

Submission to the Office of the UN High Commissioner for Human Rights on the impact of arms transfers on human rights



February 2017

Saferworld welcomes the call by the Human Rights Council in its resolution 32/12 for a study into the impact of arms transfers on human rights and by the decision of the Office of the UN High Commissioner for Human Rights (OHCHR) to consult so widely in this regard. Saferworld is pleased to submit the following in response. Of the questions included in the OHCHR's request for information, this submission focuses on questions 1 and 3. Saferworld has been in contact with civil society partners that we understand are also submitting responses, and on this basis and in the interests of efficiency have sought not to repeat points that we believe are being made by others. We also believe that questions 2, 4 and 5 can best be answered by States, and hope that with regard to question 5 (regarding transfer refusals on the grounds of risk of diversion), States reference in particular those situations where the identified downstream risk of the suspected diversion was human-rights related.

We urge all relevant UN bodies and institutions, including all those agencies that make up the UN Coordinating Action on Small Arms (CASA), UN Peacekeeping Operations, and the UN Sanctions Committees and Expert Panels, to work together and with UN Member States and others to reduce the incidence of arms transfers that have a deleterious impact on human rights and to mitigate the negative effects where they occur. We consider the adoption and entry-into-force of the Arms Trade Treaty (ATT) critical for the development of responsible global arms transfer controls and urge UN bodies to work with the ATT Secretariat, other ATT institutions, States Parties and other stakeholders to promote its effective implementation.

1. The impact of arms transfers on the enjoyment of human rights.

It is widely recognised that arms transfers can impact upon human rights, from the right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment, to enjoyment of economic, social and cultural rights. This view is clearly widely shared by States, as evidenced through repeated reference to human rights in national, regional and international laws, agreements and instruments on arms transfers, specifically the need for governments to consider the risk of human rights violations or abuses when deciding whether to authorise a transfer.

Globally, the most obvious example of this is the AATT. In 2013, 155 States voted for its adoption; it has since been signed by 130 States, of which 91 are now States Parties. As well, UN arms embargoes frequently make reference to human rights violations as one of the reasons for their imposition.

There is in addition a wide array of regional agreements and obligations which deal directly with the impact of arms transfers on *inter alia* human rights. Some of the regional groups concerned include members who have not signed the ATT. Examples include

- the Regional Centre on Small Arms ([RECSA](#)), which has adopted the [Nairobi Protocol](#) for the Prevention, Control and Reduction of Small Arms and Light Weapons [SALW] in the Great Lakes Region and the Horn of Africa—eight RECSA members have not signed the ATT
- the Organisation for Security and Cooperation in Europe ([OSCE](#)), which has agreed [Principles Governing Conventional Arms Transfers](#) and a [Handbook of Best Practices on SALW](#), both of which acknowledge directly a risk that arms transfers could negatively affect human rights—11 OSCE members have not signed the ATT.

3. Elements to be taken into account by governments when assessing the impact an arms transfer may have on human rights.

Once States accept that arms transfers can impact on human rights, and that this can form the basis for a decision to refuse a transfer, the next question for States to consider is how to factor this into their decision-making process. The obligation in Article 7 of the ATT is that an exporting State shall assess *inter alia* the potential that the conventional arms or items could be used to commit or facilitate a serious violation of international human rights law (IHRL). If, after conducting this assessment and considering available mitigating measures, the exporting State determines that there is an overriding risk of a serious violation of IHRL, it shall not authorise the export. However, the text of the ATT gives no instruction or guidance on how to carry out the assessment.

Where risks are clearly either negligible or extreme, decision-making may be straightforward. Other cases, however, may not be so simple.

One aspect of assessing human rights risks should include an examination of the prospective recipient's formal adherence to and practical application of a range of international human rights instruments and standards in general. For example, is the recipient State a Party to key human rights instruments and their additional protocols etc.; is there an efficient, effective and independent judiciary; is there a culture of impunity for law enforcement and/or security provision; and so on?

Another, more specific, element will be the past use, or misuse, of conventional arms. This will require analysis of the recipient's historical and recent/current use of all conventional arms in relation to human rights issues, and while a focus on the use of the same or similar types of equipment is a logical start-point, use of other conventional arms may also be relevant and thus needs to be part of any assessment. Unfortunately, States frequently appear to ignore this broader picture, to the point where on occasion they may even disregard past use of the same type of equipment if sourced from a different State. For example, the assessment of a potential export of armoured vehicles from State A to State B might ignore previous misuse of similar armoured vehicles exported from State C.

Looking forward

While past-practice is definitely an important element of any export assessment, it is incumbent upon governments to be *forward-looking* as well, i.e. to assess the likelihood of *future* events. Because for arms transfers as for financial investing, ‘past performance is no guarantee of future results’. Forward-looking should not however be taken to mean ignoring history, and indeed a meaningful forward-looking risk assessment will have to take account of previous, current and developing circumstances. But in addition it must involve an attempt, on the basis of imperfect information, to anticipate future developments, and then any consequent risks. Saferworld recommends that States should adopt a precautionary approach, i.e. when in doubt, do not authorise the transfer.

As part of a forward-looking process, States should consider

- the durability of the arms in question, and should thus take the ‘long view’ when considering the consequential risks of their decisions.
- any cyclical patterns that might point to a return to heightened risks of disturbance and human rights violations in the future, even if the situation has recently been calm
- any particular ‘triggers’ that might result in a deterioration in the human rights environment, and their likelihood.

In essence, States should include in their assessment a ‘stress test’, which is commonplace across a range of other issue areas where the consequences of misjudgement are significant, e.g. in the financial, insurance and health sectors. This would involve analysis of the likelihood of certain stresses occurring, and then the downstream implications for the risk that the equipment to be transferred might be used to commit or facilitate serious violations of IHRL.

In this regard, there could be a role for the Working Group on Effective Treaty Implementation ([WGETI](#))¹, potentially in collaboration with external actors (e.g. OHCHR), to develop a set of forward-looking indicators that might be of use in determining elevated or elevating risks of human rights violations. A temporal analysis of the indicators could prove especially useful in attempts to identify deteriorating or improving situations and shifting levels of risk. These would presumably include indicators that relate specifically to human rights, but could also include data addressing other relevant issues such as governance, conflict risks and early warning.

Datasets and sources that may be of use in such an exercise could include, for example

- [Human Rights Indicators](#) (OHCHR)
- [Universal Periodic Review](#) (Human Rights Council)
- [Worldwide Governance Indicators](#) (housed at the World Bank)
- [Global Conflict Risk Index](#) (Joint Research Centre of the European Commission)
- [Global Peace Index](#) (Institute for Economics and Peace)

¹ The ATT Working Group on Effective Treaty Implementation (WGETI) was established by the second Conference of States Parties to the ATT in August 2016 and met for the first time in Geneva in February 2017. A draft annotated Programme of Work for its February 2017 meeting is available [here](#).

Guidance

Most international and regional agreements that deal with transfers of conventional arms have not yet developed guidance on how to assess risks. The exception to this rule is the EU, which in its [User's Guide](#) to the [Common Position on Arms Export Controls](#) elaborates 'criteria guidance' on all eight of the Common Position criteria, including more than 30 pages of guidance on its 'human rights' criterion. This includes possible information sources and elements to consider when forming a judgement.

In an international context, Saferworld recommends developing guidance for implementing Article 7 of the ATT, including with reference to human rights. The logical forum for this would be the WGETI. While the Common Position User's Guide could be a useful resource, the EU Common Position and the ATT are not the same, and so care should be taken in assuming that what works in one context will apply directly in another. It is also noteworthy that the guidance in the User's Guide on the risk of human rights violations does not for the most part elaborate a forward-looking process as referred to above.

Concepts

One of the issues such guidance would need to address relates to certain concepts that are included in Article 7 of the ATT, and which may be either unfamiliar to States or open to a variety of interpretations. Chief among these are the *facilitation* of serious violations and *overriding* risk.

If States are required to consider the potential that arms might be used to commit *or* facilitate a serious violation of IHRL, then "to facilitate" is clearly additional to or distinct from "to use". Clarification of this term could help to avoid confusion and assist States in understanding the extent of their obligation.

The concept of "overriding risk" is new to international law and as such would benefit from clarification. Upon ratifying the ATT, Liechtenstein and Switzerland declared an understanding that "the term 'overriding risk' in Article 7, paragraph 3, encompasses ... an obligation not to authorise the export whenever the State Party concerned determines that any of the negative consequences set out in paragraph 1 are more likely to materialise than not, even after the expected effect of any mitigating measures has been considered". New Zealand declared upon ratification that "that it considers the effect of the term 'overriding risk' in Article 7(3) is to require that it decline to authorise any export where it is determined that there is a substantial risk of any of the negative consequences in Article 7(1)". Saferworld understands that EU Member States have agreed to interpret the term as being consistent with the language of "clear risk" in the EU Common Position (i.e. permission to export is to be refused if there is a "clear risk" of designated negative outcomes). It may prove useful for the WGETI to explore with other States Parties if they share a similar interpretation to that of Liechtenstein, New Zealand and Switzerland.