs to be coordinated between the exporting and the importing State beforehand.
7. The verification team should ideally be accompanied by embassy officials in the importing State.
8. Control officers could be provided with diplomatic passports. This may be more flexible than asking for formal assurances from the importing State.

Legal considerations

1. National legislation could clarify that the approval of a licence (possibly for a defined range of end-use destinations) would be dependent on the submission of written assurances by the end-user that consent is given for subsequent on-site verifications.
2. National legislative steps may also be necessary to allow the control unit to trace the transaction in question (e.g. reporting requirements for the actual export, including the submission of serial numbers to the control authority).
3. As permanent exports are usually dependent on the presentation of an end-use certificate, end-use documents are a simple and helpful tool to obtain the necessary assurances/approval from the end-user of the items in question. The template could simply be amended. For example, the template for end-user certificates could require the end-user to sign the following assurance: "Additionally, the end-user certifies that the authorities in the exporting State have the right to verify the end-use of the above-mentioned weapon on-site upon their request at any time".
4. The exchange of diplomatic notes may also be a way to obtain the consent of the importing State.

Communication with importing States

1. Embassies may play a crucial role in explaining the motivation for post-delivery cooperation. They could conduct more general outreach when post-delivery cooperation is initially introduced; more detailed information could be provided during preparations for an actual on-site verification. Embassy staff should be provided with guidance material.
2. It may be helpful to provide information material for the exporters that can be forwarded to their customers.
3. Conducting international outreach or participating in international outreach efforts may help to raise awareness and acceptance of post-delivery cooperation.

Pre-control phase – preparation of individual controls

1. Embassies can facilitate the communication with the authorities of the importing State.
2. Clear and direct communication lines between the verification team and the local embassy are necessary in the run-up to an on-site visit.
3. The preparation of a dossier for the embassy (e.g. export licence, information about the consignee/end-user, EUC, description of the arms, serial numbers) may be useful for the initial talks with the authorities of the importing State.
4. The verification measure should be planned beforehand and a strategy should be in place, i.e. what kind of items will be subject to inspection? Under which circumstances? What sort of preparation will be necessary?
5. Typical issues to be coordinated between the verification team and the local authorities include the location and time of the verification visit. In importing States with a large territory where items may have been distributed across the country, verification officers may need to travel to different locations or the items could be gathered in a central location.
6. Officers charged with the verification visit could be trained by military staff in safety measures for handling the weapons in question; they could also be trained in identifying the items that are subject to inspection. The exporter may also be a useful source of information in the run-up to a verification visit, e.g. by providing in-depth presentations of the items in question or merely by providing photographs that may help in identifying the weapons.
7. The involvement of the importing State's authorities should be discussed beforehand. It may be helpful to plan for extra meetings for example at the MFA, MoD or other local authorities that may wish to gain a better understanding of the motivation for the verification visit.
8. Coordination with the importing State at an early stage may also facilitate the issuing of visas or other required travel documents.

Control phase – conducting controls

1. Logistics to consider include issues such as access to the verification site, the use of translators, transport services, permission to take pictures of the arms and serial numbers.
2. It is useful to consider alternative means of verification, e.g. if items cannot be presented or have been used or destroyed. This could include the presentation of documents or pictures of arms.

3. There should be clear communication on the handling of the inspected items; arms should be safe and unloaded.
4. A visual check of all transferred arms – based on their serial number – is recommended; in the case of larger volumes of arms, a smaller sample check may also be acceptable.

Post-control phase

1. A template for reporting should be in place.
2. It is also useful to consider who the addressees of the reports will be (e.g. other agencies, parliament) and how often these reports will be made (e.g. after each visit or annually?).
3. Other issues to consider include the following: Will the information be shared with international partners? What kind of feedback should be provided to the importing State?
4. Will reports also be shared with other partners? It is important to consider how the outcome of the verification visit can inform subsequent export licensing processes for the end-user in question and what to do in the case of non-compliance with the end-user's assurances. Such cases could also be presented to ATT partners.
5. Appropriate sanctions in the case of non-compliance could include the suspension of export control licensing decisions until the incidents of non-compliance have been clarified. It is recommended to first discuss the instance of non-compliance with the importing State and to identify the source of the problem encountered. It may also be helpful to offer support in helping to prevent future incidents, e.g. training or capacity-building measures in the field of export controls, safe storage, anti-bribery measures etc.
