

THE RISK OF DIVERSION IN THE ARMS TRANSFER CYCLE

3 FACTORS TO CONSIDER



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Under the Arms Trade Treaty (ATT), special care must be taken to ensure that arms exports are not diverted from their intended use or user. Yet intentional and unintentional instances of diversion remain common and constitute a key challenge to the ATT regime.

UNDERSTANDING DIVERSION

Any assessment of ATT states parties' compliance with diversion-related obligations will necessarily be a function of the way such obligations are understood and implemented—and will be impacted by any variations in their interpretation among different states. In practice, consensus has been elusive and there seems to be some confusion about the types of action and behaviour that constitute diversion.

In particular, the complementary, yet distinct, concepts of “end use” and “end user” must both be considered when determining any unauthorized use of arms exports. While often used interchangeably, these concepts raise different considerations about how to prevent, detect, and respond to instances of diversion.

The need to consider both end use and end user is emphasized early in the treaty. The preamble refers to “the need to prevent and eradicate the illicit trade in conventional arms and to prevent their diversion to the illicit market, or for unauthorized *END USE* and *END USERS*, including in the commission of terrorist acts” (emphasis added).

While discussions on diversion routinely concentrate on unauthorized end user(s), the treaty makes it clear that diversion from authorized end-use is of at least equal concern. This broad understanding has concrete implications, not just for the measures taken by states parties that address diversion, but also the ability of other stakeholders to assess compliance with states' treaty obligations.

Consider a scenario in which arms exported for domestic security are used in a foreign conflict, or one in which arms exported exclusively for training are used in security operations. Even if the end user remains the same, the end use has fundamentally changed. It is therefore critical that ATT states parties consider diversion in its full scope.

PREVENTING VS. RESPONDING TO DIVERSION

Discussions about ways to address the diversion of conventional weapons tend to focus on prevention. But it is just as important to consider the range of responses available to states parties once diversion has been detected—and the barriers that those responses might encounter.

The ATT prescribes in general terms the responses that states parties should take once diversion has been detected. Article 11.4 states: “If a State Party detects a diversion of transferred conventional arms covered under Article 2 (1), the State Party shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion.” What obstacles might prevent the operationalization of this provision?

Exporting states must proactively avoid situations that could later limit their ability to meet ATT obligations—for instance, binding themselves to an arms exports contract in which possible responses to diversion are limited by the prospect of penalties or other liabilities.



CASE STUDY: STATE-SPONSORED DIVERSION WITHIN YEMEN

The war in Yemen began in late 2014. In 2015, Saudi Arabia and the United Arab Emirates (UAE) became engaged as members of a coalition to support the Yemeni government. Since 2015, Yemen has been under a UN Security Council arms embargo, established to block the provision of arms to the conflict. By the end of 2021, the UN estimates the war will have killed some 377,000 people.

Saudi Arabia is the largest importer of arms in the world, while the UAE is ninth. Many of their weapons, supplied in part from North America, Europe, South Africa, and China, are now in use in Yemen, although not always by the purchasing states.

According to human rights and conflict monitors, the two states have illicitly supplied the Yemeni government and other coalition partners with armoured vehicles, small arms, and other weapons systems. They have also provided arms to militia groups engaged in the conflict. According to American media reports, the pro-government Alwiyyat al Amalqa or “Giants Brigade” has received a number of American-made armoured vehicles that were originally exported to the UAE. This group faces credible allegations of committing serious violations of international humanitarian law and employing child soldiers.

UN expert groups have repeatedly linked the continued violence in Yemen with the ongoing supply of weapons to the conflict’s belligerents. This state-sponsored diversion of weapons only makes more devastating the current conflict, which has been repeatedly dubbed the world’s worst humanitarian crisis. As well, it introduces serious accountability gaps in the transfer chain. Those being supplied diverted weapons are not accountable to the original exporter in any way. This situation only increases the likelihood of weapons-related abuses.

And there are no known guarantees that weapons will be returned to the UAE and Saudi Arabia when hostilities end. They might remain in the possession of third parties or be re-sold/repurposed elsewhere. Such dispersion is particularly likely with small arms and light weapons, which are portable and easily concealed.

Many of the countries that have supplied arms to Saudi Arabia and the UAE since the war in Yemen began in 2014 were, or have since become, states parties to the ATT. Under Article 11, they must endeavour to prevent the diversion of arms transfers when exporting weapons. Such measures can include not authorizing further exports. But, to date, it appears most arms suppliers to Saudi Arabia and the UAE have not taken steps to address the risk of diversion to the conflict in Yemen.

To start, Article 7.1 of the ATT indicates that “if, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is ENCOURAGED to reassess the authorization after consultations, if appropriate, with the importing State” (emphasis added).

Indeed, there is no clear obligation to reassess multiyear export authorizations, even if diversion is detected while significant portions of those transfers have yet to be fulfilled. Rather, the treaty simply encourages states parties to reassess ongoing exports when new information emerges—as in instances of diversion. This mere encouragement does not seem consistent with the aspiration stated elsewhere in the treaty to achieve “the highest possible” international standards.

Under certain circumstances, responses to diversion by states parties can also be hobbled by contractual obligations that make suspending or cancelling contracts difficult. Provisions that *guarantee* the fulfillment of arms export contracts, especially those that extend over several years, discourage states parties from responding to changed circumstances, including instances of diversion.

Exporting states must proactively avoid situations that could later limit their ability to meet ATT obligations—for instance, binding themselves to an arms export contract in which possible responses to diversion are limited by the prospect of penalties or other liabilities. Adherence to end-use assurances should be an absolute requirement for the fulfillment of arms export contracts from the outset. The already weak *encouragement* to reassess export authorizations in light of new information becomes moot if states are still constrained to see contracts to completion.

CREDIBLE SOURCES OF INFORMATION

The diversion of conventional weapons usually takes place in obscurity, and there are well known limits to the ability of arms exporting states to detect diversion. Even in conflicts or contexts in which diversion is known to be widespread, detecting and verifying individual instances of diversion can be difficult.

Diversion is likely to occur covertly, and few ATT states parties have the human, financial, and logistical resources to conduct robust and credible post-export verifications to ensure that the arms exported are not being misused. Because diversion often occurs in remote, secluded locations, it can easily evade scrutiny, even from those exporting states with advanced resources.

Further, officials from the state suspected of diversion do not constitute sufficiently unbiased and credible sources of information, yet they are often cited in human rights assessments by arms exporters. Official denials of misuse are to be expected and judged with suspicion.

It is important to note that an arms exporting state’s own assessment of diversion can be biased. An exporter could be disinclined to cancel or delay a lucrative arms contract or risk damaging politically sensitive relations with those suspected of diverting arms. These considerations might lead exporting states to declare categorically that there is “no credible evidence” to suggest that diversion has occurred from the authorized end user or end use.

But there is a wealth of information that governments can use to more effectively prevent, detect, and respond to instances of diversion. The internet is replete with relevant open-source information worthy of careful consideration, from tweets and leaked footage to reporting by civil society groups with personnel on the ground in conflict zones.

Long used by journalists and civil society researchers, open-source information is now increasingly being employed by official monitoring bodies to determine weapons-based abuses, including diversion. For instance, to track the flow and use of arms within Libya, the UN Panel of Experts on Libya now relies heavily on open-source information, including images of foreign-sourced arms posted to social media channels and publically available satellite images to determine the suppliers of aircraft.

There is, of course, significant misinformation online, and so care must always be taken to verify such material. But the experienced researcher already knows to verify and check all material. With adequate vetting, online sources can inform and enhance the ability to detect diversion, including by exporting states. It is critical that ATT states parties fully embrace the ever-expanding information toolbox at their disposal in order to more accurately assess recipients' use of arms exports, including potential instances of end-use or end-user diversion.

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