



Arms Trade Treaty Implementation Toolkit

Module 5 Prohibitions on Transfers

I. Introduction

Any country joining the Arms Trade Treaty (ATT) commits to putting in place effective measures to implement the Treaty.

Each State will decide which measures it needs in order to carry out its obligations under the ATT. These measures may vary from country to country.

This fifth module, *Prohibitions on Transfers*, aims to assist States in adopting standardized criteria to take into account when authorizing arms transfers to ensure compliance with Article 6 of the ATT.

II. What constitutes a transfer?

The activities of the international arms trade (export, import, transit, trans-shipment and brokering) are transfers according to Article 2 (2).¹

III. Prohibitions

- Article 6 establishes the prohibitions on transfers of conventional arms, ammunition and parts and components (items) under the ATT. It specifies what does not constitute an acceptable and responsible arms transfer.
- Obligations under Article 6 apply to all States Parties with jurisdiction over a transfer of items covered by the Treaty.

1. Prohibition of transfers in violation of UN Security Council arms embargoes or a State Party's obligations under measures adopted by the Security Council acting under Chapter VII of the UN Charter

- States Parties shall not authorize any transfer of items covered by the ATT, if such transfer would be in violation of a UN Security Council arms embargo or any other State Party's obligations under measures adopted by the Security Council acting under Chapter VII of the UN Charter.²

¹ See modules 6, 7, 8 and 9 for more information concerning these activities.

² Article 6 (1).

- Under these arms embargoes, States are prohibited from transferring arms to the embargoed State or entity. Security Council resolutions further stipulate that States shall take all the necessary measures to implement, apply and enforce the embargo.

Tip: For a current list of Security Council arms embargoes: www.un.org/sc/committees

In addition to arms embargoes, the Security Council, acting under Chapter VII of the UN Charter, has adopted other measures that impose obligations on States. For instance, resolution 1373 establishes that States shall eliminate the supply of weapons to terrorists.³

2. Prohibition of transfers in violation of relevant international obligations under international agreements, in particular those relating to the transfer of, or illicit trafficking in, conventional arms

- States Parties shall not authorize any transfer of items covered under the Treaty if such a transfer would violate relevant international obligations under international agreements, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
- It is presumed that States Parties are aware of their legal obligations under international agreements. It is important that the officials responsible for the authorization of transfers of items covered under the ATT be well aware of which of those international obligations are relevant for the purposes of applying Article 6 (2).
- A list of examples of multilateral and regional agreements is attached as an annex to this module.

3. Prohibition of transfers if the State Party has knowledge at the time of authorization of the transfer that the covered items would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 or other war crimes

- Where a State Party has knowledge, at the time of the authorization, that the items subject to a transfer authorization would be used to commit genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party, the State Party must prohibit such transfer.

³ S/RES/1373 (2001).

- If it authorizes the transfer, the State Party would not only be in non-compliance with the ATT, but it could also be responsible under the law of state responsibility for aiding or assisting in the international wrongful act.

Article 16 of the Articles on Responsibility of States for international wrongful acts 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) The act would be internationally wrongful if committed by that State”.⁴

IV. Factors to be examined by States Parties before authorizing or denying a transfer of conventional arms, ammunition and parts and components to ensure compliance with the provisions of Article 6

- Most States have laws, regulations and procedures relating to the exercise of State control or regulation of international arms transfers. These laws, regulations and procedures may need to be revised in order to ensure full compliance with Article 6 of the ATT. The following is a list of suggested assessment factors that States Parties could utilise to ensure that they do not authorize a transfer (export, import, transit/trans-shipment and brokering activities) that is not in compliance with Article 6.

1. Factors to consider in assessing if a transfer would violate Article 6 (1)

- a. Whether the recipient is subject to a Security Council arms embargo;
- b. Whether the transfer violates Security Council resolution 1373 on threats to international peace and security caused by terrorist acts;⁵
- c. The recipient's past and current record regarding respect for the Security Council arms embargoes;
- d. The recipient's capacity to ensure that the items transferred will not be diverted in violation of a Security Council arms embargo;
- e. The recipient State's intentions as expressed in its formal commitments;

⁴ The International Court of Justice in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* affirmed that Article 16 of the Articles on State Responsibility reflects a customary rule. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 217, para. 420.

⁵ [unscr.com/en/resolutions/1373](https://www.un.org/en/resolutions/1373).

f. Whether the recipient State has failed to investigate or collaborate in the investigations of violations to Security Council arms embargoes;

g. In addition to the above, exporting States Parties may take into consideration whether the recipient State has adopted legislation making the violation of arms embargoes established by the Security Council a criminal offence.

2. Factors to consider in assessing a transfer would violate Article 6 (2)

a. Whether the transfer violates obligations under the UN Charter;

b. Whether the transfer is in breach of the authorizing State Party's relevant international human rights obligations;

c. Whether the transfer is in breach of the authorizing State Party's international humanitarian law obligations;

d. Whether the transfer is in compliance with the authorizing State Party's obligations under relevant international agreements, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3. Factors to consider in assessing if a transfer would violate Article 6 (3)

a. Whether the items would be used to commit genocide;

b. Whether the items would be used to commit crimes against humanity;

c. Whether the items would be used to commit grave breaches of the Geneva Conventions of 1949;⁶

d. Whether the items would be used to commit attacks directed against civilian objects;

e. Whether the items would be used to commit attacks against civilians protected as such;

f. Whether the items would be used to commit other war crimes as defined by international agreements to which the authorizing State is a Party.

⁶ <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

V. Sources of information to be considered by States Parties when authorizing transfers

Each State Party is in charge of its own implementation efforts to ensure compliance with its obligations under the ATT. The competent authorities within the State Party may consider consulting the following sources of information:

- The current list of Security Council arms embargoes in force;⁷
- Implementation assistance notices issued by the Security Council Committees;⁸
- Relevant documents from UN human rights bodies and international tribunals;^{9,10}
- Intelligence and other information available to the State Party through bilateral or regional information exchange mechanisms;
- Information exchanged with other States Parties to the ATT;
- Documents from regional and special courts and tribunals;
- Other credible sources, such as regional human rights organizations and civil society organizations.

⁷ www.un.org/sc/committees.

⁸ www.un.org/sc/committees.

⁹ E.g. www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

¹⁰ E.g. www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

Annex

Non-exhaustive list of relevant multilateral and regional instruments

- United Nations instruments
 - oUnited Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW)
 - oUnited Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA)
 - oUnited Nations Convention against Transnational Organized Crime (TOC) – Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol)
- International agreements
 - oConvention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC)
 - oConvention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC)
 - oConvention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Treaty)
 - oConvention on Cluster Munitions (CCM)
 - oThe Hague Code of Conduct against the Proliferation of Ballistic Missiles (HCOG) (International Code of Conduct against the Proliferation of Ballistic Missiles) (ICOC)
 - oMissile Technology Control Regime (MTCR)
 - oTreaty on Non-Proliferation of Nuclear Weapons (NPT)
 - oWassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies
- Regional agreements
 - oAndean Plan to Prevent, Fight and Eradicate Illicit Trafficking in Small Arms in All its Aspects
 - oCentral African Convention for the Control of Small Arms and Light Weapons, Their Ammunition, Parts and Components that Can be Used for Their Manufacture, Repair or Assembly (Kinshasa Convention)
 - oEconomic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials
 - oEuropean Union (EU) Common Position 2003/468/CFSP on the Control of Arms Brokering
 - oEuropean Union (EU) Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment
 - oInter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and other Related Materials (CIFTA Convention)
 - oNairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa and Bordering States
 - oOrganization for Security and Cooperation in Europe (OSCE) Document on Small Arms and Light Weapons
 - oSouth African Development Community (SADC) Protocol on the Control of Firearms, Ammunition and Other Related Materials