



Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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From arms transfers to firearms trafficking: application of the Firearms Protocol in the context of diversion

Background paper prepared by the Secretariat

I. Introduction

1. In his 2015 report to the Security Council on small arms and light weapons ([S/2015/289](#)), the Secretary-General summarized the issue of diversion in all its complexity, noting in paragraph 9 that the diversion of weaponry was a colossal problem in many parts of the world and allowed rebels, gangs, criminal organizations, pirates, terrorist groups and other perpetrators to exponentially bolster their power. He also noted that diversion might occur as a result of a transfer without proper controls, unauthorized retransfer, thefts from poorly secured stockpiles, hand-outs to armed groups or barter involving natural resources. Furthermore, the United Nations High Commissioner for Human Rights has noted with concern the negative impact of diversion and illicit arms transfers on human rights in both conflict and non-conflict situations, stating that they vastly increase the widespread and uncontrolled availability of arms, thereby increasing the risk that the arms will be directed to, or come into the hands of, those who use them to commit human rights violations or abuses.¹

2. The concept of diversion as the movement from the licit to the illicit realm was first mentioned in the Economic and Social Council in the context of drug trafficking at its first regular session of 1982, and it was later used in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (arts. 12 and 13). The concept was also adopted by the Disarmament Commission and found its way into the relevant regional and international instruments on small arms and light weapons. The issue of diversion has gained momentum in recent years. In 2018, the Conference of States Parties to the Arms Trade Treaty established a dedicated sub-working group on diversion under the Working Group on Effective Treaty Implementation. The Secretary-General's disarmament agenda, *Securing Our Common Future: An Agenda for Disarmament*, recognized the opportunity to pursue a whole-of-system approach by addressing the problem of illicit small arms through a single integrative lens.² Accordingly, the

* [CTOC/COP/WG.6/2021/1](#).

¹ [A/HRC/44/29](#), para. 5; see also [A/HRC/35/8](#), para. 7, and Human Rights Council resolution 41/20.

² *Securing our Common Future: An Agenda for Disarmament* (United Nations publication, 2018), pp. 40–41.



Secretary-General recommended the use of small arms control as part of arms embargoes in order to safeguard against proliferation and diversion.³ Against this backdrop, the prevention of diversion links criminal justice responses to arms control measures and disarmament approaches. The implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, which establishes a comprehensive framework for effective criminal justice responses to illicit firearms trafficking and related crimes, may be at the forefront of efforts by States parties to prevent and combat diversion in its various forms. Furthermore, in the Kyoto Declaration on advancing crime prevention, criminal justice and the rule of law: towards the achievement of the 2030 Agenda for Sustainable Development, adopted at the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice in 2021, Member States made a commitment to strengthen mechanisms and strategies for border control for preventing and combating illicit trafficking in and the diversion of firearms, their parts and components and ammunition.

3. The Working Group on Firearms has addressed several aspects related to diversion in the past. At its first, second and fifth meetings, the Working Group adopted recommendations with regard to transfer control systems that permit licit trading in arms while preventing the loss and diversion of firearms. The Working Group has emphasized the importance of: (a) implementing a strict and effective system of export and import licensing or authorization, as well as measures on the transit and transfer of firearms, their parts and components and ammunition; and (b) undertaking comprehensive export risk assessments. In its first and fifth meetings, the Working Group requested the United Nations Office on Drugs and Crime (UNODC) to provide technical assistance in the development and maintenance of comprehensive record-keeping systems on firearms and their transfers, the marking of firearms and the strengthening of import, export and transit controls and risk assessments.

4. In examining practical measures for preventing the diversion of firearms, the Working Group recommended at its first, fourth and sixth meetings: (a) reinforced control measures by Member States that export firearms parts and components; (b) the conduct of regular risk assessments of possible points on land, at sea and in the air from which firearms may be diverted during the import, export and transit process, including trans-shipment; (c) increased information exchange with export licensing authorities regarding identified points of diversion; (d) the maintenance of comprehensive inventories and databases of stockpiles, secure stock management and effective marking practices; and (e) the strengthening of early detection capacities, for example, through the use of state-of-the-art technological tools for the monitoring and inspection of borders on land, at sea and in the air, and through specialized training for law enforcement, customs and judicial authorities, importers and exporters.

5. The present paper explores how the concept of diversion is treated in relevant international small arms-related instruments; summarizes different approaches towards defining diversion; and analyses the responsiveness of the Firearms Protocol, with regard to both criminal justice responses and preventive and mitigation measures, to different diversion modalities.

II. Concept of diversion in relevant international instruments

6. In 1996, the Disarmament Commission adopted a guideline that all arms-transfer agreements and arrangements, in particular between Governments, should be designed so as to reduce the possibility of diversion of arms to unauthorized destinations and persons.⁴ The concept of diversion was later incorporated into the

³ S/2019/1011, para. 53.

⁴ A/51/42, annex I, para. 33.

Firearms Protocol, the Arms Trade Treaty and the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, with different nuances in each.

7. The prevention of diversion is not the main focus of the Firearms Protocol, but it is a precondition for preventing, combating and eradicating the illicit manufacture of, and trafficking in, firearms, their parts and components and ammunition. Although the Protocol does not define diversion, pursuant to article 11, in an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacture of, and trafficking in, firearms, their parts and components and ammunition, States parties are required to take appropriate measures to: (a) require the security of said items at the time of manufacture, import, export and transit through their territory; and (b) increase the effectiveness of import, export and transit controls, including border controls, and of police and customs transborder cooperation. The Arms Trade Treaty and the Programme of Action, in contrast, do not extend their scope of application to parts and components and ammunition.

8. During the negotiation of the Firearms Protocol, Member States explicitly discussed limiting the scope of application of article 11 to preventing theft, loss and diversion in the context of manufacture, import, export and transit only, instead of covering a broader concept of diversion prevention that would also encompass domestic diversion.⁵ In contrast, the prevention of diversion is one of the explicit objectives of the Arms Trade Treaty, in the preamble to which States parties underline the need to prevent and eradicate the illicit trade in conventional arms and prevent their diversion to the illicit market, or for unauthorized end use and end users, including in the commission of terrorist acts.

9. Article 11 of the Arms Trade Treaty includes a series of obligations and commitments: exporting States parties must assess the risk of diversion of the export and consider the establishment of mitigation measures (art. 11, para. 2); and States parties must exchange information in order to mitigate the risk of diversion of arms transfers (art. 11, para. 3) and address cases of detected diversion, including by alerting potentially affected States parties, examine diverted shipments and take follow-up measures through investigation and law enforcement (art. 11, para. 4). In addition, States parties are encouraged to share relevant information on effective measures to address diversion, including information on illicit activities such as corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion (art. 11, para. 5).

10. Under the Programme of Action on Small Arms, States committed themselves to putting in place adequate laws, regulations and administrative procedures to exercise effective control over the production, export, import, transit or retransfer of small arms and light weapons, in order to prevent their illegal manufacture and illicit trafficking, or their diversion to unauthorized recipients. This includes consideration, as part of the assessment of applications for export authorization, of the risk of diversion to the illegal market. Furthermore, the Programme of Action includes several commitments related to the security of small arms and light weapons – an area closely linked to the prevention of their diversion. In particular, the armed forces, police or any other body authorized to hold small arms and light weapons must establish adequate and detailed standards and procedures relating to the management and security of their stocks.⁶

⁵ For details, see *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, 2006), p. 677.

⁶ Paras. 2, 11 and 17 of the Programme of Action (see [A/CONF.192/15](#), para. 24).

III. Defining diversion

11. There is no legal or internationally agreed definition of firearms diversion.⁷ However, the Modular Small-arms-control Implementation Compendium (MOSAIC) provides the following guidance to help understand the term: “movement – either physical, administrative or otherwise – of a small arm or light weapon, its parts, components or ammunition, from the legal to the illicit realm”.⁸ It is generally recognized that essential elements of the act of diversion include the rerouting or appropriation of firearms to the illicit market, for unauthorized end use or for unauthorized end users.⁹ The preamble to the Arms Trade Treaty includes those three fundamental elements.

12. However, there are noteworthy differences in detail: some approaches seem to focus on the formal authorization process by defining diversion as the transfer of controlled items authorized for export to one end user, but delivered to an unauthorized end user or used by the authorized end user in unauthorized ways.¹⁰ Others require consistency with international law. The United Nations Institute for Disarmament Research, for instance, applies diversion to all forms of rerouting or misappropriation “contrary to relevant national and/or international law”,¹¹ regardless of whether authorizations were provided by the countries involved. The main difference between these approaches is the question of whether or not arms transfers that are authorized by both the exporting and the importing country may be regarded as diversion if one or both of the States violate their respective national laws or their regional or international commitments. This is relevant if arms transfers are authorized in violation of applicable arms embargoes or sanctions, obligations to prevent terrorists from acquiring weapons or, for States parties, the prohibitions enshrined in the Arms Trade Treaty.¹²

IV. Responsiveness of the Firearms Protocol to diversion

13. While the Arms Trade Treaty is aimed at preventing the diversion of conventional arms, it does not establish any criminal offences in that regard. In the context of the diversion of firearms, their parts and components and ammunition, this is where the Firearms Protocol, with its mandatory criminal offences, comes into play. Article 11, paragraph 4, of the Arms Trade Treaty establishes a connection to the Firearms Protocol by requiring States parties that have detected a diversion of transferred arms to take appropriate measures to address such diversion, including investigation and law enforcement. The mandatory provision is not limited to States parties that are involved in a transfer and, therefore, obliges any and every State party that detects a diversion in an arms transfer to act.¹³

14. The following chapter examines possible points of diversion throughout the supply chain for firearms, their parts and components and ammunition and analyses

⁷ For a detailed analysis, see Brian Wood, “The Arms Trade Treaty: obligations to prevent the diversion of conventional arms”, Issue Brief, No. 1 (Geneva, United Nations Institute for Disarmament Research (UNIDIR), 2020).

⁸ See United Nations, “Modular Small-arms-control Implementation Compendium 01.20: glossary of terms, definitions and abbreviations”, (2018).

⁹ See UNIDIR, “Enhancing the understanding of roles and responsibilities of industry and States to prevent diversion” (2019), p. 13 ff.; Stuart Casey-Maslen and others, “Art.11: diversion” in *The Arms Trade Treaty: A Commentary*, Andrew Clapham and others, eds., Oxford Commentaries on International Law Series (Oxford, Oxford University Press, 2016), paras. 11.01, 11.06 ff.

¹⁰ Matt Schroeder, Helen Close and Chris Stevenson, “Deadly deception: arms transfer diversion”, in *Small Arms Survey 2008: Risk and Resilience* (Geneva, Small Arms Survey, Graduate Institute of International and Development Studies, 2008), p. 114; see also Casey-Maslen and others, “Art.11: diversion”, para. 11.22.

¹¹ See UNIDIR, “Enhancing the understanding of roles”, p. 14; see also [GGE/PACAS/2020/3](#) and Wood, “The Arms Trade Treaty”, p. 33.

¹² Wood, “The Arms Trade Treaty”, p. 10.

¹³ Casey-Maslen, “Art.11: diversion”, para. 11.60.

the applicability of the criminal offences and preventive measures set out in the Firearms Protocol. Diversion can occur at any point during the manufacture, export, import, transit, trans-shipment, storage, reactivation or retransfer of firearms, both from national stockpiles and from private holdings.¹⁴ It is noteworthy that, although the Firearms Protocol applies to criminal conduct that is transnational in nature and involves an organized criminal group (art. 4, para. 1), the Legislative Guide for the Firearms Protocol explicitly states that domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved.¹⁵

A. Diversion during the manufacturing process

15. There can be diversion during the manufacturing process when authorized or licensed manufacturers produce a higher quantity of firearms, their parts and components and ammunition than authorized (illicit overproduction), or produce such items in breach of national legislation, for example without the required marking. This could be the result of insufficient security or accountability measures, negligence, or complicit or sponsored unlawful direct supply mechanisms of private or State-owned manufacturers.¹⁶

16. Pursuant to article 11 of the Firearms Protocol, States parties must take appropriate measures to require the security of firearms, their parts and components and ammunition at the time of manufacture, in an effort to detect, prevent and eliminate their theft, loss or diversion or their illicit manufacture and trafficking. The offence of illicit manufacturing covers some forms of diversion during the manufacturing process. In particular, illicit manufacturing without a licence or authorization (art. 3 (d) (ii)) should not only apply to manufacturers that do not hold any licence or authorization, but should extend to cases where licences have expired or do not cover the relevant manufacturing activities, including where the types or quantities of firearms produced are not authorized.¹⁷ This may include the circumvention of record-keeping requirements in order to receive, off the record, “clean” firearms that cannot be traced, or the manufacture of automatic instead of semi-automatic firearms. According to article 3 (d) (iii), the manufacture of firearms without appropriate markings must also be considered illicit manufacturing.

17. Of particular interest is the diversion of firearms produced under licence, whereby a licensee manufactures firearms for which it is granted production rights under certain conditions, while the licensor, often residing in another country, retains ownership of the intellectual property.¹⁸ In many cases, the licence agreements covering the transfer of manufacturing technologies fall under the same regulatory framework as the trade in firearms itself and require authorization by the countries concerned. At the same time, the production of arms by the licensee is usually subject to the national manufacturing authorization and licencing regime of the country where the manufacturing takes place. If the licensee violates the licence agreement with the licensor, for example, by continuing to produce goods beyond the licence expiry date or by exceeding the number of units agreed upon in the licence agreement, while acting within the manufacturing authorization provided by the competent national authorities, the offence of illicit manufacturing does not apply; however, the conduct might be considered diversion during the manufacturing process.

¹⁴ [GGE/PACAS/2020/3](#), para. 6, and [ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep.](#), para. 11.

¹⁵ *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, part four (United Nations publication, 2004), para. 21.

¹⁶ [GGE/PACAS/2020/3](#), para. 9 (a).

¹⁷ *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime*, part four, para. 190.

¹⁸ Barbara Gimelli Sulashvili, “Multiplying the sources: licensed and unlicensed military production”, in *Small Arms Survey 2007: Guns and the City* (Geneva, Small Arms Survey, Graduate Institute of International and Development Studies, 2007), p. 8.

Recommendation

18. **In order to prevent the diversion of and from transferred manufacturing technologies, States should apply the same requirements and criteria for the transfer of manufacturing technology as for direct firearms transfers. States that authorize or license manufacturing under foreign licence should limit these authorizations or licences to the scope of the licence agreement to allow for the investigation and prosecution of diversion through overproduction.**

B. Arms transfers and illicit firearms trafficking

19. The UNODC *Global Study on Firearms Trafficking 2020* found that the country in which firearms are manufactured and the country in which firearms are diverted and seized are often not the same, and that firearms trafficking remains a largely invisible phenomenon.¹⁹ From a legal perspective, diversion often occurs at the moment at which legal firearms, their parts and components and ammunition cross a border without the required authorization. This sheds light on the structural interlinkages between legal arms transfers and illicit firearms trafficking. Arms transfers can be roughly divided into four stages during which diversion and related criminal offences can be carried out:²⁰

- Diversion before the transfer/in the country of origin/at the point of embarkation
- Diversion during the transfer/en route to the intended end user/in transit
- Diversion at or after import/post-delivery including retransfer and re-export
- Diversion from post-delivery storage/from national or civilian stockpiles²¹

20. In many of these diversion schemes, forged documents (including end-user/end-of-use certificates, bills of lading, cargo manifests and flight plans) prepared by the traffickers or brokers themselves, or authentic documents issued in an act of collusion or corruption by government officials, play a key role in creating a façade of legitimacy.²²

21. It is noteworthy that the Firearms Protocol requires States parties to criminalize illicit trafficking in firearms, their parts and components and ammunition only where their import, export, acquisition, sale, delivery, movement or transfer was not authorized or where firearms were not duly marked (arts. 3 (e) and 5 (1) (b)). Although the fraudulent acquisition of authorizations or licences is not explicitly mentioned, the Legislative Guide for the Firearms Protocol states that the trafficking offence should include cases where licences were not validly issued and where conditions precedent for the activity on which the licence was contingent had not been met.²³

22. In this context, the design of national firearms transfer authorization systems is crucial. The offence of illicit trafficking enforces the principle of reciprocity in transfer authorization procedures: pursuant to article 10 of the Firearms Protocol, States parties are required to provide authorizations to one another before permitting shipments of firearms to leave, arrive or transit across their territory. Such authorization processes require secure channels of communication between the countries concerned that enable the authenticity of licensing or authorization

¹⁹ *Global Study on Firearms Trafficking 2020* (United Nations publication, 2020), p. 10 ff.

²⁰ [ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep](#), p. 18 ff., see also Paul Holtom and Benjamin Jongleux, “Preventing diversion: comparing ATT and African measures for importing States” (Geneva, Small Arms Survey, Graduate Institute of International and Development Studies, 2019), p. 4 ff.

²¹ Diversion from post-delivery storage will be addressed separately, because it is not necessarily carried out in the context of transfers but can also be carried out if firearms remain within the same country after being legally manufactured.

²² Schroeder, Close and Stevenson, “Deadly deception”, p. 118.

²³ *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime*, part four, para. 211.

documents to be verified or validated, in accordance with article 10, paragraph 5, of the Protocol. Although it is not a mandatory provision under the Protocol, the Legislative Guide for the Protocol mentions as a best practice the requirement under most transfer control systems to send copies or parallel documents both with the shipment and separately in advance. This enables the accuracy of the document and content of the shipment to be cross-checked for tampering or diversion between source and destination and may facilitate the verification of such documents. The process could be supported by the use of standardized templates²⁴ and electronic forms and means of transmission.²⁵ A digital, centralized firearms transfer verification system may permit exporting, importing and transit countries to verify transfer documentation in an effective and expeditious manner and increase the degree of security with regard to the risk of forged, altered or otherwise falsified documents, as required under article 10, paragraph 5.

23. The transfer authorization system under article 10 of the Firearms Protocol is process-driven and does not contain import and export criteria for security or arms control purposes. Such criteria that structure or limit the discretion of officials charged with deciding whether to issue authorizations are, however, enshrined in articles 6 and 7 of the Arms Trade Treaty. Therefore, the establishment of a comprehensive transfer control system that builds on the authorization process under the Protocol and includes the export criteria of the Arms Trade Treaty may create synergies in the implementation of the instruments for countries that are a party to both. Other instruments such as the Programme of Action on Small Arms contain the commitment of States to use authenticated end-user certificates and effective legal and enforcement measures to ensure effective control over the export and transit of small arms.

Recommendations

24. The Working Group may wish to:

(a) **Discuss the possibility of establishing an intergovernmental expert group to explore options for creating a digital, global and centralized firearms transfer verification system, for the purpose of facilitating a secure and validated reciprocal approval process as required under article 10 of the Firearms Protocol;**

(b) **Encourage States to implement the complementary global small arms control instruments they are a party to, building on secure and enforceable reciprocal transfer authorization systems as required in the Firearms Protocol, the transparent export criteria of the Arms Trade Treaty and end-user and end-use assurances for increased accountability in accordance with the Programme of Action, in order to prevent diversion during transfer by creating effective and harmonized national small arms transfer mechanisms.**

Diversion before the transfer/in the country of origin/at the point of embarkation

25. In international arms transfers, diversion can take place in the country of origin if manufacturers or exporters obtain export authorizations or licences by presenting forged, false or incomplete documentation in order to influence the decision of arms control authorities. This may, in particular, include documentation that purports that the items will be shipped to different end users or for a different end use than is actually the case.²⁶ It also includes cases in which a completely licit transaction on paper is not carried out, either in part or in whole, in order to enable items to disappear from the radar of national arms control authorities. In that regard, the Legislative

²⁴ See, for example, the Organization for Security and Cooperation in Europe, “Template for end user certificates for small arms and light weapons” (September 2011).

²⁵ *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime*, part four, para. 110.

²⁶ Nicolas Marsh, “Preventing diversion: a challenge for Arms Trade Treaty States Parties”, *Journal of the Research Institute for the History of Global Arms Transfer*, vol. 8 (July 2019), p. 58.

Guide for the Firearms Protocol explains that “to be valid, the authorization to undertake a particular act must have come from a State party entitled to authorize the action in question. Thus, for example, a licence to import firearms must have come from the State party into which the firearms were actually imported”.²⁷

26. A widely discussed case in the context of forged documentation was the export of more than 4,000 assault rifles by the German gunmaker Heckler & Koch to Mexico in the period from 2006 to 2009. Anticipating that the German export control authorities might not authorize the export of the firearms to the Mexican States of Jalisco, Chiapas, Guerrero and Chihuahua because of human rights considerations at the time, company officials acted in collusion with the Mexican central procurement office to obtain an end-user certificate that excluded those States from the list of final recipients. On the basis of that certificate, export to Mexico was authorized. However, some of the firearms ended up in Guerrero State, which had been seen as the most important customer from the outset, according to internal Heckler & Koch email communications. In 2019, two company officials were convicted of export on the basis of a fraudulently obtained licence. In addition, 3.7 million euros, the sales price of the firearms, were confiscated from the company.²⁸ According to the criminal provisions of the German Foreign Trade and Payments Act, if a licence is required, “an action without a licence shall be equivalent to an action on the basis of a licence obtained by threat, bribery or collusion or obtained fraudulently by means of incorrect or incomplete data”.

Diversion during the transfer/en route to the intended end user/in transit

27. Once legally exported firearms, their parts and components and ammunition are en route to their authorized end user, partial or complete loss, leakage, theft and/or unauthorized rerouting during transport, transit, transloading or trans-shipment marks the next possible point of diversion.²⁹ For example, facilitated by inadequate security, including corruption or negligence, criminals could break into a port where a container with a shipment of firearms is stored or hijack a vehicle transporting the arms from the point of delivery to the end user.³⁰ The criminal offence of illicit trafficking under the Firearms Protocol would extend to such conduct if it took place en route, in a country that was neither the country of export nor the country of import, because the rerouting of the shipment in a country of transit would constitute a “movement or transfer” to the territory of another State without the required authorization, pursuant to article 3 (e) of the Protocol. If, in contrast, the items were diverted in the country of export or import, the conduct would lack the transborder element of the trafficking offence, with the effect that it would not be regarded as illicit trafficking. For example, 23 assault rifles, 70 handguns and more than 42,000 rounds of ammunition for the protection of the European Union Border Assistance Mission, for which Malta had requested an exemption from the arms embargo imposed on Libya, were stolen at Tripoli International Airport by militias.³¹ In another case, Belarus had submitted a notification to the Security Council Committee established pursuant to resolution 1970 (2011) regarding more than 3,000 tons of ammunition for small arms and light weapons. Although one of the first batches was stolen at Tripoli International Airport, Belarus was not informed and continued to make at least 15 additional shipments.³² In both cases, the items were stolen in the country of authorized import before delivery to their final destination,

²⁷ *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime*, part four, para. 213.

²⁸ Ben Knight, “Heckler and Koch fined €3.7 million over illegal arms sales to Mexico”, DW News, 21 February 2019; Regional Court Stuttgart, Germany, *13 KLS 143 Js 38100/10*, Judgment of 21 February 2019.

²⁹ *GGE/PACAS/2020/3*, para. 9 (c).

³⁰ Holtom and Jongleux, “Preventing diversion”, p. 5.

³¹ *S/2015/128*, para. 151.

³² *S/2015/128*, paras. 135–139.

with the effect that the conduct would not fall within the definition of illicit trafficking.

28. Although States parties to the Firearms Protocol are not required to establish criminal offences covering such conduct, under article 11 of the Firearms Protocol, States parties are obliged to take appropriate measures to require the security of firearms, their parts and components and ammunition at the time of import, export and transit through their territory, in an effort to detect, prevent and eliminate their theft, loss or diversion, and should consider criminalizing such conduct. Similarly, article 9 of the Arms Trade Treaty requires States parties to take appropriate measures to regulate the transit or trans-shipment of conventional arms under their jurisdiction.

Diversion at or after import/post-delivery through unauthorized re-export or retransfer

29. State-sponsored unauthorized re-export or retransfer in violation of end-user control assurances, either because the authorities intentionally ignore the exporting State's conditions or are not aware of them, can take place both at or after import and in post-delivery storage.³³

30. In such cases, the re-export or retransfer exceeds the initial authorization of the original exporting country and thus constitutes diversion. In the Programme of Action on Small Arms, States committed themselves to notifying the original exporting State in accordance with their bilateral agreements before the retransfer. Nevertheless, retransfers or re-exports will usually not fall within the definition of illicit trafficking under the Firearms Protocol, because the offence only enforces the principle of reciprocity in article 10 that requires all countries directly concerned by a transfer, as exporting, importing or transiting countries, to authorize or not object to it. Hence, the criminal liability of actors involved in the re-export/transfer will generally not depend on the content of the originally issued export authorization, but on the existence of an export or re-export authorization. Endeavours by some countries during the negotiations on Security Council resolution 2220 (2015) to ban or prohibit the unauthorized re-export of small arms did not receive majority support.³⁴

31. If the re-export or retransfer was intended from the outset to circumvent arms control measures, the subsequent violation of assurances could be regarded as exceeding the initial export authorization. The latter situation is exemplified by a case involving the arms manufacturer Sig Sauer, headquartered in Germany and the United States of America. In 2009, the United States branch of the company made a deal with the Colombian police to deliver firearms worth 270 million euros. Owing to production problems at its United States facility, at least 47,000 pistols from the German plant were shipped to the United States factory for onward transport to Colombia. Sig Sauer managers were accused of having concealed the final destination of the weapons by submitting false end-user certificates to the German export authority, naming the United States as the final destination. An authorization request for export to Colombia would probably have been denied. The regional court of Kiel, Germany, sentenced the Chief Executive Officer of the United States branch and two managers at the German branch to suspended prison sentences and fines. The proceeds of the illicit transfer, 18.5 million euros, were confiscated from Sig Sauer.³⁵

32. If a firearm is diverted after import and trafficked abroad or re-exported, investigators in a third country where the firearm may be used in the commission of a criminal offence often face difficulties in tracing it back to the point of diversion if the markings on it do not permit identification of the last country of legal import.

³³ For further details, see Holtom and Jongleux, "Preventing diversion", p. 5.

³⁴ S/PV.7447.

³⁵ Case-summary by Sibylle Bauer and Mark Bromley, *Detecting, Investigating and Prosecuting Export Control Violations: European Perspectives on Key Challenges and Good Practices* (Solan, Sweden, Stockholm International Peace Research Institute, 2019), p. 25 ff.; regional court of Kiel, Germany, 3 KLS 3/18, Judgment of 3 April 2019.

Recommendation

33. **States parties to the Firearms Protocol are urged to apply appropriate marking that identifies the country of import to each imported firearm, including firearms that may be re-exported, in order to increase the effectiveness of tracing requests.**

C. Arms embargoes and illicit firearms trafficking

34. In his 2019 report to the Security Council on small arms and light weapons, the Secretary-General expressed his concern that panels of experts indicate the continued availability of arms to armed groups in countries under arms embargoes, pointing to the fact that such embargoes are being circumvented in various ways.³⁶ A critical challenge in that regard is the detection, investigation and prosecution of embargo violations.

35. Although in 1998 the Security Council encouraged Member States, as appropriate, to adopt measures making the violation of arms embargoes a criminal offence,³⁷ to date there are no explicit legally binding international standards on the criminalization of embargo violations.³⁸ It is therefore left to the discretion of Member States to decide how to enforce arms embargoes and if and how to investigate, prosecute and adjudicate private actors involved in their violation. Penalties have been established in some countries and subregions.³⁹ In accordance with article 21 of the Economic Community of West African States (ECOWAS) Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, for example, Member States are required to establish as a criminal offence any activity carried out in violation of arms embargoes imposed by the United Nations, the African Union or ECOWAS.

36. Given that firearms account for a significant proportion of materiel that is shipped to embargoed countries, the mandatory criminal provisions under the Firearms Protocol should be implemented and applied as a cornerstone of national, regional and international efforts to enforce arms embargoes and detect, investigate and prosecute cases of illicit transfers circumventing those embargoes and the actors involved. It should be noted, however, that the Protocol does not apply to State-to-State-transactions, which are generally considered to be more closely related to arms control than crime control, and therefore excludes transfers that take place directly between two Governments acting in their sovereign capacity (not, however, those that are acting commercially through entities or manufacturers that they own or operate).⁴⁰ Furthermore, State transfers for the purposes of national security, meant to cover situations in which military forces travel across borders with their firearms, are excluded.⁴¹

37. In many cases, the logistics capacities and networks of private entities and individuals, including shipping and transport companies, brokers and suppliers, are used to facilitate arms transfers, including transfers to embargoed countries. If those private entities and individuals act without the required authorizations or licences from all countries involved in the transfer, their conduct may fall within the definition of illicit trafficking, pursuant to article 3 (e) of the Firearms Protocol. Those private

³⁶ S/2019/1011, para. 53.

³⁷ Security Council resolution 1196 (1998); see also Council resolution 2117 (2013), in which the Council reminded Member States to take appropriate measures, including all legal and administrative means against any activity that violates such arms embargoes.

³⁸ Bauer and Bromley, *Detecting, Investigating and Prosecuting Export Control Violations*, p. 3.

³⁹ National examples of legislation to enable compliance with United Nations sanctions and other measures are: Canada, United Nations Act; Finland, Sanctions Act No. 659/1967, as amended; and United Kingdom of Great Britain and Northern Ireland, United Nations Act.

⁴⁰ *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime*, part four, para. 19.

⁴¹ *Travaux Préparatoires*, p. 627 ff.

actors often operate globally, creating links to various jurisdictions in addition to the exporting and importing country. This may include the country of habitual residence, the country of nationality or the country of the registered office of the private actor, as well as the country in which any stage of the transfer, including transit, trans-shipment and transloading, takes place, or the country in which a vessel or aircraft used for transportation is registered.⁴² At a minimum, States parties must criminalize the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State party to that of another State party if any one of the States parties concerned does not authorize it (arts. 3 (e) and 5 (1) (b) of the Firearms Protocol). In other words, each point of territorial contact (transit, trans-shipment and transloading) of an illicit shipment en route to an embargoed country or any personal link (nationality, residence or registered office/vessel/aircraft/bank account) may give an additional country the legal competence to initiate investigations into illicit firearms trafficking. International cooperation and information exchange to detect the rerouting of authorized transfers and illicit shipments destined for embargoed countries combined with effective criminal justice responses to illicit firearms trafficking may strengthen the enforcement of arms embargoes.

38. In this context, special attention should be paid to the offence of illicit trafficking through unauthorized sale. Article 3 (e) of the Firearms Protocol leaves open to interpretation the question of whether States parties are required to criminalize unauthorized sale only if the items are physically present in the country at some point during the transfer. The importance of the legal interpretation of the provision is exemplified by the following case. In 2017, three Italian nationals were arrested and sentenced in Italy for selling and attempting to sell military equipment, including 13,950 assault rifles with a value of 41 million euros, to a Libyan national in violation of the arms embargo imposed on the country. The rifles were supposed to be delivered by air to Libya without touching Italian soil, while the negotiations for the contracts were carried out in numerous countries in Europe, Africa and Asia.⁴³ Although Italy took the initiative in this case, it is not clear whether States parties to the Firearms Protocol are generally obliged to criminalize illicit arms sales when the firearms do not enter the territory in which the dealers are operating.

39. In any case, it is left to the discretion of States parties to the Firearms Protocol to adopt more strict or severe measures than those provided for in the Protocol (art. 1, para. 2, of the Protocol; art. 34, para. 3, of the Organized Crime Convention). This may include the requirement for arms dealers to obtain authorizations and licences to participate in the transborder sale of firearms, their parts and components and ammunition, including in cases in which the items will not be transferred from, to or across the territory of the country in which the dealer operates.

40. Various examples of the interlinkages between embargo violations and illicit trafficking can be found in the reports of the Panel of Experts established pursuant to resolution 1973 (2011). In 2016, the Panel noted that arms continued to be illicitly transferred to and from Libya on a regular basis, notwithstanding the two-way arms embargo, and that trafficking networks, including Libyan nationals and foreign brokering companies, were actively seeking to secure arms deals on behalf of various State and non-State parties.⁴⁴ In 2013, at least 1,500 pistols from a consignment of 5,000 pistols and 1 million rounds of ammunition were purchased from a United Arab Emirates manufacturer by a United States broker company and delivered to the Libyan Supreme Security Committee. The pistols were transported using a Libyan airfreight company and a carrier agent registered in Dubai.⁴⁵ In 2014, a large arms-trafficking network comprising Egyptians, Libyans and Italians that provided firearms and ammunition to terrorist groups in Libya from a warehouse located in

⁴² See article 15 of the Organized Crime Convention in conjunction with article 1, paragraph 3, of the Firearms Protocol.

⁴³ S/2018/812, paras. 98–105.

⁴⁴ S/2016/209, para. 108.

⁴⁵ S/2015/128, paras. 128–130.

Slovenia was dismantled. The entry point for the investigation was the arrest of a Libyan national living in the United Kingdom of Great Britain and Northern Ireland, who translated documents for an Italian arms dealer in charge of organizing the transfers. On the phone of the Libyan, who was later sentenced to six years' imprisonment, investigators found an invoice for 1,104 tons of firearms, ammunition and light weapons worth \$28.5 million for delivery to Libya, as well as a chartering order for a cargo aeroplane to transport the arms.⁴⁶ In 2015, the Italian *Guarda di Finanza* detected and seized 170 carbines and 200,000 rounds of ammunition destined for Libya and concealed in containers at the port of Genoa. The Public Prosecution Office launched criminal investigations related to the unauthorized entry of materiel into Italian territory and the attempt to violate the arms embargo on Libya and investigated the companies in the United Arab Emirates that had originally purchased the materiel from three German companies.⁴⁷

41. The cases not only demonstrate the global scale of the ramified supply networks that participate in trafficking in firearms and ammunition to embargoed countries, but also provide an insight into the various actors involved in such deals, including brokers, transport and carrier agents, shipment companies and manufacturers. Even if some of their actions contributing to the illicit transfers might not be criminalized under the offence of illicit firearms trafficking, in many cases they constitute forms of organizing, directing, aiding, abetting, facilitating or counselling the commission of a trafficking offence, pursuant to article 5, paragraph 2, of the Firearms Protocol.

42. In addition, under article 15, paragraph 1, of the Firearms Protocol, States parties must consider establishing a system for regulating the activities of those who engage in brokering. Under the Arms Trade Treaty, this is a mandatory provision.

Recommendations

43. **The Working Group may wish to:**

(a) Urge States parties to the Firearms Protocol to exploit the full potential of the Protocol's criminal provisions in order to investigate, prosecute and adjudicate cases of illicit arms flows into or from embargoed countries and the various actors involved;

(b) Encourage States that can establish jurisdiction over firearms-related embargo violations to use the reports of United Nations panels of experts as entry points to initiate investigations into and participate in proactive information exchanges on illicit trafficking in firearms, their parts and components and ammunition and possible incidences of diversion, in order to enforce arms embargoes and dismantle the trafficking networks involved in their violation;

(c) Urge States to trace firearms and ammunition that are suspected of being destined for countries in violation of arms embargoes and respond to tracing requests in a timely manner in order to identify their point of diversion;

(d) Request UNODC to assist United Nations missions and national authorities in the monitoring of arms embargoes in order to build their capacity for implementing and enforcing arms embargoes, including through training on investigations relating to trafficking in firearms and ammunition in the context of embargo violations, tracing capabilities and enhanced capacity for collecting and analysing seizure data;

(e) Discuss the need for an interpretative note on the interpretation and scope of the offence of illicit trafficking committed through "unauthorized sale" and its implementation in conjunction with article 15 of the Organized Crime Convention, and encourage States parties to require dealers to obtain authorizations and licences to participate in the transborder sale of firearms, their parts and components and ammunition, including in cases in which the

⁴⁶ S/2016/209, paras. 144–146; Royal Courts of Justice, EWCA Crim 568, Judgment of 17 May 2016.

⁴⁷ S/2016/209, annex 35, paras. 4–7.

items will not be transferred from, to or across the territory of the country in which the dealer operates;

(f) Discuss the topic of brokering at a future meeting, in view of the importance of regulating brokering in order to prevent and combat illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, including in the context of embargo violations.

D. Arms supply to terrorists, armed groups and non-State actors

44. In the past two decades, the Security Council has addressed the prevention and eradication of the supply, illicit transfer and sale of small arms to terrorists, armed groups and criminal networks on various occasions and in different contexts.⁴⁸

45. The Firearms Protocol, in contrast, does not distinguish between these actors, but simply requires States parties to criminalize the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State party to that of another State party if any one of the States parties concerned does not authorize it. If, therefore, any entity or private actor within the territory of a States party receives firearms without the authorization of the competent national authority, all States parties involved in the transfer, whether as countries of export, transit or import, are required to criminalize the conduct.

E. Diversion from private or government stockpiles

46. The issue of diversion from stockpiles features prominently in *Securing Our Common Future: An Agenda for Disarmament*, which notes:

Inadequate physical security can also result in diversion of arms to illicit markets, including to non-State armed groups, terrorists and transnational criminal organizations. The loss of arms and ammunition from storage sites, and their onward proliferation, can be a catalyst for armed violence, conflict and insecurity. Fragile States are particularly susceptible to problems posed by improper stockpile management practices.⁴⁹

The Secretary-General has repeatedly voiced concern that stockpile management and control has emerged as one of the greatest challenges relating to small arms and that arms embargoes are being circumvented through the diversion of national stockpiles.⁵⁰

47. The Small Arms Survey defines diversion from national stockpiles as the loss of arms and ammunition that are under the control of a State's defence and security forces. These instances range from low-order to high-order stockpile diversion and include not only loss or leakage but also theft or lending⁵¹ by personnel and external actors at storage facilities, often facilitated by weak oversight and poor physical security measures and sometimes involving acts of corruption. For example, multiple cases have been reported of the sale by security forces in Afghanistan, Iraq and Libya of their service weapons to supplement their salaries. Similarly, according to Turkish police and military personnel, a proportion of the 370,000 firearms that were originally purchased to rebuild and re-equip the Iraqi security forces in 2003 had slipped from custody and some had later been found in the hands of insurgents,

⁴⁸ Security Council resolutions [1373 \(2001\)](#); [1540 \(2004\)](#) and [2370 \(2017\)](#).

⁴⁹ *Securing our Common Future*, p. 44.

⁵⁰ [S/2011/255](#), para. 27, [S/2013/503](#), para. 11, [S/2015/289](#), para. 46, and [S/2019/1011](#), para. 53.

⁵¹ For example, a French gendarme was found to have loaned service weapons to local armed robbers, Nicolas Florquin and André Desmarais, "Lethal legacies: illicit firearms and terrorism in France", in *Triggering Terror: Illicit Gun Markets and Firearms Acquisition of Terrorist Networks in Europe*, Nils Duquet, ed. (Brussels, Flemish Peace Institute, 2018), p. 201.

terrorists and criminals in Turkey.⁵² The latter case is a vivid example of the transnational dimension of stockpile diversion, which may extend to illicit firearms trafficking at a later stage, once the firearms have entered the illicit realm. Firearms designated for disposal by destruction (especially surrendered or confiscated firearms) appear to represent a particular risk. In South Africa, for instance, corrupt police officers and gun dealers diverted small arms designated for destruction to criminals in Western Cape Province.⁵³ The maintenance of unbroken records for firearms and ammunition under government custody until final destruction and effective mechanisms of accountability are thus prerequisites for proper stockpile management systems.

48. The risk of diversion from civilian holdings, including firearms and ammunition held by manufacturers, wholesalers, gun shops, private security companies, hunters and other lawful private owners, through theft, loss, embezzlement, illicit sale, lending or any other form of unauthorized distribution should not be underestimated.⁵⁴ To secure “clean” firearms, organized criminal groups in Italy have reportedly colluded with legal owners to fake thefts from them. Straw purchases, whereby an individual buys a firearm legally with the intention of passing it on illegally, including in order to bypass stricter arms control regulations in neighbouring countries, are also used. At the land border between the United States and Mexico, straw purchases are often combined with “ant trafficking”, a process by which large quantities of firearms are divided into smaller batches and trafficked to Mexico.⁵⁵ In all of these cases, the initial faked theft or loss or the straw purchase may be followed by illicit trafficking activities. Against that backdrop, article 11 (b) of the Firearms Protocol requires States parties to increase the effectiveness of border controls and police and customs transborder cooperation.

49. The Firearms Protocol does not contain explicit provisions on stockpile management or civilian possession. However, article 11 (a) requires States parties to take appropriate measures with regard to the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through their territory, in an effort to detect, prevent and eliminate their theft, loss or diversion. The Protocol’s scope of application is therefore limited to security measures, including secured stockpiles at the time of transfer and manufacture; once firearms, their parts and components and ammunition have been delivered to the final recipient, article 11 no longer applies. That said, States parties are free to extend those measures in order to require the security and safety of firearms, their parts and components at any stage of their lifecycle, both under private and official custody. In this vein, the Programme of Action also urges States to establish adequate stockpile management, a broad range of security standards and procedures and sanctions in the event of theft or loss. Several subregional legally binding instruments, such as the ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, for instance, also require Member States to establish effective standards and procedures for stockpile management, storage and security, including “sanctions in case of theft or loss”.

50. Poorly managed stockpiles remain prominent sources of illegal small arms not only circulating within a country, but also flowing across borders. If it can be proved that the theft, embezzlement or loss from stockpiles or private possession was planned from the outset to source illicit firearms or ammunition for transborder supply, States

⁵² Inspector General, United States Department of Defense, *Assessment of the Accountability of Arms and Ammunition Provided to the Security Forces of Iraq*, Report No. SPO-2008-001 (July 2008), pp. 1, 27 ff.; general information on diversion from security-forces, Marsh, “Preventing diversion”, p. 58.

⁵³ Nicolas Florquin, Sigrid Lipott and Francis Wairagu, *Weapons Compass: Mapping Illicit Small Arms Flows in Africa* (Geneva, Small Arms Survey, Graduate Institute of International and Development Studies, 2019), p. 50 ff.; Holtom and Jongleux, “Preventing diversion”, p. 5.

⁵⁴ GGE/PACAS/2020/3, para. 9 (j).

⁵⁵ *Global Study on Firearms Trafficking 2020*, p. 64; for possible cases of fake stealing in Belgium and France, see Nils Duquet and Maarten Van Alstein, *Gun Ownership in Belgium* (Brussels, Flemish Peace Institute, 2012), p. 12 ff.; and Florquin and Desmarais, “Lethal legacies”, p. 201.

parties to the Firearms Protocol might criminalize this conduct as a form of aiding, abetting or facilitating the commission of a trafficking offence. Investigations into illicitly trafficked firearms that were diverted from national stockpiles may also help to identify the leak and the officials involved in the diversion.

Recommendations

51. **In view of the fact that theft, loss or other forms of diversion from government stockpiles and civilian holdings, including straw purchases, may precede firearms trafficking and account for a significant source of illicit arms supply to criminals, terrorists and armed groups, States should consider establishing criminal provisions and preventive measures that effectively address the issue.**

52. **States are urged to maintain unbroken records of firearms and ammunition under government custody until their final destruction and effective mechanisms of accountability that enable the conduct of criminal investigations into firearms that have been diverted from national stockpiles.**

F. Conflict and post-conflict diversion of arms and ammunition

53. Although there are commonalities between diversion from government stockpiles and private holdings on the one hand, and conflict and post-conflict diversion on the other, battlefield captures, diversion from peacekeeping missions⁵⁶ and the loss or looting of stockpiles following State collapse are unique to conflict and post-conflict situations.⁵⁷

54. The large-scale diversion that has taken place in Libya since the loss of State control and the subsequent looting of the country's national stockpile in 2011 exemplifies this. In addition to the firearms that were already in the country in 2011, more than 65,000 assault rifles, 62,000 pistols, 15,000 submachine guns, 4,000 machine guns and 60 million rounds of ammunition have been subject to approved exemption requests or notifications since the imposition of the arms embargo. For a number of these transfers, end-user certificates were signed by the Ministry of Defence and the Ministry of the Interior, but the materiel ended up in the hands of armed groups. Consequently, Libyan arms, ammunition and explosives seem to have made their way to as many as 12 countries in the Maghreb, Sahel and Levant regions and the Horn of Africa, fuelling conflicts in Mali and the Sinai Peninsula.⁵⁸

Recommendations

55. **Neighbouring countries should acknowledge the transnational dimension of conflict- and post-conflict-related diversion and use it as an entry point to investigate the networks involved in trafficking looted firearms and ammunition out of the country.**

V. Conclusions

56. The present background paper is based on the clear understanding that the prevention of diversion of firearms, their parts and components and ammunition, including in the context of embargo violations and loss or theft from stockpiles and civilian holdings, requires comprehensive approaches that combine criminal justice responses with arms control measures.

⁵⁶ Eric G. Berman, *Beyond Blue Helmets: Promoting Weapons and Ammunition Management in Non-UN Peace Operations* (Geneva, Small Arms Survey, Graduate Institute of International and Development Studies, 2019).

⁵⁷ [GGE/PACAS/2020/3](#); Conflict Armament Research, "Typology of diversion", *Diversion Digest*, No. 1 (August 2018).

⁵⁸ [S/2013/503](#), [S/2018/812](#), pp. 128–132, and [S/2019/1011](#), para. 11.

57. In international firearms transfers, the establishment of a centralized authorization verification system in accordance with article 10 of the Firearms Protocol might result in greater accountability, mitigate risks relating to forged documents and enable the effective enforcement of arms control measures through criminal investigations.
