

ISSUE BRIEF NO. 1

THE ARMS TRADE TREATY:
**OBLIGATIONS TO
PREVENT THE
DIVERSION OF
CONVENTIONAL
ARMS**

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40 | UNIDIR STIMSON



ABOUT THE RESEARCH

Strengthening shared understanding on the impact of the Arms Trade Treaty in addressing risks of diversion in arms transfers is a joint research endeavor by UNIDIR, Conflict Armament Research (CAR), the Small Arms Survey and the Stimson Center. The objective of the research is to enhance knowledge and facilitate dialogue among States to strengthen shared understanding on the impact of the Arms Trade Treaty in addressing risks of diversion in arms transfers, and to identify options and avenues for more effective policies and practices under the Treaty moving forward. The research aims to reflect on the challenges and generate ideas to strengthen counter-diversion measures within the Treaty's framework. Through a series of issue briefs, the research examines key concepts and thematic issues in preventing and mitigating the risk of diversion. The research will culminate in an assessment of progress made by States Parties and their impact in addressing risks and challenges related to diversion in arms transfers. Findings from this research will contribute to tackling the challenges associated with poorly regulated arms transfers at the national, regional and multilateral levels, and to informing the development of good policies and practices to counter diversion under the Treaty's framework and the relevant multilateral instruments.

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UNIDIR

UNIDIR is a voluntarily funded, autonomous institute within the United Nations. One of the few policy institutes worldwide focusing on disarmament, UNIDIR generates knowledge and promotes dialogue and action on disarmament and security. Based in Geneva, UNIDIR assists the international community to develop the practical, innovative ideas needed to find solutions to critical security problems.

CONFLICT ARMAMENT RESEARCH

Since 2011, Conflict Armament Research (CAR) has established active field investigation capabilities to track weapons and military assistance supply networks in over twenty-five conflict-affected countries in Africa, the Middle East, and Asia. CAR investigation teams work on the ground in active armed conflicts alongside national defense and security agencies. The teams document weapons at the point of use and track their sources back through the chains of supply. CAR teams investigate weapons in a variety of conflict-related situations—be they recovered by state security forces, surrendered at the cessation of hostilities, cached, or held by insurgent forces. All of CAR's data is housed in iTrace®, a European Union and German Government-funded project which provides policy makers with the precise, verified information required to understand weapon transfers in detail and, thereby, develop effective, evidence-based weapon management and control.

SMALL ARMS SURVEY

The Small Arms Survey is a global centre of excellence whose mandate is to generate impartial, evidence-based, and policy-relevant knowledge on all aspects of small arms and armed violence. It is the principal international source of expertise, information, and analysis on small arms and armed violence issues, and acts as a resource for governments, policymakers, researchers, and civil society. It is located in Geneva, Switzerland, and is an associated programme of the Graduate Institute of International and Development Studies. The Survey has an international staff with expertise in security studies, political science, law, economics, development studies, sociology, and criminology, and collaborates with a network of researchers, partner institutions, non-governmental organizations, and governments in more than 50 countries.

STIMSON CENTER

For three decades, Stimson has been a leading voice on urgent global issues. Founded in the twilight years of the Cold War, the Stimson Center pioneered practical new steps toward stability and security in an uncertain world. Today, as changes in power and technology usher in a challenging new era, Stimson is at the forefront: Engaging new voices, generating innovative ideas and analysis, and building solutions to promote international security, shared prosperity, and justice through applied research and independent analysis, deep engagement, and policy innovation. Stimson organizes its work in cross-program research areas: Nonproliferation, Technology and Trade, Resources and Climate, International Order and Conflict, US Foreign Policy, and Asia.

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ACRONYMS & ABBREVIATIONS

ATT	Arms Trade Treaty
CSP	Conference of States Parties
UNIDIR	United Nations Institute for Disarmament Research
UNTOC	United Nations Convention against Transnational Organized Crime
WGETI	Working Group on Effective Treaty Implementation

TABLE OF CONTENTS

1. INTRODUCTION	1
1.1 Purpose of this Briefing Paper	2
1.2 Discussion of Article 11 among States Parties.....	2
1.3 The Need to Develop Further Understanding of the 'Diversion of Transfers'	4
1.4 Dictionary Meanings of the term 'Diversion'	6
2. ATT OBLIGATIONS ON DIVERSION IN LIGHT OF ITS OBJECT, PURPOSE AND SCOPE	9
2.1 Object and Purpose of the ATT Obligations on Diversion.....	9
2.2 Scope of the Trading Activities Covered by the ATT Provisions on Diversion	11
2.3 Arms and Other Items Covered by the ATT Provisions on Diversion	12
3. ARTICLE 11 OBLIGATIONS IN THEIR CONTEXT	15
3.1 Obligation to Prevent the Diversion of Transfers.....	15
3.2 Obligation to Assess Risk and Establish Mitigation and Prevention Measures.....	16
3.3 Obligation to Detect, Investigate and Enforce Measures.....	19
3.4 Obligation to Share Appropriate Information and Cooperate on Effective Measures.....	20
4. OTHER RELEVANT OBLIGATIONS UNDER INTERNATIONAL AGREEMENTS	21
4.1 Overlapping Obligations to Prevent Diversion to Unauthorized End Users	21
4.2 Overlapping Obligations to Prevent Diversion to Unauthorized End Use	26
4.3 Obligations to Prevent Diversion to 'the Illicit Market' or in 'Illicit Trafficking'	28
4.4 Taking Account of the 'Lifecycle of the Transferred Weapons' and the 'Transfer Chain'	29
5. CONCLUSION	33



NEW YORK 2013

Foreign Ministers and Ambassadors sign the Arms Trade Treaty at the United Nations headquarters in New York, USA.

INTRODUCTION

The diversion of conventional arms and related ammunition, parts and components to unauthorized end users and uses poses a significant threat to societies around the globe. Diversion is undermining the effectiveness of counterproliferation efforts and frustrating attempts to regulate the international trade in such arms for purposes consistent with relevant international law and standards. Over the past three decades, the international community has increased its focus on ways to prevent and eradicate the illicit trade and the illicit trafficking of arms, particularly of small arms and light weapons. Diversion is an aspect of such illicit activity but, until the adoption of the Arms Trade Treaty (ATT) in 2013,¹ had not been specifically addressed in most multilateral and regional legal instruments.

Preventing such diversion presents an enormous global challenge, and diversion remains a danger to lives, livelihoods and stability in many countries. The Secretary-General has described a complex array of ways in which diversion of small arms and

light weapons and their ammunition, in particular, takes place:

“Domestically, small arms and ammunition often enter illicit circulation through theft, resale and corruption. It may occur as a result of a transfer without proper controls, unauthorized retransfer, thefts from poorly secured stockpiles, handouts to armed groups or civilian populations, or barter involving natural resources. Corruption is often associated with diversion. Government depots remain prominent sources of illicit weapons.”²

Since 2015, UNIDIR has conducted work on tackling such diversion especially with respect to the practice of States to implement end-use/r control systems and the role of industry,³ and now in 2020 has embarked on a more elaborate programme of research and analysis to identify the actual and potential impacts of the ATT framework for preventing diversion. The objective of this research is to enhance knowledge and to facilitate dialogue among States to strengthen ways to improve the impacts of

¹ Arms Trade Treaty, ‘Certified True Copy (XXVI-8)’, May 2013, https://treaties.un.org/Pages/ViewDetails.aspx?s-rc=TREATY&mtdsg_no=XXVI-8&chapter=26&lang=en; the ATT was adopted by the General Assembly in April 2013 and now has 105 States Parties.

² General Assembly, *The Illicit Trade in Small Arms and Light Weapons in All its Aspects, Report of the Secretary-General*, A/71/438-A/CONF.192/BMS/2016/1, 4 October 2016, § II, para. 11.

³ UNIDIR, “Enhancing the Understanding of Roles and Responsibilities of Industry and States to Prevent Diversion”, 2019. UNIDIR “Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings”, 2017, <https://www.unidir.org/publication/strengthening-end-user-control-systems-prevent-arms-diversion-examining-common-regional>. 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>. 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>. 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>.

the Treaty framework in addressing risks of diversion in arms transfers, and to identify options and avenues to further promote effective policies and practices under the Treaty moving forward.

1.1 PURPOSE OF THIS BRIEFING PAPER

This paper examines the legal obligations of States Parties under the ATT to prevent, detect and eradicate the diversion of conventional arms transfers, including arms already transferred. This paper does not explore in detail the examples of practical measures to address diversion included in the provision of the Treaty as these are addressed in a related paper.⁴

Nowhere does the ATT define diversion, nor does it specifically define any of the other key terms used in its provisions. Nevertheless, the interlocking provisions of the Treaty do provide indications of how States Parties can interpret their international legal responsibilities regarding diversion in order to implement them at national level. It is argued in this paper that such analysis by States Parties requires consideration not only of the ATT's core provision on diversion, namely article 11, but also the Treaty's object and purpose, its scope and other key provisions, especially its prohibitions. Additionally, the analysis should take into account the relevant obligations in various international agreements that ATT States Parties have each entered into, in particular those relating to the transfer and illicit trafficking of conventional arms.⁵ In doing so, States Parties can address the shortcomings of basing a definition of 'diversion' entirely on the notion of 'authorization' by one or more States involved in the transfer. Using these relevant international legal frameworks, States can also consider elements for a definition of an act of 'diversion' to develop

in their national legislation, regulations and administrative procedures.

1.2 DISCUSSION OF ARTICLE 11 AMONG STATES PARTIES

The Second Conference of States Parties (CSP2) in 2016 established an ad hoc open-ended Working Group on 'Effective Implementation of the Arms Trade Treaty' with the objective of sharing experiences, challenges and best practices on the national implementation of the Treaty's provisions. With due regard to the complexity and the long-term nature of Treaty implementation, the Third Conference of States Parties (CSP3), the following year, decided to establish a *standing* Working Group on Effective Treaty Implementation (WGETI) to also address, in detail, specific issues set by future Conferences as priorities. The first three priority issues to be selected by the Chair of the WGETI were article 5 (General Implementation); article 6 (Prohibitions) and article 7 (Export and Export Assessment) taken together; and article 11 (Diversion).

The WGETI sub-working group on article 11 (Diversion) held its first two meetings during the intersessional period between CSP4 and CSP5. Two working papers were introduced, one by Switzerland⁶ and another by a group of States Parties that included Argentina, Belgium, Colombia, Finland, France, Germany, the Netherlands, Mexico, the Republic of Korea, and Sweden.⁷ Participants at the working sessions considered problems of diversion during stages of 'the transfer chain' as well as stages in 'the life cycle of the weapon'. There was general acknowledgement among participants that "*diversion can take place at any stage in the life cycle of a weapon*, and that the sub-working group should consider the issue of preventing diversion that takes place during transfer (i.e. in-transfer diversion) as

⁴ UNIDIR, "The Arms Trade Treaty: Key measures to prevent and mitigate the risks of diversion", forthcoming.

⁵ Customary rules of treaty interpretation are codified in the Vienna Convention on Treaty Law, article 31 [General rule of interpretation] and article 32 [Supplementary means of interpretation], 1969.

⁶ Switzerland, Food for Thought paper on the topic of the prevention of diversion (article 11), letter of the WGETI Chair, 28 February 2018.

⁷ Argentina, Belgium, Colombia, Finland, France, Germany, Netherlands, Mexico, Republic of Korea, and Sweden, *Preventing and Fighting the Diversion of Legally Transferred Weapons*, letter of the WGETI Chair, 28 February 2018.

ARMS TRADE TREATY — ARTICLE 11 (DIVERSION)

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

well as diversion of items after they have been delivered (i.e. post-delivery diversion)" [emphasis added].⁸ The sub-working group also considered that: "All *stages of the transfer chain* are divided into smaller areas, each with their own questions and discussion guidance" [emphasis added].⁹ Thus, for clarity, the relationship between the stages of 'the transfer chain' and those in 'the life cycle of the weapon' will require further elaboration (see in section 4 below).

A multi-year work plan on diversion was proposed by the WGETI Chair and welcomed by CSP5 in August 2019 and updated in April 2020.¹⁰ The suggested focus of the sub-working group was to work on three main parts of *the transfer chain* [emphasis added]:

- (a) before the transfer;
- (b) during the transfer; and
- (c) at or after importation/post-delivery.¹¹

⁸ Working Group on effective Treaty Implementation, Chair's Draft Report to CSP4, 20 July 2020, para 11, ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep.

⁹ Work Plan Sub-Working Group on Article 11 (Diversion), annex C, letter of the WGETI Chair, 20 January 2020, paras. 2–3, ATT/CSP6.WGETI/2020/CHAIR/584/M1.LetterWorkPlans.Rev1.

¹⁰ Work Plan Sub-Working Group on Article 11 (Diversion), annex D, letter of the WGETI Chair, 20 January 2020, ATT/CSP6.WGETI/2020/CHAIR/596/M2.LetterWorkPlans.

¹¹ UNIDIR is developing a typology of arms diversion in the transfer chain that will be published separately. This complements the 'Diversion Typology' in a paper submitted by the Chair of the Group of Governmental Experts on problems arising from the accumulation of conventional ammunition stockpiles in surplus, GGE/PAV/AS/2020/3, Geneva, 20–24 April 2020; see also Conflict Armament Research, Diversion Digest Issue 1: Typology of Diversion, August 2018, <https://www.conflictarm.com/digests/diversion-digest-issue-1/>.

It was noted that diversion risks are different at each stage of the transfer chain and often very difficult to judge. The risk of diversion is one of the most common reasons for deciding not to issue an export licence. Some of the sources of information were identified that can help States Parties to conduct diversion risk assessments, including United Nations expert panel reports, non-governmental organization databases, and bilateral exchanges. A related set of challenges detected by the sub-working group is the lack of shared understanding of terminology for end use and end-user documentation. States Parties have been encouraged to share information on such documentation with the ATT Secretariat in order to create a repository of State practice and to elaborate a voluntary guide on such documentation.¹² The sub-working group suggested that areas of work it could take forward include compiling a list of guidance documents already available to help States prevent and address diversion; looking more closely at where and how diversion is occurring, as well as the challenges associated with addressing diversion; and focusing on the points in the transfer chain and life-cycle of a weapon when diversion can occur, and possible measures to mitigate or prevent diversion at the various stages. The sub-working group meeting scheduled to take place in April 2020 was intended to focus on stage 1 of the transfer chain (before the transfer) but all of the ATT working group meetings were cancelled due to the COVID-19 outbreak.¹³

1.3 THE NEED TO DEVELOP FURTHER UNDERSTANDING OF 'DIVERSION OF TRANSFERS'

Since the ATT does not contain a formal definition of 'diversion'—nor is it defined in other multilateral conventional arms control instruments—analysis of the obligations to prevent, detect and eradicate 'diversion' presents some challenges. Terms used in the other ATT provisions that contribute to the interpretation of the States Parties' obligations regarding diversion are also sometimes hard to define without detailed analysis.¹⁴ Nevertheless, States may work towards a general understanding of diversion by exploring common usage, context from other instruments and their negotiations, and by also looking beyond article 11 of the Treaty.

An international transfer of arms and/or related items involves not only the physical movement of the items but also a change to their title and/or control. The two aspects—the physical movement/possession, and the transactional changes regarding ownership/control—are usually related, but do not always take place at the same time and place or among the same actors. This is reflected in article 2(3) of the ATT.¹⁵ Moreover, both aspects are governed by a series of different national and international laws and regulations.

An international arms transfer originates with a request made by a potential end user or dealer to an exporter, often mediated by a third party such as a broker or agent. Before the transfer can take place, internationally agreed good practice recommends that the potential importing State and the potential exporting State

¹² Ibid, para. 3.

¹³ Working Group on Effective Treaty Implementation, Chair's letter regarding work plans, 7 April 2020, ATT/CSP6.WGE-TI/2020/CHAIR/596/M2.LetterWorkPlans.

¹⁴ This is evident from the travaux préparatoires of the ATT and from discussions had with key delegates during the deliberations and negotiations. For commentaries on the development of the ATT text, see Clare da Silva and Brian Wood (eds), *Weapons and International Law: the Arms Trade Treaty*, 2015; and Stuart Casey-Maslen, Andrew Clapham and Gilles Giacca, "Article 6. Prohibitions", in Andrew Clapham et al. (eds), *The Arms Trade Treaty – A Commentary*, 2016.

¹⁵ Article 2(3) of the ATT provides that: "This Treaty shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use provided that the conventional arms remain under that State Party's ownership".

first check the bona fides and reliability of the parties involved, the description of the arms and the potential consequences of the potential transfer. Decisions to authorize the import and export must be made by the respective designated competent national authorities in agreement with each other according to their national legislation and in compliance with their international legal obligations. Such procedures require clear and comprehensive national regulations and robust enforcement. Unfortunately, national legislation and regulations for arms transfers often leave gaps, or are not effectively enforced, and the risks of potential arms transfers are sometimes overlooked or underestimated in decision-making. These problems can arise because of under-investment in the establishment and maintenance of dedicated institutional capacities to control arms transfers at the national level.

The 1996 Disarmament Commission Guidelines for International Arms Transfers introduced the phrase 'unauthorized diversion' in the following statement:

"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* [emphasis

added]."¹⁶

In this statement the General Assembly recognized that arms transfers can be 'unauthorized diversions', and therefore accepted implicitly that other 'diversions' could be authorized.¹⁷ An example of a lawful or authorized diversion could be when a potential transfer in the form of an export and import to 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 received information requiring the shipment to be officially rerouted. This could occur, for example, if it was determined by the authorities that the end use or end user was no longer legitimate, or that the transactions involved criminal conduct. Similarly, 'authorized diversion' might occur in the context of rerouting the transit or trans-shipment points of an arms transfer or in a post-shipment context. However, as explained below, the term 'authorized diversion' is not the meaning given to the term 'diversion' in the ATT, but it is a useful reminder that what the ATT is addressing by the term 'diversion' should be understood to mean some sort of 'unlawful or unauthorized' activity amounting to the diversion of conventional arms.

Closely related in the ATT is the notion that the risk of diversion must be assessed before the arms are exported, and the exporting State must take measures to eliminate or minimize those risks. Some general assumptions can be made based upon multilateral policy documents and research on typical or recurring risk

¹⁶ Guidelines for International Arms Transfers in the Context of General Assembly resolution 46/36 H of 6 December 1991, Report of the Disarmament Commission, General Assembly Official Records, Fifty First Session Supplement No 42 (A/51/42) 1996, para. 33, <https://www.un.org/disarmament/wp-content/uploads/2019/09/A-51-42.pdf> which was welcomed by General Assembly resolution A/RES/51/45 N of 10 December 1996, <https://undocs.org/A/RES/51/45>.

¹⁷ Similarly, the United States Department of Commerce's Bureau of Industry and Security uses the term '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". See Bureau of Industry and Security, *BIS "Best Practices" for Industry to Guard Against Unlawful Diversion through Transshipment Trade*, 31 August 2011.

factors.¹⁸ Different actors and entities within a sector will pose a higher or lower risk of diversion of an export depending on a variety of factors, including: the nature of the arms to be exported, the professional training and accountability systems of the end users, the integrity of the institutions governing the management and uses of the arms and their regulatory system, the intermediaries and shipping services and those who arrange transactions and deliveries, the security of geographic locations where the arms are deployed and stockpiled, the available measures to prevent and mitigate specific risks, and the strength of the compliance programmes in the supplying and receiving entities and their States. In general, cases where there is a higher potential risk should be subject to a greater degree of scrutiny than cases with less risk.¹⁹

In order to develop effective measures to prevent such diversion in all its forms, it is necessary to (a) consider all the relevant binding obligations that fall under the ATT provisions, including those international obligations of the ATT States Parties that address aspects of diversion (this is the subject of the remainder of this Briefing Paper); and (b) examine more closely various types of diversion involving various actors in a range of contexts, and the way in which those have been addressed by measures taken by States, as documented and described in official reports and other studies. This is the subject of a separate Briefing Paper.

1.4 DICTIONARY MEANINGS OF THE TERM 'DIVERSION'

In the absence of a definition of 'diversion' in the ATT and in other conventional arms control agreements, key elements from common usage and from national regulations on the trade of other potentially dangerous items may help further understanding of the meaning of diversion when it is applied to transfers of conventional arms, their munitions and ammunition, and their parts and components. It may be useful to first consider the dictionary meanings of the term 'diversion'.²⁰ One such generic dictionary definition is: "the act of changing the direction or use of something; unauthorized rerouting or appropriation".²¹ This particular definition has been deployed in scholarly research on the diversion of prescription narcotics (see below). Another generic dictionary definition of 'diversion' is: "The action of turning something aside from its course; the action of re-allocating something".²²

A dictionary of commercial terms defines diversion as "the act of selling goods in a market for which they were not intended, usually without the knowledge or permission of the original seller".²³ A more elaborate definition designed for international business is broken down into two parts:

1. [For] Commerce: Practice in which goods intended for a particular market are diverted to be sold in another, usually without the knowledge or permission of

¹⁸ See for example European Union, *Users Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*, 2019; for an example of recent research on diversion risks, see Conflict Armament Research, 'Diversion Digest Issue 02', 2019, which analyses a sample of end-user documents that relate to deliveries of conventional weapons and ammunition. The analysis finds increased risk of illicit arms transfers due to 'deeply inconsistent' export certification practices, <https://www.conflictarm.com/digests/diversion-digest-issue-2/>.

¹⁹ European Union, *User's Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment*, as endorsed by the Council ("General Affairs") on 16 September 2019, section 7, which notes, *inter alia*, that "information on diversionary risks should be sought from a wide variety of sources: national, regional and international sources; public and non-public sources, official and non-governmental sources."

²⁰ Article 31, Vienna Convention on the Law of Treaties, sets out the 'general rule of interpretation' requiring each party of a treaty to interpret it "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". If there is a plausible reason to do so, dictionaries may be useful starting points or important guides to, but not dispositive of, the meanings of words appearing in treaties.

²¹ Merriam Webster Dictionary online, <http://www.merriam-webster.com/dictionary/diversion>.

²² Oxford English Dictionary online, <http://www.oed.com>

²³ Cambridge Business English Dictionary online, <https://dictionary.cambridge.org/dictionary/english/diversion>.

the primary vendor.

2. [For] 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.²⁴

From these dictionary definitions, 'diversion' can be understood to comprise various acts: the physical rerouting or changing of direction or use of goods; as well as the selling of goods in a market for which they were not intended, and that usually (but not always) this constitutes 'unauthorized rerouting or appropriation' (i.e. misappropriation); or involves transferring goods which are prohibited from diversion, or sales of goods without the knowledge or permission of the original supplier.

Another definition taken from the literature on the narcotics trade not only addresses the redirection of the physical movement, the destination, and the intentionality of the act of diversion, but also incorporates the transactional process regarding a change of ownership as follows:

"Diversion is defined as the unauthorized rerouting or misappropriation of prescription medication to someone other than for whom it was intended. Diversion can occur either voluntarily [intentional supply to another person] or involuntarily [inadvertent supply such as lost doses, theft and via stand-over or threat] and either with or without the exchange of money or other services."²⁵

²⁴ *Business Dictionary* online, <http://www.businessdictionary.com/definition/diversion.html>.

²⁵ Briony Larance et al., "Definitions Related to the Use of Pharmaceutical Opioids", *Drug Alcohol Review*, vol. 30, 2011, pp. 236–245. Similar understandings of diversion are used in James A. Inciardi and Hilary L. Surratt, *Research Issues and Experiences in Studying Prescription Drug Diversion*, 2005; and James A. Inciardi et al., "The Diversion of Prescription Drugs by Health Care Workers in Cincinnati, Ohio", *Substance Use & Misuse*, vol. 41, 2006, pp. 255–264.



GENEVA 2016

2nd Conference of States Parties of the ATT, Geneva, 2016.

ATT OBLIGATIONS ON DIVERSION IN LIGHT OF ITS OBJECT, PURPOSE, & SCOPE

According to the Vienna Convention on the Law of Treaties, all treaties must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of a treaty in their context and in the light of its object and purpose, including its preamble. Subsequent agreements between the parties regarding its interpretation or application, as well as relevant rules of international law applicable in the relations between the parties, must also be taken into account.²⁶ Therefore, before analyzing article 11, which is the ATT's main provision on diversion, and its relationship to other key provisions in section 3 below, the ATT object and purpose, including its preamble, should be examined. The scope of the ATT, which is set out in article 2, also frames the application of article 11 and the other provisions related to diversion. The scope of the Treaty includes a list of the categories of conventional arms covered, as well as a brief list of what is included in 'the activities of the international trade' and what is excluded, therefore what comprises the term 'transfer'.

2.1 OBJECT AND PURPOSE OF THE ATT OBLIGATIONS ON DIVERSION

Article 1 (Object and Purpose) of the ATT, as well as the Treaty's preamble, act as an overall guide to interpret the other provisions of the ATT. The obligation on all State Parties to take measures to prevent the diversion of conventional arms is contained in one of the two objectives set out in article 1. The first is to "prevent and eradicate the illicit trade in conventional arms and prevent their diversion" in order to contribute to international peace, security and stability, and to reduce human suffering.²⁷ The other main objective of the ATT is to "establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms". The expressed purpose of these two objectives is for contributing to international and regional peace, security and stability, reducing human suffering and promoting cooperation, transparency and responsible action by States Parties in the international trade.

²⁶ Article 31 of the Vienna Convention on the Law of Treaties. Supplementary means of interpretation are outlined in article 32 and include the preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

²⁷ ATT, article 1 [Object and purpose].



NEW YORK 2017

Report from the Arms Trade Treaty Conference of States Parties 2017 and Prospects of the Conference of States Parties 2018.

In the third paragraph of the ATT preamble, the obligation to prevent ‘diversion’ is described 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”.²⁸ This statement is not an agreed definition of ‘diversion’ as such, but it does give an indication of three fundamental elements that States considered should be included to address the issue of ‘diversion’ when they negotiated the ATT text to its final adoption by the General Assembly in April 2013—in other words, to prevent:

- diversion to the illicit market;
- diversion for unauthorized end use; and
- diversion for unauthorized end users.

The inclusion of ‘terrorist acts’ in the

preamble description of diversion also draws attention to the principle that that mere ‘authorization’ of a transfer of conventional arms by a State is not always equivalent to conferring that transfer with legality. As explained below, internationally prohibited acts are reinforced by express prohibitions in the ATT and those prohibitions on transfers are fundamental to the understanding of diversion.²⁹

The ATT preamble is underpinned by a set of principles, and the sixth principle establishes that “it is the responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms and to prevent their diversion, and a primary responsibility of States to establish and implement their respective national control systems”. The “respective international obligations” of States Parties to prevent such diversion

²⁸ The statement on diversion in the ATT preamble is more elaborate than in the preamble of the 2008 General Assembly resolution (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.

²⁹ 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. A summary of relevant conventions and protocols is at <https://www.un.org/counterterrorism/international-legal-instruments>.

are formulated in several provisions of the Treaty, notably in the prohibitions, and indicated elsewhere. For example the preamble states that the Parties are guided by the purposes and principles of the Charter of the United Nations,³⁰ and that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security.³¹ The preamble also maintains that the regulation of the international trade in conventional arms and the prevention of their diversion should not hamper international cooperation and legitimate trade in materiel, equipment and technology for peaceful purposes.³²

2.2 SCOPE OF THE TRADING ACTIVITIES COVERED BY THE ATT PROVISIONS ON DIVERSION

ATT article 2(2) requires that “For the purposes of this Treaty, the activities of the international trade comprise export, import, transit, trans-shipment and brokering, hereafter referred to as ‘transfer’”. Excluded from the activities constituting a ‘transfer’ are the movement of conventional arms beyond the borders of a State Party to its armed forces or law-enforcement authorities operating outside national borders, provided the arms remained in the ownership of that State Party, as provided for in article 2(3). This more or less followed the recommendation of the 1992 Panel of Governmental Technical

Experts on the Register of Conventional Arms which also did not attempt to define the term ‘international arms transfers’, but did clarify for the purpose of the Register of Conventional Arms that “international arms transfers involve, in addition to the physical movement of equipment into or from national territory, the transfer of title to and control over the equipment”.³³ The Register refers to arms exports and imports as “all forms of arms transfers under terms of grant, credit, barter or cash”.³⁴

These ATT terms regarding ‘transfer’ are not defined in the Treaty and left for each State Party to define in their national legislation. Nevertheless, their meanings can be understood in the context of the ATT provisions as well as other relevant international agreements to which ATT States are also party. Customs authorities use the terms ‘export’, ‘import’, ‘transit’ and ‘trans-shipment’ for goods being moved internationally.³⁵ For example, insofar as the primary delineation of a State’s jurisdiction is its territorial boundaries, an export usually occurs when any goods in circulation leave a State’s customs territory and remain outside that territory.³⁶ The United Nations Statistical Commission, of which many ATT States Parties are members, also adopted trade definitions in 1997.³⁷

There is no definition of the term ‘brokering’ in the ATT or in other relevant international

³⁰ ATT, para. 1.

³¹ ATT, para. 6.

³² ATT, para. 16.

³³ General Assembly, Report on the Register of Conventional Arms: Report of the Secretary-General, UN document A/47/342, 14 August 1992, para. 10.

³⁴ General Assembly, *Transparency in Armaments*, resolution 46/36L, 6 December 1991, annex, para. 2(f).

³⁵ The Revised Kyoto International Convention on the Simplification and Harmonization of Customs Procedures defines ‘transit’ as when: “goods are transferred under customs control from the importing means of transport to the exporting means of transport within the area of one customs office which is the office of both importation and exportation”. The term ‘trans-shipment’ is generally used where the goods in transit are reloaded en route.

³⁶ See World Customs Organization, *Glossary of International Customs Terms*, D/2013/0448/20, November 2013. The WCO has 179 States Parties responsible for 98% of the world’s trade and this WCO glossary contains the most widely accepted customs definitions for the export, import, transit, trans-shipment of goods, including their re-export and re-import.

³⁷ Department of Economic and Social Affairs, *International Merchandise Trade Statistics: Concepts and Definitions*, UN document ST/ESA/STAT/SER.M/52/Rev.2, 1998.

treaties such as the Firearms Protocol³⁸, or in United Nations standards such as the Programme of Action on small arms and light weapons.³⁹ However, a large measure of international consensus has emerged since 2003 among States in Europe, the Americas and sub-Saharan Africa where States have adopted various multilateral, regional and sub-regional instruments that describe 'brokering'. Building on this, the 2007 report of the Group of Governmental Experts on illicit brokering of small arms and light weapons listed the following types of 'intermediary activities' as constituting the roles of a broker: (a) to serve as a finder of business opportunities for one or more parties; (b) to put relevant parties in contact; (c) to assist parties in proposing, arranging or facilitating agreements or possible contracts between them; (d) to assist parties in obtaining the necessary documentation; and (e) to assist parties in arranging the necessary payments.⁴⁰ The Group also 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".⁴¹

Depending on the items included in the potential transfer, and how many actors are involved directly and indirectly in facilitating the transaction, and moreover the route for the physical movement of the arms across national jurisdictions (which is usually but not always national territory), a potentially wide spectrum of obligations is engaged for those ATT States Parties

'involved' in the transfer, including a duty to prevent the diversion of the arms.

2.3 ARMS AND OTHER ITEMS COVERED BY THE ATT PROVISIONS ON DIVERSION

Measures recommended to prevent and detect diversion in article 11 refer only to the categories of arms covered under article 2(1), and not to ammunition/munitions covered under article 3 or parts and components covered under article 4. According to article 2(1) the conventional arms must not cover less than the descriptions used in the Register of Conventional Arms at the time of entry into force of the Treaty, and for small arms and light weapons, national definitions must not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of the Treaty.

During the ATT negotiations, many States considered that measures in the ATT to address diversion should also cover ammunition, parts and components at least for small arms and light weapons because the risks of diversion of such items tend to be much higher given their lower cost, portability and ease of concealment, especially in countries where smuggling and illicit circulation need to be tackled.⁴² Some States were also concerned that weapons not covered by existing categories should be considered for inclusion because of their destabilizing potential.⁴³ Since there was no consensus on that, article 5(3) of the Treaty thus encourages each State Party to 'apply the provisions of this Treaty to the broadest range of conventional arms'⁴⁴ and

³⁸ 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'); adopted by resolution 55/25 on 31 May 2001 and in force 3 July 2005. The Protocol currently has a membership of 147 States Parties and 190 signatories.

³⁹ Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects; adopted 21 July 2001.

⁴⁰ General Assembly, Report of the Group of Governmental Experts, UN document A/62/163, 27 July 2007.

⁴¹ *Ibid.*, para. 10.

⁴² For an example of field research on the points of diversion of small arms, light weapons and their ammunition in conflict-affected countries, see Conflict Armament Research, "Diversion Digest Issue 01", 2018.

⁴³ Paul Holtom, "Chapter 2 – Scope", in Clare da Silva and Brian Wood (eds), *Weapons and International Law: The Arms Trade Treaty*, 2015, p. 38.

⁴⁴ Article 2(1) requires that the ATT be applied to battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.

leaves it up to each State Party to decide what to include in its national control list. In practice, many if not most ATT States Parties have regulations for a range of items covered by articles 3 (Ammunition/munitions) and 4 (Parts and Components) as well as for other categories of conventional arms not covered by the Treaty's minimum scope in article 2.⁴⁵ Even one year after the ATT entered into force, the very extensive conventional military technology and munitions control lists of the Wassenaar Arrangement and the European Union were utilized by at least 54 States, most of which are significant arms traders.⁴⁶

Furthermore, all States Parties are required to consider the diversion of ammunition/munitions, and parts and components, in relation to the overarching prohibitions contained in article 6 of the ATT. For example, article 6(1) requires that States Parties respect Security Council arms embargoes, the scope of which is usually wider than articles 2(1), 3 and 4 of the ATT.⁴⁷ In addition, the ATT prohibitions under article 6(2) may also require anti-diversion measures covering transfers of ammunition/munitions or parts and components where those measures are required in order to fulfil the obligations which many ATT States Parties have also accepted under the Firearms Protocol, as well as the specific prohibitions and restrictions under other relevant treaties to which the State is a party, as discussed below.

Assessment of the diversion risks of an arms export is obligatory for all States Parties under article 11, as well as to meet the object and purpose of the ATT in article 1 and in

principle 6 of the preamble. Even though the ATT obligation to prevent 'diversion' as set out in article 11 only mentions the export of conventional arms, it is worth noting that a decision under article 7 to deny the export of ammunition/munitions or parts and components covered by the Treaty could also have the effect of preventing diversion. The similarities and differences of conducting an export assessment under article 11 and under article 7 are discussed below in section 3.2.

Moreover, as indicated above, there is nothing to stop a State Party from applying its export assessments to cover ammunition/munitions and parts and components by citing article 5(5) of the ATT. It requires that "Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2 (1) and of items covered under Article 3 and Article 4". Given the object and purpose of the ATT to 'reduce human suffering', the State Party may also be required to comply with its other national laws, and international commitments and obligations, that pertain to ammunition/munitions, or to parts and components, considering article 6(2).

⁴⁵ For an example of a comprehensive transfer control list that includes 22 categories of conventional arms as well as their ammunition/munitions and parts and components, see Common Military List of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2019_095_R_0001.

⁴⁶ Holtom, "Chapter 2 – Scope", in in Clare da Silva and Brian Wood (eds), *Weapons and International Law: The Arms Trade Treaty*, 2015, p.35

⁴⁷ For example, the United Nations arms embargo imposed by the Security Council on the Central African Republic in December 2013 instructed Member States to: "[t]ake the necessary measures to prevent the direct or indirect supply, sale or transfer to the CAR, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel". United Nations Security Council). 2013. Resolution 2127 of 5 December 2013. UN Doc. S/RES/2127. Para.54



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PLANADAS 2017

A UN International Observer organizing weapons taken from FARC-EP camps in Planadas, Colombia.

ARTICLE 11 OBLIGATIONS IN THEIR CONTEXT

The ATT provisions on diversion are centered on article 11 (Diversion) and stem from article 1 on the Treaty's object and purpose. However, there are other key provisions of the Treaty that must be considered.⁴⁸ The types of obligations and related measures suggested in article 11, and the main interlocking provisions to which they relate in the ATT, can be categorized as:

- obligation to prevent the diversion of transfers;
- obligation to assess risk and establish mitigation and prevention measures;
- obligation to detect, investigate and enforce measures; and
- obligation to share appropriate information and cooperate on effective measures.

ATT provisions related to article 11 have interlocking obligations that address key aspects of the transfer chain. These are article 2 (Scope), article 5 (General Implementation), article 6 (Prohibitions), article 7 (Export and Export Assessment), article 8 (Import), article 9 (Transit and Trans-shipment) and article 10 (Brokering). Other provisions that also contain obligations and measures essential to address diversion in the transfer chain are: article 12 (Record-keeping) article 13 (Reporting), article 14 (Enforcement), article 15 (International

Cooperation) and article 16 (International Assistance). All of the obligations in these ATT articles are essential to prevent, detect and eradicate diversion in some way.

3.1 OBLIGATION TO PREVENT THE DIVERSION OF TRANSFERS

Article 11(1) sets out the benchmark obligation on diversion in the ATT requiring that each State Party involved in the 'transfer' of conventional arms "shall take measures to prevent their diversion". Article 11(1) has very broad application to all 'transfer' activities—export, import, transit, trans-shipment and brokering. It can be reasonably assumed from the ATT preamble that this benchmark provision of the ATT must include the obligation to prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts. The provisions in article 11 include obligations and recommendations for States Parties to prevent and mitigate the risk of diversion, as well as to detect and prosecute those who engage in diversion activities. Whenever applicable, the prohibitions include all conventional arms as well as ammunition/munitions and parts and components covered by the Treaty.

The legal obligation in article 11(1) can be fulfilled in part through measures required

⁴⁸ Article 31, Vienna Convention on the Law of Treaties.

to meet obligations elsewhere in the Treaty. In particular, the practical implementation of article 6 (Prohibitions) is highly relevant to the prevention of diversion. Under article 6(1):

“A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.”

Such embargoes are usually designed to prevent not only the *direct supply* of arms and related materiel to specific embargoed destinations and actors, but also their *indirect supply*, as may occur through diversion involving rerouting shipments or deception, or diversion through re-export/retransfer to a prohibited recipient.⁴⁹ States must therefore have legislation and accompanying regulations to proactively implement such arms embargoes.

Additionally, 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 [emphasis added].”

The initial implementation reports of many States Parties show that those international agreements include obligations relevant to preventing diversion.⁵⁰

Moreover, under article 6(3):

“A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party [emphasis added].”⁵¹

The relevance to the prevention of diversion of these prohibitions in article 6 is discussed below.

3.2 OBLIGATION TO ASSESS RISK AND ESTABLISH MITIGATION AND PREVENTION MEASURES

The obligation established under article 11(2) of the ATT is that each exporting State Party:

“shall seek to prevent the diversion of the transfer of conventional arms covered under Article 2(1) through its national control system, established in accordance with Article 5(2), by assessing the risk of diversion of the export and considering the establishment of mitigation measures such as confidence building measures or jointly developed and agreed programmes by the exporting and importing States.”

Article 11(2) also calls for the use of ‘other prevention measures’, which “may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not

⁴⁹ These and other techniques to divert arms transfers are evident in the reports of Security Council arms embargo investigators.

⁵⁰ For example, the obligations accepted by States Parties of the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. For details of the ATT implementation reporting, see <https://thearmstradetreaty.org/reporting.html>. For analysis of this reporting, see Stimson Centre, Arms Trade Treaty-Base-line Assessment Project, <http://www.armstrade.info/resources-2/>. Analysis of the international agreements relevant for the obligations of ATT States Parties is the subject of a research project at the Faculty of Law of the University of Antwerp.

⁵¹ Fifty-three types of ‘war crimes’ are listed in article 8 of the Rome Statute of the International Criminal Court and its Elements of Crimes, a treaty concluded on 17 July 1998 and entering into force on 1 July 2002; the acts criminalized are consistent with grave breaches of the four Geneva Conventions and additional protocol 1, and with serious violations of common article 3 of the Geneva Conventions and serious violations of customary international humanitarian law.

authorizing the export or other appropriate measures".⁵² States Parties are encouraged in article 11(5) to share relevant information with one another on effective measures to address diversion, including information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion.

Brokering activity, for example, usually takes place at the start of the transfer chain before the exporting and importing States finally agree an export can take place, or during the process of such an agreement, so assessing the risk of brokering transfers, especially through third countries, is a key challenge for national regulation systems. Article 10 (Brokering) of the ATT stipulates that: "Each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2(1). Such measures may include requiring brokers to register or obtain written authorisation before engaging in brokering". A number of States have defined their jurisdiction for the purposes of regulating arms brokering to include

nationals or residents who buy, sell or arrange the transfer of such items from their own country, or from a third country to any other third country.⁵³

For each ATT State Party, the available measures it takes to prevent and mitigate the risk of diversion may be based upon detailed multilateral and regional standards and guidance. Relevant examples of such standards and guidelines are those agreed by States in the Organization for Security and Cooperation in Europe, the Wassenaar Arrangement, the European Union,⁵⁴ the Organization of American States,⁵⁵ and by African States⁵⁶ in the Economic Community of West African States,⁵⁷ the Great Lakes Region and the Horn of Africa States,⁵⁸ the States of the Southern African Development Community, and the States of Central Africa.⁵⁹ Some of these agreements may contain obligations considered by the ATT State Party concerned to be obligatory prohibitions under ATT article 6(2).

Under article 11(3), the importing, transit, trans-shipment and exporting States Parties "shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of

⁵² UNIDIR, "Enhancing the Understanding of Roles and Responsibilities of Industry and States to Prevent Diversion", 2019. UNIDIR "Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings", 2017, <https://www.unidir.org/publication/strengthening-end-user-control-systems-prevent-arms-diversion-examining-common-regional>.

⁵³ Treaty provisions for the regulation of arms brokering adopted in the African sub-regional treaties were variously agreed between 2001 and 2010, and guidelines for national controls were agreed by the Wassenaar Arrangement, the Organization of American States, the Organization for Security and Cooperation in Europe and the European Union between 2003 and 2016. These initiatives took place after provisions on brokering were included in the Programme of Action on small arms and light weapons and the Firearms Protocol in 2001. For details, see Brian Wood, "Chapter 10 – Brokering", in Clare da Silva and Brian Wood (eds), *Weapons and International Law: The Arms Trade Treaty*, 2015, pp. 172-190.

⁵⁴ Summaries of these standards and their relevance are contained in the European Union User's Guide to the Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, as endorsed by the Council ("General Affairs") on 16 September 2019, the Organization for Security and Co-operation in Europe Handbook of Best Practices on Small Arms and Light Weapons published on 1 December 2003, and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies 'Compendium of Best Practice Documents, December 2019, available from <https://www.wassenaar.org/best-practices/>

⁵⁵ The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, adopted in 1997, addresses diversion in article VIII on security measures.

⁵⁶ For a recent summary of the relevance of African instruments for the prevention of diversion in relation to imports, see Paul Holtom and Benjamin Jongleux, *Preventing Diversion: Comparing ATT and African Measures for Importing States*, Small Arms Survey, 2019, <http://www.smallarmssurvey.org/fileadmin/docs/T-Briefing-Papers/SAS-BP-Preventing-Diversion.pdf>.

⁵⁷ Convention of the Economic Community of West African States to Combat and Eradicate the Illicit Trade in Small Arms, Light Weapons, their Ammunition and Other Related Materials, 2006.

⁵⁸ Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in East Africa, the Great Lakes and the Horn of Africa, 2002.

⁵⁹ The Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used For Their Manufacture, Repair and Assembly, 2010.



AFGOYE 2012

A tank prepares to cross bushland outside of Mogadishu, Somalia.

the transfer of conventional arms” covered by the Treaty. These measures require the establishment and maintenance of fully functioning national control systems among States Parties, as outlined in article 5 of the Treaty.

As a practical matter in export control, States Parties may choose, where relevant, to conduct a diversion risk assessment in accordance with article 11(2) at the same time as conducting a similar exercise as required under article 7, not least because, as experience shows, an overriding export risk might also constitute an unacceptable risk of diversion. Under article 7, each exporting State Party must conduct an objective and non-discriminatory assessment of possible negative consequences of a potential export of conventional arms, as well as related ammunition/munitions and parts and components covered by the scope of articles 3 and 4. This is obligatory if the export is not already prohibited under article 6. Although article 11 does not

cover the export of ammunition/munitions or parts and components, under article 7 States Parties’ national authorities may find that a potential negative consequence of an export of arms is also a risk of diversion that, under article 11, must be prevented.

The export assessment under article 7 must take into account relevant factors, including information provided by the importing State, to avoid such exports being authorized that would pose an ‘overriding risk’ of undermining peace and security, or being used to commit or facilitate acts of terrorism or transnational organized crime as defined in relevant treaties, or serious violations of international humanitarian or international human rights law. The exporting State Party must under article 7 also consider whether there are mitigation measures that could be undertaken to remove any overriding risk identified, and must make available appropriate information about the authorization in question, upon

request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.⁶⁰ While the establishment of mitigation and prevention measures under article 11(2) and 11(3) may be necessary to remove or absolutely minimize the risk of a potential arms transfer from being diverted, the mitigation measures that may be required under article 7 have a different purpose, namely to remove an overriding risk of one of a number of other possible negative consequences in order to create the conditions necessary to authorize the export of the items.

Further along the proposed transfer chain, article 9 of the ATT requires that each State Party take “appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms ... through its territory in accordance with relevant international law”. National measures to regulate transits and trans-shipments of arms vary, but standards for the regulation of arms as well as ammunition are governed by international agreements depending on whether the movement is by sea, air or land (road, rail and internal waters).⁶¹

3.3 OBLIGATION TO DETECT, INVESTIGATE AND ENFORCE MEASURES

If a State Party detects a diversion of transferred conventional arms covered by the Treaty, then according to article 11(4) the State Party “shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion”. This reference to act ‘in accordance with international law’ to address diversion introduces other

potential obligations, for example to abide by the Charter of the United Nations relating to arms embargo investigations, and to comply with treaties governing the international transport of goods. Article 11(4) recommends that such measures may include alerting potentially affected States Parties, examining diverted shipments of such conventional arms and taking follow-up measures through investigation and law enforcement.

Crucial for the efficacy of investigations, article 12 requires each State Party to “maintain national records, pursuant to its national laws and regulations, of its issuance of export authorizations or its actual exports” of arms, and to maintain records of arms “that are transferred to its territory as the final destination or that are authorized to transit or trans-ship territory under its jurisdiction”.⁶² Records must be kept for 10 years. Such records are essential for carrying out requests by States to trace the original suppliers of weapons found to be used or held illegally.

Article 14 on enforcement and article 15(5) on international assistance with investigations, prosecutions and judicial proceedings, also set out relevant provisions to address instances of diversion, including “where jointly agreed and consistent with national laws, the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty”. Of relevance, ATT States Parties may seek international assistance on legal or legislative matters, institutional capacity-building, and technical, material or financial needs.

According to article 16, such assistance

⁶⁰ This is a summary of the seven provisions of article 7 of the ATT.

⁶¹ For an analysis of this aspect of the ATT, see Peter Danssaert and Paul Beijer, “Chapter 9 – Transit and Trans-shipment”, in Clare da Silva and Brian Wood (eds), *Weapons and International Law: the Arms Trade Treaty*, 2015; see also Paul Holtom, “Article 9: Transit and Trans-shipment Provision in the ATT Initial Reports”, presentation to the Working Group on Effective Treaty Implementation, 4 February 2020, https://thearmstradetreaty.org/hyper-images/file/20200204_Article%209_Small%20Arms%20Survey/20200204_Article%209_Small%20Arms%20Survey.pdf.

⁶² Under article 11(3), “Each State Party is encouraged to include in those records: the quantity, value, model/type, authorized international transfers of conventional arms covered under Article 2 (1), conventional arms actually transferred, details of exporting State(s), importing State(s), transit and trans-shipment State(s), and end users, as appropriate”.

may include stockpile management, disarmament, demobilization and reintegration programmes, model legislation, and effective practices for implementation. Although effective measures to improve stockpile management practices and standards, where needed, are not mentioned in article 11, diversion from stockpiles can be inferred as one form of “a diversion of transferred conventional arms” in article 11(4) regarding detection, and “a source of illicit supply” as mentioned in article 11(5). States may request, offer or receive assistance through the United Nations, international, regional, sub-regional or national organizations, non-governmental organizations, or on a bilateral basis. “Each State Party in a position to do so shall provide such assistance, upon request” and the ATT Voluntary Trust Fund has been established by States Parties for this purpose.⁶³

3.4 OBLIGATION TO SHARE APPROPRIATE INFORMATION AND COOPERATE ON EFFECTIVE MEASURES

Article 11(5) encourages States Parties, pursuant to their national law, to share relevant information with one another on effective measures to address diversion, for example on “corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion”. Article 15(1) requires States Parties to cooperate, “consistent with their respective security interests and national laws”, to “effectively implement” the Treaty and article 15(4) encourages them to share information “regarding illicit activities and actors and in order to prevent and eradicate diversion of conventional arms.” This may include sharing information on actionable intelligence that could be fed into risk assessments discussed in the

previous subsections above.

The ATT Secretariat is also designated as a conduit for States Parties to share information about diversion. Under articles 11(6) and 13(2), States Parties are encouraged to report to other States Parties, through the Secretariat, “information on measures taken that have been proven effective in addressing the diversion of *transferred* conventional arms” [emphasis added]. This could include information on post-shipment measures, such as tracing. When considering information exchange on post-shipment measures, one might consider both what the exporter and the importer may be able to do to address diversion of transferred items.

In addition, article 15(4) encourages States Parties to cooperate, including through sharing information regarding illicit activities and actors, in order to prevent and eradicate diversion of conventional arms, and to identify and maintain one or more national points of contact as required by article 5(6).

⁶³ Note that States Parties of the ATT are also able to invoke the assistance of judicial cooperation such as through mutual extradition, and of international organizations concerning law enforcement, such as the United Nations Office on Drugs and Crime, Interpol and the World Customs Organization, which are mandated to assist their member States in crime and customs issues.

OTHER RELEVANT OBLIGATIONS UNDER INTERNATIONAL AGREEMENTS

In accordance with article 6(2), existing international legal obligations relevant to the international agreements entered into by each ATT State Party can reinforce and aid in the interpretation of the obligations elaborated in the ATT.⁶⁴ Such international agreements are relevant if they contain binding prohibitions or restrictions relating to the transfer, or illicit trafficking, of conventional arms.

These overlapping obligations may also describe forms of diversion of conventional arms transfers in addition to the diversion of other items covered by the Treaty. With reference to the brief description of diversion in paragraph 3 of the ATT preamble, the other relevant overlapping international obligations in international agreements to which an ATT State is a party, can be examined by considering, firstly, “diversion to unauthorized end uses and end users”, and secondly “diversions to the illicit market”.

4.1 OVERLAPPING OBLIGATIONS TO PREVENT DIVERSION TO UNAUTHORIZED END USERS

Under the terms of the ATT, it can reasonably be assumed that ‘unauthorized end users’ are (a) actors not authorized by a competent authority to ‘use’ one or more specific conventional arms or related items covered by articles 2, 3 and 4 of the Treaty; or (b) a type of actor or set of actors all of whom are not permitted to use any such items by the State whose jurisdiction applies, including under the provisions of article 6. Sometimes exporting or importing State authorities may incorrectly treat a customer as the ‘ultimate’ or ‘final’ end user, when in fact that customer will transfer the item onwards. Multilateral efforts have been made to develop common procedures to help verify the ‘stated’ end user and other parties involved in the transfer and to authenticate end-user documentation, as well as to specify the end user’s obligations, but there is no precise internationally agreed definition of ‘end user’, and deliveries to the ‘stated end user’ are not always checked to prevent or

⁶⁴ Art. 31, Vienna Convention on the Law of Treaties, provides that “The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes ... any relevant rules of international law applicable in the relations between the parties”.

detect diversion.⁶⁵ End-user certificates and their authentication at the licensing stage should play a central role in addressing diversion. Nevertheless, using end-user certificates should not substitute for a complete risk assessment of the situation in a particular case.⁶⁶

An 'unauthorized end user' could refer to a State agency, armed group, an individual or corporate entity that has not been specifically authorized by a competent national authority of an exporting or importing State, through licensing arrangements and end-use undertakings, to possess, carry or use the arms in lawful activities during operations or training, or to retransfer the arms to a third party. For example, exporting States typically require a specific written 'no re-export' commitment or undertaking from an importing State to guarantee that the authorized end user will not retransfer or re-export the items to a third party, especially if the equipment is considered 'sensitive'. In many cases such no-export clauses take the form of an absolute ban on re-exports or an undertaking not to retransfer without the prior written authorization of the original exporting State.⁶⁷

The denial of a specific end-user authorization can result from a transfer authorization being prohibited under article 6 or by it being subject to a denial under article 7 or article 11. The trigger

may be that the ATT State Party potentially involved in the transfer is obliged to comply with a binding treaty provision. Prohibited end users include those who are denied authorization to possess, carry, use or trade the arms in any way because of compliance with international sanctions measures, especially arms embargoes imposed by the Security Council.

For example, under article 6(1), before an ATT State Party can agree to authorize a potential transfer of conventional arms or related materiel covered by the Treaty, its national authorities must be certain that any export, import, transit, trans-shipment or brokering activity due to take place within its jurisdiction will not result in the arms being transferred, even indirectly, to an end user falling under a mandatory United Nations arms embargo or similar Security Council sanctions measure, even if that end user is 'authorized' by the importing State to receive and use the arms or related items.⁶⁸ Under articles 25 and 41 of the Charter of the United Nations, all Member States have a legal obligation to comply strictly with arms embargoes enacted by the Security Council and a duty to implement measures to ensure that persons within their jurisdiction also comply with the embargoes. Examples of United Nations arms embargoes are those that were imposed fully on a State and its territory, or partially on a non-State entity, in Afghanistan,⁶⁹ the Democratic Republic of the Congo,⁷⁰ the Islamic Republic of

⁶⁵ Conflict Armament Research, "Diversion Digest Issue 02", 2019; UNIDIR, "A Menu of Options to Enhance Common Understanding of End Use/r Control Systems to Strengthen their Role in Preventing Diversion", 2019; UNIDIR "Enhancing the Understanding of Roles and Responsibilities of Industry and States to Prevent Diversion", 2019; 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, 2008.

⁶⁶ European Union, Users Guide to the Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment, as endorsed by the Council ("General Affairs") on 16 September 2019, section 7.

⁶⁷ Conflict Armament Research, "Diversion Digest Issue 02", 2019, pp. 17-18

⁶⁸ For interpretations of article 6, see Clare da Silva and Penelope Nevill, "Article 6. Prohibitions", in Clare da Silva and Brian Wood (eds), *Weapons and International Law: the Arms Trade Treaty*, 2015, pp. 88-115. Stuart Casey-Maslen, Andrew Clapham and Gilles Giacca, "Article 6. Prohibitions", in Andrew Clapham et al. (eds), *The Arms Trade Treaty – A Commentary*, 2016, pp. 178-243. International Committee of the Red Cross, *Understanding the Arms Trade Treaty from a Humanitarian Perspective*, 2015.

⁶⁹ Security Council resolutions 1067 (1996), 1333 (2000), 1363 (2001) and 1390 (2002).

⁷⁰ Security Council resolution 1533 (2004) concerning the Democratic Republic of the Congo, which was modified.

Iran,⁷¹ Iraq,⁷² Somalia,⁷³ Sudan,⁷⁴ the Central African Republic,⁷⁵ Libya,⁷⁶ Yemen⁷⁷ and others.⁷⁸ States must cooperate with investigations by United Nations experts, where they exist, and help to identify actors, whether agencies, armed groups individuals or companies, that may be involved in violating a United Nations arms embargo. In some cases, the Security Council has established exemptions from an arms embargo on a particular State in order to allow the government to receive certain types of arms, related material or services for national law enforcement and to support peace agreements but only under certain specified conditions, including compliance with non-retransfer rules and procedures of prior notification to the relevant Sanctions Committee for States proposing to transfer such material. This is the case, for example, with South Sudan.⁷⁹ In such cases the importing State is under an obligation to cooperate with the Sanctions Committee regarding post-delivery security and the prevention of diversion.

However, it is reported that many States have not made the violation of a United Nations arms embargo a criminal offence under domestic law. According to one analysis in 2012, for example, overall only

29% of African States and 39% of American States had reported making illegal trade in small arms and light weapons a criminal offence.⁸⁰ National legislation also confers 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.⁸¹

The Security Council acting under Chapter VII of the Charter of the United Nations has also imposed specific sanctions on particular end users such as aviation restrictions, financial restrictions and travel restrictions on particular entities, and established a number of international tribunals to prosecute persons responsible for international crimes. ATT States Parties are forbidden under article 6(1) as well as under the Charter of the United Nations from authorizing a State agency, corporate entity, or individual within their jurisdiction to engage in an activity relating to an arms transfer, directly or indirectly, to an entity that would involve a breach of Security Council sanctions measures, whether acting as a trader, broker, transporter or financier, including a person or entity being prosecuted or having been convicted under Security Council measures for international crime. For example, resolution 2253 (2015)

71 Security Council resolution 2231 (2015) on the Islamic Republic of Iran eased many prohibitions imposed in resolution 1929 (2010) to enable the Republic to pursue an exclusively peaceful nuclear programme.

72 See Security Council resolutions 661 (1990), 687 (1991), 1483 (2003), and 1546 (2004) on Iraq.

73 Originally imposed on Somalia by Security Council resolution 751 (1992), then amended through resolutions 1356 (2001), 1425 (2002), 1725 (2006), 1844 (2008), 2093 (2013), 2111 (2013), 2142 (2014), 2244 (2015), and 2498 (2019).

74 Security Council resolution 1591 (2005) concerning the Sudan.

75 Security Council resolution 2127 (2013) concerning the Central African Republic.

76 Security Council resolutions 1970 (2011), 1973 (2011), 2009 (2011), 2095 (2013) and 2174 (2014) on Libya.

77 Security Council resolutions 2216 (2015) and 2140 (2014) on Yemen.

78 A full list of arms embargoes in force is available at <https://www.un.org/securitycouncil/sanctions/information>. This includes Somalia, ISIL (Daesh), and Al-Qaida, the Islamic Republic of Iran, Iraq, the Democratic Republic of the Congo, the Sudan, the Democratic People's Republic of Korea, Libya, the Taliban, the Central African Republic, Yemen, and South Sudan.

79 The Security Council arms embargo imposed on South Sudan pursuant to resolution 2206 (2015) was amended in resolution 2428 (2018).

80 Aggregate data from States reports to the United Nations on criminalizing involvement in illegal transfers of small arms and light weapons was compiled in Sarah Parker and Katherine Green, *A Decade of Implementing the United Nations Programme of Action on Small Arms and Light Weapons. Analysis of National Reports*, UNIDIR, 2012. pp. 237–361. According to this analysis, for example, overall only 29% of African States and 39% of American States had reported making the illegal trade in small arms and light weapons a criminal offence.

81 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>; United Kingdom, United Nations Act, <http://www.legislation.gov.uk/ukpga/Geo6/9-10/45>; United Kingdom, Export Control Act, <http://www.legislation.gov.uk/ukpga/2002/28/contents>; and United Kingdom, European Communities Act 1972, <http://www.legislation.gov.uk/ukpga/1972/68/contents>.



GENEVA 2017

Participants at the 3rd Conference of States Parties of the ATT, Geneva, 2017.

expanded sanctions to include direct and indirect trade with the Islamic State in Iraq and the Levant and recalled States' obligation to eliminate the supply of weapons to terrorist groups. In resolution 2370 (2017) the Security Council for the first time specifically named a wide range of arms and related materiel—including small arms, light weapons, larger military equipment such as unmanned aircraft systems and their components, as well as improvised components for explosive devices—to strengthen worldwide measures against those groups involved in terrorist acts.

Additionally, the obligations of ATT States Parties under article 6(2) would apply to transnational organized syndicates, which acquire weapons, ammunition, and explosives to conduct their serious criminal activities, sometimes aiding terrorist networks. In this regard, the Convention

Against Transnational Organized Crime (UNTOC) requires parties to establish criminal offences for participation in an organized criminal group, among other things, and to prohibit the supply of firearms, their parts, components and ammunition to such groups. The Firearms Protocol must be read and interpreted together with the Organized Crime Convention, pursuant to articles 12-14 of the Convention. The Convention broadly defines 'organized criminal group' to include a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes" and in order to gain some financial benefit".⁸² The Convention definition of a 'serious crime' is an offence that is "punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".⁸³ The evolution of a criminal into a terrorist and vice versa can also take place at a very informal individual

⁸² Article 2 'Use of Terms', United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000.

⁸³ Ibid.

level, rather than as a result of an agreed plan between two groups, so constant measures of surveillance are necessary to prevent diversion of arms to both types of groups.

In addition, the Firearms Protocol specifically mentions the need to prevent illicitly manufactured and trafficked firearms and related items from being acquired by 'un-authorized persons':

"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. [UN Firearms Protocol, article 6(2); emphasis added]"

Article 6(2) would also apply to prohibitions that ATT States Parties are

obliged to implement under binding regional agreements to which they are also party. For example, member States of the European Union, all of which are now parties to the ATT, are prohibited under this article from authorizing transfers of conventional arms and related items that are in violation of European Union arms embargoes, which include an obligation to prevent indirect transfers that would be diverted to the embargoed entity. Such arms embargoes not supported by Security Council embargoes have been imposed, for example, on Belarus,⁸⁴ Eritrea,⁸⁵ Myanmar,⁸⁶ the Russian Federation,⁸⁷ the Syrian Arab Republic,⁸⁸ and Zimbabwe.⁸⁹ Numerous other sanctions measures adopted by the European Union, such as the freezing of assets against particular persons, would also under ATT article 6(2) prohibit the granting of arms transfer authorizations by European Union member States to such persons.⁹⁰ In addition, the League of Arab States,⁹¹ the Organization for Security and Cooperation in Europe,⁹² the Economic Community of West African States,⁹³ and the States of Central Africa⁹⁴ have agreed prohibitions in the form of arms embargoes and/or general provisions.

⁸⁴ European Union, Council Decision 2012/642/CFSP.

⁸⁵ European Union, Council Decision 2010/127/CFSP.

⁸⁶ The European Union imposed an arms embargo on Myanmar in 1996, modified in Council Decision 2013/184/CFSP.

⁸⁷ European Union, Council Decision 2014/512/CFSP, and amended by Council Decision 2018/964/CFSP.

⁸⁸ European Union, Council Decision 2013/255/CFSP.

⁸⁹ European Union, Council Decision 2011/101/CFSP.

⁹⁰ The current list of European Union sanctions measures can be found at <https://sanctionsmap.eu/#/main>.

⁹¹ In December 2011, the Ministerial Committee of the League of Arab States announced further sanctions including an embargo by its member States on the supply of weapons of all types to the Syrian Arab Republic in response to that government's violent suppression of civilian protests.

⁹² The OSCE requested its participating States to impose an embargo on arms deliveries to forces engaged in combat in the Nagorno-Karabakh area in 1992, in response to the armed conflict between Armenia and Azerbaijan over that area, and the embargo has since remained in place but not all OSCE participating States comply with it.

⁹³ In June 2006, ECOWAS member States agreed to ban small arms and light weapons, ammunition and other related materials from being imported, exported, transferred to mercenaries, armed militia, rebel groups and private security companies, and from being possessed, used and sold by civilians. There are exemptions to the controls, including national authority legislation for possession of small arms by civilians. ECOWAS member States and non-member States can apply to the ECOWAS Commission Executive Secretariat in Abuja, Nigeria, to import or export small arms and light weapons for specific reasons, such as national defence, law enforcement, and peace support operations. Exporters of small arms and light weapons must first have proof from the ECOWAS Commission that no other ECOWAS member State objects to the importation as well as valid end-use documentation provided by the national commission of the ECOWAS State involved in the potential import.

⁹⁴ According to Article 4 of the Central African Convention for the Control of Small Arms and Light Weapons, Their Ammunition and All Parts and Components That Can Be Used for Their Manufacture, Repair and Assembly, which entered into force on 8 March 2017, "States Parties shall prohibit any transfer of small arms and light weapons, their ammunition and all parts and components that can be used for their manufacture, repair and assembly to, through and from their respective territories to non-State armed groups".

4.2 OVERLAPPING OBLIGATIONS TO PREVENT DIVERSION TO UNAUTHORIZED END USE

The concepts of 'illegal use' and 'unauthorized use' of conventional arms are very closely connected to the concepts of 'illegal user' and 'unauthorized user'. In the ATT, articles 6 and 7 largely determine what is meant by 'unauthorized end use'. Clearly the international crimes listed in article 6(3) would not count as 'authorized uses' under any circumstances. Article 6(3) and article 11 would be applied together to deny a transfer when the transferring ATT State Party has knowledge that a potential transfer of arms under consideration would, if authorized, be diverted for use in carrying out any of the international crimes listed in article 6(3). According to the International Committee of the Red Cross and other scholarly commentaries on the ATT, 'knowledge' under article 6(3) would exist when the State potentially involved in the transfer has sufficient and reliable information in its possession providing reasonable and substantial grounds to believe that the arms would be used for any of the listed international crimes.⁹⁵ The use of the phrase "would be used" in article 6(3) rather than "will be used" can plausibly be interpreted to mean that in making its decision a State Party does not necessarily need to have an absolute level of certainty.⁹⁶ When there is readily available and credible information of a prima facie nature in the possession of the transferring State about suspected international crimes that would be perpetrated with such arms if they were transferred and then almost certainly would be diverted, and where there is no

adequate evidence to the contrary, then the State undoubtedly 'has knowledge'.⁹⁷

A parallel approach under ATT articles 6, 7 and 11 is required to prevent arms being used in acts of organized crime. For example, under article 7(1)(b)(iv) 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". The provisions of the UNTOC defining such crimes apply to export assessments in article 7 of the ATT, and also apply to the prohibition under article 6(2) if the ATT State Party is also party to the UNTOC. The transnational crimes apply as well to offences under the Firearms Protocol. Those offences include organizing, directing, aiding, abetting, facilitating or counseling the commission of illicit trafficking in firearms and related items when the offense is committed intentionally.⁹⁸ 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 UNTOC.

Corrupt practices can occur when arms trade transactions are conducted via unregulated or inadequately regulated third parties—an agent, broker or marketing advisor with specialist knowledge and contacts—who might sometimes create a convenient distance between a corruptor and a corrupted individual or entity to hide their

⁹⁵ International Committee of the Red Cross, *Understanding the Arms Trade Treaty from a Humanitarian Perspective*, 2015, pp. 26-29; Clare da Silva and Penelope Nevill, "Chapter 6. Prohibitions", in Clare da Silva and Brian Wood (eds), *Weapons and International Law: the Arms Trade Treaty*, 2015, pp. 88-115; and Stuart Casey-Maslen, Andrew Clapham and Gilles Giacca, "Article 6. Prohibitions", in Andrew Clapham et al. (eds), *The Arms Trade Treaty – A Commentary*, 2016, pp.178-243.

⁹⁶ International Committee of the Red Cross, *Understanding the Arms Trade Treaty from a Humanitarian Perspective*, 2015, pp. 27-28

⁹⁷ This is reflected in the Interpretive Declaration Switzerland made when it ratified the ATT, namely that: "It is the understanding of Switzerland that the term 'knowledge' in Article 6 paragraph 3, in light of the object and purpose of this Treaty and in accordance with its ordinary meaning, implies that the State Party concerned shall not authorise the transfer if it has reliable information providing substantial grounds to believe that the arms or items would be used in the commission of the crimes listed", <http://www.news.admin.ch/NSBSubscriber/message/attachments/38166.pdf>.

⁹⁸ Firearms Protocol, article 5.



TOKYO 2018

Participants at the 4th Conference of States Parties of the ATT, Tokyo, 2018.

activities and identities. This creates fertile ground for the illegal trade and diversion of arms. Most ATT States Parties are also party to the Convention against Corruption,⁹⁹ and as such are already obligated to undertake anti-corruption measures and are required to establish corruption and bribery as criminal offences in national law. A range of measures are set out in the Convention, as well as in other multilateral and regional instruments to prevent corruption.¹⁰⁰ Article 6(2) requires States Parties to apply these anti-corruption obligations to transfers of conventional arms and related items and strengthens article 15(6) of the ATT, which reads: “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”.

The intended recipient of arms could be a named ‘importer’ that acts on behalf of a ‘purchaser’ or a ‘dealer’ whose ‘end use’ is stated as buying and selling small arms to the general public, for example as a registered gun dealer would do. The dealer might be treated as an ‘end user’ if the end-use documentation accompanying the export authorization specifies that dealer as the authorized recipient. Thus, States need to differentiate between ‘end users’ and ‘final end users’ or ‘ultimate end users’. The official terms ‘final end user’ or ‘final recipient’ that have entered the lexicon of end-user documentation for arms export control constitute an attempt to differentiate the ultimate owner and user of the items from the ‘consignee’ or ‘import agent’.¹⁰¹

⁹⁹ Convention against Corruption, adopted by the General Assembly in resolution A/RES/58/422, 31 October 2003.

¹⁰⁰ See United Nations Office on Drugs and Crime, *Legislative Guide to the Convention Against Corruption*, 2003, p. 30, which states that “the anti-corruption requirements for public procurement mentioned are only the minimum required by the Convention”.

¹⁰¹ 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, 2008. pp. 8-12, 33 and 43-44

4.3 OBLIGATIONS TO PREVENT DIVERSION TO 'THE ILLICIT MARKET' OR IN 'ILLICIT TRAFFICKING'

In relation to the diversion of conventional arms, the ATT mentions the terms 'illicit trade', 'illicit trafficking', 'illicit supply', 'illicit brokers', and 'illicit activities and actors'. However, the exact relationship of such illicit trading activities to diversion is not made clear, other than the single reference in the ATT preamble to "diversion to the illicit market, or for unauthorized end use and end users". A reasonable assumption is that the term 'illicit market' was included to denote what in reality are a variety of illicit acts in many markets and commercial activities at the global, regional, national and even local levels, each facilitating trade in different types of conventional arms and related items, as well as a range of services that facilitate that trade.

The General Assembly recognized in the 1990s that it is small arms, light weapons, and their ammunition in particular that are most frequently traded, circulated and diverted illicitly because they are easy to conceal.¹⁰² Likewise, to prevent acts of terrorism, the Security Council has, for example, recognized the need for States "to undertake appropriate measures consistent with international law to address illicit trafficking in small arms and light weapons"

and "to exercise effective control over the production, export, import, brokering, transit or retransfer of small arms and light weapons within their areas of jurisdiction" including to address looting and acquiring such weapons from national stockpiles.¹⁰³ The Security Council urged States to 'fully implement' the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, which includes almost identical wording.¹⁰⁴ The Programme of Action also commits States to ensure national measures prevent the 'diversion to unauthorized recipients', but does not include a definition of 'diversion', or spell out the forms it can take. Nevertheless, the Programme of Action calls upon States to take into account the risk of diversion before authorizing an export,¹⁰⁵ and recommends the use of authenticated end-use documentation. The Programme of Action makes no mention of 'diversion' in relation to 'illicit manufacture', 'illicit transfer', 'illicit circulation', 'illicit trade', 'illicit export, import, transit and retransfer', 'illicit trafficking', and 'illicit brokering'. Likewise, the International Tracing Instrument on small arms and light weapons¹⁰⁶ provides a definition of 'illicit small arms and light weapons' but it does not define diversion or consider the forms diversion that can take.

¹⁰² General Assembly resolution 50/70 B of 12 December 1995, entitled "Small Arms"; see also the Guidelines for International Arms Transfers in the Context of General Assembly resolution 46/36 H of 6 December 1991, Report of the Disarmament Commission, General Assembly Official Records, Fifty First Session Supplement No 42 (A/51/42) 1996, para. 28, <https://www.un.org/disarmament/wp-content/uploads/2019/09/A-51-42.pdf> which was welcomed by General Assembly resolution A/RES/51/45 N of 10 December 1996, <https://undocs.org/A/RES/51/45>.

¹⁰³ Security Council resolution 2370 (2017), paras. 5–7.

¹⁰⁴ Security Council resolution 2370 (2017), para 9; and the Programme of Action, adopted 21 July 2001. See Report of the United Nations Conference on Illicit Trade in Small Arms and Light Weapons in All Its Aspects, document A/CONF.192/15, 20 July 2001, § II, para. 2.

¹⁰⁵ The Programme of Action, § II, paras. 11–12, under measures at the national level, which refers to the "risk of diversion into the illegal trade" when authorizing the export of small arms and light weapons, commits Member States: "To assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law, taking into account in particular the risk of diversion of these weapons into the illegal trade. Likewise, to establish or maintain an effective national system of export and import licensing or authorization, as well as measures on international transit, for the transfer of all small arms and light weapons, with a view to combating the illicit trade in small arms and light weapons"; and "To put in place and implement adequate laws, regulations and administrative procedures to ensure the effective control over the export and transit of small arms and light weapons, including the use of authenticated end-user certificates and effective legal and enforcement measures". [Emphasis added.]

¹⁰⁶ International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons, 8 December 2005.

The reference to illicit ‘international trafficking routes’ in article 11(5) of the ATT is closely related to ‘diversion’ insofar as both are associated with organizing the physical movement of controlled goods from one territory to another as well as conducting illegal commerce across jurisdictions. However, they are not necessarily the same activity, as diversion additionally involves the act of redirecting or misappropriating the arms. The Firearms Protocol includes a legal definition of ‘illicit trafficking’ as follows:

“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.”¹⁰⁷

The Protocol includes movement and acquisition, but while it focuses on the reciprocal national authorization of import and export of the items and on the adequate marking of firearms at the point of import and export, it does not specifically address the act of redirecting the movement. The transit States have, at a minimum, to give notice in writing, prior to shipment, that they have no objection to the transit, and the Protocol also requires States Parties to take appropriate ‘security’ measures “to detect, prevent and eliminate

the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition”.¹⁰⁸ Here the term ‘diversion’ has a specific meaning in the Protocol that the drafters thought could not be subsumed under ‘illicit trafficking’. Also, the phrase ‘theft, loss or diversion’ implies that, for the drafters of the Protocol, acts of diversion were not quite the same as theft or loss. This is also indicated in the Inter-American Convention on illicit trafficking, which refers to ‘necessary measures’ to ‘eliminate loss or diversion’ of such items imported into, exported from, or in transit through their respective territories.¹⁰⁹ Again, a sufficiently precise meaning is not given to differentiate ‘diversion’ from loss or trafficking. What then is unique about ‘diversion’?

4.4 TAKING ACCOUNT OF THE ‘LIFECYCLE OF THE TRANSFERRED WEAPONS’ AND THE ‘TRANSFER CHAIN’

It is significant that the CSP sub-working group on diversion has acknowledged that, in general, “diversion can take place at any stage in the life cycle of a weapon” and that the objective of preventing diversion “includes in-transfer diversion as well as diversion of items after they have been delivered (i.e. post-delivery diversion).”¹¹⁰ How does ‘the lifecycle of the weapon’ affect diversion in the transfer chain’ under the ATT framework?

¹⁰⁷ 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*, 2011, pp.4-5. 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”.

¹⁰⁸ Firearms Protocol, article 11.

¹⁰⁹ Inter-American Convention on the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and Other Related Materials, 1997, § VIII [Security measures].

¹¹⁰ Working Group on Effective Treaty Implementation, Chair’s Draft Report to CSP4, document ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep, 20 July 2020, para. 11.

ATT article 11(4), (5) and (6) each refer to measures to address “diversion of *transferred* conventional arms” [emphasis added], that is, after delivery. However, the obligation to prevent diversion begins before shipment and delivery. Export assessments by States Parties prior to any decision to authorize a potential export need to consider the timeline of diversion risks lasting into the future. Given the longevity of different types of weapons, an exporting ATT State Party should consider the institutional framework of governance of the recipient State and whether it is sufficiently effective and stable enough to ensure the ongoing post-shipment security of the transferred arms. Official European Union guidance is that: “It should be kept in mind that diversion can be initiated at various levels, can take place during transfer towards a country and within a country or can involve detour or retransfer to a third “unauthorised” country and/or entity. It can be of possession (end-user) and/or function (end-use). The general question might be asked whether there is a risk of the end-user engaging in activities contrary to the legitimate purpose of the exported goods.”¹¹¹

An important part of export assessments of diversion risks is related to the efficacy of stockpile security and management. Systems of stockpile safety and security have to consider the ‘life cycle of the ammunition/munitions’ and sometimes to the life cycle of ‘parts and components’. The UN Secretary General has drawn attention to this aspect of diversion:

“The challenges posed by the illicit trade in and diversion of small arms and light weapons continue to exacerbate ongoing conflicts and contribute to the outbreak of others... Poor stockpile management, inadequate regulation and cross-border trafficking continue to plague already-fragile settings... panels of experts indicate the continued availability of arms to armed groups in countries under arms embargoes, pointing to the fact that such embargoes are being circumvented in various ways, including through the diversion of national stockpiles.”¹¹²

Destruction of unstable and surplus arms and ammunition is clearly related to ‘the lifecycle of the weapon’ and is the preferred and most economical long-term solution.¹¹³ The phrase “theft, loss or diversion’ used in article 11 of the Firearms Protocol could imply that, for the drafters of the Protocol, acts of diversion were not quite the same as theft or loss.¹¹⁴ However, this restricted use of the term ‘diversion’ is arguably at odds with the reality of stockpile, storage and transport insecurity where organized attacks and thefts form part of the diversion of transferred arms.¹¹⁵ The loss of transferred weapons through neglect of procedures and poor infrastructure also forms part of diversion.¹¹⁶ States have agreed binding instruments in which effective stockpile management, reflecting best practice principles and international technical norms, is a necessary method to prevent the diversion of conventional arms and ammunition/

¹¹¹ User’s Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, as endorsed by the Council (“General Affairs”) on 16 September 2019, section 7.

¹¹² Security Council. Report of the Secretary General on Small Arms and Light Weapons. S/2019/1011 30 December 2019 paras. 9 and 53.

¹¹³ United Nations Secretary General, *Securing Our Common Future – An Agenda for Disarmament*, Office for Disarmament Affairs, New York, May 2018, pp. 44-45

¹¹⁴ The Inter-American Convention on the Illicit Manufacturing and Trafficking of Firearms, Ammunition, Explosives and Other Related Materials, 1997, § VIII [Security measures], also refers to “necessary measures” to “eliminate loss or diversion of such items imported into, exported from, or in transit through their respective territories”. It is no coincidence that the Firearms Protocol was to some extent inspired by the Convention.

¹¹⁵ UNIDIR, *The Role of Weapon and Ammunition Management in Preventing Conflict and Supporting Security Transitions*, 2019.

¹¹⁶ Group of Governmental Experts, “Diversion Typology”, paper submitted on behalf of the Chair, document GGE/PACAS/2020/3, 10 February 2020; for background, see Geneva International Centre for Humanitarian Demining, *Towards Security, Peace and Sustainable Development: The State of Play in Safe and Secure Management of Ammunition*, 2018.

munitions, including already transferred conventional arms.¹¹⁷ It can therefore be considered that instances of diversion of arms and related items do occur 'during their life cycles' at vulnerable points along their 'chain of transfer' from locations of manufacture and export, transport modalities and shipment, post-delivery storage, operational end uses and disposal.¹¹⁸

Taking into account the ordinary uses of the term 'diversion'¹¹⁹—as used in the ATT and in binding and universal instruments directly related to the ATT, as well as the definition in commerce and narcotics control—ATT States Parties could reasonably assume that the diversion of an arms transfer involves one or more of the following: (a) redirecting the authorized physical movement of an item away from its authorized recipient; (b) rendering a transfer insecure during or after its delivery, resulting purposely or recklessly in its illicit appropriation; (c) Illicitly exchanging the item for power, money, barter, gifts or another benefit or favor. The term 'illicit appropriation' has a wide meaning that, arguably, could include loss and theft of transferred items. Both national and international law are applicable. This is consistent with the view affirmed in the General Assembly, endorsing that of the Disarmament Commission, 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."¹²⁰

¹¹⁷ For example, art. 3(b) of the Protocol on Explosive Remnants of War encourages States Parties to apply best practice norms and operating procedures with respect to storage, transport, field storage, and handling when clearing and disposing of such ordnance; among regional treaties, art. 16 of the Economic Community of West African States Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (2006) and art. 16 of the Central African Convention for the Control of Small Arms and Light Weapons, their Ammunition and all Parts and Components that can be used for their Manufacture, Repair and Assembly (2010) both provide specific standards and procedures for stockpile management, storage and security.

¹¹⁸ For typologies of diversion, see Group of Governmental Experts, "Diversion Typology", paper submitted on behalf of the Chair, document GGE/PACAS/2020/3, 10 February 2020 and Conflict Armament Research, "Diversion Digest Issue 01", 2018.

¹¹⁹ Vienna Convention on the Law of Treaties, art. 31 [General rule of interpretation].

¹²⁰ United Nations Disarmament Commission's guidelines on international arms transfers, May 1996, <https://www.un.org/disarmament/wp-content/uploads/2019/09/A-51-42.pdf#page=14>.



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NEW YORK 2013

Foreign Ministers and Ambassadors sign the Arms Trade Treaty at United Nations headquarters in New York, USA.

CONCLUSION

The diversion of international transfers of conventional arms and related items is a complex phenomenon, and its repeated occurrence poses a significant threat to peace and security in many countries. States Parties to the ATT have therefore accepted particular obligations to prevent, detect and eradicate the diversion of conventional arms transfers, including of arms already transferred.

The absence of a coherent single definition or description of 'diversion' in the international instruments relevant to the illicit arms trade makes the interpretation and implementation of ATT measures to address diversion difficult. Nevertheless, from the analysis in this paper, the following key elements would appear to be highly relevant to formulating a general description of the diversion of arms transfers for the purposes of implementing the ATT:¹²¹

- a. Diversion, for the purposes of the ATT, is the rerouting and/or the appropriation of conventional arms or related items contrary to relevant national and/or international law leading to a potential change in the effective control or ownership of the arms and items.
- b. Such diversion can easily occur if the items enter an illicit market, or when redirected to an unauthorized or unlawful end user or for an unauthorized or unlawful end use.

- c. The rerouting and misappropriation of the items can take place at any point in the transfer chain, including the export, import, transit, transshipment, storage, reactivation or retransfer of the items.
- d. The transaction chain facilitating a change of effective ownership and/or control can involve various forms of exchange, whether directly negotiated or brokered—grant, credit, lease, barter, and cash—at any time during the lifecycle of the items.

Article 11(1) of the ATT sets out the benchmark obligation requiring that each State Party involved in the 'transfer' of conventional arms 'shall take measures to prevent their diversion'. The types of obligations and related measures suggested in article 11, and the main interlocking provisions to which they relate in the ATT, can be categorized as:

- obligation to prevent the diversion of transfers;
- obligation to assess risk and establish mitigation and prevention measures;
- obligation to detect, investigate and enforce measures; and
- obligation to share appropriate information and cooperate on effective measures.

ATT provisions closely related to and reinforcing article 11 have interlocking obligations to regulate key aspects of the

¹²¹ The author is grateful to Peter Danssaert for discussion of these elements.



CANGUN 2015

Participants at the First Conference of States Parties of the Arms Trade Treaty in Cancun, 2015.

transfer chain. These are article 2 (Scope), article 5 (General Implementation), article 6 (Prohibitions), article 7 (Export and Export Assessment), article 8 (Import), article 9 (Transit and Trans-shipment) and article 10 (Brokering). Other provisions that also contain obligations and measures essential to address diversion in the transfer chain are article 12 (Record-keeping), article 13 (Reporting), article 14 (Enforcement), article 15 (International Cooperation) and article 16 (International Assistance). All of the obligations in these ATT articles are essential to prevent, detect and eradicate diversion.

Despite the omission of ammunition/munitions or of parts and components from article 11, the transfer of those items is covered by the prohibitions set out article 6. Those include, firstly, the obligation to implement measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes, which are usually designed to prevent not only the *direct supply* of arms and related materiel to specific embargoed destinations and actors, but also their *indirect supply*, as may occur through diversion. Secondly, article 6 requires each ATT State to respect relevant international

obligations in international agreements to which each it is a party, and a number of those obligations relate directly to preventing the diversion of arms to unauthorized end uses and end users and to the illicit market. Thirdly, when an ATT State is potentially involved in any aspect of a transfer covered by article 2(2) and it has sufficient and reliable information in its possession providing reasonable and substantial grounds to believe that the arms if transferred would be diverted and used for any of the listed international crimes in article 6(3), then it is required to take effective steps to prevent that transfer.

Ammunition/munitions covered under article 3 as well as parts and components covered under article 4 are also subject to the ATT export risk assessment and denial obligations set out under article 7. The practical implementation of these export risk obligations by ATT States can assist in preventing the diversion of such items.

Participants at working sessions of the ATT CSPs have considered that diversion can occur during stages of 'the transfer chain', as well as during stages in 'the life cycle of the weapon'. Vulnerable points of diversion along the 'chain of transfer' can occur in locations of manufacture and



export, transport modalities and shipment, post-delivery storage, operational end uses and disposal. While such risks of diversion can hardly ever be zero, States Parties are required by article 11 to take active steps to remove risks of diversion or at least to reduce the risks to an absolute minimum when they may become involved in any type of potential arms transfer activity, including of 'transferred arms'. That can be achieved principally by (a) establishing a robust national control system with a range of pre-shipment, in-shipment and post-shipment measures; (b) rigorously assessing the nature and degree of risk posed in each case by a potential transfer; and (c) taking action to systematically address any remaining risks of diversion through the establishment of specific mitigation and prevention measures.

Establishing and maintaining such systems across many countries requires a sufficiently large investment of time, effort and resources. Well directed international cooperation and assistance is essential to build up such systems to achieve the objects and purpose of the ATT.

Formulating a precise description of the diversion of arms and related items in national legislation could help to ensure

that deliberate and reckless acts of such diversion can be identified, prosecuted and penalized, including with criminal sanctions. All actors who participate in activities related to the transfer of arms, ammunition/munitions, and parts and components should be subject to specific regulations, administrative procedures and legal sanctions in order to ensure that they do not, unwittingly or otherwise, encourage or facilitate acts of diversion.

By identifying the core elements of the ATT legal framework and regulatory system to prevent diversion, the range of available control measures and targeted mitigation measures can be more comprehensive, consistent and effective. This is the subject of the next UNIDIR Issue Briefing paper.¹²²

¹²² UNIDIR, "The Arms Trade Treaty: Key measures to prevent and mitigate the risks of diversion", forthcoming

THE ARMS TRADE TREATY: **OBLIGATIONS TO PREVENT THE DIVERSION OF CONVENTIONAL ARMS**

States Parties to the ATT have accepted particular obligations to prevent, detect and eradicate the diversion of conventional arms transfers. However, the absence of a definition of 'diversion' makes the interpretation and implementation of ATT measures to address diversion difficult. This paper analyzes the inter-locking provisions of the ATT and other relevant instruments, providing key elements to guide the formulation of a general description of the diversion of arms transfers for the purposes of implementing the ATT. This paper is the first in a series of issue briefs released as part of a joint research project by UNIDIR, Conflict Armament Research, Small Arms Survey and the Stimson Center. The objective of the research is to enhance knowledge and facilitate dialogue among States to strengthen shared understanding on the impact of the ATT in addressing risks of diversion, and to identify avenues to further promote effective policies and practices under the Treaty.

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