

CHAPTER 2.1: RISK AND ARMS-TRANSFER CONTROL

This chapter examines how risk is formulated in the Arms Trade Treaty (ATT) and how governments – whether of States Parties to the Treaty or of countries not party to it – conceptualize and operationalize risk in their export assessments. It then discusses the drivers to arms-export policy among major exporters: the interests that countries have in exports as well as their concern for regulatory restraint. Finally, it considers the implications of the terminology of ‘overriding risk’ in Article 7 for effective risk-assessment implementation. The focus in this section is primarily on the world’s largest exporters: the US, Russia, European Union (EU) member states and China. This is because Article 7 refers to exports and therefore the practices of the major exporters are worth scrutinizing; and also because all EU members are States Parties, while the United States is a Signatory but not a State Party, and Russia and China are not Signatories. The differences in practice between them suggest opportunities and challenges for universalization of the Treaty.

RISK IN THE ATT

The core rules of the ATT are set out in the prohibitions of Article 6, and the national export risk assessment laid out Article 7.¹ This national risk-assessment process is central to the implementation of the Treaty. Article 6 prohibits States Parties from transferring weapons if this would violate their international obligations, such as those around UN Security Council arms embargoes, illicit trafficking in arms, genocide, crimes against humanity or war crimes. States Parties are thus bound to refer to their obligations under UN Security Council measures, international agreements to which they are a party (such as the Convention on Cluster Munitions and the Convention against Transnational Organized Crime), and the Geneva Conventions when considering arms transfers.²

If an export is not prohibited under Article 6, States Parties must apply Article 7 and use their national control system to assess the potential that the proposed export would contribute to or undermine peace and security. They must also assess the potential that it could be used to commit or facilitate a serious violation of international humanitarian law (IHL) or human rights law (IHRL), or certain terrorism or transnational organized-crime offences. As part of the assessment process, they must consider measures to mitigate these risks. If, having conducted the assessment, the exporter determines that there is an

overriding risk of any of these negative consequences, then it must not authorize the export. In addition, under Article 7, States Parties must take into account the risk of the weaponry being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children. Further, under Article 11, States Parties must assess the risk of diversion of weapons for unauthorized end use or to unauthorized end users, and take measures to prevent it. Chapter 2.2 discusses the operationalization of Article 7 in more detail.

RISK AND EXPORT ASSESSMENTS

The way that risk is formulated in the ATT is that States Parties must assess the potential for the misuse of a proposed export and consider potential measures to mitigate the risks of misuse. State Parties should deny authorization for the export if the risk of negative consequences is overriding. While the Treaty instructs States Parties that they must follow these rules, it does not stipulate how they are to do this. States Parties are to use their national control system to make these assessments and decisions. And while the Treaty instructs them to do so in an ‘objective and non-discriminatory manner,’ any risk assessment necessarily requires judgments to be made.³

When assessing risk under Article 7, the bar for negative consequences is lower than for positive consequences. That is, while the positive case for a transfer under Article 7a must demonstrate that it ‘would’ contribute to peace and security, the risk under Article 7b that it ‘could’ be used to commit or facilitate a serious human-rights violation or other negative effects triggers a denial. This formulation infers that there can be positive consequences of arms transfers, while requiring States Parties to thoroughly assess the risk of negative consequences. The ATT emphasises the negative consequences of a potential arms transfer so that Article 7 cannot be turned into a balancing act between export promotion and export denial. In addition, the ‘commit or facilitate’ language requires States Parties to assess the wider role of weapons in creating the conditions for violations, as well as its direct use.

The risk-assessment process is forward-looking in that States Parties are required to assess the potential ways that equipment would or could be used for negative consequences. This is designed to mitigate the pro-transfer drivers of short-term demands in foreign and domestic policy,

1 Arms Trade Treaty, Articles 6 & 7 (adopted 2 April 2013, entered into force 24 December 2014)_UNTS_(ATT) Art 6&7. <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

2 For more information see Control Arms (2015). “ATT Monitor 2015”. 25 August 2015, Chapter 1.1 pp. 26-43. <http://armstreatymonitor.org/current/wp-content/uploads/2015/08/Full-Annual-Report.pdf>

3 Arms Trade Treaty, Principles (adopted 2 April 2013, entered into force 24 December 2014)_UNTS_(ATT). <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

as well as longer-term interests in sustaining friendly regimes despite human-rights violations. Patterns of past use are often a good indicator of recipients' likely future use. And as military equipment is durable and often outlasts political regimes and geopolitical coalitions it can be used in unintended or unforeseen ways over the long term through shifts in political coalitions or strategic orientation.

The events of the Arab Spring in 2011 and since are a good example of the challenges of looking forward and backward in arms-transfer policy. The extensive use of foreign-supplied weapons to repress popular demonstrations across the Middle East and North Africa appeared to take policymakers of

many major suppliers by surprise, and generated controversy about their export regimes. Yet decades of military and police support for authoritarian regimes had created the conditions for violent responses to the protests. The risk of misuse had long been present, but it was ignored because authoritarianism was interpreted by exporting countries in terms of 'stability' and the need to protect the long-term future of friendly regimes. The response to the Arab Spring is also a good example of how export licensing is not an objective undertaking: it can be rigorous and systematic, but is inevitably political as it is bound up with the contestation over political power seen in the violent state responses to demonstrations and popular protest.



A YOUNG SOMALI GIRL RUNS IN FRONT OF AN AFRICAN UNION MISSION IN SOMALI (AMISOM) ARMOURD PERSONNEL CARRIER, MOGADISHU, SOMALIA.

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IMPLEMENTING RISK-BASED ASSESSMENTS: CURRENT PRACTICE

The following section highlights the national control systems of major exporting States in order to compare how they understand and integrate the language of risk.

THE EU

How do governments currently conceptualize and operationalize risk in their export assessments? Of the national and regional export-control regimes in operation around the world, the EU Common Position on arms exports has one of the clearest articulations of risk.⁴ The term 'risk' is explicitly articulated in relation to internal repression and international humanitarian law (Criterion 2); regional peace, security and stability (Criterion 4); national security (Criterion 5); and diversion (Criterion 7). Under Criterion 2, for example, EU member states 'shall deny a licence if there is a clear risk' that the proposed transfer 'might be used for internal repression' or 'might be used in the commission of serious violations of international humanitarian law'.⁵ This requires interpretation and judgment as to what constitutes a 'clear' risk, and whether the transfer 'might' be used in a particular way. These common European rules are incorporated into national laws and practices by member states. Governments can be more restrictive if they wish, but there is a common bottom line. The ATT works on the same basis. In addition, there are harmonization or convergence mechanisms to encourage common European practice, such as the denial notification mechanism and the EU Common Position Users' Guide.

However, implementation by EU member states often fails to meet the standards set out in the Common Position, and it also shows wide variation between them in specific cases. In the case of Saudi Arabia in light of the war in Yemen, for example,

the UK and France have increased their arms transfers since the start of the conflict in 2015, cementing their position as major European suppliers to Saudi Arabia.⁶ The UK's position has prompted a legal challenge from domestic activists who claim the government is contravening its legal commitments.⁷ Elsewhere in the EU, however, more restrictive practices are in play. The Netherlands has instituted a presumption of denial against transfers to Saudi Arabia,⁸ making it the member state closest to implementing the European Parliament resolution of February 2016 that called for an embargo on arms transfers to Saudi Arabia.⁹ Sweden, meanwhile, did not issue any export licences for transfers to Saudi Arabia in 2015 after the start of the conflict, and in Flanders (one of the three regions in Belgium) there is a consensus – although no explicit policy position – that no exports will be authorized.¹⁰ There is thus currently little evidence of EU member states coalescing around a common understanding or practical application of risk.

THE US

Among other major exporters, the US has a national control system that lists human rights, international humanitarian law and other ATT criteria as factors to be assessed in the licensing process, but there is no use of the term 'risk'. Rather, the 'likelihood' of human-rights abuses or serious violations of international humanitarian law will be taken 'into account' in arms-transfer decisions.¹¹ And in cases where a proposed transfer 'raises concerns about undermining international peace and security, serious violations of human rights law, including serious acts of gender-based violence and serious acts of violence against women and children, serious violations of international humanitarian law, terrorism, transnational organized crime, or indiscriminate use,' the US 'will exercise unilateral restraint' on a 'case-by-case basis'.¹²

4 Council of the European Union (2008). "Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment". <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>

5 Ibid.

6 See for more information, Control Arms (2016). "Dealing in double standards: How arms sales to Saudi Arabia are causing human suffering in Yemen". ATT Monitor, Case Study 2, 26 February 2016. <http://armstreasurymonitor.org/current/dealing-in-double-standards-how-arms-sales-to-saudi-arabia-are-causing-human-suffering-in-yemen/>

7 UK High Court of Justice (2016). "The Queen on the application of Campaign Against Arms Trade and the Secretary of State for Business, Innovation and Skills. Statement of Facts and Detailed Statement of Grounds; 9 March 2016". <https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016/2016-03-09.caat-v-bis-claim.pdf>

8 Netherlands Ministry of Foreign Affairs (2016). "Status toezeggingen t.b.v. algemeen overleg Wapenexportbeleid". January 2016. <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2016/01/13/kamerbrief-status-toezeggingen-algemeen-overleg-wapenexportbeleid/kamerbrief-status-toezeggingen-algemeen-overleg-wapenexportbeleid.pdf>

9 European Parliament (2016). "European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen (2016/2515(RSP))". <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0066+0+DOC+XML+Vo//EN>.

10 Tricot O'Farrell, K. (2016). "The European Parliament called for an EU arms embargo against Saudi Arabia. Now what?". Saferworld, 30 March 2016. <http://www.saferworld.org.uk/news-and-views/comment/207-the-european-parliament-called-for-an-eu-arms-embargo-against-saudi-arabia-now-what>

11 The White House (2014). "Presidential Policy Directive 27 – United States Conventional Arms Transfer Policy". 15 January 2014. <https://www.whitehouse.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>

12 Ibid.

US policy was updated in 2014 and now resonates with the text of the ATT. There are now provisions around international humanitarian law, gender-based violence and transnational organized crime, and specific mention of human-rights law, rather than just a recipient's human-rights record. While the presentation of US policy is now closer in spirit to the Treaty, the mode of export licensing is not based on risk and risk assessment. There is no explicit requirement to deny arms transfers on the basis of the risk that they might be used for negative purposes included under Article 7 of the Treaty. Rather, 'all transfer decisions will be guided by a set of criteria,' and the strategic and economic impacts of arms transfer decisions are also included as criteria.¹³ Risk is only articulated in relation to the potential adverse effects on US operational capabilities, significant changes in the recipient country that could lead to inappropriate end-use or transfer, and adverse economic, political, or social impacts within the recipient country.¹⁴ Overall, then, the ATT framework based on risk assessment is potentially more rigorous than that of the US, which self-identifies as the gold standard.¹⁵ However, the issue, as seen with the uneven implementation among EU member states, is the drivers behind arms-transfer policy, and the balance between export and restraint concerns. These are discussed later in this chapter.

RUSSIA AND CHINA

All EU members are States Parties to the ATT, while the US is a Signatory, binding it to act in a manner that does not undermine the Object or Purpose of the Treaty. Of the world's largest other arms exporters, Russia and China are not Signatories. They have national arms-export control systems, but these vary from the Treaty in two main ways: there are no human rights or international humanitarian law provisions in the substance of their regulatory regimes, and they do not use the language of risk in their licensing processes. Chinese regulation rests on three key principles: self-defence; peace,

security and stability; and non-interference.¹⁶ Some of the Treaty's provisions around international obligations and re-transfer are included, but provisions around human rights and international humanitarian law are not. The Chinese ban on transfers to non-state actors is more restrictive than the ATT and also compatible with it. China's policy does not use the language of risk: its commitments are negatively and absolutely framed. For example, 'there should be no injury to the peace, security and stability of the region concerned and the whole as a whole.'¹⁷ Yet Chinese controls 'do not specify criteria for a risk assessment process to determine whether an arms transfer should proceed.'¹⁸

Russian policy, meanwhile, is based on the objectives of facilitating 'to the fullest possible extent the promotion of Russian defence products on the foreign market,' the prevention of 'any damage to the Russian defence capability,' and ensuring compliance with Russia's international commitments.¹⁹ Beyond compliance with international commitments, there is little in the Russian system that references a common international good of peace, security and stability, on which the ATT is predicated. According to one analysis, the Russian system is 'a rigid top-down system, closely controlled by the ruling regime,' and 'Rosoboronexport [the sole state intermediary for arms transfers] has the absolute monopoly on exports of all finished weapons systems which fall under the scope of the [then] proposed Arms Trade Treaty (ATT).'²⁰ For Russia and China, the key problem of the arms trade is the leakage of weapons away from state control into the hands of non-state actors. While Article 7 of the Treaty is ultimately about exporters' responsibilities (albeit with room for the importer to provide information and discussion of mitigating measures), requiring them to assess the risk of misuse by recipients, the Russian argument is that an effective treaty would require 'improved controls over arms circulation' by importers.²¹ Russia and China resist the shift of responsibility on to the exporter, for reasons of sovereignty as well as of self-interest.

13 Ibid.

14 Ibid.

15 US Department of State (2013). "United States signs Arms Trade Treaty on September 25, 2013". 25 September 2013. <http://www.state.gov/t/isn/armstradetreaty/>

16 See Article 5 of Chinese Ministry of Commerce (1998). "Regulations of the People's Republic of China on the Administration of Arms Exports". 1 January 1998. <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100053899.shtml>

17 Ibid.

18 China Arms Control and Disarmament Association and Saferworld (2012). "The Evolution of EU and Chinese Arms Export Controls". March 2012, p. 39. <http://www.saferworld.org.uk/resources/view-resource/687-the-evolution-of-eu-and-chinese-arms-export-controls>

19 Denisentsev, S. and Makienko, K. (undated). "The Arms Trade Treaty and Russian Arms Exports: Expectations and Possible Consequences". Geneva: UN Institute for Disarmament Research, p.3. <http://www.unidir.org/files/medias/pdfs/background-paper-the-arms-trade-treat-and-russian-arms-exports-expectations-and-possible-consequences-sergey-denisentsev-and-konstantin-makienko-eng-0-257.pdf>

20 Ibid.

21 Ibid., p. 22.

As is evident from this brief survey, current practices of export assessment among major exporters are varied. Of the core ATT criteria, compliance with international obligations are included in the regimes of all major exporters, while human rights and international humanitarian law are included in the regimes of Western states but not of Russia and China. Risk is only articulated as an explicit feature of export assessment in the case of EU member states, although national interpretation of it varies considerably. The ongoing transfer of weapons by major Western and non-Western suppliers to regimes that violate human rights and international humanitarian law raises questions about the drivers of arms-transfer policy and its relation to arms export promotion. The ATT is therefore necessary to harmonize State Parties' export control systems, and is intended to ensure that they address risk in a more systematic and objective way.

DRIVERS OF ARMS-TRANSFER POLICY

The Preamble to the ATT notes the 'legitimate political, security, economic and commercial interests of States in the international trade in conventional arms'.²² The effectiveness of regulatory measures therefore needs to be understood in the broader context of the drivers of arms-transfer policy: regulation sits alongside the promotion of arms transfers as a state goal. There remains a concern that some States Parties see arms-transfer regulation only as a means to facilitate legal and legitimate trade. However, the Object and Purpose of the Treaty instructs States Parties to establish the highest possible common international standards and eradicate the illicit trade in conventional arms in order to reduce human suffering.

Government support for military industry takes different forms and the balance between export promotion and control varies. In Western, liberal capitalist countries such as the US and EU member states, companies are largely formally private but have extensive links to the state and benefit from state subsidies on military research and development, production and export, as well as extensive state support for the promotion of exports. In the US, the Foreign Military Sales programme is 'a fundamental tool of U.S. foreign policy',

and operates on the basis of government-to-government agreements, which companies then fulfil.²³ It is complemented by the Direct Commercial Sales system, in which companies can sell weapons abroad without direct government involvement, but subject to government regulation and oversight.²⁴ In the UK, the overall system of arms exports is not run on a government-to-government basis, but arms sales with Saudi Arabia, which have constituted almost half of exports in recent years,²⁵ operate under the Saudi British Defence Cooperation Programme and SALAM Project (which replaced the previous Al Yamamah agreements in operation between 1985 and 2006²⁶). These are government-to-government contracts in which BAE Systems is the prime contractor on behalf of the Ministry of Defence.²⁷

The balance between export promotion and regulation is different between the US and EU member states: the EU Common Position is a stand-alone control instrument that sets out the restrictions on arms exports, while the US Presidential Policy Directive 27 includes export promotion and restriction criteria. In the US as of 2014, transfer decisions are 'guided by a set of criteria' to maintain the 'balance' between legitimate transfers and the need for restraint, and human rights are listed 10th out of 10 policy goals.²⁸ Under the EU Common Position, in contrast, member states are free to assess the effect of proposed transfers on 'their defence and security interests' as well as those of friends and allies, but this 'cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability'.²⁹ As discussed above, there is considerable variation between member states' interpretation of the EU Common Position, but the distinction with the US system is noteworthy.

In non-Western countries such as Russia and China, military industry remains largely owned and controlled by the state. In Russia, the post-Communist transition and privatization process gave increasing amounts of power to individual companies, many of which were allowed to sell directly to foreign customers without the involvement of state intermediaries. Control over arms transfers has been re-centralized, though, and since 2000 Rosoboronexport has

22 Arms Trade Treaty, Preamble (adopted 2 April 2013, entered into force 24 December 2014)_UNTS_(ATT). <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

23 See US Defense Security Cooperation Agency. "Foreign Military Sales". <http://www.dsca.mil/programs/foreign-military-sales-fms>

24 See US Department of State. "Third Party Transfers and Foreign Military Sales Teams and Functions". <http://www.state.gov/t/pm/rsat/c14021.htm>

25 Fleurant, A., Perlo-Freeman, S., Wezeman, P., and Wezeman, S. (2016). "Trends in International Arms Transfers, 2015". Stockholm International Peace and Research Institute (SIPRI), February 2016, pg.2. <https://www.sipri.org/sites/default/files/SIPRIFS1602.pdf>

26 Ibid.

27 UK House of Commons Foreign Affairs Committee (2013). "Bilateral relations with Saudi Arabia". <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcaff/88/8807.htm>; BAE Systems (undated). "Our Partners – MODSAP". <http://www.baesystems.com/en/our-company/our-businesses/bae-systems-saudi-arabia/our-partners/modsap>

28 The White House (2014). "Presidential Policy Directive 27 – United States Conventional Arms Transfer Policy". 15 January 2014. <https://www.whitehouse.gov/the-press-office/2014/01/15/presidential-policy-directive-united-states-conventional-arms-transfer-p>

29 Council of the European Union (2008). "Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment". <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>

been the sole state intermediary authorized to handle arms imports and exports.³⁰ In China, 11 companies are authorized to export weapons, and exports are assessed and authorized by the State Administration of Science, Technology and Industry of National Defence in the case of exports from companies, while the General Armament Department authorizes exports of equipment still in service with the People's Liberation Army.³¹ Overall, there is a greater degree of political direction of arms transfers by the state there than in Western states, and a lower level of publicly stated emphasis on the restriction of transfers.

IMPLICATIONS OF 'OVERRIDING RISK' IN THE ATT

The common international regulatory standard set by the ATT is based on 'overriding risk'.³² This is not an established concept in international law. The Oxford English Dictionary defines 'overriding' as 'more important than any other considerations'.³³ The reasoning behind the term 'overriding' is that 'sometimes the expected positive effects of arms transfers, coupled with the effect of any relevant and available risk mitigation measures, may outweigh their possible misuses'.³⁴ However, this lends itself to a consequentialist reading (that the ends justifies the means), which undermines the human-rights emphasis of Article 7.³⁵ It also potentially introduces a balancing act into the assessment of Article 7.

One way of establishing common understandings of the interpretation of overriding risk is through the interpretive declarations made by States Parties upon ratification. To date, only a few States Parties have made such statements. New Zealand has stated that it will interpret it to mean 'substantial risk', and Liechtenstein and Switzerland have both said that the term means 'more likely to materialise than not', even when the effects of mitigating measures are considered.³⁶ The most recent EU Common Position User's Guide sets out a threshold of 'clear risk' to guide the practice of member states.³⁷ Over time, more interpretive declarations, and policy responses to particular cases will demonstrate how States Parties are interpreting the concept of overriding risk.



U.S. ARMY ROCKET.

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30 Denisentsev, S. and Makienko, K. (undated). "The Arms Trade Treaty and Russian Arms Exports: Expectations and Possible Consequences". Geneva: UN Institute for Disarmament Research, p.2. <http://www.unidir.org/files/medias/pdfs/background-paper-the-arms-trade-treat-and-russian-arms-exports-expectations-and-possible-consequences-sergey-denisentsev-and-konstantin-makienko-eng-0-257.pdf>

31 China Arms Control and Disarmament Association and Saferworld (2012). "The Evolution of EU and Chinese Arms Export Controls". March 2012, p. 18. <http://www.saferworld.org.uk/resources/view-resource/687-the-evolution-of-eu-and-chinese-arms-export-controls>

32 Arms Trade Treaty, Article 7 (adopted 2 April 2013, entered into force 24 December 2014) UNTS (ATT) Art 7.(4) <https://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/English7.pdf>

33 Geneva Academy of International Humanitarian Law and Human Rights (2013). "The Arms Trade Treaty (2013)". June 2013, p. 30. [http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB\(2\).pdf](http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB(2).pdf)

34 Ibid.

35 Ibid.

36 Control Arms (2015). "ATT Monitor Report 2015". ATT Monitor, 25 August 2015, p42. <http://armstretymonitor.org/current/wp-content/uploads/2015/08/Full-Annual-Report.pdf>; see also Government of Switzerland (undated). "Interpretative declaration for the ATT". <http://www.news.admin.ch/NSBSubscriber/message/attachments/38166.pdf>

37 Council of the European Union (2008). "Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment". <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008E0944&from=EN>