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## Legal arguments for the adoption and implementation of an Arms Trade Treaty

Clare da Silva, 29 June 2012

### Introduction

This paper is an overview of the United Nations (UN) Arms Trade Treaty (ATT) process and sets out a number of legal issues that are prevalent in the treaty discussions, especially with respect to the People's Republic of China (China), which has played an important role in the process. The paper explores in detail a number of the issues raised during the discussions to date, including some of the views China has expressed concerning possible provisions of the ATT. The paper begins by briefly describing the process towards an ATT in the UN, reviewing China's participation in that process, and considering some of its views on possible treaty content. Following this background to the ATT process and overview of China's contributions, the paper then turns to the normative framework of the ATT. It assesses some of the legal arguments concerning the application of a range of criteria prior to a transfer authorisation. The paper concludes with a brief analysis of potential areas in China's current export regulations that might have to be amended if China chooses to sign and ratify the ATT.

**About the author:** Clare da Silva is an independent legal consultant on the ATT and national firearms controls.

### Initiation of the Arms Trade Treaty process in the UN

On 6 December 2006, 153 UN Member States voted in the General Assembly in favour of beginning work on the elaboration of a legally binding ATT. Emerging from a long history of discussion within the UN about the need for more

effective regulation of the global arms trade, the adoption of A/Res 61/89 (2006) was a landmark step.<sup>1</sup> For the first time in the history of the UN, a significant global political will has been summoned to address the poorly and disparately regulated international trade in arms. From 2 to 27 July the UN Conference on the ATT will be held, enabling all States to participate in the negotiations towards a final treaty.

The language of UN Resolution 61/89 set the conceptual framework through which work towards an ATT has progressed, making it clear that the creation of an ATT will be grounded in existing UN objectives and standards. The resolution recognised that arms control, disarmament, and non-proliferation are essential elements of maintaining international peace and security, and that with the right to sell, to acquire, and to possess weapons comes responsibilities and legal obligations derived from the UN Charter and international law, including international human rights law, international humanitarian law, and arms embargoes mandated by the UN Security Council.

The Resolution also recognised that the absence of "common international standards on the import, export and transfer of conventional arms...is a contributory factor to conflict, the displacement of people, crime and terrorism' and undermines, among other things, peace, security, and sustainable development." Therefore, one of the

<sup>1</sup> The United Nations First Special Session on Disarmament held in 1978 concluded that "consultations should be carried out among major arms supplier and recipient countries on the limitation of all types of conventional transfer of conventional weapons." (General Assembly, Tenth Special Session, Supplement No. 4, A/S-10/4, paragraph 85). Prior to the formation of the United Nations, the League of Nations negotiated the Convention for the Control of the Trade in Arms and Ammunition in 1919 in response to the excessive accumulation of arms after the First World War. The Convention never entered into force. In 1925, the League of Nations sought agreement on a new Arms Traffic Convention. However, this initiative also failed.

main objectives of the ATT is to create common international standards.

## China's participation in the ATT process

China has been engaged in the UN process towards an ATT since it began.<sup>2</sup> While China abstained from the vote on Resolution 61/89, it nevertheless participated in the two main activities set out in the Resolution's operative paragraphs, which included submitting its views to the UN Secretary-General on the subject of the "feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms"<sup>3</sup> and participating in a group of government experts (GGE) to examine the same subject.

Despite abstaining from voting, China stated in its submission to the UN Secretary-General that it supports the international community taking "necessary measures to regulate international arms trade and combat illicit transfer and trafficking of arms."<sup>4</sup> China also recognised that "misuse of conventional arms, particularly small arms and light weapons" (SALW), has "become a growing concern for the international community."<sup>5</sup>

China's submission also noted its participation in and commitment to three existing arms control and transparency regimes: the Convention on Certain Conventional Weapons (CCW),<sup>6</sup> the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA),<sup>7</sup> and the UN Register on Conventional Arms.<sup>8</sup>

<sup>2</sup> Prior to the initiation of the ATT process, China had already affirmed the need to strengthen controls over exports of conventional weapons in the 2004 China and European Union Joint Declaration on Non-Proliferation and Arms Control. China has also previously raised its concerns in the UN First Committee that "effective measures should be adopted to address humanitarian concerns in the context of arms control" (A/C.1/60/PV.3, 4 October 2005).

<sup>3</sup> A/Res/61/89, paragraph 1.

<sup>4</sup> China submission to the UN Secretary-General, 30 April 2007 (A/62/278, Part I, 17 August 2007). China also submitted its views on proposed treaty elements and other relevant issues to the Secretary-General in 2011 (A/66/166, 20 July 2011).

<sup>5</sup> *Ibid.*

<sup>6</sup> China has signed and ratified the Convention and its 5 protocols and, as stated by China in its submission, "faithfully fulfils the obligations under the Convention and its Protocols." The CCW and its Protocols ban or restrict the use of specific types of weapons that are considered to cause unnecessary or unjustifiable suffering to combatants or to affect civilians indiscriminately.

<sup>7</sup> On 21 July 2001, China committed to a consensus decision of the UN to adopt, support, and implement the PoA. China has submitted National reports on its implementation of the PoA.

<sup>8</sup> Although China did not participate in the initial vote to create the Register, it has participated in the Register and in subsequent reviews of it since the Register was created. Every year, until 1997, China voluntarily submitted to the UN a declaration of its

China was also a member of the GGE on the ATT, which included experts from 28 countries, among them the other permanent members of the UN Security Council: France, the United Kingdom, Russia, and the United States of America. The GGE met in three sessions between February and August 2008 and adopted a final report by consensus.<sup>9</sup> The report's major recommendation was for further consideration of the issue within the UN in an open and transparent manner on the basis of consensus, through a process that would include the UN's entire membership.

Subsequent UN resolutions, A/Res/63/24 of 8 January 2009 and A/Res/64/48 of 12 January 2010, further refined the process of working towards an ATT.<sup>10</sup> The Open-Ended Working Group, open to all UN Member States, met in 2009. Preparatory meetings in advance of the Negotiation Conference on the ATT were held in 2010 and 2011. The latest resolution, A/Res/66/518<sup>11</sup> agreed to a final preparatory meeting in February 2012 to address procedural and substantive matters. China voted yes on this resolution. The Negotiation Conference for the ATT will be held in July 2012.

## Positions and views expressed by China on the content of the ATT

China has expressed its views on the ATT through its participation in the Open-Ended Working Group meetings, as well as in the preparatory meetings.<sup>12</sup> China has put forward its views on a range of issues pertaining to the possible content of the ATT, including the treaty's scope, the risk assessment criteria, and implementation mechanisms.<sup>13</sup> China has also, *inter alia*, raised the following three main issues.

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conventional arms exports and imports. It stopped reporting because the United States of America reported its exports to Taiwan. In 2007 China resumed submitting data annually on imports and exports of conventional arms in the seven categories to the Register.

<sup>9</sup> A/63/334, 26 August 2008.

<sup>10</sup> China abstained from voting on both these resolutions.

<sup>11</sup> Draft decision A/C.1/66/L.50 of 14 October 2011. The resolution was voted on in the General Assembly on 2 December 2011.

<sup>12</sup> While China abstained from voting on the resolution creating the Open-ended Working Group, it nevertheless fully participated in the meetings. China made statements relating to "goals and objectives of a feasible arms trade treaty", "consideration of the scope", "consideration of the principles and draft parameters" (A/AC.277/2009/1, Report of the Open-ended Working Group towards an Arms Trade Treaty: establishing common international standards for the import, export and transfer of conventional arms).

<sup>13</sup> Statements by all States are at: <http://www.un.org/disarmament/convarms/ATTPrepCom/Statements.html>.

## Consistency with the principles of the UN Charter

China has repeatedly emphasised that the legal principles in the ATT should be in conformity with principles of the UN Charter and with recognised international norms.<sup>14</sup> This emphasis is in light of China's export regulations,<sup>15</sup> which also refer to a limited number of broad Charter principles, including a nation's right to self-defence and the need to maintain international peace and security. China's export regulations also refer to the principle that the arms being imported should not be used as a means of interfering in the internal affairs of the recipient country.

China has stated that it:

*"has all along taken a prudent and responsible attitude in its arms export, and implemented strict and effective controls on such exports according to the "Regulations on export control of military items of the People's Republic of China". China has always observed the following three principles in its arms export: the exports should be conducive to the legitimate self-defence capability of the recipient country; the exports should not undermine the peace, security and stability of the region concerned and the world as a whole; and the exports should not be used as a means of interfering in the internal affairs of the recipient country."*<sup>16</sup>

Given China's repeated references to the broader principles of sovereignty and self-defence,<sup>17</sup> and that its own Export Regulations do not contain more specific language relating to risk assessment criteria, it remains unclear whether China is advocating for a similar approach in an ATT or whether China believes that acknowledgement of

these broader principles is an important foundation upon which to build the treaty text.<sup>18</sup>

## Application of a risk assessment criteria pertaining to international human rights law

China has also raised concerns regarding the application of potential criteria for assessing an arms transfer prior to a State authorising it, including among these potential criteria the application of international human rights law and international humanitarian law. However, while China grants that specific States are bound by human rights treaty obligations, it has remained silent on human rights obligations under customary international law. In this respect, China has stated that it:

*"can understand the logic for applying these criteria to arms transfer decisions, but it might be noted that the human rights and humanitarian criteria tend to be difficult to judge objectively due to its political sensitivity. Besides, currently not all countries have joined all treaties under the system of international humanitarian law or international human rights law. Naturally, the international obligations assumed by various countries are different, so we should make it clear that no country is allowed to breach the obligation of international humanitarian law and international human rights law to which it is a party. Therefore, China requests to add 'to which it is a party' to the final part of this article".*<sup>19</sup>

While China understands and accepts that there needs to be risk assessment in the ATT consistent with international human rights law and international humanitarian law, it is the application of such criteria that poses some challenges for China. In its above statement, China suggests that international humanitarian law and international human rights law (IHRL) are governed solely by the application of treaty obligations.

This view fails to take into account that international human rights law derives from at least two major sources: (a) customary international law, as evidenced by general practice and (b) treaty

<sup>14</sup> Statements by China, 2 March 2009 and 15 July 2009, Meeting of Open Ended Working Group on the ATT (<http://www.un.org/disarmament/convarms/ATTPrepCom/Statement s.html>).

<sup>15</sup> These are *Regulations of the People's Republic of China on Administration of Arms Export*, Decision of the State Council and the Central Military Commission on Amending the Regulations of the People's Republic of China on Administration of Arms Export, Promulgated by Decree No. 366 on 15 August 2002 and effective as of 15 November 2002 (hereinafter referred to as "Export Regulations").

<sup>16</sup> China submission to the UN Secretary-General, 30 April 2007 (A/62/278, Part I, 17 August 2007).

<sup>17</sup> These broad principles reflect to some degree China's "*Five Principles of Peaceful Coexistence*" which are: mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit and peaceful coexistence. As noted: "[T]he Five Principles of Peaceful Co-existence, which by and large reiterate the fundamental principles of international law as provided in the Purposes and Principles of the UN Charter, always serve as the political and legal basis for China to establish diplomatic relations with other countries and to conduct its foreign affairs." Xue Hanqin, *Chinese Observations on International Law*, CJIL (2007) 86. See also, Wen Jiabao, *Carrying Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development*, 3 CJIL (2004) 363.

<sup>18</sup> Other regional agreements also reference these broad principles. However, they are referred to more as "guiding principles for implementation" than substantive obligations that translate into domestic national legal systems. See, for example, CIFTA Article III: Sovereignty 1. States Parties shall carry out the obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of nonintervention in the domestic affairs of other states."

<sup>19</sup> Statement by the Deputy Director General Kang Yong, Head of the Chinese Delegation on the issue of parameters of transfer at the Second Session of the Preparatory Committee of the United Nations Conference on "Arms Trade Treaty", New York, 1 March 2011.

law.<sup>20</sup> In many cases there is considerable overlap between the customary international law obligations of a State in relation to human rights and its obligations under a treaty which it has accepted. For example, the international prohibition on genocide is both a rule of customary international law, which is binding on all States, as well as a rule of treaty law contained in the Genocide Convention, which only binds States parties to that Convention. Thus, a State may be obliged under customary international law to respect certain human rights, even if it has not ratified the treaty which explicitly guarantees those rights. This would include customary rights as the prohibition against torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions<sup>21</sup>, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. It is widely accepted that most, if not all, of the provisions of the Universal Declaration on Human Rights have almost certainly become a part of international customary law.

## National licensing control mechanisms

China has stressed that it conducts its conventional arms trade only with sovereign states and that it makes “explicit and strict requirements” regarding the provision of end-user certificates and the purpose of the exported arms by the recipient government, which includes a commitment not to transfer the arms imported from China to any third party without China’s prior consent. China stresses that it never exports arms to countries or regions subject to an arms embargo imposed by the UN Security Council. Furthermore, China stresses that it never transfers arms to non-state entities or individuals.<sup>22</sup>

<sup>20</sup> Article 38 (1) of the Statute of the International Court of Justice provides a list of the sources of international law: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states; 2. International custom, as evidence of general practice accepted as law; 3. General Principles of Law recognized by civilized nations; 4. Judicial decision and the teaching of the most highly qualified publicists of the various nations, as subsidiary means of determination of law.

<sup>21</sup> Guaranteed by article 3 of the Universal Declaration of Human Rights and article 6 of the International Covenant on Civil and Political Rights, the right to life is considered by the Human Rights Committee (HRC) to be “the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation,” (HRC, General Comment 6, 1982: para. 1). The right to life is not absolute; lawful deprivation is permitted, though international law is moving toward customary international law status for the abolition of capital punishment.

<sup>22</sup> Statement available at: <http://www.fmprc.gov.cn/eng/wjw/zjzg/ks/kjlc/cgikwt/t410766.htm>.

Again, in stating how its current export regulatory system works, it is unclear whether China is proposing for similar mechanisms to be included within the ATT text. Mechanisms such as end-use assurances (and other verifiable documentation), re-export controls and an explicit prohibition on all transfers to destinations or actors under a UN Security Council arms embargo have also been raised by a number of other States in the ATT discussions and suggested as possible content for the ATT.<sup>23</sup>

## Why are current national regulatory instruments insufficient?

China’s submission to the UN Secretary-General cites the 1996 UN Disarmament Commission Guidelines for Arms Transfers<sup>24</sup> and suggests that these Guidelines still have “profound and practical guiding significance” for all States. It is China’s view that, given the continued significance of the Guidelines, the negotiation of a specific treaty “to re-establish” such common guidelines needs to be approached with caution.<sup>25</sup>

The Guidelines are still important, and they have played an important role in the progressive development of international transfer controls. But it is clear that much has changed during the quarter century since the Guidelines were established. The non-legally binding Guidelines set out a number of important principles relating to international transfers as well as recommendations on what States “should” do, but are not required to do, with respect to a number of aspects of the arms trade.<sup>26</sup> Furthermore, the generality of the Guidelines makes it difficult to apply them with any specificity in a meaningful way at the national level. The significance of the Guidelines has also been superseded by other developments.

Perhaps in part as a result of these shortcomings, more specific agreements were developed at the sub-regional, regional, and multilateral level to develop common and more specific standards for the regulation of international arms transfers. The Americas, Europe, and Sub-Saharan Africa,<sup>27</sup> for

<sup>23</sup> See the Chairman of the Preparatory Meetings Draft Paper on the ATT, 14 July 2011 (available at <http://controlarms.org/wordpress/wp-content/uploads/2011/09/ChairPaper-14July2011.pdf>)

<sup>24</sup> UN General Assembly resolution A/51/42, Annex, “Guidelines for international arms transfers in the context of General Assembly Resolution 46/36H of 6 December 1991”.

<sup>25</sup> China Submission to Secretary-General, 30 April 2007 (A/62/278, Part I, 17 August 2007).

<sup>26</sup> This includes, *inter alia*, national licensing systems with full documentation and import certificates to assist in addressing corruption and effective supervision of the trade in SALW.

<sup>27</sup> These include, for example: InterAmerican Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition,

example, have adopted a number of comprehensive arms transfer control agreements. These agreements have resulted in the progressive development of common norms in the international arms trade. There is commonality in the contents of the basic obligations of States to maintain or establish an effective national system of controls. China's view, as stated in its submission, foregrounds the significance of the non-legally binding Guidelines and does not sufficiently recognise further developments at national and regional levels in building towards an ATT.

The States that are party to one or more of these existing regional and sub-regional agreements have generated widely accepted criteria for the risk factors a State should consider before it authorises an export of conventional arms. These factors include considerations of the risk of violations of international humanitarian law and international human rights law. Variations in the formulation and application of these various agreements reveal inherent limitations to the current international arms control framework. Additionally, the agreements that currently exist exclude a number of important players in the international arms trade, among them China. Furthermore, some regions of the world, such as the Asia-Pacific region, have no agreements on international arms transfers.

A multilateral ATT would replace the variable standards with uniform standards and would fill existing gaps in the patchwork of national and international treaties to address the risks posed by nuclear, chemical, and biological weapons,<sup>28</sup> no international treaty exists to address the wide range of threats posed by the international trade in conventional arms. Common standards are necessary to guide this trade, which is becoming increasingly globalised. At present,

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Explosives, and other Related Materials (CIFTA), 1997; European Union Common Position on Arms Exports, 2008; Organisation for Security and Co-operation in Europe (OSCE) Document on Small Arms and Light Weapons, 2000; Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies Best Practice Guidelines for Exports of Small Arms and Light Weapons, 2002; Organisation of American States (OAS) Inter-American Convention on Transparency in Conventional Weapons, 2002; OAS Model Regulations for the Control of Brokers of Firearms, their Parts and Components and Ammunition, 2003; OSCE Handbook on Best Practices on Small Arms and Light Weapons, 2003; Nairobi Protocol on Small Arms and Light Weapons, 2004 and Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons, 2005; Code of Conduct of the States of Central America (SICA) on the Transfer of Arms, Munitions, Explosives and Related Materiel, 2005; Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons their Ammunition and Other Related Materials, 2006, Central Africa Convention for the Control of Small Arms and Light Weapons (2010).

<sup>28</sup> These include, for example, the Partial Test Ban Treaty, the Outer Space Treaty, the Nuclear Non-Proliferation Treaty, the Seabed Arms Control Treaty, the Comprehensive Test Ban treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention.

the only international agreement relating to the regulation of the international trade and transfer of a particular type of conventional arms is the UN Protocol Against the Illicit Manufacturing and Trafficking of Firearms, Their Parts and Components and Ammunition (UN Firearms Protocol), which is a protocol to the UN Convention on Organised Crime.<sup>29</sup> Like the PoA, which focuses on "illicit trade," this initiative emerged from a global crime-control framework. It was drafted by the UN Crime Commission in Vienna and forms part of the UN's transnational organised crime strategy. While the Protocol is an important development, it did not emerge from a broader arms control framework and, as a result, is limited in its normative scope.

Though common norms have been developed on the international arms trade, these norms are not *international* standards. As acknowledged by a significant majority of UN Member States, the absence of international standards contributes to "conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development."<sup>30</sup> Thus, the development of international standards and the eventual global application of such standards will provide important means to address these concerns. The process towards adopting an ATT provides an opportunity for the global community to create a framework for transfers of conventional arms that will incorporate a broad range of international law standards under one comprehensive normative structure.

## Normative framework of the Arms Trade Treaty

An ATT's main objective is to establish a comprehensive and legally binding international mechanism for ensuring a more responsible legal trade in conventional arms, while also ensuring that the abilities of States to lawfully sell, acquire and possess arms is not undermined. As General Assembly Resolution 61/89 states, "creating common international standards for the import, export and transfer of conventional arms" and "preventing diversion" are the two broad objectives of an ATT. While States have suggested a range of possible other goals and objectives,<sup>31</sup> these

<sup>29</sup> The Protocol entered into force in 2006. China signed the Protocol in 2002 but has not ratified or otherwise accepted the Protocol. However, it has played a role in the development of the legislative guide and the model law to assist in implementation of the Protocol.

<sup>30</sup> 153 States of the 192 UN Members States (or approximately eighty percent) voted in favour of A/Res/61/89 where this acknowledgement is included.

<sup>31</sup> These are elaborated in the Chairman of the Preparatory Meetings Draft Paper on the ATT, 14 July 2011. This paper is meant to be a reflection of discussion and debate so far.

effectively build upon these broader normative objectives as set out in the relevant UN resolutions.

The key means to achieve these objectives is to create a normative framework binding upon States Parties that focuses on the global movement of conventional arms through various forms of “transfer,”<sup>32</sup> recognising that responsibility for arms transfers does not fall solely upon arms exporters. The ATT would potentially establish the responsibility of all States with jurisdiction over any part of a transfer, and might create a framework for the range of legal obligations States have before they authorise an arms transfer.<sup>33</sup>

Most States have suggested that, given the harm conventional arms can cause, an ATT should offer a criteria-based risk assessment regime for States to follow. This approach would focus on the potential impact of arms transfers in the context of their end-use or their end-users. Where there is a *substantial risk* of a negative outcome from a particular transfer of conventional arms, the transfer should not be authorised.<sup>34</sup> A wide range of potential risks have been identified. These risks include, for example, that the transfer under review would:

1. Be used in a manner that would seriously undermine peace and security or, provoke, prolong or aggravate internal, regional, subregional or international instability;
2. Be used to commit or facilitate serious violations of international humanitarian law;
3. Be used to commit or facilitate serious violations of international human rights law;
4. Be used to commit or facilitate serious violations of international criminal law, including genocide, crimes against humanity and war crimes;

<sup>32</sup> The Chairman of the Preparatory Meetings Draft Paper on the ATT, 14 July 2011, suggests that international transactions or activities covered by the ATT could potentially include: import, export, transfer, brokering, manufacture under foreign license, and technology transfer. The Panel of Governmental Technical Experts appointed to advise on the establishment of the UN Register on Conventional Arms in 1992 provided a description of a broad description of “transfers” as: “International arms transfers involve, in addition to the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment.” Report of the Governmental Technical Experts on the Register of Conventional Arms, annexed to General Assembly, *Report on the Register of Conventional Arms*, UN document A/47/342, 14 August 1992, paragraph. 10. China participated in this Group of Experts.

<sup>33</sup> This is effectively what States have suggested as evidenced in the Chairman of the Preparatory Meetings Draft Paper on the ATT, July 14 2011.

<sup>34</sup> Some states have suggested alternative language to “substantial risk”, including, for example, “clear risk”, or “significant risk”. See States’ submissions to the UN Secretary General, A/62/278, Parts I and II and A/62/278/Add.1 to Add.4, 17 August 2007.

5. Be diverted to unauthorised end users for use in a manner inconsistent with the principles, goals, and objectives of the Treaty, taking into account the risk of corruption; and/or
6. Be used to support, encourage, or perpetrate terrorist acts.<sup>35</sup>

Many UN, multilateral and regional documents recognise that States have the primary responsibility for establishing and implementing systems to control international sales and transfers of conventional arms. It therefore follows that the most effective means for controlling the trade in conventional arms is through robust national systems of export, import, and transfer. An ATT would establish the standards and procedures that States Parties to the treaty must have in place in their national legal systems for licensing or authorising international transfers of conventional arms. That is, States Parties would be obliged to effectively license, monitor, and prevent arms transfers according to national laws, mechanisms, and procedures that conform with the international law standards set out in the ATT. While the competence to authorise or deny a request to transfer arms remains with the national authorities of each State, an ATT would help to ensure that national authorisation decisions are made using the same international standards.

## Obligations under international law to be reflected in the ATT

Discussions of an ATT have acknowledged that there is an established body of international legal rules that will be relevant to the assessment of transfer authorisations for conventional arms.<sup>36</sup> One of the objectives of the on-going ATT process is to identify with sufficient clarity and precision the content of these existing legal responsibilities of States, and to articulate these legal responsibilities in treaty wording that will achieve the objective of creating high common standards in the international arms trade.

During discussions on an ATT, States have repeatedly made reference to UN Charter principles, to Security Council arms embargoes,

<sup>35</sup> For the complete list of potential risk factors that could be included in the ATT, see Chairman of the Preparatory Meetings Draft Paper on the ATT, 14 July 2011. See also, S. Parker, *An Analysis of States’ Views on an Arms Trade Treaty*, UNIDIR, October 2007. The report notes that of the States who made submissions, the most desired transfer criteria were international human rights and international humanitarian law, followed by a criterion relating to terrorist attacks.

<sup>36</sup> The PoA, which China participates in, also affirms this position. By paragraph 11 of Part II of the PoA, States participating in the UN Conference have undertaken to assess such applications “according to strict national regulations and procedures that ... are consistent with *existing responsibilities of States under relevant international law*” (emphasis added).

and to international humanitarian and human rights law.<sup>37</sup> This suggests that a widely endorsed body of international law already exists with direct bearing on international transfers of conventional arms. To clarify these discussions, it is useful to divide this existing body of law into three broad categories.<sup>38</sup>

1. Express limitations on arms transfers;
2. Limitations on arms transfers based on the use or the likely use of those arms in particular circumstances; and
3. Circumstances that must be taken into account when authorising arms transfers.

### **Express limitations on arms transfers**

UN Security Council decisions imposing mandatory arms embargoes provide the clearest examples of instruments that establish explicit limitations on international arms transfers. These Security Council decisions impose obligations on all UN Member States. Other instruments establish limitations on the transfer of particular types of weapons. For example, Article 1(b) of the *1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* provides, *inter alia*, that States Parties shall never under any circumstances “transfer to anyone, directly or indirectly, anti-personnel mines.” Such treaties impose binding legal obligations only on those States that are parties to them.

### **Limitations on arms transfers based on the use or the likely use of those arms in particular circumstances**

Under international law, it is the responsibility of a State to refrain from knowingly aiding or assisting another State in the commission of an unlawful act. This principle of international law is now widely accepted, even if there is room for discussion about its scope of application. The principle is expressed in Article 16 of the United Nations International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts* of 2001.<sup>39</sup> Article 16 provides:

*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. *that act would be internationally wrongful if committed by that State.*

By reference to this principle, when a State has knowledge that the conventional arms which are the subject of an arms transfer authorisation application would be, or would be likely to be, used in breach of some fundamental principle of international law, it is incumbent upon the authorising State to prohibit the proposed transfer. For example, where a State has knowledge that conventional arms that are the subject of an authorisation application would be, or would be likely to be, used in or in the commission of genocide or of crimes against humanity, or in the commission of serious violations of international humanitarian or human rights law, the State in question would itself commit an unlawful act if it authorised the transfer in question.

Obviously, the application of this principle will not always be simple or straightforward. The principle is, however, widely accepted as giving rise to binding legal obligations for all States. This obligation is reflected in nearly all of the existing regional and sub-regional agreements on transfer controls.<sup>40</sup> Its inclusion in an international treaty will create the basis for more standardised, and hence more accepted, norms of what characterises responsible trade in conventional arms.

### **International human rights law**

China has expressed reluctance to use an ATT as a basis for developing further human rights obligations under international law, stating that “any effort aiming to solve the problem of ... human rights through this treaty is not only unrealistic, but would complicate the negotiations.”<sup>41</sup> Indeed, the ATT is not envisioned as a human rights treaty.

However, there is a clear need to consider the level of risk that a particular arms transfer might be used to violate international human rights or humanitarian law, a need that China has also recognised as logical.<sup>42</sup> Under the “Principles and

<sup>37</sup> See States’ statements: <http://www.un.org/disarmament/convarms/ATTPrepCom/Statements.html>.

<sup>38</sup> It will be a matter for States during the Negotiation Conference in July 2012 to decide how to categorise and list the various bodies of law.

<sup>39</sup> The *Articles on Responsibility of States for Internationally Wrongful Act* were commended to Governments by a resolution of the UN General Assembly (A/RES/56/83, 12 December 2001).

<sup>40</sup> For example, Article 6(3) of the ECOWAS Convention states: A transfer shall not be authorised if the arms are destined to be used: a) for the violation of international humanitarian law or infringement of human and peoples’ rights and freedoms, or for the purpose of oppression”.

<sup>41</sup> Statement by the Deputy Director General Kang Yong, Head of the Chinese Delegation at the Second Session of the Preparatory Committee of the United Nations Conference on “Arms Trade Treaty”, New York, 28 February 2011.

<sup>42</sup> Statement by the Deputy Director General Kang Yong, Head of the Chinese Delegation on the issue of parameters of transfer at the

Purposes” of the UN Charter, all UN Member States have an obligation to encourage and promote universal respect for, and observance of, human rights and fundamental freedoms. This obligation is not inconsistent with other rights and obligations contained within the Charter.<sup>43</sup> Further, State practice demonstrates that, through their participation in regional and multilateral arms transfer control agreements, approximately 130 States<sup>44</sup> have already explicitly recognised that transfers of conventional arms (including SALW) should be assessed against the foreseeable risk that they will contribute to serious breaches of human rights or gross violations of international humanitarian law.

Officially, China has accepted the existence of universal international human rights norms, has acceded to many of the major international legal instruments governing human rights, has signed other major international human rights instruments, and has participated extensively in the United Nations Human Rights Council and other components of the international human rights regime.<sup>45</sup>

### **International humanitarian law**

States have a solemn obligation to "respect and ensure respect" for international humanitarian law (IHL). This obligation appears in all four of the Geneva Conventions, which China has signed and ratified. This is generally interpreted as conferring a responsibility on third-party States not involved in an armed conflict to refrain from encouraging a party to an armed conflict to violate international humanitarian law, to refrain from taking action that

would assist in such violations, and to take appropriate steps to cause such violations to cease.<sup>46</sup>

The International Committee of the Red Cross (ICRC) has stated:

*Because weapons are often transferred with the purpose of enabling the recipient to engage in an armed conflict, transfers should be considered in light of States' obligation to ensure respect for humanitarian law. States that produce and export arms can be considered particularly influential in "ensuring respect" for IHL owing to their ability to provide or withhold the means by which violations may be committed. They should therefore exercise particular caution to ensure that the weapons transferred are not used to commit serious violations of IHL.*<sup>47</sup>

In 2003, 191 States Parties to the Geneva Conventions, including China, undertook to make respect for international humanitarian law one of the fundamental criteria upon which arms transfer decisions should be assessed and to incorporate such criteria into national laws or policies and regional and global norms on arms transfers.

International humanitarian law appears among the key criteria in numerous existing regional and sub-regional agreements on arms transfer controls,<sup>48</sup> affirming its place in international law as a fundamental element to be included in the ATT. China is party to the four Geneva Conventions and the additional Protocols.<sup>49</sup>

### **Instruments and principles which identify circumstances that must be taken into account when authorising arms transfers**

A large number of international instruments identify circumstances that must be taken into account when assessing applications for transfer

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Second Session of the Preparatory Committee of the United Nations Conference on "Arms Trade Treaty", New York, 1 March 2011.

<sup>43</sup> This includes, for example, Article 2(7) which states: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

<sup>44</sup> This is the approximate number of member States to regional and sub-regional agreements on arms transfers that include a criteria relating to international human rights or international humanitarian law.

<sup>45</sup> China has signed and ratified a number of human rights treaties, including: Convention on the Prevention and Punishment of the Crime of Genocide (ratified 1983), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified 1988), International Covenant on Economic, Social and Cultural Rights (ratified 2001), International Covenant on Civil and Political Rights (signed in 1998 but not ratified), Convention on the Elimination of All Forms of Discrimination against Women (ratified 1980), Convention on the Rights of the Child (ratified 1992), Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (signed 2001 but not ratified), Convention on the Elimination of All Forms of Racial Discrimination (acceded 1981). China is also a State Party to a number of treaties relating to terrorist attacks. For a full list of human rights treaties ratified by China, see <http://www1.umn.edu/humanrts/research/ratification-china.html>.

<sup>46</sup> ICRC, Arms Transfers Decisions: Applying International Humanitarian Law criteria, available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0916.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0916.pdf), Annex 1

<sup>47</sup> Serious violations of IHL are well defined and include the grave breaches found under the four Geneva Conventions of 1949 (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) and under Additional Protocol I of 1977 (Articles 11 and 85). These sources will facilitate application of an IHL parameter focused on serious violations. Serious violations of IHL constitute war crimes, which have also been listed under Article 8 of the Rome Statute of the International Criminal Court. These are a useful reference for acts that States have generally considered serious violations under customary international law.

<sup>48</sup> Some examples include: EU Common Position on Arms Exports (2008), ECOWAS Convention on SALW (2006), Central Africa Convention on SALW (2010), Nairobi Protocol Best Practice Guidelines (2005), Wassenaar Arrangement Best Practice Guidelines for SALW Exports (2002), OSCE Document on SALW (2000), Code of Conduct of the Central American States on the Transfer of Arms (2005), OAS Model Regulations for the Control of Brokers of Firearms (2003).

<sup>49</sup> China ratified the four Geneva Conventions in 1956 and the additional protocols in 1983.



authorisations of conventional arms (including SALW). Such circumstances include, *inter alia*, the foreseeable effects of such transfers on political stability and regional security, on perpetuating high levels of violent crimes, as well as on sustainable development and poverty–reduction efforts. While there is currently no express prohibition in international law against authorising an arms transfer when such circumstances are apparent, the circumstances in question must be taken into account in the decision making process. Where it is foreseeable that there is a substantial risk of negative effects, for example on regional security, there should be a presumption against authorisation.<sup>50</sup>

## Chinese export regulations and possible changes in light of the Arms Trade Treaty

Depending on the ATT's final wording and whether China ratifies or otherwise binds itself to the ATT's provisions, China might be required to revise a number of its arms export regulations. While this would be required under international treaty law<sup>51</sup>, it is also expressly provided for in China's export regulations. Specifically, Article 6 of the Regulations of the People's Republic of China ("PRC") on Administration of Arms Export states:

*Where an international treaty concluded or acceded to by the People's Republic of China contains provisions different from these Regulations, the provisions of the international treaty shall prevail, except for the provisions on which reservations are made by the People's Republic of China.*

Chinese domestic practice in the implementation of international obligations would delineate the specific means by which such changes would occur.<sup>52</sup>

<sup>50</sup> See for example, EU Common Position Criterion 5, "Member States shall take into account:

(a) the potential effect of the military technology or equipment to be exported on their defence and security interests as well as those of Member State and those of friendly and allied countries, while recognising that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability".

<sup>51</sup> China would also be bound by their basic obligations on treaty implementation as set out in the Vienna Convention on the Law of Treaties (1969). These obligations included, *inter alia*, Article 11 (Means of expressing consent to be bound by a treaty), Article 26 ("Pacta sunt servanda") and Article 27 (Internal law and observance of treaties).

<sup>52</sup> As noted by legal scholars, Chinese legal doctrine distinguishes three types of implementation mechanisms: adoption, transformation and a hybrid form Reference. There is also specific Chinese practice relating to legislative practice of treaty application. As stated in Björn Ahl, *Chinese Law and International Treaties*, "Legislative Practice of Treaty Application From the analysis of legislative practice follows that four different modalities of state actions have to be distinguished that become relevant for the

A number of other provisions are also important in terms of possible changes that might be made to China's export regulations. These include:

**Article 4:** *The State shall institute a unified administration system for the export of arms, forbid any act of exporting arms which endangers the interests and security of the State and maintain the normal order of arms export according to law;*

**Article 5:** *The following principles shall be observed in exporting arms: (1) conduciveness to the capability for just self–defence of the recipient country; (2) no injury to the peace, security and stability of the region concerned and the world as a whole; (3) no interference in the internal affairs of the recipient country;*

**Article 13:** *The State shall implement a licencing system for arms export. Proposals and contracts for arms export shall be submitted in form of application for examination and approval in accordance with the provisions of these Regulations. Arms shall be exported on the basis of a licence for arms export.*

In light of the possible content of the final ATT, a number of changes might be required to bring China's export regulations into compliance with obligations China would assume if it were to become a State Party to the ATT. In particular, the criteria for assessing risks associated with a potential transfer would need to conform to the provisions of the ATT. As it currently reads, Article 5 in the Chinese regulations is vague. Article 5 contains broad principles but does not specify criteria that should be part of a risk assessment process to determine whether an authorisation should proceed. For example, Article 5 does not specify what China's licensing authorities are required to do in the event that the final destination of the transfer is deemed an insecure and unstable State. It does not suggest that a finding of instability should result in the transfer not being authorized. It is also unclear how Article 5(3), which advocates a policy of non–interference in internal affairs, might apply in situations when an internal conflict and instability exist. Because the regulations do not give explicit direction for how the general principles in Article 5 are to be applied when evaluating an export license application, they give a great deal of discretion to individual license administrators to approve or deny an arms export licence. Such a degree of discretion could be interpreted as the State not being fully in control of

application of international treaties in China: (1) The publication of the treaty text, (2) the adoption of statutory reference norms by the legislature and (3) the issuing of judicial interpretations by the Supreme People's Court as well as (4) the harmonization of domestic legislation with international obligations. The interaction of these four elements constitutes a mechanism for the application of treaties within the People's Republic of China (PRC)." *Hong Kong Law Journal*, 2009, pgs. 742-746.

the process in a “unified administration system” despite the requirement in Article 4.

If the ATT includes more specific criteria to apply to considerations affecting an arms transfer, Article 5 would require amendment to ensure that the licensing principles conform to international standards and that the more specific risk assessment requirements of the ATT are fully incorporated into China’s law.

## The principle of non-intervention

It could be suggested that Article 5(3), which advocates a policy of non-interference, is potentially contradictory to the widespread practice of the analysis of a range of potential risks based on the end user or on the end use that might occur in the recipient country, as contained in numerous regional and sub-regional agreements on transfer controls and in many States’ national export legislation.

The principle of non-intervention by States is not expressly set out in the UN Charter.<sup>53</sup> It is, however, generally held to be implicit in various provisions of the Charter, and in particular within the expression of the principle of the sovereign equality of States (Article 2.1). The principle of non-intervention is included in the UN General Assembly’s Friendly Relations Declaration (1970), which includes under the principle of non-intervention the following paragraph:

*No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.*

The International Court of Justice (ICJ) has elaborated on what this paragraph prohibits. In deciding the *Case Concerning the Military and Paramilitary Activities in and against Nicaragua*<sup>54</sup>, the ICJ stated that intervention is prohibited on “matters which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy.” The ICJ stated that intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. [...] the element of coercion [...] defines, and

indeed forms the very essence of, prohibited intervention.”<sup>55</sup>

Given the interpretation of the principle of non-intervention in international law, it is clear that such a principle is not at odds with the obligation of a State to assess levels of risk within the recipient State that might be posed by the transfer of conventional arms to be authorised. Such an assessment would not constitute a method of coercion or an intervention which constrains State sovereignty. Moreover, a transfer of conventional arms from China should be conducive “to the capability for just self-defence of the recipient country”, suggesting some inherent level of assessment already within China Export Regulation.

Further, China has not perceived the engagement of international bodies, such as the UN, and its member States in the area of human rights as a prohibited intervention in the international affairs.<sup>56</sup> On the contrary, the Chinese government has been supportive of the UN taking a greater and more active role in international human rights co-operation and dialogue. For example, in 2006 Ambassador Zhang Yishan, Deputy Permanent Representative of China to the UN, made the following statement:

*The Chinese Government always attaches great importance to the issue of human rights. While enhancing and protecting human rights of its own people, China has taken an active part in and supported international human rights cooperation and dialogue. We are in favor of a greater UN role in the field of human rights.*<sup>57</sup>

Therefore the principle of non-intervention and the codification of some form of risk assessment process within the ATT are not at odds with each other. Rather both are important elements necessary for ensuring that the ATT is an effectual treaty, in setting out the principle that the ATT is not a tool to support unlawful intervention, and to move from principles to practice with a clear and effective risk assessment process.

<sup>55</sup> Ibid. paragraph 205.

<sup>56</sup> Much as been written on China’s increasing role in UN peacekeeping operations which also calls for a re-examination into the historically expansive Chinese approach to the principle of non-intervention. See, for example, International Crisis Group, *China’s Growing Role in UN Peacekeeping*, Asia Report No. 166 (17 April 2009) which states: “Its [China’s] political support for UN peacekeeping missions has also evolved considerably, and its previous staunch adherence to non-interference has ceded considerable ground to a pragmatic, interest- driven approach.”

<sup>57</sup> This statement was after the adoption of the draft resolution on Human Rights Council. See, Zhu Lijiang, *Chinese Practice in Public International Law*, CJIL (2006), 495. The Chinese representative said before the Third Committee on the same day that “the universal enjoyment of human rights was unattainable without international peace and security. Violence and armed conflict were all too prevalent and the United Nations should exert greater efforts in conflict prevention, peacebuilding and combating terrorism in all its forms (A/C.3/61/SR.22, 16 November 2006, 11, para. 70).

<sup>53</sup> Article 2(7) of the UN Charter refers to the prohibition of the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.

<sup>54</sup> International Court of Justice, *Case concerning the Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 27 June 1986.

## Conclusion

This paper has provided a brief overview of the ATT process to date, and in particular has focused on China's participation in that process. As an active participant, China has contributed to the discussion and the possible content of the ATT by reflecting on its own experience in applying its domestic Regulations on Export Control. For China, the principles of the UN Charter provide an important foundation for the ATT, and its commitment to an inclusive and transparent process within the UN will assist in achieving a more widely accepted treaty. China's recognition that transfer criteria are "logical", especially in relation to international human rights law, is an important indicator of China's growing commitment to an ATT that can effectively address the wide range of concerns for Member States, including conflict, the displacement of people, crime and terrorism.

### About Saferworld

Saferworld is an independent international NGO. We work directly with local people, as well as governments and international organisations, to prevent violent conflict and encourage co-operative, people-centred approaches to peace and security. We believe that everyone should be able to lead peaceful, fulfilling lives, free from insecurity and violent conflict.

While we are not a traditional development agency, we seek to understand and influence the relationship between conflict, security and international development.

We work in over 15 countries in Europe, Africa, the Middle East and Asia. We have over 80 staff, based in Bangladesh, Kenya, Kosovo, Nepal, Somalia, Sri Lanka, Sudan and Uganda, as well as in London, Brussels and Vienna. Our funding for 2010–2011 was around £6.8 million – mainly in the form of government grants from Canada, Denmark, the EU, Germany, the Netherlands, Norway, Sweden, and the UK.

**Saferworld** – 28 Charles Square, London N1 6HT, UK  
Registered Charity no 1043843  
Company limited by guarantee no 3015948  
Tel: +44 (0)20 7324 4646 | Fax: +44 (0)20 7324 4647  
Email: [general@saferworld.org.uk](mailto:general@saferworld.org.uk)  
Web: [www.saferworld.org.uk](http://www.saferworld.org.uk)