



# ARMS TRADE TREATY: NATIONAL LICENSING OR AUTHORIZATION SYSTEMS

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*Cover Photo:*

A woman looks at the remains of a body in the Carrefour district of Duékoué, Côte d'Ivoire, April 2011.

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# ARMS TRADE TREATY: NATIONAL LICENSING OR AUTHORIZATION SYSTEMS<sup>1</sup>

## INTRODUCTION

The General Assembly has defined the aim of the Arms Trade Treaty (ATT) as a “legally binding treaty establishing common standards on *the import, export and transfer of conventional arms*” and, amongst other things, for States “to ensure that their national systems and internal controls are at *the highest possible standards* to prevent the diversion of conventional arms from the legal to the illicit market, where they can be used for terrorist acts, organized crime and other criminal activities.”<sup>2</sup> As such, one of the foundations of the ATT must be the requirement of States Parties to take measures to implement a comprehensive system to control the export, import and transfer of conventional arms.<sup>3</sup> Such a comprehensive system should include provisions on:

- Standard elements in national licensing or authorization systems;
- End-use and end-user assurances;
- Delivery verification;
- Simplified procedures;
- Brokering and brokering activities controls;
- Security measures; and
- Criminalisation provisions.

## STANDARD ELEMENTS IN NATIONAL LICENSING OR AUTHORIZATION SYSTEMS

An ATT should ensure that the underlying principle of any national authorization system is that no conventional arms can be imported, exported or otherwise internationally transferred without the awareness and consent of all States involved in the transaction.

States should consider the following elements for incorporation into the national authorization provisions within the ATT:

- *As a general obligation, the ATT should require States Parties to establish or*

*maintain an effective national system of licensing or authorization for the export, import and other international transfers of conventional arms<sup>4</sup>, as well as for measures to regulate international transit and trans-shipment of conventional arms through their territories.<sup>5</sup>*

- *Before issuing an export licence or authorisation, each State Party should verify:*
  - a. that the importing State has issued an import licence or authorization;*
  - b. that the importing State has issued a certified end use/user assurance in relation to the conventional arms that are the subject of the export authorisation;*
  - c. that, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.<sup>6</sup>*
- *Before issuing an export licence or authorization, a State Party should, at a minimum, require from the applicant for the authorization:*
  - a. the name(s), address(es) and domicile(s) of the applicant for the authorization;*
  - b. the name(s), address(es) and domicile(s) of any agents and brokers involved in the export;<sup>7</sup>*
  - c. the name and address of the importer;*
  - d. a detailed description of the type, quantity and value of the items.*
- Before issuing either an export or import licence or authorization, each State Party shall undertake an effective inquiry and meaningful assessment of each authorization application on a case-by-case basis, consistent with the assessment criteria in the Treaty.
- An issued export licence or authorization should contain information that, at a minimum, includes: the place and date of issuance, the date of expiration, the country of export, the country of import, the final consignee; the final end-user and end-use; the authorised exporter, broker, shipper and other intermediaries; the description and the quantity of conventional arms; and where there is transit or trans-shipment, the countries of transit and trans-shipment;
- Prior to the actual export of the conventional arms under licence or authorization, States should consider requiring transport route details from the applicant;<sup>8</sup>

- States Parties should also take all necessary measures to ensure that licensing or authorization procedures are secure and that the authenticity of authorization documents can be verified or validated.
- State Parties involved in an international transfer of conventional arms that is not regulated as an import or export, such as a State-to-State transfer, should ensure the transfer has received prior authorization according to an official procedure and that it is consistent with their rights and obligations under the UN Charter.

The need for full supporting documentation<sup>9</sup> prior to the issuance of an export licence or authorization will facilitate informed decision-making by licensing authorities, increase transparency and help to reduce the potential for corruption and diversion by increasing the levels of disclosure required. The licence or authorization process needs to be set out within a clear legal process both to ensure compliance at the national level and also to properly establish and prosecute a criminal offence should such procedures not be complied with.

As noted by the UN Secretary-General, global patterns of the supply of arms have changed and the use of private intermediaries has increased as outlets have multiplied and commercial markets have become “differentiated”.<sup>10</sup> One way to regulate these various actors is to require the disclosure of all actors, including agents and brokers, involved in a future import export or transfer transaction or service.

## **END-USE/USER ASSURANCES**

The United Nations Security Council has urged Member States “to consistently and responsibly use end-user certificates in their transfers” and “calls on States to establish an effective national end-user certificate system.”<sup>11</sup> The United Nations Secretary General has requested that States that have not already done so establish the necessary legislative or other measures, including the use of authenticated end-user certificates, to ensure effective control over the export and transit of small arms and light weapons.<sup>12</sup> End-user certificates and equivalent documents are also increasingly recognized as an important element in effective enforcement of UN Security Council arms embargoes.<sup>13</sup> Given that the main objectives of the Arms Trade Treaty (ATT) are to enhance responsible international transfers and trade and to prevent diversion, the ATT should include specific provisions on standardised end-use/user assurances.

States should consider the following provisions on end-use/user assurances within the ATT:

- *Before issuing an export licence or authorization, a State Party shall require from the importing State an import authorization and an end-use/user assurance from the State in which the end user is located. End-use/user assurances should be certified and include:*

- a) *The name and address of the exporter;*
  - b) *The name(s) and address(es) of the immediate consignees or purchaser and of the end-user(s) and the country of final destination the name and address of the consignee;*
  - c) *A description of the items, their types and quantities and values;*
  - d) *The specific purpose for which the items will be used.*
  - e) *An undertaking that the items will not be used for purposes other than those declared, or by end users other than those declared, or be diverted to another destination;*
- *States should also consider a provision in the end-use/user assurance attaching terms and conditions on the re-export of the items subject to the import authorization to ensure that re-export is within the terms of the ATT;*
  - *The end-use/user assurance should only be issued under conditions allowing a State Party to establish its authenticity. The ATT could require that end-use/user assurances be issued by a competent national authority on banknote-quality paper bearing a unique serial number.*

## **DELIVERY VERIFICATION**

A key measure to prevent diversion is to ensure that the items declared and authorised in the import, export, transfer and end use documentation have reached their intended destination. Such a delivery verification system makes it possible to verify that the conventional arms have not been diverted en route to its final destination.

States should consider the following provision on delivery verification:

- *The importing State party shall, upon request, inform the exporting State Party of the receipt of the dispatched shipment of conventional arms through the provision of a certified delivery verification certificate. The delivery verification certificate shall contain information that, at a minimum, shall include the name and address of the exporter and the importer, the serial number of the import certificate, a description of the goods, the quantity and value, and the port of arrival, the name of the ship, aircraft or carrier.*

## **SIMPLIFIED PROCEDURES**

The ATT should not exempt certain small arms (for example, sporting or hunting firearms) from its scope of application. A “sporting rifle” can be used not only for sporting purposes but also modified or used for other purposes, including a military one. A “hunting” rifle could have a similar capacity to a military or police rifle.



It is important that such temporary international transfers fall within the scope of the ATT and are subject to measures that ensure the integrity of domestic controls of international transfers of conventional arms, otherwise such conventional arms could be diverted or modified for illegal purposes. States should not allow such items to temporarily exit their borders without ensuring proof of the legal purpose of their use, and also proof that the item returns to its jurisdiction. The ATT could allow States to adopt simplified procedures for the temporary international transfer of strictly limited numbers of conventional arms and related ammunition for verifiably lawful purposes such as hunting, sports shooting, exhibitions or research.

States should consider the following for incorporation into a simplified procedures provision within the ATT:

- *States Parties may adopt simplified procedures for the regulation of temporary international transfer of limited quantities of conventional arms, including firearms and related ammunition for purposes that are verifiably lawful, such as sports shooting, hunting, exhibitions, repairs, evaluation, training, and research.*<sup>14</sup>

## **BROKERS AND BROKERING ACTIVITIES CONTROLS**

Member States of the United Nations General Assembly have consistently underlined their commitment to address “the threat posed by illicit brokering activities”.<sup>15</sup> The General Assembly has expressed its concern “that, if proper measures are not taken, the illicit brokering of arms in all its aspects will adversely affect the maintenance of international peace and security, and prolong conflicts, and could be an obstacle to sustainable economic and social development and result in illicit transfers of conventional arms...” Given the prevalence of brokers and brokering activities in the international arms trade, the ATT should require States to establish a clear legal framework for lawful brokering activities.

States should consider the following for incorporation into a brokering provision within the ATT:

- *Each State Party should establish or maintain an effective national system for regulating the activities of brokers of conventional arms.*<sup>16</sup> *Such a system shall include:*
- *Requiring the registration of brokers operating within their territory;*<sup>17</sup>
- *Requiring written authorization or licensing of each proposed brokering activity;*
- *Requiring applicants for an import and export licence or authorization to disclose to the relevant national authorities the names and locations of brokers involved in the transaction;*
- *Each State Party should also, at a minimum, take effective steps to*

*ensure that brokers in their jurisdiction or control do not facilitate the supply of conventional arms, directly or indirectly, in contravention of a binding UN arms embargo. Illicit brokering should be established as a criminal offence.<sup>18</sup>*

## SECURITY MEASURES

In an effort to prevent the diversion of conventional arms from the legal trade into the illicit market, the ATT should require States Parties to take appropriate security measures. This could include all necessary measures:

- *to ensure the physical security and lawful management of shipments and stocks of conventional arms at the time of their import, export, transfer, transit or trans-shipment through its territory;*
- *to ensure and if necessary increase the effectiveness of national controls of the import, export and other international transfer of conventional arms, including, where appropriate, border controls, and of police and customs transborder cooperation.<sup>19</sup>*

## CRIMINALISATION PROVISIONS

The Treaty should provide for a comprehensive system of international cooperation to control the international movement of conventional arms and ammunition. A basic premise of such a system should be reciprocity, requiring States to provide authorizations to one another before permitting shipments of conventional arms to leave, arrive or transit across their territory. The Treaty should also enable law enforcement officials to track the legal movement of shipments and changes of title and/or control so as to prevent theft and diversion. Such standards will help ensure a level of transparency to assist States Parties to better target illicit international transactions.

These measures need to be enforced through criminal provisions in the Treaty. First, the conduct of illicit trafficking and illicit brokering of conventional arms should be established as “central” offences in the ATT, requiring States Parties to enforce these in accordance with their domestic system of criminal law.<sup>20</sup> These offences should be criminal offences, unless it is a legal person in which case the offence could be a criminal, civil or administrative offence.

States should consider the following for incorporation into the criminalisation provisions within the ATT:

- *States Parties should adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally:*
  - a) *the import, export, transit, trans-shipment, transfer or brokering of conventional arms and ammunition not licensed or authorized in accordance with the terms of the Treaty;*

- *States Parties should adopt such legislative and other measures as may be necessary to establish as a criminal offence the violation of a mandatory arms embargo imposed by the UN Security Council.*
- *States Parties should also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:*
  - a) *subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in the Treaty; and*
  - b) *organising, conspiring, organising, directing, aiding, abetting, facilitating or counselling the commission of an offence established in the Treaty;*
- *States Parties should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law.*

Criminal offences cannot be detected or prosecuted effectively without the appropriate evidence. Therefore the ATT should ensure that the licence or authorisation process is set out within a clear legal process both to ensure compliance at the national level and also to properly establish and prosecute a criminal offence when such procedures are not complied with.

Similarly, the ATT should also include comprehensive articles requiring accurate national record keeping on all transnational shipments and changes of title and/or control of conventional arms. It should also include provisions for the exchange of information between States involved in such movements and transactions. Additionally articles dealing with extradition for commission of offences covered by the ATT, and mutual legal assistance, requiring States to afford each other the greatest possible assistance in investigations, prosecutions and judicial proceedings for ATT offences, will be essential tools for law enforcement under the Treaty.

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<sup>1</sup> Amnesty International wishes to acknowledge the legal analysis and drafting of Clare da Silva in this report.

<sup>2</sup> See UN Resolutions 61/89 and 63/240 (United Nations, "Open-ended Working Group towards an Arms Trade Treaty New York, 13-17 July 2009", New York 20 July 2009, A/AC.277/2009/1)

<sup>3</sup> "*Conventional arms*" should include all types of weaponry, munitions, armaments and related material used for potentially lethal force in military and law enforcement operations, as well as any parts, components and accessories thereof, and machines, technologies and technical expertise for making,

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developing and maintaining those items.

<sup>4</sup> “International arms transfers” involve, in addition to the physical movement of the arms into or from national territory, the transfer of title to and/or control over the arms. “Other international transfers” are those transfers that are not imports or exports and include State-to-State transfers. A change of title and/or control of the arms can occur through international “transactions”, including sales, gifts, loans, leases or the foreign licensing of production of arms. Brokering, transport, storage, security and financial “service providers” often help facilitate international transfers, movements and transactions.

<sup>5</sup> According to the 1996 United Nations Guidelines for International Arms Transfers (endorsed by the General Assembly in A/RES/51/47 B, 10 December 1996), “States should establish and maintain an effective system of export and import licences for international arms transfers with requirements for full supporting documentation” [paragraph 26], and that “in order to help combat illicit arms trafficking, States should make efforts to develop and enhance the application of compatible standards in their legislative and administrative procedures for regulating the export and import of arms.” [paragraph 36]. Given that transit and trans-shipment are different forms of transfer from an export or import and therefore carry a different level of risk this text suggests that States should be required to take “measures” but that would not require the same controls as a licensing or authorisation system. This also reflects the 2001 UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UN Programme of Action), where States undertook “...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.” [Section II, paragraph 11].

<sup>6</sup> This is also the basic premise of the *General requirements for export, import and transit licensing or authorization systems* (Article 10) of the Protocol against the Illicit Manufacturing of and Illicit Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime (Firearms Protocol).

<sup>7</sup> As noted by the UN Secretary-General in 2008, the global patterns of supply of arms has changed and the use of private intermediaries has increased as outlets have multiplied and commercial markets have become “differentiated” (Report of the Secretary General on Small Arms, S/2008/258, paragraph 13) and that “States must assure that the shipments handled through these often complex networks are regulated according to the rule of law” (paragraph 14).

<sup>8</sup> Such details could include: the name(s), address(es) and domicile(s) of air carrier(s) and freight forwarding agent(s) involved in the international transportation of the items; the registration and flag of any vehicle, aircraft or vessel involved in the international transportation of the items; the route to be used and planned stopovers in the international transportation of the items; certification by the air carrier(s) and freight forwarding agent(s) of previous similar international exports by air, land or sea; compliance with existing national legislation or international agreements relating to the transport of weapons by air, land or sea. See also, the Wassenaar Arrangement Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapon through Air Transport.

<sup>9</sup> The 1996 United Nations Guidelines for International Arms Transfers suggests that “States should establish and maintain an effective system of export and import licences for international arms transfers with requirements for full supporting documentation” (Paragraph 26).

<sup>10</sup> See, Report of the Secretary General on Small Arms (S/2008/258) noting that “States must assure that the shipments handled through these often complex networks are regulated according to the rule of law” (paragraph 14).

<sup>11</sup> See, for example, Security Council Presidential Statement S/PRST/2002/30.

<sup>12</sup> See, for example, Secretary General’s Report, Uniting Against Terrorism: Recommendations for a global counter-terrorism strategy, (A/60/825, 2006) and UN Security Council Presidential Statement S/PRST/2005/7.

<sup>13</sup> See for example, S/2007/584 where the Panel of Experts on the Sudan recommended to the Security Council that States supplying arms and military equipment to the Sudan require the Government of the Sudan to provide end-use certification regarding the intended primary location for the use of equipment and supplies.

<sup>14</sup> For a similar provision, see, Article 10, paragraph 6 of the Firearms Protocol.

<sup>15</sup> See, for example, General Assembly Resolution 65/75 (2011) *Preventing and combating illicit brokering activities*.

<sup>16</sup> See for example, General Assembly Resolution 65/75 (2011) *Preventing and combating illicit brokering activities* which states: “concerned that, if proper measures are not taken, the illicit brokering of arms in all its aspects will adversely affect the maintenance of international peace and security, and prolong conflicts, and could be an obstacle to sustainable economic and social development and result in illicit transfers of conventional arms...” and “Calls upon Member States to establish appropriate national laws and/or measures to prevent and combat the illicit brokering of conventional arms and materials, equipment and technology that could contribute to the proliferation of weapons of mass destruction and their means of delivery, in a manner consistent with international law.” See also, Security Council Resolution 1540 (2004) “All states shall develop and maintain appropriate and effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary illicit trafficking and brokering in accordance with their national legal authorities and legislation and consistent with international law.”

<sup>17</sup> For example, in 2002 the UN Security Council called upon States that have not already done so to establish, where applicable, a national register of arms brokers (S/PRST/2002/30).

<sup>18</sup> See, Secretary General report on Small Arms noting that “[C]ontemporary traders, agents, brokers, shippers and financiers may well combine some of the above activities, making it difficult at times to clearly distinguish small arms trading from brokering. Unquestionably, intermediaries have a growing part to play in meeting States’ security needs. However, States must assure that the shipments handled through these often complex networks are regulated according to the rule of law” (S/2008/258, paragraph 14).

<sup>19</sup> The World Customs Organisation has recommended that States and customs authorities consider designating specific offices/sites for the processing of legitimate shipments of conventional arms in order to enhance control over their transborder movement and “promote the conclusion of Memoranda of

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Understanding between customs and legitimate traders, such as manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms to strengthen controls and increase accountability (WCO International Cooperation Council recommendations regarding the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the UN Convention against Transnational Organised Crime, 29 June 2002) This recommendation was also cited in the Secretary General's Report on Small Arms, S/2008/258, paragraph 55. The International Civil Aviation Organisation, the International Maritime Organisation and non-governmental industry associations (for example the International Air Transport Association) set out standards for the conduct of their members and for the transfer of dangerous cargoes, including consignments of ammunition and explosives.

<sup>20</sup> States who have obligations under other treaties, including the Convention Against Transnational Organised Crime and the Convention on Corruption should work to ensure that the mandatory crimes included within those texts (See, for example, Article 17 "*Embezzlement, misappropriation or other diversion of property by a public official*") are applied to activities and actors pertaining to the international movement of conventional arms and ammunition.

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