

Preventing Diversion: A Challenge for Arms Trade Treaty States Parties

By NICHOLAS MARSH*

This article examines the obligations contained in the Arms Trade Treaty for preventing diversion, which is defined as the movement from authorized to unauthorized possession or use. It argues that in different places, the treaty covers both diversions taking place during a transfer and after the transfer has been completed. The article then considers the different ways that authorization can be granted; it points out that a diversion can occur if any state involved in a transfer has not provided authorization. The article then presents three examples of diversion in contemporary armed conflicts: the 2011 war in Libya; supplies to Afghanistan and Iraq between 2003 and 2016; and an export of small arms and ammunition from China to Nigeria, which was brokered from the United Kingdom. In each example, the nature of a diversion is highlighted, as are the specific issues for implementation of the Arms Trade Treaty. The article concludes with the observations that states parties need to control the activities of arms brokers, much more knowledge is needed by states parties to help them predict when a diversion may occur, and a key priority for international cooperation and assistance should be to enhance stockpile security and management.

The Arms Trade Treaty (ATT) is the most important international document that governs the trade of conventional weapons (such as armoured vehicles, aircraft, missiles, small arms, and light weapons).¹ The treaty establishes common international standards for regulating the arms trade with the aim of preventing illicit trafficking and diversion, reducing human suffering, contributing to peace, security, and stability, promoting cooperation and transparency, and building confidence.² In particular, the treaty obliges states parties to monitor their arms exports and ensure that they are not used in the violation of UN arms embargoes, to commit war crimes, or being used for other human rights violations, exacerbate conflict, or diverted.³ The treaty was negotiated in 2013 and came into force in 2014. The current article first examines the obligations under the treaty concerning preventing diversion (described in the following paragraphs). Because the treaty only came into force in 2014, states parties are still establishing what their treaty obligations actually mean in practice. The present article contributes to these discussions by examining three high-profile examples of diversion (which mostly took place before the treaty came into force), highlighting their implications for governments aiming to

* Author's Affiliation: Nicholas Marsh, Research Fellow, Peace Research Institute Oslo (PRIO).

¹ The scope of the treaty is defined in Article 3. The phrase 'conventional weapons' usually excludes nuclear, chemical, or biological arms.

² See Article 1 of the treaty.

³ See Articles 6, 7, and 11 of the treaty.

implement the treaty.

I

Article 11 of the treaty concerns ‘diversion’, and the first paragraph establishes the general obligation that ‘each State Party involved in the transfer of conventional arms [...] shall take measures to prevent their diversion’.⁴ Subsequent paragraphs establish the means by which a diversion can be prevented, including assessing the risk of the diversion prior to issuing an export licence, establishing mitigation measures, and sharing information.

Despite preventing diversion being a central aim of the ATT, with a specific article devoted to that objective, diversion is not defined in the treaty, nor is there an internationally agreed definition elsewhere concerning a diversion in the arms trade.⁵ Nevertheless, the text of the treaty – and other widely used definitions – can be used to reach an understanding of what is meant by the term.

Some inferences can be made from the remainder of the treaty’s text. The preamble of the treaty highlights ‘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’. Here, there is an implied definition of diversion that can be taken to mean moving arms from licit possession and *into* illicit markets, from authorized end use to unauthorized, or from authorized end users to unauthorized end users.⁶ An ‘end user’ is the ultimate recipient of a weapon after it has been transferred (i.e., that the weapon will not be retransferred to another party), while ‘end use’ concerns the ultimate application of the transferred arms (e.g., some exporting states require assurances arms will not be used for certain purposes, such as violations of human rights).⁷

Article 11 has an emphasis on a diversion taking place during and after the transfer has taken place. As mentioned above, paragraph 1 contains a general obligation to prevent a diversion; however, there is a narrower emphasis in paragraphs 2 and 3. Paragraph 2 focuses on the obligations of the exporting party to prevent the diversion of arms being transferred (i.e., while the export takes place),⁸ and paragraph 3 emphasizes the roles taken by the states involved in the import, transiting, and transshipment of arms.⁹ Paragraphs 4 and 5 have a wider scope and both concern the actions that should be taken if a ‘State Party detects a diversion of transferred conventional arms’. The use of the past tense suggests that the treaty is concerned with a diversion after the arms have been imported and the transfer has been completed. Paragraph 4 also indicates that state parties should address a diversion via, *inter alia*, investigation and law enforcement, something that is consistent with the treaty covering the instances of a diversion taking place within a state’s jurisdiction. Similarly, paragraph 6 concerns states reporting to each other on the effective measures of preventing the ‘diversion of transferred’ arms.

⁴ As defined in Article 2 of the treaty, a ‘transfer’ concerns the activities of international trade that ‘comprise export, import, transit, trans-shipment, and brokering’.

⁵ See Parker, ‘Article 11 diversion’, p. 348; Olabuenga and Gramizzi, ‘Article 11 diversion’, pp. 191-3.

⁶ See Parker, ‘Article 11 diversion’, pp. 348-9; Olabuenga and Gramizzi, ‘Article 11 diversion’, p. 191.

⁷ Definitions drawn from United Nations Coordinating Action on Small Arms (CASA), *Glossary of terms, definitions and abbreviations*, pp. 10-11.

⁸ See Parker, ‘Article 11 diversion’, p. 351.

⁹ ‘Transit’ concerns the movement of arms through a state’s territory or waters (e.g., on a cargo ship), and ‘transshipment’ concerns moving a cargo from one vehicle to another without the arms having cleared customs and being formally imported.

Preventing Diversion: A Challenge for Arms Trade Treaty States Parties

The treaty's text is in accordance with a widely used definition published by civil society prior to the treaty being negotiated.¹⁰ For Greene and Kirkham:¹¹

Arms diversion is the process by which holdings or transfers of arms that are authorised by relevant states (and are subject to their legal controls) are delivered to unauthorised end-users, or are put to unauthorised uses by authorised end-users.

By including 'holdings', in other words the arms in lawful possession of a state or other parties, as well as transfers, Greene and Kirkham's scope includes the diversion of arms that have been exported, as well as those being transferred. The implication from the different types of language used in the preamble and in paragraphs 1-6 of Article 11 is that some parts of the treaty are specifically concerned with a diversion taking place during a transfer (paragraphs 2 and 3 of Article 11), while others have a wider scope and are also concerned with a diversion that takes place after a transfer (paragraphs 1 and 4-6 of Article 11). In addition to the obligations outlined in Article 11, states parties should also consider diversion when assessing whether an export would contravene Articles 6 and 7. In particular, paragraph 3 of Article 6 states that a state party 'shall not authorize any transfer of conventional arms [...] if it has knowledge at the time of authorization that arms or items would be used' in the commission of genocide, crimes against humanity, or other war crimes. The term 'would be used' is not limited to the initial recipient of the weapons.¹² This prohibition would also apply to a case in which the exporter knew that the importer was not the end user of the arms and that the arms would be diverted to another party who would use them to commit war crimes or other acts covered by Article 6.

Article 7 obliges states parties to conduct a risk assessment before authorizing an export. According to the article States parties should assess the likelihood that the arms exported would 'contribute to or undermine peace and security' or could be used to commit or facilitate serious violations of international humanitarian or human rights law; terrorism; organized crime; or gender-based violence. Exporters are supposed to consider ways to mitigate the risk of such acts. If there remains an 'overriding risk' of 'negative consequences', the exporting state should 'not authorize the export'. As with Article 7, a diversion would pose a risk that should be considered by a state party when considering granting an export licence – especially the risk that the diverted arms might be used by organized criminal organizations, terrorist groups, or by any party engaged in committing or facilitating violations or more generally undermining peace and security.

When one takes into account the implications of Articles 6 and 7 and the language found in the preamble and Article 11 (paragraphs 1 and 4-6), the scope of a diversion as covered by the treaty includes a diversion that takes place after an export has been completed, as well as during that transfer. To recap, the key element of a diversion in the treaty is that there is a change in possession or use – from authorized to unauthorized.¹³ The remainder of this section considers what is authorized and unauthorized in an arms transfer.

In many cases, a diversion involves arms being taken out of a state's control and into the possession of unauthorized users, such as rebels or organized crime groups. For example, prior to an arms export, forged documentation is presented by an arms broker, which

¹⁰ See Parker, 'Article 11 diversion', p. 349.

¹¹ Greene and Kirkham, *Preventing diversion*, p. 9.

¹² da Silva and Neville, 'Article 6: prohibitions', pp. 102-3.

¹³ The emphasis on diversion being a transfer to an unauthorized party can also be found in Schroeder, Close, and Stevenson, 'Deadly deception', p. 114.

purports that the weapons are to be exported to the ministry of defence of another state. However, after the export licence has been granted, the weapons were instead shipped to a different destination. In this case, the broker would be responsible for the diversion.

Authorization for an arms export will usually be granted by several different governments or by international organizations. For example, the arms export approval would need to be granted by each of the states involved in the export, import, transit, brokering, and transshipment during an international arms transfer. To be properly authorized – and not a diversion – authorization would need to have been granted by all of the relevant governments. For example, if a transfer was authorized by the ministries of defence of the importing and exporting states, a diversion would still have occurred if either were the target of UN sanctions which prohibited their participation in the arms trade.

Authorization is a part of a complex international system of multi-level governance concerning the arms trade,¹⁴ so it could be granted by different state agencies and even international organizations. For example, authorization could be granted by the police or local government concerning civilian possession of firearms; government ministries, such as defence, foreign affairs, or interior; regional organizations (can authorize arms transfers in some cases, such via Articles 4, 5, and 6 of the Economic Community of West African States' Convention on Small Arms and Light Weapons, Their Ammunition, and Other Related Materials); and the UN Security Council, which may grant specific exemptions to arms embargoes. This complex web of national and international sources of authorization can lead to situations in which authorization has been granted by one institution (e.g., national ministry of defence) but may not have been granted by others (e.g., the exporting ministry of foreign affairs).

After the transfer has been completed, the importing state usually authorizes parties to hold the weapons – for example, the members of state security services or members of the public who can lawfully possess a weapon. Post-export commitments concerning the end user or end use of arms are often made by the importer to the exporter before an export is authorized. In such a circumstance, export authorization is conditional upon the importer meeting the terms of the export licence after the transfer has been completed. If those conditions were broken, then a diversion would have occurred (unauthorized end use). For example, consider a scenario where a state authorized the export of submachineguns on the condition that they would be used by the importing state's navy for the purposes of protecting military bases. Instead, if the guns were transferred from the navy to a special police unit with a history of extrajudicial killing, then a diversion would have occurred.

II

Preventing human suffering plays a central role in the ATT. The parties involved in committing violations are frequently non-state groups involved in political violence or organized crime or are states that are not authorized by exporters or international organizations to receive arms imports. Parties involved in warfare have significant logistical requirements,¹⁵ and especially in war, there is the need for a constant resupply of ammunition to keep fighting and for arms to equip new recruits and replace battlefield losses. For non-state groups, fighting against government forces often requires weapons that are not found among the civilian population, such as missiles, rockets, and launchers

¹⁴ Greene and Marsh. 'Governance and small arms and light weapons', pp. 164-180.

¹⁵ On the logistics needs of non-state groups see Hazen, *What rebels want*.

and mortars or artillery.¹⁶ Diversion from state stocks is a key means by which these groups can obtain the arms they need.¹⁷

The news media tends to exaggerate the size and significance of arms trafficking. Most arms trafficking is local (occurring within a country or between neighbouring countries or those countries within a region) and involves small-scale transactions (though many of them can add up to significant flows).¹⁸ Diversion from state stocks offers a plentiful supply of the quantities and types of weapons that are difficult to obtain elsewhere.¹⁹

The following sections provide three examples of diversions involving countries involved in armed conflicts. In addition to illustrating in detail how diversion can occur, they highlight complex issues that should be taken into account by ATT states parties when they attempt to implement the treaty.

III

Taking place during and after the 2011 civil war in Libya, the first example concerns one of the most dramatic and high-profile cases of diversion to have occurred in recent years.

During the decades prior to 2011, Libya's president, Muammar Qaddafi, had amassed a vast stockpile of arms. The weapons had mostly been supplied by the Soviet Union and its allies prior to the 1992 UN arms embargo on Libya. After the EU and UN embargoes were lifted in 2003 and 2004 (respectively), there was a rush by European suppliers for renewing arms sales to Libya.²⁰

Libya had relatively small armed forces, but it kept large stocks of arms and ammunition stored in depots located around the country. The explanation for this apparent mismatch is that Qaddafi apparently weakened his military (he had come to power via a coup and wanted to prevent anyone else from copying his example), so instead of a strong military, in the event of an invasion, he intended to use a 'people's war' strategy in which arms would be distributed to militias and the population in general. In 2010, the Libyan armed forces were estimated to have 76,000 regular personnel in all services (50,000 in the army, 8,000 in the navy, and 18,000 in the air force) which were equipped with 2,205 tanks (half of which were T54/55 models whose first production dates back to the 1950s and were held in storage); 1,000 BMP armoured vehicles; 2,421 artillery pieces, and 490 anti-aircraft cannon.²¹ It has been estimated that firearms (mostly Kalashnikovs) under government control at the start of the war numbered between 400,000 and one million.²²

The 2011 civil war started in February and ended remarkably quickly in September. During the initial weeks of the war, arms and ammunition were appropriated from government depots (particularly in Eastern Libya) and used to equip a rapidly growing opposition army. After Tripoli, the capital city, fell in late August, further large quantities of arms were taken from the Qaddafi regime's stockpiles. Weapons were also supplied to opposition groups by states intervening in the war. The largest quantity was donated by

¹⁶ Marsh, 'Conflict specific capital', pp. 60-62.

¹⁷ *Ibid.*; Jackson, 'From under their noses', pp. 137-141.

¹⁸ Marsh, 'Firearms seizures and trafficking: A local phenomenon'.

¹⁹ Jackson, 'From under their noses', pp. 137-145.

²⁰ Hansen and Marsh, 'Normative power and organized hypocrisy'.

²¹ IISS, *The military balance 2010*, pp. 262-3.

²² Marsh, 'Brothers came back with weapons', p. 80.

Qatar,²³ and lesser quantities were supplied by France,²⁴ Sudan,²⁵ and the United Arab Emirates,²⁶ and there are credible reports of transfers by Egypt and Italy.²⁷ It is likely that given the large stocks of infantry weapons amassed by the Qaddafi regime, the external supplies were only a minority of the arms and ammunition circulating in Libya at the end of the 2011 war.

The 2011 civil war in Libya resulted in state military arms depots being opened and their contents being distributed to armed groups. Alarm was raised during and after the war that weapons that were poorly secured in depots controlled by armed groups or being openly taken by members of the public. For example, in 2011, a Human Rights Watch team in Libya reported that large quantities of weapons were unsecured and available to the general population:

Among the unsecured weapons storage facilities that Human Rights Watch visited in the vicinity of a Khamis Brigade base in the Salahadin neighbourhood of Tripoli is a farm compound holding approximately 15,000 antipersonnel mines and 500 antivehicle mines. A nearby storage facility housed more than 100,000 antipersonnel and antivehicle mines, as well as large stocks of mortars, artillery, and tank shells; and an unfinished schoolbook-printing facility contained large stocks of surface-to-air missiles (SAMs), antitank guided missiles, mortars, tank shells, artillery shells, and other types of ammunition.²⁸

The arms taken from Qaddafi's stockpiles were not just used in the Libyan civil war. Soon after the conflict, they started leaking into Libya's neighbouring countries, and proliferation of these arms from Libya played an important role in initiating the conflicts in Mali and Sinai that started in 2012 and 2011, respectively (and continue at the time of writing in the spring of 2019).²⁹

The diversion in Libya likely occurred in three different ways. Most dramatically, arms were diverted when state stocks were distributed among unauthorized groups engaged in fighting against the Qaddafi regime. Second, troops loyal to Qaddafi may have engaged in unauthorized use when they used weapons against civilians. In some cases Libya provided assurances concerning the use of weapons that had been supplied by European states months or a few years before the start of the war.³⁰ However, it is not known whether there were binding conditions of sale. Third, it is very likely that the arms supplied to anti-Qaddafi forces during the war were captured or retransferred to other groups in the aftermath of the fighting.

Libya provides some important lessons for ATT states parties. The first is the difficulty in predicting a war and state collapse, like what took place in Libya in 2011. Arms had been enthusiastically supplied to Libya between 2004 and 2011, despite the Qaddafi regime

²³ Dickinson, 'The gun smuggler's lament'; CNN 'The Emir of Qatar on arming Libyan rebels'.

²⁴ Gélie, 'La France a parachuté des armes aux rebelles libyens', *Le Figaro*, 28 June 2011.

²⁵ de Waal, 'African roles in the Libyan conflict of 2011', pp. 375-378.

²⁶ UNSC, S/2013/99, pp. 19-22.

²⁷ *Ibid.*, pp. 21-6; Hooper, 'Italian government blocks investigation into missing arms cache', *The Guardian* (19 July 2011).

²⁸ Human Rights Watch, *Libya: secure unguarded arms depots*.

²⁹ Marsh 'Brothers came back with weapons', pp. 82-87.

³⁰ For example, Libya stated to Belgium that exported FN2000 rifles would be used by the Khamis Brigade to 'escort humanitarian convoys to Darfur'. See Spleeters, D., 'Tracking Belgian Weapons in Libya', *New York Times*, 28 December 2011, <https://atwar.blogs.nytimes.com/2011/12/28/tracking-belgian-weapons-in-libya/> (accessed 27 April 2019).

having a dubious track record that included human rights violations, war with neighbouring states, and violating UN arms embargoes.³¹ A general presumption against supplying arms to authoritarian states with similar records may also guard ATT states parties against the risk of a large-scale diversion in the event of a war.

The Libyan example also raises the risks of transferring arms to rebel forces engaged in fighting a civil war. These groups clearly did not have the authorization to receive arms from the Libyan government, so the transfers themselves could be constituted as a diversion. The issue is legally complex considering that the opposition had been diplomatically recognized by some other states. It is very unlikely that the outside suppliers could have conducted a proper assessment of whether the anti-Qaddafi forces could have kept control over the arms they had been supplied. Even if they had, the rapidly changing situation on the ground would have quickly made it obsolete. In the event, the 2011 civil war was followed by intermittent violence between rival quasi-governments, warlords, an Islamic state group, and militias. The arms supplied in 2011 have undoubtedly fuelled the continuing violence in Libya.

Finally, commitments regarding the end use given by the Libyan government before the war were easily broken after the war broke out. If a regime is fighting for its survival, then it may not put much weight on the conditions set by exporters years before. When states parties agree upon mitigation measures recommended in Article 11 (and in Article 7), they need to consider the risks that the importing state will renege on the agreement if their circumstances change.

IV

The second example involves a high risk of diversion involving the United States and partner arms supplies to Iraq and Afghanistan.

After the fall of the Taliban in 2001 and the invasion of Iraq in 2003, the United States organized the rebuilding and reequipment of the Afghan and Iraqi security forces. Armed conflict is ongoing in both countries, which has increased both the need for weapons and the risks of diversion.

Data released by the United States government provide a picture of the vast numbers of small arms provided to Afghanistan and Iraq. The data reveal that between 1 September 2001 and 1 September 2015, the United States organized the transfer of 1.45 million firearms to various security forces in both countries.³² These included over 112,000 machine guns, 978,000 assault rifles, and 266,000 pistols.³³ Using alternative trade data sources, it is possible to account for the transfers of some 446,000 firearms to Iraq,³⁴ including 126,000 pistols, 206,000 assault rifles, and 60,000 machineguns.³⁵ About 138,000 firearms were reported as having been exported from countries other than the United States; these included 23,038 assault rifles from the United Kingdom, 9,810 pistols from the Czech Republic, and 15,492 machineguns from Serbia.

Export data reveal similar quantities having been reported as having been transferred to

³¹ Hansen and Marsh, 'Normative power and organized hypocrisy'.

³² Chivers, C. 'How many guns did the U.S. lose track of in Iraq and Afghanistan? Hundreds of thousands', *New York Times Magazine*, 24 August 2016.

³³ Ibid.

³⁴ Ibid.

³⁵ Calculations by the author from the NISAT database of the small arms trade, nisat.prio.org, accessed 21 April 2019.

Iraq. Transfer data reveal that some 629,000 firearms were exported to Iraq,³⁶ including 520,000 from countries other than the United States; these exports included 86,000 assault rifles from the Czech Republic and 52,000 from Slovakia and 35,000 machineguns from Ukraine.³⁷

The exports from countries other than the United States raise the possibility that many more arms could have been provided than the 1.45 million mentioned by U.S. authorities. The United States preferred supplying Afghanistan and Iraq with Soviet pattern weapons, which were sourced from abroad, because these arms were familiar to Afghani and Iraqi personnel, and the guns (especially Kalashnikovs) have a reputation for being more hardwearing and better able to withstand use in harsher environments. The arms that were exported could have been paid for by the United States (in which case, they would likely have appeared among the 1.45 million). But the exports could also have been purchased directly by the Afghan or Iraqi governments or provided as military aid (e.g., in 2006, Hungary reported exporting 20,500 AMD-65 assault rifles as ‘government aid’).³⁸ If the arms were not paid for directly by the United States, then they may not have been counted by the United States government. In addition, the 1.45 million figure probably does not include any weapons issued directly by the United States armed forces or captured arms reissued to Afghan or Iraqi forces.³⁹

The transfers constitute a risk of diversion because the United States has admitted to having lost track of about half of the arms it supplied to Afghanistan and Iraq.⁴⁰ In response to a 2016 request for data from the *New York Times*, the U.S. Department of Defense admitted that it only had records for 48 per cent (or 700,000) of the firearms supplied to Afghanistan and Iraq.

A declassified 2008 U.S. Department of Defense Inspector General report notes that Turkish police and military personnel have complained that arms supplied by the United States to Iraqi security forces had been found in the ‘hands of insurgents, terrorists, and criminals in Turkey’.⁴¹ It went on to note that U.S. forces did not maintain unbroken accountability and control over the arms before they were handed over to Iraqi forces. In particular, the arms were sometimes stored in unsafe areas vulnerable to theft or loss and that lacked the facilities to process large numbers of items; sometimes, inventories of arms (including taking down serial numbers) were not recorded before handover.⁴² Concerning the Iraqi security forces, the Inspector General report states that they lacked enough skilled personnel to adequately monitor weapons stocks and that overall, its logistics systems were ‘fragile’.⁴³

Similarly, a 2014 report by the United States Special Inspector General for Afghanistan Reconstruction outlined deficiencies in the U.S. Department of Defense’s monitoring and accountability concerning the arms supplied to Afghanistan.⁴⁴ In particular, there was missing or erroneous information in 43 per cent of the records in one logistics database on 474,828 weapons.⁴⁵

³⁶ Chivers, ‘How many guns did the U.S. lose track of in Iraq and Afghanistan? Hundreds of thousands’.

³⁷ Calculations by the author from the NISAT database of the small arms trade, nisat.prio.org, accessed 21 April 2019. It is likely that there were also significant exports from Bosnia and Herzegovina.

³⁸ Information from the NISAT database of the small arms trade, nisat.prio.org, accessed 21 April 2019.

³⁹ Chivers, ‘How many guns did the U.S. lose track of in Iraq and Afghanistan? Hundreds of thousands’.

⁴⁰ *Ibid.*

⁴¹ Inspector General United States Department of Defense, *Assessment of the accountability*, p. 1.

⁴² *Ibid.*, p. 27-47.

⁴³ *Ibid.*, p. 73-4.

⁴⁴ Special Inspector General for Afghanistan Reconstruction, *Afghan national security forces*.

⁴⁵ *Ibid.*, p. 4.

Preventing Diversion: A Challenge for Arms Trade Treaty States Parties

Despite attempts by the United States to set up inventory management systems for the Afghan security forces, the Inspector General reported that an Afghan National Army database was missing data and ‘cannot be relied upon for accurate information’.⁴⁶ Instead, units entered weapons inventory data into ledgers (but without recording serial numbers). The Afghani National Police, meanwhile, had ‘no standardized or automated system to account for weapons’.⁴⁷

Chris Chivers, a *New York Times* journalist who investigated the transfers to Iraq and Afghanistan, is unequivocal that ‘one point is inarguable: Many of these weapons did not remain long in government possession after arriving in their respective countries’.⁴⁸ He highlights that in Iraq, the Islamic State captured arms and other equipment meant for entire Iraqi divisions and goes on to cite equipment of a U.S. origin being offered for sale online. He states the following:

These spectacular losses were on top of the more gradual drain that many veterans of the wars watched first-hand — including such scams as Afghan National Army recruits showing up for training and disappearing after rifles were issued. They were leaving, soldiers suspected, to sell their weapons.⁴⁹

The examples of supplies to Afghanistan and Iraq highlight two risks of diversion. The first is that poor management of arms could lead to theft or other losses during the transfer – such as during storage in unsafe areas prior to handover. The second is that after the transfer was completed poor security and management by the Afghan and Iraqi security forces created risks of large-scale losses from capture or theft or loss by police or military personnel.

Although the United States has been the focus of this example, arms were also supplied by ATT states parties (such as Germany, Hungary, or the United Kingdom). A key issue for states parties is the need to prevent a diversion if they are supplying arms to highly fragile states involved in warfare (such as Iraq or Afghanistan). If the recipient country lacks the facilities and infrastructure and personnel trained to use them, then a diversion during or after a transfer may be likely.

V

The third example of a diversion concerns an export of small arms and ammunition from China to Nigeria. The transaction had been arranged by a UK-based arms broker who had not been authorized to do so.

From 2005-7, UK citizen Gary Hyde and German citizen Karl Kleber set up an arms deal involving the export of 70,000 rifles, 10,000 pistols, and 32 million rounds of ammunition from China to Nigeria.⁵⁰ Hyde acted as a broker, in that he was an intermediary who was to receive a commission for arranging the arms deal, but he or his companies never bought or otherwise took possession of the arms themselves.⁵¹ It was a complex deal involving a Chinese company (Poly Technologies Inc. and previously China Jing An), two companies

⁴⁶ Special Inspector General for Afghanistan Reconstruction, *Afghan national security forces*, p. 6.

⁴⁷ *Ibid.*, p. 6.

⁴⁸ Chivers, ‘How many guns did the U.S. lose track of in Iraq and Afghanistan? Hundreds of thousands’.

⁴⁹ *Ibid.*

⁵⁰ Royal Courts of Justice, ‘Transcript’.

⁵¹ For a definition of brokering, see UNGA, A/62/163, p. 8.

representing the Nigerian government (called Deftech and Pinimi) and EWH Consultancy Ltd., which was controlled by Gary Hyde.⁵² Contractual documents signed by Hyde state that a commission of USD 1,337,800 was due to be paid out for arranging the deal.⁵³ The shipment from China to Nigeria took place in November 2007.

The United Kingdom has regulations covering the act of brokering an arms deal (such as what was undertaken by Hyde). Any person or corporate entity located in the United Kingdom and wishing to broker an arms transaction must first obtain a trade control licence (which are issued by the Export Control Organization).⁵⁴ The regulations cover arms being transferred from or to any part of the world (so long as at least some of the brokering activity takes place in the United Kingdom).

Despite being a seasoned arms exporter, Hyde did not obtain a licence – possibly because armed conflict and human rights violations in Nigeria may have meant that the United Kingdom would have refused. Instead, Hyde started to broker the transaction and made sure do so from outside the United Kingdom. In particular, he arranged for a payment of USD 400,000 to be made to a bank account in Liechtenstein.⁵⁵

Prosecutors were able to prove that in March 2006 and December 2007, Hyde had worked on renegotiating the transaction while he was located within the UK. After being sentenced, Hyde was convicted to seven years imprisonment for brokering the deal with Nigeria without the required licence and for concealing the payment to the Liechtenstein bank account from the UK authorities.

In this example, a diversion occurred because Hyde and his companies did not have the necessary authorization from the United Kingdom to broker the deal. To recap, Article 11, paragraph 2 of the treaty obliges states parties to ‘prevent the diversion of the transfer of conventional arms’, and in Article 2, ‘brokering’ is defined as being one of the activities that comprise a transfer. Similarly, Greene and Kirkham’s definition (see above) is followed with the comment that ‘authorisation is required by both the exporting and importing state, and also by relevant transit and brokering control authorities in other states’.⁵⁶ Hyde’s case shows that the transfer was not authorized by all of the states involved, even if China and Nigeria had issued the appropriate import and export licences.

The issue for ATT states parties is that a diversion can occur and involve their citizens in contexts far removed from where the arms are actually located. A broker based on a different continent from the importing and exporting states can still play a key role in an unauthorized arms transfer. States parties need to ensure that they have, as set out in Article 10, adequate laws and regulations concerning brokering; they also need to be vigilant and detect unauthorized brokering activities.

VI

To conclude, diversion has a central place in the ATT, and preventing it is key to attaining the aims of the ATT to reduce human suffering and contribute to peace, security, and stability. States parties need to fulfil their obligations and take active measures to prevent a diversion, including not allowing exports if the risks are too high and controlling the activities of arms brokers. Transfers of arms to a non-state proxy at war in another country

⁵² Royal Courts of Justice, ‘Transcript’.

⁵³ Royal Courts of Justice, ‘Transcript’.

⁵⁴ See Article 4 of the UK’s Trade in Goods (Control) Order of 2003.

⁵⁵ Royal Courts of Justice, ‘Transcript’.

⁵⁶ Greene and Kirkham, *Preventing diversion*, p. 9.

would very likely be a case of diversion.

Preventing a diversion is difficult. For an exporter, assessing the long-term risks of a diversion poses many problems; the exporter may lack detailed information on the activities of his or her own companies or on the ability of the importing state to secure arms stocks. Even if systemic deficiencies are known, the imperative to support an ally fighting a war may outweigh the fears that arms supplies could later be diverted. Cataclysmic events such as a state collapse or civil war are difficult to predict years in advance. Much more knowledge is needed by states parties to help them predict when a diversion may occur.

Many states, such as Afghanistan, lack the ability to control their arms stockpiles and prevent pilfering. If the importing states lack the ability to monitor their inventories of arms and ammunition, they may be unaware of the extent – or even existence – of a diversion. A key priority for international cooperation and assistance should be to enhance stockpile security and management. However, as the Afghanistan example shows, doing so can be a long process.

References

- Cable News Network (CNN)*, 'The Emir of Qatar on arming Libyan rebels' (14 April 2011). Transcript available from <http://cnnpressroom.blogs.cnn.com/2011/04/14/the-emir-of-qatar-talks-to-wolf-blitzer-about-weapons-to-libyan-rebels/> (accessed 27 April 2019).
- Chivers, C. 'How many guns did the U.S. lose track of in Iraq and Afghanistan? Hundreds of thousands', *New York Times Magazine* (24 August 2016).
- da Silva, C. and Nevill, P., 'Article 6: prohibitions', in C. da Silva and B. Wood, eds., *Weapons and international law: the arms trade treaty* (Brussels, 2015), pp. 88-115.
- de Waal, A., 'African roles in the Libyan conflict of 2011', *International Affairs*, 89 (2013), pp. 365-9.
- Dickinson, E., 'The gun smuggler's lament,' *Foreign Policy* (2 October 2015).
- Greene, O. and Kirkham, E., *Preventing diversion of small arms and light weapons: issues and priorities for strengthened controls* (2009).
- Greene, O. and Marsh, N., 'Governance and small arms and light weapons' in O. Greene and N. Marsh, eds., *Small arms, crime and conflict global governance and the threat of armed violence* (2012), pp. 163-82.
- Hansen, S. and Marsh, N., 'Normative power and organized hypocrisy: European Union member states' arms export to Libya', *European Security*, 24 (2015), pp. 264-86.
- Hazen, J., *What rebels want resources and supply networks in wartime* (Ithaca, 2013).
- Human Rights Watch, *Libya: secure unguarded arms depots*, Press Release, September 2011.
- 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* (2008).
- International Institute for Strategic Studies (IISS), *The military balance 2010* (Abingdon, 2010), pp. 262-3.
- Jackson, T., 'From under their noses: rebel groups' arms acquisition and the importance of leakages from state stockpiles', *International Studies Perspectives*, 11 (2010), pp. 131-47.
- Marsh, N., 'Brothers came back with weapons: the effects of arms proliferation from Libya', *PRISM*, 6 (2017), pp. 79-96.
- Marsh, N., 'Firearms seizures and trafficking: a local phenomenon', *Strategic Trade Review*, 1 (2015), pp. 73-87.
- Marsh, N., 'Conflict specific capital: the role of weapons acquisition in civil war', *International Studies Perspectives*, 8 (2007), pp.54-72.
- Olabuenga, P. and Gramizzi, C., 'Article 11 diversion', in C. da Silva and B. Wood, eds., *Weapons and international law: the arms trade treaty* (Brussels, 2015), pp. 191-201.
- Parker, S., 'Article 11 diversion', in S. Casey-Maslen, A. Clapham, G. Giacca, and S. Parker, eds., *The arms trade treaty: a commentary* (Oxford, 2016), pp. 342-365.
- Royal Courts of Justice, 'Transcript of the handed down judgment. R. v Gary Hyde'. Case no: 201300289 B2; 201304192 B2 (15 April 2014) https://www.iclr.co.uk/document/2011208328/casereport_58987/html (accessed 22 April 2019).
- Schroeder, M., Close, H., and Stevenson, C., 'Deadly deception: arms transfer diversion', in E. G. Berman,

NICHOLAS MARSH

- K. Krause, E. LeBrun, and G. McDonald, eds., *2008 small arms survey: risk and resilience* (Cambridge, 2008), pp. 113-153.
- Special Inspector General for Afghanistan Reconstruction, *Afghan national security forces: actions needed to improve weapons accountability* (SIGAR 14-84 Audit Report, 2014).
- United Nations Coordinating Action on Small Arms (CASA), *Glossary of terms, definitions and abbreviations* (New York, 2018).

Official Publications

- UNGA (United Nations General Assembly), *Report of the group of governmental experts established pursuant to General Assembly resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons*, UN Document A/62/163.
- UNSC (United Nations Security Council), *Final report of the panel of experts established pursuant to resolution 1973 (2011) concerning Libya*, UN Document S/2013/99.