Introduction

Over recent years, discussions on parameters for conventional arms transfers under a future Arms Trade Treaty (ATT) have raised a variety of questions in relation to international humanitarian law (IHL) and international human rights law (IHRL). To consider these issues, on April 27 and 28, 2010, the ICRC hosted a meeting of experts in Geneva on "Legal and Political Arguments to Support Effective International Humanitarian Law and International Human Rights Parameters in an Arms Trade Treaty".

This meeting brought together a group of some 35 experts from different regions of the world: legal and political advisers from 16 States, as well as selected legal experts from academia and non-governmental organizations. The aim was to provide for in-depth and informal discussions on a range of legal and political arguments in favour of effective IHL and IHRL parameters in an ATT and to facilitate a convergence of views on some of the issues at hand. The intention was not to pre-empt any differing views on these issues.

To facilitate open discussion, the meeting was conducted under the "Chatham House Rule" and comments have not been attributed to individual participants or countries. During the meeting, two rapporteurs synthesised discussions as well as points of convergence and divergence. The rapporteurs' reports were then discussed and refined by the group as a whole. This aide-mémoire, produced by the ICRC, is based on the rapporteurs' oral reports and discussion thereof. As such, it identifies key points of convergence, points for further clarification, and areas of divergence that emerged from the meeting. This aide-mémoire is not meant to reflect the ICRC's positions on specific issues.

It is hoped that the results of this first expert meeting on IHL and IHRL parameters in an ATT will serve as a useful resource for ongoing work by governments, NGOs and international organizations involved in promoting strong and effective IHL and IHRL parameters in a future ATT.

Sessions 1 and 2: Legal and political arguments in favour of IHL and international human rights parameters in an ATT; Nature and extent of obligations under international humanitarian law and international human rights law to be considered

Many actors have promoted an ATT as an instrument that will contain transfer parameters based on existing international legal obligations. Some of these obligations simply prohibit arms transfers to specific States or of specific weapons, while others relate to how the weapons are likely to be used. It was considered important to explore some of the arguments in favour of the proposed IHL and IHRL parameters and how these arguments may best be presented, both in legal and political terms.

Given that not all States are parties to the same instruments of IHL and IHRL, it was also necessary to examine the scope of a given recipient's IHL and IHRL obligations that a transferring State would be expected to consider under an ATT.
A) International Humanitarian Law

The meeting considered legal and political arguments that support the following IHL parameter: a duty not to transfer weapons where there is a clear risk that the weapons will be used to commit serious violations of IHL.

It was agreed that both legal and political arguments are pertinent to an IHL parameter in an ATT and should be made in tandem. Together they can make a strong case for States' duty to include such a parameter and to do more than "take into account" the risk of IHL violations when deciding whether to transfer weapons. They provide the basis for a responsibility to deny or suspend transfers where there is a clear risk that the weapons will be used to commit serious violations of IHL. Using legal and political arguments in tandem recognizes that 1) many States do accept the validity of the legal basis in existing IHL, 2) the exact extent of the legal basis cannot easily be defined or may be disputed by some, and 3) the political arguments are relevant, whatever a State's view of the legal basis.

1. Legal arguments

- Common Article 1 of the Geneva Conventions\(^1\) requiring States parties to "ensure respect" for IHL serves as a legal basis for an IHL parameter in an ATT.
- Rule 144 of the ICRC's Study on customary IHL\(^2\) serves as a legal basis for an IHL parameter in an ATT.
- An ATT will fall short of existing IHL if it does not contain an IHL parameter. IHL requires States to do more than "take into account" the risk of IHL violations with the weapons being transferred, and that they deny or suspend transfers where there is a sufficiently high risk (for example a clear or a substantial risk) that the weapons will be used to commit serious violations of IHL.
- Certain IHL treaties already contain complete prohibitions on the transfer of certain weapons.
- The International Law Commission's Draft Articles on State Responsibility\(^3\) were also recognized as being applicable to arms transfers.

a. Common Article 1 of the Geneva Conventions

Participants explored the link between the decision of a State to transfer weapons and compliance with IHL in the use of these weapons after transfer. They recognized that the duty to "ensure respect" of IHL in common Article 1 of the Geneva Conventions is an

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\(^1\) Common Article 1 of the Geneva Conventions states: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”

\(^2\) Rule 144 of the ICRC's Study on Customary IHL states: “States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law” This rule applies both to international and non-international armed conflicts.

\(^3\) Article 16 of the Draft Articles on State Responsibility and its commentary say that a State which aids or assists another State in the commission of an internationally wrongful act by the latter can be held internationally responsible. A State can incur such responsibility by providing arms that are used to commit serious violations of IHL or IHRL.
obligation of means. It is an obligation of due diligence that requires States to take steps within their own sphere of influence.\(^4\)

There is evidence to suggest that States have accepted that common Article 1 requires them (i) to take "all appropriate measures possible" in an attempt to end IHL violations, and (ii) to not encourage a party to an armed conflict to violate IHL and not take action that would assist such violations\(^5\). There was also general agreement that common Article 1 provides a basis for an IHL parameter.

Participants also recalled the 2003 and 2007 resolutions of the International Conference of the Red Cross and Red Crescent, which is composed of all States Parties to the Geneva Conventions. Both the Agenda for Humanitarian Action adopted in resolution 1 at the 2003 Conference and resolution 3 adopted at the 2007 Conference stressed that, in light of the obligation of States to respect and ensure respect for IHL, strict control of the availability of arms and ammunition is required so that they do not end up in the hands of those who may be expected to use them in violation of IHL.

On the other hand, common Article 1 itself does not specify its precise scope or application to arms transfers. It is not sufficiently precise to support the formulation of a parameter by which States must not transfer arms if there is a clear risk that, once transferred, they will be used to commit serious violations of IHL. It was recognized that insisting on the above interpretation of common Article 1 as an established rule of law could lead some States to become concerned about having to apply a similar interpretation to other delicate issues.

Nonetheless, participants found that existing IHL requires that States do more than "take into account" the risk of IHL violations that may be committed with the weapons being transferred, and that they deny or suspend transfers where there is a sufficiently high risk (for example a clear or a substantial risk) that the weapons will be used to commit serious violations of IHL.

b. Rule 144 of the ICRC’s Study on Customary IHL

Participants examined Rule 144 of the ICRC’s Study on Customary IHL (the Study), which, supported by State practice, says that "States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the

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\(^4\) Participants explored certain recent cases of the International Court of Justice (ICJ) that have supported this view. In its 2004 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory advisory opinion, the ICJ interpreted common Article 1 of the fourth Geneva Convention of 1949 as follows: “every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”. Presenting another view, however, a participant recalled that Judge Kooijmans stated in his separate opinion that “I simply do not know whether the scope given by the Court to this Article in the present Opinion is correct as a statement of positive law.” Participants also compared this obligation to States’ duty to prevent genocide as interpreted in the 2007 judgement in the contentious Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide. The ICJ in this case found that States have the "obligation to employ all means reasonably available to them, so as to prevent genocide so far as possible."

\(^5\) Throughout 2003, the ICRC arranged a series of regional expert seminars on the topic of “Improving Compliance with International Humanitarian Law.” (See annex 3 of report here: http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5XRDC?OpenDocument). Participants in these expert seminars were asked to consider the scope of the obligation to ensure respect for IHL found under common Article 1. They found that common Article 1 conferred an obligation on third States not involved in an on-going armed conflict, and that all States must perform this obligation in good faith. Participants in these expert seminars recognized that common Article 1 placed obligations on third States to not encourage a party to an armed conflict to violate IHL and not take action that would assist such violations. This “negative” obligation would be violated, for example, by transferring arms to a party who is known to use such arms to commit violations of IHL. Participants in the 2003 expert seminars also acknowledged a positive obligation on States not involved in armed conflict to take action, either unilaterally or collectively, against States that are violating IHL. They affirmed that this entails at minimum a moral responsibility and that States have a right to take such action, with the majority of participants agreeing that this constitutes a legal obligation of "means" on States to take "all appropriate measures possible" in an attempt to end IHL violations.
degree possible, to stop violations of international humanitarian law." Rule 144 has much of
the same scope and result as common Article 1, but invoking this rule as a basis for an IHL
parameter could circumvent certain difficulties in interpreting the scope and original intent
behind common Article 1 and varying opinions on it by judges of the International Court of
Justice (ICJ), as described above.

Further discussion revealed that there will be limits to invoking Rule 144 to convince certain
States of the necessity of an IHL parameter in an ATT. This is because some States (a) have
been critical of the methodology behind some aspects of the Study — although the criticism
does not specifically relate to the methodology behind Article 144, and (b) such States will
likely express resistance to customary international law in general and to its use in an ATT
context. Moreover, the practice in support of Rule 144 was not drawn directly from the
context of arms transfers, but rather from the practice of the UN Security Council, UN
sanctions, and States’ responses to serious IHL violations. Also, participants suggested that
the rule might only apply once violations have taken place, and would therefore form a
weaker basis for a preventive approach to arms transfer decisions. On the other hand, it was
proposed that the words "not to encourage" do allow for a preventive, "risk assessment"
approach to arms transfer decision-making, even though they appear more restrictive than
the obligation to "ensure respect" under common Article 1.

Participants agreed that common Article 1 of the Geneva Conventions and Rule 144 of the
Study demonstrate that we are not starting from a blank slate in asserting that an ATT would
fall short of existing IHL obligations if it did not contain an IHL parameter. There must be a
strong IHL parameter in an ATT.

c. Other legal bases

Participants also added that certain IHL treaties already contain prohibitions on the transfer
of certain weapons. The Mine Ban Treaty, the Convention on Cluster Munitions and several
protocols of the Convention on Certain Conventional Weapons all contain prohibitions or
restrictions on transfers of the weapons they cover. An ATT should therefore recognize
States’ existing international obligations regulating the transfer of specific weapons.

The International Law Commission’s Draft Articles on State Responsibility were also
recognized as being generally applicable to arms transfers. As seen below, the rules on
State responsibility were explored in greater detail in relation to an IHRL parameter.

2. Political arguments

- An IHL parameter in an ATT will deliver real humanitarian benefits. It will reduce suffering
  of civilians, prevent atrocities and war crimes, facilitate humanitarian assistance, facilitate
  post-conflict reconstruction, increase discipline of armed forces, and reduce the cost and
  length of reconstruction.

- IHL parameters can be found in many national export control systems and most regional
  arms transfer regimes.

- Among the views on an ATT submitted to the UN Secretary-General in 2007, 58 States
  were in favour of restrictions on transfers that can be expected to be used for violations of
  IHL.

- In 2003 and 2007, two resolutions of the International Conference of the Red Cross and
  Red Crescent, which is composed of all States Parties to the Geneva Conventions,
  recognized that States should make respect for IHL one of the fundamental criteria on
  which arms transfer decisions are assessed.
The unregulated availability of arms facilitates violations of IHL and undermines availability of humanitarian assistance. If States are ready to recognize the need for human security in addition to state security, then an ATT can deliver real humanitarian benefits. Protecting civilians by preventing violations of IHL should be part of the object and purpose of an ATT.

An IHL parameter applied to arms transfers would reduce suffering of civilians, prevent atrocities and war crimes, facilitate humanitarian assistance, facilitate post-conflict reconstruction, increase discipline of armed forces, and reduce the cost and length of reconstruction. These benefits make a most compelling political argument in favour of an IHL parameter in an ATT regardless of a State’s view of the extent of their legal responsibility under IHL. In addition, focusing on the human cost of “irresponsible” arms transfers can shift the burden to States to justify why they should transfer arms where there is a high risk that they will be used to inflict indefensible human suffering in the form of serious IHL violations. Many states will face a risk to their reputation in refusing to accept IHL as a parameter in their decision-making on conventional arms transfers.

Whether or not all States agree on the extent of the duty to apply an IHL parameter, there is strong evidence that many already do or wish to apply IHL considerations in arms transfer decisions. IHL parameters can be seen in many national export control systems and most regional arms transfer regimes. Among the views on an ATT submitted to the UN Secretary-General in 2007, 58 States were in favour of restrictions on transfers that may be used for violations of IHL. In 2003 and 2007, two resolutions of the International Conference of the Red Cross and Red Crescent recognized that adequate measures to control the availability of arms and ammunition are required so that they do not end up in the hands of those who may be expected to use them in violation of IHL.

3. Nature and Extent of an IHL Parameter

Discussion here focused on the scope and seriousness of IHL violations that a State must assess when deciding to transfer weapons.

- Most of IHL is universally applicable, and any differences in States’ treaty obligations are unlikely to cause a problem in the choice of IHL obligations to be assessed before transferring weapons.

- Arms-transferring States need to assess the risk of “serious” violations. These are the violations that States must investigate and for which they must prosecute or extradite suspects.

- 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 focussed 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.

Participants noted that most of IHL is universally applicable and that differences in treaty obligations are unlikely to cause any particular problem in the choice of IHL obligations to be assessed before deciding to transfer weapons.

It was accepted that States transferring weapons need to evaluate the risk of “serious” violations because these are the violations that States have the obligation to investigate and

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6 Nevertheless, participants recognized a political risk in simply adopting an IHL parameter from any one regional instrument to which all negotiating States are not a party.
for which they must prosecute or extradite suspects. Serious violations of IHL 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). According to customary IHL, serious violations of IHL constitute war crimes, which, in turn, have been listed under Article 8 of the Rome Statute of the International Criminal Court. While not all States are party to the Rome Statute, the list of war crimes under Article 8 does serve as a useful reference for acts that States have generally considered serious violations of customary international law.

Caution was recommended in the formulation of an IHL parameter: while an ATT should not aim to give a definitive or comprehensive definition of "serious violations", States should be ready to explain what is generally meant by the term. Not defining serious violations might, however, weaken the chance that transferring States' behaviour will meet the required standard.

B) International Human Rights Law

The proposed duty not to transfer weapons if there is a clear risk of serious violations of IHRL has been said to be based on Article 16 of the International Law Commission's Draft Articles on State Responsibility (Draft Articles) on aiding and assisting in the commission of an internationally wrongful act, and Articles 55 and 56 of the UN Charter on taking action to achieve respect for, and observance of, IHRL. As with IHL, the meeting considered these and other arguments and how much emphasis should be given to specific legal and political arguments in future discussions.

Legal and political arguments were found to be mutually reinforcing: peace, justice, human rights, security and development are all mutually reinforcing arguments in favour of an IHRL parameter in an ATT. As with IHL, participants felt that an ATT should not try to restate, renegotiate or expand substantive IHRL. There was also recognition of the overlap between IHL, IHRL and international criminal law, which need to be considered together in the elaboration and application of an ATT.

1. Legal arguments

- A link between arms transfers and the risk of IHRL violations can be drawn from the imposition of arms embargoes and through an interpretation of Articles 1, 55 and 56 of the UN Charter.
- The fact that some IHRL obligations are *erga omnes* can serve as a legal basis for an IHRL parameter in an ATT.
- Articles 16 and 41 of the International Law Commission's Draft Articles on State Responsibility are applicable to arms transfers and serve as a link between a State's decision to transfer arms and a recipient State's conduct.

a. The UN Charter

Participants considered that the link between arms transfers and the risk of IHRL violations could be drawn from the imposition of arms embargoes and through an interpretation of Articles 1, 55 and 56 of the UN Charter\(^7\). These also support the idea that stability and

\[^7\] Article 1(3) of the UN Charter states: “The Purposes of the United Nations are: (…) 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in
security do not take precedence over the promotion of IHRL. Yet Articles 55 and 56 of the UN Charter remain broad and do not impose an obligation to take specific action in specific contexts, such as applying IHRL parameters in arms transfer decisions or negotiating an ATT with a strong IHRL parameter.

b. *Erga omnes* IHRL obligations

Participants also explored some of the fundamental IHRL obligations that are owed *erga omnes*. "Basic rights of the human person" were addressed in the ICJ's 1970 case of *Barcelona Traction, Light and Power Company, Limited*, and the UN Human Rights Committee said, in its General Comment No. 31 in reference to "rules concerning the basic rights of the human person", that "every State Party has a legal interest in the performance by every other State Party of its obligations." Also, some elements of IHRL are so fundamental and so entrenched in international law that a failure to respect them would simply be unacceptable. The Universal Declaration of Human Rights and the notion of “basic rights” would encompass such fundamental rights.

Limits to these arguments were also explored: *Erga omnes* human rights obligations imply that a State can complain about another State’s failure to comply with the fundamental IHRL obligations that it owes towards people within its own territory and under its own jurisdiction. It does not mean that the complaining State directly owes any IHRL obligations to persons outside its territory and jurisdiction. The fundamental nature of certain human rights does not overcome the fact that IHRL obligations in a strictly legal sense are only owed to persons within a State’s territory and jurisdiction. This scope poses a general limit on the application of IHRL to arms transfers that necessarily involve conduct outside the territory and jurisdiction of the arms-transferring State.

c. International Law Commission’s Draft Articles on State Responsibility

Another proposed legal basis for an IHRL parameter was Article 16 of the Draft Articles on aiding and assisting in the commission of an internationally wrongful act. In support of this argument, participants acknowledged that Article 16 is clearly applicable to arms transfers and serves as a link between a State's decision to transfer arms and the conduct of a recipient State. A participant recalled that the ICJ recognized Article 16 as a customary obligation in its 2007 judgement in the contentious *Case Concerning the Application of the*
Convention on the Prevention and Punishment of the Crime of Genocide. Some States have also recognized the customary nature of this provision. Moreover, it is of general application to all violations of international law, not just to serious violations of IHRL law.

On the other hand, while the general principles behind Article 16 may be widely accepted, much of its scope and application remain undefined, especially in light of the International Law Commission's commentary. The following questions emerged from the meeting: What is the level of knowledge required to find international responsibility under Article 16? Does it require actual or constructive knowledge by the transferring State of the recipient's wrongful act? Is proof of intent to aid and assist required or is recklessness sufficient for Article 16 to apply? What is the level of causation required between the aid and assistance and the wrongful act?

There was general convergence on the idea that Article 16 sets a high threshold that States are not likely to want to lower. As there may be different opinions on the interpretation of Article 16 and on the International Law Commission's commentary on it, participants considered that potential ambiguity might lead to unnecessary debates among proponents and would not be helpful in convincing other States of the relevance of this provision to an IHRL parameter. Finally, the political process and evolution of the Draft Articles is not yet complete. In 2010, the UN General Assembly's 6th Committee will resume its consideration of the Draft Articles and will discuss their future, possibly in the form of a Convention.

Therefore, a primary reliance on Article 16 as a basis for a strict IHRL parameter was not recommended. It was even suggested that another legal norm should be sought to link a State's decision to transfer weapons and IHRL compliance with these weapons.

Another provision of the Draft Articles was also proposed as a possible legal basis for an IHRL parameter in arms transfer decisions: Article 41 on responsibility for aiding and assisting in maintaining a situation created by a "serious breach by a State of an obligation arising under a peremptory norm of general international law". According to the International Law Commission's commentary, certain human rights obligations would constitute peremptory norms of international law.

Nevertheless, the unresolved questions raised above in relation to Article 16 apply to Article 41 as well: questions regarding the requisite level of knowledge, intention and causation remain.

Existing links between arms transfers and IHRL violations do not necessarily form a firm legal basis for the strict IHRL parameter in an ATT that is needed to bring real benefits. While they may justify a baseline for an IHRL parameter, political arguments are also needed to reach the parameter that humanitarian concerns require. Participants expressed the need to ensure an obligation to do more than “take into account” the risk of serious IHRL violations before transferring weapons. To see a real reduction in the human cost of “irresponsible” arms transfers, an ATT must call for assessments that can result in the denial of arms transfers where there is a clear risk of serious IHRL violations.

2. Political arguments

- Complementary political arguments also advocate for a strong IHRL parameter in an ATT.
- Many of the political arguments in favour of an IHL parameter (see section A.2 above) also serve to justify an IHRL parameter.
- Various reports have demonstrated that a large percentage of IHRL violations are carried out using small arms and light weapons.
- An IHRL parameter would be complementary to UN embargoes and would constitute a
recognition of the need to take action on arms transfers so as to ensure universal promotion and observance of IHRL.

- The fact that arms continue to flow to those who use them in violation of IHRL shows that there is insufficient control of transfers and an absence of effective standards for the transfer of conventional weapons.

- IHRL parameters can already be found in national and regional export control regulation.

- Among the views on an ATT submitted to the UN Secretary-General in 2007, 62 States were in favour of restrictions on transfers of weapons that may be used for violations of human rights.

Although participants did not address political arguments in as much detail as with IHL, they did find that many of the previously mentioned political arguments for an IHL parameter are valid justifications for an IHRL parameter as well. Preventing violations of IHRL should be part of the object and purpose of an ATT. As in the case of IHL, participants readily recognized the obvious connection between unregulated access to arms and abuse of IHRL, and recalled that various reports have demonstrated that a large percentage of IHRL violations are carried out using small arms and light weapons. An IHRL parameter would be complementary to UN embargoes and would build on the need to take action in an arms transfer context to ensure universal promotion and observance of IHRL.

The fact that arms continue to flow to those who use them in violation of IHRL shows that there is insufficient control of transfers and an absence of serious standards. Of particular concern were violations of IHRL through the excessive use of force in law enforcement operations.

As with the IHL parameter, participants found that, regardless of whether States agree on the extent of their duty to apply IHRL considerations to arms transfers, there is strong evidence that they already do or wish to do so. IHRL parameters can already be found in national and regional export control regulation. Among the views on an ATT submitted to the UN Secretary-General in 2007, 62 States were in favour of restrictions on transfers of weapons that may be used for violations of human rights. Here, too, participants acknowledged a political risk in simply adopting an IHRL parameter from any one regional instrument.

3. Nature and extent of an IHRL parameter

- Much of the IHRL that is of particular relevance to arms transfers is universally accepted.

- Under an ATT parameter, serious violations of IHRL should be evaluated according to the scale, the persistence and the character of the rights at risk of violation.

Many of the rules of IHRL that are of particular relevance to arms transfers (e.g. the prohibition of arbitrary deprivation of life) are universal; all States have ratified at least one of the major IHRL instruments. As mentioned above, the Universal Declaration of Human Rights encompasses fundamental rights that are so entrenched in international law that a failure to respect them would be considered unacceptable by virtually all States.

If a clear risk of serious violations of IHRL is accepted as a basis for denial of transfers under an ATT parameter, then this risk would need to be established by evaluating the scale, the persistence and the character of the violations in the country concerned. Gross, systematic, mass, persistent, widespread, pervasive, deliberate, flagrant violations would all constitute "serious" violations for the purposes of an IHRL parameter.

Participants also looked at whether economic, social and cultural rights could be captured in an IHRL parameter. It was proposed that a State’s gross violation of its duty to respect
economic, social and cultural rights could be considered serious for the purposes of an IHRL parameter if the failure to respect amounts to a violation of the right to life (for example, through the denial to a specific ethnic group of the economic or material resources needed for their survival).

C) Other Parameters

- An ATT should contain a duty to exercise caution in transferring weapons to parties to a conflict, and not to exacerbate the conflict.
- An ATT that solely considers the risk of genocide and crimes against humanity would be too narrow and not capture other serious violations that responsible arms transfer decisions should aim to prevent.
- Preventing diversion of arms is in the interest of all States and is intrinsically linked to the prevention of IHL and IHRL violations.

Other areas of discussion included the law of neutrality, which applies to States that are considering sending weapons to parties engaged in an armed conflict. Although there may be good grounds to argue that States should not transfer weapons to parties to a conflict, participants felt that it was unlikely that States would accept a prohibition in such instances. They might, however, accept a duty to exercise caution in transferring weapons to parties to a conflict, and not to exacerbate the conflict. Some participants also mentioned the need for other, complementary arms transfer parameters based on factors such as peace and security, reduction of conflict and the non-use of force.

Participants agreed that preventing diversion was an important goal to be met in an ATT and that it is intrinsically linked to achieving an ATT's other objectives such as the prevention of IHL and IHRL violations. In fact, in their submissions to the UN Secretary-General in 2007, 45 States raised the issue of preventing diversion through an ATT. There was also concern expressed that too much emphasis placed on this parameter could have the undesired effect of narrowing the scope of an ATT. An ATT should prevent both "illicit transfers" and "irresponsible transfers".

Sessions 3 and 4: Threshold and assessment of risk; Consequences of finding a risk and safeguards for transfers

Another important issue for consideration was the threshold for refusing a transfer. Many regional instruments on the regulation of arms transfers already apply a standard of “clear risk” that the weapons will be used to commit serious violations of IHL or IHRL, while some proponents advance “substantial risk” or other thresholds that should be met. The case for specific formulations was considered, and methods for assessing risk were also examined. Participants also looked at the types of decisions that transferring States can make upon finding a risk of serious violations of IHL or IHRL.
1. The need for high standards

- If a country is committed to IHL and IHRL, then it has an interest in ensuring that these are included in arms transfer criteria at a global level, since transfers of arms have global implications for respect of IHL and IHRL.
- A global ATT would level the playing field for all States that transfer weapons.

Many arguments were put forward to explain how an ATT containing IHL and IHRL parameters would be relevant to States that already have high national standards. If a country is committed to IHL and IHRL, then it has an interest in ensuring that these are included in arms transfer criteria at a global level, since transfers of arms pose a global problem. A global ATT would level the playing field for all States that transfer weapons.

Also considered was whether an ATT would set common standards or merely base standards that could be lower than already existing high national standards. There was convergence on the view that an ATT should consist of the highest possible common standards replicating best practices.

To encourage the adherence of States that do not already apply these parameters, an ATT could also set transparency measures that would help all States gain confidence that the parameters are not applied abusively or arbitrarily.

2. Defining and assessing the risk

- A distinction should be made between the grounds for believing there is a risk of serious violations and the qualification of the risk itself.
- Specific indicators such as those in the ICRC's or Amnesty International's guidelines would be a useful tool in assisting export authorities in their risk assessments.

With respect to the consequences of finding a risk of serious violations of IHL or IHRL, participants agreed that defining the threshold of both knowledge of risk and level of risk is crucial. Based on language of IHRL provisions such as Article 3(1) of the Convention against Torture and Article 16(1) of the Convention for the Protection of All Persons from Enforced Disappearance, and interpretations by the UN Human Rights Committee (General Comment No. 31) and the European Court of Human Rights (in the 1989 case of Soering v. The United Kingdom), it was thought that a distinction should be made between the grounds for believing there is a risk and the qualification of the risk itself. It was suggested that the word "clear" used in the term "clear risk" qualifies the grounds for belief and not the risk itself.

Also addressed was the need to refer to reliable sources of different types of information to make a risk assessment. Finding information that helps anticipate certain behaviour poses a major challenge in making arms transfer decisions.

Participants then considered whether an ATT should contain guidelines for making such risk assessments. Reference was made to the ICRC and Amnesty International guidelines on applying IHL and IHRL criteria respectively. It was suggested that specific indicators would be a useful tool in assisting export authorities in making risk assessments and that guidelines could put States at ease about the objectivity with which assessments would be made.
3. Consequences of finding a risk

- Arms transfers should be denied if there is a sufficiently high risk (for example a clear or a substantial risk) that the weapons will be used to commit serious violations of fundamental norms, for example under IHL and IHRL.
- Additional engagement between a transferring State and potential arms recipients, whether before, after, or instead of transferring arms, could mitigate the risk of IHL and IHRL violations.

There was convergence on the idea that, in the presence of a sufficiently high risk (for example a clear or a substantial risk) of serious violations of fundamental norms (for example under IHL and IHRL), then the transfer should be denied. Where other parameters are to be considered before transferring weapons, States could be encouraged to “take them into account” and authorize a transfer subject to certain conditions if certain risks were found. Examples of such parameters and conditional transfers already exist in regional and national instruments. But, participants did recommend caution in drafting ATT language that would put human lives at risk by allowing measures short of denial where there is a clear risk of serious violations of IHL and IHRL.

Also considered was the opportunity for exporting States to engage with potential arms recipients with a view to improving their IHL and IHRL practices. Training and capacity building could be carried out in addition to a transfer of weapons or as a mitigating measure where arms transfers are denied. There was discussion of whether post-transfer verification could be useful in monitoring IHL and IHRL compliance. As this type of verification is very rarely exercised by transferring States, such a measure was not believed to be a sufficient guarantee against post-transfer IHL or IHRL violations. Participants also considered that engagement with potential arms recipients on respecting IHL and IHRL is important and could provide tangible benefits if proposed as a possible measure under an ATT.

Closing Comments

The ICRC is grateful to the rapporteurs for their synthesis of discussions and for the rich contributions of all participants. The ICRC hopes that the insights gained from this meeting will improve understanding of the strengths and limits of legal and political arguments in favour of IHL and IHRL parameters in an ATT. It is also hoped that the content of the meeting will inform the development of national positions and the work of upcoming multilateral meetings.

Annexes:
1. Background paper
2. Meeting agenda
3. List of participants