

**Control Arms Submission to the  
Working Group on Effective Treaty Implementation**

**21 May 2020**

Below please find Control Arms' inputs to the Working Group on Effective Treaty Implementation (WGETI) draft reports to inform intersessional work ahead of CSP6.

Over the past few months, UN representatives, celebrities, research institutions, politicians, religious leaders, NGOs and countless others have stressed the need to strengthen peace and security as a way to address the global crisis caused by the COVID-19 pandemic. With civil society support, in March 2020 the UN Secretary-General appealed to states for a global ceasefire, to which over 70 governments around the world have pledged their support, and warring parties have committed to respect.

The Arms Trade Treaty (ATT) -- given its purpose to contribute to international and regional peace, security and stability and to reducing human suffering -- can play a key role in the COVID-19 response. To ensure that irresponsible arms transfers do not exacerbate the devastating effects of this pandemic, the work carried out by ATT States Parties remains critical -- and must continue. As governments explore the wider implications of this global crisis, effective export controls should be an integral part of national and international responses to the COVID-19 pandemic.

**ATT Sub-Working Group on Articles 6 and 7**

Control Arms welcomes the Revised Draft Multi-year Plan for the WGETI sub-Working Group on Articles 6 and 7 (multi-year plan) and the Revised Draft Elements of a Voluntary Guide to Implementing Article 6 and 7 of the ATT (Voluntary Guide).

Multi-year plan

Control Arms welcomes the revised multi-year plan as set forth in Annex A of the [Chair Letter and Sub-working Group Documents for CSP6](#) from April 2020. We encourage the facilitator to consider the inclusion of additional presentations from national experts on the practical implementation of key provisions in Article 6 and 7. We see these as valuable in facilitating a better understanding of the distinct challenges states face and in identifying examples of good practice.

Draft elements of a voluntary guide to implementing Article 6 and 7 of the ATT (ANNEX B)

As development of the voluntary guide moves forward, it is important to note that a number of the voluntary guide's proposed elements are covered extensively in resources already published by States Parties, international organisations, civil society and other stakeholders. To avoid duplication of work, Control Arms encourages the sub-working group to undertake a

thorough review of each of these resources in its initial desk research. By way of example, we provide a list of three such publications:

- The paper published by Control Arms and Harvard Law School Human Rights Clinic titled [“Interpreting the Arms Trade Treaty: International Human Rights Law and Gender-Based Violence in Article 7 Risk Assessments”](#) provides guidance relating to key terms under Article 7 including “serious violation of international human rights law”; “serious acts of gender-based violence”; “commit or facilitate”; “contribute to or undermine”; and “overriding risk.”
- Saferworld’s paper titled [“Implementing the ATT: Undertaking an arms transfer risk assessment”](#) published in August 2018 following the Seventh Meeting of the ATT Expert Group, provides specific guidance on how to operationalise Articles 6, 7 and 11.2 and contributes to a wider understanding of the arms export risk assessment process.
- ATT Monitor in Chapter 2.2 of the 2016 Report, titled [“ATT Monitor Risk Watch Tool”](#) provides a detailed methodology and accessible source of data that is directly relevant to the application of the Treaty’s criteria and obligations.

Control Arms also sees value in reviewing the intended purpose of the voluntary guide. The Fifth Conference of States Parties to the ATT (CSP5) in the [“ATT Working Group on Effective Treaty Implementation - Chair’s Draft Report to CSP5”](#) tasked this sub-working group to consider “the elaboration of a document setting out basic elements for a voluntary training guide on gender-based violence”. In January 2020, the Chair broadened the scope of the sub-working group’s mandate to include all provisions in Articles 6 and 7, as outlined in the [Chair Letter and Sub-working Group Documents for CSP6 from January 2020](#). While Control Arms sees this expansion as a positive development, the sub-working group must undertake to review, to reinforce or redefine the purpose of the document as well as its intended audience.

In particular, it is not clear whether the voluntary guide is meant to remain a foundation for training purposes or if its intended use will expand beyond a basic learning tool. Another purpose for the guide might be a voluntary, non-prescriptive and living document designed to help identify elements States Parties may wish to consider when implementing Article 6 and 7, similar to the [voluntary basic guide](#) developed last year by the sub-working group on Article 5. If this guide is meant to address specific concerns of government officials who undertake the risk assessment, Control Arms sees value in including in the voluntary guide practical steps, recommendations and best practices to accompany the more definitional and theoretical research. With this added information, States Parties will be better equipped to make measurable progress toward effective implementation of the ATT prohibitions and risk assessment criteria.

Control Arms notes that section 2.a) of the voluntary guide suggests an exploration of the meaning of “*shall not authorize any transfer*” in the context of all three subsections of Article 6. We welcome this discussion as an opportunity to emphasize that here, “shall not authorize” indicates a positive obligation to take action to prevent the transfer in question. This language is

critical for all transfers, particularly in the context of transit and transshipment. Article 6 requires States Parties to refuse transfers that fall under its stated prohibitions, which, in many instances, necessitates the existence of national law and regulations in support of such a refusal. These discussions should highlight States Parties' obligation to adopt and implement legislation that enables them to actively implement their Article 6 obligations, at all points in an arms transfer, resulting in improved effectiveness in countering illicit and irresponsible transfers.

Control Arms sees value in including specific practical guidance in section 2.b) of the voluntary guide, as to which national government body, department, agency or officials is responsible for determining whether a transfer should be prohibited based on the criteria in Article 6. National systems for arms transfers decision-making include varying combinations of inter-departmental 'committees', lead ministries or ministers, and specialist agencies, each with different arrangements for administrative and political accountability and oversight. Whatever the structure adopted by each State Party, it is important to establish clear lines of national responsibility and authority for such decisions spanning across government agencies, departments, and offices, including its most senior levels. It is also critical for purposes of accountability that responsibilities are clear, legally established, set down in writing, and publicly accessible. This level of transparency will ensure that these processes are visible to all relevant stakeholders – including Parliament, industry, the media, civil society, and international partners.

Regarding section 2.e) of the the voluntary guide, Control Arms acknowledges, as referenced in the February 2020 sub-working group discussions, that the role of the facilitator is not to re-interpret key concepts and terms already well-established in international law, but to facilitate a common understanding of how these terms should be applied in the context of Article 6 and 7. So as not to risk the reopening and reinterpretation of firmly held tenets of international humanitarian law and human rights law, we encourage the sub-working group to use existing resources as a basis for exploring how these defined terms apply to Articles 6 and 7. In this regard, as a first step, Control Arms sees value in compiling a list of legal resources where these international legal terms appear. In addition to international instruments, like the Genocide Convention, the Rome Statute of the International Criminal Court, and the Geneva Conventions, reference documents should also include legal treatises, practical resources and guides produced by civil society and academia that further unpack these terms.

Control Arms welcomes the inclusion in the Revised Draft Elements of the Voluntary Guide of sections 2.c) - 2.f) which focus on mitigation measures, overriding risk, and reassessing export authorizations.

**Mitigation measures.** Control Arms sees value in the inclusion in the multi-year plan and in the voluntary guide of the topic of mitigation measures, as set out in Article 7.2. This is an opportunity to emphasize that the mere presence of mitigation measures should not be used in of itself as grounds to approve a transfer that would otherwise be refused. Mitigation measures

need to be assessed on the basis of their impact, not their existence. An otherwise risky transfer should be authorized only when the states concerned have strong support that the mitigation measures in place will lead to a substantive and significant reduction of the identified risks to the point where the formerly problematic proposed transfer can now be regarded as “safe.”

It would, therefore, be useful to hear from states not only about “confidence-building measures” and “jointly developed and agreed programmes” to mitigate risks but also examples of cases in which mitigation measures have and have not had the intended results. We strongly believe it is important to link our discussions to concrete, real-world examples (anonymised if necessary) and to share lessons learned from past experience with the aim of better understanding how to effect real, meaningful mitigation.

Further, as noted by the Women’s International League for Peace and Freedom in their statement in February 2020, the inclusion in the multi-year plan of a discussion on mitigation measures offers a distinct opportunity to also make progress towards the gender and gender-based violence (GBV) recommendations endorsed by CSP5, particularly as regards to paragraph 23.c.ii which notes that WGETI should encourage “States Parties to provide information on their national practices relating to “mitigating measures” in the context of article 7(4): what these can be and how they are implemented.”

**Overriding Risk.** Control Arms also welcomes the inclusion in the multi-year plan and the voluntary guide of discussions on the term “overriding risk”. This term in particular is the subject of a number of legal interpretations by states. These include interpretive declarations from New Zealand, Switzerland and Liechtenstein, each of whom have set a clear threshold where “overriding risk” is a risk that is ‘substantial’ or ‘more likely to materialise than not’. Similarly, the International Committee of the Red Cross (ICRC) [noted](#) that interpreting “overriding risk” as a risk of an Article 7(1) harm that is more likely than not to occur (even after considering mitigating measures). Further, Control Arms, through a [publication](#) developed in partnership with the International Human Rights Clinic at Harvard Law School, stressed the importance of recognizing that “an overriding risk exists when the potential Article 7(1) harms cannot be mitigated under Article 7(2)”. While each of these interpretations support the object and purpose of the ATT, Control Arms sees value in further discussions among more states, observers and civil society on how to operationalise these approaches.

**Reassessing Export Authorizations.** Control Arms welcomes the inclusion in the voluntary guide of section 3.f) on reassessing export authorizations. We urge the sub-working group to consider, as part of these discussions, the necessary threshold that would determine the need for further assessment of an export license or authorization.

ATT States Parties are encouraged, under Article 7(7) to reassess a transfer authorization when new information becomes available indicating, for instance, that there is a change in context in the country of destination which could impact the Article 7 risk assessment. Through this

exercise, States Parties should strive to set a stronger norm that enables them to reassess - and where necessary revoke - licenses in cases where the environment has changed.

Therefore, any licensing policies should include, at a minimum, a requirement that states retain the ability to revoke existing licenses whenever the peace and security climate has significantly changed in the importing country.

It is also important to note that the existence of policies on the reassessment of export authorizations should not be used to weaken the risk assessment process that States Parties are expected to conduct under Article 7(1)-(4). If the export assessment indicates a strong likelihood that any of the risks outlined in Article 7(1), 7(2) or 7(4) might occur in the future, the policies on reassessment of export authorizations should not preclude the government from denying the transfer at this initial stage.

#### Methodology for Unpacking Concepts.

According to the multi-year plan presented in the ATT Working Group meetings held in January 2020, the facilitator of this sub-working group was to provide, during the April meetings, a report on the number of responses from States Parties concerning national interpretation and implementation of each listed concept in the Draft Methodology Template for Unpacking Key Concepts (Attachment 2 to the [Chair Letter and Sub-working Group Documents for CSP6 from January 2020](#)). It was expected at the next WGETI meeting that the facilitator would also identify any additional concepts suggested by States Parties to include in the compilation exercise. While recognizing that many states require a significant shift in priorities due to the current global pandemic, we urge the facilitator to explore ways of engaging in a consultative process during 2020. Establishing points of contact and connection in 2020, inclusive of civil society, will provide the sub-working group with the benefits of the broad wealth of knowledge and experience available to it and the time to gather, consider and assess all inputs prior to the CSP7 Working Group meetings in 2021.

As Articles 6 and 7 contain States Parties' responsibilities to monitor the arms trade prior to any transfer in accordance with international law, efforts to ensure a common understanding of these key concepts is of paramount importance to the Treaty's application and implementation. The terms "facilitate", "serious", "overriding risk" and "knowledge" are key operative terms that govern how States Parties make arms transfer decisions and whether those decision-making processes are ATT-compliant.

Acknowledging that the topics set out for this discussion is challenging, it is important to continue momentum with these discussions this year in order to ensure that significant progress can be made at the First CSP7 Preparatory Meetings. As these key concepts are unpacked, it is also important to remember that for the Treaty to make a real difference, States Parties must establish the highest possible standards for international trade in conventional arms.

The urgency of this task has not diminished. Defining and applying key terms in Articles 6 and 7 is particularly relevant now with several arms transfer decisions under review at the national levels, including in:

- Germany, where the government established in February 2019 a temporary moratorium on arms exports to Saudi Arabia. This was recently [extended](#) until the end of 2020;
- the UK, where the Court of Appeal concluded in June 2019 that decisions to authorise the transfer of arms to Saudi Arabia for use in Yemen were “irrational, and therefore unlawful”; and
- the Belgian region of Wallonia, where in March 2020, the State Council [suspended](#) 27 licenses for the export of arms to Saudi Arabia.

Further, as Control Arms noted during the February 2020 sub-working group meetings, the European Center for Constitutional and Human Rights (ECCHR), along with Control Arms members Mwatana Organization for Human Rights, Rete Italiana per il Disarmo and Amnesty International, submitted to the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) in December 2019 a 300-page communication with supporting evidence concerning the situation in Yemen and the responsibility of European corporate and government actors in supplying weapons, ammunition and logistical support that contributed to the commission of alleged international crimes.

### Gender and Gender-based Violence

During the CSP6 intersessional process, the commitments on gender and GBV endorsed by CSP5 have largely been overlooked. As a demonstration of its commitment to advancing the goals of CSP5, Control Arms urges the sub-working group to build on the progress made last year to encourage states to continue discussions on this important issue. As Control Arms noted in its [statement](#) to this sub-working group on 04 February 2020, progress towards many of the objectives set for this sub-working group will also contribute to progress towards the CSP5 Action Plan on Gender and GBV. Therefore, both the multi-year work plan and the voluntary guide should identify and reflect explicitly where its work contributes to the CSP5 Gender and GBV Action Plan.

### **ATT Sub-Working Group on Article 9**

Control Arms continues to believe that the establishment of the Sub-working Group on Article 9 was an important step forward, and we and our participating civil society organisations and experts look forward to actively contributing to its work. The Chair’s draft work plan for this sub-working group has a systematic logic, enabling focussed exploration of the measures and options for regulating transit and transshipment of arms by land, air and sea during the first and second preparatory CSP7 meetings during 2020-21.



However, it is very important that such explorations are conducted with full awareness of the requirements and priorities arising from close interrelationships between the obligations under Article 9 and Articles 6, 7 and 11 (as well as 12). An appropriate understanding of the extent to which improvements in ATT Member States' national systems for regulating transit and transshipment of arms are 'necessary and feasible' depends on the extent to which their existing systems are adequate and effective for preventing, combating and reducing risks and processes of diversion (Article 11); or for enabling effective risk assessments or risk mitigation measures when considering whether to authorise arms transfers (Article 7).

In this context, we suggest that the facilitator of this sub-working group considers adding a session early in the work plan on the inter-relationships between implementation of Article 9 and effective implementation of Articles 6, 7, 11 and 12. Thus, such a session could be scheduled to take place at the meeting of this sub-working group during the first CSP7 Preparatory Session. Locating this session early in the work plan of this sub-working group would have the advantage of grounding the subsequent explorations of measures and options for relating land, air and sea transit and transshipment with a clearer awareness of criteria by which Member States can assess the extent to which such regulatory measures are necessary for effective implementation of ATT obligations.

If this suggestion is adopted, it would imply that the present proposed sessions would need to be scheduled for later sessions of the sub-working group. But there is space for this in the draft facilitator's schedule. Please note that the proposed session during the first CSP8 preparatory sessions on the inter-relationships between articles 9 and article 6, 7, 11, and 12 would still be justified, but would now constitute a return to, considering the implications of such inter-relationships after the detailed review of measures to regulate transit and transshipment by land, sea and air.

We further suggest that there is an additional question to be addressed in the sessions which will explore measures and options for regulating transit and transshipment of arms respectively by land, air and sea. The additional question is: *'How have States strengthened or revised their regulations in order to support effective implementation of UNSC embargoes (or similar international obligations) or to address vulnerabilities to diversion?'* The aim of such a question is to encourage participants to exchange information on their lessons from experience on the effectiveness of their transit and transshipment regulations, and on areas of improvement that they are presently considering.

Finally, at this stage, we suggest that the sub-working group work plan includes focussed exploration on whether and how it would be useful to develop a 'Voluntary Guide to Implementing Article 9 of the Arms Trade Treaty'. Such a guide would be valuable for States that are in the process of reviewing and developing their national control regulations, systems and procedures to ensure effective implementation of the ATT.

### ATT Sub-working Group on Article 11

According to the multi-year plan included in the [Chair Letter and Sub-working Group Documents for CSP6 from January 2020](#), this sub-working group was to focus during the April meeting, on Stage 1 of the transfer chain – Before the transfer --and on assessing the risk of diversion. Similarly, the facilitator was to present a paper outlining the elements of a process for assessing the risk of diversion based on the results of the discussions that took place in January 2020. While acknowledging the challenges arising from the COVID-19 pandemic, the limited progress expected to be made in this sub-working group in 2020 is disappointing. We urge the facilitator to explore ways of engaging ATT States Parties in the next 6 months in order to continue these important discussions.

Given that, according to the revised multi-year plan from April 2020, the work of this sub-working group on Article 11 will conclude at the end of the 1st CSP8 Informal Preparatory Meeting (i.e. mid-way through the CSP8 cycle), Control Arms see value in including an additional thematic session to the multi-year plan. Not only will this provide an opportunity to expand the topics of discussion, a later conclusion in August of 2022 would ensure full consideration of the sub-group's recommendations by all States Parties during CSP8. This additional time could be used by the sub-working group to:

- Share and discuss the steps taken to conduct an Article 11 risk-assessment using real-world cases where a diversion risk was identified and addressed, as well as examples of mitigation measures which proved effective. Control Arms strongly believes in the importance of linking technical discussions to concrete, real-world, cases of diversion (anonymised or otherwise) and to share lessons learned from past experience. Providing context for arms transfer decisions allows for better understanding of how to prevent and combat arms diversion in practice.
- Explore linkages between the ATT and other international and regional instruments including the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (POA) and the International Tracing Instrument (ITI) in order to help strengthen national efforts to tackle diversion.
- Share experience generated through specific investigations into, and information-exchange about, proliferation and misuse, in order to trace and identify points of diversion-risk, and explore appropriate and effective responses.
- Consider the gender impact of the diversion of all types of conventional arms and related equipment in order to gain a better understanding of how diversion facilitates GBV, particularly in regions where GBV and diversion both are highly prevalent. To this end, research on the impact of diversion on women and girls conducted by civil society organizations and other stakeholders could prove useful. For instance, Control Arms and the Women's International League for Peace and Freedom along with other stakeholders recently submitted to the UN Office of the High Commissioner of Human



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Rights (OHCHR) a paper on the impact of the diversion of arms and unregulated and illicit arms transfers on the human rights of women and girls, which identifies good practices that could help diminish these impacts. These findings and recommendations, which will be reflected in OHCHR's report to the 44th session of the Human Rights Council, can help inform discussions in this sub-working group and can strengthen efforts to include GBV considerations in Article 11 risk assessments.