

# SECTION 2

## DEFINING RESPONSIBLE TRADE



UN Photo: Sylvain Liechti

**This section explores how states define responsible trade in conventional arms. At present, most governments outline what ‘irresponsible’ trade entails, leaving the definition of ‘responsible’ trade to be established by overwhelming support for a conventional Arms Trade Treaty (ATT), the object and purpose of which is responsible transfer.<sup>1</sup>**

**This section also examines the risk-assessment process required under the treaty to authorise each transfer of conventional arms. It provides an accessible evaluation of the process and its intention to uphold international humanitarian law (IHL) and international human rights law (IHRL).**

**Risk assessment is essentially a process of due diligence. Where risk is identified, it is necessary to mitigate those risks before authorising trade in arms. This constitutes responsible action while trading in conventional weapons.**

### HOW DO STATES DEFINE IRRESPONSIBLE TRADE?

This subsection examines how responsible trade is established under the ATT. This is achieved by a brief overview of the historical negotiations that established the need for a conventional arms trade treaty. It demonstrates how UN Member States articulated the ATT in reference to irresponsible transfers that saw conventional arms cause so many problems for individual states and the international community. Finally, we review the responsibilities of the different jurisdictions involved in the transfer supply chain and the risk-assessment process.

On 6 December 2006 the UN General Assembly, through Resolution 61/89, unanimously recognised that the absence of common international standards for transfers of conventional arms contributed to ‘conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development’.<sup>2</sup>

Resolution 61/89 is important because almost 100 UN Member States argued for a legally binding instrument that established common international standards applicable to conventional arms.<sup>3</sup> This constitutes a wide commitment to the concept of responsible trade as it would come to be framed through negotiating the ATT.

*Before the ATT, it was said that an ‘eclectic set of national and regional control measures and a few global instruments on arms transfers exist, but the absence of a global framework regulating the international trade in all conventional arms has obscured transparency, comparability and accountability ...’.<sup>4</sup>*

*‘... With every transfer it authorizes, a government deciding on exporting weapons must realize the profound international responsibility of that decision. And, conversely, an importing government must ensure that it will use these weapons only to provide for the safety and security of its citizens and that it has the capacity to safeguard all weapons within its possession throughout their life cycle.’<sup>5</sup>*

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## DEFINING RESPONSIBLE TRADE

Responsible trade, within the scope of the ATT, is established by reading the treaty as a whole. The ATT's purpose is specified in Article 1 but is broadly discerned from its title, Preamble and the negotiated intent of establishing an arms trade treaty.<sup>6</sup> Under the 1969 Vienna Convention on the Law of Treaties, States Parties and Signatories are obliged to refrain from acts that would defeat the object and purpose of a treaty.<sup>7</sup>

Two themes from the ATT Principles repeat in Article 1 the purpose and object of the treaty and start to build a picture of what responsible trade means:

1. Building confidence among States Parties through cooperation, transparency and responsible action
2. Helping to prevent the diversion of conventional arms.

In addition to these themes, Articles 6 and 7, forming the body of the risk-assessment process, contribute two more important elements of responsible trade:

3. States need to develop their national control systems to close legislative, enforcement and technical gaps
4. States need to identify the end-user of arms transfers and assess what they are using the arms for.

The ATT institutes a framework for developing responsible trade norms. States Parties are agreeing to establish and work within common international standards for the transfer of conventional arms. The outcome of regulation is 'contributing to international and regional peace, security and stability, and reducing human suffering'.<sup>8</sup> But how does regulation achieve this?

The responsibility for preventing diverted arms from reaching corrupt end-users does not fall only on the exporter. The importer and jurisdictions involved in the supply chain also have responsibilities to develop their national control systems.<sup>9</sup> Each state—whether exporter, transit or transshipment or importer—ought to enable designated authorities to act effectively if those authorities deem it necessary and feasible to do so within the scope of the ATT.<sup>10</sup> This the state should do by means of material, procedural and legislative mechanisms.

*Countries face different kinds of challenges related to arms controls in different regions of the world. We have armed conflicts, terrorist attacks and organized crime, which all use conventional arms. These are phenomena across borders. No one can deal with this alone so we need cooperation between neighbours and regions. We also need to make the global environment more safe and better regulated.*<sup>11</sup>

ATT President HE Klaus Korhonen (2017)

Robust domestic control systems not only close gaps where domestic corruption and diversion occur, but also enable more effective international cooperation between states. Comprehensive national control systems generate information about transnational.

*'Corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion',<sup>12</sup>*

Sharing this information contributes to national and international crime-fighting efforts and in turn reinforces domestic security. Compared to other jurisdictions involved in the transfer, it is the exporter who carries the main responsibility for doing the initial risk assessment and the mitigation of any risks identified. In its risk assessment the exporter must account for relevant factors regarding the end-user or the end-use of the arms.

**This information can be obtained through obligatory reciprocal information exchange with the importer on the proposed end-use and end-user of the conventional arms.<sup>13</sup> If the exporter has knowledge at the time of authorisation that there is 'overriding risk', yet is unable to mitigate this risk cooperatively with the importer, the exporter should not authorise the transfer.<sup>14</sup>**

## RESPONSIBILITY OF JURISDICTIONS IN TRANSFER SUPPLY CHAINS

Each state involved in the transfer supply chain has different responsibilities under the treaty.

Exporting state	Transit states	Importing states
<p><b>Article 6 Prohibitions<sup>15</sup></b></p> <p>The exporting state must investigate if there is a prohibition involved in the transfer. The most obvious consideration is if one or more UNSC arms embargoes restrict trade with the importer or end-user.<sup>16</sup></p> <p>Other factors to assess include knowledge at the time of authorization that the end-user is committing:</p> <ul style="list-style-type: none"> <li>• genocide</li> <li>• crimes against humanity</li> <li>• grave breaches of the Geneva Conventions of 1949</li> <li>• other war crime.<sup>17</sup></li> </ul>	<p><b>Article 9 Transit or trans-shipment<sup>18</sup></b></p> <p>Each State Party shall adopt appropriate measures to regulate, where necessary and feasible, the transit or transshipment under its jurisdiction of conventional arms.<sup>19</sup></p>	<p><b>Article 8 Import<sup>20</sup></b></p> <p>Each importing State Party shall ensure that appropriate and relevant information is provided, upon request, to the exporting state to assist with risk assessment under Article 7.<sup>21</sup></p> <p>Such measures may include supplying end-use or end-user documentation.<sup>22</sup></p>
<p>Transit or transshipment states may also be required to assist in a transfer if new information becomes available that indicated that the transfer would violate Article 6 or 7.<sup>23</sup> This may include seeking to obtain information on the risk assessment and import licence from the exporting state.</p>		
<p><b>Article 7 Export and export assessment<sup>24</sup></b></p> <p>The exporting state must consider whether there is an overriding risk that the arms will be used in:</p> <ul style="list-style-type: none"> <li>• serious violation of IHL</li> <li>• serious violation of IHRL</li> <li>• organised crime or terrorism</li> <li>• gender-based violence</li> <li>• undermining peace and security.<sup>25</sup></li> </ul>		
<p><b>Article 11 Diversion<sup>26</sup></b></p> <p>The exporting state shall seek to prevent the diversion of the transfer of conventional arms.<sup>27</sup> Exporting states shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion.<sup>28</sup></p> <p>Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorising the export or other appropriate measures.<sup>29</sup></p>	<p><b>Article 11 Diversion<sup>30</sup></b></p> <p>Transshipment states shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion.<sup>31</sup></p>	<p><b>Article 11 Diversion<sup>32</sup></b></p> <p>Importing states shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion.<sup>33</sup></p>

Responsible trading in conventional arms requires that states establish the identity and intent of both the end-user of the conventional arms and the end-user. Together with Article 7 (see below), Article 6 is regarded as the 'heart' of the treaty.<sup>34</sup> To act responsibly, States Parties must prohibit transfers in certain clear circumstances—the treaty prohibits a transfer of conventional arms if a UN Security Council sanction such as an arms embargo restricts the end-user.<sup>35</sup>

Prohibitions are also in place if a State Party has knowledge at the time of authorising that transfer that the end-user is committing crimes of atrocity, genocide, crimes against humanity, or certain war crimes.<sup>36</sup> If such a transfer would violate an existing international agreement, it would also be prohibited.<sup>37</sup> If information becomes available about such crimes during the transit and transshipment of arms, both the exporting state and transiting states are also obligated to reassess the transfer.<sup>38</sup>

#### **Considering existing international agreements in Article 6**

The extent to which international agreements can be enforced will depend on the individual states' membership of them or not. When assessing a particular transfer, some examples that States Parties may consider, beyond the Geneva Conventions, might include:

- Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.
- UN Register of Conventional Arms.
- UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects.
- The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms Protocol).
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Mine Ban Treaty).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (Convention on Certain Conventional Weapons)
- Convention on Cluster Munitions.<sup>39</sup>

Article 6 imposes no new obligations on States Parties. Instead, it reinforces international legal obligations that already bind all UN Member States, for example as States Parties to the Geneva Conventions.<sup>40</sup> In the case of most states these prohibited situations are identified by the UNSC. In other cases, Article 6 requires an exchange of information about and a thorough analysis of the end-user as well as of the intended end-use.



UN Photo: Marco Dormino

## THE ATT RISK ASSESSMENT: DOING DUE DILIGENCE

This subsection provides an overview of the risk assessment process, with Article 6, Prohibitions and Article 7, Export and Export Assessment forming the heart of the treaty. It then defines ‘overriding risk’ and mitigation factors and explores some of the considerations, other than the Geneva Convention, that a State Party might incorporate into its risk-assessment process. The section also reviews responsibilities of the jurisdictions involved in the transfer supply chain.

Article 7, aptly named Export and Export Assessment, works in tandem with Article 6 to build the framework of the ATT’s Risk Assessment.<sup>41</sup> It reiterates obligations not to violate existing international law or to facilitate crimes of atrocity, and is concerned with absolute prohibitions.<sup>42</sup> Article 7 requires exporting States Parties to assess whether transferring the requested arms would undermine peace and security.<sup>43</sup> Important information about the end-user includes the type and quantity of arms being transferred as well as the intended end-use. This allows the exporting state to evaluate whether this is a common weapon type and volume of transfer for the importing state. If it is not, this may raise alarms or require further investigation as to why the state seeks to acquire conventional arms dissimilar to its current stockpiles.

An exporting state should take precautions to ensure it does not transfer arms to an end-user when that end-user will undermine peace and security.<sup>44</sup> When states consider whether a transfer would contribute to or undermine peace and security, the ATT requires them to consider whether there is an ‘overriding risk’ that the arms could be used to commit or facilitate serious violations of IHL or IHRL. It also requires states to consider whether arms could be redirected to enable terrorism or organised crime.<sup>45</sup> The possibility that the arms might be used to facilitate gender-based violence must also be considered in the exporter’s risk assessment.<sup>46</sup> The list of risks to consider is not cumulative and even if only one ‘overriding risk’ is present, the state is required to mitigate that risk.

## Establishing ‘overriding risk’

Part of the Australian Export Control Policy provides an example of the kind of consideration involved in establishing an ‘overriding risk’.<sup>47</sup>

<b>International obligations</b>
Is the export destined for countries where it might be used in a manner contrary to Australia’s international obligations or commitments?
<b>Human rights</b>
Does the export pose a clearly identifiable risk that the goods will be used to commit or facilitate serious human rights abuses?
<b>Regional security</b>
Might the export contribute to instability in the region or aggravate a threat to international and regional peace and security? Or might it aggravate the situation in a region which becomes a cause of serious concern that it might be used in internal or external conflict or that it could further militarise the situation in the destination country?
<b>National security</b>
Might the export compromise Australia’s wider security interests, its obligations to its allies and friends and its broader international responsibilities?
<b>Foreign policy</b>
Might the export cause adverse reactions by third countries important to Australia, which may affect Australia’s interests—in particular, our regional relations? And might the export be used for mercenary, terrorist or other criminal activities? <sup>48</sup>

## UN Global Compact: Establishing complicity in human rights violations

Complicity means being implicated in a human rights abuse that another company, government, individual or other group is causing. The risk of complicity in a human rights abuse may be particularly high in areas with weak governance and/or where human rights abuse is widespread. However, the risk of complicity exists in every sector and every country.<sup>49</sup>

Complicity may affect the arms industry, and the state from which it operates. This is so because the fact that a company knows that products, operations, services or a failure to act in a certain way facilitates, legitimises, assists or encourages another party to carry out human-rights abuses establishes the company's complicity in those abuses.<sup>50</sup>

The important consideration about complicity is that it is not merely formal accusations of violations of international law. Investigation by and the advocacy of the media, NGOs and civil society organisations can have an impact on the reputation of both states and the private arms industry. A standardised risk assessment process creates beneficial clarity for both parties.<sup>51</sup> If states have information that there is an 'overriding risk' that peace and security will be adversely affected by a particular transfer, then it is incumbent on the supplying state to mitigate such a risk.<sup>52</sup> If the risk can be reduced to a threshold below 'overriding risk', then the transfer may be authorised. If, after attempts are made to mitigate the risk, an 'overriding risk' remains, the transfer should be denied.<sup>53</sup> This mitigation of risk becomes part of the overall picture of responsible trade.

There is no supra-national body that monitors adherence to the ATT. Therefore, there is no reviewing body that says what correct or incorrect behaviour is. The treaty was negotiated by UN Member States and its infrastructure will continue to be developed through negotiations by States Parties. It is therefore incumbent on States Parties to interpret the treaty in good faith as per the Vienna Convention on the Laws of Treaties.<sup>54</sup> That being said, the treaty's text is interpreted by each State Party against its own legislative and constitutional system.<sup>55</sup>

There is no definitions section in the ATT. Consequently, there may be further discussion to establish international norms regarding responsible trade in conventional arms and the practicalities of conducting thorough risk assessments. This is evident from Articles 6 and 7 in the list of priorities for the ATT Working Group on Effective Implementation.<sup>56</sup> Only as an ATT State Party can a government influence the future direction of those trade norms.

Identified risk factors do not automatically prohibit an exporting state from transferring arms, provided there is thorough investigation and an assurance that such arms are not likely to be used in any violations.<sup>57</sup> For example, an exporter may be concerned that certain conventional arms have been used by a state (in a lawful conflict or in another lawful use of force situation) in a manner that has attracted allegations of breaches of IHL or IHRL. Yet this may not prevent the transfer of another type of conventional arm that has a different end-use or the same conventional arm to a different end-user within the state, where unlawful use is unlikely. Whereas there may be no overriding risk with differentiated exports to the same state, there remains, of course, scope to promote continual improvements in compliance with IHL and IHRL.

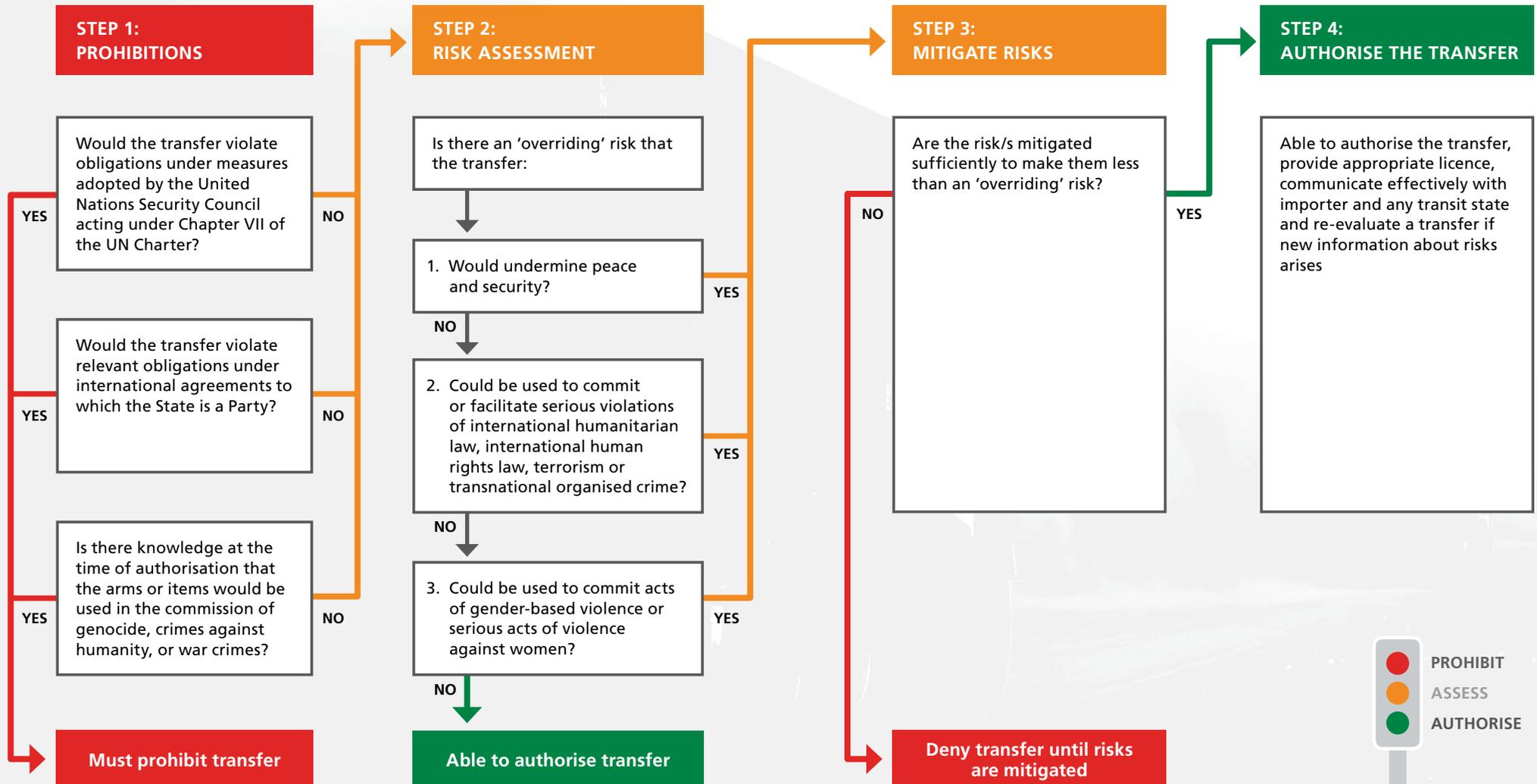
**The ATT aims to promote peace and security by standardising the trade practices that most states are already, or should already be, engaged in. One method of restricting non-state actors' access to the most common tools used in crime and terrorism is to decline transfers when there is an overriding risk that the end-user is retransferring those arms to non-state actors.**

## ATT RISK MITIGATION GUIDANCE

The ATT provides broad guidance on risk mitigation. The negotiations about and the structure of mitigation are developed between those States Parties involved in transfer supply chains.

Exporter	Transit or transshipment	Importer
<p><b>Article 11 (2)<sup>58</sup></b></p> <ul style="list-style-type: none"> <li>Confidence-building measures;</li> <li>jointly developed and agreed programmes by the exporting and importing states;</li> <li>examining parties involved in the export;</li> <li>requiring additional documentation, certificates, assurances;</li> <li>not authorising the export or other appropriate measures.</li> </ul>		<p><b>Article 11 (2)<sup>59</sup></b></p> <ul style="list-style-type: none"> <li>Confidence-building measures;</li> <li>jointly developed and agreed programmes by the exporting and importing states;</li> <li>examining parties involved in the export;</li> <li>requiring additional documentation, certificates, assurances;</li> <li>not authorising the export or other appropriate measures.</li> </ul>
		<p><b>Article 8 (2)<sup>60</sup></b></p> <p>... shall take measures that will allow it to regulate, where necessary, imports under its jurisdiction ...'</p>
<p><b>Article 11 (4)<sup>61</sup></b></p> <p>... examining diverted shipments ... and taking follow-up measures through investigation and law enforcement ...'</p>	<p><b>Article 11 (4)<sup>62</sup></b></p> <p>... examining diverted shipments ... and taking follow-up measures through investigation and law enforcement ...'</p>	<p><b>Article 11 (4)<sup>63</sup></b></p> <p>... examining diverted shipments ... and taking follow-up measures through investigation and law enforcement ...'</p>
<p><b>Article 5 (5)<sup>64</sup></b></p> <p>Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms ...'</p> <p><i>And ...</i></p> <p><b>Article 14</b></p> <p>'Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.'<sup>65</sup></p>	<p><b>Article 5 (5)<sup>66</sup></b></p> <p>Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms ...'</p> <p><i>And ...</i></p> <p><b>Article 14</b></p> <p>'Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.'<sup>67</sup></p>	<p><b>Article 5 (5)<sup>68</sup></b></p> <p>Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms ...'</p> <p><i>And ...</i></p> <p><b>Article 14</b></p> <p>'Each State Party shall take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty.'<sup>69</sup></p>

# RESPONSIBLE TRADE: A STEP-BY-STEP CHECKLIST<sup>70</sup>



The risk-assessment process is context-specific and relies on the behaviour of each State Party. Each actor in the supply chain in a conventional arms transfer will have differing obligations.<sup>71</sup> The context of the transfer and the number and type of jurisdictions involved in a supply chain will activate different treaty obligations for different parties.<sup>72</sup> Responsible action by States Parties includes making sure that transferred arms move from the supplier to the secure custody of the receiving client without diversion to the illicit market along the way.<sup>73</sup> This is in the interests of those transferring and receiving arms because neither party wants to see its product lost or stolen. It is also in the interests of the transiting state, the illicit use of diverted arms possibly having a negative impact on it.<sup>74</sup>

The risk-assessment process will reinforce international law, human security and regional stability. For example, in Côte d'Ivoire arms and ammunition entered the country from neighbouring countries in violation of an arms embargo. In addition, weapons that fuel armed violence and crime were taken from military and police stockpiles and also from local manufacturers.<sup>75</sup> The ATT contributes to regional security by restricting transfers of arms to territories where crimes of atrocity are being perpetrated. Subsequently, the ATT can also help to protect and reduce the number of internally displaced persons and refugees by restricting arms flows to countries where violence is causing population displacement.

## Summary

In summary, 'irresponsible' trade occurs when an arms transfer is authorised when the exporter has knowledge at the time that the end-user is committing atrocities and grave breaches of the Geneva Conventions. In addition, the exporter has a suspicion that there is an overriding risk that the weapons would be used in violation of IHRL or IHL, or to facilitate terrorist activities and/or gender-based violence (see *Section 4*).

Conversely, 'responsible' trade occurs when a state conducts due diligence by ensuring that it does not authorise prohibited transfers, conducts thorough risk assessments to establish that overriding risks are not present, and mitigates any existing overriding risks before authorising a transfer.



UN Photo: Unknown