



# **BANKS, ARMS AND HUMAN RIGHTS VIOLATIONS**

**AMNESTY  
INTERNATIONAL**



Amnesty International Luxembourg Publications

First published in 2016 by Amnesty International Luxembourg  
Amnesty International Luxembourg  
23, rue des Etats-Unis  
L-1019 Luxembourg  
Luxembourg

[www.amnesty.lu](http://www.amnesty.lu)

© Amnesty International Luxembourg Publications 2016  
Original language: English  
Printed by Amnesty International Luxembourg, Luxembourg  
ISBN: 978-99959-895-0-7

All rights reserved. This publication is copyright, but may be reproduced by any method without fee for advocacy, campaigning and teaching purposes, but not for resale. The copyright holders that all such use be registered with them for impact assessment purposes. For copying in any other circumstances, or for reuse in other publications, or for translation or adaptation, prior written permission must be obtained from the publishers, and a fee may be payable. To request permission, or for any other inquiries, please contact [e-mail@amnesty.lu](mailto:e-mail@amnesty.lu)

Cover photo: © REUTERS/Thaier Al-Sudani

Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

**AMNESTY  
INTERNATIONAL**



# CONTENTS

EXECUTIVE SUMMARY .....	5
AMNESTY INTERNATIONAL'S POSITION ON ARMS .....	11
FOREWORD .....	12
INTRODUCTION .....	13
I. OBJECTIVES AND METHODOLOGY OF THIS REPORT .....	16
A.    OBJECTIVES .....	16
B.    METHODOLOGY .....	17
1.    The case of Luxembourg: a local illustration of a global problem .....	17
2.    Presentation of the banks in the sample .....	19
3.    Conduct of the research .....	21
II. LEGAL FRAMEWORK APPLICABLE TO ARMS-RELATED FINANCIAL ACTIVITIES .....	22
A.    DOMESTIC PROVISIONS EXPRESSLY PROHIBITING SPECIFIC ARMS-RELATED FINANCIAL ACTIVITIES .....	22
1.    Prohibition of financing cluster munitions and explosive submunitions .....	22
2.    Prohibition of financing arms for use in terrorism .....	23
B.    INTERNATIONAL LEGAL FRAMEWORK FOR RESPONSIBILITY WITH RESPECT TO ARMS-RELATED FINANCING ACTIVITIES .....	28
1.    International legal framework for Luxembourg state's responsibility for arms-related human rights violations and crimes .....	29
2.    International legal framework for banks' responsibility for arms-related human rights violations and crimes .....	30
3.    Arms-related financial activities prohibited by international law .....	33
III. KEY FINDINGS AND RECOMMENDATIONS .....	36
A.    KEY FINDINGS OF THE RESEARCH .....	36

1.	Domestic Luxembourg legal framework on arms-related financial activities is incomplete	36
2.	A lack of transparent arms sector policies and procedures has been identified .....	37
3.	Banks often have an incomplete understanding of their legal obligations and human rights responsibilities.....	37
4.	Significant gaps in internal detection and monitoring procedures for arms-related transactions have been identified.....	38
B.	RECOMMENDATIONS TO THE LUXEMBOURG STATE .....	40
1.	Strictly prohibit financial activities related to illegal arms and arms destined to illegal use .....	40
2.	Take all appropriate measures to ensure the effective implementation and enforcement of such prohibition .....	42
C.	RECOMMENDATIONS TO BANKS.....	44
1.	Commit to stop all activities related to illegal arms or arms destined to illegal uses.....	44
2.	Ensure efficient implementation of such commitment through internal control procedures.....	45
3.	Impose binding contractual requirements to clients and suppliers .....	46
	CONCLUSION .....	47
	APPENDIX 1 – OVERVIEW OF THE LEGAL FRAMEWORK APPLICABLE TO ARMS .....	48
A.	GENERAL PROVISIONS ON THE USE OF ARMS .....	48
1.	International human rights law .....	48
2.	International humanitarian law .....	50
3.	International criminal law .....	54
B.	LEGAL STANDARDS ON SPECIFIC TYPES OF ARMS.....	56
1.	Weapons of mass destruction (WMD) .....	56
2.	Conventional arms.....	59
	APPENDIX 2 – INFORMATION GATHERED FROM THE BANKS .....	65
	APPENDIX 3 - GLOSSARY.....	77

# EXECUTIVE SUMMARY

On average at least half a million people die every year and millions more are injured, raped and forced to flee from their homes as a result of the poorly regulated global trade in arms and munitions. The proliferation of arms and their uncontrolled distribution is a continuing threat that no country can escape, whether this violence is inflicted by state armed forces, non-state armed groups or civilians.

In order to counter this threat, a legal framework has been developed over years, at international and domestic level, in order to regulate arms-related activities and to prohibit certain types of arms or certain uses of arms.

Under these rules, there are:

- Arms which use is prohibited and therefore are *per se* illegal (e.g. chemical weapons, cluster munitions). They are prohibited on a permanent basis and under any circumstances;
- And arms which may not be *per se* prohibited (e.g. AK-47 “Kalashnikov” rifle) but which use in specific circumstances may contribute to the commission of illegal purposes such as human rights violations, violations of international humanitarian law or crimes under international law.

Banks and other financial institutions have a crucial role to play as financial and investment decision-makers. Financing and investment, which are the core activities of financial institutions, are not neutral activities. They shape and facilitate economic activity, including in the arms sector.

Moreover, banks also have a key part to play as controllers of financial transactions transiting through them.

That is why Amnesty International (hereafter “AI”) decided to analyse the role of the financial sector in arms-related activities through the specific case of the Luxembourg banking sector as it is emblematic: Luxembourg is a major European and world financial centre and, as will be discussed in this paper, has a complex and somewhat ambiguous position on the question of arms.

## A. OBJECTIVES AND METHODOLOGY

The research had three objectives:

- Analyse the **legal framework** currently applicable to banks operating in Luxembourg with respect to arms-related activities and determine how it could be improved;
- Analyse which measures have been taken by the **Luxembourg state** in order to ensure the effective implementation of such legal rules to banks;

- Analyse whether **banks** operating in Luxembourg have, at their level, defined policies and procedures in order to avoid involvement in the financing of illegal arms or arms with illegal end-use.

Because of the large number of banks and financial institutions in Luxembourg, conducting an exhaustive study was impracticable. AI therefore focused on a sample of seven banks which were in 2013 among the top banks operating in the Luxembourg financial centre (in terms of net profit, turnover or number of staff) and were also for the most part international banks.

However, the issues covered by this report do not apply only to Luxembourg. The analysis and conclusions are also to a large extent applicable to other countries.

The purpose of this report is not to determine about whether or not certain banks operating in Luxembourg are actually involved in the financing of illegal arms. Rather, this report focusses on the legal framework in which the banks operate, and on the policies on arms publicly adopted by the banks (when such policies exist) and their procedures for ensuring compliance with said policies.

It is not enough for a bank to say it has decided not to finance such and such illegal arms-related activity. The bank must also effectively comply with its relevant internal implementing procedures and demonstrate that it is doing so consistently.

AI's conclusions are solely based on statements made by the banks in relation to their policies and relevant implementing measures, and on publicly available information; AI is not in a position to confirm whether or not and to what extent these statements are correct.

The purpose of this report is not to deal with the rules and procedures used in the fight against money laundering and financing terrorism (AML/CFT). However, this report will refer to these rules when they are relevant for the analysis of the legal framework applicable to arms-related banking activities.

This report should not be read as a condemnation of the banking sector, whether in Luxembourg or abroad, but rather as an analysis of current rules and practices giving grounds to the promotion of an enhanced regulatory framework on the matter.

AI assessed compliance of the existing Luxembourg legal framework and banks policies on arms on the basis of international law binding upon Luxembourg, international standards relevant to business and human rights, as well as European human rights law and the law of the European Union to which Luxembourg is subject.

Those sources of law provide the legal and normative framework for the use of arms and specific prohibitions on particular types of arms. International law prohibits arms which are of a nature to cause superfluous injury or unnecessary suffering and arms which are by nature indiscriminate. On this basis, international law specifically prohibits *inter alia* biological and chemical weapons, expanding and exploding bullets, anti-personnel landmines and cluster munitions. International law also prohibits the use of arms for undesirable purposes such as violations of human rights, violations of international humanitarian law or commission of crimes under international law. In particular, international humanitarian law prohibits the use of arms to intentionally direct attacks against civilians or conduct indiscriminate (attacks of a nature to strike military objectives and civilians without distinction) and disproportionate attacks, which may amount to war crimes. International law also puts a ban on the use of arms destined to commit genocide, crimes against humanity, war crimes or other crimes

under international law.

If the activities which banks support by providing financing or investment turn out to be unlawful or criminal then banks or individuals representing them legally may incur liability. This is especially so if they had the knowledge of the unlawful purpose of those activities. International criminal law has developed a doctrine of aiding and abetting based on which, under specific circumstances, persons can incur liability if they knowingly provided means to commit a crime. Even in the absence of full compliance of the Luxembourg state with certain international obligations, banks still have certain human rights responsibilities. Those responsibilities have been encapsulated, among other things, in the United Nations Guiding Principles on Business and Human Rights (the UNGPs).

## B. KEY FINDINGS

The key findings of the research conducted by AI are the following:

- **Domestic Luxembourg legal framework on arms-related financial activities is incomplete**

With the exception of prohibition of financing activities relating to cluster munitions and financing activities related to arms destined to terrorism, Luxembourg has taken little or no measures to expressly prohibit all financial operations related to illegal arms or arms destined to illegal use.

In this respect, Luxembourg has not fulfilled its international obligations with regards to crimes under international law and serious violations of human rights although it has a responsibility to implement and enforce its international commitments to this respect, and under applicable treaties and international laws may be held liable for not preventing the commission of such crimes and violations.

- **A lack of transparent arms sector policies and procedures has been identified**

AI's research was based on a representative sample of seven top banks operating in Luxembourg. Of the five banks that accepted AI's invitation to dialogue, BGL BNP Paribas and ING Luxembourg were the only ones providing evidence of a written and publicly available document stating their policy on the arms sector.

- **Banks often have an incomplete understanding of their legal obligations and human rights responsibilities**

Even in cases where international commitments are not yet implemented into Luxembourg law, banks operating in Luxembourg should comply with existing international obligations. Indeed, the responsibility for business enterprises to respect human rights is independent from the state's own human rights obligations. The Luxembourg's financial sector should not justify their failure to adopt and put in place the necessary policies and procedures on arms on the basis that domestic legislation on the subject is lacking or incomplete where international laws otherwise provide sufficient guidance on arms financing restrictions. Importantly, in certain circumstances under Luxembourg's criminal law, both banks (as corporations) and their employees (as individuals) could be held liable if they were

found to have provided the opportunity and the means, through financing, for the commission of serious human rights violations and crimes under international law.

- **Significant gaps in internal detection and monitoring procedures for arms-related transactions have been identified.**

The success of any responsible policy on financing and investing in the arms sector requires effective internal control procedures. As a consequence, Know your Client/Client Due Diligence (KYC/CDD) procedures are key to detect and prevent transactions relating to illegal arms or illegal uses of arms. Banks are under domestic applicable laws subject to an obligation to implement thorough due diligence procedures for AML/CFT compliance purposes. Based on the information gathered by AI through the research, and the activities reports of the Finance Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier* -CSSF)<sup>1</sup> on the implementation of AML/CFT procedures in the banking sector, some significant deficiencies in the procedures can be reported. The deficiencies spotted by the CSSF (e.g. inadequate customer due diligence, lack of documentation on the origin of funds, lack of training for employees) tallies with the observations made by AI while conducting this research. These procedural flaws are as prejudicial to the fight against terrorism financing as they are to the fight against financing of other illegal arms unrelated to terrorism. Where the banks have the necessary internal procedures against financing of international terrorism, they can leverage on these procedures to verify that financing is not used for other purposes such as financing of arms in regions where atrocities are committed or destined to end-users who may divert them for prohibited uses.

## C. AMNESTY INTERNATIONAL RECOMMENDATIONS

On the basis of the key findings of this research, AI has made a series of recommendations to improve the legislative framework and practices on financing and investment in arms in the Luxembourg financial sector.

These recommendations are not only addressed to the Luxembourg financial centre, but to the entire financial sector in Europe and the world. This report's recommendations are valid for all countries where legislation is incomplete or non-existent on arms-related financial activities. Luxembourg has already made some progress on this issue by legislating against the financing of cluster munitions.

### ▪ RECOMMENDATIONS TO THE LUXEMBOURG STATE

The Luxembourg state must:

---

<sup>1</sup> Luxembourg banks operate under the supervision of the CSSF which is a public institution which supervises the professionals and products of the Luxembourg financial sector. It supervises, regulates (through regulations and circulars), authorises, informs, and, where appropriate, carries out on-site inspections and issues sanctions. In particular, the CSSF is in charge of ensuring compliance with professional obligations as regards the AML/CTF rules by all persons subject to its supervision.



- **Strictly prohibit financial activities related to illegal arms and arms destined to an illegal use**

Luxembourg must put a ban on all financial activities in relation with illegal arms (i.e. arms which use is prohibited and therefore are *per se* illegal), for instance cluster munitions or chemical arms, or arms destined to an illegal use (i.e. arms used to commit crimes under international law and violations of human rights and international humanitarian law).

Such financial activities include financing through loans and capital market instruments, provision of guarantees, provision of financial services, portfolio management, and any other financial activity undertaken for or on behalf of individuals or legal persons that conduct activities (i.e. develop, manufacture, assemble, convert, modify, repair, acquire, use, possess, hold, transport, stockpile, keep, sell or transfer) relating to an illegal arm or an arm destined to an illegal use, or an essential component of such illegal arm or arm destined to an illegal use.

In order to guarantee its effectiveness, such legislation must provide for criminal sanctions against banks (as legal persons) and individuals performing the activities of the banks, when they knowingly violate the prohibition.

- **Take all appropriate measures to ensure the effective implementation and enforcement of such prohibition**

Luxembourg must take all appropriate legal, administrative and other national measures to ensure the effective implementation and enforcement of the prohibitions, and in particular define professional obligations applicable to banks and sanctions for non-compliance with such obligations.

Appropriate measures should include, without being limited to:

- ***Imposing on banks professional obligations aiming at detecting and preventing transactions related to illegal arms and arms destined to an illegal use***, and in particular the performance of ***human rights due diligence with respect to arms-related transactions***.  
Such measures could leverage on existing AML/CFT rules but should constitute a separate set of rules as their goal exceeds the scope of AML/CFT rules.
- ***Applying criminal and administrative penalties for non-compliance with the above professional obligations.***
- ***Introducing adequate control and supervision procedures***, by appointing a supervisory body (the CSSF).
- ***Closing loopholes in the legislation.***

▪ **RECOMMENDATIONS TO BANKS**

The banks must:

- **Commit to stop all activities related to illegal arms or arms destined to illegal uses**

Banks must publicly commit, through clear written public documents, to stop all financial activities in relation with illegal arms or arms destined to an illegal use

(i.e. arms used to commit crimes under international law and violations of human rights and international humanitarian law).

Such financial activities include financing through loans and capital market instruments, provision of guarantees, provision of financial services, portfolio management, and any other financial activity undertaken for or on behalf of individuals or legal persons that conduct activities (i.e. develop, manufacture, assemble, convert, modify, repair, acquire, use, possess, hold, transport, stockpile, keep, sell or transfer) relating to an illegal arm or an arm destined to an illegal use, or an essential component of such illegal arm or arm destined to an illegal use.

- **Ensure efficient implementation of such commitment through internal control procedures**

Banks must take all the appropriate measures to ensure compliance with international rules prohibiting illegal arms and arms destined to illegal uses, by implementing procedures to detect and prevent illegal transactions. They must enact robust policies and procedures (including human rights due diligence) to ensure that as a result of their business transactions they do not cause or contribute to human rights and international humanitarian law violations or crimes under international law.

KYC procedures and other internal due diligence procedures must be reinforced in order to identify the real economic beneficiaries of arms-related transactions; their intended and actual end-users and end use so as to determine the likelihood of those arms being in fact prohibited under national and international law or their use (no matter if they are prohibited as such or not) resulting in the commission of serious human rights violations or crimes under international law.

To this purpose, it makes sense for Luxembourg-based banks to leverage on the procedures they have already implemented for AML/CFT compliance purposes.

- **Impose binding contractual requirements to clients and suppliers**

Banks must strengthen the contractual obligations they place on the individuals and legal persons with which they do business and make compliance a condition of agreeing to transactions and maintaining a business relationship. Such clauses would impose clear representations and undertakings as to compliance with relevant international laws and treaties on illegal arms and arms destined for illegal uses.

# AMNESTY INTERNATIONAL'S POSITION ON ARMS

AI is a global human rights movement. It campaigns on behalf of victims of violations of these rights, based on impartial research and international law. The organization is independent of governments, political ideologies, economic interests and religion.

For several decades, AI and other organizations, has opposed the sale and transfer of equipment, technologies and skills for military, security and police use, when there is a substantial risk they will be used to commit serious violations of international human rights law and international humanitarian law. AI is neither anti-militarist nor pacifist. AI does not seek the disappearance of the arms industry or to eliminate the military capacity of states. Rather than contesting the legitimate right of states to arm themselves, especially to discharge their duty to protect their individuals, AI calls on them to act responsibly and improve the controls of arms transfers within and beyond their borders so that they comply with their international obligations including international human rights law, international humanitarian law and international criminal law.

In this context, AI works for radical change of the rules and practices that regulate the global arms trade. It campaigned for the Arms Trade Treaty (ATT), which entered into force on 24 December 2014 and regulates international trade in conventional weapons.

# FOREWORD

The report “*Banks, Arms and Human Rights Violations*” is the result of a three-year process, driven by the coordinator of the Business and Human Rights Group of Amnesty International Luxembourg (AIL) whom we would like to thank for her hard work and dedication. We are also grateful to our colleagues from Amnesty International’s International Secretariat, working for the Global Themes & Issues Programme and the Business & Human Rights Team, for their contributions for this report. Finally, we would like to thank the banks, which contributed with information and dedicated their time and personnel to this process.

AIL has worked in good faith to provide factual information about banks and government policies in relation to arms and human rights violations. Anyway, it welcomes any feedback, comments, clarifications and updates on this report, made with a spirit of dialogue and for a continuous search of accurate and reliable information.

David Pereira  
President  
Amnesty International Luxembourg

Stan Brabant  
Director  
Amnesty International Luxembourg

# INTRODUCTION

On average at least half a million people die every year and millions more are injured, raped and forced to flee from their homes as a result of the poorly regulated global trade in arms and munitions. The arms trade is shrouded in secrecy, but the recorded value of international transfers is approaching USD\$100 billion (about €93 billion) annually.<sup>2</sup>

The proliferation of arms and their uncontrolled distribution is a vital issue and a threat to security. No country can escape the threat of armed violence, whether it is inflicted by state armed forces, non-state armed groups or civilians.

In order to counter the threat of armed violence, a legal framework has developed over years, either at international or domestic level, in order to regulate arms-related activities (namely developing, manufacturing, assembling, converting, modifying, repairing, acquiring, using, possessing, holding, transporting, stockpiling, keeping, selling and transferring arms) and prohibit certain types of arms or certain uses of arms.

Under these rules, there are:

- Arms which use is prohibited and therefore are *per se* illegal (e.g. chemical weapons, cluster munition). They are prohibited on a permanent basis and under any circumstances;
- And arms which may not be *per se* prohibited (e.g. AK-47 “Kalashnikov” rifle) but which use in specific circumstances may contribute to the commission of illegal purposes such as human rights violations, violations of international humanitarian law or crimes under international law.

Illegality of arms or uses of arms depends on the legal framework against which it is assessed. Indeed, domestic arms-related legal rules vary from one country to another, and there is also an international set of rules (at global or regional level) which may interact with or supersede domestic provisions.

Arms-related activities, whether these arms are legal or illegal, requires money and therefore the intervention of banks and other financial institutions, which have a crucial role to play not only as financial and investment decision-makers, but also as controllers of financial transactions transiting through them.

Firstly, because of the financial and investment decisions they make, banks have a major influence on shaping certain sectors of the economy, including the arms sector. As the organization PAX<sup>3</sup> noted in its report on investment in cluster munitions, financing and

---

<sup>2</sup> <http://www.amnesty.eu/en/news/press-releases/eu/arms/arms-trade-treaty-marks-historic-breakthrough-for-human-rights-after-two-decade-campaign-0831/#.VZF45PIViko> and <https://www.amnesty.org/en/latest/news/2014/09/global-arms-trade-treaty-beginners-guide-th-ratification-update/>

<sup>3</sup> PAX is a partnership between IKV (Interchurch Peace Council) and Pax Christi. Its mission is to “*work together with involved civilians and partners in areas of war, to protect human security, to prevent and end arms violence and to build peace with justice*” ([www.paxforpeace.nl](http://www.paxforpeace.nl)).

providing financial services to companies is not a neutral activity.

*“Financial institutions sometimes regard financing or providing financial services to companies as a neutral activity. But investing in a company clearly supports that company’s objectives by raising the capital it needs to pursue them. In delivering a financial service to a company, a financial institution signifies its approval of this company’s objectives.”<sup>4</sup>*

Secondly, arms-related financial flows transit through banks, which give them a key role in controlling arms-related transactions, including the detection of illegal transactions. Indeed, the transfer of arms, whether legal or illegal, generally involves the participation of many intermediaries (e.g. brokers,<sup>5</sup> financiers, transporters) which are essential to the success of the transactions and blur the traceability of arms-related transactions. For example, Viktor Bout, one of the world’s most influential and important arms traffickers until his arrest, used an amorphous grouping of airlines that he partly or fully owned,<sup>6</sup> which allowed him to secretly organize and conduct the transfers. As another example, the arms trafficking activities of a French national Robert Montoya and his business associates in various countries of West Africa and Europe were documented by the UN Panel of experts investigating violations of the Security Council arms embargo on Cote d’Ivoire. Mr Montoya’s trafficking and brokering network was described in several UN reports between 2005 and 2012.<sup>7</sup>

Unscrupulous intermediaries are able to operate with impunity by taking advantage of the weaknesses and differences between national laws and control regimes. The complexity and opacity of these webs of intermediaries increases the risk of these arms being diverted and used to commit grave abuses under international law. A topical example illustrates this fact. On 13 November 2015, in Paris, France, 130 people were killed and more than 350 injured through a wave of bombings and shooting attacks perpetrated by the armed group calling itself *Islamic State*. Some of the M70 assault rifles used in the attacks had reportedly been produced in Serbia in the 1980s and recycled in the black market of arms after being sent to military stocks during the Balkan war.<sup>8</sup> The lack of transparency, supervision and control of the logistical and financial chain involved in the arms trade facilitates the diversion of arms. It also shows that it is necessary to identify and control the entire chain of intermediaries. The very large sums of money generally involved in arms transfers and the international

<sup>4</sup> In *Worldwide Investments in Cluster Munitions: a shared responsibility* - PAX – 2014.

<sup>5</sup> Definition of arms brokering may slightly vary from one source to another. Under the Grand-Ducal Regulation of 5 August 2015 on the brokering of defence-related products and dual use goods (Mem.A-157, p.3797), are brokering activities: activities of individuals or legal persons (i) negotiating or arranging transactions which may include the transfer, from one third party country to another third party country, of defence-related products, or (ii) acquiring, selling or transferring defence-related products which belong to them, exported from a third-party country to another third-party country, or (iii) exporting defence-related products from their territory to the territory of another member state. Are also targeted auxiliary services such as provision of technical assistance, activities relate to conclusion of lease agreement, contribution, loan or deposit related to the transfer of such products, transportation services, financial services, insurance et reinsurance, advertising and promotion.

<sup>6</sup> On this point, see *Armes de corruption massives – secrets et combines des marchands de canons* – Jean Guisnel – Editions La Découverte – 2011, chapter 8. Victor Bout is currently serving a 25 year prison sentence in the United States.

<sup>7</sup> See “*Communities Shattered by Arms Proliferation and Abuse in Cote d’Ivoire*,” Amnesty International, March 2013, INDEX AFR 31/002/2013 - <https://www.amnesty.org/.../afr310022013en.pdf> ; Final Report of the United Nations Group of Experts, April 2012, S/2012/196.

<sup>8</sup> « Des armes d’ex-Yougoslavie » – Le Monde/Attentats du 13 novembre – [http://www.lemonde.fr/attaques-a-paris/article/2015/11/29/des-fusils-utilises-par-les-auteurs-des-attentats-du-13-novembre-identifies-en-serbie\\_4819855\\_4809495.html](http://www.lemonde.fr/attaques-a-paris/article/2015/11/29/des-fusils-utilises-par-les-auteurs-des-attentats-du-13-novembre-identifies-en-serbie_4819855_4809495.html)

nature of arms transactions lead traffickers to use countries where legislation does not require detailed checks or the submission of financial accounts. The close link between arms trafficking, brokering and illegal financial transactions was highlighted by the United Nations Security Council,<sup>9</sup> which recalled “*with concern the close connection between international terrorism, transnational organized crime, drugs trafficking, money-laundering, other illicit financial transactions<sup>[10]</sup>, illicit brokering in small arms and light weapons and arms trafficking, and the link between the illegal exploitation of natural resources, illicit trade in such resources and the proliferation and trafficking of arms as a major factor fuelling and exacerbating many conflicts (...).*”

For the two reasons mentioned above, AI decided to analyse the role of the financial sector in arms-related activities through the emblematic case of the Luxembourg banking sector.

---

<sup>9</sup> Resolution 2117 of 26 September 2013.

<sup>10</sup> Underlined by the author.

# I. OBJECTIVES AND METHODOLOGY OF THIS REPORT

## A. OBJECTIVES

The research had three objectives:

- Analyse the **legal framework** currently applicable to banks operating in Luxembourg with respect to arms-related activities and determine how it could be improved;
- Analyse which measures have been taken by the **Luxembourg state** in order to ensure the effective implementation of such legal rules to banks;
- Analyse whether the **banks** operating in Luxembourg have, at their level, defined policies and procedures in order to avoid involvement in the financing of illegal arms or arms with illegal end-use.

However, the issues covered by this report are also largely relevant to other jurisdictions than Luxembourg. Most of the Luxembourg banks included in this survey are global banks so the contents of the report apply to their operations at the global level and draw out lessons that can be transposed to other countries. Moreover, many countries have arms-related legal frameworks similar to that of Luxembourg.

The purpose of this report is not to determine about whether or not certain banks operating in Luxembourg are actually involved in the financing of illegal arms. Rather, this report focuses on the legal framework in which the banks operate, and on the policies on arms publicly adopted by the banks (when policies exist) and their procedures for ensuring compliance with policies. It is not enough for a bank to say it has decided not to finance such and such illegal arms-related activity. The bank must also effectively comply with its relevant internal implementing procedures and demonstrate that it is doing so consistently.

AI conclusions are solely based on statements made by the banks in relation to their policies and relevant implementing measures, and on publicly available information; AI is not in a position to confirm whether or not and to what extent these statements are correct.

The purpose of this report is not to deal with the rules and procedures used in the fight against money laundering and financing terrorism (AML/CFT). However, this report will refer to these rules when they are relevant for the analysis of the legal framework applicable to arms-related banking activities.

This report should not be read as a condemnation of the banking sector, whether in Luxembourg or abroad, but rather as an analysis of current rules and practices giving grounds to the promotion of an enhanced regulatory framework on the matter.



## B. METHODOLOGY

### 1. THE CASE OF LUXEMBOURG: A LOCAL ILLUSTRATION OF A GLOBAL PROBLEM

The financing of activities relating to illegal arms or arms with illegal end-use is a global problem.

Why use the example of Luxembourg? Because Luxembourg is a particularly emblematic case, for several reasons:

- **Its status as a major European and world financial centre**

Luxembourg is the second biggest investment centre in the world and the number one centre for private banking in the euro zone. The total number of banks in Luxembourg at the end of 2014 was 144, of which 39 were branches of foreign banks.<sup>11</sup>

- **Its status of member state of the European Union**

Luxembourg was one of the very first member states of the European Community and its legislation exemplifies how legislation of the European Union (EU) about arms may be implemented in member states. In recent years there have been ongoing efforts at the EU level to strengthen and harmonize member states' arms controls policies.<sup>12</sup> The most important examples are the EU standards about arms export control and control of arms brokering.<sup>13</sup> These efforts aimed at preventing the export of military technology and equipment that might be used for undesirable purposes such as internal repression or international aggression, or contribute to regional instability. In particular, they established a notification and consultation mechanism for export licence denials and set criteria for the export of conventional arms. The EU also imposes arms embargoes legally binding on all member states, including Luxembourg. Further, the EU has established a regulation covering the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.<sup>14</sup>

To this respect, it is noteworthy that it is only on 5 August 2015 that Luxembourg issued a Grand-Ducal Regulation on the brokering of defence-related products and dual use goods which imposes an authorisation regime on brokering activities and

---

<sup>11</sup> *Luxembourg banking insights 2015* – KPMG – <http://www.kpmg.com/lu/en/issuesandinsights/articlespublications/pages/luxembourg-banking-insights.aspx>

<sup>12</sup> See [http://www.eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index\\_en.htm](http://www.eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm)

<sup>13</sup> Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 8 Dec.2008

<sup>14</sup> Council Regulation (EC) no. 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union*, L200, 30 July 2005. The regulation entered into force on 30 July 2006.

brings Luxembourg regulation on arms brokering in line with European provisions.<sup>15</sup>

- **Its complex and ambiguous position on the question of arms**

Luxembourg has a complex and ambiguous position on the question of arms proliferation.

Luxembourg has played a pioneering role in the struggle against the financing of arms, by becoming one of the few countries in the world to pass legislation forbidding public and private financial institutions from investing in cluster munitions.<sup>16</sup> In addition, the Luxembourg financial market has publicly expressed its determination to avoid involvement in the financing of arms: in 2008, the Association of Luxembourg Banks and Bankers (Association des Banques et Banquiers, Luxembourg, ABBL) and the Association of the Luxembourg Fund Industry (ALFI) declared that “*financing arms has no place in the markets of our financial centre.*”<sup>17</sup>

Moreover, Luxembourg signed the Arms Trade Treaty on 3 June 2013 and ratified it on 3 June 2014. It supported a strong treaty throughout negotiations. Luxembourg was among the first countries to sign the treaty and among the first 50 ratifications that triggered entry into force on 24 December 2014. However, it is only with the Grand-Ducal Regulation on the brokering of defence-related products and dual use goods issued on 5 August 2015<sup>18</sup> that Luxembourg brought its legislation in line with the ATT provisions<sup>19</sup> on this issue of arms brokering, and other implementation measures have not been taken yet.

<sup>15</sup> See in particular:

- **Common Position 2003/468/CFSP on the control of arms brokering** (JOUE, 25 June 2003 n° L 335 of 13 December 2008, p. 99). The stated objective of the Common Position is to control arms brokering in order to avoid the circumvention of United Nations, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the EU Code of Conduct on Arms Exports. To achieve this objective, member states are required “*to establish a clear legal framework for legal brokering activities*” that conforms to the mandatory provisions of the Common Position. The Common Position establishes provisions to be implemented through national legislation, requiring member states to regulate brokering activities on their territory or carried out by their nationals. In particular, it requires member states to subject brokering transactions to licence applications, to establish a system for the exchange of information on brokering activities, and to establish adequate sanctions for effective enforcement.

- **Council regulation 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual use items** (JOUE, 25 May 2009 n° L134).

<sup>16</sup> These countries are Belgium, Ireland, Italy, Liechtenstein, the Netherlands, New Zealand, Samoa, Spain and Switzerland. In addition, at least 27 States Parties and signatories to the Convention on Cluster Munitions have elaborated their view that investment in cluster munition production is a form of assistance that is prohibited by the convention. See <http://the-monitor.org/en-gb/reports/2015/cluster-munition-monitor-2015/cluster-munition-ban-policy.aspx>

<sup>17</sup> ABBL and ALFI opinion on bill 5821 on the “prohibition of the manufacture, sale, acquisition, stockpiling, transport, use and financing of cluster munitions,” 13/06/2008, <http://www.abbl.lu/fr/blog/article/2008/06/avis-de-l-abbl-et-de-l-alfi-sur-le-projet-de-loi-n-5821-visant-l-interdiction-de-la-fabrication-de-la-vente-de-l-acquisition-du-stockage-du-transport-de-l-utilisation-et-du-financement-des-armes-a-sous-munitions-basm>. Original quotation in French: “*le financement des armes n'appartient pas aux créneaux de notre place financière.*”

<sup>18</sup> Op.cit.

<sup>19</sup> For example, article 10 of the ATT states 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*

Luxembourg has not implemented yet all the international commitments it has taken with respect to arms. Luxembourg legislation on arms control still presents worrying inadequacies. Discussion of the bill on the country's intelligence services referred to gaps in its legal system regarding information gathering on arms proliferation and emphasized that *"this is a gap in our legislation that should be filled quickly, because Luxembourg airport is a point of transit for intra and extra-community military arms systems, in particular between Europe and the Middle East."*<sup>20</sup>

Nevertheless, on the political and diplomatic fronts, the Luxembourg foreign minister described the non-proliferation of conventional and nuclear arms as *"two priorities for Luxembourg in terms of conflict prevention."*<sup>21</sup> The ministry's annual report for 2013 states that *"Luxembourg supports the constant search for security and the lowest possible level of arms and is party to all regional and international treaties and conventions in this field."*<sup>22</sup>

For all these reasons, AI decided to approach the complex problem of the financing of arms-related activities by analysing the case of Luxembourg and the role of the banks that have operations in this country.

## 2. PRESENTATION OF THE BANKS IN THE SAMPLE

Given the high number and variety of financial institutions based in Luxembourg, AI restricted its preliminary research to a limited sample of banks falling into the scope of the Luxembourg Law of 5 April 1993 on the finance sector, and representative of Luxembourg's banking sector.

However, as this report analyses the legal framework about arms-related financial activities as a whole, most of the conclusions and recommendations of this report may be applied to the whole financial sector, whether in Luxembourg or elsewhere.

The seven banks contacted in the course of this research were:

- Banque et Caisse d'Epargne de l'Etat, Luxembourg (hereafter "BCEE")
- Banque Internationale à Luxembourg (hereafter "BIL")
- Banque de Luxembourg (hereafter "BdL")
- Banque Raiffeisen (hereafter "Raiffeisen")
- BGL BNP Paribas (hereafter "BNP")
- ING Luxembourg (hereafter "ING")
- KBL European Private Bankers (hereafter "KBL")

---

*authorization before engaging in brokering."*

<sup>20</sup> Bill 6675 on the organisation of state intelligence services. For full details on the proposed legislation, see <http://www.chd.lu/wps/portal/public/RoleEtendu?action=doDocpaDetails&backto=/wps/portal/public&id=6675>

<sup>21</sup> Annual Report 2013, Ministry of Foreign and European Affairs, p.52.

<sup>22</sup> Annual Report 2013, Ministry of Foreign and European Affairs, p.52.

AI chose these banks because of their importance in the Luxembourg financial centre (measured in terms of net profit, turnover and number of staff) and because of their legal status (financial institutions registered under Luxembourg law, limited liability companies registered under Luxembourg law, cooperatives registered under Luxembourg law), with a view to providing as representative a sample as possible of the Luxembourg banking sector. Two sources of information were used to make this choice:

- The list of banks registered in Luxembourg in accordance with the law of 5 April 1993, available on the website of the CSSF;<sup>23</sup>
- KPMG's analysis about Luxembourg banking institutions: "Luxembourg Banks Insights."<sup>24</sup>

On the basis of one or several of these criteria (net profits, turnover and number of staff), all the banks chosen were in 2013 in the top ten of Luxembourg banks, with the exception of Banque Raiffeisen, which was included because of its unique status as a cooperative bank.

Bank alphabetical order	Legal status	KPMG Ranking 2013		
		Turnover	Staff	Assets under management
Banque et Caisse d'Epargne de l'Etat, Luxembourg	financial institution registered under Luxembourg law	4	3	4
Banque Internationale à Luxembourg	limited liability company registered under Luxembourg law	28	2	6
Banque de Luxembourg	limited liability company registered under Luxembourg law	16	10	13
Banque Raiffeisen	cooperative registered under Luxembourg law	22	13	23
BGL BNP Paribas	limited liability company registered under Luxembourg law	5	1	5
ING Luxembourg	limited liability company registered under Luxembourg law	9	8	15
KBL European Private Bankers	limited liability company registered under Luxembourg law	101	5	20

<sup>23</sup> <http://supervisedentities.cssf.lu/index.html?language=fr&type=BNK#ResultResearch>

<sup>24</sup> <http://www.kpmg.com/LU/en/IssuesAndInsights/Articlespublications/Documents/Luxembourg-Banks-Insights-2014-09-05.pdf>. AI used the 2012 and 2013 versions.

### 3. CONDUCT OF THE RESEARCH

AI began by inviting the selected banks to discuss their policy on financing and investing in arms and whether improvements could be made to their policies to bring them into line with existing international law and the changing legislative environment. AI would like to thank those banks that agreed to participate in this study and provide information on their arms policies.

The contents of this report are based on different sources of information:

- Research and analysis of publicly available information including in particular documentation about the legal framework applicable to arms (at Luxembourg domestic level as well as international level) and the Luxembourg financial sector.
- Research and analysis of the information provided by the banks to AI in response to AI's questions, either in writing or verbally.

Only five of the seven banks contacted by AI provided information about their policies on defence and arms, with different levels of details. However, some of the banks who had initially provided information were subsequently unwilling to provide more information related to their internal implementing procedures and their outcomes. The scope of the analysis was therefore limited by the availability of information and by the communications policies of the banks in the sample.

<b>Bank</b> (alphabetical order)	<b>Status</b>
Banque et Caisse d'Epargne de l'Etat, Luxembourg	Replied and met AI.
Banque Internationale à Luxembourg	Expressly refused to meet AI and to take part in the study.
Banque de Luxembourg	First indicated that it wished to take part in the study but did not follow up on invitations to meet, nor on requests for information.
Banque Raiffeisen	Replied and met AI.
BGL BNP Paribas	Replied and met AI.
ING Luxembourg	Provided written responses to AI.
KBL European Private Bankers	Provided some basic information by courier but did not respond to further requests.

Information was gathered in the course of interviews and also via couriers and email correspondence (between February 2013 and March 2015).

As stated above, AI's analysis is based on information provided by the banks themselves and other information publicly available. AI's research did not attempt at this stage to corroborate or ascertain whether this information matches actual investment and financing practices.

The information obtained from the banks is summarized in Appendix 2 of this report. AI submitted to each bank the extracts of this report where it is mentioned.

All sources of information on which AI based its research are mentioned throughout this report.

## II. LEGAL FRAMEWORK APPLICABLE TO ARMS-RELATED FINANCIAL ACTIVITIES

The section below provides an overview of the standards which are applicable to arms-related financial activities carried out by the Luxembourg financial sector, and under which criteria certain arms may be regarded as illegal per se or destined to illegal use.

### A. DOMESTIC PROVISIONS EXPRESSLY PROHIBITING SPECIFIC ARMS-RELATED FINANCIAL ACTIVITIES

There is no Luxembourg law generally prohibiting all financial and investing activities relating to arms, whether these arms are legal or illegal.

However, under Luxembourg law, financing and investing in arms is strictly prohibited in two specific cases:

- When arms are cluster munitions or explosive submunitions;
- When arms are for use in terrorism.

#### 1. PROHIBITION OF FINANCING CLUSTER MUNITIONS AND EXPLOSIVE SUBMUNITIONS

**Cluster munitions**<sup>25</sup> are prohibited by the *Convention on Cluster Munitions* of 30 May 2008,

<sup>25</sup> The Convention provides that “cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
  - (i) Each munition contains fewer than ten explosive submunitions;
  - (ii) Each explosive submunition weighs more than four kilograms;
  - (iii) Each explosive submunition is designed to detect and engage a single target object;
  - (iv) Each explosive submunition is equipped with an electronic selfdestruction mechanism;
  - (v) Each explosive submunition is equipped with an electronic selfdeactivating feature.

The Convention provides that “explosive submunition” means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating

signed on 3 December 2008 and approved by the Luxembourg law of 4 June 2009.<sup>26</sup>

The law of 4 June 2009 prohibits “*all individuals and legal persons from knowingly financing cluster munitions or explosive submunitions.*”<sup>27</sup>

Such law provides that criminal sanctions applicable in case of violation of the prohibition are imprisonment for 5 to 10 years, and/or a fine of 25,000 to 1,000,000 euros.

When not performed knowingly, financing of cluster munitions is not subject to the prohibition and related criminal sanctions. No Grand-Ducal Regulation has been taken yet for implementation of the law of 4 June 2009.

## 2. PROHIBITION OF FINANCING ARMS FOR USE IN TERRORISM

Specific measures have been taken by Luxembourg in order to implement UN Security Council resolutions and EU legislation imposing prohibitions and restrictions on financial matters towards certain persons, entities and groups in the fight against money laundering and the financing of terrorism. So called “AML/ CFT” legislation is now a cornerstone of financial regulation in Luxembourg.

AML/CFT legal framework has impact on the financing of arms in so far as it prohibits (i) recycling funds obtained as a result of breaches of the law on arms and (ii) financing arms to be used for terrorism. This is why such regulation is mentioned within this report.

The AML/CFT legal framework in force in Luxembourg is the following:

- Law amended of 12 November 2004 on money laundering and the financing of terrorism;
- Grand Ducal Regulation of 1 February 2010 clarifying certain provisions of the amended law of 12 November 2004 on money laundering and the financing of terrorism;<sup>28</sup>
- Law of 27 October 2010 strengthening the legislation on money laundering and the financing of terrorism;<sup>29</sup>
- Grand Ducal Regulation of 29 October 2010 (co-ordinated version) enforcing the law of 27 October 2010 implementing United Nations Security Council resolutions as well as legislation adopted by the European Union concerning prohibitions and restrictive measures in financial matters in respect of certain persons, entities and groups in the context of the combat against terrorism financing.
- Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15/11/2006 on information on the payer accompanying transfer of funds.

---

an explosive charge prior to, on or after impact.

<sup>26</sup> Mém. A – 147 of 22 June 2009, p. 2038.

<sup>27</sup> Article 3 of the law: “*Il est interdit à toute personne physique ou morale de financer, en connaissance de cause, des armes à sous- munitions ou des sous-munitions explosives.*”

<sup>28</sup> Mém. A - 15 du 04.02.2010, p. 228

<sup>29</sup> Law of 27 October 2010 strengthening the legislation on money laundering and the financing of terrorism; organising the controls over the physical transport of cash entering, passing through or leaving the Grand Duchy of Luxembourg; regarding the implementation of United Nations Security Council resolutions and European Union actions introducing prohibitions and restrictions on financial matters concerning certain persons, entities and groups within the framework of the fight against the financing of terrorism - (Mém. A-193 of 3.11.2010 p.3172).

- The CSSF Regulation 12-02 of 14 December 2012.<sup>30</sup>

This legal framework is completed by Grand Ducal regulations implementing restrictive measures introduced by the United Nations Security Council and the European Union. In addition, the CSSF has adopted circulars<sup>31</sup> which provide guidance about the implementation of AML/CFT related-rules.

The below a) and b) sections describe the key features of such legal framework.

#### **a) Definition of terrorism financing practice under Luxembourg law**

Under Luxembourg criminal law,<sup>32</sup> is a terrorism financing practice any practice consisting in providing or collecting by any means whatsoever, directly or indirectly, unlawfully and wilfully, funds, securities or property of any kind, with the intention of using them or knowing they will be used, in whole or in part, to commit or attempt to commit one or more terrorist acts, even if they have not actually been used to commit or attempt to commit any of these offenses, or if they are not linked to a specific terrorist acts.

Terrorist financing practices also include the provision or collection by any means whatsoever, directly or indirectly, unlawfully and wilfully, of funds, securities or assets of any kind, with the intention of using them or knowing that they will be used, in whole or in part, by a terrorist or a terrorist group, even if they have not actually been used to commit or attempt to commit any of these offenses, or if they are not linked to a specific terrorist acts.

The list of terrorist acts includes in particular:

- Attacks against persons benefiting from international protection;
- Terrorist offences;
- Terrorist attacks with explosive devices or other lethal devices;
- Offences related to terrorist activities (including incitement to terrorism, recruitment for terrorism and training for terrorism);
- Hostage-taking.

Criminal sanctions for terrorism financing are similar to the criminal sanctions applicable to commission of the terrorist acts which are financed, and can go up to life imprisonment.<sup>33</sup>

#### **b) AML/CFT requirements under Luxembourg law**

The AML/CFT legal framework imposes a number of professional obligations to banks and other professionals subject to the supervision of the CSSF, in particular with respect to risk assessment, due diligence and reporting obligations. It also provides for penalties for non-compliance with these professional obligations.

---

<sup>30</sup> CSSF Regulation 12-02 of 14 December 2012 on money laundering and the financing of terrorism (Mém. A – 5 of 09.01.2013, p. 103)

<sup>31</sup> A list of these circulars is available at <http://www.cssf.lu/surveillance/criminalite-financiere/lbc-ft/circulaires>

<sup>32</sup> Luxembourg criminal code, article 112-1, 135-1 to 135-6, 442-1.

<sup>33</sup> Articles 135-6 and 135-7 of the Luxembourg Criminal Code.



AML/CFT professional obligations include among others: customer acceptance policy, detailed procedures as regards the identification, assessment, supervision, management and mitigation of money laundering and terrorist financing risks, specific risk management mechanisms, hiring procedures (to ensure high standards, good character and professional experience when hiring employees) and awareness-raising program, accurate definition of the respective responsibilities of the various AML/CFT functions of the personnel.

### **Risk-based approach**

The rules mentioned above provide for a risk based approach methodology where measures taken have to be properly aligned to the assessed risk. This risk assessment is based on various criteria such as client risk, country risk, risk associated with products, transactions or the distribution/selling of the product.

The written AML/CFT risk assessment must be performed by the bank for each new client and for each new product prior to client acceptance or the product launch. The risk score of each client must be kept up to date; and the bank must be in a position to communicate its risk assessment to the CSSF.

Professionals, including banks, who have to comply should do so in a way that is efficient and effective and suited to the nature, structure and organization of their business, the size of their company, and the resources available.

### **Risk Assessment and risk management**

The risk-based approach comprises a risk assessment based on various risk categories:

- Customer risk assessment: a bank must perform customer due diligence when it enters into a business relationship with a customer. Politically Exposed Persons (PEPs) are customers representing a higher risk.
- Relationship risk assessment: the bank must determine higher risk relationships depending on various criteria like the nature of the business relationship (e.g. non face to face relationships).
- Transaction risk assessment: transactions defined as having higher risk are complex transactions, transactions with an unusually high amount, non face-to-face transactions as well as all transactions which have no apparent economic purpose or licit object.
- Country and geographic areas risk: country risk may be assessed based on a number of factors including:<sup>34</sup>
  - Sanctions, embargoes or similar measures issued by, for example, the UN and the EU;
  - Countries identified as lacking appropriate AML/CFT laws and regulations;
  - Countries identified as providing funding or support for terrorists or their activities;
  - Countries identified as facing high criminality and/or political instability.
- Risk associated with products, services, transactions or delivery channels and marketing arrangements.

Assessing the risk of each new client and for each new product needs to be done before client acceptance/product launch. During the monitoring of the business relationship, the

---

<sup>34</sup> Information can be found for instance in FATF reports and declarations; World Bank reports, CSSF documentation, EU reports and lists, Transparency International reports.

professional must keep account of the development of the risk and adapt its assessment according to any significant change affecting them or any new risk. All professionals must be able to communicate their risk assessment to the CSSF.

Banks and other professionals must have policies, controls and procedures that enable them to effectively manage and mitigate their money laundering and terrorist financing risks. These policies, controls and procedures must be approved by the authorized management.

### **Customer Due Diligence and Customer Identification**

Customer Due Diligence (KYC) is a key piece of the risk assessment approach. It mainly consists in (i) the verification of the customer identification information and (ii) the identification and verification of the beneficial owner.

Each customer relationship needs to be approved in writing by an appropriately authorised employee or member of management, depending on the level of customer risk. In the case of high-risk customers, senior management and the AML/CFT compliance officer need to be involved. The identity of a customer must be verified and information on the source of a customer's funds must be obtained at the very beginning of the customer relationship.

Customer Due Diligence must include screening of sanction lists (e.g. lists arising from any regulation adopted at a national level and by the EU concerning prohibitions and restrictive measures in financial matters in respect of certain persons, entities and groups<sup>35</sup>) and screening of PEP lists. No client types are excluded, not even those for whom professionals are allowed to apply reduced due diligence measures. Checks must be performed at the beginning of the business relationship and on an ongoing basis. All results of such checks must be evidenced and documented, whether the result is a negative or positive match. On top of being reported to the Luxembourg Financial Intelligence Unit (*Cellule de Renseignement Financier* - CRF), sanction lists and PEP lists matches must be reported to the CSSF as well. Automated controls should be implemented systematically, except if the professional is able to demonstrate that such automation is not required as a result of the nature and volume of business.

There are simplified due diligence arrangements in certain cases like for instance when the customer is a credit or financial institutions subject to equivalent AML/CFT regulations.<sup>36</sup>

Enhanced Customer Due Diligence must be conducted for high-risk situations, whilst the simplified approach will remain limited to lower risk situations. Enhanced customer due diligence measures are required in situations which by nature present a higher risk of money laundering or terrorist financing (for example non face-to-face business, foreign PEPs and cross-frontier correspondent banking relationships with respondent institutions from non EU countries). It includes the implementation of an appropriate risk-based procedure to detect foreign PEPs.

### **Beneficial Owners**

For the purposes of AML/CFT, identifying the beneficial owner is paramount: the beneficial owner of a legal person or a legal arrangement consists in one or several natural persons which in the end, directly or indirectly own or control in law or fact a legal person or a legal

---

<sup>35</sup> [www.ec.europa.eu/internal\\_market/company/financialcrime/index\\_en.htm](http://www.ec.europa.eu/internal_market/company/financialcrime/index_en.htm) ; [www.eeas.europa.eu/cfsp/sanctions/consol-list\\_en.htm](http://www.eeas.europa.eu/cfsp/sanctions/consol-list_en.htm)

<sup>36</sup> Simplified due diligence arrangements are listed in Article 3-1 of the law.

arrangement. The provision adds that this may be the case even if the thresholds of the ownership or control (25% of shares or voting rights) are not met.

#### **Monitoring of client relationships and transactions**

Ongoing due diligence is required to enable banks and other professionals (i) to detect complex or unusual transactions and (ii) identify persons, entities and groups subject to prohibitions or restrictive measures in financial matters.

#### **Internal policies and procedures**

It is up to the professionals subject to AML/CFT regulations to tailor their policies, procedures, processes and controls appropriately to their company provided that they cover all AML/CFT professional duties. The requirement for management approval of policies and procedures must be validated, and, if required, regularly updated, by the person in charge of AML/CFT. The approval of senior management is mandatory. For banks and investment firms, the approval of the Board of Directors is also mandatory.

In the case of banks and investment firms, the Chief Compliance Officer must be the person responsible for AML/CFT controls. For other entities, the person responsible for AML/CFT can be another member of management, provided that appropriate safeguards are in place to prevent conflicts of interest. That person's independence, objectivity and ability to make independent decisions have to be preserved. S/he must have adequate professional experience and s/he is in charge of informing and training employees accordingly. Finally, s/he is required to provide the Board of Directors and senior management with regular reports and a formal annual summary report.

#### **Reporting and audit obligations**

The internal audit must be carried out on an annual basis.

The regulator of AML/CFT controls for the banking sector is the CSSF. There is a legal requirement for a bank's external auditor to report annually on the bank's AML/CFT controls and procedures to the CSSF. Such report should provide sample testing of KYC files and of Suspicious Activity Reports (SARs) as well as examination of risk assessments.

Suspicious transactions (e.g. unusual transactions, cash transactions above a certain threshold) must be reported to the CRF through the use of SARs.

#### **Criminal and administrative penalties in case of non-compliance with AML/CFT professional obligations**

Offenders who knowingly violate AML/CFT professional obligations can face a fine up to €1,250,000. Those guilty of professional negligence can face administrative and disciplinary sanctions: in addition to fines which can be up to €250,000, the CSSF can impose warning, reprimand, temporary or permanent prohibition of the right to carry out certain activities or transactions, temporary or permanent removal of the right to exercise an occupation for administrators, managers, de facto or de jure executives.

#### **c) Future developments of the AML/CFT professional obligations**

Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (hereafter "4th

Directive")<sup>37</sup> has been published on 5 June 2015. It adds to the European Union's regulatory arsenal used to fight money laundering and terrorist financing. It must now be transposed by all member states by June 2017. However, some measures have already been anticipated by CSSF regulations.

The 4<sup>th</sup> Directive introduces a series of new features, including focus on risk assessment and corresponding risk based approach, and increased transparency. The Directive brings in a wider range of sanctions and harsher penalties for institutions which do not conform to these new rules.

- **Focus on risk assessment and corresponding risk based approach**

The risk-based approach introduced in the Third Directive has been strengthened by the 4<sup>th</sup> Directive with the aim of better identifying, understanding and mitigating the risk of money laundering and terrorist financing. It contains explicit lists of risk factors to be taken into consideration by banks and other obliged entities when performing their internal risk assessment and in particular determining application of simplified or enhanced due diligence measures depending on the nature and level (high or low) of the risks they are exposed to.

- **Increased transparency in the identification of beneficial owners**

Member states will be required to hold information on the beneficial owners of legal entities incorporated within their territories in a national central register. The concept of beneficial owner is also further defined in the Directive: any natural person who exercises ownership or control over a legal entity, either directly or indirectly and irrespective of their shareholding percentage or of any other person having decision-making power.

## B. INTERNATIONAL LEGAL FRAMEWORK FOR RESPONSIBILITY WITH RESPECT TO ARMS-RELATED FINANCING ACTIVITIES

Under international law, the Luxembourg state has an obligation to implement and enforce its international obligations with respect to crimes under international law and serious violations of human rights, and can be held liable for not preventing the commission of such crimes and violations, if it was in a position to do so. Even in cases where the Luxembourg state does not fulfil its international obligations, corporations such as banks as well as individuals must comply with legal rules applicable to crimes under international law and serious violations of human rights.

---

<sup>37</sup> Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC - [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)

## 1. INTERNATIONAL LEGAL FRAMEWORK FOR LUXEMBOURG STATE'S RESPONSIBILITY FOR ARMS-RELATED HUMAN RIGHTS VIOLATIONS AND CRIMES

The Luxembourg legal framework<sup>38</sup> does not only comprise of the laws proposed and voted by the country's executive and legislative branches of government. It also includes the provisions of international law (agreements, treaties, conventions, etc.) when they have been approved by national Luxembourg law. Once approved, the international standards, derived from Luxembourg's international commitments, prevail over the rules of domestic law, including those of constitutional value.<sup>39</sup>

International treaties and conventions have binding effect on states which are parties to them and create obligations for them. International treaties and conventions usually provide that states undertake to take appropriate implementation measures, and thus require the intervention of the national legislator. Commitments taken by Luxembourg are binding on the Luxembourg state, which must take all appropriate legal, administrative and other measures to implement the international norm and make it a direct source of rights and obligations for legal persons (including banks) and individuals. It is therefore the responsibility of the Luxembourg state to adequately implement and enforce its international commitments. For instance, the Convention on Cluster Munitions<sup>40</sup> provides that states must take appropriate implementation measures. However, apart from the law approving the Convention, Luxembourg has not taken any normative text (law, regulation, etc.) to implement the provisions of the Convention.

States may be held liable when they breach their international obligations and commit international wrongful acts.<sup>41</sup> States are obliged to fulfil their obligations with regards to

---

<sup>38</sup> ACA-Europe seminar- "Soft law, legal standards and sources of law" - 18 December 2013 – *Note on hierarchy of norms in Luxembourg law* – <http://www.aca-europe.eu/seminars/Paris2013bis/Luxembourg.pdf>

<sup>39</sup> This primacy also concerns both primary (EU treaties) and secondary EU legislation (regulations, directives and certain decisions). In this way, any constitutional text or internal regulation may be censured or disregarded if it does not conform to the rules of international law that are binding on it. In Luxembourg, therefore, international and European standards are at the very top of the legal system, followed by constitutional standards, which constitute the highest standards in the absence of international commitments. They prevail over the laws, over jurisprudence and over regulatory standards of the executive authority. Regulatory standards constitute all of the rules enacted by the executive authority in Luxembourg. In Luxembourg's domestic legal system, the executive authority's acts are ranked in the following manner (in decreasing order of authority):

- Grand-Ducal regulations and, of equal status in their respective fields of competence, the regulations of public corporations and regulations of professional bodies;
- Regulations of the Government in council and ministerial regulations;
- Municipal regulations, which are subject to compliance with the regulatory acts issued by the central government (Grand-Duchy and ministries);
- Orders and other decisions or measures of an individual nature.
- Circulars: the governmental and administrative authorities may adopt internal directives in the form of circulars or instructions, which will act as guidelines. Although the circulars do not constitute a legal standard that is binding on the citizens and are only mandatory for the agents to whom they are addressed, they may in certain cases bind their author with regard to the citizens. The authority that created the circular and the subordinate authorities are effectively required to conform to the instructions in the internal directives.

<sup>40</sup> Op.cit.

<sup>41</sup> See *Responsibility of States for Internationally Wrongful Acts* – 2001 – United Nations. Article 2 provides that there is an internationally wrongful act "when conduct consisting of an action or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State".

crimes under international law which means taking action to prevent the commission of those crimes, including by preventing and eradicating arms transfers which facilitate them, whenever they are in a position to do so. States may incur international liability if they knowingly provide arms and other material support which aids or assists other states, groups or individuals with the commission of internationally wrongful acts such as serious human rights violations or crimes under international law.<sup>42</sup>

## 2. INTERNATIONAL LEGAL FRAMEWORK FOR BANKS' RESPONSIBILITY FOR ARMS-RELATED HUMAN RIGHTS VIOLATIONS AND CRIMES

### a) Banks' responsibility to respect human rights

Even in the absence of full compliance of the Luxembourg state with certain international obligations, banks still have certain human rights responsibilities. Those responsibilities have been encapsulated, among other things, in the United Nations Guiding Principles on Business and Human Rights (the UNGPs).<sup>43</sup>

Principle 11 of the UNGP clearly states that business enterprise (of which banks and financial institutions are a type) should respect human rights. The commentary to this principle clarifies that this responsibility applies "*wherever business enterprises operate*" and exists "*independently of States' abilities and/or willingness to fulfil their own human rights obligations*," while not diminishing those obligations. It explains further that the responsibility to respect human rights "*exists over and above compliance with national laws and regulations protecting human rights*." This means that Luxembourg's financial sector cannot claim the lack of domestic legally binding norms to justify a failure to adopt and put in place the necessary policies and procedures to ensure it does not support, through its financial activities, prohibited activities in the arms sector.

UNGP do not create new legal obligations. However, the UNGP state that "*companies should always treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue*"<sup>44</sup> and encourage them to incorporate the responsibility to respect human rights "*in binding contractual requirements between companies and their corporate and private clients and suppliers*."<sup>45</sup>

To meet this responsibility, business enterprises should have in place appropriate policies and a "*human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights*."<sup>46</sup>

<sup>42</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, International Law Commission, Yearbook of International Law Commission, 2001, vol. II, Part Two, Article 16, p. 36.

<sup>43</sup> "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31 (21 March 2011). <https://www.unglobalcompact.org/library/2>

<sup>44</sup> "Frequently asked questions about the Guiding principles on business and human rights" – United Nations Human rights - Office of the High commissioner – 2014 - Question 6.

<sup>45</sup> "Frequently asked questions about the Guiding principles on business and human rights" – United Nations Human rights - Office of the High commissioner – 2014 - Q7

<sup>46</sup> Principle 15, UNGPs.

**b) Legal framework for Banks' criminal liability for financing arms used for commission of crimes under international law**

Even if corporations *per se* cannot be prosecuted before international criminal tribunals, corporate executives, like any individual, may be held liable for crimes and human rights violations under international law.

Indeed, even though, in principle, international treaties and conventions do not create rights and obligations for individuals and legal persons of the state which approved the international norm until the national legislator has implemented them into domestic law,<sup>47</sup> intermediate provision of domestic law is not required for the attribution of criminal responsibility to individuals under international criminal law.

Crimes under international law are the most heinous crimes and their punishment is in the interest of the international community as a whole, as they undermine the fundamental values protected by international law. Some crimes under international law such as genocide, crimes against humanity and war crimes have been codified by the Rome Statute of the International Criminal Court. In addition, some conduct which amounts to crimes under international law is also criminalized by four Geneva Conventions of 1949 and their Protocols. There are also several other international treaties which define and criminalize certain acts which fall under this category such as the Genocide Convention of 1948 or the Convention against Torture of 1984. For precise definitions of genocide, crime against humanity and war crimes, please see appendix 1.

International criminal law has long recognized criminal responsibility for aiding and abetting. Individuals and, if domestic law allows for that, corporations may be held criminally liable for providing necessary means (such as arms, ammunition and money) for the commission of serious violations of international law as this conduct may amount to aiding, assisting, abetting or otherwise facilitating those crimes.<sup>48</sup> Trials related to the responsibility for crimes under international law, often under the doctrine of aiding and abetting, have taken place in various jurisdictions. Under this doctrine persons can be held criminally liable if they have provided material or other support for the commission of a crime, knowing that the crime would be committed.<sup>49</sup> The support they have provided needs to have a substantial contribution to the crime but the presence of the accused at the scene of the crime is not needed.<sup>50</sup>

For instance, Frans van Anraat, a Dutch businessman who was Saddam Hussein's most important supplier of chemicals used for the production of mustard gas utilized in attacks on the civilian population both in Iraq and Iran during the 1980s, was convicted of complicity in

---

<sup>47</sup> The question of the direct application of treaties is a complex question of international law which will not be analysed in this report.

<sup>48</sup> Rome Statute of the International Criminal Court, Article 25(3)(c); Prosecutor v Charles Taylor, Special Court for Sierra Leone, Judgment of 18 May 2012; Prosecutor v Momcilo Perisic, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment of 28 February 2013; Prosecutor v Mile Mrksic et al, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment of 5 May 2009.

<sup>49</sup> Ibid. Prosecutor v. Vasiljevic (Case No. IT-98-32-T) 29 November 2002, Prosecutor v. Furundzija (Case No. IT-95-17/1-T), Judgment, 10 December 1998.

<sup>50</sup> Prosecutor v Dusko Tadic, International Criminal Tribunal for the former Yugoslavia, (Case No. IT-94-1-T), Judgment, 7 July 1997; Prosecutor v. Furundzija (Case No. IT-95-17/1-T), Judgment, 10 December 1998.

war crimes. As the Court put it: *“he was very aware of the fact that in the given circumstances the use of this gas could not and would not fail to materialize. In different words: the defendant was very aware of the fact that –‘in the ordinary course of events’- the gas was going to be used”*.<sup>51</sup> Frans van Anraat was found *“guilty of being an accessory to provide the opportunity and the means for the proven attacks with mustard gas”* and *“guilty of the offence of complicity in being an accessory to a violation of the laws and customs of war”* and sentenced to 15 years’ imprisonment. It is noteworthy that in its decision, the Court put a significant weight on the awareness and knowledge of Frans van Anraat of the situation in Iraq and therefore the *“final destination and use”* of his supplies.

Current international criminal law does not generally impose international criminal responsibility on corporations. However, if domestic law allows for corporate criminal liability, corporations may be held liable by domestic courts for crimes and human rights violations under international law. Luxembourg law provides for the criminal liability of legal persons and applies to all corporate entities (including public legal entities) with the exception of the state and the local government entities.<sup>52</sup>

In general, under Luxembourg criminal law, a corporate entity may be held liable if a crime or an offence has been committed in its name and its interest by one of its statutory organs or by one or more of its directors, whether *de jure* or *de facto*.<sup>53</sup> There is no limitation on the crimes and offences which a corporate entity is able to commit. The criminal code is applicable to corporate entities, subject to certain conditions specific to corporate entities and with the exception of contraventions (only provisions relating to crimes and offences are applicable to corporate entities). The law applies the principle of cumulative liability of corporate entities and individuals.

Therefore, provisions of the Luxembourg Criminal Code relating, for instance, to serious violations of humanitarian law like genocide, crime against humanity and war crimes,<sup>54</sup> are applicable to corporations.

It results from the development above that **both banks (as corporations) and their managers and employees (as individuals) can potentially be held liable if they provide the opportunity and the means, through financing, for the commission of serious human rights violations and crimes under international law**. Financing is not a neutral activity: corporate liability can be engaged in case of assisting and aiding the perpetration of human rights violations. Knowledge of the final destination and use of the means which are provided is a sufficient ground for criminal liability.

---

<sup>51</sup> Public Prosecutor v. Frans Cornelis Adrianus van Anraat Court of Appeal in The Hague, Netherlands, 9 May 2007 (<http://www.internationalcrimesdatabase.org/Case/168/Van-Anraat/>);

<sup>52</sup> *Loi du 3 mars 2010 introduisant la responsabilité pénale des personnes morales dans le Code pénal et dans le Code d'instruction criminelle et modifiant le Code pénal, le Code d'instruction criminelle et certaines autres dispositions législatives*. Mémorial A – N°36, 11 March 2011, p. 641.

<sup>53</sup> A "statutory organ" is defined as one or more physical or legal persons which have specific function in the organisation of the corporate entity, in accordance with the relevant law governing that entity. This can be a function of administration, direction, representation or control.

<sup>54</sup> Luxembourg Criminal Code - TITRE Ibis. – « Des violations graves du droit international humanitaire ».



**“Both banks (as corporations) and their managers and employees (as individuals) can potentially be held liable if they provide the opportunity and the means, through financing, for the commission of serious human rights violations and crimes under international law.”**

It is therefore in the best interest of banks and other financial institutions that they have policies and procedures in place to avoid incurring potential liability in relation to conduct prohibited under international law such as serious violations of human rights, violations of international humanitarian law or other conduct which may amount to crimes.

### 3. ARMS-RELATED FINANCIAL ACTIVITIES PROHIBITED BY INTERNATIONAL LAW

Appendix 1 provides an overview of the international legal framework relating to arms and more specifically under which criteria arms may be regarded as illegal with precise references to the applicable international norms: international human rights law, international humanitarian law (IHL), international criminal law). The section below provides the key aspects of such legal rules.

Application of the international legal rules to financial activities results in prohibition of the following activities:

- Financial activities related to arms which are *per se* prohibited by international law and therefore prohibited on a permanent basis and under any circumstances;
- Financial activities related to arms which are prohibited only when used to commit prohibited purposes such as serious human rights violations, violations of international humanitarian law or crimes under international law.

#### **a) Arms which are *per se* prohibited**

International law prohibits, inter alia, the use of biological and chemical weapons, expanding and exploding bullets, blinding laser weapons, arms that cause injury by fragments which are not detectable by X ray in the human body, anti-personnel landmines and cluster munitions. These arms are prohibited in all circumstances.

All the treaties and conventions prohibiting these arms were approved by Luxembourg and are therefore binding upon the Luxembourg state. Please refer to Appendix 1 for more details about these arms and the applicable international norms.

There are also domestic provisions prohibiting certain types of arms like certain devices designed to harm people and goods using fires and explosions. Please refer to Appendix 1 for a more detailed description of these prohibitions.

**Example of arms which are *per se* prohibited<sup>55</sup>**

**The use of landmines in Darfur, 2003-2004**

Most parts of Sudan, especially the South, are infested with landmines that kill, injure and disable people. The south of the Darfur region is also affected by the proliferation of landmines. In 1997, several types of landmines were found in Sudan. The landmines had been originally produced in the following countries: Belgium, Bulgaria, China, Egypt, Iran, Iraq, Israel, Italy, North Korea, Poland, Russia, South Africa, UK, USA and former Yugoslavia. In 2000, anti-personnel mines were found in Sudan: the original producer countries were Belgium, China, Egypt, Israel, Italy, USA and former USSR. A report by the UN OHCHR on 7 May 2004 estimated that areas of the Darfur region are littered with unexploded ordnance and landmines, some of which are plainly visible on the desert surface.<sup>56</sup>

**b) Arms which are prohibited only when used to commit prohibited purposes**

International law also prohibits the use of arms for undesirable purposes such as violations of human rights, violations of international humanitarian law or commission of crimes under international law.

In particular, international law puts a ban on:

- the use of arms to ***intentionally direct attacks against civilians or conduct indiscriminate attacks*** (attacks of a nature to strike military objectives and civilians without distinction) ***and disproportionate attacks***, which may amount to war crimes. All parties to a war must distinguish between military targets and civilians. Any deliberate attack on a civilian or civilian building – such as homes, medical facilities, schools or government buildings – is a war crime<sup>57</sup>. Moreover, civilian casualties and damage to civilian buildings must not be excessive in relation to the expected military gain.
- the use of arms destined to commit ***genocide, crimes against humanity, war crimes*** or other crimes under international law such as for example torture or enforced disappearances.

Please refer to Appendix 1 for a more detailed description of these prohibitions.

---

<sup>55</sup> More examples can be found on [www.amnesty.org](http://www.amnesty.org).

<sup>56</sup> *Sudan: Arming the Perpetrators of Grave Abuses in Darfur*, Amnesty International, 16 November 2004, p.34.

<sup>57</sup> Providing the building has not been taken over for military use

**Examples of arms used for prohibited purposes<sup>58</sup>****Use of white phosphorus by the Government of Myanmar in 2012**

A deliberate attack on peaceful protestors was conducted in November 2012 by the police. During that month local villagers set up protest camps around the Letpadaung mine area and hundreds of monks from nearby monasteries joined the protests. The main protest camp was located outside Myanmar Wanbao's compound near the mining area. When protestors refused to disperse the police started throwing 'fire bombs', later identified as white phosphorus incendiary munitions. The police continued to throw incendiary white phosphorus munitions at the protestors despite seeing people's clothing and bodies catch fire, and even threw incendiaries at people who were leaving the camps. More than 100 people were injured, some suffering horrific burns and lifelong disability.<sup>59</sup>

**Bombing of MSF hospital in Afghanistan, 2015**

On October 3, the Médecins sans Frontières (MSF) surgical hospital in Kunduz in northern Afghanistan was hit by repeated airstrikes, killing 30 people, including staff members and patients. On October 7, President Obama apologised for the bombing to the president of Médecins San Frontières.<sup>60</sup>

**Air strikes by Saudi Arabia in Yemen, 2015**

10 members of a family, including five women and four children were killed in a July 9 airstrike that destroyed the Musaab bin Omar school in the village of Tahrur, north of Aden. The school had been housing families displaced by the conflict between a Saudi-led military coalition and Houthis armed groups and their allies, which took control of the capital Sanaa and large swaths of the country in late 2014. Ten other relatives, mostly children, were injured in the attack. In the ruins of the Musaab bin Omar school, there was no sign of any military activity that could have made the site a military target.

Hundreds of civilians have been killed in such strikes while asleep in their homes, when going about their daily activities, or in the very places where they had sought refuge from the conflict between mid-June and mid-July 2015. The Houthis and their allies are the declared targets of the Saudi-led air campaign. In reality, however, it is civilians who all too often pay the price of this war. The United States, meanwhile, has provided the weapons (e.g. U.S.-designed MK80 and MK-82 general-purpose bomb) that have made many of these killings possible.<sup>61</sup>

<sup>58</sup> More examples can be found on [www.amnesty.org](http://www.amnesty.org).

<sup>59</sup> *Myanmar: Open for business? Corporate crime and abuses at Myanmar copper mine*, Amnesty International, February 2015, p.6.

<sup>60</sup> <https://www.amnesty.org/en/latest/news/2015/10/afghanistan-bombing-of-kunduz-hospital-a-deplorable-loss-of-life-that-must-be-investigated/>, <https://www.amnesty.org/en/latest/news/2015/10/afghanistan-bombing-of-kunduz-hospital-a-deplorable-loss-of-life-that-must-be-investigated/>, <http://www.bbc.com/news/world-us-canada-34467631>

<sup>61</sup> <https://www.amnesty.org/en/latest/news/2015/08/the-human-carnage-of-saudi-arabias-war-in-yemen/>

# III. KEY FINDINGS AND RECOMMENDATIONS

On the basis of the key findings of this research, AI has made a series of recommendations to improve the legal framework and practices on financing and investment in arms in the Luxembourg financial centre. There are recommendations addressed to the Luxembourg government. There are also recommendations addressed to banks. Though the research was focused on banks, the recommendations below are applicable to all financial activities, whether they are conducted by banks or other financial institutions.

These recommendations are not only addressed to the Luxembourg financial centre, but to the entire financial sector in Europe and the world. This report's recommendations are valid for all countries where legislation is incomplete or non-existent on arms-related financial activities. Luxembourg has already made some progress on this issue by legislating against the financing of cluster munitions.

## A. KEY FINDINGS OF THE RESEARCH

The key findings of the research conducted by AI are the following:

### 1. DOMESTIC LUXEMBOURG LEGAL FRAMEWORK ON ARMS-RELATED FINANCIAL ACTIVITIES IS INCOMPLETE

With the exception of prohibition of financing activities relating to cluster munitions and financing activities related to arms destined to terrorism, Luxembourg has taken no measures to expressly prohibit all financial operations related to illegal arms or arms destined to illegal use.

To this respect, Luxembourg has not fulfilled its international obligations with regards to crimes under international law and serious violations of human rights. Indeed, as described under Part II of this report, fulfilling such responsibility means taking action to prevent the commission of those crimes and violations, including by preventing and eradicating financing of arms which may facilitate them.

2. A LACK OF TRANSPARENT ARMS SECTOR POLICIES AND PROCEDURES HAS BEEN IDENTIFIED

AI research was based on a representative sample of top banks operating in Luxembourg. Of the five banks that accepted AI's invitation to dialogue, BNP and ING were the only ones that provided evidence of a written and publicly available document stating their policy on the arms sector.

Only ING and BNP have a list of written commitments restricting their field of activity on illegal arms. However, these commitments are incomplete and questionable in some respects. Without going into the detail of the changes that could be made to these policies, we can nevertheless give the following examples: even in the case of arms which are banned under international law, BNP states that it will assess the risk profiles of recipient countries before deciding whether or not to finance transactions. BNP should purely and simply exclude the financing of these arms, irrespective of the country that wants to buy, sell or use them, because they are prohibited and therefore illegal by their very nature. Questioned on this point by AI, BNP stated that in the case of prohibited arms, transactions are rejected if the nature of the arms is prohibited. However, the written policy remains ambiguous on this point and should be rewritten.

3. BANKS OFTEN HAVE AN INCOMPLETE UNDERSTANDING OF THEIR LEGAL OBLIGATIONS AND HUMAN RIGHTS RESPONSIBILITIES

The policies on arms adopted by the banks should not only abide by Luxembourg laws, but they should also comply with international law. As explained in Part II of this report, banks, as any other corporation, are expected to comply with international human rights law, international humanitarian law and international criminal law regardless of whether the state in which they operate has enacted the relevant national legislation of whether it enforces it in practice.

Asked about their obligations in the field of defence and arms, the banks made a point of mentioning the AML/CFT Luxembourg legislation. Although compliance with such legislation excludes certain illegal arms financing operations (financing of arms to be used for international terrorism), it does not prohibit the financing of arms when they are not for the use of terrorists. Non terrorism-related prohibited uses of arms are not within the scope of AML/CFT legislation. For instance, financing of arms used by a state to conduct repression on civilians falls out of the scope of the AML/CFT legislation (because arms are used by a state, not a terrorist armed group), but is nevertheless subject to international law prohibitions and could potentially trigger liability of the bank. Likewise, the financing of arms which are *per se* illegal, like chemical arms, is prohibited by international law, but not by the AML/CFT legislation. The final destination of arms for which finance is sought must be examined with reference to a series of national and international standards and not only the prohibition on financing terrorism.

The banks' lack of understanding of the prohibitions in relation to arms-related activities under international law exposes them to the risk of inadvertently contributing to human rights violations and potentially to criminal liability.

#### 4. SIGNIFICANT GAPS IN INTERNAL DETECTION AND MONITORING PROCEDURES FOR ARMS-RELATED TRANSACTIONS HAVE BEEN IDENTIFIED

The success of any responsible policy on financing and investing in the arms sector requires effective internal checking procedures.

Indeed, even when banks publicly commit to not financing certain types of arms, they still need to put in place internal procedures that will ensure compliance with this commitment. The AI research therefore paid particular attention to procedural aspects of bank policies. AI asked several questions to each bank about their internal procedures but was not in a position to check whether the answers provided by the banks were reflecting the reality of internal practices.

Statements of intent are not enough. In a sector involving such complex financial flows as the arms trade, commitments run the risk of remaining a dead letter if they are not accompanied by strict implementation procedures. The fact that a bank makes a written commitment in a public document not to finance cluster munitions does not mean that the bank will in no circumstance undertake this type of financing. Even when the stated intentions are sincere, implementation of this restriction requires rigorous internal procedures that are subject to different levels of control. Any breach of these rules, whether involuntary (because of human error) or deliberate (because of malicious intent by an employee or because senior management grants a dispensation to conclude a transaction) may result in the acceptance of a transaction that is contrary to company commitments and, in many cases, against the law.

As a consequence, ***Know Your Client/Client Due Diligence (KYC/CDD) procedures are key*** to detect arms transactions related to terrorism but also to detect and prevent transactions relating to other types of illegal arms or illegal uses of arms. KYC/CDD procedures require banks to collect certain information about their clients. They should allow banks to ascertain the origin of funds and the legitimacy of operations, which must tally with their knowledge of the client. This procedure also includes verification of "atypical operations." The requirement to identify the real economic beneficiaries of transactions should allow to determine the likely end-use of the arms, and therefore are also relevant for the detection of transactions of arms destined to be used for crimes under international law or serious violations of human rights.

For instance, investigating the end-use of a consignment of arms before agreeing to finance the production allows the bank to ensure that it will not be used by individuals, groups or states using them for the commission of human rights abuses or crimes under international law. The identification of arms transactions which may result in criminal conduct, or arms which are prohibited *per se* may rely on existing internal KYC procedures. Where the banks have the necessary internal procedures to ensure that they are not financing international terrorism, they can at the same time check and ensure that they are not financing arms destined to regions where atrocities are committed or to end-users who may divert them for prohibited uses.

It is difficult to have a precise idea of internal procedures put in place by the banks and therefore to evaluate their reliability because of a lack of information provided by the banks on this issue. AI regrets that the banks refused to provide more precise information on certain internal control procedures or complete sets of statistics on projects rejected on the grounds of their association with arms. It is difficult to understand why the banks refused to provide this information on the grounds of confidentiality when this data does not allow the banks' clients to be identified.

However, by reading the policies published by the banks, listening to the comments made by them during the interviews and also reading the CSSF activities reports on the implementation of AML/CFT procedures in the banking sector,<sup>62</sup> AI was able to identify certain risk areas in the procedures. The deficiencies spotted by the CSSF tallies with the observations made by AI while conducting this research. These procedural deficiencies are as prejudicial to the fight against terrorism financing as they are to the fight against financing of illegal arms which are not related to terrorism.

The main procedural deficiencies identified by the CSSF are:

- **Lack of documentation on the origin of funds;**
- **Inadequate checking of client identity/inadequate customer due diligence**, including absence of *name matching* control with official check lists like sanctions lists and PEPs lists;<sup>63</sup>
- No application of enhanced due diligence requirements in cases where they are compulsory;
- **Weakness in the analysis of risk inherent to the clients' activities;**
- Insufficient involvement of the *compliance officer* in the supervisions of transactions;
- **Lack of adequate training** for employees.<sup>64</sup>

Based on AI research, the observations below can also be made:

- It is a concern that internal detection, control and decision making procedures to deal with risky clients and transactions include **derogation procedures that permit acceptance of transactions previously judged to be risky or unacceptable by internal control procedures.**

For example, ING's policy states that even in the case of transactions initially judged to be "unacceptable" in terms of the company's CSR policy, derogations may apply and transactions may be accepted, in exceptional circumstances. ING does not say what criteria are used for accepting transactions previously judged to be "unacceptable" and provides no monitoring statistics on this issue.

Similarly, in its policy on defence, the BNP Group reserves the right, in exceptional circumstances and after detailed analysis, to finance arms sales to countries that have, however, been judged to be sensitive:

*"For the "most sensitive countries", the decision to finance a transaction can only be exceptional. The decision is taken after a reinforced due diligence performed by the Compliance teams, following an escalation process over sighted by the Group Compliance (Financial Security) teams."*<sup>65</sup>

---

<sup>62</sup> *Rapport 2014*, chapter 13 « Les moyens de la surveillance », page 250 and *Rapport 2013*, chapter 13 « Les moyens de la surveillance » page 236. Available on [www.cssf.lu](http://www.cssf.lu). In 2014, the CSSF conducted 8 on-site AML/CTF audits in the banking sector (more were conducted in the overall financial sector).

<sup>63</sup> Op.cit. Section II.A.2 of this report

<sup>64</sup> This deficiency is not mentioned in the CSSF report but was mentioned by a CSSF official in a PwC press release : « *Des règles renforcées pour contrer le blanchiment des capitaux* » - Communiqué de presse – 21 février 2013 – PwC Luxembourg - <http://www.pwc.lu/en/press-releases/2013/aml.html>

<sup>65</sup> P.6 in *Corporate Social responsibility – sector policy – defence*. The document also states that: "The

- **There is a lack of training and awareness-raising for employees with respect to arms-related transactions.** Most of the banks included in the survey have introduced training procedures to ensure the correct application of KYC procedures, particularly those on money laundering and financing terrorism, as well as other trainings relating to various CSR policies. However, this training is rather limited in comparison with the complexity of the rules on defence and arms.

For example, BNP Paribas has a training programme: “Training on the Implementation of Sector Policies” including defence and arms but employees are not provided with systematic training on all sector policies. It is therefore possible that they receive no training on defence-related issues.

Moreover, at the banks that provided statistics on training, the number of employees trained is low as a proportion of their workforce. Without adequate training, there is reason to fear that the employees whose jobs it is to analyse clients and transactions and detect risk do not have the skills to do their job properly.

- **Adequate compliance with existing AML/CFT rules and also with all arms-related international obligations requires significant efforts and human means.** Indeed, even though such compliance can – and should – be partly achieved through automation, it also involves largely qualitative information that does require manual intervention and involvement by experienced staff. To this respect, it is worrying that the CSSF flagged lack of involvement of the compliance officer. It is also of concern that there has been a decrease in Luxembourg banking sector number of staff in 2014 (by 2% compared to 2013),<sup>66</sup> as it may have a direct impact on number of staff involved in customer due diligence work.

## B. RECOMMENDATIONS TO THE LUXEMBOURG STATE

### 1. STRICTLY PROHIBIT FINANCIAL ACTIVITIES RELATED TO ILLEGAL ARMS AND ARMS DESTINED TO ILLEGAL USE

Luxembourg must put a ban on all financial activities in relation with illegal arms (i.e. arms which are per se prohibited, for instance cluster munitions or chemical arms), or arms destined to an illegal use (i.e. arms used to commit crimes under international law and violations of human rights). Please see Part II for description of these 2 types of arms.

All financial activities undertaken for or on behalf of individuals or legal persons that conduct activities (i.e. develop, manufacture, assemble, convert, modify, repair, acquire, use, possess, hold, transport, stockpile, keep, sell or transfer) relating to an illegal arm or an arm destined to an illegal use, or an essential component of such illegal arm or arm destined to

---

*Group has therefore established a list of particularly sensitive countries, based notably on the following criteria: (...) known human rights violations.”*

<sup>66</sup> Luxembourg banking insights 2015 – KPMG -  
<http://www.kpmg.com/lu/en/issuesandinsights/articlespublications/pages/luxembourg-banking-insights.aspx>



an illegal use, must fall into the scope of the legal prohibition.

An “essential component” of an arm can be defined using the following two criteria:

- The component was primarily developed or designed for use in the arm;
- The component plays a direct role in the lethality of the arm.

An example is the case of Frans van Anraat who supplied chemicals which were an essential component of the production of mustard gas (please see Part II, section B.2.b) about Frans van Anraat’s case).

Financial activities which must be prohibited include, but are not limited to:<sup>67</sup>

**a) Financing persons conducting activities relating to illegal arms or arms destined to an illegal use**

Banks must refuse to finance, through loans or any other form of financial support, any person conducting activities relating to illegal arms or arms destined to an illegal use:

- Where financing is made through loans and other forms of financial support;
- Where financing is made through capital market instruments and banks assist such persons in their capacity as arranger, dealer or investor.
  - As an arranger: banks should not help persons conducting activities relating to illegal arms or arms used for illegal purposes to structure the issuance of securities on the market;
  - As a dealer: banks should not help persons conducting activities relating to illegal arms or arms destined to an illegal use to find investors when issuing their own securities on the market. In its capacity as a dealer, the financial institution indirectly contributes to financing;
  - As an investor: banks should not subscribe to all or some of the securities issued by persons conducting activities relating to illegal arms or arms destined to an illegal use. By investing in persons conducting activities relating to illegal arms or arms destined to an illegal use, banks contribute directly to their financing.

**b) Providing guarantees to persons conducting activities relating to illegal arms or arms destined to an illegal use**

Bank must not arrange guarantees for persons conducting activities relating to illegal arms or arms destined to an illegal use to cover the risks to which they are exposed. Neither should banks issue guarantees for a third party to cover the risk represented by the person conducting the activity relating to illegal arms or arms destined to an illegal use (for example, by granting a letter of credit).

---

<sup>67</sup> For definitions and explanations about the financial concepts on this page, please refer to <http://www.investopedia.com/>

**c) Providing services to persons carrying out activities relating to illegal arms or arms destined to an illegal use**

Banks must not provide financial services to persons conducting activities relating to illegal arms or destined to an illegal use, especially in relation to instruments of payment for transactions (for example documentary credit, advice, insurance, fund management).

**d) Portfolio management on behalf of or related to persons conducting activities relating to illegal arms or arms destined to an illegal use**

Banks must not manage funds on behalf of a person conducting activities relating to illegal arms or arms destined to an illegal use. They must not undertake portfolio management activities for clients dealing with companies conducting activities relating to illegal arms or arms destined to an illegal use, or invest in portfolios comprising any such companies.<sup>68</sup>

In order to guarantee its effectiveness, such legislation should provide for criminal sanctions against banks (as legal persons) and individuals performing the activities of the banks, when they knowingly violate the prohibition.<sup>69</sup>

**2. TAKE ALL APPROPRIATE MEASURES TO ENSURE THE EFFECTIVE IMPLEMENTATION AND ENFORCEMENT OF SUCH PROHIBITION**

Luxembourg must take all appropriate legal, administrative and other national measures to ensure the effective implementation and enforcement of the prohibitions, and in particular define professional obligations applicable to banks and sanctions for non-compliance.

Clarifying the legal obligations on banks would also provide greater legal security by clearly and precisely defining which is legal and illegal. It would remove any ambiguity regarding the extent of the obligations of banks.

Appropriate measures must include, without limitation:

**a) Imposing on banks professional obligations aiming at detecting and preventing transactions related to illegal arms and arms destined to an illegal use (human rights due diligence)**

Such obligations would include in particular:

<sup>68</sup> For the sake of recollection, 2 types of portfolio management can be found:

-*Passive management* (also called indexing): the objective here is to replicate the performance of a reference market (for example, an index such as the CAC 40 or the Dow Jones). The manager generally has no or a limited role because the aim is only to replicate the performance of one or more indexes.

-*Active management*: this does not consist in merely replicating the performance of a reference index. There is a human element actively managing a portfolio. Active managers rely on a series of analytical tools and their own judgement and experience in making investment decisions on what securities to buy, hold and sell.

<sup>69</sup> The law of 4 June 2009 on the adoption of the Convention on Cluster Munitions, which was opened for signature in Oslo on 3 December 2008, makes provision for such sanctions (article 4).

- Performance of **human rights due diligence** with respect to arms-related transactions (customer due diligence, relationship due diligence, transaction risk assessment, country and geographic areas risk...);
- Reporting of the key outcomes of the due diligence to the CSSF.

Such measures could leverage on existing CFT rules but would constitute a separate set of rules as their goal exceeds the scope of CFT rules. They should diverge from them as necessary in order to take into account the specificities resulting from international rules applicable to arms (as described in Part II of this report). In particular, financing arms destined to a state is not prohibited under the AML/CFT rules (because in such case arms are not destined to a terrorist group) but may be prohibited under other international law provisions if these arms are destined to be used by the state to commit serious violations of human rights. For instance, financing the bombs provided by the US to Saudi Arabia for air strikes on civilians is illegal (please see Part II, section B.3 about these airstrikes).

AI's recommendation to leverage on existing AML/CFT regulations should not be interpreted as an endorsement by AI of these procedures. Assessing these procedures is outside the scope of this report. However, AI considers that, in absence of other regulations, they constitute a good starting point for arms-related due diligence.

#### **b) Applying criminal and administrative penalties for non-compliance with these professional obligations.**

These sanctions should be tough enough to be a real incentive for banks to implement their professional obligations.

#### **c) Introducing adequate control and supervision procedures**

Luxembourg must appoint a responsible body to supervise the correct application of arms-related laws and regulations in the finance sector. This responsibility should come under the jurisdiction of the CSSF, which is already responsible for this task with regard to AML/CFT rules. It would then be the CSSF's task to review the banks' internal procedures, especially with regard to the detection of risk.

Additional control with respect to arms-related financial activities should also be operated through the authorisation regime applicable to brokering activities (which include financial activities accessory to brokering) based on the Grand-Ducal Regulation on the brokering of defence-related products and dual use goods issued on 5 August 2015.<sup>70</sup>

#### **d) Closing loopholes in the legislation**

Today, banks can be held criminally liable under Luxembourg domestic law only if they *knowingly* finance cluster munition or *wilfully* finance arms destined to terrorism. In other words, it means that banks can avoid criminal liability if it cannot be demonstrated

---

<sup>70</sup> Op.cit.

that they were *aware of* the nature and/or end-use of arms they were financing. This restriction raises some concerns as it gives a loophole to unscrupulous banks: those banks can deliberately (and not by negligence) avoid to put in place the KYC procedures which would enable them to *know* which illegal transactions take place, and just let them happen. As negligence in procedures implementation is only subject to fines and administrative sanctions, unscrupulous banks can conveniently choose to be negligent in the implementation of such procedures, and thus indirectly and passively enable illegal transactions without leaving trace which would otherwise make them subject to criminal liability.

It does not mean that “knowingly” and “wilfully” should be removed from law. Indeed, even the most diligent bank, fulfilling all KYC requirements, may face the risk of unknowingly and in good faith not detecting an illegal transaction, given the very high volume of transactions it has to handle, and criminal liability in such cases might be unfair.

However, in order to avoid that the restriction for criminal liability (based on deliberate intent) be used as a loophole by rogue banks, such restriction must be coupled with a very tough and strict enforcement of the KYC obligations. In other words, the excuse of not knowing something illegal is happening might be acceptable only in those circumstances in which the bank can demonstrate that it had put in place, and strictly followed, all the procedures which should have enabled it to know and that, for exceptional reasons, these procedures failed to meet their goal.

## C. RECOMMENDATIONS TO BANKS

### 1. COMMIT TO STOP ALL ACTIVITIES RELATED TO ILLEGAL ARMS OR ARMS DESTINED TO ILLEGAL USES

As explained earlier in this report, the responsibility to respect human rights exists over and above compliance with national laws. This means that Luxembourg-based banks must abide by existing domestic prohibitions on arms, but they must also adopt and put in place the necessary policies and procedures to ensure they do not support, through their financial activities, arms which are *per se* illegal and the use of which is illegal under international law. It is therefore in the best interest of banks to have appropriate due diligence in place to avoid complicity in the commission of crimes under international law and serious violations of human rights.

In order to remain transparent to their clients, shareholders, the government and civil society, all banks must publish their policy on arms. They must also make other information available about the implementation of their prohibition policy by providing figures on the number of transactions rejected, their geographical distribution, etc.

Banks must publicly commit, through clear written public documents, to stop all financial activities in relation with illegal arms (i.e. arms which are *per se* prohibited, for instance cluster munitions or chemical arms), or arms destined to an illegal use (i.e. arms used to commit crimes under international law and violations of human rights).

Such financial activities include financing through loans and capital market instruments,

provision of guarantees, provision of financial services, portfolio management, and any other financial activity undertaken for or on behalf of individuals or legal persons that conduct activities (i.e. develop, manufacture, assemble, convert, modify, repair, acquire, use, possess, hold, transport, stockpile, keep, sell or transfer) relating to an illegal arm or an arm destined to an illegal use, or an essential component of such illegal arm or arm destined to an illegal use. Please see detailed list in section B above.

## 2. ENSURE EFFICIENT IMPLEMENTATION OF SUCH COMMITMENT THROUGH INTERNAL CONTROL PROCEDURES

Unwittingly financing illegal arms trafficking is one of the biggest risks to which the banks are exposed. That is why it is essential that they strengthen their customer knowledge through reinforced due diligence procedures and do everything possible to detect risky clients or transactions. Knowledge of their clients and the transactions they are asked to undertake is a fundamental responsibility of banks. Such knowledge is all the more necessary given that the Luxembourg government wants to use financial institutions to obtain information.<sup>71</sup>

Banks must take all the appropriate measures to ensure compliance with international rules prohibiting illegal arms and arms destined to illegal uses, by implementing procedures to detect and prevent illegal transactions. It requires better customer knowledge.

It is in the best interest of banks to put in place thorough procedures to ensure "human rights due diligence" which will help them to mitigate the risk of violating the United Nations Guiding Principles on Business and Human Rights or potentially incur other liability.

KYC procedures and other internal due diligence procedures must be reinforced in order to identify the real economic beneficiaries of arms-related transactions; their intended and actual end-users and end use so as to determine the likelihood of those arms being in fact prohibited under national and international law or their use (no matter if they are prohibited as such or not) resulting in the commission of serious human rights violations or crimes under international law.

To this purpose, it makes sense for Luxembourg-based banks to leverage on the procedures they have already implemented for AML/CFT compliance purposes. However, as explained earlier in this report, the scope of the prohibitions imposed on arms by international law goes beyond the mere prohibition of arms destined to terrorism. Banks must therefore adapt and complement their existing AML/CFT rules to give them a broader scope. For instance, all clients and transactions within the arms sector should be flagged as "sensitive" or "at risk" and subject to enhanced due diligence, even if they have absolutely no link with terrorism,

---

<sup>71</sup> Article 10 (4) b) of the bill on the organization of the State Intelligence Services (SRE) places specific obligations on financial institutions in this respect. This provision states, "*for one or several events of a serious nature and that deal with (...) activities related to the proliferation of weapons of mass destruction and defence-related products and associated technologies,*" the SRE are authorized to request banks and other financial institutions to provide information about banking transactions involving bank accounts of persons under investigation and their real economic beneficiaries. Financial institutions must respond to such requests "*without delay*" (The comments on article 10 of the bill state that "*In particular in the area of the proliferation (...), the SRE needs to check the use of intermediary companies, front-men and concealed bank transfers.*").

because arms can be destined to illegal uses other than terrorism.

In particular, the following deficiencies must be fixed:

- The insufficient customer and transaction due diligence procedures;
- The derogation procedures that permit acceptance of transactions previously judged to be risky or unacceptable by internal control procedures;
- The lack of training and awareness-raising for employees with respect to arms-related transaction;
- The lack of human resources dedicated to the detection and prevention of arms-related transactions.

### 3. IMPOSE BINDING CONTRACTUAL REQUIREMENTS TO CLIENTS AND SUPPLIERS

Banks must strengthen the contractual obligations they place on the individuals and legal persons with which they do business and make compliance a condition of agreeing to transactions and maintaining a business relationship. Such clauses would require clear and unequivocal representations and undertakings from clients and suppliers as to their compliance with the international norms on illegal arms and arms destined for illegal uses.

Such clauses should be included in all contracts concluded by the banks, not only those concluded with individuals and legal persons known to be directly involved in arms-related activities.

# CONCLUSION

As highlighted in the introduction to this report, the aim of the AI's research was not to reach a conclusion on whether or not the Luxembourg financial centre is involved in the financing of illegal arms or arms destined to an illegal use, but to analyse whether an appropriate framework exists to prevent such illegal financial activities from happening. This research shows that the Luxembourg legislation on arms-related financial activity is incomplete and that the banking sector's policies and procedures in relation to financing of arms are not adequate and effective.

AI hopes that this report will alert the Luxembourg financial centre, as well as the authorities and the general public, in Luxembourg and abroad, about the gaps so identified by this report, and kickstart a marketplace discussion on how to address the challenges it poses. This report makes certain recommendations and invites financial institutions and relevant authorities to come up with additional measures through a constructive dialogue, with a view to ensuring enactment of the necessary laws and greater compliance with existing laws in the context of the arms sector.

Financial institutions, like other business enterprises, have a responsibility to respect human rights. They must not only refrain from financing illegal arms, but also require their clients and suppliers to avoid involvement in illegal arms trafficking. While their responsibility to respect human rights is independent from states, they will benefit from a legislative and regulatory framework that clearly defines the boundaries of their obligations. It is the role of governments to put in place such a framework, in accordance with their international commitments on arms and human rights.

Controlling arms financing is not only about defending human rights, it is also about actively fighting the growing scourge of terrorism. Identifying arms-related transactions and their real beneficiaries is an indispensable part of the fight against terrorist organizations. Investigating the end-use of arms before agreeing to finance their production and sale ensures that they will not be used by terrorist groups or used to commit atrocities against civilian populations. KYC procedures that help to combat terrorism and human rights violations can and must be conducted simultaneously.

There are two remedies against armed violence: knowledge and sense of responsibility. They are both within reach but require determination and perseverance.

# APPENDIX 1 – OVERVIEW OF THE LEGAL FRAMEWORK APPLICABLE TO ARMS

International law contains general provisions on the use of arms, and limitations or specific prohibitions on particular arms. These restrictions were initially a response to a desire to limit the suffering caused by armed conflicts, as shown by the preamble of the Declaration of Saint-Petersburg,<sup>72</sup> the first formal agreement to ban the use of certain arms during wars:

*“Considering:  
That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;  
That the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy;  
That for this purpose it is sufficient to disable the greatest possible number of men;  
That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;  
That the employment of such arms would, therefore, be contrary to the laws of humanity”.*

The use of arms is subject to the provisions of international law, in particular in the following domains of international law: international humanitarian law, international human rights law, and international criminal law. The use of arms is also subject to provisions of EU law.

## A. GENERAL PROVISIONS ON THE USE OF ARMS

### 1. INTERNATIONAL HUMAN RIGHTS LAW

The *United Nations Charter* (UN Charter, or *Charter*) gave human rights international legitimacy particularly because most states ratified the Charter, which is the core constituent document of the United Nations. It is a legally binding, multilateral international treaty with 193 states parties. The Charter specifically mentions human rights in its preamble and in a number of articles.<sup>73</sup> Since the adoption of the UN Charter international human rights law

<sup>72</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 11 December 1868.

<sup>73</sup> Human rights are mentioned in the preamble as well as in Articles 13, 55, 62 and 68. Article 55 stipulates that “the United Nations shall promote [...] universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”



has developed significantly and it is now composed of an international body of law of treaties and decisions from international tribunals. Some elements of it like for example the prohibition of slavery or the prohibition of torture became norms of customary international law binding on all states. Most states have also enacted domestic laws that protect what are traditionally thought of as human rights.

Human rights are defined as "*inalienable rights of all members of the human family*" by the Universal Declaration of Human Rights (UDHR) of 1948,<sup>74</sup> which set out, for the first time, fundamental human rights to be universally protected. Thus, human rights are, in principle, applicable to all persons, regardless of their nationality. Specifically, the Universal Declaration calls on nations to respect the rights to life, liberty, and security (Article 3). It also states that no person should be enslaved, tortured, or deprived of the right to a trial before a "national tribunal." Thus the Declaration proclaims negative rights, whereby national governments may not engage in certain activities against persons. Positive rights are also part of the Declaration. It states that everyone should enjoy the right to an education and basic standards of living. In doing so, it calls on nations to provide for all of their citizens without discrimination. Human rights, in substance, are protections against abuses by all states, and guarantees that people shall receive benefits from states.

The UDHR proclaims the ideals of nations aspiring to respect the human rights of people of all nations. Legally, however, this document is not a treaty and does not bind countries as it was adopted as a resolution of the UN General Assembly. However, after the adoption of the UDHR, the UN has adopted a number of legally binding treaties which contained and further developed the set of human rights enshrined in the UDHR. Now treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights are binding upon states parties and provide the international legal framework to protect human rights. Under these treaties, states agree to abide by certain restrictions on their conduct and to uphold certain freedoms and basic needs for citizens.<sup>75</sup> For example, the UN Convention against Torture adopted in 1984, defines and bans torture and other cruel, inhuman, or degrading treatment or punishment. It requires torture to be made a criminal offence under national laws and provides for universal jurisdiction to prosecute torture irrespective of the place of its commission and the nationality of its perpetrator. The Convention also provides for remedies and the right to reparation for torture victims.

The International Covenant on Civil and Political Rights of 1966 mirrors some provisions of the UDHR and guarantees basic rights, including the right to life, and bans torture, inhuman and degrading punishment and treatment, slavery, forced labour, arbitrary arrest and detention. It also guarantees the freedom of movement and the right of people to leave any country including their own, the right to a fair trial, the freedom of conscience and religion, the freedom of opinion and expression, and the freedom of association.

The Human Rights Committee<sup>76</sup> is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its state parties. In particular, it interprets and applies the treaty to cases in which a state exercises control over circumstances affecting the right of a person outside of its borders, such as backing of

---

<sup>74</sup> The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations.

<sup>75</sup> [https://www.law.cornell.edu/wex/human\\_rights](https://www.law.cornell.edu/wex/human_rights)

<sup>76</sup> <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

military factions in another country who were carrying out human rights abuses,<sup>77</sup> and failure to provide effective remedies to people abroad who have been victims of activities of business enterprises domiciled in that state's territory and/or its jurisdiction.<sup>78</sup> Other UN human rights treaty bodies, including the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of All Forms of Discrimination Against Women and the Committee on Economic, Social and Cultural Rights, have followed a similar approach, calling on states to ensure companies within their jurisdiction do not cause or contribute to human rights abuses abroad.<sup>79</sup>

Additionally, several other regional organizations, created by various treaties, have come into existence. The European Convention on Human Rights, for example, binds members of the Council of Europe to the human rights obligations set forth in it. Similar human rights protection systems exist in Africa and in the Americas. The European Convention specifically mentions the Universal Declaration of Human Rights, and charges all signatories with upholding the basic principles of the document. The European Convention on Human Rights has an international tribunal (European Court of Human Rights) to which individuals who have exhausted all domestic remedies can bring claims of violations of their human rights.<sup>80</sup>

## 2. INTERNATIONAL HUMANITARIAN LAW

International humanitarian law (or law of war) is a field of international law regulating armed conflict between states, and more recently, between states and informal groups and individuals. International humanitarian law governs both the legality of justifications for war (*jus ad bellum*, or when states can resort to war) and the legality of wartime conduct (*jus in bello*, or how parties must behave themselves during war). It seeks to limit the impact of wartime, especially on civilians and anyone not participating in hostilities. It introduced rules that should be respected by everyone in armed conflicts and wars, whatever the cause of the conflict or the causes defended by any of the parties concerned.<sup>81</sup> Core principles of international humanitarian law can be found in major international treaties such as the four Geneva Conventions of 1949,<sup>82</sup> and their two Additional Protocols of 1977.<sup>83</sup> In particular,

<sup>77</sup> Human Rights Committee, 'Concluding Observations: Croatia' (1992) UN Doc CCPR/C/79/Add.15, para. 7; Human Rights Committee, 'Concluding Observations: Yugoslavia' (1992) UN Doc CCPR/C/79/Add.16, para. 5, 8.

<sup>78</sup> Human Rights Committee, 'Concluding Observations on Germany' (2012) UN Doc CCPR/C/DEU/CO/6, para. 16.

<sup>79</sup> See, *inter alia*, CERD Committee: 'Concluding Observations: United States of America' (2008) UN Doc CERD/C/USA/CO/6 para. 30; CEDAW Committee: 'General Recommendation 28 on the Core Obligations of States Parties under Article 2' (2010) UN Doc CEDAW/C/GC/28: 'States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory', para. 12; Committee on Economic, Social and Cultural Rights, Concluding Observations on Germany, UN Doc. E/C.12/DEU/CO/5 (20 May 2011), para. 10: "*The Committee expresses concern that the State party's policy-making process in, as well as its support to, investments by German companies abroad does not give due consideration to human rights.*" See also CESCR General Comment No. 14: "*To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, ...*" CESCR, 'General Comment 14: The Right to the Highest Attainable Standard of Health' (2000) UN Doc E/C.12/2000/4, para. 39.

<sup>80</sup> [http://www.echr.coe.int/Documents/Pub\\_coe\\_domestic\\_remedies\\_ENG.pdf](http://www.echr.coe.int/Documents/Pub_coe_domestic_remedies_ENG.pdf)

<sup>81</sup> [https://www.law.cornell.edu/wex/International\\_humanitarian\\_law](https://www.law.cornell.edu/wex/International_humanitarian_law)

<sup>82</sup> There are 4 Conventions:

they seek to protect people who are not participating in hostilities (civilians, health and religious personnel and members of humanitarian organizations), as well as anyone not taking part in the fighting (the wounded, the ill, the shipwrecked and prisoners of war). These instruments define “serious breaches” of IHL and provide for the universal jurisdiction of national courts for such acts.

Serious breaches of these treaties and other serious violations of IHL constitute war crimes. The list of war crimes provided in Article 8 of the Rome Statute of the International Criminal Court (ICC)<sup>85</sup> reflected customary international law at the time of its adoption, although a number of important war crimes are not included.<sup>86</sup>

As regards arms specifically, IHL prohibits two types of weapons:

- those which are of a nature to cause superfluous injury or unnecessary suffering
- and those which are by nature indiscriminate.<sup>87</sup>

On these grounds, international humanitarian law prohibits, *inter alia*, the use of biological and chemical weapons, expanding and exploding bullets.<sup>88</sup> The use of such prohibited weapons constitutes a war crime.<sup>89</sup> Specific treaties have been agreed banning anti-personnel landmines and cluster munitions.<sup>90</sup>

The *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects* (CCW) of 10 October 1980, signed on 10 April 1981 and approved by the Luxembourg Law of 3 April 1996<sup>91</sup> restricts or prohibits the use of certain conventional arms on the principle that they may strike combatants and civilians indiscriminately, and cause superfluous injury or unnecessary suffering to combatants. The CCW has several protocols. It was amended on 21

I. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;

II. Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea;

III. Convention relative to the Treatment of Prisoners of War;

IV. Convention relative to the Protection of Civilian Persons in Time of War.

<sup>83</sup> Protocol I covers the Protection of Victims of International Armed Conflicts. Protocol II covers the Protection of Victims of Non-International Armed Conflicts.

<sup>85</sup> The Rome Statute of the International Criminal Court, signed on 17 July 1998, entered into force on 1 July 2002 and was approved by the Luxembourg law of 14 August 2000 (Mém. A – 84 of 25.08.2000, p. 1968) and the law of 26 December 2012 approving amendments to the Rome Statute of the International Criminal Court by resolution RC/Res.5 and resolution RC/Res.6 adopted at the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 10-11 June 2010 (Mém. A – 284 of 31.12.2012, p. 4448). Two laws were adopted to make the Statute national law: the law of 27 February 2012 on the provisions of the Rome Statute of the International Criminal Court, approved by the law of 14 August 2000 approving the Rome Statute of the International Criminal Court, Rome, 17 July 1998 (Mém. A – 41 of 7.03.2012, p. 410) and the law of 27 February 2012 regulating cooperation with the International Criminal Court (Mém. A – 41 of 7.03.2012, p. 414).

<sup>86</sup> For a more complete list of war crimes see the authoritative study by the International Committee of the Red Cross, *Customary International Humanitarian Law*, Volume I: Rules; Rule 156.

<sup>87</sup> ICRC, *Customary IHL Study*, Rules 20 and 71.

<sup>88</sup> ICRC, *Customary IHL*, Rules 73, 74, 77, and 78

<sup>89</sup> ICRC *Customary IHL*, Rule 156, p580.

<sup>90</sup> Cluster munition are prohibited by the Convention on Cluster Munitions (Op.cit. Part II, section A.2) and anti-personnel landmines are prohibited by the Mine Ban Treaty (see below in this section).

<sup>91</sup> Mém. A – 23 of 16.04.1996, p.865.

December 2001 and approved by the Luxembourg Law of 8 April 2005.<sup>92</sup>

The CCW Protocols are as follows:

- Protocol I of 10 October 1980, approved by the Law of 3 April 1996,<sup>93</sup> prohibits arms that cause Injury by Fragments Which Are Not Detectable by X ray in the Human Body;
- Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices of 10 October 1980, as amended on 3 May 1996, and approved by the Luxembourg Law of 29 April 1999,<sup>94</sup> prohibits, in all circumstances, the use of such arms against the civilian population in general or against individual civilians, or their indiscriminate use;
- Protocol III of 10 October 1980, approved by the Law of 3 April 1996,<sup>95</sup> restricts the use of *incendiary weapons* designed to set fire to objects or cause severe burns to persons (for example, white phosphorus or napalm, and flame throwers);
- Protocol IV of 13 October 1995, prohibits *Blinding Laser Weapons*, approved by the Luxembourg Law of 29 April 1999;<sup>96</sup>
- Protocol V of 28 November 2003 on *Explosive Remnants of War*, approved by the Luxembourg Law of 8 April 2005.<sup>97</sup>

A fundamental rule of international humanitarian law is that parties to any conflict must at all times “*distinguish between civilians and combatants*”, especially in that “*attacks may only be directed against combatants*” and “*must not be directed against civilians*.”<sup>98</sup> A similar rule requires parties to distinguish between “civilian objects” and “military objectives.” These rules are part of the fundamental principle of distinction.

For the purposes of distinction, anyone who is not a member of the armed forces of a party to the conflict is a civilian, and the civilian population comprises all persons who are not combatants.<sup>99</sup> Civilians are protected against attack unless and for such time as they take a direct part in hostilities.<sup>100</sup>

Civilian objects are all objects (that is, buildings, structures, places, and other physical property or environments) which are not “military objectives,” and military objectives are “*limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.*”<sup>101</sup> Civilian objects are protected against attack, unless and for such time as they

<sup>92</sup> Mém. A – 57 of 29.04.2005, p. 890.

<sup>93</sup> Mém. A – 23 of 16.04.1996, p.865.

<sup>94</sup> Mém. A – 50 of 6.05.1999, p. 1175.

<sup>95</sup> Mém. A – 23 of 16.04.1996, p.865.

<sup>96</sup> Mém. A – 50 of 6.05.1999, p. 1175.

<sup>97</sup> Mém. A – 57 of 29.04.2005, p. 890.

<sup>98</sup> ICRC Customary IHL Study, Rule 1. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 48, and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 12(2).

<sup>99</sup> ICRC Customary IHL Study, Rule 5; see also Protocol I, Article 50.

<sup>100</sup> ICRC Customary IHL Study, Rule 6; see also Protocol I, Article 51(3); Protocol II, Article 13(3).

<sup>101</sup> ICRC Customary IHL Study, Rules 8 and 9; Protocol I, Article 52.

become military objectives because all of the criteria for a military objective just described become temporarily fulfilled.<sup>102</sup> In cases of doubt whether an object that is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling, or a school, is being used for military purposes, it is to be presumed not to be so used.<sup>103</sup>

Intentionally directing attacks against civilians or against civilian objects is a war crime.<sup>104</sup> The principle of distinction also includes a specific rule that “*acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*”<sup>105</sup>

The corollary of the rule of distinction is that “indiscriminate attacks are prohibited.”<sup>106</sup> Indiscriminate attacks are those that are of a nature to strike military objectives and civilians or civilian objects without distinction, either because the attack is not directed at a specific military objective, or because it employs a method or means of combat that cannot be directed at a specific military objective or has effects that cannot be limited as required by international humanitarian law.<sup>107</sup>

International humanitarian law also prohibits disproportionate attacks, which are those “*which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*”<sup>108</sup> Intentionally launching an indiscriminate attack resulting in death or injury to civilians, or a disproportionate attack (that is, knowing that the attack will cause excessive incidental civilian loss, injury or damage) constitutes a war crime.<sup>109</sup>

In addition to benefiting from the protection accorded to civilians and civilian objects, certain persons and objects are afforded special protection under international humanitarian law. Medical personnel and medical transports must be respected and protected in all circumstances.<sup>110</sup> Humanitarian relief personnel and humanitarian relief objects must be respected and protected.<sup>111</sup> And “*special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.*”<sup>112</sup>

The protection of the civilian population and civilian objects is further underpinned by the requirement that all parties to a conflict take precautions in attack. In the conduct of military operations, then, “*constant care must be taken to spare the civilian population, civilians and civilian objects*”; “*all feasible precautions*” must be taken to avoid and minimize incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>113</sup> The parties must choose means and methods of warfare with a view to avoiding, and in any event to

<sup>102</sup> ICRC Customary IHL Study, Rule 10.

<sup>103</sup> Protocol I article 52(3). See also ICRC Customary IHL Study, pp. 34-36.

<sup>104</sup> ICRC Customary IHL Study, Rule 156, pp. 591,593,595-598. See also Rome Statute of the ICC, articles 8(2)(b)(i) and (ii) and 8(2)(e)(i)(ii)(iv) and (xii). See also discussion in ICRC Customary IHL Study, p. 27.

<sup>105</sup> ICRC Customary IHL Study, Rule 2; see also Protocol I, Article 51(2) and Protocol II, Article 12(2).

<sup>106</sup> ICRC Customary IHL Study, Rule 11; Protocol I, Article 51(4).

<sup>107</sup> ICRC Customary IHL Study, Rule 12; Protocol I, Article 51(4)(a).

<sup>108</sup> ICRC Customary IHL Study, Rule 14; Protocol I, Articles 51(5)(b) and 57.

<sup>109</sup> ICRC Customary IHL Study, Rule 156, pp. 599-601.

<sup>110</sup> ICRC Customary IHL Study, Rules 26 and 29.

<sup>111</sup> ICRC Customary IHL Study, Rules 31 and 32.

<sup>112</sup> ICRC Customary IHL Study, Rule 38.

<sup>113</sup> ICRC Customary IHL Study, Rule 15. See also Protocol II, Article 13(1).

minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>114</sup> Everything feasible must be done to verify that targets are military objectives, to assess the proportionality of attacks, and to halt attacks if it becomes apparent they are wrongly directed or disproportionate.<sup>115</sup> Where circumstances permit, parties must give effective advance warning of attacks which may affect the civilian population.<sup>116</sup>

Parties must choose appropriate means and methods of attack when military targets are located within residential areas. This requirement rules out the use of certain types of weapons and tactics. The use of means (such as using imprecise explosive weapons on targets located in densely populated civilian areas) of combat that cannot be directed at a specific military objective may result in indiscriminate attacks and is prohibited. Choosing methods of attack (e.g. attacking objectives at times when many civilians are most likely to be present) that do not minimize the risk to civilians also violates international humanitarian law.

Warring parties have obligations to take precautions to protect civilians and civilian objects under their control against the effects of attacks by the adversary. As with precautions in attack, these rules are particularly important when fighting is taking place in areas with large numbers of civilians. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas.<sup>117</sup>

However, Article 50(3) of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), states: “*The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.*”

Applicable IHL also provides fundamental guarantees for civilians as well as fighters or combatants who are captured, injured or otherwise rendered unable to fight (*hors de combat*). Between them, Common Article 3 of the 1949 Geneva Conventions and customary international humanitarian law include the following rules: murder is prohibited; humane treatment is required; discrimination in application of the protections of IHL is prohibited; torture, cruel or inhuman treatment and outrages on personal dignity (particularly humiliating and degrading treatment) are prohibited, as are enforced disappearances, the taking of hostages, and arbitrary detention. No one may be convicted or sentenced except pursuant to a fair trial affording all essential judicial guarantees. Collective punishments are also prohibited.<sup>118</sup> Depending on the particular rule in question, many or all acts that violate these rules will also constitute war crimes.<sup>119</sup>

### 3. INTERNATIONAL CRIMINAL LAW

International criminal law criminalizes acts of individuals and groups, which amount to crimes under international law such as for example genocide, crimes against humanity, war crimes, torture or enforced disappearances committed on the territory under state jurisdiction

---

<sup>114</sup> ICRC Customary IHL Study, Rule 17.

<sup>115</sup> ICRC Customary IHL Study, Rules 16-19.

<sup>116</sup> ICRC Customary IHL Study, Rule 20.

<sup>117</sup> ICRC Customary IHL Study, Rule 23; see also Protocol I, Article 58(b).

<sup>118</sup> ICRC Customary IHL Study, Rules 87-105.

<sup>119</sup> ICRC Customary IHL Study, Rule 156, pp. 590-603.

or by their citizens. Crimes under international law are also internationally wrongful acts, which means that states may also incur responsibility for aiding and assisting those acts if they provide means (including arms and money) to facilitate them with intent.<sup>120</sup>

There are 5 features characterising a crime under international law:<sup>121</sup>

- 1) The crime violates or threatens fundamental values or interests protected by international law and is of concern to the international community as a whole;
- 2) The criminal norm emanates from an international treaty or from customary international law, without requiring intermediate provision of domestic law;
- 3) The criminal norm has direct binding force on individuals and therefore provides for direct individual criminal responsibility;
- 4) The crime may be prosecuted before international or domestic criminal courts in accordance with the principle of universal jurisdiction;<sup>122</sup>
- 5) A treaty provision or a rule of customary international law establishing liability for an act as an international crime binds all (or a great majority of) states and individuals.

States have the primary responsibility for either prosecuting before their national courts or extraditing to international or foreign courts and tribunals individuals suspected of responsibility for crimes under international law. In addition, all states are permitted and, sometimes, obliged to exercise universal jurisdiction with regard to those crimes.<sup>123</sup> International criminal law is also practiced by, and prosecuted within, international criminal tribunals, such as the International Criminal Court<sup>124</sup>.

International law provides the following definitions:

- **Genocide** is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.<sup>125</sup>

<sup>120</sup> Articles on State Responsibility for Internationally Wrongful Acts, Article 16.

<sup>121</sup> <http://www.internationalcrimesdatabase.org/Crimes/Introduction>

<sup>122</sup> Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgement of 5 February 1970, International Court of Justice, para 34-34: "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

<sup>123</sup> See, for example, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, arts.49 and 50

<sup>124</sup> Source : [https://www.law.cornell.edu/wex/international\\_law](https://www.law.cornell.edu/wex/international_law)

<sup>125</sup> See the Convention on the prevention and punishment of the crime of genocide of December 9, 1948, and the Rome Statute of the ICC.

- **Crimes against humanity** – conduct amounts to crimes against humanity if it encompasses specific acts such as murder, extermination (notably, conditions of life calculated to bring about the destruction of part of the population), enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy (with the intent of affecting the composition of the population), enforced sterilization, persecution, enforced disappearance of persons, persecutions on political, racial or religious grounds, other inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. This conduct usually involves multiple commission of those acts against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.<sup>126</sup>
- **War crimes** are serious violations of the IHL, i.e. violations of the laws or customs of war. Such violations include, but are not limited to, wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering, or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement; taking of hostages or other serious violations of the laws and customs of war.

The Luxembourg Criminal Code incorporated provisions of the ICC Statute in its Title I *bis* “About serious violations of international humanitarian law” including in particular definitions of genocide, crime against humanity and war crimes.<sup>127</sup>

## B. LEGAL STANDARDS ON SPECIFIC TYPES OF ARMS

Since the end of the Second World War and the invention of the nuclear bomb, weapons of mass destruction are distinguished from conventional weapons.

### 1. WEAPONS OF MASS DESTRUCTION (WMD)

According to the UN Office for Disarmament Affairs, weapons of mass destruction are weapons designed to kill a large number of people, and are directed at both civilians and the military. These weapons are not in general used against a very precise objective, but rather against an extensive area with over a 1km radius, with devastating effects on people,

<sup>126</sup> See in particular the Charter of the International Military Tribunal and the Rome Statute of the ICC.

<sup>127</sup> Code Pénal – Titre I bis “Des violations graves du droit international humanitaire.”



infrastructure and the environment.<sup>128</sup>

Weapons of mass destruction include:

- **Nuclear weapons:** although they are not specifically banned by international law, they are strictly regulated by a number of international treaties to which Luxembourg is party.<sup>129</sup> In an Advisory Opinion issued in 1996, the International Court of Justice stated that their use is “*generally contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law,*” while stating that it could not reach a definitive

<sup>128</sup> <http://www.un.org/fr/disarmement/wmd/index.shtml>

<sup>129</sup> Luxembourg is party to the following treaties that deal with nuclear weapons:

- *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)* of 1 July 1968, signed on 14 August 1968 in Washington, Moscow and London, adopted by the law of 20 December 1974 (Mém. A - 91 of 27 December 1974, p. 2114). The NPT requires each nuclear-weapon state party to undertake not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices and not to assist any non-nuclear-weapon state to manufacture or acquire such weapons or devices, or control them (art.I). Non-nuclear-weapon states must undertake not to receive transfers of nuclear weapons and devices or control them and not to manufacture or acquire such weapons or devices and not to seek or accept assistance (art.II). However, the NPT recognizes the right of all states to develop, research, produce and use nuclear energy for peaceful purposes (art.IV). The agreement between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the European Atomic Energy Community and the International Atomic Energy Agency, in implementation of article III of the NPT, in Brussels, 5 April 1973 and adopted by the law of 20 December 1974 (Mém. A - 91 of 27.12.1974, p. 2114), deals with the International Atomic Energy Agency's mission of guaranteeing that special fissionable materials produced or used in the nuclear installations of non-nuclear-weapon states are only used for peaceful purposes. Additional Protocol on the Non-Proliferation of Nuclear Weapons to Detect Clandestine Nuclear Activities, Vienna, 22 September 1998 and adopted by the law of 1 August 2001 (Mém. A - 105 of 23.08.2001 p. 2136).
- *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil thereof* of 11 February 1971, London, Moscow and Washington and adopted by the law of 11 August 1982 (Mém. A - 74 of 01.09.1982, p. 1546). Additional Protocol on the Non-Proliferation of Nuclear Weapons to Detect Clandestine Nuclear Activities, Vienna, 22 September 1998 adopted by the law of 1 August 2001.
- *Comprehensive Nuclear Test Ban Treaty*, of 10 September 1996, New York, signed on 24 September 1996 and adopted by the law of 11 March 1999 (Mém. A - 27 of 19.03.1999, p. 669).
- *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water* of 5 August 1964, Moscow, signed on 13 August 1963 and adopted by the law of 6 January 1965 (Mémorial A - 1 of 13.01.1965 p. 10).
- *Convention on the Physical Protection of Nuclear Material* of 3 March 1980, New York and Vienna, adopted by the law of 11 April 1985 (Mém. 21 du 29.04.1985 p. 351) amended by the law of 12 August 2003 on 1) suppression of terrorism and the financing of terrorism 2) adoption of the International Convention for the Suppression of the Financing of Terrorism, opened for signature in New York on 10 January 2000 (Mém. A - 137 of 15.09.2003, p. 2850), the law of 27 October 2010 strengthening the legal framework regulating the fight against money laundering and the financing of terrorism (Mém. A - 193 of 03.11.2010, p. 3172), the law of 28 July 2011 adopting the Amendment to the Convention on the Physical Protection of Nuclear Material, adopted in Vienna (Mém. 170 of 09.08.2011, p. 2918), the law of 26 December 2012 adopting the Council of Europe Convention on the Prevention of Terrorism (Mém. A- 290 of 31.12.2012).

conclusion as to the legality of the use of nuclear weapons by a state “*in an extreme circumstance of self-defence, in which its very survival would be at stake.*”<sup>130</sup>

- **Chemical weapons**, banned by the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* of 3 September 1992, signed on 13 January 1993, entered into force in April 1997. The convention was adopted by the Luxembourg law of 10 April 1997<sup>131</sup>.
- **Biological and Bacteriological arms**, banned by the *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, of Bacteriological Methods of Warfare* of 17 June 1925, approved by the Luxembourg law of 15 July 1936,<sup>132</sup> and by the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* of 10 April 1972, approved by the Luxembourg law of 28 November 1975.<sup>133</sup>

In addition, Luxembourg is obliged to implement UN Security Council Resolution 1540 of 28 April 2004 on the proliferation of weapons of mass destruction, which requires states (i) to refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery and (ii) to approve and enforce laws preventing the proliferation of weapons of mass destruction.<sup>134</sup>

---

<sup>130</sup> I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p.266.

<sup>131</sup> Mém. A - 23 of 16.04.1997 p. 881. This Act led to the adoption of the ministerial regulation of 25 June 1997 amending the list annexed to the Grand Ducal Regulation of 31 October 1995 on the import, export and transit of arms, munitions and equipment intended specifically for military use and of related technology (Mém. A - 51 of 22.07.1997). The Convention on Chemical Weapons completely banned chemical weapons: toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention; munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals which would be released as a result of the employment of such munitions and devices; any equipment specifically designed for use directly in connection with the employment of these munitions and devices.

For more information, see: <http://www.opcw.org/chemical-weapons-convention/>

<sup>132</sup> Mém. A - 63 of 14.08.1936 p. 1015.

<sup>133</sup> Mém. A - 82 of 11.12.1975 p. 1775. The Convention also banned microbial or other biological agents, or toxins, whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict. The Convention also contains provisions on disarmament. Luxembourg also signed the Convention on the Prohibition of the Military or any Other Hostile Use of Environmental Modification Techniques, adopted in New York, 10 December 1976.

<sup>134</sup> In addition, Resolution 1887 of 24 September 2009 invites states to strengthen their controls over exports of nuclear equipment and to condition their export on the recipient state's compliance with the agreements signed or to be signed with the IAEA. It also calls on member states to strengthen their national legislation, by adopting stricter national controls for the export of sensitive goods and technologies of the nuclear fuel cycle; improving their capabilities to detect, deter, and disrupt illicit trafficking in nuclear materials throughout their territories; by taking all appropriate national measures in accordance with their national authorities and legislation, and consistent with international law, to prevent proliferation of financing and shipments, to strengthen export controls, to secure sensitive materials, and to control access to intangible transfers of technology.

Climatic, seismic and thermobaric weapons are also considered to be WMDs.

## 2. CONVENTIONAL ARMS

The UN Office for Disarmament Affairs states that conventional arms are not weapons of mass destruction. They are generally devices designed to kill, wound or cause damage and their means of delivery. Their effects are generally, but not only, due to high explosives, weapons powered by kinetic energy or incendiary devices.<sup>135</sup>

Conventional arms are therefore, by default, all arms that are not WMD. It is therefore difficult to define them exactly. Conventional arms are a crucial issue for security as well as for human rights. It is estimated that more than 500,000 civilians are killed by the misuse of conventional arms every year, which is equivalent to one person every minute.<sup>136</sup>

### a) Definition of conventional arms

The UN Register of Conventional Arms<sup>137</sup> distinguishes several categories of major conventional arms: large-calibre artillery systems, combat aircraft, battle tanks, attack helicopters, armoured combat vehicles, warships, missiles, missile launchers and SALW.

SALWs include the following categories of arms:

- Small arms: revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles, light machine guns;
- Light weapons: heavy machine guns, hand-held underbarrel and mounted grenade launchers, portable anti-aircraft cannons, portable anti-tank guns, recoilless rifles, portable anti-tank missile launchers and rocket systems, portable anti-aircraft missile launchers, mortars of less than 100 mm;
- munitions and explosives: anti-personnel and anti-tank grenades, landmines and explosives, SALW ammunition (cartridges for small arms, shells and missiles for light weapons, mobile containers with missiles or shells for single action anti-aircraft and anti-tank systems).

Since the 1990s, there has been uncontrolled distribution of SALWs.

In 2007, the *Small Arms Survey* estimated that 875 million firearms were in circulation in the world, which accounts for only a part of SALWs.<sup>138</sup> SALWs are now one of the major components of international trafficking in arms. They are lethal arms: it is estimated that, between 1990 and 2000, they caused the death of 4 million people, 90% of them civilians and 80% of them women and children.<sup>139</sup> The proliferation of SALWs is in part due to the

<sup>135</sup> <http://www.un.org/fr/disarmament/wmd/index.shtml>

<sup>136</sup> *Shattered Lives: the case for tough international arms control*. Amnesty International and Oxfam, 2003, p24.

<sup>137</sup> The United Nations Register of Conventional Arms was established on 1 January 1992, in accordance with General Assembly Resolution 46/36 of 6 December 1991, entitled *General and Complete Disarmament*, doc. UN A/RES/46/36.

<sup>138</sup> *Small Arms Survey 2007: Guns and the city*, Geneva, Cambridge University Press. Cited in Amnesty International, *Contrôler les armes*, Editions Autrement.

<sup>139</sup> Amnesty International, *Contrôler les armes*, op. cit.

fact that they are not expensive and easy to acquire.

### b) Legal framework for conventional arms

Although only certain conventional arms are strictly prohibited, the trade in conventional arms as a whole, whether prohibited or not, is regulated by international law.

#### ▪ Prohibition of certain conventional arms

The following arms are strictly prohibited:

- **Anti-personnel landmines**, prohibited by the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* (also known as the Mine Ban Treaty) of 18 September 1997, signed in Ottawa on 4 December 1997 and approved by the Luxembourg law of 29 April 1999;<sup>140</sup>
- **Cluster munitions**, prohibited by the *Convention on Cluster Munitions* of 30 May 2008, signed in Oslo on 3 December 2008 and approved by the Luxembourg law of 4 June 2009<sup>142</sup>. The law of 4 June 2009 prohibited “*all physical and legal persons from knowingly financing cluster munitions or explosive submunitions.*”<sup>143</sup>
- **Projectiles Under 400 Grammes**, which are explosive or charged with fulminating or inflammable substances, prohibited by the Declaration of Saint Petersburg.
- **Bullets Which Expand or Flatten Easily in the Human Body**, such as bullets with a hard envelope, prohibited by Declaration IV of The Hague, of 29 July 1899.

There are other conventional arms which are not prohibited but the use of which is strictly restricted. Please see section A.2 “International humanitarian law.”

#### ▪ Regulation of international trade in conventional arms

##### ✓ *International law*

International law regulates international transfers of conventional arms in order to limit their proliferation and uncontrolled use.

- **The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies**. Adopted on 12 May 1996, it introduced a

---

<sup>140</sup> Mém. A – 50 of 6.05.1999, p. 1189. However, the Convention authorizes the retention or transfer of a number (minimum number absolutely necessary) of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction. The transfer of anti-personnel mines for the purpose of destruction is also permitted.

<sup>142</sup> Mém. A – 147 of 22 June 2009, p. 2038.

<sup>143</sup> Article 3 of the Act.

system to control exports of conventional arms and dual use goods and technologies, common to the 41 states parties (including Luxembourg).

- **The Arms Trade Treaty (ATT).** Adopted by the United Nations General Assembly on 2 April 2013, it established international standards on the import, export and transfer of conventional arms, ammunition, and related parts and components, in order to eliminate the illicit trade in these arms and prevent unauthorized end-use or diversion to unauthorized end-users (human rights violations, acts of terrorism...). The ATT entered into force after obtaining 50 ratifications. The ATT was signed by Luxembourg on 3 June 2013 and approved by the law of 23 May 2014.<sup>144</sup> As the 2013 Annual Report of Luxembourg's foreign ministry emphasized, "*Luxembourg was among the first members states of the United Nations to sign the Arms Trade Treaty (ATT) at the United Nations headquarters in New York. Luxembourg welcomes the creation of a legally binding universal instrument setting the highest possible standards on the export, import and transfer of conventional arms.*"<sup>145</sup>

The aim 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*" and "*to prevent and eradicate the illicit trade in conventional arms and prevent their diversion*" for the purpose of "*reducing human suffering.*"<sup>146</sup>

The production, export, import and transfer of conventional arms are not prohibited in principle by the ATT. States are authorized to acquire conventional arms<sup>147</sup> for their own legitimate defence and peacekeeping operations.

The ATT lists a series of illegal and prohibited uses of arms. One of the most important provisions of the ATT is its Article 6 (3) which prohibits transfer of arms if the exporting state has knowledge that the arms would be used in the commission of genocide, crimes against humanity or war crimes. States are also prohibited from transferring arms to places where the UN Security Council has imposed an arms embargo and when the transfer should be prohibited under other international agreement on fight against illicit arms trafficking.

If the transfer of arms is not prohibited under Article 6 then, based on Article 7, states parties are required to conduct an objective assessment to determine whether the arms would not be used to, among other things, commit or facilitate serious violations of international human rights law or international humanitarian law. If, after conducting such assessment, it is concluded that there exists an overriding risk of such negative consequences the exporting state shall not authorize the export.

States which have ratified or acceded to the ATT, including Luxembourg, have voluntarily

---

<sup>144</sup> Law of 23 May 2014 approving the Arms Trade Treaty, New York, 2 April 2013, signed by Luxembourg on 3 June 2013 in New York, Mém. A – 89 of 27.05.2014, p. 1406. As of 8 January 2016, 130 had signed the treaty, 79 of which were states parties. A list of these countries can be found on [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVI-8&chapter=26&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-8&chapter=26&lang=en)

<sup>145</sup> Annual Report 2013, Ministry of Foreign Affairs, *op. cit.*, p.52.

<sup>146</sup> Article 1 of the Arms Trade Treaty.

<sup>147</sup> List given in article 2: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft; attack helicopters; warships; missiles and missile launchers; small arms and light weapons. Article 3 concerns, in addition, the export of munitions fired, launched or delivered by the conventional arms covered under article 2 (1). Article 4 covers the export of parts and components, where the export is in a form that provides the capability to assemble the conventional arms covered under article 2 (1).

taken upon themselves specific obligations deriving from it. In particular they have recognized, as the object and the purpose of the treaty their obligations to “*establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms*” and to “*prevent and eradicate the illicit trade in conventional arms and prevent their diversion.*”

Based on the ATT Luxembourg, as well as other states parties, is obliged to ensure that trade in arms covered by the treaty is effectively regulated. This means controlling and regulating “*export, import, transit, trans-shipment and brokering*” of arms by individuals and other legal entities (including corporations) under their jurisdiction.<sup>148</sup>

In addition, there are also multilateral arms embargoes that have been implemented by an international organisation, such as the EU or UN, or by a group of nations as a sanction “*to coerce states and non-governmental actors to improve their behaviour in the interests of international peace and security.*”<sup>149</sup>

#### ✓ Luxembourg law

At the national level, the law amended on 15 March 1983 on arms and munitions<sup>150</sup> made a distinction between two categories of arms. It is forbidden to import, manufacture, transform, repair, acquire, purchase, hold, store, transport, carry, transfer, sell, export or trade in Category I arms and munitions,<sup>151</sup> although some activities are authorized in particular circumstances (art. 4). In the case of Category II arms and munitions,<sup>152</sup> these activities require justice ministry authorization.

The law is implemented by:

- the amended Grand Ducal Regulation of 13 April 1983 implementing the law of 15 March 1983 on arms and munitions;<sup>153</sup>

<sup>148</sup> Arms Trade Treaty, Article 2(2).

<sup>149</sup> <http://www.sipri.org/databases/embargoes>

<sup>150</sup> Mém. A – 254 of 15.12.2011, p. 4268.

<sup>151</sup> For prohibited arms, the law covers the following arms and munitions: arms and other devices designed to harm people using lachrymatory, toxic, asphyxiating, inhibitive or similar substances, as well as their munitions, with the exception of guns and revolvers intended to fire cartridges containing inhibitive substances and the munitions used by these arms; arms and other devices designed to harm people and goods using fire or explosions, and their munitions, with the exception of arms and devices listed in Category II below; weapons with a blade, which have more than one cutting edge, bayonets, swords, double-edged swords, sabres, spears, stilettos and throwing knives; flick knives, with the exception of hunting knives; unsheathed knives with a blade under 7 cm in length or with a length between 7 cm and 9 cm, on condition, in the latter case, that the width is greater than 14 mm; knuckle-dusters, clubs, sword and sabre sticks, firearms, unmarked elementary packages of munitions; all other firearms not listed in Category II, and their munitions and accessories.

<sup>152</sup> This category includes: kinetic energy weapons (excluding firearms) with a kinetic energy at the mouth of the barrel greater than 7.5 joules; guns and revolvers used to fire cartridges containing inhibitive substances; guns and firearms for defence and sport; firearms designed for alarm, signalling, lifesaving and animal slaughtering; hunting and sport rifles and guns; military rifles and guns operating or performing in a way that is identical to hunting and sport arms, or that have been modified to become hunting and sport arms; flick knives specially used for hunting; truncheons; the munitions used with the arms listed above; silencers; guns used to slaughter animals, known as “kill-cattle”; crossbows with an arrow propulsion force greater than 10 kg as well as all other devices designed to throw solid projectiles (slings, catapults) by mechanical force, with the exception of bows used for sport.

<sup>153</sup> Mém. A – 254 of 15.12.2011, p. 4267.

- the Grand Ducal Regulation of 7 June 1993 authorizing 1. Extension of the use of the database containing the names of the owners, carriers, holders and sellers of prohibited arms; 2. Use of the identity numbers of physical and legal persons;<sup>154</sup>
- the Grand Ducal Regulation of 24 November 2005 on the placing on the market and control of explosives for civil uses,<sup>155</sup> amended by the Grand Ducal Regulation of 31 March 2006 complementing the Grand Ducal Regulation of 24 November 2005 on the placing on the market and control of explosives for civil uses.<sup>156</sup>

The amended Grand Ducal Regulation of 31 October 1995 on the import, export and transit of arms, munitions and equipment intended specifically for military use and related technology<sup>157</sup> prohibits these activities in the case of arms, munitions and equipment intended specifically for military use in Category I. An export and transit licence must be obtained for arms, munitions and equipment intended specifically for military use in Category II. A licence must also be obtained for arms, munitions and equipment intended specifically for military use in Category II section 2. Licences are granted by the Licence Office.<sup>158</sup>

Without removing the existing licensing regime, the bill on the control of the export, transfer, transit and import of defence-related products and dual use products,<sup>159</sup> registered on 24 July 2014,<sup>160</sup> seeks to bring together all existing legislation into a single law. The bill is aimed at defence-related products (technologies and military equipment), goods that may be used to inflict capital punishment, torture or other cruel, inhuman or degrading punishments or treatment,<sup>161</sup> and dual use products.<sup>162</sup> The law deals with operations involving the export, import, transfer and transit of these goods as well as brokering, technical assistance and technology transfers, as well as restrictive measures on these goods imposed by embargoes. A Grand-Ducal Regulation on the brokering of defence-related products and dual use goods was also issued on 5 August 2015 and provides for an authorisation regime for brokering activities in relation with defence-related products.

### c) Other types of military devices

#### ▪ Security equipment

There is no internationally recognized and exhaustive list of security equipment. However, security equipment includes equipment held by most of the world's security forces: handcuffs, shackles, chains, batons, cudgels, incapacitating chemical products (tear gas),

<sup>154</sup> Mém. A - 49 of 12.07.1993, p. 988.

<sup>155</sup> Mém. A - 187 of 30.11.2005, p. 2992.

<sup>156</sup> Mém. A - 62 of 10.04.2006, p. 1263.

<sup>157</sup> Mém. A - 94 of 28.11.1995, p. 2214.

<sup>158</sup> The list appended to the Grand Ducal Regulation was amended by the ministerial regulation of 7 April 1997 (Mém. A - 30 of 29.04.1997, p. 1117); the ministerial regulation of 25 June 1997 (Mém. A - 51 of 22.07.1997, p. 1648); the ministerial regulation of 3 March 1998 (Mém. A - 253 of 14.12.2011, p. 259); the ministerial regulation of 7 February 2012 (Mém. A - 29 of 17.02.2012, p. 354).

<sup>159</sup> Bill n° 6708 on the control of the export, transfer, transit and import of goods of a strictly civil nature, defence-related products and dual use goods; brokering and technical assistance; intangible transfers of technology; implementation of United Nations Security Council resolutions and European Union positions including restrictive measures on commercial matters towards certain states, political regimes, persons, entities and groups.

<sup>160</sup> At the time of writing this report, the Bill had received favourable opinions from the Chamber of Civil Servants and Government Employees (Chambre des Fonctionnaires et Employés publics) (13.10.2014) and the Chamber of Employees (Chambre des Salariés) (30.10.2014),

<sup>161</sup> The bill prohibits the export and import of leg-irons, gang-chains and portable electric shock devices.

<sup>162</sup> They include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.

electric shock equipment (such as Taser guns).<sup>163</sup>

- Components for military, police and security systems

A decreasing number of sites produce complete arms systems in one country. Systems are now assembled from components and equipment (spare parts, electronic systems...). Therefore, in addition to the export of “complete” arms, it is indispensable to control transfers of their components.<sup>164</sup>

- “Dual use” goods and technologies

Goods and technologies are labelled “dual use” when they can be used for civilian as well as military purposes. In general, this includes equipment supplied for civilian use that is then used to develop military arms or materials. For example, digital signal processors used in DVD readers are also used in guiding devices; and the acquisition of missile targeting systems for combat aircraft. This may also include software used for conducting surveillance, including online, some of which may be intrusion software.

The Wassenaar Arrangement introduced a system for controlling the export of dual-use goods and technologies.

Luxembourg is also subject to Council Regulation EC n°428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual use items.<sup>165</sup> The regulation is aimed at *“items, including software and technologies, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.”* It is implemented in Luxembourg by the Grand Ducal Regulation of 2 September 2011 regulating the export and transit of dual-use goods and technologies<sup>166</sup> and the Grand-Ducal Regulation on the brokering of defence-related products and dual use goods issued on 5 August 2015.<sup>167</sup>

---

<sup>163</sup> <https://www.amnesty.org/en/documents/act30/1305/2015/en>

<sup>164</sup> Cf. article 4 of the ATT.

<sup>165</sup> JOUE n° L 134 of 29.5.2009, p. 1. The regulations were amended by European Parliament and Council Regulation (EU) n° 1232/2011 of 16 November 2011 (JOUE n° L 326 of 8.12.2011, p. 26) and European Parliament and Council Regulation (EU) No 388/2012 of 19 April 2012 (JOUE n° L129 of 16 May 2012, p. 12) and European Parliament and Council Regulation (EU) n° 599/2014 of 16 April 2014 (JOUE n° L 173 of 12.06.2014, p. 79).

<sup>166</sup> Mém. A – 195 of 12.09.2011, p. 3552.

<sup>167</sup> Op.cit. p.3798.



## APPENDIX 2 – INFORMATION GATHERED FROM THE BANKS

This appendix includes information provided by the banks that agreed to participate in the AI study. Only BCEE, BNP and Raiffeisen met AI representatives to answer our questions and also provided information through emails and letters. ING provided information through emails and letters. KBL provided some basic information by courier but did not respond to further requests. BdL first indicated that it wished to take part in the study but did not follow up on invitations to meet, nor on requests for information. BIL expressly refused to meet AI and to take part in the study.

This section of the report is therefore based only on statements made by the banks in the course of their contact with AI, as well as in some of their public documents. AI is not in a position to confirm whether or not and to what extent these statements and the information contained in the public documents were accurate.

The table below presents, for each bank which answered to AI, the information provided with respect to:

- The existence (or not) of **policies on defence and arms**;
- **internal procedures** to govern the implementation of the policies on defence and arms ;
- **training** of employees about the policies on defence and arms;
- whether the goals of policies on defence and arms are taken into account into the **performance evaluation** of employees;
- the use of **external experts** to obtain the information necessary for their financing and investment procedures for the defence and arms sector.

BNP Paribas	
Policies on defence and arms	<p>BNP has a public written policy on defence and armaments, available on the group's website.<sup>168</sup> This is the group's policy and is therefore not specific to the bank in Luxembourg. It is one of the BNP group's seven sector-level policies that form part of the group's CSR policy.</p> <p>Published in December 2010, the group's policy excludes investments in and financing of certain types of arms (called "controversial arms") and arms destined to certain geographical zones. The comments below are based on the bank's policy document entitled <i>Sector Policy – Defence</i><sup>169</sup> and Registration</p>

<sup>168</sup> <http://www.bnpparibas.com/sites/default/files/ckeditor-upload/files/PDF/RSE%20-%20Politique%20Sectorielle%20Defense%20BNPP%20-%20publi%C3%A9%20internet%20V2%20corr%202014.pdf>

<sup>169</sup> English version available online in May 2015 at

	<p>Document 2013<sup>170</sup> and on information gathered in the course of exchanges with BNP Paribas.</p> <p>The policy governs all business activities related to the defence sector, the armed forces, the military and others. The policy applies to all arms and materials used by the armed forces. The policy refers to manufacturing, trade, stockpiling “<i>and all other activities</i>” (for example, maintenance). The policy applies to physical and legal persons. It also applies to intermediaries.</p> <p>- <u>Policy on controversial arms</u></p> <p>The policy states that the group does not wish to be involved in the financing of transactions involving controversial arms. The group also does not want to be involved in the provision of financial products and services to companies involved in the manufacture, trade or stockpiling of controversial arms, or any other activity involving controversial arms, and does not want to invest in these companies. BNP defines controversial arms as arms having indiscriminate effects and causing undue harm and injuries. It includes in this category biological and chemical weapons, cluster munitions, nuclear weapons,<sup>171</sup> anti-personnel mines and depleted uranium munitions.</p> <p>BNP does not finance or invest in certain companies because they produce controversial arms. BNP maintains a list of companies that are either excluded or being monitored by virtue of its policy on defence and armaments. This list is based on information in a database supplied by external providers. In 2013, 90 listed and non-listed companies were excluded and 31 were being monitored.<sup>172</sup> In 2014, the list of companies excluded 121 listed and non-listed companies and 33 being monitored.<sup>173</sup> Excluded and monitored companies are excluded from all bank activities, whatever the nature of the transaction, or are monitored. BNP was unwilling to give AI the list of excluded and monitored companies.</p> <p>In addition, in December 2013, THEAM, BNP Paribas Investment Partners’ partner specialising in index-linked, systematic, guaranteed and alternative fund management, started to use indexes excluding</p>
--	---

<http://www.bnpparibas.com/sites/default/files/ckeditor-upload/files/PDF/RSE/CSR%20-%20Sector%20Policy%20-%20Defense%20-%20public%20policy%20published%20on%20website%20V2.pdf>

<sup>170</sup> The deadlines for the production of this report means that the information used here is taken from the Registration Document of 2013. When possible, BNP was kind enough to provide more recent data.

<sup>171</sup> With the exception of companies that only participate in nuclear programmes controlled by governments of NATO countries.

<sup>172</sup> Page 400 of the Registration Document And Annual Financial Report 2013.

<sup>173</sup> Information communicated by BNP.

	<p>companies with activities involving controversial arms (for example, the MSCI Controversial Weapons Indexes) for a range of open funds (indexed sub-funds, SICAV Parworld shares).</p> <p>- <u>Policy on non-controversial arms</u></p> <p>Non-controversial arms, by default, are arms not classed as controversial arms.</p> <p>In the case of non-controversial arms, the company's approach depends on the final destination of the arms in question and an assessment of the potentially irresponsible use that could be made of them. BNP refuses to finance or provide financial services for the export of arms to countries under arms embargo by France, the European Union, the United States or the United Nations or responsible for violations and abuses against children during conflicts. Moreover, BNP maintains a list of countries considered to be particularly sensitive on the basis of a series of criteria, including known human rights violations. In the case of the more sensitive countries, the decision to finance a transaction can only take place on exceptional grounds and following a strengthened due diligence procedure.</p>
Implementation procedures	<p>At BNP, the groups' senior management determines policy on the defence sector when it is first defined and every time it is updated. The CSR department is responsible for making proposals. Application of the policy is the joint responsibility of the Compliance Office (the head of which is a member of the group's executive committee). Since 2012, the CSR is a group function, led by a general manager who is delegated by the group. The missions and responsibilities of the CSR department are clearly defined by a senior management directive.</p> <p>At BNP, the teams analyses the transactions with reference to the group's policy on defence and armaments and then make a decision on whether to refuse or accept a transaction, or, in the event of any doubt, whether to conduct more detailed research and whether to refer the transaction to the CSR department. Only sensitive cases are referred to the CSR department. Transactions with which the teams are familiar are not referred to the CSR department and are not included in the list of sensitive cases linked to defence and armaments in order to avoid the burden of reporting. The group does not have a centralized database recording all defence and armaments-related transactions, which could be used to conduct a thorough monitoring analysis of rejected projects. BNP uses the following monitoring indicator: the number of rejected transactions over the total number of transactions reviewed by the CSR teams. There is also an internal <i>whistleblowing</i><sup>174</sup> system.</p>

<sup>174</sup> *Whistleblowing* is the act taken by an individual who, in his professional activity, is witness to illegal acts and warns internal or external authorities that have the power to end those acts.

	<p>Every year, the number of sensitive transactions reviewed by the CSR teams is published either in the Registration Document<sup>175</sup> or the CSR report. For example, the Registration Document 2013 states that <i>"Under the defence policy, 135 sensitive transactions required a specific review by the Group's CSR correspondents in 2013."</i><sup>176</sup> In 2014, 241 transactions were reviewed.</p> <p>The members of the group refer to the Group Guidelines and sector implementation guides (retail, investment and financing bank, asset management...) when implementing defence sector policy. BNP was unwilling to show these guides to AI on the grounds of confidentiality.</p> <p>BNP reserves the right, in exceptional circumstances and after detailed analysis, to finance arms sales to countries that have, however, been judged to be sensitive:  <i>"For the "most sensitive countries", the decision to finance a transaction can only be exceptional. The decision is taken after a reinforced due diligence performed by the Compliance teams, following an escalation process over sighted by the Group Compliance (Financial Security) teams."</i><sup>177</sup></p>
Training	<p>BNP provides training in the implementation of sector policies, including defence policy.<sup>178</sup> It focuses on employees that deal with the corresponding policies. Training is delivered face-to-face and via a dedicated e-learning course. Since December 2012, the company has trained 10,476 employees online on at least one sector policy. The "percentage of employees trained on-line on sector policies" is one of 13 CSR indicators used by the company<sup>179</sup> and monitored annually by the Group Executive Board.</p> <p>The employee performance evaluation system takes account of CSR objectives. The company uses nine of its thirteen CSR indicators to calculate the salaries of the group's top 5,000 managers.</p>
Performance evaluation	<p>The employee performance evaluation system takes account of CSR objectives. The company uses nine of its thirteen CSR indicators to calculate the salaries of the group's top 5,000 managers</p>
External experts	<p>BNP uses external providers. It also occasionally uses information provided by NGOs and other stakeholders. BNP also refers to the</p>

<sup>175</sup> Chapter 7 -

[https://invest.bnpparibas.com/sites/default/files/documents/ddr\\_2013\\_bnp\\_paribas\\_gb.31981\\_0.pdf](https://invest.bnpparibas.com/sites/default/files/documents/ddr_2013_bnp_paribas_gb.31981_0.pdf)

<sup>176</sup> Page 400 of the Registration Document and Annual Financial Report 2013.

<sup>177</sup> P.6 in *Corporate Social responsibility – sector policy – defence*. The document also states that: *"The Group has therefore established a list of particularly sensitive countries, based notably on the following criteria: (...) known human rights violations."*

<sup>178</sup> Page 428 of the Registration Document and Annual Financial Report 2013.

<sup>179</sup> Page 393 of the Registration Document and Annual Financial Report 2013.

	recommendations formulated by the working group on sector policies at the Corporate Social Responsibility Observatory (Observatoire de la Responsabilité Sociétale des Entreprises, ORSE), which publishes <i>“Lignes directrices sectorielles de l’industrie de l’armement.”</i> <sup>180</sup> BNP told AI that its policy is stricter than the ORSE’s recommendations on certain points.
--	---

ING	
Policies on defence and arms	<p>ING Luxembourg has a written and public policy on defence and armaments. This is the group’s policy and is therefore not specific to the bank in Luxembourg. This policy forms part of the ING Environmental and Social Risk framework, available online since March 2013.</p> <p>The ING Environmental and Social Risk framework is based on the ING Business Principles, which commit the company to respect human rights and the environment. On this basis, ING has developed a series of exclusion policies, including one on defence, entitled Controversial Weapons &amp; Arms Trade.</p> <p>This policy sets out restrictions to ING’s financing and investment activities in the defence sector.</p> <p>(1) <u>Policy on non-controversial arms</u></p> <p>ING will not have dealings with companies in the defence sector when there is concrete evidence that these companies make arms available to countries that are under a weapons embargo, or to terrorists and other non-governmental armed groups. Furthermore, ING commits not to finance the trade of weapons to countries in which there is a clear risk that the weapons can be used for internal repression, serious violations of international humanitarian law or for any other purpose which cannot reasonably be considered consistent with normal and legitimate national security and defence.</p> <p>(2) <u>Policy on controversial arms</u></p> <p>In 2013, Dutch law restricted investments in cluster munitions. The same year, several NGOs (PAX, ICAN, etc.) published reports on investment in companies producing nuclear weapons and expressed their concern about certain investments made by ING. The company then reviewed its policy on controversial arms and adopted the following positions :</p>

<sup>180</sup> [http://www.orse.org/lignes\\_directrices\\_sectorielles\\_de\\_l\\_industrie\\_de\\_l\\_armement-52-50.html](http://www.orse.org/lignes_directrices_sectorielles_de_l_industrie_de_l_armement-52-50.html). ORSE is a French association, created in June 2000 at the initiative of various actors, which now includes over one hundred members from large companies from the world of industry, services and finance; portfolio management companies and investors; professional and social organizations; environmental and human rights NGOs. These actors have felt the need to have in France a permanent monitoring structure on issues that affect social and environmental responsibility, sustainable development and ethical investments.

	<ul style="list-style-type: none"> <li>- ING will not finance the production, stockpiling and trade of controversial arms (anti-personnel mines, cluster munitions, depleted uranium arms, chemical arms, biological arms) or provide financial services to companies involved with this type of weapon. ING will not invest its own assets in these companies and, when legally possible and applicable for ING to act independently, will ensure that the funds of clients managed by ING will not be invested in such companies (except for discretionary mandates and exchange-traded funds).</li> <li>- ING will not finance nuclear weapons. However, in the case of companies that have nuclear arms-related and other activities, ING may finance non-nuclear arms-related activities if the companies state that the funds will not be used for nuclear arms-related activities:  <i>“When the excluded activity is a minority of the total operations of a company or organization, we may finance its non-controversial activities. If so, we will obtain satisfactory assurance based on the nature of the transaction, or a confirmation stating that ING funds are not directly used to finance excluded activities.”</i>            So, for example, ING finances the EADS group, which has activities related to nuclear arms, but which also has a major role in civil aviation, through its subsidiary Airbus, on condition that ING funds will not be used for the production of nuclear weapons.</li> </ul>
Implementation procedures	<p>At ING, the CSR Department proposes, writes, implements and updates the company's policy on defence, in consultation with stakeholders. Implementation of its exclusion policy on defence follows the ING Group's approval procedures, which are described in detail in chapters 6 and 7 of the ING ESR framework, entitled “ESR Due Diligence” and “Governance.” Implementation of the policy mainly takes place at two levels:</p> <ul style="list-style-type: none"> <li>- The <i>Front Office</i> collects information on clients and transactions and assesses the level of risk they present (<i>Client ESR Assessment, Transaction ESR Assessment</i>);</li> <li>- The <i>Credit Risk Management</i> reviews and approves the assessments made by the <i>Front Office</i>, and decides whether it is necessary to take additional measures (for example, put further questions to the client).</li> </ul> <p>Other company departments are involved in the procedure:</p> <ul style="list-style-type: none"> <li>- The <i>Global Credit Committee</i> (GCC) has the final say on problems related to Social and Environmental Risk;</li> <li>- The internal system for credit approval: <i>Signatory Approval Process</i> (SAP);</li> <li>- The <i>Group Credit Committee Transaction Approval</i> (GCC-TA) which reviews and takes the final decision on “unacceptable” transactions as laid down in the derogation procedure (<i>ESR Waiver requests</i>).</li> </ul>

	<p>ING provides a detailed description of its procedures in chapters 6 and 7 of the ING Environmental and Social Risk (ESR) framework, entitled “ESR Due Diligence” and “Governance”. It uses two types of assessment to identify potential client and transaction-related risks:</p> <ul style="list-style-type: none"> <li>- The Client ESR Assessment, carried out as part of the KYC/CDD procedures;</li> <li>- The Transaction ESR Assessment, carried out as part of the Credit Approval Package, and following the Signatory Approval Process (SAP).</li> </ul> <p>The company uses this dual procedure to make a general assessment of the environmental and social risk, according to the following classification: low, medium, high, unacceptable.</p> <p>ING also uses a list of excluded companies with links to cluster munitions, which includes the indicative list prepared by the Dutch Financial Markets Authority in cooperation with the Dutch financial sector.</p> <p>ING’s policy provides that even “unacceptable” transactions can be reviewed and accepted on an exceptional basis: <i>“Exemptions to the ESR Policies shall only occur on a very exceptional basis and may only be granted by GCC Transaction Approval.”</i></p> <p>The ING ESR framework does not stipulate on what grounds transactions initially judged to be “unacceptable” may be finally accepted and provides no monitoring statistics on the matter.</p> <p>Risk assessment, in accordance with CSR policy, combines the conclusions reached by the <i>Client ESR Assessment</i> and the <i>Transaction ESR Assessment</i>. Section 6 of the ESR framework (ESR Due Diligence) describes four levels of risk in detail: ESR Low risk, ESR Medium risk, ESR High risk, Unacceptable.</p> <p>Assessment of transactions is carried out with regard to the following criteria:</p> <ul style="list-style-type: none"> <li>- Country where ING funds will be used (with reference to the list of sensitive countries);</li> <li>- Impact on critical natural habitats, critical cultural heritage sites and/or indigenous peoples;</li> <li>- Alleged labour and human rights violations;</li> <li>- Nature of activities related to the transaction;</li> <li>- International (negative) media coverage, NGO scrutiny and/or general public concern.</li> </ul> <p>As the disclaimer in the <i>ESR Framework</i> states, ING’s CSR policy, and by extension, its policy on defence, is obligatory for all ING</p>
--	--

	<p>Group employees. ING reserves the right to change or withdraw the policy at any time. The disclaimer also states that the standards applied are subjective and any decision thereto remains within ING's discretion.</p> <p>The ING Group evaluates implementation of the policy on the basis of data collected by a dedicated online tool, which it uses to evaluate the results of its CSR policy as a whole. The main results are presented in an annual <i>ING Sustainability Report</i>, which provides a brief assessment of actions taken by ING on a series of CSR issues, including defence and armaments.<sup>181</sup></p> <p>ING also has an internal <i>whistleblowing</i> system that applies to all parts of the company throughout the world (<i>ING Whistleblower Procedure</i>).</p>
Training	As its CSR risk assessment procedures are decentralized and mainly depend on Front Office teams, the ING Group has invested in training programmes. In 2013 and 2014, the group trained more than 880 employees on CSR policy and implementation. <sup>182</sup> In general, employees concerned (for example, front team officers) attend training sessions once a year in order to update their knowledge.
Performance evaluation	Correct application of the rules set out in the CSR policy (ESR framework) is compulsory for all group employees and therefore is not used to evaluate performance and has no impact on pay.
External experts	No information available

BCEE	
Policies on defence and arms	<p>Questioned about its policy on armaments and defence, BCEE said it aimed to be a socially responsible bank, in accordance with article 5 of the organic law creating BCEE (law of 24 March 1989), which states that all the bank's activities should be conducted in a socially responsible way. BCEE's mission is to contribute, through its activities, especially its financing activities, to the country's economic and social development in all fields.</p> <p>BCEE signed a Company Charter for Social Responsibility and Sustainable Development,<sup>183</sup> which states that company governance will be sensitive to the impact of its activities on the economic environment, notably in Luxembourg, its staff, the natural</p>

<sup>181</sup> <http://www.ing.com/ING-in-Society/Sustainability/Data-center/Sustainability-reports-archive.htm#>

<sup>182</sup> ING Sustainability Report 2013 – p.42.

<sup>183</sup> <https://www.bcee.lu/D%C3%A9couvrir-la-BCEE/D%C3%A9couvrir-la-BCEE/Corporate-Social-Responsibility-CSR>.



	<p>environment and the local community. The charter makes no mention of the defence and armaments sector.</p> <p>BCEE also refers to its Socially Responsible Company certificate awarded by the National Institute for Sustainable Development and Corporate Social Responsibility (<i>Institut national pour le développement durable et la responsabilité sociale des entreprises</i>, INDR) in 2012. This certificate is based on the three traditional pillars of CSR: Social and equality of employment opportunities – Governance – Environment. Its governance component covers “<i>the company’s actions vis-à-vis the general public.</i>” However, it makes no mention of the defence and armaments sector.</p> <p>BCEE applies certain restrictions on investments in the defence sector, notably towards companies that are active in the cluster munitions and anti-personnel mines sectors. It refers to the list compiled by ETHIX<sup>184</sup> with reference to the Belgian law of 2007 banning investments in companies producing anti-personnel mines and cluster munitions.<sup>185</sup> BCEE has indicated that an official list compiled by the Luxembourg authorities would be useful.</p>
Implementation procedures	<p>At BCEE, detection of atypical cases is the responsibility of the Compliance Office, which identifies armaments as a risk sector. In addition, a Compliance Acceptance Committee meets regularly to review new client relationships on a case-by-case basis. This committee reviews applications from intermediaries (including funds) against a set of criteria (compliance, ethics, etc.). This committee deals with applications from clients that are atypical because of their activity, structure, etc., (for example, lotteries).</p> <p>BCEE does not feel it necessary to introduce a formal whistleblowing system on the grounds that the company’s culture is based on trust and promotes free communication by employees.</p>
Training	<p>BCEE has no training or awareness raising programme focused on arms-related investments. It argues that company culture is based on trust and facilitates informal exchanges of information between employees and that this is reinforced by the very low turnover of personnel. The bank seeks to educate and train rather than proscribe and prohibit.</p>
Performance evaluation	No information available
External experts	BCEE uses VIGEO to incorporate the assessment of risk factors and ESG performances in SICAV Lux-Equity Eco Global investment

<sup>184</sup> *Defining controversial weapons for European institutional investors - Report on definitions, criteria and process for assessing corporate involvement in controversial weapons – endorsed by BEAMA - March 2011 - ETHIX SRI ADVISORS.*

<sup>185</sup> Belgium has never published the official list of excluded companies.

	<p>procedures. VIGEO carries out quarterly analyses based on a list of exclusion criteria (controversies regarding respect for human rights, workers' rights, respect for the environment, etc.) to review companies referred by BCEE Asset Management (BCEE-AM). It reports on the degree of exposure to all the indicators with reference to the exclusion criteria. There are three categories of exposure:</p> <ul style="list-style-type: none"> <li>- "Red Light" exposure: serious exposure, requiring an immediate halt to the investment;</li> <li>- Significant exposure: BCEE halts investment, without internal discussions;</li> <li>- Minor exposure: BCEE holds an internal discussion on whether to halt the investment.</li> </ul> <p>BCEE says that it uses the criterion of turnover in the defence and armaments sector of the company in question to classify exposure.</p> <p>The VIGEO assessments are used for mass market products. In the case of private portfolios, the client decides whether to use the VIGEO system. BCEE-AM's portfolio managers meet regularly and review investments on the basis of VIGEO reports. In the event of any uncertainty, they refer the case to the Board of Directors.</p>
--	---

RAIFFEISEN	
Policies on defence and arms	<p>Raiffeisen has indicated that it does not have any specific principles on investment other than those imposed by the law<sup>186</sup>. It referred to the regulations on money laundering and financing of terrorism. It makes no investments in the armaments and defence sector, given its status as a cooperative bank. The bank has no written principles to guide the nature of its investments, with the exception of the internal policy that states that the bank must not buy shares.</p> <p>Raiffeisen stated that before granting credit, the bank conducts a detailed analysis of the reasons for the request for credit. In addition, Raiffeisen said that it has controls based on "blacklists" such as the EU's official lists (for example, of terrorists), which is available on the CSSF website and the Office of Foreign Assets Control list.</p>
Implementation procedures	<p>At Raiffeisen, the Compliance Office is mainly responsible for the correct application of internal procedures. There are several levels of control:</p> <ul style="list-style-type: none"> <li>- the agency administrator;</li> <li>- internal controls/compliance, which ensure that the</li> </ul>

<sup>186</sup> With the exception of internal rules.

	<p>administrator has carried out the necessary checks and that the rules are respected;</p> <ul style="list-style-type: none"> <li>- the internal audit, which supervises compliance;</li> <li>- the external audit.</li> </ul> <p>Depending on the case, there are several levels of decision making about opening an account for new clients or accepting new transactions:</p> <ul style="list-style-type: none"> <li>- the administrator;</li> <li>- the <i>Back Office</i>, which controls the opening of accounts;</li> <li>- the compliance office, which checks applications and either rejects them or refers them to the acceptance committee;</li> <li>- the acceptance committee;</li> <li>- the final decision by the executive board.</li> </ul> <p>Applications by risky clients are analyzed by an acceptance committee (<i>Comité de Relation de Compte</i>), and depending on the category of risk, even by an executive board member.</p> <p>Raiffeisen also has a <i>whistleblowing</i> system: employees are obliged to declare any suspicion of money laundering and financing of terrorism immediately and directly to the compliance office. The internal <i>whistleblowing</i> procedure provides employees with the opportunity to declare their suspicions without implicating their line manager.</p> <p>Raiffeisen says that it has never had to deal with a case involving arms trafficking.</p>
Training	<p>Raiffeisen employees attend training sessions on money laundering and the financing of terrorism from the moment they are employed. These include internal training initiatives and certificated external sessions organized by the IFBL.<sup>187</sup> Training covers all primary offences. Every year, employees must attend “refresher” training. These training programmes are administered by the compliance office. They are for employees who are in contact with clients (sales personnel, asset managers, etc.).</p>
Performance evaluation	<p>Raiffeisen’s employee performance evaluation system includes a component on compliance with procedures.</p>
External experts	<p>No information available</p>

<sup>187</sup> Institut de Formation Bancaire, Luxembourg.

KBL	
Policies on defence and arms	KBL's <i>Conduct of Business Policy</i> , approved by its executive committee and Board of Directors, and applicable to all the group's subsidiaries, states that the KBL group only has relations with clients, contracting parties, suppliers and other commercial partners (commercial intermediaries, external asset managers, issuers of products distributed by KBL, brokers...) that adhere to the same fundamental values. KBL stated that, since 2004, it has applied a restrictive policy towards companies with links to the armaments sector. A number of companies active in the production, sale or stockpiling of arms are excluded from KBL investments and advice. The list of companies is regularly updated and communicated to subsidiaries through the group's intranet. AI has not had sight of this list.
Implementation procedures	No information available
Training	No information available
Performance evaluation	No information available
External experts	No information available

## APPENDIX 3 – GLOSSARY

AI:	Amnesty International
AML/CFT:	Anti-Money Laundering / Countering the Financing of Terrorism (also used for <i>Combating the financing of terrorism</i> )
ATT:	Arms Trade Treaty
CRF:	<i>Cellule de Renseignement Financier</i> – Financial Intelligence Unit
CSR: <sup>188</sup>	Corporate Social Responsibility
CSSF:	<i>Commission de Surveillance du Secteur Financier</i> - Finance Sector Supervisory Commission
ESG:	Environment, Social and Governance
ESR:	Environmental and Social Risk
EU:	European Union
GRIP:	Group for Research and Information on Peace and Security
ICC:	International Criminal Court
IHL:	International Humanitarian Law
IHRL:	International Human Rights Law
KYC:	Know Your Client
OFAC:	Office of Foreign Assets Control
ORSE:	<i>Observatoire de la Responsabilité Sociétale des Entreprises</i> - Corporate Social Responsibility Observatory

---

<sup>188</sup> The concept of Corporate Social Responsibility (CSR) applies the idea of sustainable development to companies. According to the European Commission, it is “*the responsibility of enterprises for their impacts on society*” and “*what an enterprise should do to meet that responsibility*” (European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM (2011)0681 final).

PEP:	Politically Exposed Person
SALW:	Small Arms and Light Weapons
SAR:	Suspicious Activity Report
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNGP:	United Nations Guiding Principles on Business and Human Rights
WMD:	Weapon of Mass Destruction