

Compilation of Global Principles for Arms Transfers

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This group of non-governmental organisations includes: the Africa Peace Forum, the Albert Schweitzer Institute, Amnesty International, Arias Foundation for Peace and Human Progress, Caritas Internationalis, the Friends Committee on National Legislation, Nonviolence International Southeast Asia, the International Action Network on Small Arms (IANSA), Oxfam International, Project Ploughshares, Saferworld, Sou da Paz, Viva Rio, and the Women's Institute for Alternative Development (WINAD). Additional legal advice to the group has been provided by Clare da Silva. While the Global Principles are a proposal of the group, the annotated notes below have not been collectively agreed by the group as such. These notes have been drafted by the legal and policy advisors and are included to aid the discussion as to the validity and relevance of the Principles.

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The following Principles bring together States' existing obligations in respect of international transfers of arms and ammunition. The Principles are proposed by a diverse group of non-governmental organizations¹. The Principles reflect the content of a variety of international instruments including: international and regional treaties, declarations and resolutions of the United Nations and other multilateral and regional organisations, and model regulations intended for

national legislation. Some of the Principles reflect customary and treaty law, while others reflect widely accepted emerging norms. The compilation indicates the best general rules for effective control of international transfers of all conventional arms and ammunition. The rules reflect States' obligations under international law while also recognising States' right to legitimate self-defence and law enforcement in accordance with international standards.

1

Responsibilities of states

All international transfers of arms and ammunition shall be authorised by all States with jurisdiction over any part of the transfer (including import, export, transit, transshipment and brokering) and carried out in accordance with national laws and procedures that reflect, as a minimum, States' obligations under international law².
Authorisation of each transfer

shall be granted by designated State officials in writing only if the transfer in question first conforms to the Principles set out below in this instrument and shall not be granted if it is likely that the arms or ammunition will be diverted from their intended legal recipient or re-exported contrary to the aims of these Principles³.

2

Express limitations⁴

States shall not authorise international transfers of arms or ammunition that violate their expressed obligations under international law.

These obligations include:

- A Obligations under the Charter of the United Nations – including:
 - a Binding resolutions of the Security Council, such as those imposing arms embargoes⁵;
 - b The prohibition on the threat or use of force⁶;
 - c The prohibition on intervention in the internal affairs of another State⁷.
- B Any other treaty or decision by which that State is bound, including:
 - a Binding decisions, including embargoes, adopted by relevant international, multilateral, regional, and sub-regional organisations to which a State is party⁸.

b Prohibitions on arms transfers that arise in particular treaties which a State is party to, such as the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, and its Protocols, and the 1997 Convention on the Prohibition of Anti-Personnel Mines⁹.

- C Universally accepted principles of international humanitarian law – including:
 - a The prohibition on the use of arms that are of a nature to cause superfluous injury or unnecessary suffering¹⁰;
 - b The prohibition on weapons or munitions incapable of distinguishing between combatants and civilians¹¹.

3

Limitations based on use or likely use¹²

States shall not authorise international transfers of arms or ammunition where they will be used or are likely to be used for violations of international law, including:

A Breaches of the UN Charter and customary law rules relating to the use of force¹³;

- B** Gross violations of international human rights law¹⁴;
- C** Serious violations of international humanitarian law¹⁵;
- D** Acts of genocide or crimes against humanity¹⁶.

4

Factors to be taken into account¹⁷

States shall take into account other factors, including the likely use of the arms or ammunition, before authorising an arms transfer, including the recipient's record of compliance with commitments and transparency in the field of non-proliferation, arms and munitions control, and disarmament¹⁸.

States should not authorise the transfer if it is likely to:

- A** Be used for or to facilitate terrorist attacks¹⁹;
- B** Be used for or to facilitate the commission of violent or organised crime²⁰;

- C** Adversely affect regional security or stability²¹;
- D** Adversely affect sustainable development²²;
- E** Involve corrupt practices²³;
- F** Contravene other international, regional, or sub-regional commitments or decisions made, or agreements on non-proliferation, arms control, and disarmament to which the exporting, importing, or transit States are party²⁴.

5 Transparency²⁵

6 Comprehensive controls²⁶

States shall submit comprehensive national annual reports on all their international arms and ammunition transfers to an international registry, which shall publish a compiled, comprehensive, international

annual report. Such reports should cover the international transfer of all conventional arms and ammunition including small arms and light weapons.

States shall establish common standards for specific mechanisms to control:

- A All import and export of arms and ammunition²⁷;
- B Arms and ammunition brokering activities²⁸;
- C Transfers of arms and ammunition production capacity²⁹; and

D The transit and trans-shipment of arms and ammunition.³⁰

States shall establish operative provisions to monitor enforcement and review procedures to strengthen the full implementation of the Principles³¹.

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2 Responsibility of States to Regulate Arms and Ammunition

Principle 1 reflects the responsibility of States to regulate all international transfers of conventional arms within their jurisdiction and the requirement of all States to effectively licence, monitor and prevent the diversion of such arms transfers according to national laws, mechanisms and procedures in conformity with international law and standards.

The United Nations, in keeping with its overall purposes and principles, has a legitimate interest in the field of arms transfers. This is recognised in the **UN Charter**, which refers specifically to the importance of the regulation of armaments for the maintenance of international peace and security (Articles 11 and 26). Article 51 of the

UN Charter reaffirms all States' inherent right to individual or collective self-defence. Every State also has the right to import, produce and retain legitimate arms for its self-defence and security needs, subject to the existing responsibilities of States under international law, including the Charter.

The General Assembly has consistently called upon all States to give high priority to eradicating illicit arms trafficking in all kinds of weapons and military equipment. For example, in 1991 the General Assembly urged Member States to: exercise effective control over their weapons and military equipment and their arms imports and exports to prevent them from getting into the hands of parties engaged in illicit arms trafficking; ensure that they had in place an adequate body of laws and administrative machinery for regulating and monitoring effectively their transfer of arms, to strengthen or adopt strict measures for their enforcement; and cooperate at the international, regional and sub-regional levels to harmonise, where appropriate, relevant laws, regulations and administrative procedures as well as their enforcement measures, with the goal of eradicating illicit arms trafficking (A/RES/46/36 H). Subsequent resolutions reaffirm the need for all States to fulfill their responsibility to control the transfer of arms (for example, A/RES/49/75 G and A/RES/51/45 F).

In December 2005, the UN General Assembly invited all "Member States that are in a position to do so...to enact or improve national legislation, regulations and procedures to exercise effective control over the transfer of arms, military equipment and dual-use goods and technology, while ensuring that such legislation, regulations and procedures are consistent with the obligations of States parties under international treaties". [A/RES/60/69]

In December 2006, the UN General Assembly recognised that the "absence of common international standards on the import, export and transfer of conventional arms undermin[es] peace, reconciliation, safety, security, stability and sustainable development" and voted in favour of taking first steps towards a legally binding Arms Trade Treaty (ATT) to establish 'common international standards for the import, export and transfer of conventional arms'. [A/RES/61/89]

According to the 1996 **United Nations Guidelines for International Arms Transfers** (endorsed by the General Assembly in A/RES/51/47 B, 10 December 1996), "limitations on arms transfers can be found in international treaties, binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations and the principles and purposes of the Charter." [Paragraph 8] Moreover, the

activity of "illicit arms trafficking is understood to cover that international trade in conventional arms, which is contrary to the laws of States and/or international law." [Paragraph 7] To give effect to such international obligations, "States should establish and maintain an effective system of export and import licences for international arms transfers with requirements for full supporting documentation" [Paragraph 26] and that "in order to help combat illicit arms trafficking, States should make efforts to develop and enhance the application of compatible standards in their legislative and administrative procedures for regulating the export and import of arms." [Paragraph 36]

In the 2001 **UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN Programme of Action)**, States undertook "...to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit, for the transfer of all small arms and light weapons, with a view to combating the illicit trade in small arms and light weapons." [Section II, Paragraph 11]

Article 10(1) of the **Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition**,

supplementing the UN Convention against Transnational Organized Crime (UN Firearms Protocol) states: "Each State Party shall establish or maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition."

For the purposes of the **International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons** adopted by the General Assembly on 8 December 2005, an "illicit" small arm or light weapon includes those that are transferred without a licence or authorization by a competent national authority. [Section II, Article 6 (e)]

The responsibility of States to regulate international arms transfers is also incorporated into all regional arms control measures. The 2004 **Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Nairobi Protocol)** mandates that "each State Party shall establish and maintain an effective system of export and import licensing or authorisation, as well as of measures on international transit, for the transfer of small arms and light weapons." [Article 10(a)] The 2001 **Protocol on the control of firearms,**

ammunition and other related materials in the Southern African Development Community (SADC) region (SADC Protocol) states: "States Parties further undertake to incorporate [in their national law]... the co-ordination of procedures for the import, export and transit of firearms shipments." [Article 5(3)(c)] The 1997 **Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA)** states: "States Parties shall establish or maintain an effective system of export, import, and international transit licenses or authorizations for transfers of firearms, ammunition, explosives, and other related materials" [Article IX (1)] and "States Parties shall not permit the transit of firearms, ammunition, explosives, and other related materials until the receiving State Party issues the corresponding license or authorization." [Article IX (2)] The Inter-American Drug Abuse Control Commission (CICAD) of the Organization of American States (OAS) produced **Model Regulations for the Control of the International Movement of Firearms, their Parts, Components and Ammunition (OAS/CICAD Model Regulations for the Control of Firearms)**, that were endorsed by the OAS General Assembly in June 1998. The OAS/CICAD Model Regulations provide detailed requirements about procedure to export, import and transit

arms, and specifies the information required to make a licensing decision.

3 Duty to Prevent Diversion from the Intended Legal Recipient

In some circumstances, arms transfers from one State to another or to persons in the territory of another State without the latter State's consent will amount to a breach of existing obligations under customary international law relating, for example, to the threat or use of force. Transfers to persons other than those exercising governmental authority may also amount to a breach of the principle of non-intervention in the internal affairs of the State.

The duty to prevent diversion of arms in international transfers is stressed in the **United Nations Guidelines for International Arms Transfers** which states: "All arms transfer agreements and arrangements, in particular between Governments, should be designed so as to reduce the possibility of diversion of arms to unauthorized destinations and persons. In this context, a requirement by the exporter for import licences or verifiable end-use/end-user certificates for international arms transfers is an important measure to prevent unauthorized diversion." [Paragraph 33]

The need to prevent diversion is also underlined several times in the **UN**

Programme of Action. States have undertaken "to put in place, where they do not exist, adequate laws, regulations and administrative procedures ...in order to prevent illegal manufacture of and illicit trafficking in small arms and light weapons, or their diversion to unauthorized recipients". [Section II, Paragraph 2] In Section II, Paragraph 11, States agreed "to assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade."

Article 11 of the **UN Firearms Protocol** states: "In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures: a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs transborder cooperation."

The risk of diversion as a consideration in authorisation of an arms transfer is included in regional instruments.

The 2006 **Economic Community of West African States Convention on Small Arms, their Ammunition and other Related Material (ECOWAS Convention)** prohibits all transfers of small arms and light weapons unless an exemption has been granted. Article 6(5) states: "A transfer shall not be authorised if it is likely to be diverted, within the transit or importing country or be re-exported, to unauthorized uses or users or into the illicit trade."

The 2003 **OAS/CICAD Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition (OAS/CICAD Model Regulations on Arms Brokers)** states: "The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to...result in a diversion of firearms to illegal activities, in particular, those carried out by organized crime." [Article 5 (f)] The **Guidelines for Implementation of the Nairobi Protocol** (Annex A to the Ministerial Declaration on Practical Implementation of Small Arms Action in the Great Lakes Region and the Horn of Africa, 21 June 2005) provides that "States Parties shall not authorize

transfers that are likely to be diverted, within the recipient country or be re-exported, to any other user than the stated final end-user. States should take into account the recipient's: Record on compliance with end-use undertakings and diversion; Stockpile management and security procedures; Ability and willingness to protect against unauthorized transfers, loss, theft and diversion." [paragraph 2.2.3 (c) (viii)]

Criterion Seven of the 1998 **European Union Code of Conduct on Arms Exports (EU Code of Conduct)** states: "In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered: a) the legitimate defence and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity; b) the technical capability of the recipient country to use the equipment; c) the capability of the recipient country to exert effective export controls; d) the risk of the arms being re-exported or diverted to terrorist organisations (anti-terrorist equipment would need particularly careful consideration in this context)."

In 2002 the **Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and**

Technologies adopted its **Best Practice Guidelines for Exports of Small Arms and Light Weapons (Wassenaar Arrangement Best Practice Guidelines for Export of Small Arms and Light Weapons)**. Section I, Article 1 of the Guidelines states: "Each Participating State will, in considering proposed exports of SALW, take into account: ...j) The risk of diversion or re-export in conditions incompatible with these Guidelines, particularly to terrorists." Section I, Article 2, states: "Each Participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might:... (c) Be diverted to territories whose external relations are the internationally acknowledged responsibility of another State; ... (g) Contrary to the aims of this document, be either re-sold (or otherwise diverted) within the recipient country, re-produced without licence, or be re-exported."

The 2000 **Organization for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons** states: "Each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might: ... (iii) Be diverted to territories whose external relations are the internationally acknowledged responsibility of another State; ... (vii) Be either re-sold (or

otherwise diverted) within the recipient country or re-exported for purposes contrary to the aims of this document." [Section III (A) 2(b)]

4 Express Limitations in Existing International Law

Principle 2 encapsulates existing express limitations under international law on States' freedom to transfer and to authorize transfers of arms. It focuses on circumstances in which a State is already bound not to transfer arms, as set out in expressed limitations in international law. The language is clear: "States shall not ...". When new binding international instruments are agreed, new criteria should be added to the above principles, for example, if there is a new binding instrument on marking and tracing or illicit brokering.

The **UN Programme of Action** requires States "to assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law..." [Section II, Paragraph 11]

Principle 2 is reflected exactly as stated in the **Guidelines for Implementation of the Nairobi Protocol**.

5 Security Council Arms Embargoes

Security Council decisions to impose arms embargoes are taken under Chapter VII of the **UN Charter** and are binding on all members of the UN. Obligations ensue on two levels. First, States are prohibited from transferring all or specified types of arms or arms-related material, military advice and training to the embargoed entity, generally a State violating international law, but also non-state armed groups. Secondly, States must also take the necessary measures to implement, apply and enforce the embargo internally so as to make it operative with respect to private actors within their jurisdiction.

The Security Council has encouraged States to adopt legislation making the violation of Security Council arms embargoes a criminal offence [see, for example, S/RES/1196 (1998)]. In 2001, the Security Council urged Member States to “consider, where appropriate, measures that may be taken to discourage corporate actors, within their own jurisdiction, from maintaining commercial relations with parties to armed conflicts that are on the Security Council’s agenda, when those parties are violating applicable international law ... [and to] consider measures against corporate actors, individuals and entities under their jurisdiction that engage in illicit trade in natural resources and small arms, in violation of relevant Security Council

resolutions and the Charter of the United Nations... [S/RES/1379]

This was also underlined in the **UN Programme of Action**. In Section II, Paragraph 15, States undertake: “To take appropriate measures, including all legal or administrative means, against any activity that violates a United Nations Security Council arms embargo in accordance with the Charter of the United Nations.”

The need to sanction violations of Security Council arms embargoes has also been underlined in several regional instruments. The **SADC Protocol** requires that “States Parties shall enact the necessary legislation and other measures to sanction criminally, civilly or administratively under their national law the violation of arms embargoes mandated by the Security Council of the United Nations.” [Article 5(2)] Under the **Guidelines for Implementation of the Nairobi Protocol**, “State Parties shall not authorise transfers which would violate their direct obligations under international law, including: Obligations under the Charter of the United Nations – including, inter alia, decisions of the Security Council such as those imposing arms embargoes.” [paragraph 2.2.3 (a)] The **OSCE Document on Small Arms and Light Weapons** commits each participating State to “avoid issuing licences for exports where it deems that there is a

clear risk that the small arms in question might... Contravene its international commitments, in particular in relation to sanctions adopted by the Security Council of the United Nations, decisions taken by the OSCE, agreements on non-proliferation, small arms, or other arms control and disarmament agreements.” [Section III, A(2b)(iv)] The **Wassenaar Arrangement Best Practice Guidelines for Export of Small Arms and Light Weapons** contains a similar provision [Section I, Article 2(d)]. The **EU Code of Conduct** states that “an export licence should be refused if approval would be inconsistent with, inter alia, the international obligations of member states and their commitments to enforce UN, OSCE and EU arms embargoes...” [Criterion One]

6 Prohibition on the Threat or Use of Force

One of the cornerstones of the **UN Charter** is the prohibition on the threat or use of force. This is enshrined in Article 2(4) which states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” If it is apparent that an arms-receiving state will use the weapons in violation of the prohibition of the use of force, the transfer will be prohibited even in the absence of a specific embargo.

7 Prohibition on intervention in the internal affairs of another State

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference. This principle is expressed in Article 2(7) of the UN Charter: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state ...” This principle is expanded in the **Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of their Independence and Sovereignty** (A/RES/2131 (XX), 21 December 1965) The General Assembly declared that “No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.” These principles were reiterated in the **Declaration on Principles of International Law concerning Friendly Relations among States in Accordance with the Charter of the United Nations** [A/RES/2625 (XXV), 24 October 1970]. The Declaration provides that: “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or

terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force. The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (General Assembly resolution 36/103, 9 December 1981) further affirms this principle.

The prohibition of intervention in the internal affairs of another State is reflected in other regional Charters. For example, Article 19 of the **OAS Charter** states: “no State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.”

The **UN Guidelines for International Arms Transfers** require that “in their efforts to control their international arms transfers and to prevent, combat and eradicate illicit arms trafficking, States should bear in mind the principles listed below... [including]: “States should respect the principles and purposes of the Charter of the United Nations, including the right to

self-defence; the sovereign equality of all its Members; non-interference in the internal affairs of States; the obligation of Members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State; the settlement of disputes by peaceful means; and respect for human rights; and continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.” [paragraph 14]

8 Binding Decisions of Multilateral, Regional, and Sub-regional Organisations

States have a legal obligation to comply strictly with sanctions and arms embargoes imposed by the

Security Council under the authority of Chapter VII of the Charter of the United Nations. The Security Council will determine the scope and terms of each arms embargo according to its understanding of the particular conditions that give rise to threats to international peace and security. Such UN arms embargoes have been imposed on States as well as non-state armed groups.

In addition, regional and multilateral organisations have established rules for member or participating States to respect UN and other multilateral arms embargoes. For example, EU Member States must comply with arms embargoes imposed in the framework of the **EU Common Foreign and Security Policy** and the **Treaty of the European Union**.

Regional and multilateral instruments also emphasize the prohibition of arms transfers violating arms embargoes. Article 6 (2)(a) of the **ECOWAS Convention** prohibits authorization of a transfer which would violate obligations under the Charter of the United Nations, including “binding resolutions of the United Nations Security Council such as those imposing arms embargoes”. Article 5 of the **OAS/CICAD Model Regulations on Arms Brokers** provides that “the National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to

believe that the brokering activities will, or seriously threaten to: ... (d) violate a United Nations Security Council embargo or other multilateral sanctions to which the country adheres, or that it unilaterally applies.” Under the **Central American Integration System's (SICA) 2005 Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Materiel** transfers of such items shall not be carried out from or to States which act in contravention of a range of international legal obligations and norms including “fail[ing] to comply with arms embargoes or other sanctions imposed by regional organizations or pursuant to regional agreements to which States parties.” [Article 1 (6)] Similar provisions are found in instruments agreed by the **OSCE**, the **Wassenaar Arrangement** and the **European Union**.

9 Prohibitions on Arms Transfers that Arise in Particular Treaties

Numerous international instruments prohibit the use of specific weapons (“weapon-specific” prohibitions) including the 1868 **St Petersburg Declaration on Explosive Projectiles**, the 1899 **Hague Declaration concerning Expanding Bullets**, the 1980 **Convention on Certain Conventional Weapons** and most recently, the 1997 **Convention on the Prohibition of Anti-Personnel Mines**.

The more recent conventions expressly prohibit not only the use of weapons but also their transfer. The prohibition on transfers of the weapon in addition to their use reflects a development in this area of law and should be read into the earlier treaties which prohibit only the use of a particular weapon. This conclusion is supported by the fact that it would be difficult to reconcile a State's freedom to transfer a weapon whose use is prohibited with the overarching duty on states to respect and ensure respect for international humanitarian law, as enshrined in Article 1 of the **Geneva Conventions**.

10 Prohibition of Arms Causing Superfluous Injury or Unnecessary Suffering

It is a fundamental principle of international humanitarian law that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited. The prohibition on the use of arms and ammunition that are of a nature to cause superfluous injury or unnecessary suffering is expressed in Article 35(2) of **Additional Protocol I to the Geneva Conventions**. It is also part of customary international law and therefore is universally binding. The prohibition on transfers follows from the appreciation that the transfer of such arms or ammunition would be irreconcilable with the prohibition of their use under

international humanitarian law. This prohibition on transfers would also cover arms and ammunition the use of which is prohibited by a specific convention where the convention does not explicitly address the question of transfers.

11 Prohibition of arms incapable of distinguishing between combatants and civilians

The principle of distinction between civilians and combatants is codified in Articles 48, 51(2) and 52(2) of **Additional Protocol I to the Geneva Conventions** and Article 13(2) of **Additional Protocol II**.

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The jurisprudence of the **International Court of Justice** in the 1996 Nuclear Weapons Advisory Opinion and the **International Criminal Tribunal for the former Yugoslavia (ICTY)** including the Tadić, Martić, and Kupreškić cases is further evidence that the obligation is customary international law. The prohibition on transfers follows from the appreciation that the transfer of such arms would be irreconcilable with the prohibition of their use under international humanitarian law.

12 Limitations Based on the Likely Use of Arms to be Transferred

In Principle 3, the limitations are based

on the use or likely use of the weapons and munitions to be transferred. The responsibility of transferring States to prohibit arms transfers under this heading flows from the obligation not to participate in the internationally wrongful acts of another State. The principle is stated in Article 16 of the International Law Commission's **Articles on Responsibility of States for Internationally Wrongful Acts** (commended by the General Assembly, A/RES/56/83, 12 December 2001) in terms which reflect customary international law, binding on all States. Article 16 states: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."

Principle 3 is reflected almost word for word in the **Guidelines for Implementation of the Nairobi Protocol**. [Paragraph 2.2.3(b)] Numerous provisions of international instruments on arms transfers also reflect Principle 3, as outlined above and below.

13 Customary Law Rules relating to the Use of Force

This would include breaches of the

prohibition on the threat or use of force in international relations as set out in Article 2(4) of the **UN Charter**, in the General Assembly **Declaration of Principles of International Law** [A/RES/2625 (XXV), 1970] and in other standard-setting United Nations resolutions. Corresponding rules apply at the level of customary international law.

Article 2(4) of the **UN Charter** prohibits the threat or use of force in international relations, when directed "against the territorial integrity or political independence of states, or in any other manner inconsistent with the purposes of the United Nations." Threats are illegal when the force threatened would itself be illegal. This prohibition is subject to two universally recognized exceptions: force authorized by the United Nations; or, individual or collective self-defence. The Security Council has wide discretionary powers under Chapter VII of the **UN Charter** to address threats to international peace and security, including imposing arms embargoes and authorizing States to use armed force. Article 51 permits States to defend themselves against armed attacks, without requiring the prior authorization of the Security Council.

The **UN Charter** prohibition on the use of force applies to arms transfers and other assistance to opposition armed forces. The 1986 decision of the

International Court of Justice [ICJ] in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* held that the transfer of weapons in such circumstances could be considered a use of force in violation of Article 2(4).

14 Duty to Avoid Aiding Gross Violations of International Human Rights Law

There is a positive obligation of all States to cooperate in the protection and fulfillment of human rights within and beyond their borders. Under Articles 1, 55 and other articles of the **UN Charter** all Member States have an obligation to encourage and promote universal respect for, and observance of, human rights and fundamental freedoms. Article 1(3) requires all Member States "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

In 2006 the Sub-Commission on the Promotion and Protection of Human Rights adopted its **Principles on the Prevention of Human Rights Violations Committed with Small Arms (Human Rights Sub-commission Principles)**.

Principle 14 states: "Governments shall prohibit international transfers of

small arms which would violate their obligations under international law, including in circumstances in which such arms are likely to be used to commit serious human rights violations."

General international law prohibits conduct that involves patterns of blatant abuse. The expression "gross" or "serious" violation of human rights" is commonly used to convey a sense of scale, evoking both the number of violations and the gravity of their consequences for the victims. It also suggests a measure of intent.

The commission of serious violations of human rights would include violations of the non-derogable provisions of the 1966 **International Covenant on Civil and Political Rights (ICCPR)**, the 1984 **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** and other international human rights treaties. The most prominent example of such a right – and one which is most likely to be breached using arms, including small arms and light weapons – is the right to life. This right imposes both a positive duty on States to enact laws that aim at protecting the right to life and a negative duty not to arbitrarily deprive anyone of their right to life.

Other non-derogable rights have been set out for Member States by the

United Nations Human Rights Committee. In its **General Comment on States of Emergency**, the Human Rights Committee broadened the list of non-derogable rights contained in Article 4 of the ICCPR to include: the prohibition against arbitrary detention; the prohibition against taking of hostages, abductions or unacknowledged detention; the protection of the rights of persons belonging to minorities; the deportation or forcible transfer of population without grounds permitted under international law; and the prohibition against engaging in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence (CCPR/C/21/Rev.1/Add.11, 31 August 2001).

Under international human rights law, States are responsible for their own actions and the actions of their agents. They also have a duty to prevent patterns of abuse committed by private persons, whether or not they are acting under the control of the State. Failure to exercise "due diligence" by omitting to take the necessary steps to protect individuals from organised crime such as kidnapping and killing for ransom can amount to a violation of human rights law. In some cases, the obligation to protect individuals from violations perpetrated by private actors

is part and parcel of the State's obligation not to commit the violation itself. For example, failing to adopt the necessary measures to prevent acts of torture from being carried out on one's territory may amount to more than a violation of the "due diligence" standard and be treated as a breach of the international norm prohibiting torture.

The **Rome Statute of the International Criminal Court (ICC)**, in Article 25 (3)(c), establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by providing the means for its commission. Providing the weapons used to commit or attempt to commit one of the crimes for which the ICC has jurisdiction is sufficient to give rise to responsibility as an accomplice.

The **Human Rights Sub-Commission Principles** state: "Governments and State agents, especially law enforcement officials, shall not use small arms to violate human rights. All State agents have the obligation to uphold and affirm human rights including the right to life, liberty and security of person, as guaranteed in the International Bill of Human Rights. A State agent includes any person or persons acting at the instigation of or with the consent or acquiescence of a public official." [Principle 1]

International human rights instruments include, for example, the 1948 **Universal Declaration of Human Rights**, the 1966 **International Covenant on Civil and Political Rights (ICCPR)**, the 1967 **International Covenant on Economic, Social and Cultural Rights**, the 1974 **Declaration on the Protection of Women and Children in Emergency and Armed Conflict**, the 1984 **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** and the 1989 **Convention on the Rights of the Child**. Regional human rights instruments include the 1950 **European Convention for the Protection of Human Fundamental Rights and Freedoms**, the 1969 **American Convention on Human Rights** and the 1980 **African Charter on Human and Peoples' Rights**.

The obligations of States regarding the observance of fundamental human rights when considering the authorisation of international arms transfers include the following regional and multilateral instruments:

ECOWAS Convention: "A transfer shall not be authorised if the arms are destined to be used: a) for the violation of international humanitarian law or infringement of human and peoples' rights and freedoms, or for the purpose of oppression." [Article 6 (3)(a)]

OAS/CICAD Model Regulations on Arms Brokers: "The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to: ... (b) violate humans rights contrary to international law." [Article 5]

Guidelines for Implementation of the Nairobi Protocol: "State Parties shall not authorize transfers which are likely to be used: ... for the violation or suppression of human and peoples' rights and freedoms, or for the purpose of oppression" [paragraph 2.2.3 (6)(i)].

EU Code of Conduct: "Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States will: a) not issue an export licence if there is a clear risk that the proposed export might be used for internal repression and b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU. For these purposes, ... Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or

punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights." [Criterion Two]

Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons: "Each Participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might: ... (h) Be used for the purpose of repression; (i) Be used for the violation or suppression of human rights and fundamental freedoms". [Article I, paragraph 2]

OSCE Document on Small Arms and Light Weapons: "Each participating State will, in considering proposed exports of small arms, take into account: (i) The respect for human rights and fundamental freedoms in the recipient country." Common export criterion 2(b): "Each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question fundamental freedoms; ... (viii) Be used for the purpose of repression." [Section III, Common export criteria 2(a)]

SICA Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Materiel: "Transfers of arms, ammunition, explosives and other related materiel shall not be carried out from or to States which: Commit and/or sponsor crimes against humanity or human rights violations..." [Article 1(1)]

15 Duty to Avoid Aiding Serious Violations of International Humanitarian Law

Serious violations of international humanitarian law include the 'grave breaches' identified in the four 1949 **Geneva Conventions** applicable in international armed conflict, which include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer of a protected person and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" (Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions of 1949) and those identified in Article 3 common to the four Conventions, applicable in internal conflicts. These violations include: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages of personal dignity, in particular humiliating and degrading treatment,

and the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples". The term is also capable of a more expansive interpretation, covering all violations of international humanitarian law for which there is individual criminal responsibility.

The most recent codification of such violations, collectively referred to as "war crimes", is to be found in the **Rome Statute of the International Criminal Court (ICC)** adopted in 1998. This provision is consistent with the existing obligation to respect and ensure respect for international humanitarian law. In Article 25 (3)(c), the Statute establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by providing the means for its commission. Providing the weapons used to commit or attempt to commit one of the crimes for which the ICC has jurisdiction, including war crimes, is sufficient to give rise to responsibility as an accomplice. Common Article 1 to the four 1949 **Geneva Conventions**, which codify customary rules of international humanitarian law, obliges States to "respect and ensure respect" for the rules of international humanitarian

law. A State which transfers weapons in circumstances where it is likely they will be used to commit serious violations of international humanitarian law would clearly be failing its obligation to ensure respect for international humanitarian law (see also the International Committee of the Red Cross Agenda for Humanitarian Action, December 2003).

Regional and multilateral instruments contain similar provisions. The **ECOWAS Convention** states: "A transfer shall not be authorised if the arms are destined to be used: b) for the commission of serious violations of international humanitarian law, genocide or crimes against humanity." [Article 6 (3)(b)]

The **OAS/CICAD Model Regulations on Arms Brokers** states: "The National Authority shall prohibit brokering activities and refuse to grant licenses if it has reason to believe that the brokering activities will, or seriously threaten to: (a) result in acts of genocide or crimes against humanity; ... (c) lead to the perpetration of war crimes contrary to international law." [Article 5]

The **SICA Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Materiel** states: "Transfers of arms, ammunition, explosives and other

related materiel shall not be carried out from or to States which: Commit and/or sponsor crimes against humanity or human rights violations or commit serious violations of the laws and customs of war contained in the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977 or other rules and principles of international humanitarian law applicable to situations of armed conflict between States and within States". [Article 1(1)]

The **Guidelines for Implementation of the Nairobi Protocol** provide that "State Parties shall not authorize transfers which are likely to be used: ...for the commission of serious violations of international humanitarian law". Further: "States Parties shall take into account other factors before authorizing an arms transfer. States should not authorize the transfer if it is likely to ...be used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict; or be used in the commission of genocide or crimes against humanity. [paragraph 2.2.3]

16 Duty to Avoid Aiding Acts of Genocide or Crimes Against Humanity

The 1948 **Convention on the Prevention and Punishment of the**

Crime of Genocide defines genocide, inter alia, as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". Acts punishable under this heading include genocide, the conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide. Additionally, the prohibition on genocide is part of customary international law. Under the terms of the Convention, the application of the term 'genocide' requires proof of the specific intent to destroy, in whole or in part, one of four protected groups (national, ethnical, racial or religious). This is a high threshold to meet. Absent the specific intent necessary for genocide, a State transferring weapons to a State that it knows is using them to carry out genocidal acts will likely still be in violation of international humanitarian law, particularly war crimes or crimes against humanity under the doctrine of State Responsibility.

Crimes against humanity are similarly defined in a number of cases, the definitions are largely uncontroversial.

When committed as part of a widespread or systematic attack against a civilian population, a violation of the right to life or a violation of the

prohibition of torture may amount to a crime against humanity. The crime of genocide, prohibited by the **Convention on the Prevention and Punishment of the Crime of Genocide** is also a crime against humanity. According to the **Rome Statute of the International Criminal Court**, the following acts can form the basis of a crime against humanity: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds, in connection with any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. [Article 7(1)]

The **International Convention for the Protection of All Persons From Enforced Disappearance**, adopted by the General Assembly on 20 December 2006 (A/RES/61/177) states that "the widespread or systematic practice of enforced

disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law". [Article 5]

17 Requirement to Take Into Account Certain Other Factors

Principle 4 identifies possible consequences of transfers and international obligations that States are required to take into account before authorizing a transfer of arms and ammunition. It imposes a positive duty on states to address these issues, and establishes a presumption against authorization where these consequences are deemed likely. These factors are included in Section I of the **UN Programme of Action** as well as in regional instruments concerned with arms transfers.

18 Compliance with Commitments on Transparency and Disarmament

In the **UN Principles on International Arms Transfers**, States agreed that "Arms transfers should be addressed in conjunction with the question of maintaining international peace and security, reducing regional and international tensions, preventing and resolving conflicts and disputes, building and enhancing confidence, and promoting disarmament as well as social and economic development. Restraint and greater

openness, including various transparency measures, can help in this respect and contribute to the promotion of international peace and security." [paragraph 2] See also other relevant paragraphs of these Principles.

Regional instruments include:

Guidelines for Implementation of the Nairobi Protocol: "States shall take into account the recipient's record of compliance with commitments and transparency in the field of non-proliferation, arms control and disarmament." [paragraph 2.2.3 (c) (viii)]

EU Code of Conduct: "Member States will take into account, inter alia, the record of the buyer country with regard to:... b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts; c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions..." [Criterion six]

OSCE Document on Small Arms and Light Weapons: "Each participating State will, in considering proposed

exports of small arms, take into account: ... (iii) The record of compliance of the recipient country with regard to international obligations and commitments, in particular on the non-use of force, and in the field of non-proliferation, or in other areas of arms control and disarmament, and the record of respect for international law governing the conduct of armed conflict." [Section III, Common export criteria 2(a)]

Other multilateral instruments include the **Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons**. The Guidelines mandate that: "Each Participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might: ... (d) Contravene its international commitments, in particular in relation to sanctions adopted by the Security Council of the United Nations, agreements on non-proliferation, small arms, or other arms control and disarmament agreements." [Article I, paragraph 2]

19 Requirement to Prevent Terrorist Attacks

The term "terrorist attacks" should be understood generally in this context to mean acts which are prohibited under international law, such as deliberate attacks on civilians, indiscriminate attacks,

hostage-taking, torture or deliberate and arbitrary killings, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or to abstain from doing any act. There are some continuing disagreements around the use and definition of the term "terrorism", particularly regarding the question of intent and whether states can commit acts of terrorism. The proposed definition in the Report of the High-level Panel on Threats, Challenges and Change, "A more secure world: Our shared responsibility," published by the UN in December 2004 has been gaining growing international acceptance. Paragraph 164(d) of the report suggests that terrorism should be understood as "any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." The definition by the High-level Panel excludes state violence on the grounds that such conduct is already covered by the

Geneva Conventions and other instruments, including international criminal law. Many still do not accept the exclusion of certain state conduct being characterized as terrorism.

Despite the lack of an accepted definition of "terrorism" there are numerous existing conventions where the word appears, usually relating to specific acts associated with terrorism or terrorist attacks. The most recent example of an international convention is the **International Convention for the Suppression of the Financing of Terrorism** (entered into force 10 April 2002). This treaty defines terrorism (in the context of financing) as: "(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex [see below]; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." [Art. 2. 1 (a) & (b)] By default it appears that "terrorism" is being defined by the acts which have been prohibited in these conventions, as legislative drafters seek to avoid a general definition by referring to acts or offences in existing international law. Current treaties include for example:

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;
- International Convention against the Taking of Hostages;
- International Convention for the Suppression of Terrorist Bombings;
- International Convention for the Suppression of the Financing of Terrorism;
- Convention on Offences and Certain Other Acts Committed on Board Aircraft;
- Convention for the Suppression of Unlawful Seizure of Aircraft;
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation & the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation;
- Convention on the Physical Protection of Nuclear Material;
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation & the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf;
- Convention on the Marking of Plastic Explosives for the Purpose of Detection.

20 Requirement to Prevent the Commission of Violent or Organised Crime

In December 1991 the General Assembly called upon all States to,

inter alia, give high priority to eradicating illicit arms trafficking in all kinds of weapons and military equipment, a most disturbing and dangerous phenomenon often associated with terrorism, drug trafficking, organized crime and mercenary and other destabilizing activities, and to take urgent action towards that end, as recommended in the study submitted by the Secretary-General. [A/RES/46/36 H] According to the **United Nations Guidelines for International Arms Transfers**, one of the measures necessary to prevent illicit arms trafficking associated with such criminal activity is that "States should define, in accordance with their national laws and regulations, which arms are permitted for civilian use and which may be used or possessed by the military and police forces." [Paragraph 30]

Regional and multilateral instruments include:

ECOWAS Convention: "A transfer shall not be authorised if it is destined to: a) be used for or to facilitate the commission of violent or organised crime." [Article 6 (4)(a)]

Guidelines for Implementation of the Nairobi Protocol: "States Parties shall take into account other factors before authorizing an arms transfer. States should not authorize the transfer if it is

likely to ...be used for or to facilitate the commission of violent crimes.” [paragraph 2.2.3(c)]

EU Code of Conduct: “Member States will take into account inter alia the record of the buyer country with regard to: a) its support or encouragement of terrorism and international organised crime...” [Criterion six]

Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons: “Each Participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might: ... (j) Facilitate organised crime.” [Article I, paragraph 2]

OSCE Document on Small Arms and Light Weapons: “Each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might: ... (x) Facilitate organized crime.” [Section III, Common export criteria 2 (b)]

21 Requirement to Avoid Aggravating Regional Insecurity and Instability

According to the **United Nations Guidelines for International Arms Transfers**, “Arms-producing or supplier States have a responsibility to seek to ensure that the quantity

and level of sophistication of their arms exports do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms” [paragraph 20] and “States receiving arms have an equivalent responsibility to seek to ensure that the quantity and the level of sophistication of their arms imports are commensurate with their legitimate self-defence and security requirements and that they do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.” [paragraph 21]

Regional instruments include:

ECOWAS Convention: “A transfer shall not be authorised if it is destined to: b) adversely affect regional security; endanger peace, contribute to destabilising or uncontrolled accumulations of arms or military capabilities into a region, or otherwise contribute to regional instability.” [Article 6 (4)(a)]

Guidelines for Implementation of the Nairobi Protocol: “States Parties shall take into account other factors before authorizing an arms transfer. States should not authorize the transfer if it is likely to ...adversely affect regional security; to endanger peace, introduce destabilizing accumulations of arms or military capabilities into a region, or

otherwise contribute to regional instability.” [paragraph 2.2.3 (c) (v)]

EU Code of Conduct: “Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.” [Criterion three] Further, “Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim. When considering these risks, EU Member States will take into account inter alia: a) the existence or likelihood of armed conflict between the recipient and another country; b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force; c) whether the equipment would be likely to be used other than for the legitimate national security and defence of the recipient; d) the need not to affect adversely regional stability in any significant way.” [Criterion four]

OSCE Document on Small Arms and Light Weapons: “Each participating State will, in considering proposed exports of small arms, take into account: ... (ii) The internal and regional situation in and around the recipient country, in the light of existing

tensions or armed conflicts.” Common export criterion 2(b): “Each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might: ... (v) Prolong or aggravate an existing armed conflict, taking into account the legitimate requirement for self-defence, or threaten compliance with international law governing the conduct of armed conflict; (vi) Endanger peace, create an excessive and destabilizing accumulation of small arms, or otherwise contribute to regional instability.” [Section III, Common export criteria 2(a)]

United Nations and multilateral instruments reinforce these regional instruments. The **Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons** provides that: “Each Participating State will avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might: ... (e) Prolong or aggravate an existing armed conflict, taking into account the legitimate requirement for self-defence, or threaten compliance with international law governing the conduct of armed conflict; (f) Endanger peace, create an excessive and destabilising accumulation of small arms, or otherwise contribute to regional instability.” [Article I, paragraph 2]

A 1997 United Nations Report of the Panel of Governmental Experts on Small Arms stated that “accumulations of small arms and light weapons become excessive and destabilizing: (a) When a State, whether a supplier or recipient, does not exercise restraint in the production, transfer and acquisition of such weapons beyond those needed for legitimate national and collective defence and internal security; (b) When a State, whether a supplier or recipient, cannot exercise effective control to prevent the illegitimate acquisition, transfer, transit or circulation of such weapons; (c) When the use of such weapons manifests itself in armed conflict, in crime, such as arms and drug trafficking, or other actions contrary to the norms of national or international law.” [A/52/298, 27 August 1997, paragraph 37]

22 Requirement to Avoid Adversely Affecting Sustainable Development

Article 26 of the **UN Charter** states that one of the functions of the Security Council is to promote “the establishment and maintenance of international peace and security with the least diversion for armaments of the world’s human and economic resources.”

Articles 1(3), 55 and 56 pledge Member States to promote and encourage respect and observance of

human rights to achieve among other things, “higher standards of living, full employment and conditions of economic and social progress and development”.

The **Declaration on the Right to Development**, adopted by the General Assembly in 1986 recognizes a collective international obligation to promote development and requires States to “cooperate with each other in ensuring development and eliminating obstacles to development”. [A/41/128, 4 December 1986, Article 3(3)]

Regional instruments include:

ECOWAS Convention: “A transfer shall not be authorised if it is destined to: c) hinder or obstruct sustainable development and unduly divert human and economic resources to armaments of the states involved in the transfer.” [Article 6 (4)(c)]

OAS Charter: “The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: ...h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.” [OAS Charter, Article 2(h)]

OAS Declaration on Security in the Americas, 2003: “We reaffirm the objective of achieving an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states.” [OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, 28 October 2003, Paragraph 4(w)]

Guidelines for Implementation of the Nairobi Protocol: “States Parties shall take into account other factors before authorizing an arms transfer. States should not authorize the transfer if it is likely to ...adversely affect sustainable development through the excessive or unjustifiable diversion of resources from social expenditure to military expenditure.” [paragraph 2.2.3 (c) (vi)]

EU Code of Conduct: “Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country...” [Criterion eight]

Wassenaar Arrangement Best Practice Guidelines for Exports of Small Arms and Light Weapons: Each Participating State will, in considering proposed exports of SALW, take into account: ... d) The nature and cost of the arms to be transferred in relation to the circumstances of the recipient country,

including its legitimate security and defence needs and to the objective of the least diversion of human and economic resources to armaments.” [Article I, paragraph 1]

OSCE Document on Small Arms and Light Weapons: “Each participating State will, in considering proposed exports of small arms, take into account: ... (iv) The nature and cost of the arms to be transferred in relation to the circumstances of the recipient country, including its legitimate security and defence needs and to the objective of the least diversion of human and economic resources to armaments.” [Section III, Common export criteria 2(a)] The 1993 OSCE Principles Governing Conventional Arms Transfers contains identical text.

23 Duty to Prevent Corrupt Practices

The **United Nations Guidelines for International Arms Transfers** require that: “States should intensify their efforts to prevent corruption and bribery in connection with the transfer of arms. States should make all efforts to identify, apprehend and bring to justice all those involved in illicit arms trafficking.” [paragraph 25]

The **UN Convention against Corruption** was adopted by the General Assembly in 2003 (A/RES/58/4) and entered into force on 14 December 2005. 140 States have signed the

Convention, with 84 ratifications or accessions. Article 9 requires that State parties “in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.”

Regional instruments also address the issue of corruption. For example, the **ECOWAS Convention** prohibits authorization of transfers that “involve corrupt practices at any stage – from the supplier, through any middlemen or brokers, to the recipient. [Article 6 (4)(d)] The **Guidelines for Implementation of the Nairobi Protocol** require: “States Parties shall take into account other factors before authorizing an arms transfer. States should not authorize the transfer if it is likely to ...involve corrupt practices at any stage – from the supplier, through any middlemen or brokers, to the recipient.”

Other instruments include: the **Inter-American Convention against Corruption**, adopted by the OAS on 29 March 1996, the **Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union**, adopted by the Council of the European Union on 26 May 1997, the **Convention on**

Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Co-operation and Development on 21 November 1997, the **Criminal Law Convention on Corruption**, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, the **Civil Law Convention on Corruption**, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, and the **African Union Convention on Preventing and Combating Corruption**, adopted by the Heads of State and Government of the African Union on 11 July 2003.

24 Duty to Comply with Bilateral and Multilateral Arms Control Agreements

Regional instruments include:

ECOWAS Convention: A transfer shall not be authorised if its authorization violates “any other treaty or decision by which the Member States are bound, including: i. binding decisions, including embargoes, adopted by relevant international, multilateral, regional and sub-regional bodies, such as the African Union Peace and Security Council, to which a State is party.” [Article 6 (2)(c)(i)]

OAS/CICAD Model Regulations on Arms Brokers: “The National Authority shall prohibit brokering activities and refuse to grant licenses if it has

reason to believe that the brokering activities will, or seriously threaten to: ... (g) result in a breach of a bilateral or multilateral arms control or non-proliferation agreement.” [Article 5]

OSCE Document on Small Arms and Light Weapons: “Each participating State will avoid issuing licences for exports where it deems that there is a clear risk that the small arms in question might: ... (iv) Contravene its international commitments, in particular in relation to sanctions adopted by the Security Council of the United Nations, decisions taken by the OSCE, agreements on non-proliferation, small arms, or other arms control and disarmament agreements.” [Section III, Common export criteria 2(b)]

Guidelines for Implementation of the Nairobi Protocol: “States Parties shall take into account other factors before authorizing an arms transfer. States should not authorize the transfer if it is likely to ...contravene other international, regional or sub-regional commitments or decisions made, or agreements on non proliferation, arms control and disarmament.” [paragraph 2.2.3 (c) (viii)]

EU Code of Conduct: An export licence should be refused if approval would be inconsistent with, inter alia: ... “b) the international obligations of

member states under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention; c) their commitments in the frameworks of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement; d) their commitment not to export any form of anti-personnel landmine.” [Criterion one]

25 Requirement for Transparency

Principle 5 is a minimum requirement to increase transparency so as to help ensure compliance with Principles 1-4 above. States should report each international arms transfer from or through their territory or subject to their authorization. Reporting should be standardized and tied to the implementation of the normative standards set out in the Principles. These reports should be sent to an independent and impartial Registry of International Arms Transfers, which should issue a comprehensive annual report.

In the **United Nations Guidelines for International Arms Transfers**, it was agreed that “States should recognize the need for transparency in arms transfers” [paragraph 15] and that “States should report all relevant transactions in their annual reports to the Register of Conventional Arms as an important confidence-building

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measure. Those States which do not yet provide annual reports to the Register are strongly encouraged to do so. States should also consider developing additional transparency measures at the regional, subregional and national levels as well as unilateral transparency measures.” [paragraph 38] On 6 December 1991, the General Assembly agreed to the creation of the Register of Conventional Arms. The Register is universal and non-discriminatory and is to include data on international arms transfers as well as information provided by Member States on military holdings, procurement through national production and relevant policies. [A/RES/46/36]

In December 2006, the General Assembly reiterated its call for “all Member States to cooperate at the regional and subregional levels, taking fully into account the specific conditions prevailing in the region or subregion, with a view to enhancing and coordinating international efforts aimed at increased openness and transparency in armaments.” [A/RES/61/77]. In 2007 the General Assembly stated its continuing view “that an enhanced level of transparency in armaments contributes greatly to confidence-building and security among States and that the establishment of the United Nations Register of Conventional Arms constitutes an important step forward

in the promotion of transparency in military matters.” [A/RES/52/38 R]

Regional instruments include:

EU Code of Conduct: The Code contains operative provisions aimed at harmonising its application by Member States and increasing the transparency of the process. The EU Code of Conduct imposes an annual reporting obligation on states. Although intended to be confidential, recognising Member States’ desire to increase transparency in this area, in 1999 the Council of Europe decided to render the report public (Annual Report in conformity with Operative Provision 8 of the European Union Code of Conduct on Arms Exports, 3 November 1999, 1999/C315/01). In addition, transparency is strengthened by obligating Member States to consult before granting a licence which has been denied by another Member State for an essentially identical transaction in the preceding three years.

Inter-American Convention on Transparency in Conventional Weapons Acquisitions: “The objective of this Convention is to contribute more fully to regional openness and transparency in the acquisition of conventional weapons by exchanging information regarding such acquisitions, for the purpose of promoting confidence among States in

the Americas.” [Article II] Article III requires States to report annually to the depositary on their imports and exports of major conventional weapons providing information, with respect to exports, on the importing State, and the quantity and type of conventional weapons exported.

SADC Protocol: “a) develop and improve transparency in firearms accumulations, flows and policies relating to civilian owned firearms; and b) establish national firearms databases to facilitate the exchange of information on firearms imports, exports and transfers.” [Article 16]

ECOWAS Convention: “Member States shall establish where they do not exist already, national computerised registers and database of small arms and light weapons.” [Article 9 (1)]

CIFTA: “States Parties shall assure the maintenance for a reasonable time of the information necessary to trace and identify illicitly manufactured and illicitly trafficked firearms to enable them to comply with their obligations under Articles XIII (Exchange of Information) and XVII (Mutual Legal Assistance).” [Article XI]

26 Requirement for Comprehensive Controls

Principle 6 will help ensure that states enact national laws and regulations

according to common standards, and ensure that all the principles are implemented consistently. This will help ensure that loopholes are not exploited which undermine the purpose of the Global Principles.

27 Duty to Control all Imports and Exports of Arms and Ammunition

The establishment of a state licensing system is an elementary requirement of all United Nations and other multilateral and regional standards for the control of international transfers of conventional arms including small arms and light weapons. Article 10 of the **UN Firearms Protocol** requires State parties to establish a licensing system for the export, import and transit of firearms and their parts, components and ammunition. For example, Article 10(5) states: “Each State Party shall, within available means, take such measures as may be necessary to ensure that licensing or authorization procedures are secure and that the authenticity of licensing or authorization documents can be verified or validated.” The **United Nations Guidelines for International Arms Transfers** require that “States should establish and maintain an effective system of export and import licences for international arms transfers with requirements for full supporting documentation” [Paragraph 26], and that “the exporting State should seek to obtain an import certificate from the receiving State covering the exported

arms. The receiving State should seek to ensure that imported arms are covered by a certified licence of the authorities in the supplying State.” [Paragraph 27]

28 Duty to Control all Brokering activities in Arms and Ammunition

An emerging body of international standards addresses the state responsibility to strictly regulate international arms dealers and brokers. According to the **United Nations Guidelines for International Arms Transfers**, “States should maintain strict regulations on the activities of private international arms dealers and cooperate to prevent such dealers from engaging in illicit arms trafficking.” [Paragraph 39] The prevention of illicit brokering of small arms is a requirement in the **UN Firearms Protocol**. Article 15(1) states: “With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as: (a) Requiring registration of brokers operating within their territory; (b) Requiring licensing or authorization of brokering; or (c) Requiring disclosure on import and export licences or authorizations, or

accompanying documents, of the names and locations of brokers involved in the transaction.”

Discussions in the United Nations are proceeding concerning the development of standards and measures by States to prevent the illicit brokering of small arms and light weapons as required by the **UN Programme of Action** and subsequent UN Biennial Meetings of States (2003, 2005).

In 2005 the UN General Assembly adopted resolution 60/81 establishing a “Group of Governmental Experts (GGE) to Consider Further Steps to Enhance International Cooperation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons”. The GGE began its work in November 2006.

Regional and multilateral initiatives to promote the regulation of arms brokering activities include the development of an elaborate text by the OAS Inter-American Drug Abuse Control Commission entitled “Amendments to the Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition - Broker Regulations” (also referred to as the “**Model Regulations for the Control of Brokers of Firearms, their parts, components and ammunition**”). Regulation of

arms brokering is also mentioned in the African Union’s **Bamako Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small arms and Light weapons** (2000) and the **SADC Protocol** (2001). Additional elaborated provisions to control arms brokering have since been developed including: the 2000 **Nairobi Declaration on the Problem of the Proliferation of Illicit Small Arms and Light Weapons**; the **Nairobi Protocol** (2004); the agreements of the European Union in its **Council Common Position on the Control of Arms Brokering** (2003); the **OSCE Best Practice Guide on National Control of Brokering Activities** (2003); the **OSCE Principles on the Control of Brokering in Small Arms and Light Weapons** (2004); and the **Wassenaar Arrangement** in its **Elements for Effective Legislation on Arms Brokering** (2003). Lesser known security-related initiatives that mention brokering include the **UN Economic Commission for Europe’s Proposal for Standards Development in support of Trade Facilitation and Security** (2003).

29 Duty to Control Transfers of Production Capacity

According to the **United Nations Guidelines for International Arms Transfers** “States have responsibilities in exercising restraint over the production and procurement of arms as well as transfers.” [Paragraph 18]

Moreover, “arms-producing or supplier States have a responsibility to seek to ensure that the quantity and level of sophistication of their arms exports do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.” [Paragraph 20] and “States receiving arms have an equivalent responsibility to seek to ensure that the quantity and the level of sophistication of their arms imports are commensurate with their legitimate self-defence and security requirements and that they do not contribute to instability and conflict in their regions or in other countries and regions or to illicit trafficking in arms.” [Paragraph 21] Thus, “States should scrutinize their national arms-control legislation and procedures and, where necessary, strengthen them in order to increase their effectiveness in preventing the illegal production, trade in and possession of arms in their territory that can lead to illicit arms trafficking.” [Paragraph 24] Also, “all arms-transfer agreements and arrangements, in particular between Governments, should be designed so as to reduce the possibility of diversion of arms to unauthorized destinations and persons. In this context, a requirement by the exporter for import licences or verifiable end-use/end-user certificates for international arms transfers is an important measure to prevent unauthorized diversion.” [paragraph 33]

30 Duty to Control Transit and Trans-shipment of Arms and Ammunition

The international transfer of arms includes instances where the arms are transshipped or are in transit between an exporting and importing state. The **UN Firearms Protocol**, Article 7, requires State parties to maintain records for 10 years on the international transfer of firearms, their parts, components and ammunition including for countries of transit. Article 10(1) states: "Each State Party shall establish or maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition. Article 10(2) states: "Before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State Party shall verify: (a) That the importing States have issued import licences or authorizations; and (b) 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." In the **UN Programme of Action**, Member States included as one of their aims "promoting responsible action by States with a view to preventing the illicit export,

import, transit and retransfer of small arms and light weapons." In addition to undertakings made in Section II, paragraphs 2 and 11, States agreed "to put in place and implement adequate laws, regulations and administrative procedures to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures" [Section II, paragraph 12] and "to make every effort, in accordance with national laws and practices, without prejudice to the right of States to re-export small arms and light weapons that they have previously imported, to notify the original exporting State in accordance with their bilateral agreements before the retransfer of those weapons." [Section II paragraph 13]

The **Guidelines for Implementation of the Nairobi Protocol** define "international arms transfers" to include "export, transit and brokered transactions" of small arms and light weapons [Chapter 2]. Provisions of international standards cited further above in endnote 3 that refer to the states' obligations to prevent the diversion, re-sale and re-export of arms contrary to international law and standards are directly relevant to states' obligations to control the transshipment of arms and arms in transit.

31 Requirement to Monitor Enforcement and Strengthen Full Implementation

In its resolution 46/36 H, the General Assembly called upon all States to give high priority to eradicating illicit arms trafficking in all kinds of weapons and military equipment; urged Member States to exercise effective control over their weapons and military equipment and their arms imports and exports to prevent them from getting into the hands of parties engaged in illicit arms trafficking; and also urged Member States to ensure that they had in place an adequate body of laws and administrative machinery for regulating and monitoring effectively their transfer of arms, to strengthen or adopt strict measures for their enforcement, and to cooperate at the international, regional and subregional levels to harmonize, where appropriate, relevant laws, regulations and administrative procedures as well as their enforcement measures, with the goal of eradicating illicit arms trafficking. Subsequent General Assembly resolutions have called for Members States to comply strictly with all bilateral, regional and international agreements, including arms control and disarmament agreements, to which they are party and to provide technical and financial assistance to support implementation of such agreements (for example, A/RES/60/64, A/RES/58/55, and A/RES/57/50). In the decisions of the

Security Council and its Sanctions Committees, all States have been urged to take the necessary measures to implement, apply and enforce UN arms embargoes so as to make each UN embargo operative, including with respect to private actors within their jurisdiction.

The **ECOWAS Convention** creates a Group of Independent Experts tasked with ensuring monitoring and compliance with the Convention. [Chapter VI, Article 28 (1)]. ECOWAS Member States are also required to submit an annual report to the ECOWAS Executive Secretary on their activities related to small arms and light weapons as well as other matters within the purview of the Convention. [Chapter VI, Article 28 (3)]

The General Assembly has encouraged the international community to support full implementation of the ECOWAS Convention. [A/RES/61/71, 3 January 2007]

The **CIFTA** establishes a Consultative Committee responsible for: "a. promoting the exchange of information contemplated under this Convention; b. facilitating the exchange of information on domestic legislation and administrative procedures of the States Parties; c. encouraging cooperation between national liaison authorities to detect suspected illicit

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exports and imports of firearms, ammunition, explosives, and other related materials; d. promoting training and exchange of knowledge and experience among States Parties and technical assistance between States Parties and relevant international organizations, as well as academic studies; e. requesting from nonparty states, when appropriate, information on the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials; and, f. promoting measures to facilitate the application of this Convention". [Article XX]

The **EU Code of Conduct** contains a set of detailed "Operative Provisions" which facilitate the implementation and monitoring of the Code. Operative Provision 3 states: "Member States will circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused.

Operative Provision 8 requires each EU Member State "to circulate to other EU Partners in confidence an annual report on its defence exports and on its implementation of the Code".

The **Guidelines for Implementation of the Nairobi Protocol** contain a number of provisions to enhance monitoring and implementation. One of the functions of the Advisory Committee mandated to be created under the Protocol is to "advise the Minister of community action and the role and support of civil society, in matters pertaining to the implementation of the Nairobi Protocol and national legislation". [paragraph 1.2.2 (d)(iv)]. To improve operational capacity State parties shall "strengthen sub-regional co-operation among police, intelligence, customs and border control officials, in combating the illicit circulation and trafficking in small arms and light weapons, and suppressing criminal activities relating to the use of these weapons". [paragraph 5.2.1 (a)]

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