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RESEARCH

Enhancing the Understanding of Roles and Responsibilities of Industry and States to Prevent Diversion

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About UNIDIR

The United Nations Institute for Disarmament Research (UNIDIR)—an autonomous institute within the United Nations—conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to a variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and Governments. UNIDIR activities are funded by contributions from Governments and donor foundations.

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List of acronyms and abbreviations

ATT	Arms Trade Treaty
EU	European Union
NGE	non-governmental entity
NGO	non-governmental organization
OSCE	Organization for Security and Cooperation in Europe
SALW	small arms and light weapons
UN	United Nations
PoA	United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects
UNIDIR	United Nations Institute for Disarmament Research
UNSCAR	United Nations Trust Facility Supporting Cooperation on Arms Regulation
WCO	World Customs Organization
WTO	World Trade Organization

1 Summary

Diversion poses a significant threat to societies around the globe, limiting the effectiveness of arms control initiatives and frustrating attempts to regulate or catalogue flows of conventional arms, ammunition and parts and components. All private sector actors involved in the international trade in conventional arms have a role to play in preventing diversion. This report aims to examine this role and support better understanding on how all relevant actors can work to prevent the diversion of conventional arms.

The Private Sector's Role

- Private sector actors include defence manufacturers and other commercial entities such as agents, dealers, brokers, shippers, trans-shippers, freight forwarders, and insurers. Whether such actors are large or small operators, and wherever in the chain of supply and transaction they are operating, they can work to prevent diversion.
- Nevertheless, it must be acknowledged that private sector actors may have vastly differing levels of resources, capacity and awareness and that approaches must be tailored to the specific actor.
- This report notes that, in order to contribute effectively to preventing diversion, private sector actors involved in the international arms trade need to know not only their own State's national controls, prohibitions and procedures but also the controls, prohibitions and procedures that have been agreed by their home State with other States where they trade.
- Imparting knowledge about the national control system to private sector actors is a responsibility of governments and can also be carried out with the support of private sector business associations, nationally and internationally.

Diversion

- None of the international treaties designed to regulate the trade in conventional arms contain a definition of diversion, but rather describe various forms of diversion and so it falls to States to define diversion in their national laws.
- This report identifies that the two most consistent aspects of the generic definition of diversion are:
 - the act of changing the direction or use of something; and
 - unauthorized rerouting or appropriation.

Corporate Responsibility and Compliance

- Modern compliance and ethical practices of private sector actors can also encourage due diligence, including respect for international standards on ethical issues and international human rights standards as forms of corporate responsibility and risk management.
- Internal compliance programmes promote awareness raising and the fulfilment of export control requirements by exporters. They can also enhance communication and cooperation between the State licensing, customs and other law enforcement authorities and the exporting companies or entities.

Pre-Transfer Risk Assessments and Licensing System

- The most important issues during the pre-transfer stage are related to the overall licensing process, risk-assessment procedures, and end user verification.

- Before an actual transaction can be initiated, licensing authorities and private security actors often engage in various types of information exchange and coordination. The weight given to the risk factors and measures individually or in combination in assessing the overall risk of a potential transfer may vary according to the size, sophistication, nature and scope of the items and services to be supplied, and who would provide and receive them. This report identifies that private sector actors can be in possession of relevant information and data that, if provided to authorities in a timely fashion, can mitigate the risk of diversion.
- Private sector actors should provide accurate and relevant information to national authorities about the equipment and its intended end use/r when applying for registration and licenses to conduct trade in conventional arms and related items. National regulations vary across countries, but international standards have been agreed to bring greater coherence to the system in the interests of international cooperation and security.
- End-user certificates or equivalent documents and their authentication at the licensing stage can play a central role in preventing diversion. Nevertheless, using end-user agreements cannot substitute for a complete risk assessment of the particular case.

Shipping and Transit Issues

- A pre-shipment assessment by the exporting State is essential. This assessment should draw upon information provided by other relevant States, and by private sector actors, on the risk of diversion during the actual physical transfer of conventional arms, their ammunition/munitions and parts and components.
- The control of shipments across land, sea, waterways and sea borders is essential. It is necessary for customs and other law enforcement agencies to use systematic targeting techniques based upon profiling operators and other intelligence-led activities, selecting for examination the highest-risk transports and cargoes.
- As before, the information available to private sector actors can assist States in monitoring and targeting high-risk transfers and private sector actors should consider sharing it.

Post-Delivery Issues

- Whereas the emphasis of export controls remains on the pre-licensing phase, post-shipment verification, monitoring and end-use controls can be an important supplementary tool to strengthen the effectiveness of national arms export controls.
- When the diversion track record of the destination country or of an end user offers grounds for concern, suppliers could consider strict post-shipment measures to reduce risk.
- One way, amongst others, in which the private sector can play a role in supporting post-delivery verification is in the development of 'track and trace' technologies.

Key Elements of General Cooperation

- Cooperation between all actors involved in the international trade in conventional weapons is vital to address diversion. This applies to risk management, licensing, transit and post-delivery situations. In addition, cooperation can be fostered by:
 - private sector outreach programmes which can secure the support of the private sector and key actors in civil society, build a culture of compliance and secure adequate resources for preventative action;
 - training programmes for both State representatives and private sector actors, to develop skills and share best practice; and
 - cooperation with law enforcement to support compliance with national laws, regulations and procedures and support enforcement action.

2 Introduction

UNIDIR has conducted work on tackling diversion especially with respect to end-use/r controls since 2015 in the form of a multi-phase project, funded by the United Nations Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR).¹

This report draws from the inputs provided during an informal expert group meeting held in October 2018 as well as other research since then. It maps out the key issues identified by participants, and sets out areas for further exploration and study. Industry and private sector actors provided the majority of the substantive comments generated by the informal expert group meeting. The authors of this report have since carried out further research. UNIDIR will continue to support discussion from a wide variety of stakeholders.

2.1 OBJECTIVE OF THE PROJECT

Diversion of conventional arms poses a significant threat to societies around the globe, limiting the effectiveness of arms control initiatives and frustrating attempts to catalogue flows of conventional arms. Since 2015, UNIDIR has sought to address this problem through three phases of a larger project.

The current third phase of the project, made possible by funding from UNSCAR, focuses on the roles and responsibilities of industry and private sector actors² in conventional arms transfers and their contributions to preventing diversion. The objective of this phase is to examine options and avenues for strengthening end-use/r controls applicable to industry and private sector actors and to create a space for States to engage in dialogue with industry and private sector actors.

2.2 PREVIOUS PHASES OF THE PROJECT

The previous phases of the project—also supported by UNSCAR—focused on governmental entities. *The first phase*, entitled “Examining Models for Harmonization of End-Use/r Control Systems”, sought to enhance the knowledge and capacity of policymakers and practitioners to identify frameworks, procedures and practical measures in harmonizing end-use/r control systems in order to promote meaningful dialogue among States in mitigating risks of arms diversion. This phase produced a meeting summary from an informal expert group meeting held in Vienna, Austria, on 22–23 April 2015,³ and a research study entitled “Examining Options to Enhance Common Understanding and Strengthen End-Use and End-User Control Systems to Address Conventional Arms Diversion”.⁴

¹ UNSCAR is a flexible multi-donor, United Nations-managed fund supporting arms regulation. Among other things UNSCAR aims to mobilize resources to support the ratification/accession and implementation of relevant international instruments on arms regulation.

² The term “industry and private sector actors” refers to all commercial entities involved in the transfer of conventional arms, including manufacturers, shippers, trans-shippers, freight forwarders, brokers and other related actors.

³ UNIDIR, “Meeting Summary: Examining Options and Model for Harmonization of End Use/r Control Systems,” Informal Expert Group Meeting, Vienna, 22–23 April 2015, <http://www.unidir.org/files/publications/pdfs/eucmeeting-summary-survey-en-632.pdf>.

⁴ UNIDIR, “Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion”, 2016, <http://www.unidir.org/files/publications/pdfs/final-euc-2015-en-649.pdf>.

The second phase, entitled “Tackling Diversion (Phase II): Promoting Regional Dialogue to Enhance Common Understanding and Cooperation to Strengthen End-Use/r Control Systems”, had a regional focus, engaging with States in Africa and the Middle East, Latin America and the Caribbean, and Asia and the Pacific, that were not participating in export control regimes of the European Union (EU) or the Organization for Security and Cooperation in Europe (OSCE). This phase was aimed at developing knowledge and capacity for addressing diversion among key policymakers and practitioners. It also focused on identifying practical measures to strengthen end-use/r control systems at regional and global levels. This phase produced three meeting summaries, from informal consultative meetings in Port of Spain, Trinidad and Tobago (21–22 September 2016),⁵ Nairobi, Kenya (6–7 October 2016)⁶ and Bangkok, Thailand (1–2 March 2017),⁷ as well as a research study entitled “Strengthening End-Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings”.⁸

Together, these phases resulted in several key findings. In particular, both phases identified four major areas that were required for an effective end-use/r control system: (i) common definitions of key terms, (ii) common understandings of the exact information that must be provided to export control authorities, (iii) widely accepted types of assurances to be provided by the end user or importer, and (iv) a shared understanding of the role and function of end-use/r documentation. As a result, these areas are most relevant for, and should be prioritized in, any harmonization or strengthening initiative. In addition, both phases identified two further areas as being especially challenging for harmonization or strengthening initiatives, but equally important to any effective end-use/r control system: these were (i) the exchange of information and risk assessments, and (ii) post-delivery cooperation. Reports in both phases supported enhancing international cooperation, working towards agreement on common understandings of key terms and the aligning of standards—in particular, key elements to be contained in end-use/r control documentation and general principles for effective end-use/r control.

2.3 OBJECTIVE OF THIS THIRD PHASE OF THE PROJECT

Whereas the previous phases of the project—also funded by UNSCAR—focused only on governmental entities, this third phase of the project focuses also on the roles and responsibilities of industry and private sector actors in conventional arms transfers and ways that they can contribute to the efforts of the international community in preventing the diversion of conventional arms and related items to the illicit market, for unauthorized end use or to unauthorized end users.

The objective of this phase is to examine relevant international and national measures that enhance options and avenues for strengthening end-use/r controls applicable to industry and private sector actors. In this manner, the project supports the goals of both the United Nations

⁵ UNIDIR, “Meeting Summary: Examining Common Subregional Understandings to Strengthen End Use/r Control Systems to Prevent Arms Diversion”, Subregional Consultative Meeting, Port of Spain, Trinidad and Tobago, 21–22 September 2016, <http://www.unidir.org/files/publications/pdfs/eucii-caribbean-meeting-en-669.pdf>.

⁶ UNIDIR, “Meeting Summary: Examining Common Regional Understandings to Strengthen End Use/r Control Systems to Prevent Arms Diversion”, Regional Consultative Meeting, Nairobi, Kenya, 6–7 October 2016, <http://www.unidir.org/files/publications/pdfs/eucii-africa-meeting-en-670.pdf>.

⁷ UNIDIR, “Meeting Summary. Examining Common Regional Understandings to Strengthen End Use/r Control Systems to Prevent Arms Diversion”, Regional Consultative Meeting, Bangkok, Thailand, 1–2 March 2017, <http://www.unidir.org/files/publications/pdfs/eucii-thailand-meeting-en-681.pdf>.

⁸ UNIDIR “Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings”, 2017, <http://www.unidir.org/files/publications/pdfs/strengthening-end-use-r-control-systemsto-prevent-arms-diversion-en-686.pdf>.

Programme of Action on Small Arms and the Arms Trade Treaty (ATT), as well as other relevant international instruments such as the United Nations Firearms Protocol.

This report explores issues related to documentation, risk management, information-sharing, awareness-raising, and supply chain oversight actions and opportunities. It seeks to provide an overview of the measures that might be taken to prevent the illicit diversion of transfers of conventional arms, ammunition and related parts and components, at all stages of transfer. The key findings and observations will contribute to the work of the previous phases and encourage further development of practical solutions to strengthen end-use/r controls for tackling diversion in conventional arms transfers.

2.4 INITIAL MEETING WITH SELECTED INDUSTRY AND PRIVATE SECTOR REPRESENTATIVES

On 7 August 2018, UNIDIR convened an initial scoping meeting in Geneva, Switzerland, with a small group of representatives from key actors in the defence industry and relevant private sector entities, supplemented with representatives of States and subject-matter experts. The meeting sought to facilitate initial discussions on the roles and responsibilities of industry and private sector actors and to explore their contributions to preventing diversion in conventional arms transfers.

The participants identified five key issues to be discussed in greater depth: i) licensing and pre-delivery phase; ii) transport and trans-shipment; iii) addressing diversion; iv) defining end-use and end-users; and v) general cooperation among industry and private sector actors and governments. The preliminary findings guided further research and discussion topics for later stages of this phase.

2.5 INFORMAL EXPERT GROUP MEETING WITH STATES, INDUSTRY AND THE PRIVATE SECTOR

On 3–4 October 2018, UNIDIR convened an informal expert group meeting in Geneva, Switzerland, for representatives of States, non-governmental organizations (NGOs), industry and private sector actors to consider the roles and responsibilities of industry and private sector actors in conventional arms transfers; examine how end-use/r controls could be strengthened to support these actors in addressing diversion; outline the contributions that States can, and do, make in cooperating with industry and private sector actors in preventing diversion; and discuss how States, industry and private sector actors as well as other stakeholders can better cooperate to prevent diversion. This report draws from the inputs provided during that meeting. It maps out the key issues identified by participants, and sets out areas for further exploration and study.

The meeting included 18 representatives of States, NGOs, industry and the private sector. It was divided into four sessions: one session for representatives of States, two sessions for representatives of industry and the private sector, and a final session for both groups. This allowed UNIDIR to identify the key perspectives, concerns and questions of both groups before bringing them together to jointly discuss and share their thoughts.

3 The Private Sector's Role in Preventing Diversion in the International Arms Trade

Private sector actors involved in the international trade in conventional arms and corresponding ammunition/munitions and parts and components can play a vital role in preventing the diversion of those products. Such actors include defence manufacturers and other commercial entities such as agents, dealers, brokers, shippers, trans-shippers, freight forwarders, and insurers. Whether such actors are large or small operators, and wherever in the chain of supply and transaction they are operating, they can benefit from knowing how the national control systems function.

3.1 A RULE OF LAW APPROACH

In order to contribute effectively to preventing diversion, for example by detecting and reporting unauthorized acts of rerouting arms, commercial actors involved in the international arms trade need to know not only their own state's national controls, prohibitions and procedures but also the controls, prohibitions and procedures that have been agreed by their home State with other States where they trade. This is particularly the case when the laws extend to extra-territorial rules and obligations, some of which may invoke individual responsibility, as is the case with laws on terrorism, organized crime and United Nations sanctions.

The reality is that many national control systems are complex and they change as new legislation, regulations and international agreements are agreed. A list of typical areas of national legislation is as follows:⁹

- Firearms legislation (e.g. this often takes the form of a firearms act or an arms and ammunition act);
- Import/export control/trade control legislation (e.g. this is usually found in export and import of goods act, strategic goods act, a foreign trade act, a war weapons act, and related regulations);
- Customs and transport legislation (e.g. usually a customs act, transportation of dangerous goods act, and in aviation, maritime and port regulations);
- Armed forces legislation (e.g. typically in an armed forces act or defence act and a police act);
- Legislation establishing relevant governmental structures (e.g. often in the form of a national strategic export control authority and/or a national commission on small arms),
- Legislation to implement relevant obligations arising from membership of regional and international organizations (e.g. such as a United Nations Act with relevant provisions for implementing international sanctions and arms embargoes);
- Criminal code (defining individual criminal liability, e.g. for smuggling, bribery, etc.); and
- Other statutes (e.g. regulating private security companies etc.).

Imparting knowledge about the national control system to private sector actors is a responsibility of governments and can also be carried out with the support of private sector business associations, nationally and internationally. However, the manner in which such information is prioritized and communicated to existing and potential private sector actors involved in the arms

⁹ ATT Working Group on Effective Treaty Implementation (WGETI), *(Draft) Basic Guide to Establishing a National Control System*, 15 January 2019, section a.i.

trade is not straightforward. Measures relevant to the prevention, detection and eradication of ‘diversion’ of conventional arms vary greatly across States, even though the diversion of arms is deemed to be an illicit activity under the ATT, the United Nations Firearms Protocol¹⁰ and other legally binding instruments that have a large and growing membership of well over 100 States. Apart from the fact that not all States are yet party to these treaties, most of the anti-diversion measures in the ATT and the Protocol are only described in general terms or just listed briefly. Also, many of the key provisions overlap with other provisions and with those in other international instruments, and so require a degree of interpretation. For example, there is a lack of common definitions in many of the instruments (e.g. of end user and end use, illicit trade, and diversion). Some of the provisions are obligatory (e.g. ‘each State Party shall’) while others are in the form of recommendations (e.g. ‘each State Party is encouraged to’).

There is therefore a need for greater awareness among many private sector actors involved in the conventional arms trade of the legal parameters arising from States’ ratifications of the ATT, the Firearms Protocol or other relevant treaties. This need also applies to knowledge of the key best practice guidelines recommended by the United Nations and other international bodies that address the trade in conventional arms and related items, as well as established best practice within industries.

In that regard, article 13(3) of the Firearms Protocol requires that “States Parties shall seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect the illicit activities referred to in paragraph 1 of this article”, that is, illicit manufacturing and illicit trafficking.

3.2 PRODUCTS AND ACTIVITIES

It stands to reason that if the widest array of weapons, munitions and related items is subject to trade regulation, and the entities involved in such trade are regulated, then the risk of their diversion into an illicit market, or to unauthorized end users or end use, would be greatly reduced.

Regarding the products traded, in practice, most States maintain a national arms control list, which is a list that must provide definitions of categories of conventional arms and related items for which the international transfer is regulated. For example, 51 out of 57 States that were party to the ATT in January 2019 reported to the ATT Secretariat that they had a national control list covering all of the conventional arms and corresponding ammunition (or munitions) included in the ATT, and 50 States Parties had lists also covering the corresponding parts and components. States often have more than one such national control list—one for conventional arms and another for ‘dual use’ equipment and technologies (i.e. those that are not specifically designed for military use but which can be used for military applications as well as civilian uses).

To abide by national regulations where they operate, industry and private sector actors have an interest in knowing exactly what is included in the national arms control lists, and what may be excluded. They also have an interest in making sure governments maintain accurate descriptions of the items on each national control list so that company personnel can deal efficiently with applications for licences and other authorizations, as well as customer sales and customs

¹⁰ General Assembly, *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*, UN document A/RES/55/255, 8 June 2001.

procedures. Harmonized or common control lists governing the export, import and transit of arms and related items make such tasks easier and create more of a ‘level playing field’ in the markets.

The ATT sets out a minimum list of conventional arms that must be controlled by provisions of the Treaty. In any case, article 5(3) stipulates that national definitions for the categories of conventional arms covered by article 2(1)(a)-(g) must “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”,¹¹ and for category (h) on small arms and light weapons, that “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”.¹²

Since the diversion of small arms and light weapons (SALW) and associated ammunition, parts and components poses a higher risk than some other categories of arms, it is vital for all States to incorporate in their national control lists the two main instruments with descriptions of SALW. These are the International Tracing Instrument¹³ and the United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. It is particularly important for States to adopt the broadest definition these weapons, going even beyond that of the Wassenaar category ML1, so as to not allow, for instance, firearms to be poorly regulated because manufacturers describe them as ‘non-military’, or only for sport shooting and hunting. Many of the latter firearms can be as powerful as weapons used in military and policing operations and can be used in armed violence and crime.

However, article 5(3) of the ATT encourages each State Party to “apply the provisions of this Treaty to the broadest range of conventional arms”. In practice, almost all significant arms-exporting States have already adopted comprehensive arms control lists based upon the 22 categories in the munitions list of the Wassenaar Arrangement, which is regularly reviewed and updated by technical experts from the 41 participating States in the Arrangement and used by almost 60 exporting States.¹⁴

In order to prevent diversion, national control lists need to be updated regularly because of changes in technologies and products entering the markets, a technical and often complex task. The Wassenaar Arrangement undertakes this task collectively in order to ensure coherence of controls among States.

It is vital that a national control system is established on all activities of the international trade in conventional arms, and that such controls are harmonized between States to highest possible

¹¹ The list and descriptions of major conventional arms are contained in the United Nations Register of Conventional Arms, as Amended—see General Assembly, *Transparency in Armaments*, UN document A/RES/46/36L, December 1991; subsequent iterations of which can be found here: <https://www.un.org/disarmament/convarms/register/>.

¹² For the United Nations agreement on what constitute small arms and light weapons, see the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, UN document A/60/88, 27 June 2005, annex. The agreed United Nations definition of firearms and related items is contained in 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 (“Firearms Protocol”), UN document A/RES/55/255, 8 June 2001.

¹³ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, adopted by the General Assembly as A/CONF.192/15 on 8 December 2005.

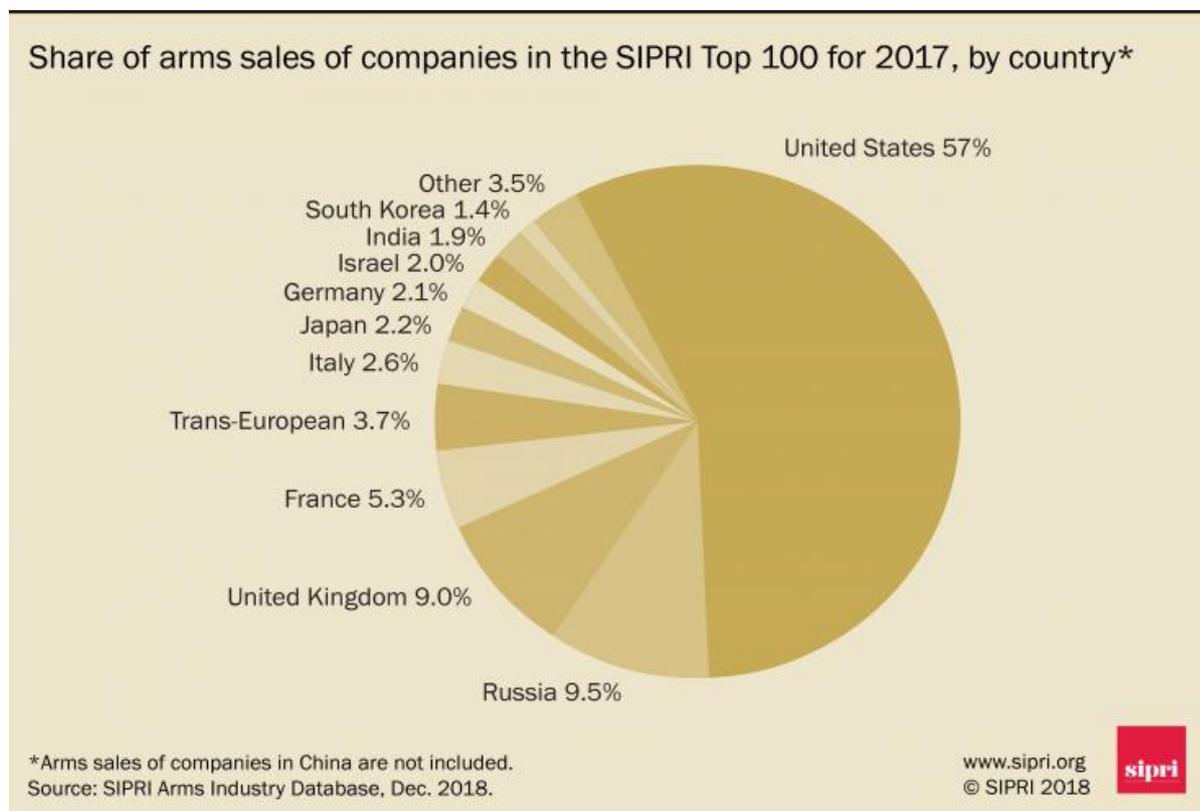
¹⁴ Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, “Wassenaar Arrangement Stand Alone Munitions List”, n.d., <https://www.wassenaar.org/control-lists/>. This Wassenaar Stand Alone Munitions List on conventional arms is closely aligned by the Member States of the European Union to the EU Common Military List, and copied by many other States, including States that are not yet party to the ATT. A useful analysis of these lists is summarized in Paul Holtom, “Article 2. Scope”, in Clare da Silva and Brian Wood (eds.), *Weapons and International Law: The Arms Trade Treaty*, 2015, pp. 191–201.

standards. A mandatory requirement under article 11 of the ATT is that all States Parties take measures to prevent the diversion of transfers of conventional arms that cover all activities of the international trade listed in article 2(2) of the Treaty. These activities are listed in the ATT to include export, import, transit, trans-shipment and brokering, but the definition of each activity is left to each State. There are also other activities essential for the international arms trade and which should be strictly regulated such as transport and storage.

3.3 ARMS MANUFACTURING COMPANIES

The largest traders in the international markets for modern conventional weapon systems, parts, components and technologies are, according to the value of their sales, the industrial corporations with international supply chains, subsidiaries and associates. They trade in tens of thousands of types of such products, a trade that is increasingly globalised and often linked to international defence cooperation projects involving advanced technologies.

Each year since 1989, and more comprehensively since 2002, the Stockholm International Peace Research Institute (SIPRI) has collected data worldwide on large arms producing and military services companies. The most recent available SIPRI data ranking the world’s top 100 companies in 2017, shows that 42 such companies were based in the United States (which included 5 out of the top 10), 24 were based in Western Europe (two of which were trans-European, and with 7 more based in the UK, 6 more in France, 4 more in Germany and 2 more in Italy), 10 were based in Russia (with 1 in the top 10), 5 in Japan, 4 in India, 4 in the Republic of Korea, 3 in Israel, and 2 in Turkey.¹⁵ The arms sales of such companies as a proportion of their total sales varies considerably from 100% to just 3%, but even a very low percentage represents a high absolute arms sales value.



¹⁵ Stockholm International Peace Research Institute (SIPRI), Arms Industry Database, a data set for 2002-17; ‘Arms sales’ are defined by SIPRI as sales of military goods and services to military customers, including sales for domestic procurement and sales for export. Changes are calculated in real terms and country comparisons are only for the same companies over different years. <https://www.sipri.org/databases/armsindustry>

Several Chinese companies were also large enough to rank in the top 100, but SIPRI excluded them because the data was not believed to be not sufficiently accurate and comparable. In some countries such as Russia, Germany, the UK and emerging producers Brazil, India, Republic of Korea and Turkey, sales of arms industrial companies grew faster in 2016 and 2017.¹⁶

The landscape of defence procurement and businesses involved in the conventional arms trade is in constant transformation.¹⁷ In addition, the arms manufacturing industry includes holding and investment companies, and hundreds of smaller companies which are either producing parts and components for the top industrial corporations, or make and supply their own finished weapons and munitions. For instance, in the EU, although the defence industry is dominated by a group of leading companies, there is also a larger group of about 1350 Small-Medium Enterprises (SMEs). According to the European Commission, in 2014 these companies employed approximately 500,000 people and were dispersed throughout the EU but concentrated mostly in France, Germany, Italy, Spain, Sweden and United Kingdom.¹⁸

Economic sustainability of parts of the defence industry is often tied to exports, increasing pressures on governments to sometimes accumulate excessive quantities of arms. Some regions of the world are more dependent on supplies from imports or foreign licenced production or assembly arrangements, especially where the domestic arms industry is much smaller than in Europe, North America and parts of east and south Asia. In Africa, for instance, the only current sizable producer and exporter of weapon systems is South Africa, Companies in other African countries only produce and refurbish armoured vehicles and/or SALW (e.g. Algeria, Egypt, Nigeria, Sudan, and Zimbabwe) while others only make ammunition for SALW (amongst whom are Kenya, Tanzania, Uganda, and Zimbabwe).¹⁹ Craft production of rudimentary firearms in small workshops that supply private individuals for hunting and personal protection has also been prevalent in some countries, especially in West Africa.

Arms producing companies must be registered or authorized to operate by the State. In addition, the companies' exports require prior authorization from the national authorities. However, official monitoring and enforcement of those laws and regulations, which are usually addressed to multiple activities, is not always carried out robustly, especially in States lacking resources and accountability.

3.4 OTHER ARMS TRADING COMPANIES

In addition, to prevent diversion, the national descriptions and regulation of international arms trading activities need also to cover a range of other actors that *facilitate* arms production and exports. Such actors include public and private entities that engage in imports, re-exports, transits, trans-shipments, temporary importation and brokering, as well as services relating to the physical

¹⁶ SIPRI Press Release, 'Global arms industry: US companies dominate the Top 100; Russian arms industry moves to second place', 10 December 2018, and SIPRI Press Release 'Global arms industry: First rise in arms sales since 2010', 11 December 2017. See <https://www.sipri.org/research/armament-and-disarmament/arms-transfers-and-military-spending/arms-production>

¹⁷ See for example, Elli Kytömäki, *The Defence Industry, Investors and the Arms Trade Treaty*, Chatham House, December 2014

¹⁸ European Commission, 'Defence Industries', *Website of DG Growth*, http://ec.europa.eu/growth/sectors/defence_en; accessed on 30 May 2018.

¹⁹ Data from multiple sources on arms and ammunition factories in Africa was published in an inter-active on-line map in August 2018 by the International Peace Information Service and Omega Research Foundation; see <http://ipisresearch.be/mapping/webmapping/factories/index.html>

movement and safekeeping of arms, such as warehousing, transport, and shipping. In addition, there are services relating to trade promotion, financial, insurance and contractual arrangements for the transfer of arms and related items. Transfers of title can take the form of gifts, transactions covering sales, loans, leases, and commissions (sometimes called ‘facilitation payments’). Most of these activities take place on a commercial basis and include a myriad of businesses of different sizes that change their configuration over time. For example, in South Africa, the national industry council reported in 2017 that employment had dropped from about 130,000 employees in 3,000 companies in 1990 to about 15,000 employees in 120 companies in 2017.²⁰

Definitions of such activities in national legislation on arms trading will determine which businesses require official registration and which of their arms-related trading activities must receive prior authorization to be deemed lawful. Some activities will usually be criminalized in national criminal codes. To prevent, detect and eradicate the unlawful diversion of arms, it is essential that States should adopt broad definitions that cover all relevant activities and should require traders to record and submit vital information to the authorities about their activities. It is also essential that national authorities know the beneficial owners and controlling interests of companies involved in the arms trade. Tens of thousands of companies are registered worldwide in jurisdictions with nominee directors under reporting procedures that hide the beneficiaries and trade of the company, making it an ideal vehicle for arms and other forms of illicit trafficking.²¹

An opaque commercial activity used in international arms trading is that of brokering. The 2007 report of the United Nations Group of Governmental Experts on illicit brokering of SALW described a broker as a “person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction ... in return for some form of benefit, whether financial or otherwise”.²² It is important to note the term “potential transaction” because an illegal act of arms brokering under this definition can take place long before the actual shipment of the arms. According to the Group, the types of ‘intermediary activities’ involving SALW that an arms broker might undertake are to (a) serve as a finder of business opportunities to one or more parties; (b) put relevant parties in contact; (c) assist parties in proposing, arranging or facilitating agreements or possible contracts between them; (d) assist parties in obtaining the necessary documentation; and (e) assist parties in arranging the necessary payments.²³ However, evidence suggests that arms brokers also often act as arms dealers, merchants or traders in an intermediary role by buying weapons or munitions themselves in order to sell them for a profit. Sometimes they may also act as commercial agents that represent certain buyers and sellers in an on-going relationship. In addition, to ensure the delivery of consignments, arms brokers often work in networks with arms suppliers, transport, warehousing and logistics agents, financiers, insurers and relevant State officials.

In addition, the Group discussed those “activities closely associated with brokering in small arms and light weapons that do not necessarily in themselves constitute brokering” but which “might be undertaken by brokers as part of the process of putting a deal together to gain a benefit”.

²⁰ South African National Defence Industry Council, Defence Industry Strategy Draft, 2017: p. 7

²¹ See for example World Bank, ‘The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It’, 2011; and Mike Findley, Daniel Nielson, and Jason Sharman, ‘Global Shell Games, Testing Money Launderers’ and Terrorist Financiers’ Access to Shell Companies’, Cambridge Studies in International Relations, January 2014.

²² General Assembly, *Report of the Group of Governmental Experts Established Pursuant to General Assembly Resolution 60/81 to Consider Further Steps to Enhance International Cooperation in Preventing, Combating and Eradicating Illicit Brokering in Small Arms and Light Weapons*, UN document A/62/163, 27 July 2007, para. 8.

²³ *Ibid.* para. 9.

According to the Group, such activities may include, for example, acting as dealer or agent in small arms and light weapons, providing technical assistance, training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other services.”²⁴ The overall extent of these activities is widespread internationally. The Southern African Development Community and Nairobi Protocols, as well as the EU Common Position, define brokering to cover mediation as well as buying and selling.²⁵ In the Economic Community of West African States and Kinshasa Conventions, for example, the definition of ‘broker’ includes “the provision of financial support and transportation”²⁶ and “financial and shipping agents” .²⁷

²⁴ Ibid. para. 10.

²⁵ Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community (SADC) Region, 14 August 2001, art. 1; and The Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, Nairobi, Kenya, 21 April 2004, art. 1.

²⁶ Economic Community of West African States, Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, 14 June 2006, art. 1(8).

²⁷ Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition, Parts and Components that Can Be Used for Their Manufacture, Repair or Assembly, 2010, art 2(l-m).

4 What is Diversion?

Private sector actors involved in the conventional arms trade are obligated to seek official authorization for their activities, and are expected to understand the laws, regulations and procedures applicable to their activities. Government officials, including their legal advisors and their own compliance officers, usually provide guidance. However, given the multiple jurisdictions in which the international arms trade takes place and the variations in national laws, regulations and procedures, private sector operators need advice from various States, and such advice may differ or be highly complex.

None of the international treaties designed to regulate the trade in conventional arms contain a definition of diversion, but rather describe various forms of diversion and so it falls to States to define diversion in their national laws. Two general aspects of the generic definition of diversion are important: “the act of changing the direction or use of something; unauthorized rerouting or appropriation”.²⁸ This particular definition (i.e. the unauthorized physical re-routing and the unauthorized appropriation of an item) has been applied in research on the diversion of prescription narcotics in the United States, for example.

Private sector actors rely on business or commercial definitions. For example, diversion can be defined as follows:

1. Commerce: Practice in which goods intended for a particular market are diverted to be sold in another, usually without the knowledge or permission of the primary vendor.
2. Shipping: (1) Change that redirects an en-route shipment to a consignee or port of destination different from the original. It is an illegal practice where the particular goods are prohibited from diversion. (2) Service offered by a carrier that allows a consignor to divert an en-route shipment from its original consignee or port of destination to another, usually without paying additional freight or fees.²⁹ [emphasis added]

One focus here is on the permission of commercial actors, and another is on illegal practice in shipping.

Small arms researchers have defined diversion in a similar way as “the transfer of controlled items authorized for export to one end-user, but delivered to an unauthorized end-user or used by the authorized end-user in unauthorized ways”.³⁰ However, relying solely on the concept of ‘unauthorized’ to define illegality does not cover situations where a State approves an arms transfer that violates a United Nations arms embargo or sanctions, or another binding obligation such as on terrorism, transnational organized crime, crimes against humanity or war crimes. It was for this reason that in the 1996 Disarmament Commission’s Guidelines for International Arms Transfers, Member States agreed that ‘illicit arms trafficking’ is understood to cover “that international trade in conventional arms which is contrary to the laws of States and/or international law”.³¹

The Disarmament Commission’s Guidelines also introduced the phrase ‘unauthorized diversion’ in the following statement:

²⁸ See <http://www.merriam-webster.com/dictionary/diversion>.

²⁹ See <http://www.businessdictionary.com/definition/diversion.html>.

³⁰ Small Arms Survey, “Deadly Deception: Arms Transfer Diversion”, in *Small Arms Survey 2008: Risk and Resilience*, 2008, p. 114.

³¹ General Assembly, *Guidelines for International Arms Transfers*, UN document A/51/42 (annex I), 1996.

All arms-transfer agreements and arrangements, in particular between Governments, should be designed so as to reduce the possibility of diversion of arms to unauthorized destinations and persons. In this context, a requirement by the exporter for import licences or verifiable end-use/end-user certificates for international arms transfers is an important measure to prevent unauthorized diversion.³² [emphasis added]

Similarly, the US Department of Commerce's Bureau of Industry and Security has defined 'unlawful diversion' as follows: "Unlawful diversion occurs when an item intended for an authorized end-use and end-user is instead directed toward an unauthorized end-user for an unauthorized end-use".³³ The US Government Accountability Office differs slightly, defining diversion as "the transfer or release, directly or indirectly, of a good, service, or technology to an end user or an intermediary that is not an authorized recipient of the good, service, or technology".³⁴

The term 'unlawful diversion' appears to mean that if a potential transfer in the form of an export and import for an approved end user and end use had been authorized by the exporting and importing States, and yet while the arms were being shipped either one or both of those States determined that the end use or end user was no longer legitimate, or that the transactions involved criminal conduct, and consequently the shipment was actually authorized to be redirected elsewhere. An 'authorized diversion' might occur in the context of rerouting the transit or trans-shipment points of an arms transfer.

The ATT does not use the terms 'unlawful diversion' or 'unauthorized diversion', but it describes 'diversion' in its Preamble as follows: "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".³⁵ The inclusion of 'terrorist acts' in this description of diversion also draws attention to the principle that, for internationally prohibited acts, authorization of a transfer by a State is not always the same as conferring the transfer with legality, and therefore that relevant international law is fundamental to the understanding of diversion.³⁶

Taking the above points into account, including the ordinary dictionary definitions, the meaning given by the General Assembly and the provisions of the ATT, the term 'unlawful or unauthorized diversion' could be understood as follows:

1. Diversion is the physical re-routing and/or the appropriation of conventional arms or related items contrary to relevant national and/or international law and leading to a potential change in the effective control or ownership of the arms and items through the

³² Ibid., para. 33.

³³ Bureau of Industry and Security, *BIS "Best Practices" for Industry to Guard Against Unlawful Diversion through Transshipment Trade*, US Department of Commerce, 31 August 2011.

³⁴ United States Government Accountability Office, *Export Controls: Compliance and Enforcement Activities and Congressional Notification Requirements under Country-Based License Exemptions*, document GAO-13-119R, 16 November 2012.

³⁵ The statement on diversion in the ATT preamble was more elaborate than in the preamble in the 2008 General Assembly resolution (A/RES/63/240) on the ATT, which stated, in part: "Determined to prevent the diversion of conventional arms, including small arms and light weapons, from the legal to the illicit market", which left out references to unauthorized end use and end users.

³⁶ While there is no internationally agreed definition of terrorism or a global treaty addressing terrorism generally, there are currently 14 major legal instruments and additional amendments dealing with terrorism. Most include acts constituting offences. For a summary of all conventions and protocols, see <http://www.un.org/en/terrorism/instruments.shtml>.

transfer of the items into the illicit market, or to an unauthorized or unlawful end user or for an unauthorized or unlawful end use.

2. The transaction chain can involve various forms of exchange: grant, credit, lease, barter, and cash, at any time during the life cycle of the items.

4.1 DETECTING AND REPORTING FORMS OF DIVERSION

Since a wide range of actors, including State agencies, corporate entities and private individuals are involved in arms trade activities internationally and some may be involved incidentally or in a systematic manner in illicit arms trading activities, including the supply of arms and related items to actors they may know will use the arms for criminal acts or serious violations of international law, it is crucial that States seek the assistance of such actors in identifying and reporting illicit activities through outreach activities and awareness raising. There are numerous variations in the relevant laws of individual States and their implementation, given that any international transfer involves at least two actors, but usually more, and two or more States, and hence numerous ways in which illicit diversions can occur. Insofar as defence companies and private sector actors usually work in association with each other, they also need to guard against common regulatory failings giving rise to accusations that they may be involved in ‘unlawful or unauthorized diversions’ such as:

- Exporting States issue export or brokering licences without adequate checks or risk assessment on the basis of false or misleading documentation or with inadequate restrictions on transit and end uses or end users.
- Items are lost, stolen or otherwise diverted during trans-shipment or delivery as a result of insecure transportation, circuitous shipping routes or inadequate checks along the route.
- Security at intermediate storage sites along the transfer route is inadequate.
- Import, export, transit or brokering licensing systems are corrupt or vulnerable to forgery.
- Importing States issuing import licences or authorizing imports, without adequate checks or risk assessments of end users, including whether end users have in the past complied with licences and regulations, without assessing the end users’ legitimate needs and failing to ensure that end users have safe and secure storage sites.
- Importing and exporting States and their authorized arms trading companies have inadequate compliance systems to ensure and verify that arms reach their agreed destinations, end users and end uses.
- Authorized end users are complicit in allowing an authorized shipment or its intended ownership or control to be diverted to an unauthorized agency, company or individual.

Diverting arms to an illicit market is itself an illegal act and, if done intentionally and with knowledge of the circumstances, would constitute a criminal act in all or most jurisdictions.³⁷ There may even be circumstances where the transfer that gave rise to the diversion was authorized by a State authority in contravention of the international legal obligations of that State. In this case, the authorization of a transfer may itself be illegal, a circumstance addressed in article 6 of the ATT. However, defining exactly what is the ‘illicit market’ and what are the applicable international obligations of a State relating to an illicit market, may present challenges. There are in fact many markets at the global, regional, national and even local levels for different types of conventional arms and related items. Moreover, at any point in time, overlapping national

³⁷ It is beyond the scope of this paper to examine the laws and criminal codes of all national jurisdictions on this point.

legislation and international laws set out obligations and rules for States, corporate entities and individuals to define what are lawful—and hence what are unlawful—trading activities for specific arms and related items between and within State jurisdictions.

Diverting arms to an ‘unauthorized end user’ could refer to a sale, gift, lease, loan or barter exchange of weapons or munitions to the armed forces, law enforcement agencies or other security forces of a particular State that has not been specifically authorized by a competent national authority of an exporting and importing State, through licencing arrangements and end use undertakings, to possess, carry or use the arms in operations or training, or to retransfer the arms. It could also refer to a natural or legal person (an individual or corporate entity) not authorized by such an authority to possess, carry or use or trade the arms in any way.

Diverting arms for an ‘unauthorized end use’ implies that the supplier knows what the intended recipient will use the arms or related items for, and that the use is unlawful. For example, article 6(3) of the ATT prohibits the authorization of any transfer in certain defined circumstances, in particular when a State Party:

has knowledge at the time of a potential transfer that the arms or related materiel would, if authorized, be used for the commission genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

The Firearms Protocol requires the investigation and prosecution of offences where those offences are transnational in nature and involve an organized criminal group (article 4). These offences include organizing, directing, aiding, abetting, facilitating or counseling the commission of illicit trafficking in firearms and related items when the offence is committed intentionally (article 5).

4.2 INTERNATIONAL INSTRUMENTS ON SMALL ARMS TRANSFERS AND ILLICIT TRADING

Illicit diversion in the conventional arms trade occurs most frequently when the goods being diverted are easy to conceal and to transport. This affects the trade in small arms, light weapons and in parts and components, including for larger weapon systems. Industrial companies and other private sector actors that trade in such products should be subject to stringent regulations based on international standards.

For the purposes of the Firearms Protocol, the terms ‘illicit manufacturing’ and ‘illicit trafficking’ mean the following:

[T]he manufacturing or assembly of firearms, their parts and components or ammunition:

- (i) From parts and components illicitly trafficked;
- (ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or
- (iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol;

Licensing or authorization of the manufacture of parts and components shall be in accordance with domestic law[.]

“Illicit trafficking” shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in

accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol[.]³⁸ [emphasis added]

SALW can themselves be labelled illicit, and that the illegality derives from how the items have been subjected to other illicit activities, which is articulated in the International Tracing Instrument (§ II, para. 6) as follows:

For the purposes of this instrument, small arms and light weapons are “illicit” if:

(a) They are considered illicit under the law of the State within whose territorial jurisdiction the small arm or light weapon is found;

(b) They are transferred in violation of arms embargoes decided by the Security Council in accordance with the Charter of the United Nations;

(c) They are not marked in accordance with the provisions of this instrument;

(d) They are manufactured or assembled without a licence or authorization from the competent authority of the State where the manufacture or assembly takes place; or

(e) They are transferred without a licence or authorization by a competent national authority.

[emphasis added]

4.3 DIVERSION AS A CRIMINAL OFFENCE

A natural or legal person involved in such an unlawful act involving the diversion of conventional arms, ammunition and related items would normally be deemed to be committing an offence. That may invoke criminal liability if the act is intentional or reckless. Alternatively, the offence may require appropriate disciplinary and administrative action, for example if the omission was inadvertent (such as a genuine loss or theft of the arms or the result of intimidation or threat of serious harm to the person accused).

It is important that private sector actors are also aware of international laws the violation of which could result in criminal penalties, or damages. Arms trade activities involving violations of United Nations or other multilateral arms embargoes, and violations of the prohibitions relating to specific types of weapons and munitions, constitute clear-cut aspects of the illicit trade.³⁹ Examples of United Nations arms embargoes are those imposed on Somalia,⁴⁰ the Democratic

³⁸ Article 3, Firearms Protocol, emphasis added. See also United Nations Office on Drugs and Crime *Technical Guide to the Implementation of 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*, April 2011. Among the guidance for when firearms or their parts and components and ammunition have been illicitly trafficked and should be lawfully confiscated is listed the following: “(i) No export licence or authorization for shipments of firearms, their parts and components and ammunition has been issued by the exporting State party or the licence fails to contain the minimum information required under the Protocol; (ii) No import licence or authorization has been issued by the importing State party or the import licence or authorization does not contain the minimum information required under the Protocol; (iii) The State through which the shipment is in transit has not given its authorization to the transit; (iv) The documentation accompanying the shipment is determined not to be valid because it was not validly issued, has expired, the prerequisite conditions in the licence have not been met or the licence does not cover the types or quantities of firearms, parts and components or ammunition involved; (v) The firearms, parts or components are not marked in accordance with article 8 of the Protocol or the markings have been falsified, illicitly obliterated, removed or altered in anyway”.

³⁹ The basis in international law for the imposition of sanctions, including arms embargoes, comes from chapter VII of the Charter of the United Nations, and specifically article 41.

⁴⁰ Security Council Committee pursuant to resolution 751 (1992) concerning Somalia (see below in the case appended to this paper).

Republic of the Congo,⁴¹ the Sudan,⁴² South Sudan,⁴³ the Central African Republic⁴⁴ and many others.⁴⁵ Besides trade restrictions, the Security Council can, under chapter VII of the Charter of the United Nations, also impose aviation restrictions, financial restrictions and travel restrictions on particular entities, and can also establish international tribunals to prosecute persons responsible for international crimes.⁴⁶

Private sector actors need to be aware that it is usually a criminal offence in national law to knowingly trade or attempt to trade or transfer conventional arms and related materiel in violation of a United Nations arms embargo. States must cooperate with investigations by United Nations panels of experts and help to identify nationals or companies that may be involved in violating an arms embargo. National law should also confer the power to seize shipments that are in apparent contravention of an embargo, and make provision for freezing or seizing assets from proceeds of illegal arms deliveries.⁴⁷ Therefore private sector actors must keep track of United Nations arms embargoes and other sanctions measures, and how these apply in the countries where they wish to trade.

Likewise, it is a criminal offence in all States to knowingly aid or assist a terrorist organization. In 2017, Security Council resolution 2370 called on all States to eliminate the supply of weapons—including small arms, military equipment, unmanned aircraft systems and their components, and improvised explosive device components—to those involved in terrorist acts. Industry and private sector actors involved in arms trading therefore need to thoroughly double check the bona fides of who they are trading with, and this is usually done through the official procedures for export and import licences or permits, which involve the verification of end use and user documents.

Unlawful diversion of such weapons may occur when a prohibited weapon is distributed to the market or transferred indirectly to a user. Specific weapon bans have to be precisely defined in technical terms and enforced by trained customs and other law enforcement personnel, which are often in short supply especially in many developing countries. Such treaties include the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (the Mine Ban Treaty, 1997),⁴⁸ the Convention on Cluster Munitions (2008), and the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991).

⁴¹ Security Council Committee established pursuant to resolution 1533 (2004) concerning the Democratic Republic of the Congo (see below in the case appended to this paper).

⁴² Security Council Committee established pursuant to resolution 1591 (2005) concerning the Sudan.

⁴³ Security Council Committee established pursuant to resolution 2206 (2015) concerning South Sudan.

⁴⁴ Security Council Committee established pursuant to resolution 2127 (2013) concerning the Central African Republic.

⁴⁵ For a full list of arms embargoes in force see <https://www.un.org/securitycouncil/sanctions/information>; the list includes Somalia, ISIL (Daesh) and Al-Qaida, Iraq, the Democratic Republic of the Congo, the Sudan, the Democratic People's Republic of Korea, Libya, Taliban, the Central African Republic, Yemen, and South Sudan.

⁴⁶ See for example Security Council resolution S/RES/955 (1994) establishing the International Tribunal on Rwanda and requiring all States to cooperate with the Tribunal.

⁴⁷ Examples of national legislation to enable compliance with United Nations and other sanctions measures are Canada: United Nations Act, <http://laws-lois.justice.gc.ca/eng/acts/u-2/>; Finland: Sanctions Act, No. 659/1967 as amended, <http://www.finlex.fi/en/laki/kaannokset/1967/en19670659.pdf>; and United Kingdom: United Nations Act, <http://www.legislation.gov.uk/ukpga/Geo6/9-10/45>, Export Control Act, <http://www.legislation.gov.uk/ukpga/2002/28/contents>, and European Communities Act 1972, <http://www.legislation.gov.uk/ukpga/1972/68/contents>.

⁴⁸ The following States have not signed the Mine Ban Treaty: China, Egypt, India, Israel, Pakistan, the Russian Federation and the United States, <http://www.the-monitor.org/en-gb/the-issues/mine-ban-treaty.aspx>.

Thus, among other permutations, 'diversion to an illicit market' could involve offering legally owned or controlled arms for illicit buying, selling, leasing or gifting, or for trade involving illicit export, import, transit, trans-shipment or brokering. The illegality of such commercial activity could also stem from the fact that the weapon or munition itself is prohibited, or its manufacture or assembly is somehow unlawful.

5 Corporate Responsibility and Compliance

5.1 GENERAL ETHICAL STANDARDS

Among the possible measures available to mitigate risks of diversion are modern compliance and ethical practices of commercial actors which encourage due diligence, including respect for international standards on ethical issues and international human rights standards as forms of corporate responsibility and risk management. For example, the Universal Declaration of Human Rights (preamble) calls on “every individual and every organ of society” to play its part to secure universal observance of human rights.

In June 2011 the United Nations Guiding Principles on Business and Human Rights (the Ruggie Principles) were unanimously endorsed by the United Nations Human Rights Council and these principles require companies to ensure that they do not cause or contribute to “adverse human rights impacts”, independent of any measures taken by States. This includes impacts that the company may contribute to through business activities like the provision of products or services—such as the sale of munitions and supply of related support services.⁴⁹

One study has found that most banks, insurance companies and investors now follow some form of ethical investment criteria to assess an acquisition target, and this has in particular impacted large defence manufacturing companies, which are under pressure to follow suit. Some financial institutions have made a general decision not to invest in aerospace and defence companies, but the sector continues to be a large and profitable part of international financial markets.⁵⁰ In the past, many large financial actors – including those involved in banking, investment, insurance, mergers, acquisitions, lending, bonds, consulting and equity capital markets activities – have adopted policies regarding financing of industries related to armament and defence. Some of them have decided to introduce guidelines and approval procedures for dealing with sensitive items, such as Crédit Agricole (CA), one of the largest banking groups in Europe,⁵¹ while others, such as HSBC, have stated they will attempt to withdraw progressively from financing the manufacture and sale of weapons altogether.⁵²

5.2 CORPORATE CRIME

Corporate crime is a type of organizational crime committed by employees of business entities or corporations acting for the entity in their legitimate occupations, or by individuals acting on behalf of the entity as contractors for the benefit of their employing organization. Such individuals generally do not think of themselves as criminals, nor do they consider their activities criminal. Any corporation can be made liable for act of its agent or servant if s/he: commits a crime; acts within the scope of employment; and with the intent to benefit the corporation. Corporate

⁴⁹ United Nations Human Rights Council, *Guiding Principles on Business and Human Rights*, June 2011, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁵⁰ Elli Kytömäki, ‘The Defence Industry, Investors and the Arms Trade Treaty’, Chatham House, December 2014, pp. 15-16

⁵¹ Ibid, p.16, which cites the policies of Crédit Agricole (CA) from <http://www.credit-agricole.com/en/Group/Credit-Agricole-a-leader-in-Europe>.

⁵² Hong Kong and Shanghai Banking Corporation (HSBC). Defence Equipment Sector Policy. HSBC Online. February 2010, cited by Elli Kytömäki, *ibid*, p.15

criminal liability is based on the common law doctrine of respondent superior, which is commonly known as the theory of vicarious liability. However, some jurisdictions do not recognize corporate criminal liability, and only address administrative violations under the civil law separately from individual criminal liability. In the arms trade the goods being traded are weapons and therefore serious crime in this sector can have the most deadly of consequences.

Serious crimes and malpractices may be committed in the course of arms trading, some of which are codified in international treaties, and organized criminals may try to retain control over criminally derived assets while frustrating the ability of law enforcement to trace the origin and ownership of the assets. Companies can develop rigorous internal compliance programmes to prevent such crime, and work with the national authorities to report breaches of the law. States also have obligations to criminalize such acts, and to apply them when regulating the arms trade.

The provisions of the United Nations Convention against Transnational Organized Crime (the Organized Crime Convention),⁵³ apply to export risk assessments under article 7 of the ATT and hence must be taken into account by the exporting State. In practice, the exporting State should seek the appropriate information from the importing State, as well as from the transit, trans-shipment and brokering States where those activities are involved in the export. Under article 7(1)(b)(iv) of the ATT an exporting State Party is required to assess the potential that the conventional arms or items “could be used to 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”. In addition, under article 6(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.” Such international agreements include, but are not confined to, the Organized Crime Convention, the Firearms Protocol to that Convention, and the United Nations Convention against Corruption,⁵⁴ so have a wide effect on national criminal codes. The number of States that were party to the Organized Crime Convention in July 2018 was 189⁵⁵; the number of States that were party to the Firearms Protocol in March 2019 was 117⁵⁶; and the number of States party to the Convention Against Corruption was 186 in June 2018.⁵⁷

State Parties to both the Convention and the Firearms Protocol must establish the following as criminal offences in their national law: participation in an organized criminal group, laundering of the proceeds of crime, corruption, obstruction of justice, trafficking of persons, and smuggling of migrants. Certain serious violations should be classified as major crimes and could include violations of embargoes and acts that clearly support terrorist activities—transactions that are clearly ineligible for proper authorization of export, import, transit, trans-shipment and brokering.

The Firearms Protocol requires the investigation and prosecution of offences where those offences are transnational in nature and involve an organized criminal group (article 4). These

⁵³ United Nations Convention Against Transnational Organized Crime, adopted by resolution 55/25 of the General Assembly on 15 November 2000 at: <https://www.unodc.org/unodc/en/organized-crime/intro.html>

⁵⁴ United Nations Convention Against Corruption, adopted by resolution 58/4 of the General Assembly on 31 October 2003 at: <https://www.unodc.org/unodc/en/corruption/uncac.html>

⁵⁵ Number of ratifications given by the United Nations Office on Drugs and Crime in April 2019 at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>

⁵⁶ Number of ratifications given by the United Nations Office on Drugs and Crime in April 2019 at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>

⁵⁷ Number of ratifications United Nations Office on Drugs and Crime in April 2019 at: <https://www.unodc.org/unodc/en/corruption/uncac.html>

offences include organizing, directing, aiding, abetting, facilitating or counseling the commission of illicit trafficking in firearms and related items when the offence is committed intentionally (article 5). Ratification of the Protocol also enables applying the Convention provisions on international cooperation such as extradition.

The Organized Crime Convention requires State Parties to act pursuant to article 12 (confiscation and seizure), article 13 (international cooperation for purposes of confiscation), and article 14 (disposal of confiscated proceeds of crime or property) of the Convention. For example, if the firearms or related items are suspected to be proceeds of crime or have been used in, or will be used in, the commission of offences covered by the Convention, the firearms or ammunition also become subject to articles 12 and 13 of the Convention.

Specific characteristics of the arms trade make it particularly vulnerable to corruption. A veil of secrecy, invoked ostensibly in the interests of national security, shrouds the activities of the defence sector. The widespread use of middlemen, whose identities and activities are kept secret, further limits oversight. Corruption can encourage the excessive accumulation of arms, increase the circumvention of arms controls and facilitate the diversion of arms consignments to unauthorized recipients. Article 15(6) of the ATT states that “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”. Diversion of conventional arms through the transaction chain can be driven by or result from the authorization and arrangement of transfers using corrupt practices. In general, corruption is a form of dishonest or fraudulent conduct, typically involving bribery and often to acquire illicit benefit, undertaken by a person or organization entrusted with a position of authority. A bribe could be a facilitation payment or can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, favours, etc.). Forms of corruption vary in practice and scale, as well as in different legal traditions, and can also include extortion, cronyism, nepotism, patronage, influence peddling, collusion, graft, and embezzlement.

The International Financial Institutions Task Force guidelines applicable to international financial aid defined corrupt practices as “Offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party” and defined fraud as: “A fraudulent practice is any act or omission, including a misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation.”⁵⁸ For Transparency International, corruption is:

the abuse of entrusted power for private gain. It can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs Political corruption is a manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.⁵⁹

Active and passive corruption in the private sector is a criminal offence in many States. Multilateral institutions such as the United Nations, the Organization for Economic Cooperation

⁵⁸ International Financial Institutions (IFI) Anti-Corruption Task Force, ‘Uniform Framework for Preventing and Combatting Fraud and Corruption’, September 2006, p. 1. The IFI Task Force was composed of the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank Group, the International Monetary Fund, the Inter-American Development Bank Group and the World Bank Group

⁵⁹ Transparency International, “Anti-Corruption Glossary” accessed in April 2019 at: [available at: https://www.transparency.org/glossary](https://www.transparency.org/glossary).

and Development, the European Union, and the International Organization for Standardization have all played a role in the development of anti-corruption norms.⁶⁰

5.3 INTERNAL COMPLIANCE AND REPORTING SYSTEMS

Internal compliance programmes for companies and research centres specifically for entities involved in the development and export of military equipment and dual use technologies have been promoted in sets of voluntary guidelines by inter-governmental organisations such as the EU⁶¹ and by the Wassenaar Arrangement.⁶² Internal Compliance Programs (ICPs) promote awareness raising and the fulfilment of export control requirements by exporters, for example in the supply chain, systems integrators, distributors and research centres. They can also enhance communication and cooperation between the state licensing, customs and other law enforcement authorities and the exporting companies or entities. ICPs provide the organisation exporting sensitive items and technologies with a structured approach, and support a culture of doing business in ways that ensure delivery of items to legitimate end-users thus minimizing the risk of diversion. ICPs require an exporter to introduce clear policies and procedures that will be easily understood by staff. Each exporter has to tailor its ICP to its own characteristics (e.g. size, nature of items exported, national, regional or global footprint).⁶³

Anti-corruption measures for defence companies could include the following:⁶⁴

- Make a clear anti-bribery and corruption commitment with a zero-tolerance approach by the board of the company;
- Hold regular reviews by the board of corruption risks to the company;
- Provide tailored training for all employees of the company working in high-risk positions;
- Establish a policy and procedure to protect whistle-blowers;
- Maintain a register of all conflict of interest declarations pertaining to employees and board members;
- Declare payments made for advisory services and publish names of lobbyists;
- Fully disclose charitable and political donations by the company;
- Disclose details of meetings with government as far as possible when requested;
- Conduct enhanced due diligence on all third-party contractors, including offset beneficiaries, brokers, agents and consultants, and publish their names and nature of service;

⁶⁰ See United Nations Convention Against Corruption, op cit, and United Nations Convention Against Transnational Organized Crime, op cit; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>. Five European Union laws address corruption; see <https://guides.ll.georgetown.edu/c.php?g=363494&p=2455879>.

⁶¹ European Commission, 'Strengthening Strategic Export Controls by Internal Compliance Programmes'. Second Revision, 2014. <http://publications.jrc.ec.europa.eu/repository/bitstream/JRC92964/sevini%20-%20online.pdf>

⁶² Wassenaar Arrangement, Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies, agreed at the 2011 Plenary

⁶³ Examples of defence company compliance systems are: Rheinmetall (Germany) https://www.rheinmetall.com/en/rheinmetall_ag/group/corporate_compliance/compliance_management_system_1/index.php; Leonardo (ex Finmeccanica) (Italy), <https://www.leonardocompany.com/en/chi-siamo-about-us/etica-compliance/controlli-sulle-esportazioni-e-paesi-sensibili>; Embraer (Brazil), <http://compliance.embraer.com.br/en/SitePages/Home.aspx>; Boeing, <https://www.boeing.com/principles/ethics-and-compliance.page>

⁶⁴ This list is adapted from Katherine Dixon, Charlotte Linney, Mia Paukovic, Andrew Watson, *Out of the Shadows: Promoting Openness and Accountability in the Global Defence Industry*, Transparency International UK Transparency International UK, 2018, p. 2.

- Disclose the company's beneficial ownership, its holdings, its board members and a financial breakdown of defence sales by customer;
- If a State-owned enterprise, follow a transparent process in nominating and appointing board members, and ensure that its audit committee is composed of independent directors; and
- Ensure that asset transactions are conducted according to market value.

5.4 MARKING AND RECORD-KEEPING

Arms manufacturing companies should be required under national regulations to place unique markings on all military items and use those unique markings in their records of sales. This is mandatory for State Parties under the Firearms Convention whereby article 7 requires State Parties to maintain records of the markings of each firearm, and 'where feasible' information on firearms parts, components and ammunition for the purpose of preventing and detecting illegal manufacturing and trafficking. Article 7 stipulates that each firearm must be given a unique marking at the time of manufacture permitting ready identification by all States of the country of manufacture (preferably providing the name of the manufacturer, the country of manufacture and the serial number), and that each imported firearm (excluding temporary imports) must also have an appropriate marking.

Under the International Tracing Instrument national regulations should require comprehensive record-keeping on the manufacture, export and import of marked SALW to facilitate tracing for law enforcement purposes. State agencies and commercial actors authorized to engage in the trade of conventional arms and related items are required under the Instrument (part IV) to maintain accurate and comprehensive documentary records on manufacture for at least 30 years, and on import and export for at least 20 years—and if possible keep the records indefinitely. States agreed in the Instrument that records pertaining to SALW held by companies that go out of business must be forwarded to the State, in accordance with national legislation.⁶⁵

According to the Instrument the systematic marking with unique serial numbers and symbols or letters, which identify the manufacturer, is required for all government-held stocks of SALW, and for any such items if and when they are authorized for transfer to civilians, and wherever possible for all such items imported.

Such records and markings should enable the authorities to trace points of diversion from the legally authorized physical movement of the arms and the legally authorized chain of custody. Records could, for example, include:⁶⁶

- Manufacturers' records compiled by each factory and assembly plant, to record each weapon, its date of manufacture, and to whom it was transferred;
- Quality control records, preferably compiled by an independent organization responsible for manufacturing standards;
- All export documentation that specifies the recipient of the transferred weapon, including export authorization and end-user certification;

⁶⁵ *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, adopted by the UN General Assembly as doc A/CONF.192/15.on 8 December 2005., part IV, para. 13.

⁶⁶ This list of records is adapted from Small Arms Survey, "Revealing Provenance: Weapons Tracing During and After Conflict", 2009, <http://www.poa-iss.org/mge/Documents/Topics/Small-Arms-Survey-2009-Chapter-03-0-EN.pdf>.

- Packing lists that detail the weapons contained in boxes, crates, and other shipping containers;
- Shipping documents, such as bills of lading, with which transport agents (air, land, and sea) acknowledge receipt of goods;
- Import documentation, such as import licences and any registries of import-marked weapons;
- Transit documentation, which details the origins and destinations of weapons shipped on or through the territory of a State;
- Proof house records, which certify a weapon as safe or reliable, usually upon import, but also if a weapon has been deactivated; and
- Inventories of the military, police and other security forces recording weapons held in stock, issued to particular units, and destroyed or demilitarized.

Industrial entities are essential implementers of these standards. Most ammunition and munitions are marked at the point of manufacture when not carried out directly by military and law enforcement agencies. The regulations for military and law enforcement agencies differ from those for civilian materiel.⁶⁷ Marks on military cartridges and their packaging are supposed to conform to detailed standards on quantity, type, manufacture, design and configuration intended for stockpile management, transportation, record-keeping, and identification for operational needs.⁶⁸ Producers of ammunition for civilian markets tend to use marks for identification (type and calibre) and for quality assurance.⁶⁹

⁶⁷ See Giacomo Persi Paoli, "Ammunition Marking: Current Practices and Future Possibilities", Small Arms Survey, Issue Brief no. 3, 2011.

⁶⁸ See for example North Atlantic Treaty Organization (NATO) Allied Ordnance Publication (AOP) -2(c), December 2008. Unclassified. This document addresses the identification of ammunition.
<https://www.scribd.com/doc/47273625/34065603-NATO-AOP-2-C-The-Identification-of-Ammunition-2008>

⁶⁹ For example, the Permanent International Commission for Firearms Testing, *'Marking Firearms'* and *Council Directive 91/477/EEC*, 18 June 1991, which provides legally binding regulations; see also Organization for Security and Cooperation in Europe, *Best Practice Guide on Ammunition Marking, Registration and Record-Keeping*, 2007, and in the Americas, *Draft Proposed Model Legislation on the Marking and Tracing of Firearms and Ammunition* for the effective application of the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (CIFTA), Article 4 – Marking of Ammunition; Technical Secretariat of Group of Experts. 2006.

6 Pre-Transfer Risk Assessments and Licensing Systems

The most important issues during the pre-transfer stage are related to the overall licensing process, risk-assessment procedures, commercial ethics policies and definition of end use or end user. Industry and other private sector actors that engage in making international transfers of conventional arms, or ammunition/munitions, or their parts and components must first apply for and receive authorization to make such transfers from the exporting State's national authorities. Before an ATT State Party agrees to authorize a transfer of conventional arms or related materiel the national authorities must be certain that:

- Other States involved in the potential transfer, whether or not they are a State Party to the ATT, as well as anyone involved as a trader, broker, transporter, recipient or end user of the items, is not a prohibited entity (e.g. falling under a United Nations arms embargo or sanctions measure), as required by ATT article 6(1).
- The weapon or ammunition/munitions, or its transfer, would not involve a breach of the relevant obligations under international agreements to which any of the State potentially involved are party, relating to unlawful acquisition or unlawful use (e.g. the transfer of an unmarked firearm or cluster munitions or anti-personnel mines, or transfer to an end user involved in an armed action that is expressly prohibited by the Charter of the United Nations or a relevant treaty such as prohibitions on terrorism and transnational organized crime), as required by article 6(2).
- The government ministries, departments and agencies dealing with the potential transfer have no knowledge and are not aware of any reason why the proposed end user of the arms would use the arms or related materiel 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 the State is party, as required by article 6(3).

6.1 RISK ASSESSMENT BY NATIONAL AUTHORITIES AND COMPANIES

Before an actual transaction can be initiated, licensing authorities and private security actors, such as companies interested in exporting military goods, often have to engage in various types of information exchange and coordination. The weight given to the risk factors and measures individually or in combination in assessing the overall risk of a potential transfer may vary according to the size, sophistication, nature and scope of the items and services to be supplied, and who would provide and receive them. Nevertheless, the factors should be considered holistically and not in isolation.

The predictability and reliability of the importing State and the end user to prevent the diversion and misuse of the arms or other items should form another starting point for diversion risk analysis. A judgement has to be made by ATT States Parties on whether the end user would behave in a manner inconsistent with ATT articles 6, 7 and 11. Basic questions that might be asked to prevent diversion when considering the authorization of an import are:

- Is the equipment intended for the government or an individual company?
- Where known or required at the licensing stage, does the routing raise concerns?

- Where known or required at the licensing stage, does the commercial setup raise concerns (possible involvement of agents, brokers, distributors or other actors)?
- Has any actor involved in the commercial setup or routing of the transaction been formerly convicted for illicit arms trafficking or violations of arms export legislation?

If the potential importer is a government, it is important to establish exactly for which branch of the armed forces, police or other security forces is the use of the export intended. For example, in a recipient country the army and police might be involved in an armed conflict in which the navy has no role. In this respect, the risk of internal diversion should also be considered.⁷⁰ Key questions include:

- Is the government/specific government branch a an end user that poses a high risk of violating relevant international standards?
- Has the government/branch honoured previous end-user certificates or other provisions regarding the authorization of re-export?
- Is there any reason to suspect that the government/ branch does not have the capacity to be a reliable end user?

More complex cases arise when equipment may be going to or from a private sector company or research institute. In this case a judgement should be made on the likelihood of diversion from that entity or by the actions of an individual. Identifying those individuals and businesses that match a profile that indicates the possibility of illegal activity requires profiling using relevant information systems, probing questions, investigations and vigilance. Past involvement of a broker in illicit trafficking is also an important element to take into account for risk assessment. So too is the potential participation other actors linked to the broker who may be involved in a brokered transaction. Such actors may include dealers, consultants and subcontractors of brokers, freight forwarders (air, sea, rail, road, barge), financiers, and insurance companies.

For the supply chain or transfer chain to function legally, a series of documents is required that precedes and accompanies the shipments.⁷¹ Most of this documentation is hidden from public scrutiny. These documents are intended to address national and international general provisions, regulations, and voluntary agreements, and may be important for the authorization and verification of international arms transfers to a government or private end user. The types of documents include:

- Documents related to the transaction such as commercial invoices, enquiry/request for quote/offer, invitation, offer/quotation, pro-forma invoice, dispatch advice;
- Documents related to payments, such as documentary credit application and types of documentary credit;
- Documents related to forwarding and cargo-handling, such as standard consignment instructions, International Federation of Freight Forwarders Associations (FIATA) forwarding instructions, forwarder's certificate of receipt, FIATA warehouse receipt;
- Documents directly related to transport, such as Government Bill of Lading, Standard Bill of Lading (International Chamber of Shipping), international rail consignment note, international road consignment note, Universal Air Waybill, negotiable FIATA multimodal

⁷⁰ The questions set out here are adapted from Wassenaar Arrangement, *Elements for Objective Analysis and Advice Concerning Potentially Destabilizing Accumulations of Conventional Weapons*, parts 1–3; see also the European Union, *Users Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*. Brussels, 2015: – see for example Section 3

⁷¹ These points are from Brian Wood and Peter Danssaert, *Study on the Development of A Framework for Improving End-Use and End-User Control Systems*. New York: United Nations Office for Disarmament Affairs, 2011, pp. 55-57.

- transport Bill of Lading, non-negotiable FIATA multimodal transport Way Bill, FIATA forwarder's certificate of transport, FIATA shipper's inter-modal weight certificate; and
- Documents related to the official controls sector, such as dangerous goods declaration, goods declaration for export (Kyoto Convention), goods declaration for transit (Kyoto Convention), or Single Administrative Document.

6.2 LICENSING, REGISTRATION AND END USE/USER VERIFICATION

Industry and private sector actors are required to provide accurate and relevant information to national authorities about the equipment and its intended end use/r when applying for registration and licenses to conduct trade in conventional arms and related items. National regulations vary across countries, but international standards have been agreed to bring greater coherence to the system in the interests of international and security.

Each State Party to the ATT, for instance, is required under article 7(5) and (6) to take measures to ensure that all authorizations for the export of conventional arms or ammunition/munitions or parts and components covered by the Treaty "are detailed and issued prior to the export", and that subject to its national laws, practices or policies, an exporting State Party must "make appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties". Also, under article 8, the importing State Party must take measures that will allow it to regulate, where necessary, the import of arms under its jurisdiction, not least because the ATT recognizes, in its preamble, the "sovereign right of any State to regulate and control conventional arms exclusively within its territory, pursuant to its own legal or constitutional system".

National assessments of exports, and therefore of imports, transits, trans-shipments and brokering should follow the principle that cases where there is a higher potential risk should be subject to a greater degree of scrutiny than cases with less risk. Evaluation of individual import and export licence applications should be done on a case-by-case basis and include an over-all risk analysis, based on the potential risk level associated with the end user and in the recipient State, the reliability of all those actors involved in the transactions, the nature of the arms and/or items to be transferred, and the intended end use.⁷²

Using the same risk principle, some States use a system of 'open' or 'general' export licences. These licences are often valid for multiple years and allow the unlimited export of specified categories of equipment to particular destinations (for example, to allied States under a general international agreement), thereby cutting down on administrative work. Some national authorities have addressed these problems by requiring that exporting and importing companies, and ministries and their agents, adopt strict internal compliance regimes, and report to a single official entity when an export or import has actually taken place.

Effective systems of end-user control can contribute to the prevention of unlawful diversions and high risk re-exports of conventional arms, as well as ammunition/munitions and parts and components, as recognized in article 8(1) of the ATT regarding import measures:

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

⁷² This is the approach taken in the European Union, *Users Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*, 2015; see for example § 7, "How to apply Criterion Seven".

exporting State Party in conducting its national export assessment under Article 7. Such measures may include end use or end user documentation. [emphasis added]

It is generally agreed among States that end-user certificates or equivalent documents and their authentication at the licensing stage can play a central role in preventing diversion. Nevertheless, using end-user agreements cannot substitute for a complete risk assessment of the particular case.⁷³ End-use documents are intended primarily to enable the authorities in the exporting and importing States to easily identify the authorized end user and end use of the arms and related items. The end user can be either a State agency, a commercial entity or an individual. Unlike other documents such as export and import licenses, bills of lading, etc., end-use certificates are not considered a legal necessity for the purposes of customs declaration and clearance. However, if diversion is suspected, police and customs officials will be able to refer to the end-use certificate or document, along with other documents, when considering criminal intent.

Thus, it is important that both end-use/r documents as well as the export and import authorizations contain detailed information. From a study of a fairly large sample data of end-use/r certificates/documents, the following are elements that are most frequently required by major exporting States, bearing in mind that there are some slight variations in formulations: (i) date of issuance of the end-use/r certificate; (ii) contract number; (iii) details of the exporter (name, address); (iv) details of the end user (name, address); (v) details of the foreign consignee (name, address); (vi) country of final destination; (vii) description of the goods; (viii) quantity; (ix) value; (x) stated end use of the goods; (xi) non-re-export clause; (xii) full name of person authorized to sign end-use/r certificate and signature of said person; and (xiii) seal of company or government. The elements that were found to be less frequently demanded by exporting States include: (i) end-use/r certificate number; (ii) contract date; (iii) import licence number; (iv) export application number; (v) expiry date of end-use/r certificate; (vi) place of final destination; (vii) details of intermediaries; (viii) delivery verification; (ix) post-shipment inspection; (x) follow-up check on the use of goods; and (xi) expected delivery date.⁷⁴ In addition, various forms of end-use/r control can be included in the export authorization linked to the import authorization to prevent diversion through unauthorized re-exports

The EU recommends that at the licensing stage attention should be given not only to the consignee and the final end user (who may not be the same), but also to the intermediaries likely to be involved in the transfer—brokers, subcontractors of brokers, freight forwarders (air, sea, rail, road, barge), financiers, insurance companies and others. Article 10 of the ATT requires States Parties to “take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms” covered by the Treaty and recommends that “such measures may include requiring brokers to register or obtain written authorization before engaging in brokering”. In practice, most significant exporting States, which participate in the Wassenaar Arrangement, have agreed that effective legislation should establish “a licensing system or other control mechanism by the competent authorities of the Participating State where these activities take place whether the broker is a citizen, resident or otherwise subject to the jurisdiction of the Participating State” and in addition, “a licence may also be required regardless

⁷³ Ibid., chp. 2, § 1; see also Wassenaar Arrangement, *End User Assurances Commonly Used: Consolidated Indicative List*, agreed originally in 1999 and amended at the 2005 Plenary.

⁷⁴ Brian Wood and Peter Danssaert, *Study on the Development of a Framework for Improving End-Use and End-User Control Systems*, United Nations Office for Disarmament Affairs, 2011, pp. 34–35.

of where the brokering activities take place.”⁷⁵ The legislation should cover all conventional arms and related military equipment, as well as, if possible, dual-use goods and technologies.

⁷⁵ Wassenaar Arrangement Best Practices for Effective Legislation on Arms Brokering, agreed in 2003 and updated at the 2016 Plenary. p.2, para 1(a) and (b). This update followed General Assembly resolution 63/67 of 2 December 2008, which recognized the need for Member States to prevent and combat illicit arms brokering activities.

7 Shipping and Transit Issues

7.1 PRE-SHIPMENT INSPECTIONS

An assessment by the exporting State, drawing upon information provided by other relevant States and by industry and private sector actors, of the risk of diversion during the actual physical transfer of conventional arms, their ammunition/munitions and parts and components is essential. This should take into account the possible itinerary, modalities and transit points of the intended consignment. The exporting company should also inform the relevant authorities of the exporting State, the importing State and, if relevant, the transit State when the consignment has been dispatched. In certain higher risk circumstances, States may require that transfers of arms take place under the supervision and escort of security forces assigned by the relevant national authorities.

International standards for customs administrations do encourage the pre-shipment inspection of higher risk cargoes.⁷⁶ A crucial task is that before a commercial shipment is loaded or leaves port, the standard cargo manifest should be checked by customs, as a norm, against the relevant export licence and initial end-use/r certificate to which it refers, reporting to the relevant national licensing authorities.

The World Customs Organization proposes that customs administrations develop the ability to inspect and screen cargo and transport conveyances before they leave and arrive: “Using automated targeting tools, Customs administrations [should] identify shipments that are high-risk as early as possible in the supply chain, at or before the port of departure. Provision should be made for the automated exchange of information. Systems should therefore be based on harmonized messages and be interoperable”.⁷⁷

Basic questions to pose before the shipment of a consignment might include:

- Are the freight forwarder, shipping broker and carrier firm officially registered?
- Are any of those firms a ‘shell’, ‘brass plate’ or ‘front’ company disguising its beneficiary owners?
- Does the carrier firm (e.g. air charter company, maritime shipper, trucker) have any past record of involvement in unauthorized deliveries?
- Is the proposed routing unusual, circuitous, involve suspicious ports, or involve transits or trans-shipments through multiple countries or companies?
- Are freight forwarders designated as foreign consignees or end users?
- Are foreign intermediate consignees involved, whether as trading companies, freight forwarders or export companies, with no apparent connection to the end user?

⁷⁶ For example the World Customs Organization SAFE Framework of Standards to Secure and Facilitate Global Trade, June 2012.

⁷⁷ Ibid., p. 7.

7.2 FREIGHT FORWARDERS AND SHIPPERS

The Security Council and the OSCE⁷⁸ have identified air and maritime transport as two of the main channels for the illicit spread of SALW and related equipment, particularly to destinations or entities subject to United Nations arms embargoes. Some transport companies or agents and their associated intermediaries employ a range of techniques and strategies to avoid official scrutiny and legal regulations such as falsifying transport documentation, concealing information on the origin of weapons, including cases when they are produced illegally, or when the origin is not known or questionable, concealing actual flight plans, routes, and destinations, as well as falsification of aircraft registration or quick change of registration numbers

The control of such shipments across land, sea, waterways and sea borders is essential. In most border posts it is neither possible nor desirable to undertake physical checks of all the cargo which passes through, not only is the volume of trade too high, but a process of physical examination of every item would impose unreasonable delays on trade and industry. Nevertheless, to reduce risks of diversion, the authorities at transit or trans-shipping ports and airports, including where there is a free trade zone or bonded warehouse, must be notified in advance to provide extra security for certain cargoes and open the cargo if they receive an order by law enforcement authorities. This applies in particular to all firearms, as in the Firearms Protocol States agreed that the information contained in the import licence must be provided in advance to the transit State. Following World Customs Organization good practice, customs clearance of the cargo against the manifest must be notified to the authority undertaking the delivery verification certification and the end-use verification procedure.⁷⁹

Since some 90 per cent of cargo is carried in standard shipping containers it is necessary for customs and other law enforcement agencies to use systematic targeting techniques based upon profiling operators and other intelligence-led activities, selecting for examination the highest-risk transports and cargoes. It is also important to use risk indicators which relate especially to containers, including observing whether seals have been tampered with, seal numbers have been changed from those on the official documents, container number appears to be incorrect, or there are traces of recent welding or new rivets, paint, etc. Crucially it is also important to verify the length of the container both from the inside and the outside in case of hidden compartments used for smuggling.

Customs authorities should use risk indicators to differentiate between the two phases of pre-clearance and clearance of cargo since the precise indicators used will vary accordingly. Pre-clearance of cargo involves the review of cargo manifests prior to the arrival of a conveyance in order to identify cargo that should be subjected to more intense review on arrival; this should also on occasion involve reviewing the itinerary of a conveyance when they originated from or transited through States or locations where arms trafficking is known to have taken place. In this phase customs authorities should have access to basic documents such as bills of lading, airway bills and cargo manifests, either electronically or in hard copy. Clearance of cargo involves reviewing documents submitted in connection with the entry and exit of goods and cargo for the purpose of identifying those that are a high risk of arms trafficking. Clearance can also involve the physical examination of cargo and conveyances at the point of entry or exit.

⁷⁸ OSCE, *Best Practices to Prevent Destabilizing Transfers of Small Arms and Light Weapons through Air Transport*, annex V to Decision No 11/08, 5 November 2008.

⁷⁹ Brian Wood and Peter Danssaert, *Study on the Development of A Framework for Improving End-Use and End-User Control Systems*. New York: United Nations Office for Disarmament Affairs, 2011, p.71.

7.3 USE OF TRACK AND TRACE TECHNOLOGIES

Modern technologies and sophisticated marking systems should be adapted and deployed wherever possible to track the arms cargo through all phases of the supply chain until physical verification of delivery to the lawful end user. Currently, there is growing interest in the real-time tracking of shipments of conventional arms and munitions.⁸⁰ Since July 2002 all ships of 300 gross tonnage and greater that are engaged on international voyages have to be fitted with an automatic identification system that sends to shore stations and other vessels the ship's identity, type, position, course, speed, navigational status and other safety-related information. This was extended to smaller ships in 2006. More recently, a more sophisticated long-range identification and tracking system for ships has been developed under the auspices of the International Maritime Organization (IMO). To allay fears that pirates and terrorists might use the data, the new system—unlike the old one—is supposed to be accessible only to the contracting Member States of the IMO.

It is now feasible using new technologies to track and trace entire shipments of arms and related items in real time, thus making it possible for authorities to take action when a physical diversion takes place. Active radio-frequency identification tags, which were pioneered by Wal-Mart, Tesco, and the US Department of Defense, are used to identify containers or pallets and their contents. These tags allow identification at a distance by transmitting information using radio waves. Active tags have been combined with specialized components such as global navigation satellite systems making it possible to locate the cargo at all times with so-called 'real time visibility.'

⁸⁰ For this subsection the authors are grateful to Peter Danssaert of the International Peace Information Service for providing a draft of his report on real-time locating systems.

8 Post-Delivery Issues

Whereas the emphasis of export controls remains on the pre-licensing phase, post-shipment verification, monitoring and end-use controls can be an important supplementary tool to strengthen the effectiveness of national arms export controls.⁸¹ When the diversion track record of the destination country or of an end user offers grounds for concern, suppliers could consider strict post-shipment measures to reduce risk. States have used various generic terms to describe cooperative actions and agreements during the post-shipment phase—for example, post-delivery cooperation, post-delivery measures, post-delivery information-sharing, post-delivery controls, and post-delivery monitoring.⁸²

8.1 DELIVERY VERIFICATION

The final consignee should provide the exporter with a delivery verification certificate once the export has reached the final destination or is verified by on-site inspections. The customs authority in the destination country will sign the delivery verification certificate. This requirement can be a confidence-building undertaking, or be formalized in a joint agreement, for instance as a condition of the export authorization and end-user document, which constitutes a legal obligation.⁸³ For example, under article 10(4) of the Firearms Protocol, the importing State Party must, upon request, inform the exporting State Party of the receipt of the shipment of firearms, their parts and components or ammunition.

Delivery verification certificates should contain information that at the least includes the name and address of the exporter and the importer, the serial number of the import certificate, a description of the goods, the quantity and value, the port of arrival, the name of the carrier company, and the identification number of the vehicle—the International Maritime Organization number for ships, the manufacturing number for aircraft, and the chassis number for trucks and railcars.⁸⁴

Very sensitive conventional arms, such as those military technologies with great destructive power, for example man-portable air defence system and high explosives, or items that are more easily concealed and smuggled such as SALW, may pose higher risks of diversion. In such cases, delivery verification and post-shipment monitoring can be carried out through appropriate means, for example by on-site inspections by the exporter, supplier or officials of the exporting State.

⁸¹ European Union, *Users Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*. Brussels, 2015, Chapter 1 Licensing Practices 3.1; also OSCE, *Basic Document on Small Arms and Light Weapons*, June 2012, recommends that the goods should be verified, when possible. Post-shipment verification can take two forms: (a) physical inspection in situ, or (b) the final consignee provides the exporter with a delivery verification certificate once the export has reached the final destination.

⁸² Paul Holtom, Himayu Shiotani and Sebastian Wilkin, *A Menu of Options to Enhance the Common Understanding of End Use/r Control Systems to Strengthen their Role in Preventing Diversion*, United Nations Institute for Disarmament Research, 2019, p.8.

⁸³ Brian Wood and Peter Danssaert, *Study on the Development of A Framework for Improving End-Use and End-User Control Systems*. New York: United Nations Office for Disarmament Affairs, 2011, pp. 57-60.

⁸⁴ *Ibid* p.71.

8.2 STOCKPILE MANAGEMENT

The unauthorized retransfer of conventional arms and ammunition/munitions from inadequately managed official stockpiles, whether to the illicit market or to unauthorized end users or end uses, can constitute a major form of diversion in many countries. To eradicate illegal acquisitions from stockpiles States must ensure that physical security and stockpile management (commonly known as PSSM among practitioners) measures are implemented which can prevent:

- Theft and loss— often resulting from negligence and inadequate screening of personnel, inventory management, or record-keeping;
- Armed robbery and looting through battlefield capture—often due to poor guarding of confiscated weapons and supply depots;
- Organized leakage and fraudulent sales— usually involving deception by corrupt officials with legal access or authority to release stocks;
- Politically motivated removals—for example if political leaders or commanders issue orders that override or misinterpret regulations; or
- Sale of arms that have only been temporarily deactivated, which is a reversible process— often applied to firearms while in transfer, or stored in depots, used in expositions or brought to courts or other public places.

Risks of diversion from replenished stockpiles, especially of more easily concealed weapons and ammunition, will tend to increase over time if there is no destruction of surpluses, a subject receiving increased international attention. The United Nations Office for Disarmament Affairs Destruction Handbook on small arms, light weapons, ammunition and explosives⁸⁵ builds upon the Secretary-General's report of 2000 on methods of destruction.⁸⁶ The European Commission also established common guidelines for the deactivation of firearms in 2015⁸⁷ and the OSCE has recently published a Best Practice Guide for the deactivation of SALW in 2018.⁸⁸ Preventing the diversion of ammunition stocks requires particular measures. The General Assembly has endorsed the International Ammunition Technical Guidelines (IATG),⁸⁹ which are a comprehensive set of practical standards for ammunition stockpile management, safety and security.⁹⁰

Key measures to reduce the risk of diversion from stockpiles include:

- Whether there are comprehensive staff vetting, selection and training systems before the commencement of service and at regular intervals during service to ensure that officials have a high level of integrity and work in conformity with existing standards and regulations.

⁸⁵ United Nations Office for Disarmament Affairs, *A Destruction Handbook: Small Arms, Light Weapons, Ammunition and Explosives*, July 2001.

⁸⁶ Security Council, *Report of the Secretary General on Methods of Destruction of Small Arms and Light Weapons, Ammunition and Explosives*, UN document S/2000/1092, 15 November 2000.

⁸⁷ European Commission, *Common Guidelines on Deactivation Standards and Techniques for Ensuring that Deactivated Firearms are Rendered Irreversibly Inoperable*, 15 December 2015.

⁸⁸ OSCE, *Best Practice Guide: Minimum Standards for National Procedures for the Deactivation of Small Arms and Light Weapons*, document FSC.DEL/250/17/Corr.2, May 2018; see also the Geneva Centre for Humanitarian Demining, *Towards Security, Peace and Sustainable Development. The State of Play in Safe and Secure Management of Ammunition*, July 2018.

⁸⁹ See General Assembly, *General and Complete Disarmament: Problems Arising from the Accumulation of Conventional Ammunition Stockpiles in Surplus*, UN document A/RES/72/55, 5 December 2017.

⁹⁰ United Nations Office for Disarmament Affairs, *Guide to the International Ammunition Technical Guidelines (IATG)*, document IATG 01.10, 2nd ed., 2015.

- Whether all illicit SALW that are found in their territory of the country are uniquely marked and recorded, or destroyed, as soon as possible, pending which the items are securely stored.⁹¹
- Whether there are procedures in place for deactivation measures to be verified, where appropriate, by a competent authority and for the prevention of illicit reactivation of deactivated firearms or other weapons.
- Whether unique markings are applied to the essential or structural components of weapons—such as the frame or receiver—where the component’s destruction would render the weapon permanently inoperable and incapable of reactivation.⁹²
- Whether the arrangements for physical security and destruction of national stocks of ammunition are consistent with relevant standards in the IATG.
- Whether, in the context of armed conflict, physical measures are in place to prevent battlefield capture.

Private sector actors that have concerns about stockpile safety and security issues should raise those concerns with relevant authorities without delay so that they can be addressed.

8.3 END-USER MONITORING AND ON-SITE INSPECTIONS

Various forms of end-use/r controls can be included in the export authorization linked to the import authorization. For example, in sensitive cases:

- The first option employed in State practice is that the importing State and end user can be prohibited by a specific agreement with the exporting State from: (i) re-exporting the items per se, or (ii) re-exporting the items to certain other destinations or locations, or simply (iii) re-transferring the items to certain other end users in the same importing State.
- A second option, linked to the first, is that the end user can be required by the exporting State to seek and obtain a further authorization to re-export items or to retransfer them to other users in the destination country.
- A third option is for the exporting State to merely require a notification from the importing State of any re-export or retransfer, or to require the importing State to follow a certain agreed export or transfer procedure when making their own decision to re-export or retransfer the items.⁹³ The ATT State Party’s decision regarding the appropriate end-use/r measures should correlate with the level and nature of the risks of diversion or misuse that are objectively assessed under articles 7 and 11.

⁹¹ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, UN document A/60/88, 27 June 2005, para 9; similarly, under 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 (“Firearms Protocol”), UN document A/RES/55/255, 8 June 2001, “States Parties shall adopt, within their domestic legal systems, such measures as may be necessary to prevent illicitly manufactured and trafficked firearms, parts and components and ammunition from falling into the hands of unauthorized persons by seizing and destroying such firearms, their parts and components and ammunition unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those firearms and ammunition have been recorded”.

⁹² International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, UN document A/60/88, 27 June 2005, para 10.

⁹³ Examples of such options are given in Brian Wood and Peter Danssaert, *Study on the Development of A Framework for Improving End-Use and End-User Control Systems*. New York: United Nations Office for Disarmament Affairs, 2011, sections 4.3 and 4.4. See also, Wassenaar Arrangement, *Introduction to End User/End Use Controls for Exports of Military-List Equipment*, adopted July 2014, and more recently in Paul Holtom, Himayu Shiotani and Sebastian Wilkin, *A Menu of Options to Enhance the Common Understanding of End Use/r Control Systems to*

To prevent post-shipment diversion in potentially higher-risk cases, a clause on post-shipment controls and end-use monitoring of the arms and related items can be agreed between the exporting and importing States. In order for such post-shipment controls to be carried out, a clause on post-shipment controls should be inserted into the specific contract and ideally also into the arms export regulations requiring various forms of a post-delivery monitoring and control.

Examples of a long-standing post-shipment verification programmes are the Blue Lantern programme of the US Department of State, begun in 1990, and the Golden Sentry programme of the US Department of Defense, which began in 2001. Another specific end-use monitoring programme is run by the US Department of Commerce for the export of US-origin dual-use items, which since October 2013 also covers items moved from the Wassenaar Arrangement Munitions List and the former US Munitions List to the Commerce Control List.⁹⁴ These are not law enforcement operations or investigations, but rather targeted fact-finding programmes aiming to ensure the integrity and security of US exports of conventional arms, ammunition and related items, including technology and services.

Blue Lantern involves both pre-license checks as well as post-delivery checks. The Department of State claims that Blue Lantern:

... has proven to be a useful instrument in: 1) deterring diversions to unauthorized end-users, 2) aiding the disruption of illicit supply networks used by governments under U.S. or international restrictions and sanctions and international criminal organizations, and 3) helping the Department to make informed licensing decisions and to ensure compliance with the [Arms Export Control Act] and the [International Trade in Arms Regulations]. End-use checks performed under the Blue Lantern program have significantly encouraged compliance with legal and regulatory requirements and have proven particularly effective in combating the global “gray arms” trade. “Gray arms” refers to the use of fraudulent export documentation to acquire defense articles through legitimate channels for re-transfer to unauthorized end-users.⁹⁵

Switzerland has conducted post-shipment verification since 2012 and conducts between 5 and 10 such verifications per year. A verification exercise can cover all weapon categories, but it does not cover ammunition and generally does not cover parts and components. The countries to be visited are selected on a risk-based assessment according to the risks associated with use of the weapon in question and the risk of diversion in the country or region.⁹⁶

Strengthen their Role in Preventing Diversion, UNIDIR, 2019; see also OSCE, *Standard Elements of End-User Certificates and Verification Procedures for SALW Exports*, 2004; OSCE, *Template for End User Certificates for Small Arms and Light Weapons*, 2011; European Union, *Users Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*. Brussels, 2015, Chapter 1 – Licensing Practices, section 1 pp. 5-8; South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons, *Toolkit for Addressing Unauthorised Re-export or Retransfer of Arms and Ammunition*, 2015; and Modular Small-Arms-Control Implementation Compendium , Module 03.20—*National Controls Over the International Transfer of Small Arms and Light Weapons*, 2014.

⁹⁴ For information on the Blue Lantern programme, see United States Directorate of Defense Trade Controls, End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2017, which is the latest 2017 report by the Department of State to the US Congress, https://www.deccspmddtc.servicenow.com/sys_attachment.do?...; and for information on the Golden Sentry programme see <https://www.dsca.mil/about-us/end-use-monitoring-eum>.

⁹⁵ United States Directorate of Defense Trade Controls, End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2016, p.2, https://www.pmdtdc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=eebde4f1dbf51340528c750e0f961959

⁹⁶ Swiss Ministry of Economic Cooperation, communication with the author Brian Wood, 1 March 2019.

Germany decided to implement a new system of selective post-shipment end-use controls in 2015 coupled with a stricter set of export principles, and the first phase has been a pilot project focused on the verification of all military weapons and specific types of firearms exports.⁹⁷ Foreign recipients must now all sign declarations of end use, in which they also consent to on-the-spot inspections. Random checks are to be made for large quantities of arms. If a State violates an end-use statement or refuses post-shipment controls, no further deliveries of military goods will, in principle, be made to that State.⁹⁸ Various control methods are to be tested within the pilot project. There were three on-site verification visits to India, the United Arab Emirates and Republic of Korea carried out by officials of the Federal Office for Economic Affairs and Export Control and German embassies during 2017–2018. Each visit consisted of a visual inspection of the weapons during which serial numbers or other identification symbols and numbers were verified.

Germany's Federal Foreign Office is advocating the introduction of comparable controls on the part of their partners in the EU and NATO, and some States are following suit.⁹⁹

8.4 TRACING ILLICIT ARMS AND AMMUNITION

When weapons are seized from criminals or retrieved in the field because the items are related to a crime or will present a danger to the public, the markings on the weapons can help law enforcement or other authorities to identify the manufacturer, government stockpile, importer or exporter, with which authorities can determine the provenance of the weapon and, if possible, trace its chain of custody and any points of unlawful diversion. States have agreed international procedures for such cooperation in the International Tracing Instrument and the Firearms Protocol.¹⁰⁰ Tracing is defined in the Firearms Protocol as “the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking”.¹⁰¹ A similar methodology has been used to

⁹⁷ On the launch of the German end-use control initiative, see the official German Federal Government press release of 8 July 2015, in German, <https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2015/20150708-gabriel-entscheidende-verbesserung-bei-kontrolle-von-ruestungsexporten.html>; see also in German https://www.linksfraktion.de/fileadmin/user_upload/PDF_Dokumente/19-3658.pdf.

⁹⁸ This provision is set out in fig. IV, no. 4 of the Political Principles adopted in 2015 by the Government of the Federal Republic of Germany for implementing the Export of War Weapons and Other Military Equipment legislation of 2000. The new principles are available at https://www.bmwi.de/Redaktion/EN/Downloads/eckpunkte-einfuehrung-post-shipment-kontrollen-deutsche-ruestungsexporte.pdf?__blob=publicationFile&v=2.

⁹⁹ Niguel Gonzales, ‘España realizará inspecciones voluntarias del uso final de las armas que exporta’, El País, Madrid, 25 February 2019, published in Spanish.

¹⁰⁰ See in particular, International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, UN document A/60/88, 27 June 2005, Parts III, IV, V and VI concerning marking, record keeping, tracing and international cooperation and assistance to identify illicit small arms and light weapons; and also Article 12, paragraph 4, of 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 (“Firearms Protocol”), UN document A/RES/55/255, 8 June 2001, which requires States Parties to cooperate in the tracing of firearms that may have been illicitly manufactured or trafficked, and this cooperation must include the provision of prompt responses to requests for assistance in tracing such firearms.

¹⁰¹ 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 (“Firearms Protocol”), UN document A/RES/55/255, 8 June 2001, Article 3(f).

mark and trace the provenance of ammunition using international ammunition marking standards.

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Systematic marking and record-keeping of markings on weapons and ammunition casings and packaging are essential for the success of tracing, and make it more difficult to divert weapons to unauthorized users or for unauthorized use. The limitation of this approach is that tracing only begins after diversion has already taken place. However, tracing can lead to successful corrective actions, including prosecutions that act as a deterrent. Moreover, as outlined above, it is now feasible using new affordable and secure technologies to track entire shipments of arms and related items in real time, and thus make it possible for authorities to take prompt action to trace items where and when diversion takes place.

¹⁰² Giacomo Persi Paoli, Tracing Firearms and Ammunition, The RAND Blog, RAND Corporation, 9 September 2016, <https://www.rand.org/blog/2016/09/tracing-firearms-and-ammunition.html>; reference is made to the North Atlantic Treaty Organization (NATO) Allied Ordnance Publication (AOP), 2008 — 2(c): The Identification of Ammunition.

9 Key Elements of General Cooperation

9.1 PRIVATE SECTOR OUTREACH

Outreach programmes are a proactive way of securing the support of the private sector and key actors in civil society that, during the course of their activities, may report on suspected instances of diversion. Building a culture of compliance and securing adequate resources should be twin aims of government and private sector actors involved in the trade.¹⁰³

In its preamble, the ATT recognizes “the voluntary and active role that civil society, including nongovernmental organizations, and industry, can play in raising awareness of the object and purpose of this Treaty, and in supporting its implementation”. States Parties are also bound by other relevant international instruments to work cooperatively with the private sector and civil society.

For example, Security Council resolution 2370 specifically “urges Member States to act cooperatively to prevent terrorists from acquiring weapons, including through information and communications technologies, while respecting human rights and fundamental freedoms and in compliance with obligations under international law, and stresses the importance of cooperation with civil society and the private sector in this endeavour, including through establishing public private partnerships.”¹⁰⁴ In article 13(3) of the Firearms Protocol, States Parties agreed to “seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect [illicit activities]”, that is, the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

Implementing anti-diversion measures requires that government leaders and public professionals, including legal advisers, have a sound understanding of the risks and are able to exercise judgement according to international standards. They and private sector actors must adopt procedures to avoid the possibility that they may unwittingly commit or become an accessory to the commission of a substantive offence related to diversion. Above all they must recognize the importance of building a culture of compliance among employees and contractors that is consistent with and supportive of the regulations implemented by the national arms control authorities. To achieve that, the government must ensure that sufficient resources are devoted to the implementation of essential measures appropriate to the size, scale and activities of each regulatory body and enforcement organization, and private sector actors must ensure sufficient resources are devoted to implementing their compliance mechanisms for arms trade activities across all relevant departments and branches of the company and its contractors. Such a culture of compliance requires the building of expertise through training, recruitment, taking professional advice and ‘learning by doing’. It also requires the allocation of necessary resources to gather and interpret information on diversion risks, both at the national and international levels.

¹⁰³ These points about a culture of compliance and adequate resources are adapted from Financial Action Task Force, *Risk Based Approach Guidance for Legal Professionals*, adopted at the Plenary in October 2008. FATF is an inter-governmental policymaking body to set standards and promote effective implementation of legal, regulatory and operational measures to combat money laundering, terrorist financing and other related threats to the integrity of the international financial system.

¹⁰⁴ Security Council resolution S/RES/2370 (2017) para. 13.

9.2 TRAINING PROGRAMMES

Export, import, transit, trans-shipment and brokering authorizations, procedures and risk assessments need to be coordinated by skilled and trained managers and other personnel in the private sector as well as by officials in national authorities and in relevant ministries and departments of trade, defence and foreign affairs. Likewise, customs authorities, which are often best placed to assess the risks of diversion related to the cross-border modes of transport, must have highly trained and well-informed officials who are familiar with methods of concealment, trafficking routes, and economic operations used in the diversion of conventional arms and ammunition. In addition, the police and immigration authorities must be trained to profile traffickers who may circumvent or break the law and to conduct investigations and prosecutions to enforce the law.¹⁰⁵

Defence industry companies as well as armed forces and police are required to secure stocks and conduct the supply and procurement of arms according to tendering and anti-corruption regulations. Finance ministries must supervise the banking sector to ensure 'know your customer' practices and to keep track of suspicious money transfers and company formations. Each of these regulatory and enforcement responsibilities requires skilled personnel, the management of information exchanges, the coordination of timely interventions, and systems of accountability. Personnel need to receive regular training to keep abreast of legal, policy and technology developments as well as threat profiles relating to new designs of controlled items, high-risk routes and modes of diversion.

9.3 COOPERATION WITH LAW ENFORCEMENT

Transparency, reporting and information-sharing by States and industry and other private sector actors involved in the arms trade can be principal means of ensuring compliance with national laws, regulations and procedures.

Information-sharing among States to prevent and detect diversion that may also involve private sector actors, subject to a confidentiality agreement, could include:

- Diversion risk assessments and on-site inspections;
- Case studies of how diversions have been organized, especially in cross-border activities;
- Unclassified intelligence on specific high-risk routes, ports and countries;
- Lists of approved, suspicious and banned corporate entities and individuals;
- Suspicious arms-related cross-border movements and transactions;
- Best practices in the areas of record-keeping, marking and deactivation of firearms;
- Efficient measures for seizure, confiscation, management and disposal of arms and related items;
- Statistical data on firearms, light weapon and ammunition losses, thefts and seizures; and
- Impacts on society and the best types of public awareness campaigns.

State Parties to the ATT are required to take appropriate measures, pursuant to its national laws and in accordance with international law, to address a diversion that it has detected. Such measures may include alerting potentially affected States, examining diverted shipments and taking follow-up measures through investigation and law enforcement.

¹⁰⁵ The OSCE participating States agreed in 2012 they "will also encourage and facilitate regional, subregional and national training programmes and joint training exercises for law enforcement, customs and other appropriate officials in the small arms field" including of stockpile staff; see OSCE, *OSCE Document on Small Arms and Light Weapons*, June 2012, § III(E), para. 4, and § IV(B), para. 1(ix).

However, many States do not have sufficient customs and police investigatory capacity, and national arms trade control authority may be weak. All States need to have:

- Appropriate systems for national authorities and approved private actors to effectively record and cross-check relevant information on arms transfers and the parties involved in such transfers;
- Skilled personnel and equipment to conduct thorough investigations in order to obtain vital information on diversion and illicit trafficking of arms; and
- Procedures and points of contact to share information on diversion with the corresponding authorities of other States Parties to the ATT.

To achieve this, police, customs, immigration, prosecutors, investigating magistrates and other law enforcement agents should have adequate resources and powers to monitor compliance and to conduct investigations to detect the various forms of diversion.¹⁰⁶ Judicial authorities must have the power to prosecute offences and to impose proportionate sanctions, whether criminal, civil or administrative. Legislation should define serious offences in relation to acts of diverting arms and related items, and thus enable the prosecution of offenders. If unlawful diversion is not itself made an offence, then at least the definitions of other closely related crimes could include provisions for conventional arms and their ammunition, parts and components.

It is important that private sector actors involved in the trade have ways to bring issues of law enforcement to the attention of authorities. They may also raise such issues in international forums where they have observer status if that is appropriate, as well as bilaterally with their home governments.

International law enforcement and other forms of cooperation and assistance among States, often requiring the provision of accurate and timely information by private sector actors, are essential to prevent, detect and eradicate of the many forms of unlawful and unauthorized diversion of conventional arms and related items. International assistance is needed to improve legislative frameworks, build institutional and law enforcement capacities, and provide technical and financial resources to strengthen the regulation of exports, imports, transit, trans-shipment, brokering, storage and legitimate end uses. Associations of industry and private sector actors can play a role using their technical expertise, market know-how and contacts to support such efforts, as long as this is done in the public and national interest and with a rule of law approach.

¹⁰⁶ Specific international standards for the conduct of all kinds of law enforcement officials, which also apply at border crossings and ports, in conducting investigations, are the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. These two sets of standards address such issues as corruption, human rights, and the use of appropriate force as opposed to arbitrary and abusive force or violence by officers. Note that the Code defines “law enforcement official” in a very wide manner to include border guards, immigration, soldiers doing policing, etc.



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Enhancing the Understanding of Roles and Responsibilities of Industry and States to Prevent Diversion

Diversion poses a significant threat to societies around the globe, limiting the effectiveness of arms control initiatives and frustrating attempts to regulate or catalogue flows of conventional arms, ammunition and parts and components. All private sector actors involved in the international trade in conventional arms have a role to play in preventing diversion.

This report aims to enhance the understanding of how all relevant actors can work to prevent the diversion of conventional arms.