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**ATT WORKING GROUP ON EFFECTIVE TREATY IMPLEMENTATION
CHAIR'S DRAFT REPORT TO CSP9**

INTRODUCTION

1. The Draft Report to the Ninth Conference of States Parties (CSP9) is presented by the Chair of the Working Group on Effective Treaty Implementation (WGETI) to reflect the work conducted by the WGETI since CSP8 and to put forward recommendations for consideration by CSP9.
2. The draft report includes the following annexes:
 - a. [Annex A: Draft Chapter 2 \(Article 6 – Prohibitions\) of the proposed Voluntary Guide to implementing Articles 6 & 7 of the ATT](#) (page 11);
 - b. [Annex B: Draft elements of the proposed Voluntary Guide to implementing Article 9 of the ATT](#) (page 25);
 - c. [Annex C: Draft Operational Steps for the Introduction and Implementation of Post-Delivery Cooperation](#) (page 48); and
 - d. [Annex D: Draft Proposal on the WGETI Configuration and Substance](#) (page 53).

BACKGROUND

3. The Third Conference of States Parties (CSP3) decided to establish a *standing* Working Group on Effective Treaty Implementation to operate under the Terms of Reference contained in Annex A of the Co-chairs' report to CSP3 ([ATT/CSP3.WGETI/2017/CHAIR/158/Conf.Rep](#)), including a mandate to serve as an ATT continuous platform to:
 - a. exchange information and challenges on the practical implementation of the Treaty at the national level;
 - b. address, in detail, specific issues set by CSP as priority areas (topics) to take Treaty implementation forward; and
 - c. identify Treaty implementation priority areas for endorsement by CSP to be used in Treaty implementation support decisions e.g. ATT Voluntary Trust Fund.

4. In accordance with the CSP5 decision, the WGETI focused its work during intersessional period of CSP9 on Articles 6, 7, 9 and 11 in dedicated sub-working groups.

Appointment of WGETI Chair

5. On 24 November 2022, the CSP9 President appointed Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain as Chair of the WGETI for the period between CSP8 and CSP9.

WGETI Sub-working Groups and appointment of facilitators

6. After consultation and guided by decisions of CSP5, the WGETI Chair decided to focus work until CSP9, first and foremost, on three priority issues to be addressed in three Sub-working Groups led by dedicated facilitators as listed below:

- a. Articles 6 (Prohibitions) and 7 (Export and Export Assessment) facilitated by Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain.
- b. Article 9 (Transit or trans-shipment) facilitated by Mr. Rob WENSLEY of South Africa.
- c. Article 11 (Diversion) facilitated by Ambassador Ignacio SÁNCHEZ DE LERÍN of Spain.¹

FIRST MEETING OF THE WGETI

7. The WGETI Sub-working Groups held their first set of meetings of the CSP9 preparatory process on 14 - 15 February 2023. 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.

Sub-working Group on Articles 6 & 7

8. During the joint meeting of the Sub-working Groups on Articles 6 & 7 and Article 9, the Facilitator on Articles 6 & 7 introduced the possible draft elements for Chapter 2 (Article 6 – Prohibitions) of the proposed Voluntary Guide to implementing Articles 6 & 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 & 7 in the CSP8 cycle.

9. In the open discussion that followed, all the delegations that intervened found the draft chapter a valuable and accessible document, providing a good overview of all the key issues and correctly reflecting the discussions that were conducted in the Sub-working Group. In that respect, it can be an important tool for capacity-building. Delegations 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 delegations 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.

¹ Ambassador SÁNCHEZ DE LERÍN facilitated the work on Article 11 as an interim arrangement throughout the CSP9 cycle, because despite extensive consultations by the CSP9 President, the WGETI Chair and the ATT Secretariat, no eligible and willing State Party had been secured to assume the role of Facilitator on this topic.

10. Following the discussions on their respective draft elements, the Facilitator on Articles 6 & 7 and the Facilitator on 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).

11. Delegations exchanged views based on the questions that were included in the Facilitators' background paper on the topic. Some delegations 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.

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

13. Subsequently, some delegations 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, focusing 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.

Sub-working group on Article 9

14. During the joint meeting of the Sub-working Groups on Articles 6 & 7 and Article 9, 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 to implementing 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 delegations directed attention to.

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

16. During the open discussion that followed, intervening delegations commended the draft elements for the clear manner in which they explain complex concepts, which makes the Voluntary Guide a useful tool to support implementation of Article 9. In doing so, delegations emphasized the importance of strengthening transit controls, while respecting the different realities which various States Parties face. Delegations also acknowledged the importance of outreach and support to private sector actors that are active in transit and trans-shipment. Some delegations 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.

17. 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, delegations exchanged views based on the questions that were included in the Facilitators' background paper on the topic.

18. On the relationship between Articles 9 and 11, delegations 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.

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

Sub-working group on Article 11

20. The interim Facilitator started the meeting of the Sub-working Group 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 Article 11 by one additional year for this purpose. Delegations 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.

21. 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 confidence and trust building, as well as 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).

22. 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 delegations agreed that the basis for 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 delegations 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, delegations acknowledged the role of the Diversion Information Exchange Forum, while also more open discussions could be useful.

SECOND MEETING OF THE WGETI

23. The WGETI Sub-working Groups held their second set of meetings of the CSP9 preparatory process on 09 May 2023. On 10 May 2023, the Working Group as a whole held a meeting with the aim to identify the priority topics and working methods for the Working Group beyond CSP9, with a view to present a proposal to CSP9.

Sub-working Group on Articles 6 & 7

24. The Facilitator on Articles 6 & 7 introduced the revised draft elements for Chapter 2 (Article 6 (Prohibitions) of the proposed Voluntary Guide to implementing Articles 6 & 7. The revised draft took into account the comments that were made to the draft document presented to the Sub-working Group in February, and included additional elements which reflected and built on the views exchanged during the February meeting about the relationship between Article 6 and other Treaty Articles.

25. In the open discussion that followed, all the delegations that intervened reiterated their support to the document and acknowledged that the additional elements reflected the discussions that were conducted in February in a clear manner. A few delegations provided minor suggestions on the draft text, and one delegation emphasized the voluntary nature of the draft elements, which should be very clear. In that regard, the Facilitator reconfirmed that this issue is explicitly addressed in paragraph 2 of the draft chapter.

26. Following the discussion on the revised Voluntary Guide, the Sub-working Group explored the obligation in Article 7(2) for exporting States Parties to consider risk mitigating measures when conducting assessments in accordance with Articles 7.1(a) and (b) as well as Article 7.4.

27. The Small Arms Survey kicked-off the discussion on this topic with an expert presentation about mitigating the risk of serious acts of arms related gender based violence, and violence against women and children. Argentina then presented their working paper to the Sub-working Group, proposing the preparation of a Guide to Good Practices in arms control for the prevention of gender-based violence and introducing a draft questionnaire to that end. The two presentations were followed by a lively interaction between delegations and presenters. Issues that were raised included support to institutional capacity-building as a mitigating measure, monitoring the impact of mitigation measures and information sources regarding GBV to inform risk assessments.

28. After the specific debate on mitigating measures and GBV, delegations also exchanged views about mitigating measures in general, based on the questions that were included in the Facilitator's background paper on the topic. Some delegations explained that to mitigate risks, they conduct in-depth analyses before granting export licences, insist on detailed descriptions of the specific use of weapons by the end-user and have the flexibility in their systems to react to changes in circumstances after the export. Other delegations noted that risk mitigation stretches beyond the export risk assessment phase and also concerns actions in the importing State. In that regard, one delegation described that arms sales are dealt with as part of a partnership with the importing State and imply a long-term-dialogue which includes conditions on the use and storage of the weapons and training on use. Some delegations also shared that the application of due diligence by exporters plays a role in risk mitigation.

29. *Conclusion and Way forward.* For CSP9, the Facilitator has considered the few outstanding comments and suggestions on the revised draft elements for Chapter 2 (Article 6 (Prohibitions) of the proposed Voluntary Guide and has prepared a revised draft of the chapter for this draft report (Annex A). The Conference is recommended to note that the draft Chapter 2 is completed as a living document of a voluntary nature, to be reviewed and updated by the Working Group, as appropriate.

30. After CSP9, In accordance with the multi-year work plan for the Sub-working Group, the Facilitator will begin his work on a list of possible draft elements for Chapter 3 (Article 7 (Export and Export Assessment), derived from national presentations and the views exchanged during the discussions held so far during the meetings of the Sub-working Group. These draft elements will be presented to the first meeting of the Sub-working Group in the CSP10 cycle in 2024.

Sub-working group on Article 9

31. The Facilitator on Article 9 first gave an overview of the discussions in his Sub-working Group, and indicated that since he had not received any proposal to hold further discussions on any transit-related topic, the Sub-working Group will wrap up its work this year (2023). The Facilitator then presented the revised draft elements for a possible Voluntary Guide to implementing Article 9. The revised draft took into account the comments that were made to the draft document presented to the Sub-working Group in February, and included additional elements which reflected and built on the views exchanged during the February meeting about the relationship between Article 9 and other Treaty Articles.

32. During the open discussion that followed, no specific changes to the revised draft were proposed. In response to comments in that regard, the Facilitator emphasized again 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 obligation in Article 9, nor to reinterpret established definitions. This is also explicitly mentioned in the draft Chapter, in paragraph 6, as well as paragraph 58.

33. *Conclusion and Way forward.* As no specific amendments to the revised draft elements for a possible Voluntary Guide to implementing Article 9 were proposed, an unchanged version of the proposed Voluntary Guide is included in this draft report and submitted to CSP9 (Annex B). The Conference is recommended to endorse the proposed Voluntary Guide as a living document of a voluntary nature, to be reviewed and updated by the Working Group, as appropriate.

34. As the Sub-working Group ends its work at CSP9 and taking into account that many cross-cutting issues are highly relevant for transit and trans-shipment controls, in particular enforcement and international cooperation, the Conference is also recommended to encourage States Parties to keep transit and trans-shipment as an important topic of attention, whenever these cross-cutting issues are explored further in the Working Group.

Sub-working group on Article 11

35. The interim Facilitator on Article 11 reminded delegations that this would be the last meeting of the Sub-working Group on Article 11, after its work was already extended by one year at CSP8 to focus on the topic of post-delivery cooperation. In line with this focus and as a follow-up to the discussions in February, the interim Facilitator then presented the draft proposal of including operational steps for the introduction and implementation of post-delivery cooperation as an Annex in the existing document with Possible Measures to Prevent and Address Diversion.

36. In the exchanges that followed, the majority of delegations that intervened could support the proposal, with some delegations emphasizing that the proposed Annex should not be prescriptive. Those delegations indicated that post-delivery cooperation is not a compulsory measure under the Treaty and that different States apply different levels of control. Other delegations emphasized that the responsibilities of all parties involved in arms transfers should be clear, including the responsibility of importing States to observe their end-use commitments and to manage the storage and use of imported weapons. In that regard, they argued that jointly feasible measures are deemed preferable. Some delegations also shared their national approach to post-delivery cooperation and broader measures to prevent diversion, such as engagement with industry and regional enforcement cooperation.

37. *Conclusion and Way forward.* For CSP9, the interim Facilitator has considered the comments and suggestions on the draft proposal of including operational steps for the introduction and implementation of post-delivery cooperation as an Annex in the existing document with Possible Measures to Prevent and Address Diversion and has prepared a revised draft for this draft report (Annex C). The Conference is recommended to endorse the document as an Annex to the document with Possible Measures to Prevent and Address Diversion and as living document of a voluntary nature, to be reviewed and updated by the WGETI, as appropriate.

38. As the Sub-working Group ends its work at CSP9, and taking into account that the obligation to take measures to prevent diversion is a crucial requirement across-the-board of all types of transfer, the Conference is also recommended to encourage States Parties to: 1) keep diversion as an as an important topic of attention in all future discussions in the Working Group; and 2) to increase the exchange of diversion-related information in the Diversion Information Exchange Forum.

Session about the forthcoming topics and working methods for the Working Group

39. During the session about the forthcoming topics and working methods for the Working Group, the WGETI Chair introduced the draft proposal on the WGETI configuration and substance. The Chair called for particular attention to a number of aspects addressed in the draft proposal: 1) the proposed shift in the focus of the Working Group to practical Treaty implementation issues and to progressive discussions on national implementation measures and exchanges on national implementation cases and/or experiences; 2) the proposal to arrange WGETI discussions along the lines of general phases/stages of practical Treaty implementation rather than distinct topics and articles, to highlight the interconnectedness of Treaty articles; 3) the cross-cutting support functions of international cooperation and assistance; 4) the proposed flexible working arrangements; and 5) the collaboration with other stakeholders that are involved in the topic under discussion, such as relevant international, regional and civil society organisations.

40. In the discussion on this topic, intervening delegations expressed their support for the shift in focus to practical Treaty implementation and discussions on national implementation experiences. Delegations also supported the proposal to no longer structure discussions along the lines of distinct articles; all delegations agreed that the WGETI needs a broad, holistic mandate.

41. Delegations saw merit in structuring discussions along the lines of general phases/stages of practical Treaty implementation, but cautioned about addressing those in a chronological order. Not all phases/stages require urgent discussion and priorities should be set. These could be identified on the basis of the needs of States Parties and should balance the interests of new and established States Parties, exporting, importing and transit states. Some topics should also be standing agenda items for the Working

Group. In that regard delegations mentioned topics such as national control systems, risk assessments, scope (national control lists), international cooperation, information management and transparency.

42. Most delegations also expressed support for the development of a multi-year workplan, but highlighted the need for flexibility and responsiveness, to allow the Working Group to address current and emerging implementation issues that affect the application of the Treaty, as well as to explore certain issues in-depth. In this context, delegations raised questions about the proposal of ad hoc sessions: who can call for ad hoc sessions and what would be the link with the structured discussions. More broadly, delegations expressed the need for flexibility in working arrangements, to allow for the broadest and most effective participation possible.

43. In terms of working arrangements, delegations commended the proposal to work with presentations of States Parties and other stakeholders and brought up the relevance of testimonies by VTF beneficiary States. Delegations also mentioned different settings of the working group such as small group meetings to increase interactive discussions.

44. Lastly, delegations also addressed the link with the other working groups. While most delegations agree that the other working groups should explore possibilities of aligning their work with the mainstream work of WGETI, some delegations emphasized that issues and phases/stages of implementation more related to universalization or reporting should still be dealt with in the dedicated working groups, as also included in the mandate of the respective working groups.

45. *Conclusion and Way forward.* For CSP9, the Chair has considered the comments and suggestions made concerning the draft proposal on the WGETI configuration and substance and has prepared a revised draft proposal for adoption by CSP9 (Annex D). In the CSP10 cycle in 2024, the Working Group will develop a multi-year workplan for its structured discussions, based on priority stages/phases of implementation, and initiate its discussions on practical Treaty implementation.

WGETI RECOMMENDATIONS

46. On the basis of discussions during WGETI meetings and progress made since CSP8, the following is presented for consideration by CSP9:

- a. To note that draft Chapter 2 (Prohibitions) of the proposed Voluntary Guide to implementing Articles 6 & 7 has been completed as a living document of a voluntary nature, to be reviewed and updated by the WGETI, as appropriate (Annex A).
- b. To endorse the proposed Voluntary Guide to implementing Article 9 as a living document of a voluntary nature, to be reviewed and updated by the Working Group, as appropriate (Annex B).
- c. To encourage States Parties to keep transit and trans-shipment as an important topic of attention, whenever cross-cutting issues such as enforcement and international cooperation are explored further in the Working Group.
- d. To endorse the document with operational steps for the introduction and implementation of post-delivery cooperation as an Annex to the document with Possible Measures to Prevent

and Address Diversion and as living document of a voluntary nature, to be reviewed and updated by the WGETI, as appropriate (Annex C), and to encourage exporting and importing States Parties to cooperate on the basis of mutual trust to prevent diversion.

- e. To encourage States Parties to keep diversion as an as an important topic of attention in all future discussions in the Working Group and to increase the exchange of diversion-related information in the Diversion Information Exchange Forum.
- f. To adopt the draft proposal on the WGETI configuration and substance (Annex D) and to mandate the Working Group to develop a multi-year workplan for its structured discussions, based on priority stages/phases of implementation, and initiate its discussions on practical Treaty implementation.

ANNEX A

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

Draft Chapter 2 – Prohibitions

**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 implementing Articles 6 & 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.²

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 & 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*

² 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).

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 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 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.

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.³

³ [An identical definition of genocide is included in Article 6 of the Rome Statute of the International Criminal Court \(ICC; see <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>\).](#) It needs to be noted, however, that

Box 1. '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 (including legal measures) within their power to halt arms transfers (under their jurisdiction) 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 and that the arms in question would be used in the commission of these acts.⁴

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.

[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 genocide.](#)

⁴ 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.”*

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 2013.⁵ Its 2019 Draft articles on Prevention and Punishment of Crimes Against Humanity, submitted to the UN General Assembly, provides the following definition in Article 2⁶:

Box 2. '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;*
- (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;*

⁵ See https://legal.un.org/ilc/texts/7_7.shtml.

⁶ See https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf.

(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).⁷ 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.

⁷ See <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

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: 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.⁸ 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 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*”.⁹ 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.

⁸ Elements of Crimes, <https://www.icc-cpi.int/publication/elements-crimes>, page 3.

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 38.

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.¹⁰ 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 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,

¹⁰ 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.

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”.¹¹ 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 3. 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);

¹¹ 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 Rule 156 in the ICRC study on customary international humanitarian law. Some States parties apply Article 6 (3) to all war crimes, ~~even if, the war crimes included including those~~ in ~~this~~ Rule 156 that are *only* war crimes under customary international law, ~~even if this goes~~ beyond the mandatory scope of Article 6 (3).¹²

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

Relationship between Article 6 and Article 7

36. Articles 6 & 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 & 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.

¹² 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 6.¹³

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

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.

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.

¹³ This concerns the revised Initial Reporting Template, endorsed and recommended for use at CSP7.

ANNEX B

**DRAFT ELEMENTS OF A VOLUNTARY GUIDE TO IMPLEMENTING ARTICLE 9
OF THE ARMS TRADE TREATY**

**ELEMENTS OF A VOLUNTARY GUIDE TO IMPLEMENTING ARTICLE 9
OF THE ARMS TRADE TREATY**

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.¹⁴

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*](#)

¹⁴ 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\(19%20Feb%202021_cl\)/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20\(19%20Feb%202021_cl\).pdf](https://www.thearmstradetreaty.org/hyper-images/file/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20(19%20Feb%202021_cl)/Annex%20B%20-%20Draft%20WGETI%20Multi-year%20Workplan%20for%20Article%209%20(19%20Feb%202021_cl).pdf).

6. Mr. Richard PATTERSON, Firearms and Ammunition Import/Export Roundtable – *An industry perspective*¹⁵

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”*.¹⁶ 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,

¹⁵ This presenter did not use a PowerPoint presentation or other documentation for his presentation.

¹⁶ This guide is available at <https://www.smallarmssurvey.org/resource/arms-trade-treaty-practical-guide-national-implementation>.

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.

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 1. 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).¹⁷ 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).

¹⁷ This topic was also addressed in the Small Arms Survey’s Practical Guide to National Implementation of the ATT, previously mentioned in paragraph 8.

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 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 2. 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.¹⁸

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)		

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

¹⁸ 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.

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 3. 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”.¹⁹ 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).

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.

¹⁹ 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.

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 4. 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 5. 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 6. 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.²⁰

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).

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 allows 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.

²⁰ 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.

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.²¹

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;*²²
- 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

²¹ 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 ([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](#).

²² 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.

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.

Relationship between Article 9 and Article 12 (2)

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 \("Chicago Convention"; 1994\)](#)
- ❖ 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

**DRAFT OPERATIONAL STEPS FOR THE INTRODUCTION AND IMPLEMENTATION OF POST-DELIVERY
COOPERATION**

(ANNEX I TO POSSIBLE MEASURES TO PREVENT AND ADDRESS DIVERSION)

**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.²³ 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. In that regard, the suggestions also do not detract from the intrinsic responsibility of importing States Parties to prevent diversion. While post-delivery cooperation can be an effective method for importing States Parties to engage in joint diversion risk mitigation with exporting States, importing States have a distinct responsibility under Article 11 (1) of the Treaty to take measures to prevent diversion of imported arms. Examples of such measures are included in the document with Possible Measures to Prevent and Address Diversion.

²³ The working paper is available at <https://www.thearmstradetreaty.org/conference-documents-csp8> (CSP8 President).

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.
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.

ANNEX D

DRAFT PROPOSAL: WGETI CONFIGURATION AND SUBSTANCE

DRAFT PROPOSAL: WGETI CONFIGURATION AND SUBSTANCE

BACKGROUND

1. In September 2017, the Third Conference of States Parties (CSP3) adopted the Terms of Reference establishing the Working Group on Effective Treaty Implementation (hereinafter WGETI). CSP3 further endorsed a list of Treaty implementation priority issues for discussion by WGETI in the period ahead. The identified Treaty implementation priority issues endorsed by CSP3 are: Article 5 (General Implementation), Articles 6 (Prohibitions), Article 7 (Export and Export Assessment), Article 9 (Transit or trans-shipment), Article 11 (Diversion), Article 12 (Record keeping) and Interagency cooperation or communication.

2. Considering the involved nature of the priority issues identified, CSP3 indicated that WGETI may focus on a subset of these priorities and remain mindful of the maturity level of the Treaty and matters associated thereto.

3. From the CSP4 (2018) to date, WGETI has focused its discussion on these issues and developed workplans to guide its work. The work plans covered organizational as well as substantive elements of each of the priority issues. As matters stand, it is foreseen that by CSP9, the WGETI sub-working groups on Article 9 (Transit or trans-shipment) and Article 11 (Diversion) will exhaust their workplans, and the sub-working group on Articles 6 & 7 (Prohibitions and Export & Export Assessment) will conclude its work in 2024.

4. The current status of the WGETI work requires this working group to deliberate and propose to CSP9 new topics to guide Treaty implementation discussions from the CSP10 cycle moving forward. This moment coincide with the current work being undertaken by the Management Committee concerning the review of the ATT programme of work. As a result of this confluence, the WGETI proposals to CSP9 regarding the focus of its future work and working arrangements should align with the broader agenda to review the ATT programme of work as led by the Management Committee following the CSP8 decision.

CONSIDERATIONS FOR WGETI FUTURE WORK

5. From 2018 to date, WGETI has approached its work by focusing on individual articles of the Treaty and has facilitated exchanges of information on national approaches to the implementation of those articles. As a matter of course and following general exchanges, WGETI has elaborated a number of Voluntary Guides to provide a picture of how States Parties approach the implementation of articles under consideration and provided some understanding of the key concepts involved in those articles.

6. It is assessed that the current approach to Treaty implementation discussions has served its purpose well and has produced appropriate outcomes. In view of this situation and considering the current level of Treaty maturity and changed circumstances, it is now the appropriate time to change gear and recalibrate the Treaty implementation discussions.

7. The WGETI meeting in February 2023 provided an opportunity for ATT stakeholders to reflect on the future work of WGETI in terms of forthcoming topics and working arrangements. During this discussion, the general view was that in order to meaningfully assist States Parties in the effective implementation of their Treaty obligations, WGETI must shift its focus to practical Treaty implementation issues and allow for progressive discussions on national implementation measures and exchanges on national implementation cases and/or experiences (reflecting implementation successes, challenges, and opportunities). This approach to Treaty implementation discussions would facilitate international cooperation and assistance amongst States Parties and other stakeholders. In this regard, international assistance and cooperation could be channelled to areas where States' national implementation capacities are constrained and need to be strengthened for improved Treaty implementation outcomes.

PROPOSED APPROACH TO WGETI'S DISCUSSIONS

8. To allow for practical Treaty implementation to take a centre in WGETI discussions, it is proposed that Treaty implementation discussions should be considered as a continuum rather than distinct topics and articles. Accordingly, it is proposed that WGETI discussions should be arranged along the lines of general phases/stages of practical Treaty implementation. This arrangement will help highlight the interconnectedness of articles of the Treaty and that these are actually dealt with simultaneously in practice. Below are the suggested general phases/stages of Treaty implementation at a practical level:

- a. ~~{ATT ratification or accession}~~. [To be discussed under the Working Group on Treaty Universalization with a feedback loop to WGETI.]
- b. ATT domestication. [To be discussed under the Working Group on Treaty Universalization with a feedback loop to WGETI.]
- c. Establishment and maintenance of a national control system.
- d. General regulation of role players in arms transfer.
- e. Application and authorisation of arms transfers.
- f. Management of arms transfer information.
- g. Accounting and reporting on arms transfers. [To be discussed under the Working Group on Transparency and Reporting with a feedback loop to WGETI.]
- h. Establishment and operationalisation of enforcement measures.
- i. Post delivery measures.

9. Attached to this document is a graphic representation of the proposed configuration of the foreseen practical Treaty implementation discussions. Each of the above general phases/stages should be seen as interconnected and part of a Treaty implementation *mosaic*. The general phases/stages of Treaty implementation reflected above are embedded on a cross cutting support functions of international cooperation and assistance. In practice, this will mean that during discussions of Treaty implementation, attention will also be given to available opportunities of international cooperation (cooperation amongst states) and assistance (mechanisms established to support Treaty implementation, for example, the ATT Voluntary Trust Fund). In that respect, the discussions will highlight that national capacity constraints could be addressed through mechanisms established within the ATT framework.

10. To provide States Parties and other stakeholders the opportunity to raise and discuss any current Treaty implementation issue, in addition to its structured discussions, the working group needs to allow space for *ad hoc* sessions. Such sessions on current issues should be demand driven and only organized upon request. Accordingly, their format should be tailored according to the proposed topics and the number of proposals received.

WORKING ARRANGEMENTS

11. WGETI shall operate on the basis of its Terms of Reference adopted by CSP3. However, to expedite movement towards the desired practical Treaty implementation discussions and without prejudice to the WGETI Terms of Reference, the following working arrangements are proposed for the reconfigured WGETI:

- a. In the context of the proposed Treaty implementation general stages/phases, this working group will identify the priority stages/phases to be addressed first, as well as possible standing agenda items. For structured discussions, the working group will develop ~~its~~ a flexible multiyear workplan, setting out topics to be discussed, ~~and~~ practical implementation questions to be addressed. It shall also include, and interface arrangements between this working group and the other ATT working groups (WGTU and WGTR), which can deal with topics relevant to the stages/phases related to universalisation and reporting, in line with their respective mandates. In this exercise, the working group will take into account its existing body of work to avoid repeating discussions.
- b. For time efficiency purposes, in the first year (2024) this working group will focus on three objectives: 1) finalisation of the current workplan of the WGETI sub-working group on Articles 6&7, 2) development of a multi workplan for the reconfigured WGETI, and 3) initiation of practical discussions on a few selected~~the first two~~ general phases/stages of Treaty implementation in no chronological order, taking into account the balanced interests of States Parties.
- c. For each general phase/stage of implementation, this working group will receive no less than two presentations from States Parties (including VTF beneficiary States) focusing on practical measures that those states are taking to address implementation issues of that general phase/stage. Where appropriate, the working group will also receive contributions from other stakeholders that are involved in the topic under discussion, such as relevant international, regional and civil society organisations. This will contribute to identifying synergies between the ATT and other international instruments, and their symbiotic implementation at the national

level. An pertinent example could be the United Nations Office on Drugs and Crime and the UN Firearms Protocol.

- d. Each presentation will be followed by Q&A sessions and information exchanges between States Parties and other stakeholders. These exchanges will include: noting implementation challenges or constraints that would have been made visible, sharing information on possibilities for international cooperation and assistance in response to these implementation challenges or constraints ~~that would have been made visible~~, as well as identifying issues that might benefit from further clarification within the ATT framework.
- e. Presentations to the working group should be diverse in terms of geography and export/import profile of States Parties.
- f. Unless determined otherwise, presentations by States Parties and other stakeholders shall be made freely available.
- g. At the beginning of each CSP cycle and ahead of the in-person WGETI meeting, the WGETI Chair will invite States Parties and other stakeholders to raise any current implementation issue on which they seek an *ad hoc* discussion in the WGETI.
- h. In addition to the in-person working groups' meeting, where appropriate, ATT office holders will conduct intersessional informal consultations utilising virtual or hybrid meetings.
- i. Where deemed necessary, this working group will, on the basis of exchanges, discuss identified issues more in-depth and/or elaborate voluntary guidance documents or other tools to assist national implementation efforts by States Parties. For that purpose, *ad hoc* sub-working groups can be established. In developing Voluntary Guides, the working group should endeavour to keep the guides focused on practical Treaty implementation and avoid duplication.

CONCLUSION

12. The prioritisation of practical Treaty implementation proposed above requires the entire effort of the ATT process to be streamlined and focused on agreed workplans to advance this priority. As a result, it is expected that no other priorities should be set outside of the agreed workplans, while leaving space for States Parties and other stakeholders to address any current and emerging implementation issues that affect the application of the Treaty.

Draft General stages/phases of Treaty Implementation

ATT Domestication

- Executive role
- Parliament role
- Legislative processes
- National consultation processes

Establishing and maintaining a national control system

- Infrastructure
- National control list
- Competent authority
- National point of contact
- Legislation
- Interagency co-ordination

General Regulation of role players

- Registration measures
- Outreach programs including outreach to industry.
- Internal compliance programs
- Documentation for regulation

Application and authorization

- Prohibitions
- Risk Assessment
- Mitigations
- Decision making
- Review of decisions
- Verification of documentation
- Undertakings and cooperation of role players

Enforcement Arrangements

- Legal framework
- Interagency co-ordination
- Legal and administrative procedures

Information Management

- Record management
- National co-ordination
- Litigation arrangements

Accounting and reporting

- Transfer reports to ATT Secretariat
- Reports to Cabinet
- Reports to Parliament
- Audit enquiries
- Public request for information

Post delivery measures

- Transfer Undertakings
- DVCs
- Post shipment co-operation
- Verification
- Stockpiles management

International Co-operation and Assistance

(cross cutting functions)