

## Arms Trade Treaty Articles 6 & 7 Flowchart and Indicator Checklist

**OBJECTIVE:** To facilitate implementation by the widest possible group of states parties, the essential elements of ATT Arts 6 & 7 are concisely distilled into the attached flowchart and checklist. While they are stand-alone tools, this note contains interpretive explanations for stakeholders who may require them.<sup>1</sup>

1. The process set out in the flowchart and checklist proposes working step by step through the requirements of Arts 6 & 7, alongside any other related required assessments.<sup>2</sup> This synergises efforts and avoids duplication because the same information will often be relevant to multiple steps.<sup>3</sup> While only Art 7 refers explicitly to risk assessments, they are implicitly also required for Art 6 to determine whether any of its prohibitions apply.

2. While a national implementation mechanism per ATT Art 5 may have internal responsibility for the process, ATT obligations are on the state party as a whole, so it is incumbent on national officers responsible for ATT decisions to compile and assess all relevant information reasonably available to the state as a whole. For example, some UN investigative or special procedures mechanisms directly address arms trade issues;<sup>4</sup> others detail serious IHL or international human rights law (IHRL) violations in individual countries, or prevalence of thematic concerns, such as violence against women, across multiple countries.<sup>5</sup> A state party which, for example, engaged with those mechanisms by participating in negotiations on their creation or mandate, or speaking on their reports in a UN body, would not be able to claim it had no knowledge of them, even if the state entity engaging with the mechanism is not the entity responsible for ATT.

### **Requirements of Art 6**

3. Art 6 applies to all transfers (defined in ATT Art 2.2 as export, import, transit, trans-shipment and brokering) of conventional arms or related ammunition, parts or components (defined in Arts 2.1, 3 and 4; hereafter 'arms/items').

4. **Art 6.1** requires reviewing UNSC resolutions adopted under Chapter VII UN Charter to identify any containing binding measures such as international economic sanctions including arms embargoes that are applicable to the proposed transfer. UNSC arms embargoes generally prohibit direct or indirect transfer so risk of diversion to unauthorised end-use/users must also be considered. If any such binding measures are applicable, then unless any exemptions identified in the resolution apply, the transfer must be denied.

5. **Art 6.2** requires identifying obligations in international agreements the transferring state is party to and that are relevant to the ATT, and then assessing whether the proposed transfer would violate any of them. If so, the transfer would also be prohibited by the ATT and must be denied. To avoid non-compliance with the ATT and the other treaty, it is in state parties' interests to take a wide view as to what obligations

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1 This note and its attached flowchart and checklist have been prepared for Control Arms by Dr Lucy Richardson (lucy.richardson@graduateinstitute.ch).

2 Related assessments may be required as a matter of domestic or international law such as for wider export control regimes, UNSC sanctions or human rights risk assessments.

3 e.g., when checking for UNSC resolutions in compliance with Art 6.1, a resolution condemning violations of international humanitarian law (IHL) but without an arms embargo or other binding measure would not prohibit transfer under Article 6.1 but may be relevant to the assessments in Arts 6.3 or 7.

4 e.g. in its report A/HRC/57/CRP.6, the UN Human Rights Council's Fact Finding Mission on Sudan concluded, among other things, that "the fighting will stop once the arms flow stops" and recommended expanding the existing UNSC arms embargo, noting the risk that those supplying arms may be complicit in grave violations of human rights and humanitarian law.

5 e.g. the UN Special Representative on Sexual Violence in Conflict's annual reports to the UNSC on the implementation of certain UNSC resolutions have cited multiple concerns of gender-based violence.

are relevant. This includes obligations relating to transfer of, or illicit trafficking in, conventional arms and – noting the principles set out in the ATT, and its object and purpose – may also include relevant obligations from treaties the transferring state is party to in areas of disarmament, corruption, organised crime, human rights, UN Charter etc. Although Art 6.2 covers treaty obligations only, to avoid a separate process, states parties may wish to also assess at this stage whether the proposed transfer would violate their customary international law obligations.

6. **Art 6.3** provides that transfers must be denied if, at the time of authorisation, the transferring state has knowledge the arms/items it seeks to transfer would be used in the commission of: genocide; crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which the state is party (as defined in international law and hereafter “listed matters”).

7. Art 6.3 is a central provision of the ATT and, accordingly, subject of much debate, largely on interpreting **knowledge** and **would**. As a requisite element for legal responsibility, *knowledge*, or state of mind, has different meanings depending on the legal context and offence in question. It can range from actual knowledge (full awareness) to constructive knowledge (ought to have known), wilful blindness (should have known, but for having consciously not enquired), and recklessness (acting despite awareness of a risk) or even negligence (not taking steps that would be expected of a reasonable person to avoid foreseeable risks). For example, individual responsibility under the Rome Statute generally requires that the crime was committed with intent and knowledge, where knowledge means “*awareness that a circumstance exists or a consequence will occur in the ordinary course of events*”.<sup>6</sup> However, some crimes and forms of responsibility require different knowledge standards: e.g., Art 28 Rome Statute provides for commanders to be liable for crimes committed by their subordinates where the commander ‘*either knew or, owing to the circumstances at the time, should have known*’ that crimes were committed or about to be committed by subordinates and ‘*failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution*’.

8. Some have argued that Art 6.3 only prohibits transfers where there is actual knowledge, in the sense that a transferring state has certainty or near certainty that arms/items would be used in the commission of a listed matter. Offered in support of this position is that a constructive knowledge standard (ought to have known) was rejected during the drafting of the relevant article on state responsibility for complicity such that it requires providing assistance with a high standard of knowledge and some degree of shared intention in that the assistance be provided with a view to furthering the wrongful act.<sup>7</sup> However, state responsibility for complicity in already-committed genocide, crimes against humanity or war crimes is a different matter than Art 6 ATT which is a preventive mechanism. In recognition of this difference, a proposal to include some degree of shared intention (that only transfers made *for the purpose of facilitating* a listed matter be prohibited) was rejected during the drafting of Art 6.

9. In terms of individual criminal responsibility, standards of “beyond reasonable doubt” are appropriate for tribunals empowered to convict and thus deny individuals their liberty, but may take years to establish on the basis of detailed evidence acquired after the fact. Importing such a high standard to Art 6.3 would defeat its preventive purpose, since it will almost never be reached until the listed matter is occurring. A civil ‘on the balance of probabilities’ standard is inapt to Art 6.3 for the same reasons.

10. While legal tests from other areas of law may be useful in interpreting Art 6.3, care should thus be taken not to confound the high thresholds required to attribute state or individual legal responsibility for the listed matters with the level of risk that would require a transfer to be denied under the ATT. Rather than being analogous to high standards required for legal responsibility, the threshold in Art 6.3 might be thought of as more akin to legal standards to justify opening a criminal investigation (e.g., “*reasonable*

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6 Art 30 Rome Statute.

7 Art 16, *Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc A/56/10 (2001), reproduced in *Yearbook of the International Law Commission*, 2001, vol II, Part Two.

*suspicion*” or “reasonable basis to believe” a crime has been committed). As a preventive measure, Art 6.3 is also analogous to legal tests that seek to prevent violations, such as a state’s obligation to act to prevent genocide which arises “at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed”<sup>8</sup> or the non-refoulement test in refugee and human rights law (where an individual may not be returned to a situation where there are substantial grounds for believing they **would** face a **real risk** of torture or arbitrary deprivation of life), or obligations to ensure respect for IHL.<sup>9</sup> Like Art 6.3 ATT, these are obligations of means rather than end, and generally understood to encompass a due diligence obligation on states to take preventive measures within their power. Art 6.3 does not create new definitions of genocide, crimes against humanity and war crimes but relies on their existing definitions in international law, meaning that the due diligence in compliance with Art 6.3 may also differ slightly depending on which listed matter is identified as a risk.

11. In any case, and to avoid circular debates about knowledge standards, the flowchart and checklist propose reading “knowledge” and “would” together, such that “knowledge” will be satisfied (and the transfer prohibited) if the likelihood the arms/items would be used in the commission of a listed matter is assessed as sufficiently high.

### **Process for Art 6 Assessments (Matrix Step 1)**

12. Simplified to facilitate implementation, the proposed assessment process thus requires states parties, via their Art 5 national implementation mechanism, to compile all internal (e.g., diplomatic, military, intelligence etc) and external (e.g., open-source, from proposed recipient, UN reports, ICJ or ICC proceedings etc) information available to the state as a whole regarding the proposed transfer. This includes information regarding the general situation re respect for human rights, existence of armed conflict, internal repression etc for the proposed recipient and arms/items.

13. Using this information, the assessment should consider relevant actor(s)’ intent (e.g., motivation, desire) and capability (eg, technical ability, resources, opportunity) to use the arms/items in the commission of any of the listed matters. Both intent and capability are required to assess likelihood because without intent, for example, then adding to a recipient’s capability by transferring arms might not increase risks.

14. The assessment is context-specific, focussing on the specific proposed recipient – including risks during transit and of diversion – and specific arms/items. For example, if a state is party, through its military, to an armed conflict in a given region where there are reported violations of IHL using combat aircraft within scope of the ATT, authorising a transfer of small arms or ammunition also within scope of the ATT to the state’s law enforcement or customs authority not known to be engaged in the armed conflict and in a region removed from it would nevertheless require a robust assessment process for sufficient confidence they would not be diverted to the armed conflict or that the risks identified in relation to combat aircraft were not present in relation to small arms or ammunition.

15. After considering whether any available mitigations might lower risk, then per Step 1 in the matrix below, states parties should assess likelihood as LOW, MEDIUM or HIGH. Noting the seriousness of the consequences (including potential legal consequences for transferring state) if arms/items are used in commission of the listed matters, this assessment should be conservative.

16. If the result of this assessment is that the likelihood is sufficiently high, then the knowledge standard is met and the transfer must be denied. The ATT does not define the degree of likelihood sufficient for knowledge the arms/items would be used in the commission of a listed matter. It has been expressed by states parties as, e.g., *real/serious/clear risk*, *reasonable degree of likelihood*, *substantial grounds for believing* etc. It is not a mathematical formula and requires more than mere suspicion or possibility, but not near certainty. “Knowledge that something *would* be used” is a lower standard than “knowledge that something *will* be used” and a higher standard than “knowledge that something *could* be used”. Using the

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8 *Application of the Convention on the Prevention and Punishment of the crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, paras 430-432.

9 Common Article 1 to the Geneva Conventions of 1949.

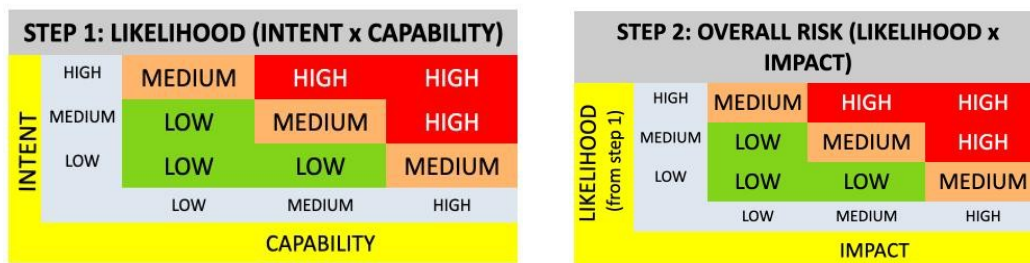
matrix, HIGH likelihood will prohibit transfer; MEDIUM likely prohibits transfer and requires more work to mitigate risk.

**Process for Art 7 Assessments (Matrix Steps 1 and 2)**

17. While Art 6 covers all transfers, Art 7 is restricted to exports.<sup>10</sup> The process proposed here again requires compiling and reviewing all relevant internal and external information reasonably available to the exporting state as a whole. Information compiled for Art 6 is likely to be relevant but further information will be required given Art 7’s wider scope including also terrorism, transnational organised crime, gender-based violence and serious violence against women and children etc.

18. Based on the compiled information, states parties must then assess if the proposed export: could contribute to or undermine peace and security; and/or, would be used to commit or facilitate: serious violations of international humanitarian law or international human rights law; or terrorism or transnational organised crime offences. This assessment must take into account risks of gender-based violence and serious violence against women and children. As with Art 6.3, assessing the likelihood of negative consequences considers both the intent and capability of relevant actor(s), including if any mitigations could reduce the risk (matrix below, Step 1).

19. Unlike Art 6.3 (which covers the most serious offences, the consequences of which will generally always be high), the wider range of matters relevant to Art 7 means a second step is required in the proposed risk assessment process, to factor in the assessed impact or consequences if the negative consequence were to eventuate. Overall risk for Art 7 is thus assessed by plotting (matrix below, Step 2) the likelihood assessed in step 1, and the impact if specific negative consequence were to eventuate. This assesses overall risk for Art 7 as LOW, MEDIUM or HIGH. Export must be denied if risk is “overriding”, ie it overrides other considerations because of the high likelihood of it occurring or, even with lower likelihood, because of the serious impact if it occurs. Using the Step 2 matrix, HIGH overall risk is overriding and export must be denied; MEDIUM overall risk is likely overriding and requires more work to mitigate risk.



<sup>10</sup> If an export has already been prohibited following the assessment under Art 6, there is no need to continue to Art 7.