

CHAPTER 1.2

PUTTING THEORY INTO PRACTICE: A HYPOTHETICAL CASE STUDY

INTRODUCTION

To highlight States Parties' obligations, this chapter considers the application of three key Articles: 6 (Prohibitions), 7 (Export and Export Assessment) and 11 (Diversion), with regard to arms transfers to a hypothetical state, 'Canteron'. It examines a series of prospective arms transfers to Canteron, from the perspective of a potential arms-exporting State Party, offering conclusions based on obligations under the Treaty.

The application of Articles 6, 7 and 11 of the ATT to this hypothetical country aims to illustrate how prospective arms transfers can be evaluated when an end-user country is flagged as being of concern on a number of levels.

Two key parameters should guide an assessment of the risks associated with any transfer of conventional arms:

- the nature of the recipient
- the nature of the equipment.

Depending on circumstances, transfers of certain types of equipment for certain purposes could be approved, while others may be refused.

INFORMATION SOURCES

In considering whether or not to authorise an arms transfer, States Parties should draw on a wide variety of information sources. Relevant information will often be sketchy or fragmentary, not least because questions about arms transfers are often regarded as sensitive and may involve confidentiality or national security.

Information should first be sought from the prospective importing state authorities and, where appropriate, the end-user. Both the importing authorities and the end-user may, for example, be able to provide important information not in the public domain that can address concerns arising during the transfer assessment process.

However, multiple other sources will need to be consulted, as it is unlikely that a full picture of the risks attached to a transfer can be properly understood from a single source. Specialist sources often do not cover the full range of relevant criteria, while more generalist analyses are unlikely to go into sufficient detail on every issue. Multiple sources also help address bias, partiality and potential mistakes. Digital social media gives previously unimaginable access to conflict zones and trouble spots, but can be fundamentally misleading (sometimes deliberately so) and requires careful checking.

There is already a substantial body of accepted practice in arms transfer risk assessments. Standard sources include (in no particular order):

- competent United Nations bodies
- diplomatic missions of the transferring State, and potentially of its allies or regional bodies it belongs to
- the International Committee of the Red Cross (ICRC) and other international or regional organisations
- relevant government departments and institutions, including intelligence services
- counterparts from licensing authorities of other States
- research institutes
- humanitarian and human rights NGOs and other civil society organisations (local and international)
- media (specialised and general, traditional and social).

Within most of these categories there is a wide range of viable sources. States Parties must make their own decisions over what is relevant and appropriate, taking into account issues such as objectivity, non-discrimination, universality of coverage, credibility, rigour and diversity. In this chapter, given that many of the above sources will be useful across the whole of the arms transfer risk assessment process, further reference to them will only be made where areas of specialism are noted as potentially useful. The chapter should be read in conjunction with the legal analysis of Article 7 in Chapter 1.1.



**AN ITALIAN SOLDIER ON
LOOKOUT DUTY ABOARD AN
ARMOURED VEHICLE CONVOY
IN AFGHANISTAN**

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A GEOPOLITICAL OVERVIEW OF CANTERON

Canteron is a medium-small state which shares land borders with two countries (Belsa and Verrania). It has a lengthy coastline and a barren mountainous interior. Most of its population of almost 7 million lives in coastal urban areas. Annual per capita GDP is US\$40,000, due largely to major oil reserves. However, wealth distribution is extremely uneven, with minority groups, including economic migrants and refugees, faring worst.

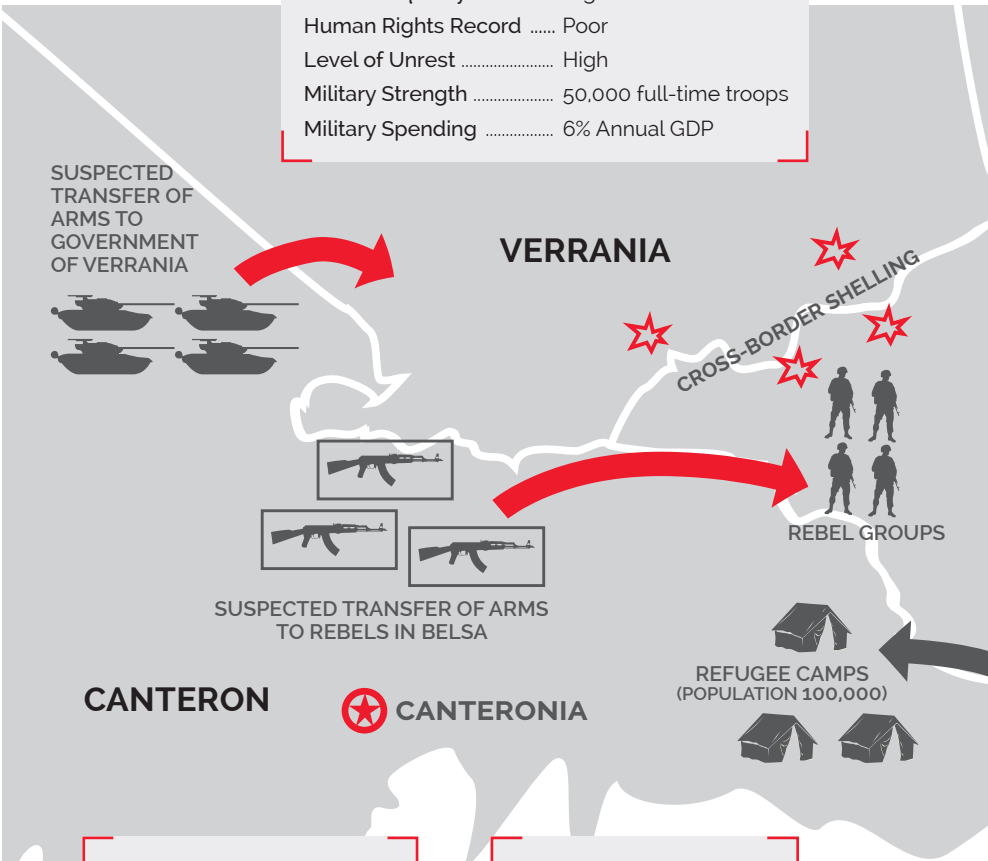
Canteron is a one-party state. The president leads both party and government, and was recently re-elected unopposed with 87 per cent of the vote. Freedom of expression, association and religion are significantly limited, and serious human rights violations by law enforcement agencies frequently reported. Women's political and civil rights are restricted, and citizens risk prison and harsh treatment for opposing the government. There are occasional reports of torture and abuse by the police, persistent rumours of widespread police corruption and links to organised crime, and concerns about police impunity.

Domestic unrest has recently increased, alongside calls for greater democracy. Peaceful protest has occasionally led to violence. Television footage shows security forces equipped with armoured vehicles and automatic weapons confronting apparently unarmed crowds. Tear gas and plastic bullets are used routinely to disperse protests.

Isolated explosions have targeted religious figures and facilities, with responsibility claimed by a transnational fundamentalist organisation. The government uses these attacks to justify further clamp-downs on civil liberties, making numerous questionable arrests.

OVERVIEW OF CANTERON

Government	One-party Government
Source of Income	Oil and natural gas
Annual GPD per Capita	US\$40,000
Social Inequality	High
Human Rights Record	Poor
Level of Unrest	High
Military Strength	50,000 full-time troops
Military Spending	6% Annual GDP



VIOLATIONS OF INTERNATIONAL LAW

Canteron

- Diverting arms shipments
- Suppression of civil rights
- Torture

Belsa

- Recruiting child soldiers
- Gender-Based Violence
- Targeting civilians and civilian infrastructure

Verrania

- Gender-Based Violence
- Targeting civilians and civilian infrastructure

RELATIONSHIP BETWEEN CANTERON & BELSA

- Canteron's ruling elite supports the opposition (aligned with Verrania) in Belsa
- Canteron special forces are identified in Belsa
- Rebel small arms supply linked to Canteron
- Canteron hosts up to 100,000 refugees from Belsa.

CONFLICT BETWEEN BELSA & VERRANIA

After decades of ethnic, religious, strategic and economic differences, a minor border incident has flared into a full-scale war. Both sides have been accused of various human rights abuses, including gender-based violence.



Social and political upheaval is increasing across the region, with evidence of neighbouring state support for insurgent groups. Bitter conflict recently erupted between Belsa and Verrania. Both are accused by external observers of serious and widespread breaches of international law, including targeting civilians. The armed opposition in Belsa stands accused of recruiting child soldiers, while both sides claim the other uses rape as a weapon of war. This conflict now threatens the wider region, with neighbouring states, including Canteron, taking sides. The political class in Canteron advocates on behalf of opposition groups in Belsa (who are aligned with Verrania's government). It has so far accepted almost 100,000 Belsan refugees, but there are increasing concerns that they are providing cover for a criminal and politically destabilising element.

Canteron has made strident statements supporting Verrania and calling for international action against Belsa. There are growing rumours that Canteron has started supplying arms directly to Verrania's government, and to armed opposition groups in Belsa that have claimed responsibility for terrorist acts. There are even allegations that Canteron has Special Forces embedded in Belsa. Videos and photos circulating online purport to show armoured vehicles and personnel from Canteron involved in offensive operations on Belsa's territory, although some independent experts question their veracity.

Canteron has a large standing military relative to population size and allocates around 6 per cent of GDP to military expenditure. It has well-resourced and relatively high-tech land, sea and air military capabilities, and access to latest-generation weaponry from several large arms-exporting states. It is frequently listed as among the world's top 15 recipients of major weapons.

APPLYING ARTICLE 6 (PROHIBITIONS)

Article 6 sets out the circumstances where transfers of arms (covered by Articles 2.1, 3 and 4) are prohibited. It is important to note that it applies to the export, import, transit or transshipment and brokering of relevant arms, ammunition and components.

Article 6.1 prohibits a State Party from authorising arms transfers where this would violate obligations under measures adopted by the United Nations (UN) Security Council under Chapter VII of the UN Charter, in particular, arms embargoes.

Specifically in relation to Article 6, and from the information above describing Canteron, despite the ongoing regional conflict, there is no evidence to suggest that arms transfers specifically intended for Canteron would be in breach of any UN Security Council decisions under Chapter VII of the UN Charter.

The UN Security Council Sanctions Committee¹ has information on the full range of UN Security Council sanctions, while the Stockholm International Peace Research Institute (SIPRI) arms embargo database² and the *Groupe de recherche et d'information sur la paix et la sécurité* (GRIP) embargoes database³ both provide updated information on embargoes in a more accessible format.

Article 6.2 prohibits a State Party from authorising arms transfers that would violate 'relevant international obligations under international instruments to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms'.

This suggests only legally-binding international instruments are relevant (where 'international' applies to agreements between two or more States). At the global level this would include, at a minimum:

- 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol), supplementing the UN Convention against Transnational Organised Crime⁴
- 1997 Anti-Personnel Mine Ban Convention⁵
- 2008 Convention on Cluster Munitions.⁶

Relevant legally-binding regional agreements that address international transfers of conventional arms will also be included.

These instruments impose a range of restrictions on the transfer of particular types of conventional weapons, including firearms, anti-personnel land-mines and cluster munitions. While some of these weapons lie outside the explicit scope of the ATT, any State considering the transfer of weapons to Canterbury would nevertheless be required to ensure that they would not contravene the prohibitions or restrictions enshrined in any of the international agreements to which it is a party, including those listed above.

It should be noted that while the Firearms Protocol applies only to commercial transactions (where States are not principals to the transfer), the ATT still obliges any such transfers to be authorised by the State Party of the country of export. Therefore, that State Party will need to consider the transfer taking full account of the ATT as well as the relevant provisions of the Firearms Protocol, including those relating to transfer authorisation and notification, marking and record-keeping.

Any decision as to whether transfers of arms to Canterbury would be in breach of legally-binding regional agreements will necessarily depend on the specific provisions of those agreements to which the exporting State is Party.

¹ | UN Security Council Sanctions Committees. Accessed 10 July 2015: <http://www.un.org/sc/committees/>

² | SIPRI. Arms Embargo Database. Accessed 10 July 2015: <http://www.sipri.org/databases/embargoes>

³ | GRIP. Embargoes Database. Accessed 10 July 2015: <http://www.grip.org/fr/node/1558>

⁴ | 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. Accessed 10 July 2015: https://treaties.un.org/doc/source/RecentTexts/18-12_c_E.pdf

⁵ | The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. Accessed 10 July 2015: <http://www.apminebanconvention.org/>

⁶ | The Convention on Cluster Munitions. Accessed 10 July 2015: <http://www.clusterconvention.org/>

Article 6.3 prohibits a State Party from transferring arms if it has knowledge, at the time of authorisation, that the arms would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks on civilian objects and civilians, and other war crimes.

There is no specific indication that Canteron is committing the war crimes covered under Article 6.3 on its own territory. However, a robust analysis will assess whether there might be a connection between arms supplies to Canteron and the conduct of hostilities between Belsa and Verrania that may constitute war crimes. If credible external observers such as the ICRC indicate that a violation or a potential violation of ATT Article 6.3 has occurred in Belsa or Verrania, States Parties will need to consider claims that Canteron is:

- operationally involved in the conflict in Belsa
- supplying, or facilitating the supply of, weapons to rebels within Belsa
- supplying, or facilitating the supply of, weapons to Verrania.

If any or all of these concerns are substantiated and it is known that arms transferred would be used in genocide, crimes against humanity or war crimes as specified in Article 6.3, States Parties are bound to refuse those transfers.

If there is sufficient doubt about the direct involvement of Canteron's forces in the conflict between Belsa and Verrania that it does not trigger a refusal under this 'knowledge' test, the transfer is not automatically prohibited per se. This is also the case in the absence of reliable evidence to support allegations of re-transfers from Canteron to Verrania or to rebels in Belsa. However, this does not mean that the transfer should automatically be approved. If an export is not prohibited by Article 6, then it becomes subject to a comprehensive risk assessment under Articles 7 and 11.

For relevant primary sources relating to war crimes, see Chapter 1.1.



IT IS FUNDAMENTAL TO AN EFFECTIVE PROCESS THAT THE RISK ASSESSMENT MUST ALSO BE FORWARD-LOOKING

APPLYING ARTICLE 7 (EXPORT AND EXPORT ASSESSMENT)

If an exporting State Party decides that a transfer of arms under Articles 2.1, 3 and 4 is not prohibited under Article 6, Article 7 requires that it carry out an export risk assessment. This must include concerns relating to human rights, international humanitarian law, terrorist acts, transnational organised crime and gender-based violence or violence against women and children.

In the case of Canteron, this would require careful analysis of:

- respect for international law by the recipient entity (for example, armed forces, police or other security forces)
- increasing levels of political protest
- limits to fundamental freedoms
- human rights violations by law enforcement agencies and their lack of accountability, including with regard to:
 - responding to political protest
 - treatment of prisoners
 - treatment of minorities
 - a culture of police impunity
 - due process
- accommodation of a significant refugee population
- corruption, particularly among the police
- terrorist attacks on religious figures and facilities
- conflict and sectarian violence in the region
- involvement in the war between neighbouring countries, potentially including the supply of arms to rebel groups or even operational engagement on the ground
- high level of defence spending.

In addition, licensing authorities need to take into account not only the risk of immediate misuse. It is fundamental to an effective process that the risk assessment must also be forward-looking. This is because authorisations may be valid for a period of years, and the items themselves typically have a shelf life of many years. To base an assessment simply on how the items for transfer would be used only at the time of authorisation is to misunderstand the object and purpose of the ATT.

Article 7.2 obliges the exporting State Party to 'consider whether there are measures that could be undertaken to mitigate risks identified'. However, the exporting State Party is not obliged to implement any of the mitigation measures it may have identified. Depending on the circumstances, a number of options present themselves, such as:

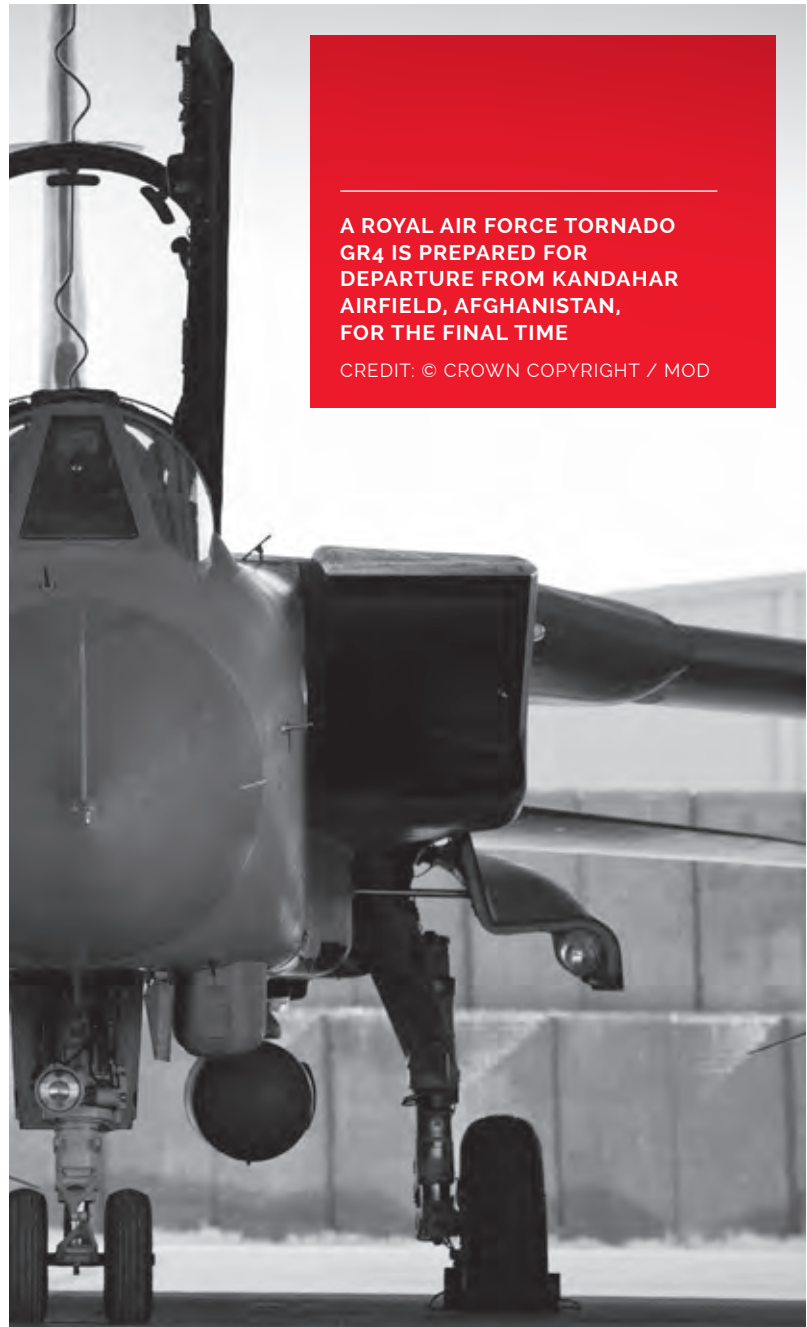
- placing explicit limitations on the end-uses or end-users of the items
- improving certification and verification procedures
- agreeing terms to allow for post-delivery inspection of the items
- improving physical security and stockpile management in the recipient country
- providing human rights or other training to end-users.

Note that it is the effect of mitigation measures, and not just their identification or implementation, that is critical. Where mitigation measures do not reduce the identified risks to a low level, an export of arms should be refused.

Article 7.3 states that if after 'conducting [a risk] assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorise the export'⁷

(See Chapter 1.1 for a full discussion of Article 7.3 and, in particular, the application of the term 'overriding'.)

Crucially, with regard to the consequences set out in Articles 7.1 and 7.4, authorities must assess not only the risk that items will be used to commit the stated violations or acts, but that they will be used to facilitate these violations or acts. This broadens considerably the scope and application of the criteria, in that it means they also apply where the items are not used directly but their mere possession and availability help to create the climate, conditions or circumstances whereby the recipient feels able to, is encouraged to or does undertake problematic acts.



A ROYAL AIR FORCE TORNADO GR4 IS PREPARED FOR DEPARTURE FROM KANDAHAR AIRFIELD, AFGHANISTAN, FOR THE FINAL TIME

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⁷ | The negative consequences in paragraph 1 are that the relevant items would undermine peace and security or could be used to commit or facilitate: a serious violation of international humanitarian or human rights law, an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or an act constituting an offence under international conventions or protocols relating to transnational organised crime to which the exporting State is a Party.

IMPACT ON PEACE AND SECURITY⁸

ATT Article 7.1(a) requires States Parties to 'assess the potential that the conventional arms or items would contribute to or undermine peace and security'.

The international legal context of peace and security is defined by the UN Charter and elaborated primarily in decisions of the UN Security Council. These decisions have extended the concept to include human security issues (see Chapter 1.1).

Under the ATT, exporting States are to assess the risks of harm to peace and security, as well as the possibility of a positive contribution, whether global, regional or national. This should be considered from a longer-term, macro perspective, given that building peace and security is a long-term project going beyond any immediate short-term imperative to respond to a crisis. A further consideration is that while peace and security take a long time to build, they can be destroyed extremely quickly.

Peace and security for Canteron and the surrounding region are in constant flux and under significant threat, with many factors needing consideration. This criterion is therefore likely to be critical in the assessment of a high proportion of arms exports across the full scope of the Treaty, from aircraft and naval vessels down to small arms and ammunition. In this context, there is no suggestion that Canteron's role in or relationship to any neighbouring conflict is such that supplying arms will contribute to peace and security.

Conversely, indications of a drift towards countries becoming increasingly involved in their neighbours' strategic affairs points to a developing risk of transfers having a negative impact on regional peace and security. For example, arms supplies could directly or indirectly (via loss, theft or diversion) reach non-governmental actors who may be committing terrorist acts.

**LICENCE APPLICATION
FOR TRANSFER**

DESTINATION: Canteron

ITEM: 12 attack helicopters and 250 helicopter-launched air-to-ground missiles

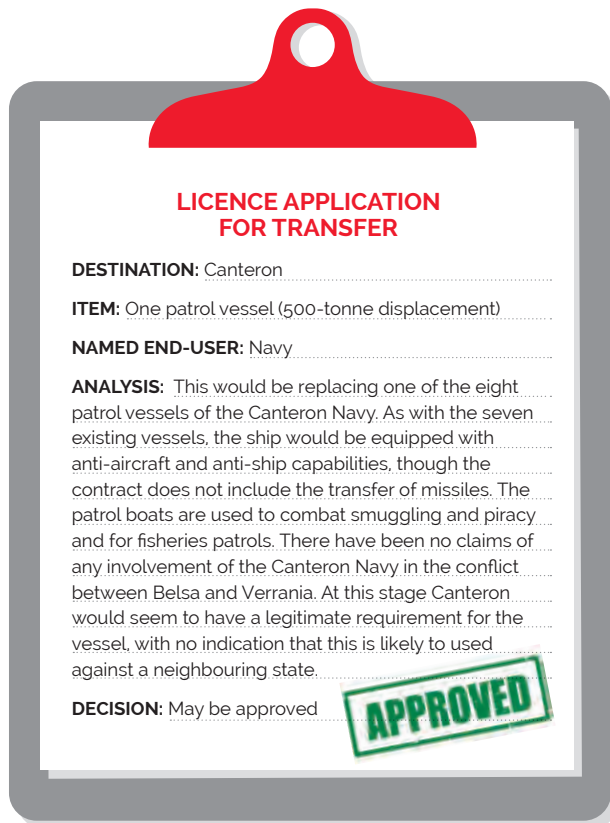
NAMED END-USER: Marines

ANALYSIS: This would introduce significant additional offensive capacity to Canteron's Marines. In light of escalating tensions in the region, and the reports of Canteron's involvement in the conflict between Belsa and Verrania, the export should be refused, unless a persuasive case can be made for why the transfer does not raise significant concerns under Articles 7.1(a) (peace and security) and 7.1(b) i and ii (international humanitarian and human rights law).

DECISION: Denied

DENIED

⁸ | For a legal analysis of the concept of peace and security, including relevant primary sources, see Chapter 1.1



In this context, while acquisitions of a size and type consistent with maintaining Canteron's existing armed capacities might not increase concerns relating to peace and security, the excessive militarisation of Canteron implied by a defence budget of 6 per cent of GDP needs to be considered. An assessment will therefore still be required of Canteron's capacities and configurations, military doctrine, relationships with its neighbours and national security discourse. This must be carried out in the context of the deteriorating regional situation, taking into account whether one particular transfer could be part of a larger regional arms race or an excessive and potentially destabilising accumulation of arms.

Of obvious and immediate concern would be acquisitions that, owing to their scale or technological advancement, indicate a shift in the military capacity of Canteron, the military balance in the region, or towards a more aggressive military posture. Each export will also need to be assessed, not just in its own right, but as part of any broader trends in military acquisitions and the developing security dynamic. In this case, the categories of equipment covered by the ATT (Articles 2, 3, and 4) – in particular battle tanks and armoured combat vehicles, artillery, combat aircraft and missiles, their components and ammunition – would be especially relevant.

Sources of information on military acquisitions include organisations and publications such as SIPRI, the International Institute for Strategic Studies' Military Balance and Strategic Survey, specialised defence-sector media (such as *Jane's*, *Defense News*), along with national, regional and international reports on equipment transfers and holdings (such as the UN Register of Conventional Arms).

Regarding the wider regional security picture, internal government sources will be important, as will relevant deliberations of the UN Security Council and other UN institutions and agencies. Other sources include information provided by specialist academics, research institutes and NGOs, and specialist and general media. Useful indices relating to conflict and instability have been developed in recent years by non-governmental organisations – such as the Institute for Economics and Peace's Global Peace Index⁹, and the Fund for Peace's Fragile States Index¹⁰. These sources function as pointers to potential risks and the need for more detailed analysis.

⁹ | Institute for Economics and Peace. Global Peace Index. Accessed 10 July 2015; <http://www.visionofhumanity.org/#/page/indexes/global-peace-index>

¹⁰ | Fund for Peace. Fragile States Index. Accessed 10 July 2015; <http://library.fundforpeace.org/fsi>

INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW¹¹

Under ATT Article 7.1(b), States Parties to the ATT must refuse arms exports where there is an overriding risk that the arms could be used to commit or facilitate a serious violation of international humanitarian or international human rights law.

INTERNATIONAL HUMAN RIGHTS LAW

As noted in Chapter 1.1, the international trade in arms can impinge on a wide range of human rights as enshrined in Treaty and customary international law, from the right to life to the right to health, education, food and housing. Accordingly, when assessing risks relating to international human rights law (IHRL), any ATT State Party contemplating arms exports to Canteron will need to consider reports of serious human rights violations by law enforcement agencies. This assessment should be further informed by the wider context in which limits to fundamental freedoms, responses to legitimate protest, the treatment of minorities, the application of due process, the treatment of prisoners and the conduct of security forces all give cause for concern. Exporting authorities need to consider whether the arms or items to be exported would exacerbate such concerns.

If their investigations conclude that the reports have been significantly overstated, it will still be important for them to consider potential future risks. These could be expected to intensify in the context of Canteron's declining domestic security environment, as evidenced by increasing anti-government protest, terrorist violence and internal stresses due to attitudes towards the growing refugee population. Exporting authorities will also need to make a forward-looking assessment of whether the deteriorating internal security situation is likely to provoke a violent or repressive government response. In this context an assessment of governance structures and accountability to the population would be useful.

Within the scope of the ATT, the types of equipment most relevant to IHRL violations are small arms and light weapons and their ammunition, and armoured vehicles. However, in situations of extreme internal stress, all conventional weapons are of potential concern and should be subject to careful pre-export assessment. As well as the risk that items would themselves be used to commit violations, an assessment should consider the risk that the items could simply by their presence facilitate, or enable, violations such as assault or rape, for example, by protecting or enhancing the overall operational capacity of the end-users.

In addition to the exporting government's internal information sources, many other sources may assist States in their human rights risk assessments, including relevant UN bodies such as the Office of the High Commissioner for Human Rights (OHCHR)¹², the Human Rights Council and Special Procedures,¹³ UN Sanctions Committees¹⁴ and Security Council¹⁵ reports.

¹¹ | For a legal analysis of the applicability of international human rights law and international humanitarian law, including relevant primary sources, see Chapter 1.1.

¹² | Office of the High Commissioner for Human Rights (OHCHR). Accessed 10 July 2015: <http://www.ohchr.org/EN/Pages/WelcomePage.aspx>

¹³ | Special Procedures comprise a special rapporteur or independent expert or a working group tasked to address either specific country situations (14, as of 10 July 2015) or thematic issues (currently 39). Human Rights Council and Special Procedures. Accessed 10 July 2015. <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>

¹⁴ | UN Security Council Sanctions Committees. Accessed 10 July 2015: <http://www.un.org/sc/committees/>

¹⁵ | United Nations Security Council. Accessed 10 July 2015. <http://www.un.org/en/sc/>

International NGOs such as Amnesty International and Human Rights Watch provide useful data on in-country practices, while human-rights monitoring organisations and agencies on the ground may have first-hand knowledge of problems. The US State Department provides a detailed yearly human rights report on all countries (excepting the US).

Other useful sources include:

- Geneva Academy, What amounts to 'a serious violation of international human rights law'?, August 2014¹⁶
- The User's Guide to EU Council Common Position 2008/944/CFSP, new edition forthcoming¹⁷
- Amnesty International, Applying the ATT to ensure the protection of human rights, February 2015.¹⁸

INTERNATIONAL HUMANITARIAN LAW

As noted in Chapter 1.1, international humanitarian law (IHL) applies only in situations of armed conflict and seeks to limit the effects of such conflict, particularly in relation to non-combatants. In practice, however, there is often overlap between IHL and IHRL.

Despite rumours concerning Canteron's involvement in the neighbouring conflict (where serious IHL violations are alleged), the reality is unclear. An export assessment should therefore explore and analyse all relevant available information to determine the level and nature of Canteron's involvement in the conflict between Belsa and Verrania, before considering the extent of IHL violations and the likelihood of an increase or decrease in the foreseeable future.

Even if current concerns are not substantiated, the export assessment should explore the potential for serious violations of IHL going forward. States Parties contemplating exports to Canteron need to assess:

- the possibility that Canteron will become more deeply involved in the conflict between Belsa and Verrania or embroiled in another conflict
- the risk of any such conflict contributing to serious violations of IHL
- the likelihood that once involved, Canteron would be directly implicated in serious violations of IHL
- whether the items to be exported would be used to commit or would facilitate such violations.

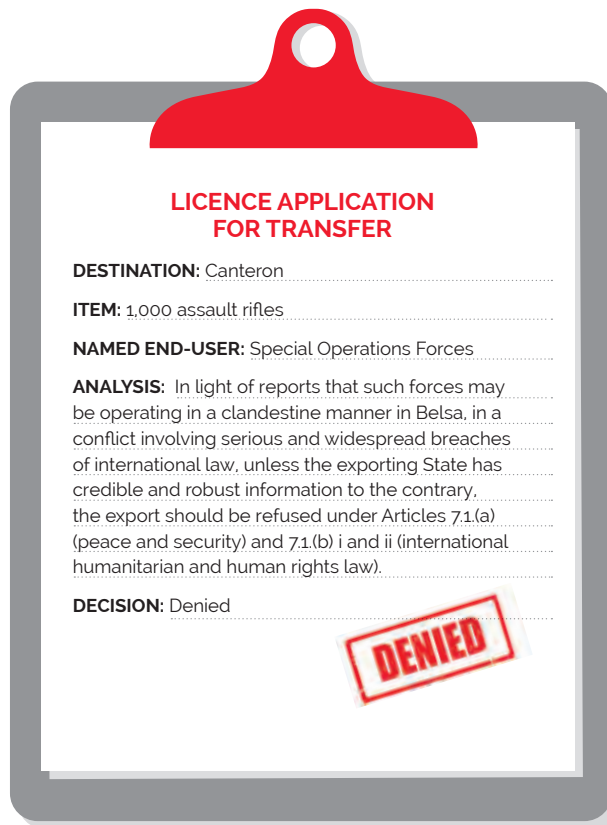
Sources relevant to the IHL analysis include the deliberations and outputs of the ICRC, not least its 2007 publication *Arms transfer decisions – Applying international humanitarian law criteria: Practical guide*.¹⁹ This offers several relevant risk indicators, such as the proposed recipient's previous history in respecting IHL, its formal commitments to respect IHL, and the integration of IHL into military doctrines, manuals and instructions.

¹⁶ | Geneva Academy, 2014. What amounts to 'a serious violation of international human rights law'? August 2014. [http://www.geneva-academy.ch/docs/publications/Briefings and In briefs/Briefing 6 What is a serious violation of human rights law_Academy Briefing No 6.pdf](http://www.geneva-academy.ch/docs/publications/Briefings%20and%20In%20briefs/Briefing%206%20What%20is%20a%20serious%20violation%20of%20human%20rights%20law_Academy%20Briefing%20No%206.pdf)

¹⁷ | The 2009 edition of the User's Guide, which is soon to be replaced, is available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209241%202009%20INIT>

¹⁸ | Amnesty International, 2015. Applying the ATT to ensure the protection of human rights. February 2015. <https://www.amnesty.org/en/documents/act30/0003/2015/en/>

¹⁹ | ICRC, 2007. Arms transfer decisions—Applying international humanitarian law criteria: Practical guide. 2007. https://www.icrc.org/eng/assets/files/other/icrc_002_0916.pdf



TERRORIST OFFENCES²⁰

Under ATT Article 7.1(b) iii, States Parties must refuse arms exports where there is an overriding risk that the arms could be used to commit or facilitate terrorist offences as set out in relevant international instruments.

The lack of a universally accepted definition of the terms 'terrorism' or 'terrorist' means that the ATT applies to those areas where there is international agreement, namely relevant conventions or protocols. Most such instruments relate to offences concerning the safety of civil aviation and maritime activities and terrorist acts that employ particular tools or modus operandi (see Chapter 1.1 for a comprehensive list of relevant instruments).

Canteron is experiencing some low-level, but nonetheless serious, incidents of terrorist activity involving improvised explosive devices. This, in itself, is not critical to the Article 7 risk assessment about potential exports of arms to Canteron. More important in this context is Canteron's role (if any) in the conflict between Belsa and Verrania and whether arms have been supplied by Canteron to armed opposition groups in Belsa known to have perpetrated terrorist acts.

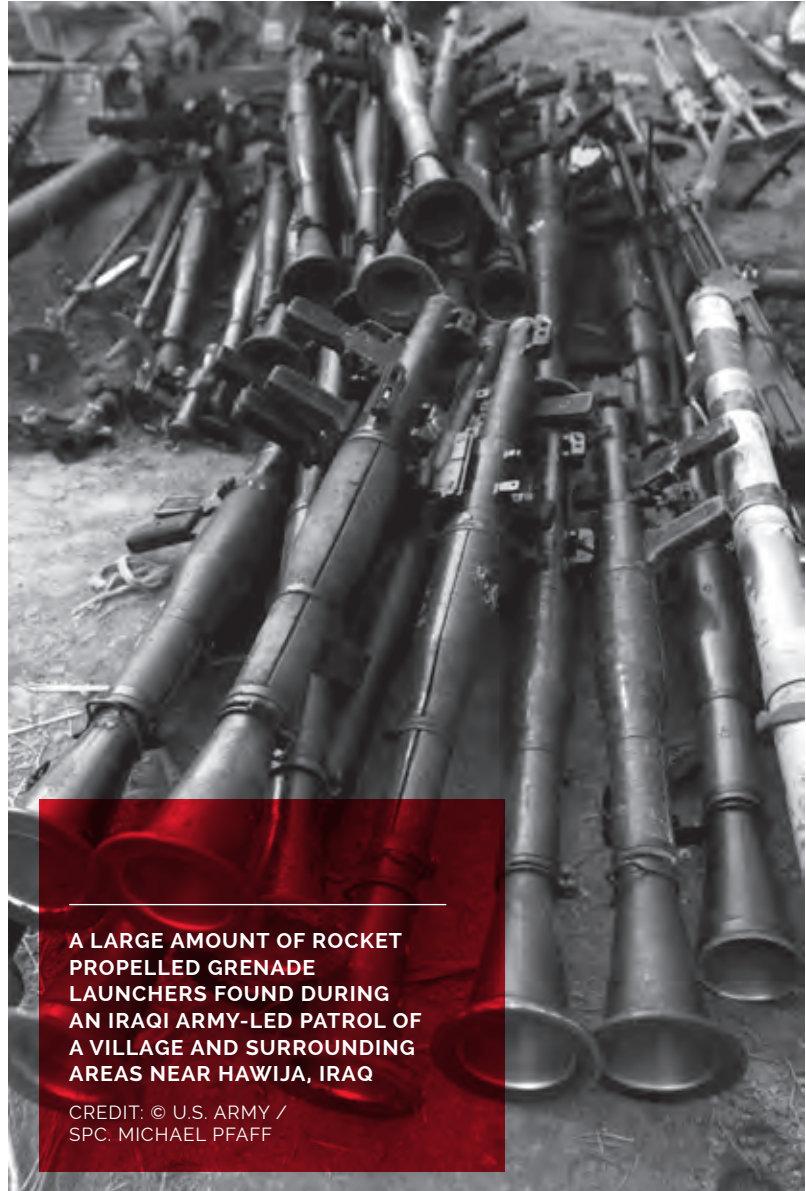
²⁰ | For a legal analysis of Article 7.1 (b) iii, including relevant primary sources, see Chapter 1.1

In making this assessment, an exporting State Party should ascertain:

- whether there is a substantial risk that Canteron is involved in the direct or indirect transfer of arms to armed opposition groups in Belsa known to have committed terrorist offences
- whether security forces from Canteron are involved in Belsa and are responsible for, or complicit in, terrorist offences. Even if no evidence is found, it will nevertheless be important to assess the possibility that, in the context of a volatile sub-region, Canteron might engage in these activities in the foreseeable future. This assessment might involve the relevant authorities in the exporting State Party consulting with their intelligence services, with consular officials in Canteron or with authorities in partner States.

If there is evidence to confirm either of the above scenarios, the exporting State Party is required to consider whether there is a substantial risk that the proposed export of arms could be used to commit or facilitate terrorist offences – either by Canteron providing the weapons directly or indirectly to armed groups in Belsa, or to sections of its own security forces operating there under cover. If a substantial risk is identified and no effective mitigation measures can be implemented, the export under consideration should be refused.

Relevant sources of information include UN Security Council resolutions relating to terrorism and the work of the Council's Counter Terrorism Committee.²¹ Publications of respected organisations and institutes focused on international security and related issues are also applicable.



**A LARGE AMOUNT OF ROCKET
PROPELLED GRENADE
LAUNCHERS FOUND DURING
AN IRAQI ARMY-LED PATROL OF
A VILLAGE AND SURROUNDING
AREAS NEAR HAWIJA, IRAQ**

CREDIT: © U.S. ARMY /
SPC. MICHAEL PFAFF

²¹ | UN Security Council. Counter Terrorism Committee. Accessed 10 July 2015.

TRANSNATIONAL ORGANISED CRIME²²

States Parties must refuse arms exports where there is an overriding risk that the arms could be used to commit or facilitate an act relating to transnational organised crime which constitutes an offence under international instruments to which the exporting State is a Party.

'Transnational organised crime' refers to a wide range of criminal activity by groups operating internationally, including trafficking in illegal drugs, people, endangered species and firearms, as well as cyber-crime and money laundering.²³ Corruption – particularly systemic corruption – can also be viewed as part of this matrix.

With suggestions circulating on social media and in international media that senior police figures in Canteron are corrupt and have links to organised crime, an export risk assessment should explore the veracity of these allegations and whether any arms exported to the government may be used by the police or others to pursue international criminal activity. This should include assessment of the possibility that weapons such as small arms, purportedly destined for military end-use, may be misappropriated and used by the police for organised criminal activity, or that they may fall into the hands of criminal groups. In the case of Canteron, where evidence is limited, further investigation will be necessary. This might involve authorities in the exporting State Party consulting with their intelligence services, with consular officials in Canteron, with authorities in partner States and with the UN Office of Drugs and Crime.

If it is decided that the incidence of criminal (including corrupt) activity by the police is significant, and that there is a substantial risk of the proposed export of arms being used in the facilitation or commission of transnational organised crime, the proposed export should be refused.

The principal international instrument in this field is the UN Convention against Transnational Organised Crime²⁴, together with Protocols on Trafficking in Persons, Especially Women and Children, on Smuggling of Migrants, and on Illicit Manufacturing and Trafficking of Firearms. Also of relevance may be publications of respected organisations and institutes that address transnational organised crime issues, for example: Global Initiative on Transnational Organised Crime, *Clingandael*, Global Witness, Transparency International and *Stiftung Wissenschaft und Politik*.

²² | For a legal analysis of Article 7.1 (b) iv, including relevant primary sources, see Chapter 1.1.

²³ | There is no explicit definition of the term 'transnational organised crime' in the United Nations Convention on Transnational Organized Crime (UNTOC). However the convention does contain a definition of 'organized criminal group' in Article 2(a) as: a group of three or more persons that was not randomly formed, existing for a period of time, acting in concert with the aim of committing at least one crime punishable by at least four years' incarceration, in order to obtain, directly or indirectly, a financial or other material benefit'. See <http://www.unodc.org/unodc/en/organized-crime/index.html>

²⁴ | UN Convention against Transnational Organized Crime. Accessed 10 July 2015, <http://www.unodc.org/unodc/treaties/CTOC/>

GENDER-BASED VIOLENCE OR SERIOUS ACTS OF VIOLENCE AGAINST WOMEN AND CHILDREN²⁵

In conducting an export risk assessment, Article 7.4 obliges States Parties to take into account the risk of the arms or items being used to commit or facilitate serious acts of gender-based violence (GBV), or serious acts of violence against women and children. It is worth reemphasising that GBV is committed against women, girls, men and boys, and includes rape, sexual violence and non-sexual attacks. Chapter 1.1 includes a comprehensive discussion of these issues.

As noted, Belsa and Verrania have accused each other of employing rape as a weapon of war against the civilian population, while armed rebels within Belsa are also alleged to have recruited child soldiers. These claims should be investigated not only in the context of Article 7.4 but also in the context of Article 6 (prohibitions) and Article 7.1 (IHL and IHRL). If claims relating to the conduct of Belsa and Verrania are substantiated, and relevant support from Canteron is identified, exports of major conventional weapons and small arms and light weapons to Canteron should be refused.

Information sources identified under Articles 6 and 7.1 are relevant here, given the overlapping nature of the issues. Particular prominence should be given to organisations and institutions with a special interest in GBV and violence against women and children. These include UN agencies such as the UN Children's Fund (UNICEF), the UN Population Fund (UNFPA) and the Office of the Special Representative of the Secretary-General for Children and Armed Conflict; the ICRC, and international NGOs such as the International Rescue Committee, the International Medical Corps, *Medecins Sans Frontières* and Oxfam. Some have an extensive field presence in conflict and human rights crisis zones and can serve as primary sources of credible information.

APPLYING ARTICLE 11 (DIVERSION)

Arms diversion is the process by which authorised holdings or transfers of arms are either delivered to unauthorised end-users contrary to the terms of the transfer, or put to unauthorised uses by a legitimate end-user. ATT Article 11 requires States Parties to prevent the diversion of arms (listed under Article 2.1) and sets out a range of measures that they must either adopt or consider adopting.

Exporting States Parties are obliged firstly to assess the risk of diversion of an export, then to consider the establishment of mitigation measures. Other prevention measures may include 'examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorising the export'.

Allegations that Canteron is supplying weapons to the Government of Verrania and to armed rebels in Belsa require investigation on the grounds that they imply a diversion risk. If the claims are substantiated, efforts should be made to identify exactly the types and quantities of arms transferred. The diversion of relatively few small arms to Verrania or to rebels in Belsa may not necessarily suggest a risk of Canteron also diverting major conventional arms, so there is a need for export assessments to obtain a proper understanding of how diversion risks manifest themselves.

²⁵ | For a legal analysis of the concepts of gender-based violence and violence against women and children, including relevant primary sources, see Chapter 1.1.

In practice, the regional situation is such that if a substantial diversion risk is identified, States Parties should take a very cautious approach to exporting any items that might be of use to identified unauthorised end-users. A related issue is whether the prospective unauthorised end-user has the capacity to use the arms in question. If it does not, and Canteron does, that would suggest a reduced diversion risk.

Other actors in the transfer control chain can also be involved in diversion, including brokers, shipping agents, or countries linked to transit or transshipment. As past behaviour is an important indication of future risk, it is vital that an exporting State Party is aware of all those involved in the arms transfer chain, and refuses exports where significant questions are raised. Transport routes may also provide a clue to diversion risks. States Parties should be wary, for example, of approving exports to Canteron which would transit through Belsa and Verrania. Other factors to consider include whether Canteron's stockpile management is effective and not vulnerable to corruption, and whether the export would be sensible in terms of Canteron's legitimate defence needs.

If a diversion risk is identified, the exporting State Party is obliged before any licensing decision is taken to consider the establishment of mitigation measures to reduce that risk. Options proposed in Article 11 include:

- possible confidence-building measures or joint programmes with the importing State
- no-re-export clauses
- physical security measures for arms in transit
- post-shipment controls including on-site verification measures.

Crucially, any mitigation measures agreed with the importing or transit State must be appropriate and effective in reducing the risks of diversion to a low level before



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INCLUDES FAMILIARISATION
WITH AMMUNITION
(PICTURED), WEAPONS,
PARTS AND EQUIPMENT**

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the decision can be taken to authorise the export. Where mitigation measures are irrelevant or ineffective in reducing risk, exports should be refused.

If the assessment concludes that diversion is a serious risk, the key to resolving this issue will lie in securing credible high-level political commitment from within Canteron. Technical 'fixes' will be of limited effect if key actors in Canteron remain committed to diverting arms into the conflict zone.

The User's Guide to EU Council Common Position 2008/944/CFSP (new edition forthcoming) provides detailed guidance to the issues and sources to consider during any diversion risk assessment.²⁶ The UN – including the reports of various UN Security Council Sanctions Panels of Experts – is an important source of information on arms diversion to proscribed end-users. Information can also be obtained from humanitarian agencies such as Amnesty International and Human Rights Watch, which document cases of misuse of arms.

Several organisations specialise in locating, identifying and tracing specific conventional arms and ammunition, such as Conflict Armament Research (responsible for iTrace) and Armament Research Services. Interpol has established an Illicit Arms Records and Tracing Management System (iARMS) – a 'state-of-the art tool that facilitates information exchange and investigative cooperation between law enforcement agencies in relation to the international movement of illicit firearms'. The US maintains a publicly available List of Statutorily Debarred Parties²⁷, which includes the names of all those who have violated US arms export legislation.

Exporting States Parties may also obtain important information from their intelligence services and diplomatic missions or those of allies.²⁸

**LICENCE APPLICATION
FOR TRANSFER**

DESTINATION: Canteron

ITEM: 30 anti-vehicle guided-by-wire missiles with eight launchers

NAMED END-USER: National Police

ANALYSIS: There is no record of the police using such equipment against the domestic population, nor any specific grounds for anticipating that this is likely to change. These anti-vehicle missiles would, however, seem completely inappropriate items for a police force to own or use, suggesting either a diversion risk or the possibility of a drastic (negative) change in police tactics. With these risks in mind, the exporter should definitely seek more information about end-use, with the expectation that, unless there is some reasonable explanation, the export would be refused, primarily under Article 11.2 (diversion).

DECISION: More information required
– if no feedback, licence denied

DENIED

²⁶ | 2009 User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment

²⁷ | US Department of State, Directorate of Defence Trade Controls, List of Statutorily Debarred Parties, Accessed 10 July 2015, <http://pmdtc.state.gov/compliance/debar.html>

²⁸ | NB: calculation of future diversion risk should not stand or fall on the basis of whether there is physical evidence of previous diversion

CONCLUSION

The agreement under the ATT that all prospective international exports of conventional arms should be required to pass certain universally applied objective 'tests' before being approved, regardless of their ultimate declared destination, is a landmark achievement. However, the challenge to States Parties did not end with the Treaty's entry into force.

As this chapter demonstrates, the obligation for States Parties to make a rigorous risk assessment of all proposed arms exports requires several stages. It starts with a consideration of whether a proposed transfer would be automatically prohibited on the grounds that it would violate specific international legal obligations. If not, a more involved assessment of the likelihood of a range of negative consequences arising from the proposed export is required.

The object and purpose of the ATT require due diligence in conducting this assessment. This means careful consideration of the risks regarding both the nature of the recipient and the nature of the equipment to be transferred. It involves consulting a variety of sources, both public and confidential, and the exercise of judgement in potentially very fluid and stressed contexts. It also obliges States Parties to consider not only the risk that the items for export would be subject to misuse if exported immediately, but also how contexts might develop over time and the likelihood of items being misused in future.

With this in mind, it is evident that if ATT States Parties are to implement the export risk assessment robustly they will have to:

- take a measured and careful approach to export licensing
- be proactive in seeking information from a variety of sources, especially where significant doubt exists, as may frequently be the case
- exercise particular caution where decisions may have to be made on the basis of incomplete information
- consider longer-term risks, not just those at the moment of licence application.