

# **HOW TO APPLY HUMAN RIGHTS STANDARDS TO ARMS TRANSFER DECISIONS**

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# How to apply human rights standards to arms transfer decisions<sup>1</sup>

In order to achieve a more effective and responsible regulation of the international arms trade, all international transfers of conventional weaponry, munitions and equipment<sup>2</sup> (hereinafter referred to as ‘transfers of conventional arms’) should be carried out in accordance with States’ international legal obligations, and with national laws and policies that implement those obligations. All States have obligations under international human rights law applicable to transfers of conventional arms. These obligations apply to any state with jurisdiction over a transfer of conventional arms and cover the export, import, transit, transshipment, brokerage and licensed production of conventional arms.

While it is clear that many States recognize that their obligations under international human rights law have application to transfers of conventional arms,<sup>3</sup> the rigorous and consistent application of these obligations must also be prioritised. The purpose of the following document is to assist States and regional organisations in applying their human rights obligations. It proposes guidelines for assessing the risk of a proposed transfer being used for serious violations of human rights and sets out a number of elements to consider when forming a judgment.

## ***1 International human rights instruments***

### **a. The UN Charter**

All UN Member States have accepted the centrality of human rights and their application to a range of state activities, including the transfer of conventional arms and ammunition. The UN Charter requires Member States to promote the full range of human rights, including “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>4</sup> The Charter also requires Member States to “take joint and separate action”<sup>5</sup> in cooperation with the UN to promote human rights. These UN Charter provisions reflect a positive obligation of all States to cooperate in the protection and fulfilment of human rights within and beyond their borders.

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<sup>1</sup> AI wishes to acknowledge the substantial legal research and drafting carried out by Clare da Silva, a consultant in international law, for this report.

<sup>2</sup> “Transfers” refers to international transfers moving from the territory or from the ownership or effective control of one state to that of another. “Conventional arms and ammunition” includes: military equipment, heavy weapons; small arms and light weapons; parts and components thereof; expertise or technology including logistical or financial support for such transfers, paramilitary equipment; dual-use goods intended for military, security and police purposes; munitions including ammunition and explosives; expertise or technology from one country to another. The Wassenaar Arrangement of major arms exporting states has developed the most technically developed lists defining conventional arms.

<sup>3</sup> 118 states have made explicit commitments in regional and multilateral arms transfer control agreements where human rights is a criterion in the arms transfer licensing process.

<sup>4</sup> Article 55 (c) of the UN Charter.

<sup>5</sup> Article 56 of the UN Charter.

## **b. Human rights treaties**

Every UN member state is a party to one or more of the universal human rights treaties. These treaties include:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Elimination of all Forms of Discrimination against Women;
- the Convention on the Rights of the Child;
- the Convention on the Elimination of All Forms of Racial Discrimination;
- the International Convention on the Protection of the Rights of all Migrant Workers and Member of Their Families;
- the International Convention on the Rights of Persons with Disabilities;
- the International Convention for the Protection of all Persons from Enforced Disappearances

Currently there are more than one hundred international treaties that concern the protection of human rights. Through the UN Charter, the Universal Declaration of Human Rights, the 1993 Vienna Declaration on Human Rights, and numerous other instruments, all 192 UN Member States have committed themselves to realizing human rights as part of general international law.

These treaty standards provide the benchmarks for assessing a potential transfer of conventional arms against a human rights criterion. There is no hierarchy of international human rights: the use of conventional arms could result in the perpetration of serious violations of a spectrum of human rights standards (see Box 1) including civil, cultural, economic, political and social rights, and rights relating to women, children, minority and indigenous groups. Many of these human rights have attained the status of “customary international law” binding on all States regardless of whether they are parties to a particular treaty.

Respect for human rights will not be achieved by a state if it provides or authorizes arms transfers to a person or an entity with the knowledge that the arms will be used or are likely to be used for the *serious* violation of human rights.

**Box 1: At what point does a violation become “serious”?<sup>6</sup>**

Each situation needs to be assessed objectively on a case-by-case basis and the final assessment must be carried out by the state authorising the transfer. In determining whether human rights abuses are serious, reference should be made to credible evidence and previous findings of serious violations by independent competent bodies, NGOs, UN reports etc. (see below in this report for Sources of Information). Such reports might also establish the occurrence and nature of human rights violations or abuses leading the prospective transferring state to determine for itself that those violations or abuses are serious. Two aspects are helpful for such a determination:

**1. Scale and persistency of the violations:** Is there conduct that involves a pattern of violations or abuse of that right? Are the violations persistent or affecting many people? Violations that are widespread or systematic are among the **most** serious.

**2. Character and pervasiveness of the violations:** Do the violations or abuses apply to a significant spectrum of human rights including civil, cultural, economic, political and social rights? The range and fundamental nature of the rights being violated or abused can also determine the overall severity of the violations.

**Box 2: Relevance of Economic, Social and Cultural Rights**

Under international law States are responsible for serious human rights violations committed by bodies or persons acting on its behalf or with its consent. Article 2 of the International Covenant on Economic, Social and Cultural Rights of 1966<sup>7</sup>, to which more than two third of UN Member States are parties, specifies that: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

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<sup>6</sup> 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 right 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 to protect 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 UN Human Rights Committee. In its General Comment on States of Emergency, the 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; 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 (UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001).

<sup>7</sup> Economic and social rights are also included in numerous other human rights legal instruments, among which are: the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, and the International Convention for the Protection of all Persons from Enforced Disappearances

All the rights under the Covenant must be respected, protected and fulfilled. A violation occurs either when a state has omitted to act to overcome deprivation or, alternatively, when it has actively impeded, or allowed others to impede, the realisation of a right. Violations can be of duties to respect, protect or fulfil rights. Where denial of economic, social and cultural rights is a result of inability (there are genuine resource constraints, or circumstances beyond the control or outside the knowledge of the state), a state cannot be said to have violated its international obligations. Violations are the result of unwillingness, negligence or discrimination.

Some of these violations of economic, social and cultural rights are committed with the use of arms. For example, Amnesty International has documented how armed force or the threat of armed force has been used to carry out mass forced evictions, violate land rights of indigenous peoples, to subject people to forced labour, and to repress human rights defenders who are campaigning for economic, social and cultural rights. We have also documented armed attacks on medical personnel and infrastructure, schools, water sources and networks, and to carry out the destruction of crops, homes and livelihoods. While the realization of economic, social and cultural rights may be a greater challenge during armed conflict, there is no provision made for derogation from obligations under the Covenant. Under IHL States have duties, in the conduct of hostilities, which are relevant to economic, social and cultural rights.

States have the duties to take steps towards the progressive full realization of economic, social and cultural rights and have the duty to prioritize minimum essential levels of these rights. However, governments too often unreasonably fail to allocate resources to prioritize the full realization of economic, social and cultural rights in favour of other areas, such as military expenditure. On average, the world's rich countries spend three times as much on health as they do on defence and nearly three times as much on education. The world's low-income countries spend slightly less on health than on defence – an average of 2.1% of GDP against 2.5% - and only 50% more on education than on defence. Those last proportions have been improving since 1999 but only slowly.<sup>8</sup> An effective ATT will need to address this issue.<sup>9</sup>

## **2 States' human rights obligations**

In addition to their primary obligations to realize and promote human rights pursuant to the UN Charter and their treaty law obligations, States are responsible for the actions of their agents (e.g. police officers, soldiers).<sup>10</sup> They also have a responsibility to protect persons from

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<sup>8</sup> Data from SIPRI 2007 Report

<sup>9</sup> See *Arms Without Borders, Why a globalised trade needs global controls*, Control Arms, 2 October 2006; and *Guns or Growth? Assessing the impact of arms sales on sustainable development*, Control Arms June 2004 which highlight how excessive military spending can undermine the provision of health, education and other key social services.

<sup>10</sup> The Principles on the Prevention of Human Rights Violations Committed with Small Arms (adopted in 2006 by the Sub-commission on the Protection and Protection of Human Rights) states that "A state agent includes any person or persons acting at the instigation of or with the consent or acquiescence of a public official."

conduct involving abuses by private actors, including companies, whether or not those actors are acting under the control of the state. Such protection involves the exercise of “due diligence”, including taking measures to prevent human rights abuses by private actors that impair the enjoyment of human rights of anyone within its territory or subject to its jurisdiction.

Under general principles of state responsibility, the responsibility of a state is engaged if it aids or assists the commission of an internationally wrongful act, including a human rights violation, by another state in the knowledge of the circumstances of the internationally wrongful act (see Box 3). Such assistance might include the provision of material aid, such as weapons or munitions, to a state that uses that aid to commit serious human rights violations.<sup>11</sup>

### **Box 3: Articles on State Responsibility**

*“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.”*

(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)

*“[A] State may incur responsibility if it (...) provides material aid to a State that uses the aid to commit human rights violations. In this respect, the UN General Assembly has called on Member States in a number of cases to refrain from supplying arms and other military assistance to countries found to be committing serious human rights violations.”*

(Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft resolution XVII, 14 December 1982, A/37/745, p. 50)

*(Commentary on the Draft Articles on State Responsibility, Article 16, para. 9, pg. 158)*

## **a. IHL and human rights law during conflict**

During armed conflict, States have specific obligations under IHL, including a general obligation to “respect and ensure respect” for the rules of IHL.<sup>12</sup> IHL is intended, among other things, to protect civilians and those who are not taking part in hostilities (i.e. wounded, sick and captured combatants) and it regulates the conduct of armed conflict. Serious violations of IHL include the “grave breaches” identified in the four 1949 Geneva

<sup>11</sup> Article 16 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, (Articles on State Responsibility), commended by the General Assembly, A/RES/56/83, 12 December 2001. The customary law status of the Articles on State Responsibility was affirmed by the International Court of Justice in its Genocide Case Judgement (Bosnia v. Serbia), 26 February 2007.

<sup>12</sup> Common Article 1 to the four 1949 Geneva Conventions.

Conventions and Additional Protocol I which are applicable in international armed conflict. The Rome Statute of the International Criminal Court also includes other serious violations of IHL applicable in international and non-international conflicts which give rise to individual criminal responsibility, in other words war crimes.<sup>13</sup>

States, when considering the authorization of the transfer of conventional arms, must equally consider the recipient's respect for IHL and should not authorize transfers if there is a substantial risk that the arms will be used to commit serious violations of this law.<sup>14</sup>

International human rights law also applies during times of armed conflict and is not displaced by the application of IHL. The two bodies of law operate concurrently and at times human rights law can be directly applied in situations of armed conflict.<sup>15</sup> The International Court of Justice has affirmed that human rights law, including economic, social and cultural rights, continues to apply in situations to which IHL is applicable.<sup>16</sup> The Human Rights Committee has also affirmed that in situations of armed conflict, "both spheres of law are complementary, not mutually exclusive"<sup>17</sup> Decisions concerning transfers of conventional arms, particularly to States involved in armed conflict, must therefore include not only consideration of the recipient's respect for IHL but must also consider whether there is a substantial risk that a transfer will be used to violate human rights.

## **b. International criminal law**

International criminal law is also relevant to States' arms transfer decisions. All States have an obligation to prohibit the provision of conventional arms to any person or entity which would knowingly assist in the commission or the attempted commission of international crimes.

The Rome 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.<sup>18</sup> Providing the weapons used to commit one of the crimes for which the ICC has jurisdiction may give rise to individual criminal responsibility.

Under the Rome Statute international crimes include crimes against humanity, war crimes, genocide and the crime of aggression. When committed as part of a widespread or systematic attack against the civilian population, a violation, for example, of the right to life or a violation of the prohibition of torture may amount to a crime against humanity. Other acts

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<sup>13</sup> Article 8, Rome Statute of the International Criminal Court.

<sup>14</sup> For a fuller discussion on the application of IHL in the arms transfer decision making process, see: "Arms Transfers Decisions: Applying international humanitarian law criteria", ICRC, Geneva, June 2007

<sup>15</sup> The International Court of Justice (ICJ) has stated that, "some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law." ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", Advisory Opinion, 9 July 2004/106

<sup>16</sup> ICJ, "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", Advisory Opinion, 9 July 2004, paras 107-112

<sup>17</sup> UN CCPR Human Rights Committee, General Comment 31 on The Nature of the General Legal Obligation on the States Parties to the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 11

<sup>18</sup> Rome Statute, Article 25 (3)(c)

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including for example, murder, enslavement, imprisonment, forcible transfer of a population, sexual violence, and enforced disappearance can form the basis of a crime against humanity.<sup>19</sup>

### **3 Key concepts for applying international human rights law**

One of the fundamental normative aims of the application of international human rights law in the arms transfer decision making process is to create a more responsible trade in conventional arms. In order to achieve this aim, the process towards forming a judgement regarding a potential transfer of arms should embody two principles:

- a. Prevention of serious human rights violations; and
- b. Fairness and objectivity in decision-making.

#### **a. Preventative not Punitive Approach**

In order to create a more responsible trade in conventional arms and ammunition, decisions on transfer authorizations based on international human rights obligations should be viewed primarily as a means to prevent serious human rights violations or abuses. Therefore, the decision making process should occur within a “preventative approach” framework. Such an approach would aim to prevent arms transfers where there is credible and reliable information indicating there is a substantial risk that a particular group, such as the security forces, will use those arms for serious violations or abuses of human rights. Where there is such information on a substantial risk then the presumption should be to prohibit that transfer of arms until the risk for such further serious violations or abuses with such arms has been curtailed

Through this conceptualization, the application of international human rights law to arms transfer decisions should be a means to prevent irresponsible international arms transfers and ensure that the use of military and security equipment and related items falling within the control list is consistent with international standards.

This approach is distinct from a “punitive” approach to arms control, which reduces the decision-making process to one where States that are seen to have unspecified “bad human rights records” cannot receive any transfers of arms. Such an approach might fail to take fully into account specific legitimate military, security and policy needs of a state to protect its population consistent with international standards for the rule of law. It also undermines the creation of opportunities for constructive dialogue between potential exporting and importing States whereby preventative or remedial measures could be discussed and implemented as a prerequisite for decisions regarding particular arms transfers that would then no longer pose a substantial risk of being used in serious human rights violations. For

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<sup>19</sup> Article 7, Rome Statute of the ICC

example, agreed measures could include enhanced systems of accountability and training of police and soldiers that are consistent with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Such an approach is in line with existing state practice and remedial measures imposed by international courts.

**Box 4: Example of preventative and remedial measures**

“Likewise, the Court has indicated that in order to adequately guarantee the right to life and integrity, the members of the security forces must receive adequate training ... Therefore, the State must design and implement, within a reasonable period of time, human rights education programs, addressed to agents of the police force, on the international standards applicable to matters regarding treatment of inmates in situations of alterations of public order in penitentiary centers.”

*(Case of the Miguel Castro-Castro Prison v. Peru, Inter-American Court of Human Rights, Merits and Reparations, November 25, 2006)*

## **b. Fairness and Objectivity**

One concern for States is that an assessment process applying a human rights criterion be applied in an objective and fair manner. In order to ensure fairness and objectivity the following factors should apply to the decision making process for an authorization to transfer arms:

- The assessment process should apply to all transfer authorizations to all countries, without distinction;
- There should be a case-by-case assessment of each application for an arms transfer license;
- Objective, verifiable and detailed information from credible and reliable sources on the arms, the intended recipients, the likely uses, the route and all those involved in the transfer should be used;
- Up-to-date information on human rights standards and violations should be used to ensure proper case-by-case assessments are made.

## **4 Practical application of international human rights law to transfer decisions**

To assist licensing authorities and other government officials involved in the arms transfer decision-making process, a clear and consistent procedure for determining whether there is a substantial risk that the transfer will be used or is likely to be used for serious violations of human rights is required. The following steps, including key factors that should be taken into account, are recommended:

- (i) An assessment of the recipient state's respect for international human rights law in relation to those rights likely to be impacted;
- (ii) A more specific assessment of the nature of the equipment, its stated end-use and the stated end-user, as well as the route, those involved in the transfer and the risk of diversion;
- (iii) Reaching a decision based on an overall assessment as to whether there is a "substantial risk" that the transfer in question will be used or is likely to be used for serious human rights violations or abuses.

### **a. Recipient state's attitude**

A thorough assessment of the risk that a transfer of conventional arms would be used or is likely to be used in the commission of serious violations of international human rights law should start with an inquiry into the recipient state's overall conduct in relation to its human rights obligations.

The following indicators should be taken into account, when assessing a recipient state's attitude towards respecting and promoting its obligations under international human rights law:

- The formal commitments made by the state to relevant international and regional human rights instruments;
  - Has the recipient country state become party to key human rights instruments (e.g. the ICCPR, the ICESCR, the regional human rights treaties, the Rome Statute?)?
- The implementation record of the state of its human rights obligations through national policy and practices;
  - Has the recipient country adopted the implementation measures required by the human rights instruments to which it is a party, including the adoption of national legislation and regulations?
- Whether the recipient state has in place the legal, judicial and administrative measures necessary for the respect and promotion of its human rights obligations;
  - Does the recipient state have legislation and procedures in place to allow for investigations into human rights abuses and violations by the state and its agents?
  - Is there a competent, independent, impartial and functioning judicial system in the recipient country, capable of prosecuting serious human rights violations?
  - Does the recipient state educate and train key sectors such as its security forces and police officers (and other arms bearers) in the content and application of international human rights law?
- Whether accountable government infrastructures exist with the capacity to implement and ensure respect for human rights obligations and to bring human rights violators to justice and provide remedy and reparation to victims;
  - Are there independent monitoring bodies and national institutions for the promotion or protection of human rights?

- Is there a record of impunity for human rights violators?
- Is there a record of providing full reparation to victims?
- The degree of cooperation with international and regional human rights mechanisms (e.g. the UN treaty bodies and special procedures);
- Has the recipient state agreed to independent monitoring and investigations into alleged serious violations of human rights and abuses? If so, how has it addressed the outcome? (i.e. has it implemented any recommendations?)

## **b. Assessing the nature of the conventional arms and its end-use/end-user**

In order to ensure that there is a case-by-case analysis a more specific assessment should be undertaken. The objective of such an assessment should be to determine whether there have been previous serious violations or abuses of human rights (See Box 5) and whether there is a substantial risk that such violations are likely to be facilitated by the transfer of those conventional arms under review. The following factors should be considered in this assessment:

- The nature of the military or security equipment, munitions or other items falling within the control list;
- A thorough assessment of the stated end-user and the stated end-use of the transfer;
- Methods agreed to verify the delivery and safe storage;
- Assessment of the risk of diversion.

## **c. Assessing the nature of the conventional arms**

- Is there any evidence that this type or a similar class of military or security equipment or other item on the control list has previously been used by the intended recipient for serious violations of human rights or IHL?
- Is the equipment or other item intended for internal security purposes? If so, is there evidence of the use of this type of arms or a similar type being used for serious violations of human rights or IHL in the receiving country, particularly for example torture and other cruel, inhuman or degrading treatment or punishment, extra-judicial executions, arbitrary detentions and enforced disappearances?
- Are the type, quality and quantity of the equipment or other items requested compatible with the stated end-user's legitimate military, security or policing requirements?

## **d. Assessing the End-User**

### **Nature of the end-user**

- Who is the stated end-user? An assessment of the end-user should be conducted regardless of whether the recipient is a state or a non-state entity (e.g. a private military or security company).

- What is the end-user's role in the recipient state and is it lawful and legitimate?
- Does the end-user (e.g. security forces) operate under clear and accountable lines of command and control?
- Can the recipient guarantee that it is the actual lawful end-user of the equipment or other items?
- Will the recipient accept to not transfer the equipment or other item to a third party without the express authorization of the supplier state?

**End-user's capacity**

- Does the stated end-user have a legitimate need for this equipment or other item?
- Does the end-user have the knowledge and capacity to manage and use the equipment or item in accordance with international human rights law standards (e.g. if the transfer of arms or munitions is designated for use by the army are there adequate systems of accountability and training in human rights law and IHL by those military or security personnel who will be using the arms or munitions)?
- Does the end-user have the capacity to verify the delivery, to manage the safe storage and distribution, and to properly maintain and deploy the equipment or other item?

**End user's human rights and IHL conduct**

- Has the conduct of the stated end-user in upholding international human rights standards and IHL been the subject of substantial concern (such as the UN monitoring bodies, national human rights commissions or international human rights NGOs)?
- If yes, has the recipient country or end-user taken measures to prevent serious violations of international human rights law and IHL (including prosecuting those responsible for such violations)?

**End user's control over its arms and munitions**

- Does the recipient state have effective arms control legislation, regulations and administrative procedures in place regarding the import, export, transit, transshipment, brokerage and closely related activities, and licensed production of military and security equipment and related items? Does this system take international human rights law and IHL fully into consideration? Is the control list of the recipient country sufficiently robust to facilitate delivery verification and lawful control over further transfer?
- Does the stated end-user have adequate stockpile management capacity and security procedures in place, including for the disposal of surplus weapons and munitions?
- Are thefts or leakages from stockpiles known to be a problem in the recipient state?
- Is illicit trafficking of arms or corrupt practices relating to arms a problem in the recipient state?

### **e. Risk of Diversion**

- Does the recipient have the capacity to ensure that the equipment or related items on the control list to be transferred will not diverted or transferred to other entities or destinations where there is a substantial risk that such items are likely to be used for serious violations of international human rights law or IHL?
- Does the recipient maintain strict and effective control over its military and security equipment and related items and their further transfer?
- Have there been previous known or suspected cases of arms or military or security equipment and related items being diverted or re-transferred from this recipient to a third party where there was a substantial risk that they would be used, or were used, for serious violations or abuses of human rights or IHL? The risk of diversion does not relate solely to concerns of diversion to an unauthorized user but also to authorized users who will or are likely to misuse the equipment for serious human rights violations or abuse, or for serious violations of IHL.

### **f. Reaching a decision**

- Based on information and assessment of these various elements a state will be able to reach a decision on whether there is a substantial risk that the proposed transfer of military or security equipment or related item on the control list would be used or is likely to be used for serious violations of international human rights law or IHL and therefore whether the transfer should be authorized or not. A final decision should be based on an overall assessment and decisions should clearly indicate the reasons for believing that there is or is not a substantial risk that the transfer in question would be likely to be used for serious violations of human rights or IHL.
- A decision not to allow the transfer of items on the control list should be based on the principle of human rights protection, taking full account of the most likely use of the types of arms in question over the projected life-cycle of the items. The decision should not be a punitive measure in the sense outlined above or made to secure an economic, political or military advantage to a State or group of States.
- If there is a wide range of arms and related items being used for serious violations and abuses of human rights, or for serious violations of IHL, and a substantial risk that further types of arms or related items would be so misused, States should act without delay to impose a generalised cessation or embargo on the transfer all those types of arms and related items. A cessation should be maintained until the substantial risk of the arms or related items being used for serious violations of human rights or IHL has ended through remedial actions.

### **g. At what point does a risk become “substantial”?**

The analysis of “substantial risk” should be carried out by competent authorities based on a case-by-case consideration of available evidence of history and present circumstances in the

recipient country regarding the proposed end-use and end-user. In assessing whether there is a substantial risk the following should be considered:

- **The current and past record** of the proposed end-user with regard to upholding their human rights obligations:
  - Have there been any significant recent developments?
  - Are there any identifiable trends (both positive and negative) regarding government action in the area of human rights?
  - Are there any foreseeable future events that would be reasonably expected to create conditions leading to increased or pervasive human rights abuses or serious violations of IHL? Particular weight should be given to the current situation and how it may develop in future when reaching a determination.
- **Time frames:** In determining risk, the focus should be whether any identified past or new trends are continuing or not. Evidence of recent serious violations of international human rights standards and IHL and an analysis of whether such violations may recur is a clearer indication of the level of risk. Evidence of past serious violations could still be relevant, though on their own they are not a sufficiently reliable indicator of present or future conduct. Such information should be taken into consideration along with other relevant institutional factors.
- *Isolated* incidents of violations of international human rights law are not necessarily indicative of a recipient's attitude or commitment towards its obligations under this body of law. An isolated incident may not be a sufficient basis for denying a transfer. However, where there is **evidence of patterns**, or where there is evidence that the recipient has not taken appropriate steps to end violations and prevent their recurrence, the likelihood of substantial risk becomes greater.
- Determination of a substantial risk should be based on a judgment that is objectively informed through the systematic application of clear criteria using reliable and credible evidence, and it should be a balanced finding based on a reasoned consideration of the facts.

#### **Box 5: Uncertainty?**

In cases where uncertainty persists, a state should seek further information and clarification from the recipient state or other sources. Where there are substantive concerns about the risk of serious human rights violations or abuses, and where preventative measures can realistically be taken prior to the authorization of a transfer (e.g., training on a type of equipment or human rights accountability for the proposed end-user), the exporting and importing governments should enter into discussions on ways to carry out such measures.

These discussions should be with a view to continuing a dialogue on the potential authorization of the transfer of conventional arms, and should ensure the successful completion of the agreed preventative measures before any decision is made to authorize the transfer. **However, in circumstances where substantive concerns about the risk of serious human rights violations or abuse persists, the presumption should be against authorizing the arms transfer.**

## **h. National legislation**

In order to give effect to the above principles and guidelines, legislation and regulations should be precise in its terms and concrete in its procedures, avoiding ambiguities and minimizing the scope for interpretation which could contradict the purpose of the law. The objectives and provisions of laws and regulations should be consistent with the UN Charter and international law.

National legislation should also provide for the legislature to be notified of all information necessary to enable it to exercise proper control over the implementation of the law; for all arms transfers to be scrutinized by a legislative committee, and evaluated in advance if there is a real risk of serious human rights violations or abuse, or serious violations of IHL; for reports to be issued on the human rights situation in the receiving countries; and for effective channels to be established for receiving relevant information from NGOs and other sources.

## **5 Sources of Information**

A variety of credible, reliable and verifiable information sources exist that are relevant to making assessments should be consulted to assist States in their transfer decision-making process. Such information sources include:

- Documentation from the UN human rights bodies, the ICRC and other international and regional bodies;
- Reports from international human rights NGOs;
- Reports from reliable local sources including local NGOs;
- Reliable media reports;
- Diplomatic missions in the recipient state;
- Human rights reports by States, including domestic human rights commissions reports;
- Judgements and reports by the International Criminal Court and the ad hoc tribunals;
- Research by academic, research and policy institutes on arms transfers and human rights issues.

## **APPENDIX: International Human Rights Instruments**

The following list is not exhaustive.

### **GENERAL STANDARDS**

- [UN] Charter of the United Nations
- [UN] International Bill of Human Rights:
  - Universal Declaration of Human Rights, 1948
  - International Covenant on Economic, Social and Cultural Rights [ICESCR], 1966
  - monitoring, Committee on Economic, Social and Cultural Rights [CESCR]
  - International Covenant on Civil and Political Rights [ICCPR], 1966
  - monitoring, Human Rights Committee [HRC]
  - (first) Optional Protocol to the International Covenant on Civil and Political Rights, 1966
  - Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989
- [UN] United Nations Millennium Declaration, 2000
- [UN] Vienna Declaration and Programme of Action, World Conference on Human Rights, 1993
- [AU] African Charter on Human and Peoples' Rights [abbreviation, African Charter]
- [AU] Protocol to the African Charter on Human and Peoples' Rights
- [AU] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
- [CoE] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints
- [CoE] European Convention for the Protection of Human Rights and Fundamental Freedoms [abbreviation, European Convention on Human Rights]
- [CoE] European Social Charter
- [CoE] Protocol Amending the European Social Charter
- [League of Arab States] Council of the League of Arab States, Arab Charter on Human Rights, 1994
- League of Arab States, Revised Arab Charter on Human Rights, 2004
- Council of the League of Arab States, Arab Charter on Human Rights, 2004
- [OAS] American Convention on Human Rights [also known as, "Pact of San José, Costa Rica"]
- [OAS] American Declaration of the Rights and Duties of Man

### **ADMINISTRATION OF JUSTICE, LAW ENFORCEMENT**

- [UN] Basic Principles for the Treatment of Prisoners

- [UN] Basic Principles on the Independence of the Judiciary
- [UN] Basic Principles on the Role of Lawyers
- [UN] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- [UN] Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- [UN] Code of Conduct for Law Enforcement Officials
- [UN] Guidelines on the Role of Prosecutors
- [UN] Standard Minimum Rules for the Treatment of Prisoners
- [UN] United Nations Guidelines for the Prevention of Juvenile Delinquency (also known as, The Riyadh Guidelines)
- [UN] United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- [UN] United Nations Standard Minimum Rules for Non-custodial Measures (also known as, The Tokyo Rules)
- [UN] United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also known as, “The Beijing Rules”)

## **BUSINESS, CORPORATIONS, INSTITUTIONS**

- [UN] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights [abbreviation, Business Norms]
- [UN] Principles relating to the status of national institutions [also known as, “The Paris Principles”]
- [AU] Convention on Preventing and Combating Corruption
- [OAS] Inter-American Convention against Corruption

## **CHILDREN**

- [UN] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
- [UN] Convention on the Rights of the Child
- monitoring, Committee on the Rights of the Child [CRC]
- [UN] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict
- [UN] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
- [UN] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime
- [AU] African Charter on the Rights and Welfare of the Child
- [ILO] ILO Convention No. 182 on the Worst Forms of Child Labour, 1999
- [OAS] Inter-American Convention on International Traffic of Minors

## **DEATH PENALTY**

- [UN] Safeguards guaranteeing protection of the rights of those facing the death penalty
- [UN] Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty
- [CoE] Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty
- [CoE] Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances
- [OAS] Protocol to the American Convention on Human Rights to Abolish the Death Penalty

## **DISCRIMINATION, RACISM, INDIGENOUS, MINORITIES, DISABILITIES**

- [UN] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
- [UN] Declaration on the Rights of Indigenous Peoples
- [UN] Durban Declaration and Programme of Action, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001
- [UN] International Convention on the Elimination of All Forms of Racial Discrimination
- monitoring, Committee on the Elimination of Racial Discrimination [CERD]
- [UN] Principles for the protection of persons with mental illnesses and the improvement of mental health care
- [UN] Standard Rules on the Equalization of Opportunities for Persons with Disabilities
- [CoE] Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the general prohibition of discrimination
- [ILO] ILO Convention No. 169 on Indigenous and Tribal Peoples, 1989
- [OAS] Inter-American Convention on the Elimination of All Forms of Discrimination against Persons With Disabilities

## **ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

- [UN] International Covenant on Economic, Social and Cultural Rights [ICESCR], 1966
- monitoring, Committee on Economic, Social and Cultural Rights [CESCR]
- [UN] Kyoto Protocol to the United Nations Framework Convention on Climate Change

- [OAS] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [also known as, “Protocol of San Salvador”]

## **EMPLOYMENT, FORCED LABOUR**

- [ILO] International Labour Organization conventions:
- [ILO] ILO Convention No. 29 on Forced Labour, 1930
- [ILO] ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, 1948
- [ILO] ILO Convention No. 97 on Migration for Employment (Revised), 1949
- [ILO] ILO Convention No. 98 on the Right to Organise and Collective Bargaining, 1949
- [ILO] ILO Convention No. 100 on Equal Remuneration, 1951
- [ILO] ILO Convention No. 105 on the Abolition of Forced Labour, 1957
- [ILO] ILO Convention No. 107 on Indigenous and Tribal Populations, 1957
- [ILO] ILO Convention No. 111 on Discrimination (Employment and Occupation), 1958
- [ILO] ILO Convention No. 138 on Minimum Age, 1973
- [ILO] ILO Convention No. 143 on Migrant Workers (Supplementary Provisions), 1975
- [ILO] ILO Convention No. 169 on Indigenous and Tribal Peoples, 1989
- [ILO] ILO Convention No. 182 on the Worst Forms of Child Labour, 1999
- [ILO] ILO Declaration on Fundamental Principles and Rights at Work, 1988

## **HUMAN RIGHTS DEFENDERS**

- [UN] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms [abbreviation, Declaration on Human Rights Defenders]

## **HUMANITARIAN LAW**

- [ICRC] Geneva Conventions:
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field [also known as, First Geneva Convention]
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [also known as, Second Geneva Convention]
- Geneva Convention relative to the Treatment of Prisoners of War [also known as, Third Geneva Convention]
- Geneva Convention relative to the Protection of Civilian Persons in Time of War [also known as, Fourth Geneva Convention]
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [also known as, Protocol I]

- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [known as, Protocol II]

## **REFUGEES, ASYLUM, MIGRANTS, NATIONALITY**

- [UN] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [abbreviation, Migrant Workers Convention]
- monitoring, Committee on Migrant Workers
- [UN] Convention relating to the Status of Refugees
- [UN] Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live
- [UN] Guiding Principles on Internal Displacement
- [UN] Protocol relating to the Status of Refugees
- [AU] Convention Governing the Specific Aspects of Refugee Problems in Africa
- [CoE] European Convention on the Legal Status of Migrant Workers
- [ILO] ILO Convention No. 143 on Migrant Workers (Supplementary Provisions), 1975

## **TORTURE, ILL-TREATMENT, DISAPPEARANCE, EXTRAJUDICIAL EXECUTIONS**

- [UN] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [abbreviation, Convention against Torture] monitoring, Committee against Torture [CAT]
- [UN] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- [UN] Declaration on the Protection of All Persons from Enforced Disappearance
- [UN] International Convention for the Protection of All Persons from Enforced Disappearance monitoring, Committee on Enforced Disappearances
- [UN] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [abbreviation, Optional Protocol to the Convention against Torture]
- [UN] Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- [UN] Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- [UN] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
- [AU] Guidelines and Measures for the Prohibition and the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (also known as, Robben Island Guidelines), 2002
- [CoE] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- [OAS] Inter-American Convention on Forced Disappearance of Persons

- [OAS] Inter-American Convention to Prevent and Punish Torture

## **TRAFFICKING IN HUMAN BEINGS, SLAVERY**

- [UN] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
- [UN] High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking
- [UN] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime
- [UN] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime
- [UN] Slavery Convention
- [UN] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery
- [UN] United Nations Convention against Transnational Organized Crime
- [CoE] Council of Europe Convention on Action against Trafficking in Human Beings
- [OAS] Inter-American Convention on International Traffic of Minors

## **WAR CRIMES AND CRIMES AGAINST HUMANITY**

- [UN] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity
- [UN] Convention on the Prevention and Punishment of the Crime of Genocide
- [UN] International Criminal Court, Elements of Crimes
- [UN] International Criminal Court, Rules of Procedure and Evidence
- [UN] Rome Statute of the International Criminal Court

## **WOMEN**

- [UN] Beijing Declaration and Platform of Action, Fourth World Conference on Women, Beijing, 1995
- [UN] Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others
- [UN] Convention on the Elimination of All Forms of Discrimination against Women
- monitoring, Committee on the Elimination of Discrimination against Women [CEDAW]
- [UN] Declaration on the Elimination of Violence against Women
- [UN] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
- [UN] Outcome document of the twenty-third special session of the UN General Assembly, Women 2000: Gender Equality, Development and Peace for the 21st Century, 2000 [also known as, “Beijing +5”]

- [UN] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, supplementing the United Nations Convention against Transnational Organized Crime
- [AU] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- [OAS] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women [also known as, “Convention of Belém do Pará”]

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