We have noted that the President's Discussion Paper of July 3 refers to international humanitarian law (IHL) in three separate ways: “grave breaches” in Paragraph 5(4), “serious violations of international humanitarian law” in Paragraph 6(A)(1)(b), and “war crimes” in Paragraph 6(A)(1)(c). We would like to offer some clarification on the meaning of these different references to IHL.

"Serious violations of international humanitarian law" are “war crimes,” and the two terms are interchangeable. The majority of these offences involve death, injury, destruction or unlawful taking of property. They include but are not limited to “grave breaches” as specified under the four Geneva Conventions of 1949 and their Additional Protocol I of 1977. But the grave breaches specified in these instruments only arise in international armed conflicts. War crimes also include the offences defined in article 8 of the Rome Statute of the International Criminal Court, which can occur in both international and non-international armed conflicts. The ICRC is distributing an explanatory note on the meaning of "serious violations of IHL". It lists in an annex the specific "serious violations" or "war crimes" and indicates what the legal sources are for these crimes. This document demonstrates that serious violations of IHL are not a subjective category but a specific set of offences.

As regards the criteria in the President's Discussion Paper of July 3, we have some observations:

- The reference to "grave breaches" in paragraph 5(4) is too narrow as it would apply only to crimes committed in international armed conflicts. If this paragraph is retained it should refer to "serious violations of IHL" or "war crimes" to ensure that acts are covered in all armed conflicts.

- A presumption against authorization which can nonetheless be overridden for unspecified reasons, as proposed in paragraphs 5(2) and (3) of the President's Discussion Paper of July 3, is, in our view, not adequate to meet the goal of reducing the human cost of irresponsible arms transfers. This would constitute a lower standard than the political commitments undertaken by States Parties to the Geneva Conventions at International Conferences of the Red Cross and Red Crescent in 2003, 2007 and 2011 in which they resolved to ensure that the arms and ammunition they transfer do not end up in the hands of persons who may be expected to use them in violation of IHL.

The ATT should reflect all States' obligation to ensure respect for IHL by requiring that they: assess the likelihood that serious violations of IHL will be committed with the weapons being transferred, as proposed in para 6A(1) of the President's Discussion Paper, and do not authorize transfers when there is a clear risk that the arms will be used to commit serious violations of IHL. The same criterion should be set where there is a substantial risk of serious violations of international human rights law.

The ICRC considers that precautionary and preventive measures to mitigate risk should not replace a denial of transfer or be used to legitimize an otherwise unjustified transfer as is currently proposed in paragraph 6A(3). Instead, a transferring State should, in cases of doubt, be encouraged to take the type of measures proposed in paragraph 6A(3) to ensure that the risk is reduced, but should proceed with a transfer only when it is satisfied that a substantial risk of serious violations does not or no longer exists.