

**MINISTRY OF DEFENCE AND MILITARY VETERANS
Republic of South Africa**

Private Bag x427, Pretoria, 001, Tel: (012) 355 6119, Fax: (012) 3556139
PO Box 47, Cape Town, 8000, Tel: (021) 787 6070, Fax: (021) 465 5870
<http://www.dod.mil.za>

Ms B Mbete, MP
Speaker of the National Assembly
Private Bag X15
Parliament, Cape Town
8001

Fax: 021-4619462

Dear *MADAM SPEAKER,*

**SUBMISSION OF THE UNITED NATIONS ARMS TRADE TREATY TO
PARLIAMENT FOR APPROVAL IN ACCORDANCE WITH SECTION 231(2) OF
THE CONSTITUTION**

I have the pleasure to submit the United Nations Arms Trade Treaty to the National Assembly for approval in accordance with section 231(2) of the Constitution.

The Agreement is submitted together with an explanatory memorandum prepared in accordance with rule 306 of the Rules of the National Assembly.

Yours sincerely,

Ms NN Mapisa-Nqakula

Ms NN Mapisa-Nqakula, MP
MINISTER OF DEFENCE AND MILITARY VETERANS

DATE: *19 Sept. 2014*



DEPARTMENT OF DEFENCE

REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM

ON THE

RATIFICATION OF THE ARMS TRADE TREATY

ANNEXURES

Annexure A: UN Original Text of the Arms Trade Treaty

Annexure B: Legal Opinion DIRCO State Law Advisor

Annexure C: Legal Opinion Chief State Law Advisor

PURPOSE

1. As authorised at a meeting of Cabinet held in July 2013, approval of Parliament is sought to ratify the Arms Trade Treaty in terms of section 231(2) of the Constitution.

SUMMARY

2. First mooted in the UN in December 2006, the General Assembly adopted the Arms Trade Treaty (ATT) on 2 April 2013 regulating international trade in conventional arms.

3. The Treaty (see Annexure A) establishes common international standards for regulating trade in conventional arms and seeks to prevent their illicit transfer or diversion.

4. The President signed the Treaty on 25 September 2013 while attending the United Nations General Assembly in New York.

5. South Africa has committed itself to the international agenda of disarmament and non-proliferation of arms. Given South Africa's strong defence industry base, South Africa's robust arms control system will be complemented by this Treaty as it sets common standards for arms transfers that place South Africa's arms trading partners on a similar footing when they become party to the Treaty.

6. South Africa's current regulatory framework on arms control is of higher standard than that called for by the Treaty and as such there are no new obligations for South Africa other than to keep records of transactions for ten years instead of the current legislated period of five years. Therefore, the Treaty will not undermine National arms regulation laws and standards already in place.

7. The Treaty will enter into force ninety days after the fiftieth State has deposited its instrument of ratification, acceptance or approval with the Depositary of the United Nations. South Africa's timely ratification and deposition with the United Nations will contribute towards the Treaty's speedy enablement.

8. When South Africa deposits its instrument of ratification, this Treaty shall enter into force for South Africa ninety days following the date of deposit of its instrument of ratification.

STRATEGIC IMPERATIVES

9. South Africa has committed itself to the international agenda of disarmament and non-proliferation of arms. Built into this agenda is the right of States to engage in responsible and accountable trade in arms. Given South Africa's strong defence industry base, South Africa's robust arms control system needs to be complemented by international instruments that set common standards for arms transfers. Ratification of this Treaty gives South Africa credibility as a responsible player in the global arms trade.

BACKGROUND

10. The key elements of the Treaty comprise the following:

- a. Scope. Transfer, (meaning export, import, transit, trans-shipment and brokering) of conventional arms include battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; small arms and light weapons and the ammunition therefor. The Treaty does not restrict States Parties from taking such conventional arms to other parts of the world for their own use.
- b. Criteria. Criteria governing arms transfers are in line with current South African legislation and are related to complying with United Nations arms embargoes, the commission of 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.

- c. Reporting Obligations. Reporting obligations are similar to current reporting processes in force under South African legislation.
- d. Implementation Measures. The Treaty requires each State Party to establish a national control system, apply standards no less than prescribed by the Treaty, and create a national control list open to other States Parties and preferably the public. The National Conventional Arms Control Act, 2002 provides for this aspect adequately.
- e. Entry into Force. The Treaty will come into force ninety days after fifty States have signed, ratified, accepted, approved or acceded to the Treaty.

ENVISAGED IMPLEMENTATION PLAN

11. South African implementation measures are already in force under the National Conventional Arms Control Act, 2002. The implementation of the Treaty obligations will be carried out by the National Conventional Arms Control Committee through its operational structures and budgets established under the National Conventional Arms Control Act, 2002. Amendment of the Act related to extending the period for keeping records from five years to ten years will be made once South Africa has ratified the Treaty.

ORGANISATIONAL AND PERSONNEL IMPLICATIONS

12. The structures of the National Conventional Arms Control Committee and personnel attached thereto shall be responsible for the execution of the Treaty obligations.

FINANCIAL IMPLICATIONS

13. The current allocated and future budgets of the National Conventional Arms Control Committee structures will support the implementation of the Treaty obligations, such as attending annual meetings of States Parties in conjunction with the Department of International Relations and Cooperation who make routine payments to the United Nations to meet certain conference costs.

COMMUNICATION IMPLICATIONS

14. None

CONSTITUTIONAL IMPLICATIONS

15. None

IMPLICATIONS FOR VULNERABLE GROUPS

16. None

SECURITY IMPLICATIONS

17. None

DEPARTMENTS AND PARTIES CONSULTED, RESPONSES AND COMMENTS

18. International Relations and Cooperation.

- a. Diplomatic Matters. The Department of International Relations and Cooperation has worked closely with the Department of Defence in handling matters negotiated under the auspices of the United Nations Conference on Disarmament related to the emergence of the Arms Trade Treaty.
- b. Legal Opinion. The State Law Advisor for DIRCO, Ms Tania Steenkamp, in her letter reference 13GCZ020280501/ 30/9/1 R0232 /2013 of 28 May 2013 concludes (see Annexure B):
 - i. That the Arms Trade Treaty is acceptable from an international law point of view.
 - ii. Falls within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996, requiring parliamentary approval for ratification before the Treaty can be ratified.
 - iii. The Regulations of the National Conventional Arms Control Act be updated to reflect that the period for which records must be kept be extended from the current five years to ten years as called for in the Treaty.

19. State Law Advisor. Mr Monwabisi Nguqu of the Office of the Chief State Law Advisor, in his letter reference 273/2013A&B of 17 May 2013 affirms that (see Annexure C):

- a. The Treaty is consistent with domestic law, including international law.
- b. The National Conventional Arms Control Act be considered again with the view to amend and bring it in line with the Treaty, once the latter has come into force and ratified by Parliament of the Republic.

ANNEXURE A

UNITED NATIONS: ARMS TRADE TREATY



United Nations

ARMS TRADE TREATY

Preamble

The States Parties to this Treaty,

Guided by the purposes and principles of the Charter of the United Nations,

Recalling Article 26 of the Charter of the United Nations which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources,

Underlining the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts,

Recognizing the legitimate political, security, economic and commercial interests of States in the international trade in conventional arms,

Reaffirming the sovereign right of any State to regulate and control conventional arms exclusively within its territory, pursuant to its own legal or constitutional system,

Acknowledging that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

Recalling the United Nations Disarmament Commission Guidelines for international arms transfers in the context of General Assembly resolution 46/36H of 6 December 1991,

Noting the contribution made by the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, as well as the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons,

Recognizing the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms,

Bearing in mind that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict and armed violence,

Recognizing also the challenges faced by victims of armed conflict and their need for adequate care, rehabilitation and social and economic inclusion,

Emphasizing that nothing in this Treaty prevents States from maintaining and adopting additional effective measures to further the object and purpose of this Treaty,

Mindful of the legitimate trade and lawful ownership, and use of certain conventional arms for recreational, cultural, historical, and sporting activities, where such trade, ownership and use are permitted or protected by law,

Mindful also of the role regional organizations can play in assisting States Parties, upon request, in implementing this Treaty,

Recognizing the voluntary and active role that civil society, including non-governmental organizations, and industry, can play in raising awareness of the object and purpose of this Treaty, and in supporting its implementation,

Acknowledging that regulation of the international trade in conventional arms and preventing their diversion should not hamper international cooperation and legitimate trade in materiel, equipment and technology for peaceful purposes,

Emphasizing the desirability of achieving universal adherence to this Treaty,

Determined to act in accordance with the following principles;

Principles

- The inherent right of all States to individual or collective self-defence as recognized in Article 51 of the Charter of the United Nations;
- The settlement of international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered in accordance with Article 2 (3) of the Charter of the United Nations;
- Refraining in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations in accordance with Article 2 (4) of the Charter of the United Nations;
- Non-intervention in matters which are essentially within the domestic jurisdiction of any State in accordance with Article 2 (7) of the Charter of the United Nations;
- Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights;
- The responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary

responsibility of all States in establishing and implementing their respective national control systems;

- The respect for the legitimate interests of States to acquire conventional arms to exercise their right to self-defence and for peacekeeping operations; and to produce, export, import and transfer conventional arms;
- Implementing this Treaty in a consistent, objective and non-discriminatory manner,

Have agreed as follows:

Article 1

Object and Purpose

The object of this Treaty is to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms;
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion;

for the purpose of:

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

Article 2

Scope

1. This Treaty shall apply to all conventional arms within the following categories:

- (a) Battle tanks;
- (b) Armoured combat vehicles;
- (c) Large-calibre artillery systems;
- (d) Combat aircraft;
- (e) Attack helicopters;
- (f) Warships;
- (g) Missiles and missile launchers; and
- (h) Small arms and light weapons.

2. For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as "transfer".

3. This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party's ownership.

Article 3

Ammunition/Munitions

Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions.

Article 4 Parts and Components

Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.

Article 5 General Implementation

1. Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, bearing in mind the principles referred to in this Treaty.
2. Each State Party shall establish and maintain a national control system, including a national control list, in order to implement the provisions of this Treaty.
3. Each State Party is encouraged to apply the provisions of this Treaty to the broadest range of conventional arms. National definitions of any of the categories covered under Article 2 (1) (a)-(g) shall not cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of this Treaty. For the category covered under Article 2 (1) (h), national definitions shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty.
4. Each State Party, pursuant to its national laws, shall provide its national control list to the Secretariat, which shall make it available to other States Parties. States Parties are encouraged to make their control lists publicly available.
5. Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2 (1) and of items covered under Article 3 and Article 4.
6. Each State Party shall designate one or more national points of contact to exchange information on matters related to the implementation of this Treaty. Each State Party shall notify the Secretariat, established under Article 18, of its national point(s) of contact and keep the information updated.

Article 6 Prohibitions

1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations

Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.

2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of 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.

Article 7 **Export and Export Assessment**

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to:
 - (i) commit or facilitate a serious violation of international humanitarian law;
 - (ii) commit or facilitate a serious violation of international human rights law;
 - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
 - (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms

covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

Article 8

Import

1. Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7. Such measures may include end use or end user documentation.

2. Each importing State Party shall take measures that will allow it to regulate, where necessary, imports under its jurisdiction of conventional arms covered under Article 2 (1). Such measures may include import systems.

3. Each importing State Party may request information from the exporting State Party concerning any pending or actual export authorizations where the importing State Party is the country of final destination.

Article 9

Transit or trans-shipment

Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law.

Article 10

Brokering

Each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.

Article 11

Diversion

1. Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion.
2. The exporting State Party shall seek to prevent the diversion of the transfer of conventional arms covered under Article 2 (1) through its national control system, established in accordance with Article 5 (2), by assessing the risk of diversion of the export and considering the establishment of mitigation measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.
3. Importing, transit, trans-shipment and exporting States Parties shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of the transfer of conventional arms covered under Article 2 (1).
4. If a State Party detects a diversion of transferred conventional arms covered under Article 2 (1), the State Party shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion. Such measures may include alerting potentially affected States Parties, examining diverted shipments of such conventional arms covered under Article 2 (1), and taking follow-up measures through investigation and law enforcement.
5. In order to better comprehend and prevent the diversion of transferred conventional arms covered under Article 2 (1), States Parties are encouraged to share relevant information with one another on effective measures to address diversion. Such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion.
6. States Parties are encouraged to report to other States Parties, through the Secretariat, on measures taken in addressing the diversion of transferred conventional arms covered under Article 2 (1).

Article 12

Record keeping

1. Each State Party shall maintain national records, pursuant to its national laws and regulations, of its issuance of export authorizations or its actual exports of the conventional arms covered under Article 2 (1).
2. Each State Party is encouraged to maintain records of conventional arms covered under Article 2 (1) that are transferred to its territory as the final destination or that are authorized to transit or trans-ship territory under its jurisdiction.
3. Each State Party is encouraged to include in those records: the quantity, value, model/type, authorized international transfers of conventional arms covered under Article 2 (1), conventional arms actually transferred, details of

exporting State(s), importing State(s), transit and trans-shipment State(s), and end users, as appropriate.

4. Records shall be kept for a minimum of ten years.

Article 13 Reporting

1. Each State Party shall, within the first year after entry into force of this Treaty for that State Party, in accordance with Article 22, provide an initial report to the Secretariat of measures undertaken in order to implement this Treaty, including national laws, national control lists and other regulations and administrative measures. Each State Party shall report to the Secretariat on any new measures undertaken in order to implement this Treaty, when appropriate. Reports shall be made available, and distributed to States Parties by the Secretariat.

2. States Parties are encouraged to report to other States Parties, through the Secretariat, information on measures taken that have been proven effective in addressing the diversion of transferred conventional arms covered under Article 2 (1).

3. Each State Party shall submit annually to the Secretariat by 31 May a report for the preceding calendar year concerning authorized or actual exports and imports of conventional arms covered under Article 2 (1). Reports shall be made available, and distributed to States Parties by the Secretariat. The report submitted to the Secretariat may contain the same information submitted by the State Party to relevant United Nations frameworks, including the United Nations Register of Conventional Arms. Reports may exclude commercially sensitive or national security information.

Article 14 Enforcement

Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.

Article 15 International Cooperation

1. States Parties shall cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty.

2. States Parties are encouraged to facilitate international cooperation, including exchanging information on matters of mutual interest regarding the implementation and application of this Treaty pursuant to their respective security interests and national laws.

3. States Parties are encouraged to consult on matters of mutual interest and to share information, as appropriate, to support the implementation of this Treaty.

4. States Parties are encouraged to cooperate, pursuant to their national laws, in order to assist national implementation of the provisions of this Treaty, including through sharing information regarding illicit activities and actors and in order to

prevent and eradicate diversion of conventional arms covered under Article 2 (1).

5. States Parties shall, where jointly agreed and consistent with their national laws, afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty.

6. States Parties are encouraged to take national measures and to cooperate with each other to prevent the transfer of conventional arms covered under Article 2 (1) becoming subject to corrupt practices.

7. States Parties are encouraged to exchange experience and information on lessons learned in relation to any aspect of this Treaty.

Article 16 International Assistance

1. In implementing this Treaty, each State Party may seek assistance including legal or legislative assistance, institutional capacity-building, and technical, material or financial assistance. Such assistance may include stockpile management, disarmament, demobilization and reintegration programmes, model legislation, and effective practices for implementation. Each State Party in a position to do so shall provide such assistance, upon request.

2. Each State Party may request, offer or receive assistance through, inter alia, the United Nations, international, regional, subregional or national organizations, non-governmental organizations, or on a bilateral basis.

3. A voluntary trust fund shall be established by States Parties to assist requesting States Parties requiring international assistance to implement this Treaty. Each State Party is encouraged to contribute resources to the fund.

Article 17 Conference of States Parties

1. A Conference of States Parties shall be convened by the provisional Secretariat, established under Article 18, no later than one year following the entry into force of this Treaty and thereafter at such other times as may be decided by the Conference of States Parties.

2. The Conference of States Parties shall adopt by consensus its rules of procedure at its first session.

3. The Conference of States Parties shall adopt financial rules for itself as well as governing the funding of any subsidiary bodies it may establish as well as financial provisions governing the functioning of the Secretariat. At each ordinary session, it shall adopt a budget for the financial period until the next ordinary session.

4. The Conference of States Parties shall:

(a) Review the implementation of this Treaty, including developments in the field of conventional arms;

(b) Consider and adopt recommendations regarding the implementation and operation of this Treaty, in particular the promotion of its universality;

(c) Consider amendments to this Treaty in accordance with Article 20;

(d) Consider issues arising from the interpretation of this Treaty;

(e) Consider and decide the tasks and budget of the Secretariat;

(f) Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of this Treaty; and

(g) Perform any other function consistent with this Treaty.

5. Extraordinary meetings of the Conference of States Parties shall be held at such other times as may be deemed necessary by the Conference of States Parties, or at the written request of any State Party provided that this request is supported by at least two-thirds of the States Parties.

Article 18 **Secretariat**

1. This Treaty hereby establishes a Secretariat to assist States Parties in the effective implementation of this Treaty. Pending the first meeting of the Conference of States Parties, a provisional Secretariat will be responsible for the administrative functions covered under this Treaty.

2. The Secretariat shall be adequately staffed. Staff shall have the necessary expertise to ensure that the Secretariat can effectively undertake the responsibilities described in paragraph 3.

3. The Secretariat shall be responsible to States Parties. Within a minimized structure, the Secretariat shall undertake the following responsibilities:

(a) Receive, make available and distribute the reports as mandated by this Treaty;

(b) Maintain and make available to States Parties the list of national points of contact;

(c) Facilitate the matching of offers of and requests for assistance for Treaty implementation and promote international cooperation as requested;

(d) Facilitate the work of the Conference of States Parties, including making arrangements and providing the necessary services for meetings under this Treaty; and

(e) Perform other duties as decided by the Conferences of States Parties.

Article 19 **Dispute Settlement**

1. States Parties shall consult and, by mutual consent, cooperate to pursue settlement of any dispute that may arise between them with regard to the interpretation or application of

this Treaty including through negotiations, mediation, conciliation, judicial settlement or other peaceful means.

2. States Parties may pursue, by mutual consent, arbitration to settle any dispute between them, regarding issues concerning the interpretation or application of this Treaty.

Article 20 Amendments

1. Six years after the entry into force of this Treaty, any State Party may propose an amendment to this Treaty. Thereafter, proposed amendments may only be considered by the Conference of States Parties every three years.

2. Any proposal to amend this Treaty shall be submitted in writing to the Secretariat, which shall circulate the proposal to all States Parties, not less than 180 days before the next meeting of the Conference of States Parties at which amendments may be considered pursuant to paragraph 1. The amendment shall be considered at the next Conference of States Parties at which amendments may be considered pursuant to paragraph 1 if, no later than 120 days after its circulation by the Secretariat, a majority of States Parties notify the Secretariat that they support consideration of the proposal.

3. The States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall, as a last resort, be adopted by a three-quarters majority vote of the States Parties present and voting at the meeting of the Conference of States Parties. For the purposes of this Article, States Parties present and voting means States Parties present and casting an affirmative or negative vote. The Depositary shall communicate any adopted amendment to all States Parties.

4. An amendment adopted in accordance with paragraph 3 shall enter into force for each State Party that has deposited its instrument of acceptance for that amendment, ninety days following the date of deposit with the Depositary of the instruments of acceptance by a majority of the number of States Parties at the time of the adoption of the amendment. Thereafter, it shall enter into force for any remaining State Party ninety days following the date of deposit of its instrument of acceptance for that amendment.

Article 21 Signature, Ratification, Acceptance, Approval or Accession

1. This Treaty shall be open for signature at the United Nations Headquarters in New York by all States from 3 June 2013 until its entry into force.

2. This Treaty is subject to ratification, acceptance or approval by each signatory State.

3. Following its entry into force, this Treaty shall be open for accession by any State that has not signed the Treaty.

4. The instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

Article 22
Entry into Force

1. This Treaty shall enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary.
2. For any State that deposits its instrument of ratification, acceptance, approval or accession subsequent to the entry into force of this Treaty, this Treaty shall enter into force for that State ninety days following the date of deposit of its instrument of ratification, acceptance, approval or accession.

Article 23
Provisional Application

Any State may at the time of signature or the deposit of instrument of its of ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.

Article 24
Duration and Withdrawal

1. This Treaty shall be of unlimited duration.
2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty. It shall give notification of such withdrawal to the Depositary, which shall notify all other States Parties. The notification of withdrawal may include an explanation of the reasons for its withdrawal. The notice of withdrawal shall take effect ninety days after the receipt of the notification of withdrawal by the Depositary, unless the notification of withdrawal specifies a later date.
3. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Treaty while it was a Party to this Treaty, including any financial obligations that it may have accrued.

Article 25
Reservations

1. At the time of signature, ratification, acceptance, approval or accession, each State may formulate reservations, unless the reservations are incompatible with the object and purpose of this Treaty.
2. A State Party may withdraw its reservation at any time by notification to this effect addressed to the Depositary.

Article 26
Relationship with other international agreements

1. The implementation of this Treaty shall not prejudice obligations undertaken by States Parties with regard to existing or future international agreements, to which they are parties, where those obligations are consistent with this Treaty.
2. This Treaty shall not be cited as grounds for voiding defence cooperation agreements concluded between States Parties to this Treaty.

Article 27
Depositary

The Secretary-General of the United Nations shall be the Depositary of this Treaty.

Article 28
Authentic Texts

The original text of this Treaty, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations

**LEGAL OPINION: DIRCO INTERNATIONAL
STATE LAW ADVISOR**



international relations & cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)
Private Bag x 152, PRETORIA, 0001 Tel: +27 12 351 0857 Fax: +27 12 329 1721

13GCZ020280501
File: 30/9/1
RO232 /2013

Mr W Zaayman
Route GAA200

THE ARMS TRADE TREATY

1. Your request for legal advice, dated 23 May 2013, under reference ML7/ATT5, refers.
2. Please be advised that we have reviewed the text of the Arms Trade Treaty ("ATT") from an international law perspective. In our opinion, the ATT is acceptable from an international law point of view.
3. We agree with the comments of the Department of Justice and Constitutional Development ("DOJ&CD"), but would add the following two comments:
 - 3.1. It is true that South Africa is a party to the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime ("Protocol"). However, the scope of the Protocol is much more limited than that of the ATT.
 - 3.2. The ATT requires, in article 12(4), that all records required to be kept in terms of article 12, should be kept for a period of 10 years. Regulation 13 to the National Arms Control Act, 2002, requires that information be kept for a period of at least 5 years. It is the primary responsibility of the line function department, together with the DOJ&CD to consider whether it is necessary to amend Regulation 13, although we do advise that, in order to comply with our international obligations once the ATT has entered into force, steps be taken to ensure that the necessary records are kept for a period of 10 years, regardless of whether the relevant regulation is amended or not. This Office would be willing to provide an opinion on the matter if it is approached to do so.
4. We are of the view that the ATT falls within the ambit of section 231(2) of the Constitution of the Republic of South Africa, 1996, requiring parliamentary approval for ratification. Parliament's approval needs to be obtained **before** the ATT can be ratified.

CONFIDENTIALITY NOTE:

This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).

5. In order to obtain Parliamentary approval the ATT needs to be certified by this Office. The documentation required for certification consists of:
 - two copies of the President's Minute;
 - two copies of the Explanatory Memorandum setting out the purpose of the ATT and proposed date of signature;
 - two copies of the finally agreed text of the ATT;
 - two copies of the legal opinions from the State Law Advisers at the Department of Justice and Constitutional Development and this Office;
 - Completed certification form (attached herewith)
 - all documentation in folder Z137.

6. Once the President has signed the Minute, the Agreement cannot be amended in any way.

7. Following the process to obtain the Presidential Minute, the ATT must be submitted to Parliament in the following manner :
 - 7.1. Approach the relevant cabinet portfolio committee :

The line function department must prepare a Cabinet Memorandum. The various Cabinet Committees may have their own requirements for the format of Cabinet Memoranda. The usual headings required are: Subject; Purpose; Summary; Discussion; Organisational and Personnel Implications; Financial Implications; Communication Implications; Constitutional Implications; Other Departments/Bodies consulted; Recommendations.

 - 7.2. The ATT must be considered by Parliament (National Assembly and National Council of Provinces) :
 - 7.2.1.1. The line function department must prepare an Explanatory Memorandum setting out the history, objectives and implications of the agreement;
 - 7.2.1.2. The legal opinions from the State Law Advisors of both Departments (DOJ&CD and DIRCO) must be included;
 - 7.2.1.3. It must be stated whether the agreement contains any self-executing provisions in terms of section 231(4) of the Constitution;
 - 7.2.1.4. The projected financial and other costs of the agreement must be set out;
 - 7.2.1.5. The Explanatory Memorandum must contain all other information needed to take an informed decision.

 - 7.3. In cases of treaties requiring an Instrument of Ratification, such Instrument of Ratification must be deposited with the Depository:
 - 7.3.1.1. The Line Function Department must prepare the Instrument of Ratification;
 - 7.3.1.2. The Minister of International Relations and Cooperation or the President must sign the Instrument of Ratification;
 - 7.3.1.3. DIRCO will send the Instrument of Ratification to the relevant depository through the diplomatic channels.

 - 7.4. The ATT must be deposited with the Treaty Section at DIRCO :

The documents required are :

 - A certified copy of the agreement;
 - The President's Minute or Parliamentary authorisation
 - Copy of the signed Instrument of Ratification (where applicable).

8. It is trusted that our comments would be of assistance to you.

ANNEXURE C

LEGAL OPINION: CHIEF STATE LAW ADVISOR

**LEGAL OPINION: CHIEF STATE LAW
ADVISOR**



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
Private Bag x9069, CAPE TOWN 8000 / Private Bag x81, PRETORIA 0001
9 Riebeeck Street, Atterbury House, SUMSUNG Building, 12th Floor, CAPE TOWN 8001 / 329 Pretorius
Street, Momentum Centre, PRETORIA 0001

Reference: 273/2013A&B
Enquiries: Monwabisi Nguqu
Telephone: 021 441 4928
E-mail: mnququ@justice.gov.za
Website: <http://www.justice.gov.za>
Date: 17th May 2013

Ambassador JM Matjila
The Director-General
Department of International Relations and Cooperation
Private Bag x152
PRETORIA
0001

Per email: zaaymanw@dirco.gov.za (Wouter Zaayman)

Dear Ambassador

**THE ARMS TRADE TREATY: SCRUTINY AND COMMENT BY THE
OFFICE OF THE CHIEF STATE LAW ADVISER**

Introduction

1. Your request to the Office of the Chief State Law Adviser, dated 18 April 2013, to review the above-mentioned Treaty so as to establish its compliance with the domestic law of the Republic, in line with paragraph 5.9 read with paragraphs 5.20(a) and 5.21 of the Manual on Executive Acts of the President of the Republic of South Africa (the "Manual"), has reference.

2. Paragraph 5.9 read with paragraphs 5.20(a) and 5.21 of the Manual requires the Department of International Relations and Cooperation, prior

to its submission to Cabinet and the President, to refer the treaty to the Office of the Chief state Law Adviser to scrutinise the Treaty and comment on its consistency with domestic law and appropriate and correct legal drafting.

Background

3. There are currently no common international standards and treaties governing the import, export and transfer of conventional arms. The only international measures currently in place to control the arms trade are arms embargoes, but these are specific to geography or actors.¹

4. We have been informed that the Treaty was overwhelmingly adopted by the United Nations (the "UN") General Assembly on Tuesday, 2 April 2013, with a recorded vote of 154 votes in favour – including South Africa, 3 against (Syria, Iran and the DPRK) and 23 abstentions.

5. This followed from resolution 64/48 of 2 December 2009 of the UN General Assembly entitled: "***The arms trade treaty***", which, amongst others, calls for the UN Conference on the Arms Trade Treaty in 2012 to be undertaken in an open and transparent manner, on the basis of consensus, to achieve a strong and robust treaty, to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms.

6. We have also been informed that South Africa was actively involved in the Treaty process and consistently supported the negotiation of an instrument that is as comprehensive as possible and one that would make a meaningful difference in the international legal arms trade.

¹ UN General Assembly Resolution 61/89 of 8 December 2006 entitled "*Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*"; See also Guy Lamb "*Beyond 'shadow-boxing' and lip service: The enforcement of arms embargoes in Africa*", ISS Paper 135, April 2007, page 1.

7. That said, it is stated that the Treaty is essentially a product of compromise which to a certain extent **reflects the lowest common denominator** on which it was possible to reach agreement. Nevertheless, as an international instrument regulating the trade in conventional arms, the treaty closes a glaring gap that has long existed in the global arms control system. It sets norms and criteria that States would adhere to when considering arms transfers and therefore does not only seek to address illicit arms trade².

8. It is also stated that **the transfer criteria contained in the Treaty are not more onerous than the criteria that is already taken into account by the National Conventional Arms Control Committee** (the "NCACC") when making decisions as to whether or not to approve export applications.³

9. We are also informed that **the next step for South Africa would be to sign and then ratify the Treaty**, which would be opened for signature on 3 June 2013 and enter into force ninety days following the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary.⁴

10. Lastly, it is stated that the UN Secretary-General has reminded Member States that, under established international practice, only Heads of State or Government or Ministers of Foreign Affairs are empowered, by virtue of their functions, to sign treaties on behalf of States without having to produce full powers to that effect.⁵ Other representatives wishing to sign the Treaty must be in possession of appropriate full powers emanating from one of the said authorities.⁶

² See our discussion on the Convention against Transnational Organised Crime and the supplementary Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition on paragraphs 30 to 38 of this opinion.

³ See our discussion on the National Conventional Arms Control Act, 2002 (Act No. 41 of 2002) on paragraphs 39 to 54 of this opinion.

⁴ Articles 21 and 22 of the Treaty.

⁵ See Article 7(2) of the Vienna Convention on the Law of Treaties, 1969.

⁶ See Article 7(1) of the Vienna Convention on the Law of Treaties, 1969.

Discussion

Relevant domestic law and application of law or legal principles to the Treaty

11. The starting point for purposes of this opinion is the **Constitution of the Republic of South Africa, 1996** (the "Constitution"), which is the supreme domestic law of the Republic in terms of section 2 read with sections 1(c) and 172(1)(a) of the Constitution.

12. Section 39(1) read together with section 233 of the Constitution requires a court when interpreting (domestic) legislation to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

13. This ensures that courts are guided by international norms and the interpretation placed upon these norms by international courts and other institutions.

14. Moreover, sections 231(4) and 232 of the Constitution respectively provide that any international agreement or treaty that is incorporated by national legislation or a self-executing provision of an agreement or a treaty and customary international law constitutes domestic law of the Republic. Only a provision of the Constitution or an Act of Parliament that is clearly inconsistent with the self-executing provision of the treaty and customary international law will trump them.

15. Furthermore, an agreement or a treaty of a technical, administrative or executive nature or which does not require either ratification or accession, binds the Republic without the approval of Parliament. The

instrument must however be tabled in Parliament within a reasonable time.⁷

16. Any instrument that does not fall into one of the above categories binds the Republic only after it has been approved by resolution of Parliament.⁸

17. As already alluded to in paragraph 9, **Article 21** of the Treaty provides that the Treaty will be opened for signature at the UN Headquarters in New York by all states from 3 June 2013 until its entry into force in terms of **Article 22** of the Treaty, which is ninety days following the date of the deposit of the fiftieth instrument of ratification, acceptance or approval with the Depositary established by **Article 27^a** read with **Article 28¹⁰** of the Treaty.

18. Most importantly, Article 21 read together with Article 22 Treaty expressly provides that the Treaty is subject to ratification, acceptance or approval by each signatory State. The instruments of ratification, acceptance, approval or accession must be deposited with the Depositary.

19. **Article 25** of the Treaty enjoins State Parties the right, at the time of signature, ratification, acceptance, approval or accession, to express reservations, which may be withdrawn at any time by notification to the Depositary, as long as they are not incompatible with the object and purpose of the Treaty, as provided for in **Article 1**, namely—

(1) to establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; and

⁷ Section 231(3) of the Constitution

⁸ Section 231(2) of the Constitution

⁹ UN Secretary-General.

¹⁰ Article 28 also provides for equally authentic texts of the Treaty, which is the Arabic, Chinese, English, French, Russian and Spanish.

(2) *to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion*¹¹,

for the purpose of contributing to international and regional peace, security and stability, reducing human suffering and promoting cooperation, transparency and responsible action by State Parties in the international trade in conventional arms, thereby building confidence among State Parties.

20. **Article 24** of the Treaty expressly provides for the duration of the Treaty on unlimited or permanent basis. The Article also enjoins State Parties the right to withdraw from the Treaty by giving notification to the Depositary, who in turn must notify all other State Parties. Be that as it may, the exercise of the right of withdrawal does not discharge a State from the obligations arising from the Treaty while it was a Party, including any financial obligations that the State may have accrued.

21. **Article 20** of the Treaty enjoins State Parties the right, six years after the entry into force of the Treaty, to propose any amendments to the Treaty in writing to the Secretariat which is provided for in and established by **Article 18** of the Treaty to assist State Parties in the effective implementation of the Treaty. Thereafter, proposed amendments may only be considered by the Conference of State Parties, provided for in **Article 17** of the Treaty, every three years.

22. **Article 19** of the Treaty requires State Parties to pursue dispute settlement arising out of the interpretation or application of the Treaty through negotiations, mediation, conciliation, judicial settlement or other peaceful means as well as through arbitration.

23. **Articles 15 and 16** of the Treaty requires and encourages international cooperation and assistance between State Parties, consistent

¹¹ See the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition supplementing the Convention against Organised Crime of 2001 (Resolution 55/255 of 2001), which is discussed later on in this opinion.

with their respective security interests and national laws, in pursuit of effective implementation and application of the Treaty.

24. **Article 26** of the Treaty expressly protects or safeguards State Parties against any prejudice from their existing or future international obligations in the implementation of the Treaty where those obligations are consistent with the Treaty. The article also prohibits or prevents State Parties from citing the Treaty Parties as grounds for avoiding defence cooperation agreements and/or obligations between State Parties to the Treaty.

25. Instead, State Parties may, according to **Article 23** of the Treaty, at the time of signature or the deposit of instrument of its ratification, acceptance, approval or accession, declare that it will apply provisionally Articles 6¹² and 7¹³ pending the entry into of the Treaty in terms of Article 22, which has been already discussed in paragraphs 17 to 19 above.

26. Articles 19 to 28¹⁴ of the Treaty are respectively in line with or sanctioned by Articles 66, 39 read with 40, 11 read with 12, and 14 to 16, 24, 25, 54 read with 43 and 44, 19 read with 23 and 23, 3, 76 read with 77 and 80, and 33 read with 10, of the Vienna Convention on the Law of Treaties of 1969¹⁵ read together with Chapters I, IV, VI, XV and XVI of the Charter of the UN ("UN Charter"). Articles 15 to 18 of the Treaty are broadly covered under the said Chapters of the UN Charter.

27. Sections 231 to 233 of the Constitution, which deal with international agreements, customary international law and application of international law respectively, therefore, represent a reflection of Articles 14 read with 15, and 24, of the Vienna Convention on the Law of Treaties.

¹² Article 6 is discussed at paragraph 58 of the opinion.

¹³ Article 7 is discussed at paragraph 59 of this opinion.

¹⁴ As already mentioned in the opinion, Articles 19 to 28 of the Treaty deal with dispute settlement, amendments, signature, ratification or acceptance or approval and accession, entry into force, provisional application, duration and withdrawal, reservations, and relationship with other international agreements, depositary, and authentic texts

¹⁵ The Convention was adopted by the UN Conference on the Law of Treaties on 22 May 1969 and opened for signature on 23 May 1969. It came into force on 27 January 1980 in accordance with Article 84(1) of the Convention.

28. The point or statement attributed to the UN Secretary-General, which we referred to in paragraph 10 above of this opinion, is in fact in line with Article 7 read with Article 6 of the Vienna Convention on the Law of the Treaties, which deals with State's consent to be bound by treaties.

29. Therefore, the provisions or terms of the Treaty that we have discussed so far are clearly in congruence with the Vienna Convention on the Law of Treaties read together with the UN Charter, on the one hand, and the Constitution, on the other hand.

30. That said, South Africa ratified the **Convention against Transnational Organised Crime** (the "Convention")¹⁶ adopted by the UN General Assembly¹⁷ in November 2000.

31. The purpose of the Convention is to promote cooperation aimed at preventing and combating transnational organised crime more effectively.¹⁸ It also provides for the criminalisation of the laundering of proceeds of crime, for combating money laundering and for the criminalisation of corruption.¹⁹

32. The Convention provides for supplementary protocols which are only binding on a State Party to the Convention if that State becomes party to the protocol in accordance with the provisions thereof.²⁰

33. The **Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition supplementing the Convention against Organised Crime** (the "Protocol") is one of those supplementary protocols.²¹

34. South Africa also ratified the Protocol in 2004.

¹⁶ In 2004

¹⁷ Resolution 55/25 of 15 November 2000

¹⁸ Article 1

¹⁹ Articles 7 to 8

²⁰ Article 37

²¹ The Protocol was adopted by UN General Assembly Resolution 55/255 of 2001.

35. The Protocol was adopted to deal specifically with the *harmful effect of the illicit manufacturing of, and trafficking in firearms on the security of States, regions and the world as a world*²², endangering the well-being of peoples, their social and economic development and their right to live in peace.

36. The Convention compels State Parties to take the necessary measures, including legislative and administrative measures, in accordance with their domestic law, to ensure the implementation of their obligations under the Convention.²³

37. The Protocol compels State Parties to establish as criminal offences the conducts targeted by the Protocol, including the illicit trafficking in firearms, their parts and components and ammunition.²⁴

38. State Parties are required to maintain an effective system of export and import licensing or authorisation, including measures to deal with international transit, the transfer of firearms, their parts and components and ammunition.²⁵ In addition, State Parties are required, before issuing export licences or authorisations, to verify that the importing State has issued import licences or authorisations and that transit States have given notice in writing prior to the shipment that they have no objection to the transit.²⁶

39. The **National Conventional Arms Control Act, 2002** (the "NCACA")²⁷, was enacted in compliance with the Convention and its supplementary Protocol. Through ratification in 2004, South Africa expressed its intention to be bound by and incurred international obligations in terms of the international norms and standards.

²² Note 8 and Article 1 of the Treaty

²³ Article 34

²⁴ Article 5(1)(b)

²⁵ Article 10(1)

²⁶ Article 10(2)

²⁷ Act No. 41 of 2002

40. The purpose of the NCACA is to establish the National Conventional Arms Control Committee (the "NCACC"), ensure compliance with the government's policy in respect of arms control and to ensure the implementation of a legitimate, effective and transparent control process, to ensure adherence to international treaties and agreements and to ensure proper accountability in the trade of conventional arms, to foster national and international confidence in the control procedures, to provide for an Inspectorate to ensure compliance with the provisions of the Act, to provide for the guidelines and criteria to be used when assessing applications for permits made in terms of the Act.²⁸

41. Section 13 of the NCACA provides that no person may trade in conventional arms unless that person is registered with the secretariat contemplated in section 8 of the NCACA and is in possession of a permit authorised by the NCACC established by section 2 of the NCACA.

42. Section 24(1) of the NCACA makes it an offence to trade in conventional arms in contravention of section 13. In terms of section 24(2)(a), a person liable on conviction to a fine or imprisonment for a period not exceeding 25 years, or to both such fine and imprisonment.

43. In addition, the court may order seizure of any goods in respect of which the offence was committed and the goods so seized must be disposed of as order by the Secretary of defence appointed in terms of the Defence Act, 1957 (Act No. 44 of 1957).

44. Section 25A of the NCACA provides for exemptions from the provisions of the Act relating to the export and import of conventional arms in cases of an emergency or special operations and at the request of the National Police Commissioner or Chief of the Defence Force, subject to certain procedural mechanism.

²⁸ Long title of the NCACA

45. Section 26 of the NCACA provides for extra-territorial application of the Act and extra-territorial jurisdiction of the South African courts in respect of the offences contemplated in section 24 of the NCACA and committed by any citizen or permanent resident of the Republic or any juristic person incorporated or registered in the Republic. Foreign citizens may only be tried for offences contemplated in section 24 of the NCACA that are committed within the Republic.

46. The provisions of the NCACA are complemented by the **National Conventional Arms Control Regulations, 2004**,²⁹ which provide, amongst others, for various categories and purposes of permits³⁰ as well as the conditions to be fulfilled for a permit to be issued³¹. Annexed to the Regulations is the **Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies**, which contains a list of dual-use goods and technologies as well as munitions list.

47. For instance, in *State v Van Rensburg*³², a vessel called *Surat*, which was the property of a shipping company registered in Britain with business premises in Cape Town and Port Elizabeth, P & O Nedlloyd Ltd, docked at the Cape Town harbour on 29 May 2005 with 200 000 rounds of armour piercing incendiary ammunition. From there she sailed to Port Elizabeth with her cargo, arriving on 2 June 2005.

48. Upon arrival, a member of the South African Police Service established that *Surat* was conveying the ammunition without the necessary permit prescribed by the South African law. As a result, the authorities seized the ammunition.

49. Unaware of the legal requirements of the domestic law, employees of Nedlloyd informed the authorities that two other vessels, *Molmiracle* and

²⁹ GG 26372 of 28 May 2004

³⁰ Regulations 2 and 3

³¹ Regulation 4

³² Case Number RC/107/2005, Eastern Cape Regional Division, 13 July 2005, Unreported.

Dejima, contracted by and property of Nedlloyd respectively, were transporting two other consignments – 1687 millions rounds of pistol, rifle and shotgun ammunition in the first case and 220 000 rounds of armour piercing incendiary ammunition, 1 000 000 rounds of pistol ammunition and 110 000 shotgun pellets in the second case. The ammunition aboard these two ships was likewise seized by the authorities upon arrival in the Port Elizabeth harbour on 8 and 12 June 2005.

50. The accused were criminally charged for unlawful and intentional trade in conventional arms in contravening of section 13 read with the relevant provisions of sections 1, 24, 26 and 27 of the NCACA and the Wassenaar Arrangement's munitions list, by conveying the ammunition on board the ships in the territorial waters of South Africa whilst not registered with the secretariat created in terms of section 8 of the NCACA and not in possession of a permit authorised by NCACC created in terms of section 2 of the NCACA.

51. Nedlloyd was found guilty and sentenced to a fine of R50 000 of which R25 000 was suspended pursuant to a plea and sentence agreement entered into between Nedlloyd and the National Prosecuting Authority in terms of section 105A of the Criminal Procedure Act, 1977³³.

52. The prosecution accepted that the goods were conveyed in the ordinary course of business in pursuance of a legitimate arms deal and that, had Nedlloyd complied with all the legal requirements, NCACC and the secretariat would have had no objection to the issuing of the conveyance permits.

53. Most importantly, for the purposes of this opinion, the prosecution averred that **the proliferation of conventional arms posed a threat to international peace and security**, that **South Africa has signed international agreements obliging it to ensure proper accountability in the trade of conventional arms** and that **conveyance of such arms**

³³ Act No. 51 of 1977

encourages them to make the same publicly available for information-sharing purposes and transparency and openness.

59. **Article 6** of the Treaty prohibits the transfer of conventional arms listed in Article 2(1) or of items covered under article 3 and 4 if the transfer would violate obligations under arms embargoes adopted in terms of Chapter VII of the UN Charter or international obligations under international agreements to which a State is a Party, particularly those relating to the transfer of or illicit trafficking in conventional arms or if it has knowledge at the time of authorisation that the arms or items would be used in the commission of 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.

60. **Article 7** of the Treaty requires State Parties to, in accordance with their national control system, assess, before allowing for the export of conventional arms, whether the conventional arms would contribute to or undermine peace and security or would be used to commit or facilitate a serious violation of international humanitarian or international human rights law.

61. **Articles 8, 9 and 10** of the Treaty respectively require State Parties to take appropriate measures to regulate the import, transit or trans-shipment and brokering of conventional arms listed in Article 2(1). For the purposes of the Treaty, all of these activities are referred to as "transfer" in terms of Article 2(2).

62. **Article 11** of the Treaty requires State Parties involved in the transfer of conventional arms to take measures to prevent the diversion of conventional arms listed in Article 2(1). The Article also requires State Parties to take appropriate measures, pursuant to their national laws and in accordance with international law, where a diversion of transferred conventional arms listed in Article 2(1) is detected.

63. **Article 12** of the Treaty requires and encourages State Parties to maintain, and keep for a minimum of ten years, records relating to the export and transfer of conventional arms listed in Article 2(1).

64. **Article 13** of the Treaty requires State Parties to report periodically to the Secretariat regarding measures undertaken to implement the Treaty.

65. **Article 14** of the Treaty requires State Parties to take appropriate measures to enforce national laws and regulations that implement the provisions of the Treaty.

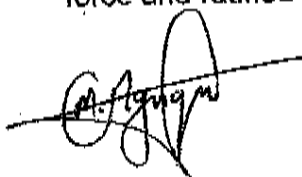
66. Lastly, the **Preamble** contains a list of principles that State Parties to the Treaty expressed their determination to be guided by in their interpretation, application and implementation of the Treaty.

67. Therefore, Articles 1 to 14 of, and the Preamble to, the Treaty are broadly consistent with the provisions of the NCACA, which together are in accordance with the principles of the UN Charter, the Universal Declaration of Human Rights and the Geneva Conventions of 1949.

Conclusion

68. Accordingly, we are therefore of the view that the Treaty is consistent with domestic law, including international law.

69. We propose that the NCACA be considered again with the view to amend and bring it in line with the Treaty, once the latter has come into force and ratified by Parliament of the Republic.



for CHIEF STATE LAW ADVISER