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Delegations will find attached updated User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, as endorsed by the Council ("General Affairs") on 16 September 2019.

USER'S GUIDE TO COUNCIL COMMON POSITION 2008/944/CFSP
(AS AMENDED BY COUNCIL DECISION (CFSP) 2019/1560)
DEFINING COMMON RULES GOVERNING THE CONTROL OF EXPORTS OF MILITARY TECHNOLOGY AND EQUIPMENT

Introductory note

All Member States have agreed to abide by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment when assessing applications to export items listed in the agreed EU Common Military List. The Common Position also aims to improve the sharing of information between Member States and to increase mutual understanding of their export control policies.

The User's Guide is intended to help Member States apply the Common Position. It does not replace the Common Position in any way, but summarises agreed guidance for the interpretation of its criteria and implementation of its articles. It is intended for use primarily by export licensing officials.

This User's Guide will be regularly updated. The most recent version will be available on the European External Action Service internet site.

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CHAPTER 1 - LICENSING PRACTICES

Section 1: Best practices in the area of end-use/r documentation

1.1. There is a common core of elements that should be in an end-use/r documentation when one is required by a Member State in relation to an export of items on the EU Common Military List. There are also some elements which might be required by a Member State, at its discretion.

1.2. The end-use/r documentation should at a minimum set out the following details:

- Exporter's details (at least name, address and business name);
- End-user's details (at least name, address and business name). In the case of an export to a firm which resells the goods on the local market, the firm will be regarded as the end-user;
- Country of final destination;
- A description of the goods being exported (type, characteristics), or reference to the contract number, or to the order number referenced in the contract, concluded with the authorities of the country of final destination;
- Quantity and/or value of the exported goods;
- Signature, name and position of the end-user and, where applicable, of the certifying authority;

- The date of the end-user certificate;
- End-use and/or non re-export clause, where appropriate;
- Indication of the end-use of the goods;
- An undertaking, where appropriate, that the goods being exported will not be used for purposes other than the declared use;
- An undertaking, where appropriate, that the goods will not be used in the development, production or use of chemical, biological or nuclear weapons or for missiles capable of delivering such weapons.

1.3. The elements which *might* be required by a Member State, at their discretion, are *inter alia*:

- An undertaking that:
  - the goods will be used for civil end-use;
  - the goods will be incorporated;
  - the goods will be re-exported to a specified country;
- A clause prohibiting re-export of the goods covered in the end-user certificate. Such a clause could, among other things:
  - contain a pure and simple ban on re-export;
  - provide that re-export will be subject to agreement in writing of the authorities of the original exporting country;
  - allow for re-export without the prior authorisation of the authorities of the exporting country to certain countries identified in the end-user certificate;
  - the final consignee's/end-user's undertaking that the exported goods will not be retransferred to an unauthorized internal end-user;
- Full details, where appropriate, of the intermediary;

- If the end-user certificate comes from the government of the country of destination of the goods, the certificate will be authenticated by the authorities of the exporting country in order to check the authenticity of the signature and the capacity of the signatory to make commitments on behalf of its government;
- A commitment by the final consignee to provide the exporting state with a Delivery Verification certificate upon request;
- The final consignee/end-user' agreement to allow on-site verification;
- If issued by the government authority, a unique identifying Certificate/Statement number.

End use and end-user controls, including the requirement of an end-user certificate, are essential in the assessment and the follow-up of exports of items on the EU Common Military List. In that respect, when applying such controls, Member States should take into account the existing body of good practices concerning end use and end-user controls and concerning end-user documentation, in particular the following documents:

- Wassenaar Arrangement: End-Use Assurances Commonly Used – Consolidated Indicative List (agreed at the 1999 Plenary; amended at the 2005 Plenary);
- Wassenaar Arrangement: Introduction to End User/End Use Controls for Exports of Military-List Equipment (agreed by the Plenary, 3 July 2014);
- OSCE: Handbook of Best Practices on SALW,
- OSCE: Standard Elements of End-User Certificates and Verification Procedures for SALW Exports
- OSCE: Template for End User Certificates for Small Arms and Light Weapons;
- ATT: Possible Measures to Prevent and Address Diversion (annex D of the ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP4, welcomed by States Parties);
- ATT: List of Possible Reference Documents to be Considered by States Parties to Prevent and Address Diversion (annex C of the ATT Working Group on Effective Treaty Implementation Chair's Draft Report to CSP4, welcomed by States Parties).

Section 2: Assessment of applications for incorporation and re-export

2.1. As with all licence applications, Member States shall fully apply the Common Position to licence applications for goods where it is understood that the goods are to be incorporated into products for re-export. However, in assessing such applications, Member States will also have regard *inter alia* to:

(i) the export control polices and effectiveness of the export control system of the incorporating country;

(ii) the importance of their defence and security relationship with that country;

(iii) the materiality and significance of the goods in relation to the goods into which they are to be incorporated, and in relation to any end-use of the finished products which might give rise to concern;

(iv) the ease with which the goods, or significant parts of them, could be removed from the goods into which they are to be incorporated;

(v) the standing entity to which the goods are to be exported.

Section 3: Post-shipment verification

3.1. Whereas the emphasis of export controls remains on the pre-licensing phase, post-shipment control can be an important supplementary tool to strengthen the effectiveness of national arms export control.

Post-shipment measures, e.g. on-site inspections or delivery verification certificates, are particularly useful tools to help prevent diversion within the buyer country or re-export under undesirable conditions.

In order to share available information on a voluntary base, Member States implementing post-shipment control are invited to inform partners about their experience in this field and about knowledge of general interest gathered by post-shipment measures.

Section 4: The export of controlled equipment for humanitarian purposes

4.1. There are occasions on which Member States consider permitting the export of items on the EU Common Military List for humanitarian purposes in circumstances that might otherwise lead to a denial on the basis of the criteria set out in Article 2 of the Common Position. In post-conflict areas, certain items can make important contributions to the safety of the civilian population and to economic reconstruction. Such exports are not necessarily inconsistent with the criteria. These exports, like all others, will be considered on a case-by-case basis. Member States will require adequate safeguards against misuse of such exports and, where appropriate, provisions for repatriation of the equipment.

Section 5: Definitions

5.1. The following definitions apply for the purposes of the Common Position:

5.2. - 'Transit': movements in which the goods (military equipment) merely pass through the territory of a Member State

- 'Transhipment': transit involving the physical operation of unloading goods from the importing means of transport followed by a reloading (generally) onto another exporting means of transport

5.3. As defined in Article 2 of Council Common Position 2003/468/CFSP,

- 'Brokering activities' are activities of persons and entities:

  - negotiating or arranging transactions that may involve the transfer of items on the EU Common Military List from a third country to any other third country; or

  - who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.

5.4. - 'Export licence' is a formal authorisation issued by the national licensing authority to export or transfer military equipment on a temporary or definitive basis. Export licences include:

- licences for physical exports, including where these are for the purpose of licensed production of military equipment;

- brokering licences;

- transit or transhipment licences;

- licences for any intangible transfers of software and technology by means such as electronic media, fax or telephone.

Given the wide divergence in procedures for the processing of applications by the national licensing authorities of Member States, information exchange obligations (e.g. denial notifications) should, where appropriate, be fulfilled at the pre-licence stage, e.g. for preliminary licences and licences to conduct marketing activities or contract negotiations. Member States' legislation will indicate in which case an export licence is required.

Introduction to all criteria best practices

The purpose of these best practices is to achieve greater consistency among Member States in the application of the criteria set out in Article 2 of Council Common Position 2008/944/CFSP by identifying factors to be considered when assessing export licence applications. They are intended to share best practice in the interpretation of the criteria rather than to constitute a set of instructions; individual judgement is still an essential part of the process, and Member States are fully entitled to apply their own interpretations. The best practices are for the use of export licensing officials and other officials in government departments and agencies whose expertise *inter alia* in regional, legal (e.g. human rights law, public international law), technical, development as well as security and military related questions should inform the decision-making process.

These best practices will be reviewed regularly, or at the request of one or more Member States, or as a result of any future changes to the wording of the criteria contained in Article 2 of Council Common Position 2008/944/CFSP.

Section 1: Best practices for the interpretation of Criterion One

How to apply Criterion One

1.1. Council Common Position 2008/944/CFSP applies to all exports of military technology or equipment by Member States, and to dual use items as specified in Article 6 of the Common Position. Thus *a priori* Criterion One applies to exports to all recipient countries without any distinction. However, the best practices follow the principle that if there is a risk of breach of international commitments or obligations of Member States or the EU as a whole, a careful analysis of Criterion One should be carried out.

The purpose of Criterion One is to ensure in particular that the sanctions decreed by the UN, OSCE or EU, agreements on non-proliferation and other disarmament agreements, as well as other international obligations, are respected. All export licences should be assessed on a case-by-case basis and consideration should be given to Criterion One where there are concerns over the inconsistency with international commitments or obligations.

1.2. ***Information sources:*** Information on the risk of breach of international commitments or obligations shall be, first of all, sought from foreign affairs desk officers dealing with the particular country and with respective non-proliferation, disarmament or export control agreements. Equally recommended is the opinion of Member States diplomatic missions and other governmental institutions, including intelligence sources.

A common EU base of information includes country EU Heads of Mission (HOMs) reports, the EU denials database, and EU Council conclusions/statements on respective countries or security issues. Lists of restrictive measures, including arms embargoes, are updated regularly by the EEAS and can be reached through regular information systems. The general guidelines on EU non-proliferation policy can be found in the EU Strategy against the proliferation of weapons of mass destruction, and non-proliferation clauses in bilateral agreements.

Documentation from the United Nations and other relevant organisations such as IAEA and OPCW would be helpful in defining requirements of particular international regimes or agreements, as well as in determining policy of the recipient country in this aspect.

A list of relevant internet websites is contained in Annex 1 to this section.

Elements to consider when forming a judgement

1.3. Criterion One provides that an export licence shall be denied if approval would be inconsistent with, *inter alia*:

(a) the international obligations of Member States and their commitments to enforce United Nations, Organisation for Security and Cooperation in Europe and European Union arms embargoes

Member States should check the stated or probable destination of export and the location of end-user against the embargoes enforced by UN, OSCE and EU. As the list of embargoed countries, non-state entities and individuals (such as terrorist groups and individual terrorists) is subject to regular changes, the utmost care should be given to take recent developments into account.

Countries, non-state entities and individuals subject to UN, OSCE and EU sanctions overlap to a large extent. However, the list of goods (both military and dual use) under several embargoes towards the same end-user may vary and the restrictions imposed may be either mandatory or non-mandatory. To assure unified EU interpretation of the scope of legally binding UN sanctions, relevant Security Council resolutions are incorporated into the EU law in the form of a Council Decision, and, where required, a Council Regulation. Thus, in case of uncertainties concerning interpretation of mandatory UN sanctions, EU sanctions lists should be consulted. As far as non-legally binding UN and OSCE sanctions are concerned, the interpretation is left to Member States.

When forming a judgement on issuing a licence, in order to avoid conflict with their international obligations, Member States should follow the strictest restrictions that are binding or applicable to them.

(b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention

TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT)

The NPT is a legally binding treaty. It acknowledges that States Parties have the right to participate in the fullest possible exchange of equipment, material and related information for peaceful uses of nuclear energy. However, Article I of the NPT puts an obligation on nuclear-weapon-States (NWS) not to transfer to any recipient whatsoever nuclear weapons or other nuclear devices. Under Article III paragraph 2 of the NPT, nuclear-weapon-States and non-nuclear-weapon-States (NNWS) undertook not to transfer source or special fissionable material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any NNWS for peaceful purposes unless these items are subject to appropriate (IAEA) safeguards.

Items, material and equipment falling under the scope of the Treaty (Article I and III) :

- nuclear weapons or other nuclear explosive devices;
- source or special fissionable material;
- equipment or material especially designed or prepared for the processing, use or production of special fissionable material.

The NPT does not give a definition or specify detailed lists of the above devices and items. As for nuclear weapons or other nuclear explosive devices an UNIDIR[1] publication gives the following definition: "A nuclear weapon is a weapon consisting of a nuclear explosive and a delivery system; nuclear explosive is a device that releases energy through nuclear fission or fission and fusion reaction (delivery system for nuclear explosives could be aerial bombs, ballistic and cruise missiles, artillery shells, naval mines and torpedoes, and landmines)". For definition of the source or special fissionable material one should refer to the Statute of the IAEA (Article XX). Relevant information on nuclear and nuclear dual-use items and technologies can be found in the control lists of the Nuclear Suppliers Group and the Zangger Committee, as well as in the EU Common Military List (category ML 7a) and Annex I of Council Regulation (EC) No 428/2009 setting up an EU regime for the control of exports, transfers, brokering and transit of dual-use items, as well as relevant Council Regulations imposing sanctions against certain countries.

When forming a judgement on issuing a licence for goods and technologies covered by the NPT, Members States should take into consideration whether the country of destination is a State Party to the NPT and the necessary IAEA safeguards are in force.

[1] Coming to terms with security, A Lexicon for Arms Control, Disarmament and Confidence Building (2004), UNIDIR Publication.

BIOLOGICAL AND TOXIN WEAPONS CONVENTION (BTWC)

The BTWC is a legally binding treaty that bans the development, production, stockpiling, acquisition and retention of biological and toxin weapons and their means of delivery. However, it should be noted that under Article X of the Convention States Parties have the right to participate in the fullest possible exchange of equipment, material and related information if it is intended for peaceful purposes.

The scope of the BTWC covers the following items (Article I):

- microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

The BTWC itself does not include a detailed list of the above items. Relevant information can be found in the EU Common Military List (ML 7), in the Australia Group control lists and in Annex I of Council Regulation (EC) No 428/2009 setting up an EU regime for the control of exports, transfers, brokering and transit of dual-use items.

When forming a judgement on issuing a licence for goods and technologies covered by the BTWC, it should be taken into consideration that, according to BTWC:

- Export applications for biological agents of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes are to be denied. (Possible peaceful purposes could be disease control or public health measures.)
- The transfer of any type of conventional weapon, military equipment or means of delivery designed to use such agents for hostile purposes or in armed conflict is forbidden.

CHEMICAL WEAPONS CONVENTION (CWC)

The CWC is a legally binding treaty that bans the development, production, stockpiling, transfer and use of chemical weapons, and also stipulates their timely destruction. At the same time, it underlines the right of States Parties to participate in the international exchange of scientific information, chemicals and equipment for the purposes not prohibited in the Convention.

Chemical weapons are defined in Article II of the CWC as follows, together or separately:

- toxic chemicals (chemicals that can cause death, temporary incapacitation) and their precursors, except where intended for purposes not prohibited under the CWC;
- munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified above, which would be released as a result of the employment of such munitions and devices;
- any equipment specifically designed for use directly in connection with the employment of munitions and devices specified above.

The CWC has a comprehensive Annex on chemicals. The Annex forms an integral part of the Convention. Relevant information can also be found in the EU Common Military List (ML 7), in the Australia Group control lists and in Annex I of Council Regulation (EC) No 428/2009 setting up an EU regime for the control of exports, transfers, brokering and transit of dual-use items.

When forming a judgement on issuing a licence for goods covered by the CWC, Member States should consider the following but non-exhaustive list of elements:

- General obligation of States Parties is to deny the transfer of chemical weapons as specified in Article II of the CWC.
- The CWC Annex on chemicals comprises three so-called Schedules (chemical lists). The transfer regime for Schedule 1, Schedule 2 and Schedule 3 is detailed respectively in Part VI, Part VII and Part VIII of the CWC Verification Annex. Given the fact that there is overlap between ML7 of the EU Common Military List and the CWC Schedules, as a first step it should be determined whether the ML7 chemical agent or precursor in question is on the CWC schedules or not. Subsequently in case of an export application for a CWC schedule chemical the transfer rules as set out in the corresponding Part of the CWC Verification Annex should be followed.
- Research, medical, pharmaceutical or protective purposes are not prohibited under CWC.

(c) the international obligations of Member States having ratified the Convention on Cluster Munitions

(d) the international obligations of Member States having ratified the 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, and relevant annexed protocols.

The Convention on Certain Conventional Weapons (CCW) contains prohibitions or restrictions on the use of certain conventional weapons. Five protocols were annexed to the convention:

- Protocols I, II and III (Protocol I on Non-Detectable Fragments, Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, and Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons);
- Protocol IV on Blinding Laser Weapons,
- Protocol V on Explosive Remnants of War.

(e) the international obligations of Member States under the Arms Trade Treaty;

Article 1 Object and Purpose

The object of this Treaty is to: – Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; – Prevent and eradicate the illicit trade in conventional arms and prevent their diversion; for the purpose of: – Contributing to international and regional peace, security and stability; – Reducing human suffering; – Promoting cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.

(f) the international obligations of Member States under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction;

The most comprehensive international instrument dealing with anti-personnel mines is the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (also known as the Ottawa Convention). State Parties to the Convention took on the obligation, among others, not to use, develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines, except for the purpose of destruction. In addition, they agreed not to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party.

Some countries, although not State Parties to the Ottawa Convention, announced an export moratorium on anti-personnel landmines.

When forming a judgement on issuing a licence, in accordance with their international obligations, Member States who are State Parties to the Ottawa Convention shall refuse such an export, unless it is deemed for purpose of destruction.

(g) the commitments of Member States under the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects;

One objective of the Programme (PoA) is to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects. It was agreed that this will in part be achieved through cooperation at national, regional and global levels. Member States agreed to improve national small arms laws, import/export controls, and stockpile management – and to engage in cooperation and assistance. Outputs of PoA meetings are, inter alia: the International Tracing Instrument, the recommendations of a Group of Governmental Experts on Brokering Controls, and United Nations Programme of Action Implementations Support System (PoA-ISS).

(h) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Hague Code of Conduct Against Ballistic Missile Proliferation

Council Regulation (EC) No 428/2009 of 5 May 2009 sets up an EU regime for control of exports, transfers, brokering and transit of dual-use items. The regulation contains in the annex a total list of all products subject to export controls and a list of the most critical dual-use products, which are subject to even more stringent rules. These lists could be used as a reference for most of the items covered by the Australia Group, the Missile Technology Control Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Hague Code of Conduct against Ballistic Missile Proliferation.

THE AUSTRALIA GROUP (AG)

The AG is an informal arrangement. Participants do not undertake any legally binding obligations: the effectiveness of the cooperation between participants depends solely on their commitment to chemical and biological weapons (CBW) non-proliferation goals and national measures aiming at preventing the spread of CBW.

The AG "no undercut policy" is the core element of the members' commitments intended to ensure a common approach to controls on CBW-related exports. If one member denies an export of an AG-listed item for CBW non-proliferation reasons, all other members agree not to approve essentially identical export license applications without first consulting with the member that issued the original denial.

The transfer of AG-controlled chemicals or biological agents should only be authorized when the exporting member country is satisfied that there will be no CBW-related end use.

When forming a judgement on issuing a transfer licence, Member States should consider the following but non-exhaustive list of elements:

- The significance of the transfer in terms of the potential development, production or stockpiling of chemical or biological weapons;
- Whether the equipment, material, or related technology to be transferred is appropriate for the stated end-use;

- Whether there appears to be a significant risk of diversion to chemical or biological weapons programmes;
- Whether a transfer has been previously denied to the end-user or whether the end-user has diverted for purposes inconsistent with non-proliferation goals any transfer previously authorized;
- Whether there are good grounds for suspecting that the recipients have been engaged in clandestine or illegal procurement activities;
- Whether there are good grounds for suspecting, or it is known, that the recipient state has or is pursuing chemical or biological warfare programmes;
- Whether the end-user is capable of securely handling and storing the item transferred;
- Whether the exported goods are not intended for re-export. If re-exported, the goods would be properly controlled by the recipient government and satisfactory assurances that its consent will be secured prior to any retransfer to a third country would be obtained;
- Whether the recipient state as well as any intermediary states have effective export control systems;
- Whether the recipient state is a party to the Chemical Weapons Convention or Biological and Toxin Weapons Convention and is in compliance with its obligations under these treaties;
- Whether governmental actions, statements, and policies of the recipient state are supportive of chemical and biological weapons non-proliferation and whether the recipient state is in compliance with its international obligations in the field of non-proliferation.

MISSILE TECHNOLOGY CONTROL REGIME (MTCR)

The MTCR is an informal arrangement between countries which share the goals of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction, and which seek to co-ordinate national export licensing efforts aimed at preventing their proliferation. The MTCR rests on adherence to common export policy guidelines (the MTCR Guidelines) applied to an integral common list of controlled items (the MTCR Equipment, Software and Technology Annex). Each member country has implemented the Guidelines in accordance with its national legislation and decisions on transfer applications are taken at the national level.

In the evaluation of transfer applications for Annex items, Member States shall take the following factors into account:

- Concerns about the proliferation of weapons of mass destruction;
- The capabilities and objectives of the missile and space programmes of the recipient state;
- The significance of the transfer in terms of the potential development of delivery systems (other than manned aircraft) for weapons of mass destruction;
- The assessment of the end use of the transfers. Where the transfer could contribute to a delivery system for weapons of mass destruction, transfers should only be authorised on receipt of appropriate assurances from the government of the recipient state that:

- The items will be used only for the purpose stated and that such use will not be modified nor the items modified or replicated without the prior consent of the authorising government;
- Neither the items nor replicas nor derivatives thereof will be re transferred without the consent of the authorising Government;

- The applicability of relevant multilateral agreements;
- The risk of controlled items falling into the hands of terrorist groups and individuals.

If a denial is issued by another member country for an essentially identical transfer, all other members agree not to approve essentially identical export license applications without first consulting with the member that issued the original denial.

THE NUCLEAR SUPPLIERS GROUP (NSG)

NSG is an informal arrangement, whose members seek to contribute to the non-proliferation of nuclear weapons through the implementation of Guidelines for nuclear exports and nuclear related exports. The NSG Guidelines are implemented by each Participating Government in accordance with its national laws and practices. Decisions on export applications are taken at the national level in accordance with national export licensing requirements.

The Basic Principle is that suppliers should not authorise transfers of equipment, materials, software, or related technology identified in the Annex:

- for use in a non-nuclear-weapon state in nuclear explosive activity or an unsafeguarded nuclear fuel-cycle activity, or
- in general, when there is an unacceptable risk of diversion to such an activity, or when the transfers are contrary to the objective of averting the proliferation of nuclear weapons, or
- when there is an unacceptable risk of diversion to acts of nuclear terrorism.

In considering whether to authorise nuclear or nuclear-related transfers, in accordance with NSG, Member States should exercise prudence in order to carry out the Basic Principle and should take relevant factors into account, including:

- Whether the recipient state is a party to the NPT or to the Treaty for the Prohibition of Nuclear Weapons in Latin America, or to a similar international legally-binding nuclear non-proliferation agreement, and has an IAEA safeguards agreement in force applicable to all its peaceful nuclear activities;
- Whether any recipient state that is not party to the NPT, Treaty for the Prohibition of Nuclear Weapons in Latin America, or a similar international legally-binding nuclear non-proliferation agreement has any unsafeguarded nuclear fuel-cycle activity, which is not subject to IAEA safeguards;
- Whether the nuclear related technology to be transferred is appropriate for the stated end-use and whether that stated end-use is appropriate for the end-user;
- Whether the nuclear related technology to be transferred is to be used in research on or development, design, manufacture, construction, operation, or maintenance of any reprocessing or enrichment facility;
- Whether governmental actions, statements, and policies of the recipient state are supportive of nuclear non-proliferation and whether the recipient state is in compliance with its international obligations in the field of non-proliferation;
- Whether the recipients have been engaged in clandestine or illegal activities; and
- Whether a transfer has not been authorised to the end-user or whether the end-user has diverted for purposes inconsistent with the Guidelines any transfer previously authorised.

- Whether there is reason to believe that there is a risk of diversion to acts of nuclear terrorism;
- Whether there is a risk of retransfers of equipment, material, software, or related technology identified in the Annex or of transfers of any replica thereof contrary to the Basic Principle, as a result of a failure by the recipient State to develop and maintain appropriate, effective national export and transhipment controls, as identified by UNSC Resolution 1540.

THE WASSENAAR ARRANGEMENT (WA)

WA on Export Controls for Conventional Arms and Dual-Use Goods and Technologies is an informal export control regime. Membership in WA does not create legal obligations for Participating States. The decision to transfer or deny transfer of any item is the sole responsibility of each Participating State. All measures with respect to the Arrangement are taken in accordance with national legislation and policies, and are implemented on the basis of national discretion.

National policies, including decisions to approve or refuse license, are guided by Best Practices, Guidelines or Elements agreed within the Arrangement. For full texts of these documents please see the WA Website http://www.wassenaar.org

In considering whether to authorise transfers of goods listed by WA, Member States should take into account that principle commitments under WA include:

- Maintaining national export controls on items listed in the Control Lists;
- Exchanging, on a voluntary basis, information that enhances transparency on arms transfers, as well as on sensitive dual-use goods and technologies;
- For items in Munitions list exchanging information every six months on deliveries to non-participating states of conventional arms;
- For items in the Dual-Use List notifying all licences denied to non-participating states, on an aggregate basis, twice per year;

- For items in the List of Sensitive Items and the List of Very Sensitive Items, notifying all licences denied to non-participating states on an individual basis and all licenses issued to non-participating states, on an aggregate basis, twice per year;
- Notifying Participating States of an approval of a licence which has been denied by another Participating State for an essentially identical transaction during the last three years (undercut notification). The decision to transfer or deny transfer of any item is the sole responsibility of each Participating State.

ZANGGER COMMITTEE

The Zangger Committee is an informal arrangement which significantly contributes to the interpretation of article III, paragraph 2, of the Nuclear Non-Proliferation Treaty (NPT) and thereby offers guidance to all parties to the Treaty.

In the evaluation of transfer applications for items covered by the Zangger Committee, Member States shall take the following factors into account:

- Provision of source or special fissionable material to any non-nuclear-weapon State for peaceful purposes is not allowed unless the source or special fissionable material is subject to safeguards under an agreement with the International Atomic Energy Agency (IAEA);
- If the Government wishes to supply source or special fissionable material for peaceful purposes to such a State, it will:
  - specify to the recipient state, as a condition of supply, that the source or special fissionable material, or special fissionable material produced in or by the use thereof shall not be diverted to nuclear weapons or other nuclear explosive devices; and
  - satisfy itself that safeguards to that end, under an agreement with the Agency and in accordance with its safeguards system, will be applied to the source or special fissionable material in question;

- In the case of direct exports of source or special fissionable material to non-nuclear-weapon States not party to the NPT, the Government will satisfy itself, before authorising the export of the material in question, that such material will be subject to a safeguards agreement with the IAEA as soon as the recipient state takes over responsibility for the material, but no later than the time the material reaches its destination;
- The Government, when exporting source or special fissionable material to a nuclear-weapon State not party to the NPT, will require satisfactory assurances that the material will not be re-exported to a non-nuclear-weapon State not party to the NPT unless arrangements are made for the acceptance of IAEA safeguards by the State receiving such re-export;
- An Annual Return regarding exports of source and fissionable material to non-nuclear-weapon States not party to the NPT shall be submitted.

HAGUE CODE OF CONDUCT AGAINST THE PROLIFERATION OF BALLISTIC MISSILES (HCoC)

The HCoC is a politically binding non-proliferation instrument which addresses the problem of ballistic missiles capable of delivering WMD. A central aim of the Code is to increase transparency and confidence among Subscribing States by implementing specific confidence building measures, namely pre-launch notifications of ballistic missile and space-launch vehicle launches and annual declarations of ballistic missile and space launch vehicle policies.

When forming a judgement on issuing a licence, Member States should take into consideration whether or not a state has subscribed to the HCoC and its core principles:

- The urgency to prevent and curb the proliferation of ballistic missiles capable of delivering WMD;
- The importance of strengthening multilateral disarmament and non-proliferation instruments;
- The recognition that states should not be excluded from utilising the benefits of space for peaceful purposes, but that in doing so, they must not contribute to the proliferation of ballistic missiles capable of delivering WMD;
- The necessity of appropriate transparency measures on ballistic missile and space launch vehicle programmes.

1.4. ***Arriving at a judgement***. Based on the assessment presented above, Member States will reach judgement as to whether the export would represent a breach of international commitments and obligations of the Member State or the EU, and if it should be refused.

ANNEX 1 (to Chapter 2 Section 1)

NON-EXHAUSTIVE LIST OF INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDES:

List of EU sanctions (EEAS):

https://www.sanctionsmap.eu/#/main

List of embargoes in force (SIPRI):

http://www.sipri.org/databases/embargoes

International Atomic Energy Agency (NPT):

www.iaea.org

The United Nations Office at Geneva (Disarmament, BTWC):

www.unog.ch

Organisation for the Prohibition of Chemical Weapons (CWC):

www.opcw.org

Anti-Personnel Mine Ban Convention

https://www.apminebanconvention.org/

https://www.unog.ch/80256EE600585943/(httpPages)/CA826818C8330D2BC1257180004B1B2E?OpenDocument

Convention on Cluster Munitions

http://www.clusterconvention.org/

https://www.unog.ch/80256EE600585943/(httpPages)/F27A2B84309E0C5AC12574F70036F176?OpenDocument

Convention on Certain Conventional Weapons

https://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument

International Campaign To Ban Landmines:

www.icbl.org

Geneva International Centre for Humanitarian Demining:

www.gichd.ch

Australia Group:

www.australiagroup.net

MTCR:

www.mtcr.info

Zangger Committee:

www.zanggercommittee.org

Nuclear Suppliers Group:

www.nuclearsuppliersgroup.org

Wassenaar Arrangement:

www.wassenaar.org

Hague Code of Conduct against the Proliferation of Ballistic Missiles (HCoC):

www.hcoc.at

Section 2: Best practices for the interpretation of Criterion Two

How to apply Criterion Two

2.1. Common Position 2008/944/CFSP applies to all exports of military technology or equipment by Member States, and to dual use items as specified in Article 6 of the Common Position. Thus *a priori* Criterion Two applies to exports to all recipient countries without any distinction. However, because Criterion Two establishes a link with the respect for human rights as well as respect for international humanitarian law in the country of final destination, special attention should be given to exports of military technology or equipment to countries where there are indications of human rights violations or violations of international humanitarian law.

2.2. ***Information sources***: A common EU base of information sources available to all Member States consists of EU HOMs reports, EU human rights country strategies and in certain cases EU Council statements/conclusions on the respective recipient countries. These documents normally already take into account information available from other international bodies and information sources. However, because of the essential case-by-case analysis and the specificity of each licence application, additional information might be obtained as appropriate from:

- Member States diplomatic missions and other governmental institutions,
- Documentation from the United Nations, the ICRC and other international and regional bodies,
- Reports from international NGOs,
- Reports from local human rights NGOs and other reliable local sources,
- Information from civil society.

Furthermore the EU has designed and adopted specific guidelines to serve as a framework for protecting and promoting human rights in third countries, such as the Guidelines on the death penalty, torture, children and armed conflict and human rights defenders and the Action Plan on Human Rights and Democracy 2015-2019. A non-exhaustive list of relevant internet websites is contained in Annex I.

Elements to consider when forming a judgement

2.3. ***Key concepts:*** Examination of Criterion Two reveals several key concepts which should be taken into account in any assessment, and which are highlighted in the following text.

"Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, Member States shall:

(a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

(b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe;"

"Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

(c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law."

"For these purposes, military technology or equipment which might be used for internal repression will include, *inter alia,* military technology or equipment where there is evidence of the use of this or similar technology or equipment for internal repression by the proposed end-user, or where there is reason to believe that the equipment will be diverted from its stated end-use or end-user and used for internal repression. In line with Article 1 of this Common Position, the nature of the equipment will be considered carefully, particularly if it is intended for internal security purposes.

Internal repression includes, *inter alia*, torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights."

In assessing whether there is a clear risk that a proposed export might be used for internal repression Member States should consider the current and past record of the proposed end-user with regard to respect for human rights and that of the recipient country in general. The latter includes the policy line of recipient country's government; recent significant developments, including *inter alia* impact of "fight against terrorism"; effective protection of human rights in constitution; human rights training among key actors (e.g. law enforcement agencies); impunity for human rights violations; independent monitoring bodies and national institutions for promotion or protection of human rights.

2.4. ***International human rights instruments***: A non-exhaustive list of the main international and regional instruments is contained in Annex II.

These instruments and their respective additional protocols represent the main international norms and standards in the areas of human rights and fundamental freedoms. They guarantee civil and political rights (such as *inter alia* right to life; prohibition of slavery and forced labour; liberty and security of person; equality before the law; fair trial and effective remedy; freedom of expression and information; freedom of assembly; freedom of movement; freedom of thought, conscience and religion; right to seek and enjoy asylum); women's rights; children's rights; non-discrimination; rights of minorities and indigenous peoples; economic, social and cultural rights.

2.5. ***The recipient country's attitude:*** The following indicators should, as appropriate, be taken into account when assessing a country´s respect for, and observance of, all human rights and fundamental freedoms including the risk of the items covered under Article 2.1, Article 3 or Article 4 of the ATT being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

- The commitment of the recipient country´s Government to respect and improve human rights and to bring human rights violators to justice;
- The implementation record of relevant international and regional human rights instruments through national policy and practice;
- The ratification record of the country in question with regard to relevant international and regional human rights instruments;
- The degree of cooperation with international and regional human rights mechanisms (e.g. UN treaty bodies and special procedures);
- The respect for democratic principles in the country of final destination. Democracy is inextricably linked to the full respect of all human rights.

- The political will to discuss domestic human rights issues in a transparent manner, for instance in the form of bilateral or multilateral dialogues, with the EU or with other partners including civil society.

2.6. ***Serious violations of human rights***: In the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna in June 1993, the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all and democracy in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law was reaffirmed. Equally reaffirmed were the principles of universality, indivisibility, interdependence and interrelatedness of all human rights.

Regarding the qualification of a human rights violation as “serious”, each situation has to be assessed on its own merits and on a case-by-case basis, taking into account all relevant aspects. Relevant factor in the assessment is the character/nature and consequences of the actual violation in question. Systematic and/or widespread violations of human rights underline the seriousness of the human rights situation. However, violations do not have to be systematic or widespread in order to be considered as “serious” for the Criterion Two analysis. According to Criterion Two, a major factor in the analysis is whether the competent bodies of the UN, the EU or the Council of Europe (as listed in Annex III) have established that serious violations of human rights have taken place in the recipient country. In this respect it is not a prerequisite that these competent bodies explicitly use the term “serious” themselves; it is sufficient that they establish that violations have occurred. The final assessment whether these violations are considered to be serious in this context must be done by Member States. Likewise, the absence of a decision by these bodies should not preclude Member States from the possibility of making an independent assessment as to whether such serious violations have occurred.

2.7. ***Internal repression, clear risk, "might", case by case:*** The text of Criterion Two gives an ample set of examples of what constitutes internal repression. But assessing whether or not there is a clear risk that the proposed export might be used to commit or facilitate such acts requires detailed analysis. The combination of “clear risk” and “might” in the text should be noted. This requires a lower burden of evidence than a clear risk that the military technology or equipment will be used for internal repression.

An analysis of clear risk must be based upon a case-by-case consideration of available evidence of the history and current prevailing circumstances in the recipient state/regarding the proposed end-user, as well as any identifiable trends and/or future events that might reasonably be expected to precipitate conditions that might lead to repressive actions (e.g. forthcoming elections). Some initial questions that might be asked are:

- Has the behaviour of the recipient state/ the proposed end-user been highlighted negatively in EU Council statements/conclusions?
- Have concerns been raised in recent reports from EU Heads of Mission in the recipient state/regarding the proposed end-user?
- Have other international or regional bodies (e.g. UN, Council of Europe or OSCE) raised concerns?
- Are there consistent reports of concern from local or international NGOs and the media?

It will be important to give particular weight to the current situation in the recipient state before confirming any analysis. It may be the case that abuses have occurred in the past but that the recipient state has taken steps to change practices in response to domestic or international pressure, or an internal change in government. It might be asked:

- Has the recipient state agreed to external or other independent monitoring and/or investigations of alleged repressive acts?
- If so, how has it reacted to/implemented any findings?
- Has the government of the recipient state changed in manner that gives confidence of a change in policy/practice?
- Are there any EU or other multilateral or bilateral programmes in place aimed at bringing about change/reform?

Mitigating factors such as improved openness and an on-going process of dialogue to address human rights concerns in the recipient state may lead to the possibility of a more positive assessment. However, it is important to recognise that a lengthy passage of time since any highly publicised instances of repression in a recipient state is not on its own a reliable measure of the absence of clear risk. There is no substitute for up-to-date information from reliable data sources if a proper case-by-case assessment is to be made.

2.8. ***The nature of the military technology or equipment*** is an important consideration in any application. It is vital that any assessment of equipment under Criterion Two be realistic (i.e. are the items in question really useable as a tool of repression?). But it is also important to recognise that a wide variety of equipment has a track record of use to commit or facilitate repressive acts. Items such as Armoured Personnel Carriers (APCs), body armour and communications/surveillance equipment can have a strong role in facilitating repression.

2.9. ***The end-user*** is also a strongly linked consideration. If intended for the police or security forces, it is important to establish to exactly which branch of these forces in a recipient state the items are to be delivered. It should also be noted that there is no strict rule as to which branches of the security apparatus may have a role in repression. For example, the army may have a role in many states, while in others it may have no record of such a role. Some initial questions might include:

- Is there a record of this equipment being used for repression, in the recipient state or elsewhere?
- If not, what is the possibility of it being used in the future?
- Who is the end-user?

- What is the end-user's role in the recipient state?
- Has the end-user been involved in repression?
- Are there any relevant reports on such involvement?

2.10. ***The relevant principles established by instruments of international humanitarian law.***
International humanitarian law (also known as the "law of armed conflict" or "law of war") comprises rules which, in times of armed conflict, seek to protect people who are not or are no longer taking part in the hostilities (e.g. civilians and wounded, sick and captured combatants), and to regulate the conduct of hostilities (i.e. the means and methods of warfare). It applies to situations of armed conflict and does not regulate when a State may lawfully use force. International humanitarian law imposes obligations on all parties to an armed conflict, including organised armed groups.

The main principles of international humanitarian law applicable to the use of weapons in armed conflict are the rules of distinction, the rule against indiscriminate attacks, the rule of proportionality, the rule on feasible precautions, the rules on superfluous injury or unnecessary suffering and the rule on environmental protection.

The most important instruments of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols of 1977. They are complemented by treaties on particular matters including prohibitions of certain weapons and the protection of certain categories of people and objects, such as children and cultural property (see Annex IV for a list of the main treaties).

Relevant questions regarding the ratification and national implementation of international humanitarian law treaties include:

- Ratification of the four Geneva Conventions of 1949 and their Additional Protocols of 1977.
- Ratification of other key treaties of international humanitarian law.
- Ratification of treaties that contain express prohibitions or limitations on transfers of specific weapons.
- Has the recipient country adopted national legislation or regulations required by the international humanitarian law instruments to which it is a party?

2.11. **Serious violations of international humanitarian law** include grave breaches of the four Geneva Conventions of 1949. Each Convention contains definitions of what constitutes grave breaches (Articles 50, 51, 130, 147 respectively). Articles 11 and 85 of Additional Protocol I of 1977 also include a broader range of acts to be regarded as grave breaches of that Protocol. For the list of these definitions, see Annex V. The Rome Statute of the International Criminal Court includes other serious violations of the laws and customs applicable in international and non-international armed conflict, which it defines as war crimes (Article 8, sub-sections b, c and e; for the full text of the Rome statute, see http://legal.un.org/icc/statute/romefra.htm.

- Have violations been committed by any actor for which the State is responsible? (e.g. state organs, including the armed forces; persons or entities empowered to exercise elements of government authority; persons or groups acting in fact on its instructions or under its direction or control; violations committed by private persons or groups which it acknowledges and adopts as its own conduct.)
- Has the recipient country failed to take action to prevent and suppress violations committed by its nationals or on its territory?
- Has the recipient country failed to investigate violations allegedly committed by its nationals or on its territory?
- Has the recipient country failed to search for and prosecute (or extradite) its nationals or those on its territory responsible for violations of international humanitarian law?
- Has the recipient country failed to cooperate with other states, ad hoc tribunals or the International Criminal Court in connection with criminal proceedings relating to violations of international humanitarian law?

2.12. **Arms Trade Treaty**, Article 7 (1) (b) (i) ("serious violation of international humanitarian law") and (ii) (“serious violation of international human rights law”) and Article 7 (4) (“gender-based violence and violence against women and children”)

The Arms Trade Treaty contains a provision similar to criterion 2 of the EU Common Position. Article 7 states:

“Export and Export Assessment

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

[...]

(b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(ii) commit or facilitate a serious violation of international human rights law;

[...]”

The considerations above concerning criterion 2 also fully apply to the implementation of Article 7 (1) b) (i) and (ii).

The Arms Trade Treaty also contains a provision referring to a specific form of human rights and IHL violations that are not explicitly mentioned in the Common Position, but that are also covered by Criterion 2, i.e. gender-based violence (GBV) or violence against women and children.

Article 7 (4) states:

"4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children."

In line with these provisions of the Arms Trade Treaty the issue of gender-based violence (GBV) and violence against women and children should be taken into account when examining Criterion 2. Acts of GBV violate a number of human rights principles enshrined in international instruments and can constitute violations of international humanitarian law if perpetrated during armed conflict. Common examples of GBV include sexual violence (including rape), forced prostitution and trafficking. It should also be considered that the risk of GBV is always higher in emergencies/conflict situations.

The EU understanding of respect for human rights law and of international humanitarian law fully covers the acts referred to in Article 7 (4) of the ATT. Criterion 2 therefore fully encompasses the obligations stemming from Article 7 (4) of the ATT.

2.13. ***Clear risk.*** A thorough assessment of the risk that the proposed export of military technology or equipment will be used in the commission of serious violations of international humanitarian law should include an inquiry into the recipient's past and present record of respect for international humanitarian law, the recipient's intentions as expressed through formal commitments and the recipient's capacity to ensure that the equipment or technology transferred is used in a manner consistent with international humanitarian law and is not diverted or transferred to other destinations where it might be used for serious violations of this law.

Isolated incidents of international humanitarian law violations are not necessarily indicative of the recipient country's attitude towards international humanitarian law and may not by themselves be considered to constitute a basis for denying an arms transfer. Where a certain pattern of violations can be discerned or the recipient country has not taken appropriate steps to punish violations, this should give cause for serious concern.

Common Article 1 of the Geneva Conventions is generally interpreted as conferring a responsibility on third party states not involved in an armed conflict to not encourage a party to an armed conflict to violate international humanitarian law, nor to take action that would assist in such violations, and to take appropriate steps to cause such violations to cease. They have a particular responsibility to intervene with states or armed groups over which they might have some influence. Arms producing and exporting states can be considered particularly influential in "ensuring respect" for international humanitarian law due to their ability to provide or withhold the means by which certain serious violations are carried out. They should therefore exercise particular caution to ensure that their export is not used to commit serious violations of international humanitarian law.

The obligations set out in the Common Position 2008/944/CFSP are consistent with those set out in Article 7, paragraphs 1, 3 and 4 of the Arms Trade Treaty. Member States, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 of the ATT being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

Relevant questions to be considered include:

- Is there national legislation in place prohibiting and punishing violations of international humanitarian law?
- Has the recipient country put in place requirements for its military commanders to prevent, suppress and take action against those under their control who have committed violations of international humanitarian law?
- Has the recipient country ratified the Rome Statute of the International Criminal Court?

- Is the internal situation in the recipient State/end destination one which may increase the likelihood that the arms would be used to commit or facilitate the relevant acts of GBV identified in an assessment of the end-destination?

- Have international or regional bodies (e.g. UN, Council of Europe or OSCE) raised concerns about the occurrence/prevalence of GBV in the end destination?

- Does the recipient state cooperate with other states, ad hoc tribunals or the International Criminal Court in connection with criminal proceedings relating to violations?
- Is there an established minimum age for the recruitment (compulsory and voluntary) of persons into the armed forces?
- Have legal measures been adopted prohibiting and punishing the recruitment or use in hostilities of children?
- Does the recipient country educate and train its military officers as well as the rank and file in the application of the rules of international humanitarian law? (e.g. during military exercises)
- Has international humanitarian law been incorporated in military doctrine and military manuals, rules of engagement, instructions and orders?
- Are there legal advisers trained in international humanitarian law who advise the armed forces?
- Have the same measures been taken to ensure respect for international humanitarian law by other arms bearers which operate in situations covered by international humanitarian law?
- Have mechanisms been put in place to ensure accountability for violations of international humanitarian law committed by the armed forces and other arms bearers, including disciplinary and penal sanctions?
- Is there an independent and functioning judiciary capable of prosecuting serious violations of international humanitarian law?

- Is there a risk of a sudden or unexpected change of government or authority structures that could adversely affect the recipient's willingness or ability to respect international humanitarian law? (e.g. disintegration of state structures)
- Does the end-user have the capacity to use the equipment in accordance with international humanitarian law? (e.g. if military weapons are transferred to arms bearers other than the armed forces operating in situations covered by international humanitarian law, have they been trained in international humanitarian law?)
- Does the end-user have the capacity to maintain and deploy this technology or equipment? (If not, there may be reasonable concern as to how it will be used and over diversion to other actors.)
- Does the stated end-user have adequate procedures in place for stockpile management and security, including for surplus arms and ammunition?
- Are theft and leakages from stockpiles or corruption known to be a problem in the recipient country? If so, are there indications that the actors engaged in the arms export are involved in such practices.
- Is illicit trafficking of weapons a problem in the recipient country? Do groups involved in illegal arms trafficking operate in the country?
- Are border controls adequate in the recipient country or are the borders known to be porous?
- Does the recipient country have an effective arms transfer control system in place? (Import, export, transit, and transshipment.)

- Is the recipient the actual end-user of the military technology or equipment, will it accept verification of this and will it undertake not to transfer these to third parties without the authorisation of the supplier state.

2.14. ***Diversion.*** The question of internal diversion also needs consideration. There may be clues to this in the nature of the military technology or equipment and the end-user. It might be asked:

- Does the stated end-user have a legitimate need for this military technology or equipment? Or are the items in question more appropriate to another branch of the security apparatus?
- Would we issue a licence if the end-user were another part of the security apparatus of the recipient state?
- Do the different branches of the security forces have separate procurement channels? Is there a possibility that equipment might be redirected to a different branch?

2.15. ***Arriving at a judgement***. Based on information and assessment of elements suggested in paragraphs 2.3 - 2.14 above Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion Two.

ANNEX I (to Chapter 2 Section 2)

INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDE:

Office of the United Nations High Commissioner for Human Rights (www.ohchr.org)

United Nations (www.un.org ; http://untreaty.un.org)

International Committee of the Red Cross (www.icrc.org)

Council of Europe (www.coe.int)

European Union (http://europa.eu)

Organization for Security and Co-operation in Europe (www.osce.org)

Organization of American States (www.oas.org)

African Union (www.au.int)

Amnesty International (www.amnesty.org)

Human Rights Watch (www.hrw.org)

Fédération internationale des ligues des droits de l'homme (www.fidh.org)

Organisation mondiale contre la torture (www.omct.org)

Association for the Prevention of Torture (www.apt.ch)

International Commission of Jurists (www.icj.org)

OTHER INFORMATION SOURCES INCLUDE:

International Criminal Court and ad hoc tribunals

International agencies operating in the recipient state

International Crisis Group

Coalition to Stop the Use of Child Soldiers

Small Arms Survey

SIPRI and other research institutes

Military manuals (instructions to armed forces)

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ANNEX II (to Chapter 2 Section 2)

CORE INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

UNITED NATIONS:

International Covenant on Economic, Social and Cultural Rights (ICESCR)

International Covenant on Civil and Political Rights (ICCPR)

Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1)

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP2-DP)

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW-OP)

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Optional Protocol to the Convention Against Torture (CAT-OP)

Convention on the Rights of the Child (CRC)

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC)

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC)

1951 Convention on the Status of Refugees

1967 Protocol relating to the status of refugees

Rome Statute of the International Criminal Court;

REGIONAL INSTRUMENTS:

WITH RESPECT TO MEMBER STATES OF THE COUNCIL OF EUROPE:

European Convention on Human Rights, including protocols 6 and 13 concerning the abolition of the death penalty

European Convention for the Prevention of Torture

WITH RESPECT TO MEMBER STATES OF THE ORGANIZATION OF AMERICAN STATES:

Inter-American Convention on Human Rights

Additional Protocol to the American Convention of Human Rights in the area of Economic, Social and Cultural Rights, Protocol of San Salvador

Protocol to the American Convention on Human Rights to abolish the death penalty
Inter-American Convention on Forced Disappearance of Persons

Inter-American Convention to Prevent and Punish Torture

WITH RESPECT TO MEMBER STATES OF THE AFRICAN UNION:

African Charter on Human and People's Rights

Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

African Charter on Rights and Welfare of the Child

WITH RESPECT TO MEMBER STATES OF THE ARAB LEAGUE:

Arab Charter on Human Rights

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ANNEX III (to Chapter 2 Section 2)

COMPETENT BODIES OF THE UN, THE COUNCIL OF EUROPE OR THE EU TO ESTABLISH SERIOUS VIOLATIONS OF HUMAN RIGHTS ARE:

UNITED NATIONS:

The General Assembly (including country-specific resolutions)

The Security Council

Human Rights Council and the Economic and Social Council

The Office of the United Nations High Commissioner for Human Rights

Special procedures and other mandate-holders

The treaty bodies

COUNCIL OF EUROPE:

The Ministerial Committee of the Council of Europe

Parliamentary Assembly

European Court of Human Rights

The Council of Europe Commissioner for Human Rights

European Commission against Racism and Intolerance (ECRI)

European Committee for the Prevention of Torture (CPT)

EUROPEAN UNION:

The European Council

Statements by CFSP bodies

Country-specific common positions and declarations of the EU

EU Annual human rights report

EU HOMs human rights reports and EU human rights country strategies

Resolutions and declarations by the European Parliament

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ANNEX IV (to Chapter 2 Section 2)

MAIN TREATIES OF INTERNATIONAL HUMANITARIAN LAW

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. Geneva, 8 June 1977.

Declaration provided for under article 90 of Additional Protocol I: Acceptance of the Competence of the International Fact-Finding Commission.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. Geneva, 8 June 1977.

Convention on the Rights of the Child, New York, 20 November 1989.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, New York, 25 May 2000.

Rome Statute of the International Criminal Court, 17 July 1998.

Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

First Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, New York, 10 December 1976.

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and Warfare, Geneva, 17 June 1925.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, opened for signature in London, Moscow and Washington, 10 April 1972.

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. Geneva, 10 October 1980.

- Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-traps and Other Devices, 10 October 1980 (Protocol II to the 1980 Convention)
- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 October 1980. (Protocol III to the 1980 Convention)
- Protocol on Blinding Laser Weapons, 13 October 1995. (Protocol IV to the 1980 Convention)
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended to the 1980 Convention)
- Amendment to the 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, 21 December 2001
- Protocol on Explosive Remnants of War, 28 November 2003 (Protocol V to the 1980 Convention).

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris 13 January 1993.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997.

Convention on Cluster Munitions, Dublin, 30 May 2008

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ANNEX V (to Chapter 2 Section 2)

Grave breaches specified in the 1949 Geneva Conventions and in Additional Protocol I of 1977

Grave breaches specified in the four 1949 Geneva Conventions (Art. 50, 51, 130, 147 respectively)	**Grave breaches specified in the third 1949 Geneva Convention (Art. 130)**	**Grave breaches specified in the fourth 1949 Geneva Convention (Art. 147)**
- wilful killing; - torture or inhuman treatment, including biological experiments; - wilfully causing great suffering or serious injury to body or health; - extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and	- compelling a prisoner of war to serve in the forces of the hostile Power; - wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in the Convention.	- compelling a protected person to serve in the forces of the hostile Power; - wilfully depriving a protected person of the rights of fair and regular trial prescribed in the Convention - unlawful deportation or transfer or unlawful confinement of a protected person;

Grave breaches specified in the four 1949 Geneva Conventions (Art. 50, 51, 130, 147 respectively)	Grave breaches specified in the third 1949 Geneva Convention (Art. 130)	Grave breaches specified in the fourth 1949 Geneva Convention (Art. 147)
wantonly (this provision is not included in Art. 130 third 1949 Geneva Convention).		- taking of hostages.

Grave breaches specified in the Additional Protocol l of 1977
(Art. 11 and Art. 85)

Article 11:

Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

Article 85 (2):

Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

Article 85 (3):

In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

Article 85 (4):

In addition to the grave breaches defined in the preceding paragraphs and the Conventions, the following shall be regarded as grave breaches when committed wilfully and in violation of the Conventions or the Protocol;

- making the civilian population or individual civilians the object of attack; - launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; - launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects; - making non-defended localities and demilitarised zones the object of attack; - making a person the object of an attack in the knowledge that he is *hors de combat*; - the perfidious use of the distinctive emblem of the red cross and red crescent or other protective signs.	- the transfer by the occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; - unjustifiable delay in the repatriation of prisoners of war or civilians; - practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination; - making the clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives or used by the adverse party in support of its military effort; - depriving a person protected by the Conventions or by Protocol 1 of the rights of fair and regular trial.

Section 3: Best practices for the interpretation of Criterion Three

How to apply Criterion Three

3.1. Council Common Position 2008/944/CFSP applies to all exports by Member States of military technology or equipment included in the EU Common Military List, and to dual use items as specified in Article 6 of the Common Position. Criterion Three applies to all recipient countries without distinction. However, these best practices follow the principle that if there is an armed conflict or if there are internal tensions in the country of destination, a careful analysis should be carried out of the risk of this proposed export provoking or prolonging the conflict or aggravating the existing tensions and escalating them into a wider conflict. If the analysis shows a risk of this happening, a restrictive approach should be adopted towards the export licence under consideration. Particular attention should be given to the role of the end-user in this conflict. All export licences should be assessed on a case-by-case basis and consideration should be given to Criterion Three where there are concerns over the existence of tensions or armed conflicts.

3.2. ***Information sources:*** Information on whether there is a risk that the equipment would provoke or prolong armed conflicts, or aggravate existing tensions or conflicts in the country of final destination, should be sought from a Member State's mission in the country concerned, as well as from the Foreign Ministry country desk.

A common EU base of information sources available to all Member States consists of EU HOMs reports, EU reports, and in some cases, EU Council statements/conclusions on the respective recipient country. When consulting other Member States on their denials to an area of concern, Member States are encouraged to share their analysis and interpretation of the internal situation in the country of final destination.

Wider internet and intelligence reports – from national intelligence services - are also helpful, especially when assessing the possible increase in capabilities.

Additional information can be obtained from:

- Local UN/EU/OSCE missions;
- Documentation from the UN (UNGA, UNSC), International Criminal Court and/or other international and regional bodies;
- Research institutes (e.g. SIPRI);
- Reports from international NGOs;
- Information from local and regional NGOs / civil society.

A non-exhaustive list of relevant internet websites is contained as Annex I.

Elements to consider when forming a judgement

3.3. ***Key concepts:*** Examination of Criterion Three reveals several key concepts which should be taken into account in any assessment, and which are highlighted below.

Internal situation

"Internal situation" refers to the economic, social and political developments and stability within the borders of the country of final destination. Common Position 2008/944/CFSP elsewhere also refers to the "country of final destination" as the "recipient country".

Function of the existence of tensions or armed conflicts

"Tensions" refers to unfriendly or hateful relations between different groups, or groups of individuals, of the society based either on race, colour, sex, language, religion, political or other opinion, national or social origin, interpretation of historic events, differences in economic wellbeing or ownership of property, sexual orientation, or other factors. Tensions could be at the origin of tumult or violent actions, or a cause for the creation of private militia not controlled by the State.

"Armed conflicts" refers to the escalation of the tensions between above mentioned groups to the level in which any of the groups uses arms against others.

In considering an export licence application the competent authority must assess the internal situation of the country of destination; possible participation and role of the end-user in the internal conflict or tensions and the probable use of the proposed export in the conflict. In assessing the potential risks in the country of final destination the competent authority might ask the following questions:

- What is the end-use of the proposed export (military technology or equipment)? Would the export be used to enforce internal security or to continue with the hostilities?
- Is the military equipment or technology intended to support internationally-sanctioned peace-keeping/peace enforcing operations or humanitarian interventions?
- Is the end-user participating or closely related to a party involved in the armed conflict within the country? What is the role of the end-user in the conflict?
- If components or spares are being requested, is the recipient state known to operate the relevant system in armed conflict in the country?
- Have there been recent reports that the existing tensions might be aggravating? Is there a risk that the existing tensions might turn into an armed conflict when one or more of the participants gain access to the military technology or equipment to be exported?
- Is the country of final destination subject to regional or UN embargoes because of the internal situation in the country (see also criterion1)?

The nature of the equipment

The nature of equipment will impact the judgement of whether to approve or refuse a licence. Consideration should be given as to whether the technology or equipment to be exported actually is related, directly or indirectly, to the tensions or conflicts in the country of final destination. This will be all the more important when there already is an existing armed conflict.

Some questions to consider might be:

- Is the export in nature such, that it is or could be used in an armed conflict within the country of final destination?
- Is there a risk that the existing internal tensions might turn into an armed conflict when the proposed end-user obtains access to this military technology or equipment?

The end-user

The end-user also plays an important role in the analysis. If there are concerns related to Criterion Three, it is important to establish exactly for which branch of the armed forces, police or security forces the export is intended. For example, in a recipient country the army and police might be involved in an armed conflict in which the navy has no role. In this respect, the risk of internal diversion should also be considered.

More complex cases arise when equipment may be going to a research institute or private company. Here a judgement should be made on the likelihood of diversion, and the views on Criterion Three should be based on the other criteria, specifically concerns related to Criterion Seven, the risk of diversion.

The following might be considered:

- What is the end-user's role in the country of final destination? Is the end-user part of the problem, or rather attempting to be part of the solution?
- Is the end-user involved in the internal armed conflict or tensions?
- Are there any relevant reports of such involvement?

3.4. ***Arriving at a judgement***

Based on information and the over-all risk assessment as suggested in the paragraphs above, Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion Three.

ANNEX I (to Chapter 2 Section 3)

NON-EXHAUSTIVE LIST OF INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDE:

United Nations
(www.un.org)

1540 Committee
(http://www.un.org/en/sc/1540/)

OSCE/arms controls
(www.osce.org/)

European Union
(http://europa.eu)

Section 4: Best practices for the interpretation of Criterion Four

How to apply Criterion Four

4.1. Common Position 2008/944/CFSP applies to all exports by Member States of military equipment and technology included in the EU Common Military List and to dual use items as specified in Article 6 of the Common Position. Criterion Four applies to all recipient countries without distinction. However, these best practices follow the principle that where there is a greater risk of regional conflict, greater scrutiny of Criterion Four is required than in cases where there is a lesser risk. All export licences should be assessed on a case-by-case basis and consideration given to Criterion Four where there are concerns over the preservation of peace, security and stability in the region.

The purpose of Criterion Four is to ensure that any export does not encourage, aggravate, provoke or prolong conflicts or tensions in the region of the intended recipient country. The criterion makes a distinction between the intention to use the proposed export for aggressive as opposed to defensive purposes. The criterion is not intended to preclude exports to countries that are (potential) victims of aggression or a threat of aggression. A careful assessment would need to be carried out as to whether there are sound indications of an intention by the intended recipient country to use the proposed export to attack, potentially attack or threaten to attack another country.

4.2. ***Information sources***

Information on whether the equipment is a risk to the preservation of the regional peace, security and stability should be sought from a Member State's mission in the country concerned, as well as from Foreign Ministry country desks; both desks responsible for the recipient country and those responsible for the threatened/aggressor country.

A common EU base of information sources available to all Member States consists of EU HOMs reports, EU reports, and in some cases, EU Council statements/conclusions on the respective recipient country and the region. Extensive use of the EU INTCEN (Country Risk Assessment) could be made. When consulting other Member States on their denials to an area of concern, the Member States are encouraged to share their analysis and interpretation of the regional situation.

The wider internet and intelligence reports – from national intelligence services - are also helpful, especially when assessing the possible increase in capabilities.

Additional information can be obtained from:

- Local UN/EU/OSCE missions;
- Documentation from the UN (UNGA, UNSC, UN Arms register), International Criminal Court and/or other international and regional bodies;
- Research institutes (e.g. SIPRI);
- Reports from international NGOs;
- Information from local and regional NGOs / civil society.

A non-exhaustive list of relevant internet websites is contained as Annex I.

Elements to consider when forming a judgement

4.3. ***Key concepts***

Preservation of regional peace, security and stability

Member States shall deny an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.

All nations have the right to defend themselves according to the UN Charter. This criterion addresses the issue of whether the recipient state has intentions to use or threaten to use the proposed export aggressively against another country. An assessment should therefore be made of the recipient's intentions, as well as whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations.

Licence applications to sensitive and potentially sensitive destinations are carefully assessed on a case-by-case basis, especially when the export destination concerns a country that is or has been involved in armed conflict. When analysing whether there is a clear risk, the history of armed conflict and the current prevailing circumstances in the recipient state and the region should be taken into consideration, as well as any identifiable trends and/or future events that might reasonably be expected to heighten tensions or lead to aggressive actions.

The wording "shall deny" in this criterion means that if in the assessment of a licence application it has been established that there is a clear risk that the proposed export would be used aggressively against another country or to assert by force a territorial claim, the export licence must be denied regardless of the outcome of the analysis with respect to the other criteria set out in Article 2 of the Common Position, or any other considerations.

When considering these risks, Member States will take into account *inter alia*:

(a) the existence or likelihood of armed conflict between the recipient and another country

For the purposes of this element, a judgement will have to be made as to whether there is a clear risk that this equipment will be used in an existing armed conflict between the recipient country and its neighbours or another conflict in the region. Where there is no armed conflict, the regional situation should be considered. Growing tensions in the region, increased threats of conflict or weakly held peace arrangements are examples of where there is a likelihood of a conflict, putting the preservation of the regional peace, security and stability at risk.

In these cases, a judgement would need to be made as to whether there is a clear risk that supplying this piece of equipment would hasten the advent of conflict, for instance by giving the recipient country an advantage over its neighbours or others in the region. Where the equipment to be exported will add to the military capability of the recipient country, a judgement will have to be made as to whether there is a clear risk that this equipment will prolong an existing conflict or bring simmering tensions into armed conflict.

The following questions are indicators that may be taken into consideration as appropriate:

- Is there an existing conflict in the region?
- Is the current situation in the region likely to lead to an armed conflict?
- Is the threat of conflict theoretical / unlikely or is it a clear and present risk?

(b) a claim against the territory of a neighbouring country which the recipient has in the past tried or threatened to pursue by means of force

An assessment should be made on whether there is a clear risk that the recipient country will by armed conflict or threat of force assert a territorial claim on a neighbouring country. Such a territorial claim might be stated as an official position or be voiced by official representatives or relevant political forces of the recipient country and could relate to land, sea or air space. The neighbouring country does not have to be the direct neighbour of the recipient country.

When making a judgement any recent claims by the recipient country on another's territory should be factored in. Where the recipient country has tried in the past to pursue by force a territorial claim or is threatening to pursue a territorial claim, a judgement should be made as to whether it seems probable that the equipment would be used in such a case and as to whether it would give the recipient country an additional capability to try to pursue this claim by force, thus destabilising the region.

The following questions are indicators that may be taken into consideration as appropriate:

- Is the recipient country pursuing a claim against the territory of a neighbouring country?
- Has a territorial claim led to conflict in the region, or underlying tensions between the recipient country and its neighbours?
- Has the recipient country tried to resolve the issue through peaceful means, has it tried in the past to assert by force its territorial claim, or has it threatened to pursue its territorial claim by force?

(c) the likelihood of the military technology or equipment being used other than for the legitimate national security and defence of the recipient

When assessing this element of Criterion Four, the exporting state should estimate whether the recipient state has expressed an aggressive military doctrine, and the likelihood of the requested equipment being used in accordance with this doctrine. The exporting state should also estimate whether the requested equipment is compatible with, or constitutes a necessary addition to or replacement of, existing armament systems in the defence forces of the recipient state. It may also be relevant to take into account the quantity and quality of the equipment to be exported.

(d) the need not to affect adversely regional stability in any significant way

A judgement on this criterion will have to be made on whether supplying the recipient country with the equipment will significantly improve its military capability, and if it does, would a neighbouring country as a result be put under threat of conflict. Where there are existing tensions in the region, would supplying this equipment enhance the recipient country's capability by introducing a new piece of equipment into the region which could threaten a neighbouring country.

The following questions are indicators that may, if appropriate, be taken into consideration:

- Why does the recipient wish to acquire the military equipment or technology?
- Is this equipment simply a replacement or for maintenance for existing items that might be old or in disrepair, or is the recipient developing new capabilities, such as a significantly improved air strike capability?

The nature of the equipment

The nature of the equipment to be exported will impact the judgement of whether to approve or refuse a licence. Consideration should be given as to whether there is a clear risk that the equipment can be used in a conflict between the recipient country and its neighbours. This will be used to a greater extent where there are regional tensions or armed conflicts. Where tensions exist, the type of equipment is all the more important as the equipment could significantly increase the recipient country's capability to move to armed conflict or threaten armed conflict. Could a neighbouring country be moved to increase its arms imports due the export of this equipment? Given tensions in certain regions, an export could be seen as an increase in threat to a neighbouring country, and thus consideration of this question becomes vital.

Some questions to consider might be:

- Would the recipient's capability be enhanced by the export, and if so, would it be enhanced to the point where an existing power balance would be upset? Given the circumstances in the recipient country and its intentions, would an enhanced capability present a clear risk of hastening the advent of conflict?
- Would a neighbouring country feel threatened by the military technology or equipment to be exported?
- Is there a risk that the existing regional tensions might turn into an armed conflict when one or more of the participants obtains access to this military technology or equipment?

Is the export in nature such, that it is or could be used in an armed conflict within the region? What is the likelihood of this equipment being used in a conflict?

The end-user

A judgement would have to be made on whether the end-user would allow this equipment to be used in a manner inconsistent to Criterion Four. If it is going directly to the military/government, a decision has to be made on whether the equipment will be used in any military action against another country.

More complex cases arise when the military technology or equipment may be going to a research institute or private company. Here a judgement should be made of the likelihood of diversion, and views on Criterion Four should be based on the other criteria, specifically concerns related to Criterion Seven, the risk of diversion.

The following might be considered:

- Is the export likely to be deployed in conflict with a neighbouring state? Or would it most likely go to the Police or a UN contribution, or some other branch of the security forces not directly connected to the Criterion Four concern?

4.4. ***Arriving at a judgement:*** Based on the information and assessment of elements suggested in the guidance above, Member States will reach a judgement as to whether the proposed export should be denied on the basis of Criterion Four.

ANNEX I (to Chapter 2 Section 4)

NON-EXHAUSTIVE LIST OF INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDE:

United Nations
(www.un.org)

1540 Committee
(http://www.un.org/en/sc/1540/)

OSCE/arms controls
(www.osce.org)

European Union
(http://europa.eu)

Section 5: Best practices for the interpretation of Criterion Five

How to apply Criterion Five

5.1. Council Common Position 2008/944/CFSP applies to all exports by Member States of military technology or equipment included in the EU Common Military List, and to dual use items as specified in Article 6 of the Common Position; without any restrictions on destination. The extent of its application is also valid for Criterion Five. Unlike the other seven criteria, which draw Member States' attention to a particular aspect of the country of destination deemed to be a source of risk, Criterion Five requires the Member States to carry out an analysis focused on a parameter specific to them: their national security and that of friends, allies and other Member States. The objective of Criterion Five is to prevent an export of military technology or equipment from affecting the national security of Member States, allied or friendly countries. Exports will have to be evaluated in the light of Criterion Five, without prejudice to compliance with the other criteria set by the Common Position.

Two points must be subject to analysis before any licence is issued:

(a) the potential impact of the operation on the security and defence interests of friends, allies or other Member States, without prejudice to observance of the other criteria, particularly Criteria Two and Four;

(b) the consequences of the export on the operational security of the armed forces of Member States and of friendly or allied countries.

5.2. ***Information sources***: The information relating to the national security of Member Stares and of territories whose external relations are the responsibility of a Member State, and to defence interests, come mainly from the following sources:

- Charter of the United Nations;
- NATO Treaty [2];
- OSCE: Conference on Security and Cooperation in Europe (Helsinki Final Act 1975); Principles governing conventional arms transfers (25 November 1993)
- Council of Europe;
- Treaty on European Union; the basic CFSP texts ("A secure Europe in a better world. European Security Strategy");
- National or regional texts: defence agreements; assistance agreements; military cooperation agreements; alliances, etc.

Since security and defence agreements are usually confidential, the Member States may, when dealing with a specific application likely to fall within the scope of Criterion Five, consult their friends and allies directly in order to deepen their analysis of the possible impact of the export on security and defence interests.

[2] The reference concerns certain Member States of the EU only. Cf. Section 5.6 below.

Elements to consider when forming a judgement

5.3 ***Key concepts.*** The heading of Criterion Five reads as follows: ***"National security*** *of the Member States and of* ***territories whose external relations are the responsibility of a Member State****, as well as that of* ***friendly and allied countries"*** [3].

5.4. ***National security.*** National security refers to the capability of the Member States to ensure territorial integrity, protect the population and preserve national security interests as well as the resources and supplies deemed essential for its subsistence and its independence vis à vis all kinds of threats and attacks.

National security is closely linked to the security of Europe. The European Security Strategy adopted by the European Council in December 2003 defined the spectre of threats to the security of the European Union. These include: terrorism (religious extremism, electronic networks); proliferation of weapons of mass destruction; regional conflicts (violent or frozen conflicts which persist on our borders, threatened minorities); state failure (corruption, abuse of power, weak institutions, lack of accountability, civil conflict); organised crime (crossborder trafficking in drugs, women, illegal migrants and weapons, maritime piracy).

National security must also be assessed by taking account of international (or collective) security, which is among the aims pursued by the Charter of the United Nations. The latter provides that regional systems of collective security are lawful, provided that such arrangements are consistent with the purposes and principles of the universal system (Article 52). It recognises the inherent right of individual or collective self-defence (Article 51).

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[3] This phrase is taken over and adapted from one of the principles governing conventional arms transfers adopted by the OSCE: "*Each participating State will avoid transfers which would be likely to threaten the national security of other States and of territories whose external relations are the internationally acknowledged responsibility of another State*." (principle 4(b)(ii)).

5.5. ***Territories whose external relations are the responsibility of a Member State.*** The territories in question may be assimilated to the following types:

- The territories covered by Article 5 of the NATO Treaty, which defines the geographical scope of an armed attack which might trigger the mechanism of military assistance between the parties;

- The **outermost regions (ORs):** the four French overseas departments (ODs) (Guadeloupe, French Guiana, Martinique, Réunion); the Portuguese autonomous regions of the Azores and Madeira in the Atlantic Ocean; the Spanish autonomous community of the Canary Islands in the Atlantic Ocean;

- The **overseas countries and territories**, covered by Articles 198 to 204 of the Treaty on the functioning of the EU (TFEU), and listed in Annex II to the TFEU: Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Bonaire, Curacao, Saba, Sint Eustatius, Sint Maarten, Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territory, British Indian Ocean Territory, Turks and Caicos Islands, British Virgin Islands, Bermuda;

- The European territories to which the provisions of the TFEU apply under certain conditions (Article 349 of the TFEU).

5.6. ***Allied countries.*** Allied countries may be defined as the States associated by a treaty or an international agreement providing for a solidarity clause or a mutual defence clause. A solidarity clause provides for the mobilisation of all the instruments available to the States parties, including military means, if one of them is the victim of a terrorist attack or of a natural or manmade disaster. A collective defence clause stipulates that in the event of an armed attack on one of the States parties, the others have an obligation to give it aid and assistance by all the means in their power, whilst observing the specific character of their security and defence policy.

Examples of mutual defence clauses are Article 5 of the North Atlantic Treaty establishing the Atlantic alliance and Article 42(7) of the Treaty on European Union (TEU). The mutual defence clause laid down in the TEU is supplemented by the solidarity clause (Article 222 of the Treaty on the Functioning of the EU (TFEU)) which provides that Member States have to act jointly where a Member State is the victim of a terrorist attack or a natural or man-made disaster. Such clauses may also be included in bilateral defence agreements, but these are not generally published.

Most of the EU Member States are members of NATO, apart from Sweden, Ireland, Cyprus, Malta, Austria and Finland.

5.7. ***Friendly countries.*** The description "friendly countries" is less precise than "allied countries". Generally speaking, it is likely to apply to countries with which the Member State maintains a close and/or longstanding bilateral relationship, particularly in the field of defence and security, or with which it shares values and interests and pursues common objectives.

To determine whether a country may be described as a friend by a particular Member State, the Member States may check for the existence of a body of positive evidence, including: the number of persons holding dual nationality, the presence of European nationals, the existence of a language community, the number of trade agreements and cooperation agreements, etc.

The text of Criterion 5 reads as follows:

"Member States shall take into account:

(a) the potential effect of the military technology or equipment to be exported ***on their defence and security interests*** *as well as those of Member States and those of friendly and allied countries, while recognizing that this factor cannot affect consideration of the criteria on respect for human rights and on regional peace, security and stability;*

(b) the risk of ***use*** *of the military technology or equipment concerned* ***against their forces*** *or those of friends, allies or other Member State."*

5.8. ***Criterion 5a***

5.8.1. ***The meaning of the potential effect of export***

(a) Positive effect

If the proposed export helps to reinforce the national security, in particular the defence and security interests, of friends, allies and other Member States, the assessment will be favourable *a priori* without prejudice to the analysis which will have to be conducted in terms of Criteria Two and Four.

(b) Negative effect

If, on the other hand, export would directly or indirectly threaten the defence and security interests of friends, allies and other Member States, the *a priori* assessment will be unfavourable.

The assessment will take into account in particular:

- The maintenance of strategic balance;
- The offensive nature of the equipment exported;
- The sensitivity of the material;
- The increase in operational performance which would be brought about by the material exported;

- The deployability of the equipment exported and/or the deployability conferred by that equipment;
- The end use of the material;
- The risk that the material will be diverted.

5.8.2. ***Defence and security interests***

When analysing the risk to their defence and security interests and to those of allies, friends and other Member States, Member States must not fail to take into account the possible impact on the security of their forces when deployed out of area.

Moreover, this assessment will be without prejudice to compliance with the other Criteria.

5.9. ***Criterion 5b***

The operational risk is analysed as follows:

(a) Is there a direct threat to the security of the forces of a Member State or those of a friendly or allied country?

The threat may be permanent or temporary. The Member State will consider very carefully those applications where the final recipient is in a region known to be unstable, in particular where the export is for armed forces which might not always be under total or permanent control. In time such instability is likely to give rise to a threat for our forces or for those of an ally or friend, particularly where such forces are present in the region for military cooperation or peacekeeping operations.

In sum, if an export is liable to engender a direct threat to the security of the forces of a Member State or of an allied or friendly country, who are present either in the country of final destination or in a neighbouring country, the *a priori* assessment will be unfavourable. The same approach will be used to ensure the security of international peacekeeping forces.

(b) Is there a risk that the military technology or equipment will be diverted to a force or body which is hostile to the interests or forces of a Member State, friend or ally?

This risk is analysed in the same way as those mentioned in Criterion Seven. The exporting country will take account of the existence of terrorist groups, organisations engaged in armed struggle against those currently in power, or organised crime networks which might use the equipment in activities which could affect the security of the forces of the Member States and of allied or friendly countries, as well as that of international peacekeeping forces, or which might use such equipment in a way that would be inconsistent with one of the other criteria set by the Common Position.

(c) Does the recipient country have the technical capacity to use the equipment?

Technical capacity refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. It also refers to the technological level of the recipient country and its operational capacity, and generally to the standard of performance of its equipment.

Consequently, examination of the compatibility of an export of military technology or equipment with respect to this technical capacity should include consideration of whether it is opportune to deliver to the recipient equipment which is more sensitive or sophisticated than the technological means and operational needs of the recipient country.

In order to determine this compatibility, Member States could consider the following questions:

- Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- Is the technological level of the equipment requested proportionate to the needs expressed by the recipient country and to its operational capacity?
- Is similar equipment already in service well maintained?
- Are enough skilled personnel available to be able to use and maintain the equipment? [4]

[4] For instance, are a high proportion of the country's engineers and technicians already working in the military sector? Is there a shortage of engineers and technicians in the civilian sector that could be aggravated through additional recruitment by the military sector?

(d) To take their analysis of the operational risk into greater depth, especially for particularly sensitive cases, the Member States could carry out impact studies on a case-by-case basis, drawing on any relevant information which might be exchanged between the Member States, friends or allies. These studies will aim to establish the presence of national, European, and international forces, and those of friends or allies, in the various regions of the world, and also to evaluate the reality of the risk that the equipment or technology to be exported will be used against those forces.

These impact studies could include the following questions:

- In its analysis of the reality of the risk, the Member State will in particular take into account:

  - The nature of the equipment: whether it is directly offensive in character, the technological superiority which it would confer on the forces possessing it, its autonomy of use, the increase in operational performance which the equipment would allow;

  - Any distinctions in the doctrine for the use of the equipment, depending on the user;

  - The nature of the operations: war between conventional forces, asymmetric war, civil war, etc.

- In its analysis of the risk of diversion, the Member State will in particular take into account:

  - Whether the equipment can be easily diverted, then easily used even by non-military agents, and/or incorporated into other systems;

  - Whether the equipment can be adapted for military use, or used to modify other equipment for military use (in particular, to transform nonlethal equipment into a lethal weapon);

  - Some equipment could be the subject of special attention under this heading, in particularly small arms and light weapons (including MANPADS) and night vision and light-intensifying equipment;

  - In this respect, operations with increased control measures (marking and traceability, on-site inspection) or in the fight against dissemination (destruction of old stocks, quantity surveillance mechanism) will receive a less restrictive *a priori* assessment.

5.10. ***Arriving at a judgement***

Depending on the information and the assessment of the factors suggested in paragraphs 5.8 and 5.9 above, the Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion 5.

ANNEX I (to Chapter 2 Section 5)

INFORMATION SOURCES

EU (European Union)

http://www.europa.eu/

UN (United Nations)

http://www.un.org/

OSCE (Organisation for Security and Cooperation in Europe)

http://www.osce.org/

NATO (North Atlantic Treaty Organisation)

http://www.nato.int/

Section 6: Best practices for the interpretation of Criterion Six

How to apply Criterion Six

6.1. Common Position 2008/944/CFSP applies to all exports by Member States of military equipment or technology included in the EU Common Military List, and to dual use items as specified in Article 6 of the Common Position. Thus, generally speaking, Criterion Six applies to exports directed to all non EU recipient countries.

However, because Criterion Six establishes a link to the behaviour of the recipient country with regard to the international community, special attention should be given to those countries which represent reasons of concerns because of their attitude to terrorism, the nature of their alliances and respect for international law.

In adherence with the principles expressed in the Preamble and in the relevant provisions of the Arms Trade Treaty and as stressed in Article two of the EU Common Position 2008/944/CFSP, another aspect to be considered while proceeding in evaluations based on criterion Six should be the support or encouragement provided by the recipient country to the international or transnational organized crime[5]. With reference to the arms trafficking and to the scope and relevant provisions of the ATT, it is important to recall the relevant international normative framework the "Protocol against the Illicit manufacturing of and trafficking in firearms, their parts and components and ammunition", that supplements the United Nations Convention against Transnational Organized Crime.

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[5] Referring to definitions listed in art. 2 of the United Nations Convention against Transnational Organized Crime, Transnational Organized Crime defines the illegal and criminal activities led by "Organized Criminal Groups" or by "Structured Groups", whose aim is to realize offences and serious crimes of transnational nature in order to obtain, directly or indirectly, a financial or other material benefit and that are punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.
On the basis of article 3 para 2 of the Convention, the organized crime is transnational when it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State.

6.2. ***Information sources***. A common EU base of information sources available to all Member States consists of EU Heads of Mission (HOMs) reports, EU Council statements/conclusions, as well as UN Security Council Resolutions.

Additional information might be obtained also from:

- Member States' diplomatic missions and other national governmental institutions;
- The United Nations and other international and regional bodies and agencies, such as the Organization for Security and Co-operation in Europe (OSCE), the Regional Centre on Small Arms in Nairobi, the Organisation of American States and the International Atomic Energy Agency;
- The International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies, and other humanitarian bodies;
- Europol, Interpol and intelligence agencies;
- Non-governmental organizations and other reliable sources.

A non-exhaustive list of relevant information sources is contained in Annex I.

6.3. ***Key concepts.*** Criterion Six refers to a broad field of overarching issues which should be taken into account in any assessment, and which are highlighted in its text:

"*The behaviour of the buyer country with regard to the international community, as regards in particular its attitude to terrorism, the nature of its alliances and respect for international law.*

Member States shall take into account inter alia the record of the buyer country with regard to:

(a) its support for or encouragement of terrorism and international organised crime;

(b) its compliance with its international commitments, in particular on the non-use of force, and with international humanitarian law;

(c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in point (b) of Criterion One."

Consequently, in assessing whether an export licence should be granted or not, Member States should consider the current and past record of the buyer country with regard to its attitude to terrorism and international organized crime, the nature of its alliances, its respect for international commitments and law, concerning in particular the non-use of force, international humanitarian law and WMD non-proliferation, arms control and disarmament.

Criterion Six has to be considered for buyer countries whose governments exhibit negative behaviour with respect to the above provisions, thus, during the assessment the specific identity and the nature of the end-user or the equipment to be exported are not the main focus. In fact the focus of the analysis is the **behaviour of the buyer country**, more than any consideration of the risk that a particular transfer might have particular negative consequences.

Thus, concerning the key concepts stressed in Criterion Six, Member States could consider the following suggestions.

6.4. ***Buyer country's support or encouragement of terrorism and international organised crime.***
A higher degree of scrutiny is required when evaluating individual export licence applications to buyer countries suspected of supporting terrorism and international organized crime in any way.

In this framework, the term "terrorism" is to be understood to mean "terrorist acts" prohibited under international law, such as deliberate attacks on civilians, indiscriminate attacks, hostage taking, torture or deliberate and arbitrary killings, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to commit or to abstain from committing any act.

Concerning “international organised crime”, reference should be made to activities such as drug trafficking, trade in human beings, illegal immigrant smuggling, trafficking in nuclear and radioactive substances, money laundering *et similia*, conducted by a structured group of persons, existing for a period of time and acting in concert with the aim of committing serious crimes or offences established in accordance with the UN Convention against Trans-national Organised Crime. With reference to the Protocol against the Illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, supplementing the United Nations Convention against Transnational Organized Crime and to the Arms Trade Treaty, illicit manufacturing and trafficking in arms should be considered among the illicit activities of organized criminal groups.

A buyer country may encourage or support terrorism and international crime in many ways and before granting a licence, the competent authority might ask, among others, the following questions:

- Does the buyer country have a record of past or present terrorist/criminal activities?
- Are there any known or suspected links between the buyer country and terrorist/criminal organizations (or even individual terrorists/criminals) or any reasons to suspect that entities within, and tolerated by the buyer country, have those links?
- Is there any other reason to suspect that the buyer country tolerates re-export or diversion of military technology or equipment to terrorist/criminal organizations, or that it organizes re-export or diversion itself?

- Does the buyer country have internal legislation that tolerates terrorist/criminal activities, or does failure to apply legislation result in tolerance of terrorist/criminal activities?

Many of these questions may also be asked during an assessment under Criterion Seven, but under Criterion Six they involve the buyer country's government rather than the end-user.

More detailed questions should be:

- Does the buyer country criminalize the provision of funds to terrorists, freeze the financial assets of people who commit, or attempt to commit, terrorist acts and prohibit the provision of services to those who participate in the commission of terrorist acts?
- Does the buyer country refrain from providing any form of support, active or passive, to entities or persons involved in the terrorist acts?
- Does the buyer country provide early warnings to other states by exchanging information?
- Does the buyer country deny safe havens to those who finance, plan, support, or commit terrorist acts?
- Does the buyer country prevent those who finance, plan, facilitate or commit terrorist acts from using its territory?
- Does the buyer country prevent the movement of those who carry out acts through effective border controls?

6.5. ***Nature of buyer country's alliances.*** In a strict interpretation, the term "alliance" might mean an international treaty that links a State to one or more other States and foresees the conditions in which they should give each other assistance. Considering that few of the many relations between States concerning economic, military or defence cooperation can fit into such a strict interpretation of the term "alliance", in the context of Criterion Six the term "alliance" should be interpreted in a wider sense, and include all those economic, military and defence agreements which, by their nature, are aimed at establishing a significant connection (intended also as common political aims) between two or more States.

Wider interpretation of the term "alliance" will also include any shared vision of international relations (originated, *inter alia*, by a common political view, economic interests or matters of convenience), which will result in a significant action intended to pursue a mutual goal. For instance this can be any type of combined support to a party involved in a situation of crisis, tension or conflict.

Thus, as the nature of alliances is mostly a political assessment, the term "alliance" should be interpreted *cum grano salis*, on the basis of Member States' national interests.

Bearing in mind the above, when considering whether to grant an export licence, Member States may ask, among others, the following questions:

- Does the buyer country belong to an alliance founded or acting against a Member State, or against an allied or friendly country?

- Does the buyer country belong to an alliance that does not respect or promote the respect of the founding principles of the Unites Nations Organization?
- Does the buyer country belong to an alliance that acts for the destabilization of the international community?

6.6. ***Buyer country's compliance with its international commitments.*** When considering whether to grant an export licence, Member States may also consider if the buyer country (i.e. government of the buyer country) does or does not respect its international commitments.

Attention should be paid to those commitments that are legally binding for every State as both norms of international law and norms of treaty universally accepted by every State; including in particular commitments which by their nature could be violated (such as non-use of force (Article. 41 of the UN Charter), or respect of international law during a conflict) in most cases by using military technology or equipment.

Members States should also consider:

- Does the buyer country respect its commitments to enforce UN, OSCE, and EU arms embargoes?
- Does the buyer country use, has it used, or is it threatening to use force in violation of Article 41 of the UN Charter, in order to solve an international crisis?

- Does the buyer country normally infringe international common law commitments, or treaties which it has voluntarily signed?

- Does the buyer country behave in a manner so as to exclude itself from the international community of States?

Concerning international humanitarian law, possible indicators to assess the risk are:

- Whether the buyer country has made a formal commitment to apply the rules of international humanitarian law and taken appropriate measures for their implementation;

- Whether the buyer country has in place the legal, judicial and administrative measures necessary for the repression of serious violations of international humanitarian law;

- Whether a buyer country which is, or has been, engaged in an armed conflict, has committed serious violations of international humanitarian law;

- Whether a buyer country, which is or has been engaged in an armed conflict, has failed to take all feasible measures to prevent serious violations of international humanitarian law.

As mentioned above, the type of equipment to be exported does not seem to be in the main focus of the analysis, neither does the final user of this equipment, as Criterion Six is meant to avoid any exports of military equipment or technology to those countries whose governments do not comply with international commitments.

In this framework, Criterion One of the Common Position (the "international commitment" criterion) is of particular relevance. Thus Member States should also refer to it.

A non-exhaustive list of international treaties is included in Annex II to this Section.

6.7. ***Buyer country's commitment to non-proliferation and other areas of arms control and disarmament.***

Criterion Six also requires consideration, during the assessment, of the buyer country's record with regard to its commitments in the area of disarmament and arms control. In particular Member States will examine both the buyer country's internal legislation and its international commitments. Attention should be paid primarily to those conventions included in Criterion One.

Some questions that might be asked are:

- Has the buyer country signed/ratified/acceded to the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention and to the Arms Trade Treaty, and does it adhere to the obligations contained in these treaties? If not, why?

- Does the buyer country respect the commitment not to export any form of anti-personnel landmine, based on the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction?

- Is the buyer country a member/participant in, or does it respect the commitments of international arrangements or regimes, in particular the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime, the Wassenaar Arrangement and the Hague Code of Conduct against Ballistic Missile Proliferation?

Even if Criterion Six reports the above mentioned issues as more relevant during the assessment, Member States might also ask some of the questions that they should ask during assessment under Criterion Seven, and others:

- Does the recipient country report to the UN Register of Conventional Arms; if not, why not?

- Has the recipient country aligned itself with the principles of Common Position 2008/944/CFSP or similar regional arrangements?

- Is the recipient country involved in the Conference on Disarmament?

- Does the recipient country apply effective export and transfer controls encompassing dedicated control legislation and licensing arrangements that conform to international norms?

Once more, Members States should note that when making assessments under Criterion Seven (risk of diversion), it is possible to make a distinction between qualities of military technology or equipment, or between end-users; when the same questions are asked when assessing against criterion Six, Member States will decide whether or not to send any kind of equipment to the country in question, on the basis of their opinion on the recipient country's government.

A non-exhaustive list of Arms Export Control Regimes and Organizations are included in Annex III.

6.8. ***Arriving at a judgement.*** Based on the information and the over-all country examination as suggested in the paragraphs above, Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion Six.

Member States will not issue a licence where the general evaluation of the buyer country's record with reference to Criterion Six is not positive.

In any case, even if such evaluation is positive, it can never be used as a justification for arms transfers that would otherwise be refused under other criteria of the Common Position.

ANNEX I (to Chapter 2 Section 6)

INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES:

United Nations/conventional arms

(http://disarmament.un.org)

Security Council Sanction Committees

(http://www.un.org/sc/committees/)

Security Council Report

(http://www.securitycouncilreport.org)

Security Council Counter Terrorism Committee

(http://www.un.org/en/sc/ctc/)

1540 Committee

(http://www.un.org/en/sc/1540/)

Global Programme against Corruption, UN Office on Drugs and Crime

(http://www.unodc.org/)

United Nations Institute for Disarmament Research/UNIDIR

(http://www.unidir.org)

OSCE/arms control

(http://www.osce.org)

European Union

(http://europa.eu)

CIA World Fact Book

(https://www.cia.gov/library/publications/the-world-factbook/)

Jane's Defence and Jane's foreign report

(http://www.janes.com/)

SIPRI

(http://www.sipri.org)

International Action on Small Arms

(http://www.iansa.org)

Small Arms Survey

(http://www.smallarmssurvey.org/)

International Committee of the Red Cross

(http://www.icrc.org)

ANNEX II (to Chapter 2 Section 6)

RELEVANT INTERNATIONAL TREATIES:

Charter of the United Nations

Biological and Toxin Weapons Convention

Chemical Weapons Conventions

Non-Proliferation Treaty (NPT)

Comprehensive Nuclear Test Ban Treaty (CTBT)

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction

Raratonga Treaty

Treaty of Pelindaba

Treaty of Tlatelolco

Bangkok Treaty

Central Asia nuclear-weapon-free zone treaty

Antarctic Treaty

Sea-bed Treaty

Outer Space Treaty

Strategic Arms Limitation Talks (SALT)

Geneva Conventions

ENMOD Convention

Certain Conventional Weapons Convention (CCWC)

United Nations Convention against Transnational Organized Crime

The Arms Trade Treaty

The texts of these and other international treaties could be found at http://untreaty.un.org/

ANNEX III (to Chapter 2 Section 6)

RELEVANT INTERNATIONAL ARMS EXPORT CONTROL REGIMES AND ORGANISATIONS:

Wassenaar Arrangement

(http://www.wassenaar.org)

Nuclear Suppliers Group

(http://www.nuclearsuppliersgroup.org)

The Australia Group

(http://www.australiagroup.net)

Zangger Committee

(www.zanggercommittee.org)

MTCR

(http://www.mtcr.info)

The Hague Code of Conduct against Ballistic Missile Proliferation

(http://www.hcoc.at/)

Section 7: Best practices for the interpretation of Criterion Seven

How to apply Criterion Seven

7.1. Common Position 2008/944/CFSP applies to all exports of military technology and equipment by Member States, and to dual use items as specified in Article 6 of the Common Position. Thus *a priori* Criterion Seven applies to exports to all recipient countries without any distinction. However, these practices follow the principle that cases where there is a higher potential risk should be subject to a greater degree of scrutiny than cases with less risk. Evaluation of individual export licence applications should be done on a case-by-case basis and include an over-all risk analysis, based on the potential risk level in the recipient state, the reliability of those involved in the transactions, the nature of the goods to be transferred and the intended end-use.

In order to better comprehend and prevent the diversion of military technology and equipment, Member States are encouraged to exchange information regarding countries, activities and entities of concern on a case-by-case basis through the co-operation in COARM, or by other channels.

In line with article 11 of the Arms Trade Treaty, and pursuant to their national laws, such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, destinations used by organised groups engaged in diversion. ATT States Parties commit to take appropriate measures in case of a detected diversion. Such measures may include alerting potentially affected ATT States Parties, examining diverted shipments and taking follow-up measures through investigation and law-enforcement. For example: in case a Member State identifies a diversion caused by a certain activity or entity, it should consider notifying the other Member States (and concerned ATT States Parties) in order to mitigate the risk of diversion of any subsequent transaction involving the same activity or entity. The same should apply if a Member State identifies a case of corruption concerning the export of military equipment. The exporting Member State, in making an assessment of a conventional arms export, could take into account the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention establishes that it would be considered as a criminal offence for any person intentionally to engage in offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any foreign public official also during the procurement processes.

Also Art. 13 (2) of the ATT encourages States Parties to report to other States Parties, through the Secretariat, information on measures taken that have been proven effective in addressing the diversion of transferred conventional arms and Article 15 (4) encourages States Parties to cooperate, including through sharing information regarding illicit activities and actors in order to prevent and eradicate diversion of conventional arms. In any case, all ATT States Parties have committed to cooperate and exchange information, where appropriate and feasible, in order to mitigate the risk of diversion. With regard to the aforementioned exchange of information all restrictions placed the use of sensitive information are taken into account.

In addition, improved documentation (such as contracts or agreements, end-user certificates, various assurances) in diversion risk-assessment at the licensing stage makes diversion more difficult. Effective systems of end-user control contribute to the prevention of undesirable diversion or re-export of military equipment and technology. End-user certificates and their authentication at the licensing stage should play a central role in counter-diversion policies. (see also Chapter 2 - Licensing Practices). Nevertheless, using end-user certificates cannot substitute for a complete risk assessment of the situation in the particular case. In line with Article 11 of the Arms Trade Treaty Member States shall seek to prevent diversion also by considering the establishment of mitigation measures, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing states. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures

7.2. ***Information sources***. Information on diversionary risks should be sought from a wide variety of sources: national, regional and international sources; public and non-public sources, official and non-governmental sources...

In the first instance a licensing authority should connect on a national level with government agencies dealing with curbing the illicit trade and diversion, such as Customs, Law Enforcement, Justice, Intelligence, Financial Intelligence Units and Defence. These agencies may have information on the diversion track record of entities involved in a transaction. A licensing authority could consider using the European Criminal Records Information System (ECRIS) and the future ECRIS-TCN (third country nationals) system to access criminal records information on entities/persons convicted for arms trafficking for use in their risk assessment of licence application for military technology and equipment. Some countries, like the United States of America, publish lists of entities that were convicted of violating national arms export legislation. Additional information might be obtained as appropriate from Member States' diplomatic missions. On the EU level there is the denial-notification system and other information exchange in the context of COARM and of Regulation 258/2012.

Also the members of the Wassenaar Arrangement commit to share best practices and information on end-users that are considered a high risk with regard to diversion. OSCE-member states share best practices about export control, including end-use documentation. Regional organisations in other parts of the world can also offer information on diversion. On the international level a useful source are the reports of expert panels that support UN Sanction Committees. These reports contain detailed information about violations of UNSC-arms embargoes. Also the information exchange in the context of Security Council Committee 1540 (2004) and the publications and reports on the websites of UNODA and UNODC can be useful. INTERPOL's EU-funded online Illicit Arms Records and Tracing Management System (iARMS) includes a separate module on Statistics and Reports with regard to illicit firearms. This module can generate tailored reports and allows to analyse national data information on firearm-related crime and tracing. Licensing Authorities of EU Member States could consider requesting access to this module directly via their National Central Bureaus (contact point between national police and Interpol) or indirectly via the national Law Enforcement authorities. On the non-governmental side several research organisations, companies and publications offer online information, databases and indexes, such as the EU-funded iTrace database, relevant for the assessment of the diversion risk and the application of criterion 7 in general.

A non-exhaustive list of relevant internet websites is contained in Annex I to this section.

Elements to consider when forming a judgement

7.3. ***Key concepts***. Criterion Seven refers to a broad field of overarching issues which should be taken into account in any assessment. It should be kept in mind that diversion can be initiated at various levels, can take place during transfer towards a country and within a country or can involve detour or retransfer to a third "unauthorised" country and/or entity. It can be of possession (end-user) and/or function (end-use). The general question might be asked whether there is a risk of the end-user engaging in activities contrary to the legitimate purpose of the exported goods, e.g. in criminal activities including inter alia poaching.

Ad (a): ***The legitimate defence and domestic security interests of the recipient country, including any involvement in United Nations or other peace keeping activity.***

All nations have the right to defend themselves according to the UN Charter. Nonetheless, an assessment should be made of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, or assist in United Nations or other peace-keeping activity. In this regard, consideration could be given to the recipient country's usual military needs and technical capability as reflected by different international sources, such as the UN register on conventional arms (UNROCA), the SIPRI yearbook or the International Institute for Strategic Studies (IISS) Annual Military Balance.

The following questions might be asked:

- Is there a plausible threat to security that the planned import of military technology or equipment could meet?
- Are the armed forces equipped to meet such a threat?
- What will the destination be of the imported equipment after the participation in UN or other peace-keeping activity has been terminated?
- Is there a risk that the procurement is driven by other factors than legitimate defence and domestic security interests?

Ad (b): ***The technical capability of the recipient country to use the military technology or equipment.***

Technical capacity refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. It also refers to the technological level of the recipient country and its operational capacity, and generally to the standard of performance of its equipment.

Consequently, examination of the compatibility of an export of military technology or equipment with respect to this technical capacity should include consideration of whether it is opportune to deliver to the recipient equipment which is more sensitive or sophisticated that the technological means and operational needs of the recipient country.

The "technical capability of a recipient country to use the equipment" can be a key indicator of the "existence of a risk" of diversion. A proposed export that appears technically or quantitatively beyond what one might normally expect to be deployed by the recipient state may be an indication that a third-country end-user is in fact the intended final destination. This concept applies equally to complete goods and systems, as well as components and spare parts. The export of components and spare parts where there is no evidence that the recipient country operates the completed system in question may be a clear indicator of other intent.

Some questions that might be asked are:

- Is the proposed export high-tech in nature?
- If so, does the recipient have access to, or are they investing in, the appropriate technical backup to support the sale?
- Does the proposed export fit with the defence profile of the recipient state?
- Does the proposed export correspond, quantitatively and qualitatively, with the operational structure and technical capability of the armed forces or police forces of the recipient state? If components or spares are being requested, is the recipient state known to operate the relevant system that incorporates these items?

Ad (c): The capability of the recipient country to apply effective export controls.

Recipient states' adherence to international export control norms can be a positive indicator against either deliberate or unintentional diversion. Some questions that might be asked are:

- Is the recipient state a signatory or member of key international export control treaties, arrangements or regimes (e.g. Wassenaar, Arms Trade Treaty)?
- Does the recipient country report to the UN Register of Conventional Arms; if not, why not?
- Has the recipient country aligned itself with the principles of Council Common Position 2008/944/CFSP or similar regional arrangements?
- Does the recipient country apply effective export and transfer controls encompassing dedicated control legislation and licensing arrangements that conform to international norms?
- Is stockpile management and security of sufficient standard (cf. STANAG, International Small Arms Control Standards (ISACS) and the International Ammunition Technical Guidelines (IATG)? Are there known cases of problems with leaking stockpiles in the country of the end-user?
- How serious is corruption assessed in the recipient country? Are there effective legal instruments and administrative measures in place to prevent and combat corruption?
- More specifically, do the armed forces, the internal security forces or similar entities, or other individuals or entities involved in the transaction have any history of corruption? If so, are there any risks that such corruption might contribute to the diversion of military equipment?
- Is the country party to the UN Convention against Corruption and does it have a good track-record in terms of honouring its obligations under the implementation review mechanism?

- Is the recipient state in the proximity of conflict zones or are there on-going tensions or other factors within the recipient state that might mitigate against the reliable enforcement of their export control provisions?
- Does the country of stated end-use have any history of diversion of arms, including the non-authorised re-export of surplus equipment to countries of concern?

A non-exhaustive list of relevant internet websites is contained in Annex I to this section.

Ad (d): ***The risk of such technology or equipment being re-exported to undesirable destinations, and the record of the recipient country in respecting any re-export provision or consent prior to re-export which the exporting Member State considers appropriate to impose.***

The competent authority should assess the reliability of the specific consignee as well as, where known at the licensing stage, the plausibility and reliability of the routing and commercial setup envisaged for the transaction. Besides the end-user, possible other actors involved in a transaction include: brokers, sub-contractors of brokers, freight forwarders (air, sea, rail, road, barge), financiers, insurance companies,… Past involvement of any of these entities in trafficking is an element to be taken into account for risk assessment.

While specific items themselves may not be subject to diversion, they may facilitate diversion by enabling un-authorized re-transfer of weapons held in existing stocks. Specifically when the diversion track record of the recipient country or end-user offers grounds for concern, suppliers could consider measures to reduce this risk.

Questions that might be asked are:

- Is the equipment intended for the government or an individual company?
- Where known or required at the licensing stage, does the routing raise concerns?
- Where known or required at the licensing stage, does the commercial setup raise concerns (possible involvement of brokers, distributors…)?
- Has any actor involved in the commercial setup or routing of the transaction been formerly convicted for arms trafficking or violations of arms export legislation?

If the importer is the government:

- Is the government/the specific government branch reliable in this respect?
- Has the government/the specific government branch honoured previous end-user certificates or other provisions regarding the authorisation of re-export?
- Is there any reason to suspect that the government/the specific government branch is not reliable?

If the importer is a company:

- Is the company known?
- Is the company authorised by the government in the recipient state?
- Has the company previously been involved in undesirable transactions? Has the company been convicted for arms trafficking?

Ad (e): The risk of such technology or equipment being diverted to terrorist organisations or to individual terrorists (anti-terrorist equipment would need particularly careful consideration in this context).

In assessing the potential risk in the recipient state, the competent authority might ask the following questions:

- Does the recipient state have a record of past or present terrorist activities?
- Are there any known or suspected links to terrorist organisations (or even individual terrorists) or any reason to suspect that entities within the recipient state participate in the financing of terrorism?
- Is there any other reason to suspect that the equipment might be re-exported or diverted to terrorist organisations?

If the answer is "yes" to one or more of the questions asked, a higher degree of scrutiny is necessary. The competent authority should consult with open and other sources when continuing that risk assessment.

Ad (f): The risk of reverse engineering or unintended technology transfer.

When the Member States are deciding on an export licence application, account must be taken of the capabilities of the recipient, whether State or private, to analyse and to divert the technology contained in the military equipment being acquired.

The Member States will be able to exchange the relevant information with a view to establishing the capabilities of a potential purchaser of European military equipment.

In this context, and particularly for equipment which uses sensitive technology, the following factors must be considered:

- The sensitivity and the level of protection of the technologies contained in the system, as regards the estimated level of expert knowledge of the recipient, and the evident desire of that recipient to acquire some of those technologies;
- The ease with which those technologies could be analysed and diverted, either to develop similar equipment, or to improve other systems using the technology acquired;
- The quantities to be exported: the purchase of a number of sub systems or items of equipment which appears to be under (or over) estimated is an indicator of a move to acquire technologies;

- The past behaviour of the recipient, when that recipient has previously acquired systems which it has been able to examine to obtain information about the technologies used in those systems. In this context, the Member States may inform one another about the cases of technology theft which they have experienced.

In order to determine this compatibility, Member States could consider the following questions:

- Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- Is the technological level of the equipment requested proportionate to the needs expressed by the recipient country and to its operational capacity?
- Is similar equipment already in service well maintained?
- Are enough skilled personnel available to be able to use and maintain the equipment? [6]

7.4. ***Arriving at a judgement.*** Based on information the over-all risk assessment as suggested in the paragraphs above and after the establishment of mitigation measures, Member States will reach a judgement on whether the proposed export should be denied on the basis of Criterion Seven.

[6] For instance, are a high proportion of the country's engineers and technicians already working in the military sector? Is there a shortage of engineers and technicians in the civilian sector that could be aggravated through additional recruitment by the military sector?

ANNEX I (to Chapter 2 Section 7)

INTERNET WEBSITES OF RELEVANT INFORMATION SOURCES INCLUDE:

Global Arms Trade

- UN Register of Conventional Arms (UNROCA) - http://www.un-register.org/HeavyWeapons/Index.aspx
- UN Comtrade database - http://comtrade.un.org/data/

Non-Governmental Sources:

- SIPRI Arms Transfers Database -http://www.sipri.org/databases/armstransfers

Arms Embargoes

- European Union - Restrictive measures (sanctions) in force - https://www.sanctionsmap.eu/#/main
- UN Security Council Sanction Committees – Reports of groups of experts - http://www.un.org/sc/committees/

Non-Governmental Sources:

- SIPRI Arms Embargoes Database - http://www.sipri.org/databases/embargoes

Terrorism

- EU Fight Against terrorism - http://www.consilium.europa.eu/policies/fight-against-terrorism?lang=en
- UN Security Council Counter Terrorism Committee - http://www.un.org/en/sc/ctc

Best Practices and Standards

- International Ammunition Technical Guidelines - http://www.un.org/disarmament/convarms/ammunition/IATG/
- Study on the development of a framework for improving end-use and end-use control systems -

http://www.un.org/disarmament/HomePage/ODAPublications/OccasionalPapers/PDF/OP21.pdf

- International Small Arms Control Standards - http://www.smallarmsstandards.org/isacs/
- Handbook of Best Practices on Small Arms and Light Weapons - http://www.osce.org/fsc/13616
- Wassenaar Arrangement - http://www.wassenaar.org/

Diversion and trafficking

- EU Commission DG Home – fire arms trafficking initiative - http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-firearms/index_en.htm
- UN Security Council Sanction Committees – Reports of groups of experts - http://www.un.org/sc/committees/
- Interpol iArms database – access to Module on Statistics and Reports to be requested via National Central Bureau - http://www.interpol.int/Crime-areas/Firearms/INTERPOL-Illicit-Arms-Records-and-tracing-Management-System-iARMS
- USA - List of entities convicted of violations of arms export legislation - http://pmddtc.state.gov/compliance/debar.html
- UN Office on Drugs and Crime - study on firearms trafficking
- http://www.unodc.org/unodc/en/firearms-protocol/global-firearms-trafficking-study.html

Non-Governmental Sources:

- Conflict Armament Research - http://www.conflictarm.com/
- iTrace - Database of diverted weapons and ammunition - https://itrace.conflictarm.com/
- Peace Research Institute Oslo (PRIO) – NISAT- http://nisat.prio.org/Document-Library/Region/
- Insight Crime http://www.insightcrime.org/investigations/gunrunners

Corruption

- UN Office on Drugs and Crime - http://www.unodc.org/unodc/corruption
- OECD Anti-bribery convention - http://www.oecd.org/corruption/ , https://www.oecd.org/g20/topics/anti-corruption/

Non-Governmental Sources:

- Corruption Watch - http://www.cw-uk.org/
- Global Integrity Report - www.globalintegrity.org
- Transparency International - http://www.transparency.org/research/cpi/overview
- Transparency International – government defence anti-corruption index - http://government.defenceindex.org/
- Transparency International - http://www.ti-defence.org/
- U4 Anti-Corruption Resource Centre - http://www.u4.no/

General

- Arms Trade Treaty - http://www.un.org/disarmament/ATT
- Australia Group - http://www.australiagroup.net/en/index.html
- EU Arms Export Control - http://eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm
- Hague Code of Conduct against the Proliferation of Ballistic Missiles - http://www.hcoc.at/
- Missile Technology Control Regime MTCR - http://www.mtcr.info
- OSCE/arms control - http://www.osce.org/what/arms-control
- Nuclear Suppliers Group - http://www.nuclearsuppliersgroup.org/
- UN Office on Disarmament – http://www.un.org/disarmament/
- UN Programme of Action on the illicit trade in Small Arms and Light Weapons – www.poa-iss.org
- United Nations Institute for Disarmament Research/UNIDIR - www.unidir.org
- Wassenaar Arrangement - http://www.wassenaar.org/

Non-Governmental Sources:

- Armed violence monitor: www.avrmonitor.org
- AeroSpace and Defence Industries Association of Europe - http://www.asd-europe.org/
- Bonn International Center for Conversion (BICC) – Arms export evaluation database - http://www.ruestungsexport.info/
- Defense Industry Daily - http://www.defenseindustrydaily.com/
- EU Non-Proliferation Consortium - http://www.nonproliferation.eu/
- Federation of European Defence Technology Associations - http://www.fedta.eu/home
- Fondation pour la Recherche Stratégique - http://www.frstrategie.org/
- Groupe de Recherche et d'Information sur la Paix et la Securite (GRIP) - http://www.grip.org
- Gunpolicy - http://www.gunpolicy.org/
- Hessische Stiftung Friedens- und Konfliktforschung - http://www.hsfk.de/
- International Action Network on Small Arms (IANSA) - http://www.iansa.org
- International Institute for Strategic Studies (IISS) - http://www.iiss.org/
- International Peace Information Service (IPIS) - http://www.ipisresearch.be/?&lang=en
- Jane's Defence - http://www.janes.com
- Small Arms Survey - www.smallarmssurvey.org
- Saferworld - www.saferworld.org.uk
- Stockholm International Peace research Institute (SIPRI) - www.sipri.org
- South Eastern and Eastern Europe Clearinghouse for the Control of SALW (SEESAC) - http://www.seesac.org/

Section 8: Best practices for the interpretation of Criterion Eight

How to apply Criterion Eight

8.1. Common Position 2008/944/CFSP applies to all exports by Member States of military technology or equipment included in the EU Common Military List, and to dual use items as specified in Article 6 of the Common Position. Thus *a priori* Criterion Eight applies to exports to all recipient countries without any distinction. However, because Criterion Eight establishes a link with the sustainable development[7] of the recipient country, special attention should be given to arms exports to developing countries. It would be expected only to apply when the stated end-user is a government or other public sector entity, because it is only in respect of these end-users that the possibility of diverting scarce resources from social and other spending could occur. **Annex A** outlines a two-stage "filter" system to help Member States identify export licence applications which may require assessments against Criterion Eight. Stage 1 identifies country-level development concerns, while Stage 2 focuses on whether the financial value of the licence application is significant to the recipient country.

[7] The Sustainable Development Goals encapsulate sustainable development and include progress on goals related to inter alia poverty, hunger, health, education, gender equality, water, energy, climate and the environment.

8.2. ***Information sources.*** If the filter system outlined in paragraph 8.1 indicates that further analysis is required, **Annex B** lists a series of social and economic indicators for Member States to take into account. For each indicator it provides an information source. The recipient country's performance against one or more of these indicators should not in itself determine the outcome of Member States' licensing decisions[8]. Rather these data should be used to form an evidence base which will contribute to the decision-making process. Paragraphs 8.3 - 8.10 outline elements of criterion 8 on which further judgement needs to be reached.

Elements to consider when forming a judgement

8.3. Criterion Eight refers to a number of broad, overarching issues which should be taken into account in any assessment, and which are highlighted in the following text.

Compatibility of the exports of the military technology or equipment with the ***technical and economic capacity*** *of the recipient country, taking into account the desirability that states should meet their* ***legitimate security and defence needs*** *with the* ***least diversion of human and economic resources for armaments****.*

[8] COARM will discuss at least on a yearly basis licensing decisions relevant to criterion 8 in order to gain a better collective insight on the application of the criterion**.**

Member States shall take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, International Monetary Fund and Organisation for Economic Cooperation and Development reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They shall consider in this context the recipient country's relative levels of ***military and social expenditure****, taking into account also any* ***EU or bilateral aid****.*

Technical and Economic Capacity

8.4a ***Economic capacity*** refers to the impact of the import of military technology or equipment on the availability of the financial and economic resources of the recipient country for other purposes, in the immediate, medium and long term. In this regard, Member States might consider taking into account:

- Both the capital cost of the purchase of military technology or equipment and the likely follow-on life-cycle costs of related operation (e.g. ancillary systems and equipment), training and maintenance;

- Whether the arms in question are additional to existing capabilities or are replacing them, and - where appropriate – the likely savings in operating costs of older systems;
- How the import will be financed by the recipient country[9] and how this might impact on its external debt and balance of payments situation.

8.4b ***Technical capacity*** refers to the ability of the recipient country to make effective use of the equipment in question, both in material and human terms. In this regard, Member States should consider the following questions:

- Does the recipient country have the military infrastructure to be able to make effective use of the equipment?
- Is similar equipment already in service well maintained?
- Are enough skilled personnel available to be able to use and maintain the equipment? [10]

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[9] This needs to be considered because the payment methods could have detrimental macro-economic and sustainable development effects. For example if the purchase is by cash payment then it could seriously deplete a country's foreign exchange reserves, impeding any exchange rate management safety net, and also have short term negative effects on the balance of payments. If provided on credit (of any form) it will add to the recipient country's total debt burden – and this may already be at unsustainable levels.

[10] For instance, are a high proportion of the country's engineers and technicians already working in the military sector? Is there a shortage of engineers and technicians in the civilian sector that could be aggravated through additional recruitment by the military sector?

Legitimate Needs of Security and Defence

8.5. All nations have the right to defend themselves according to the UN Charter. Nonetheless, an assessment should be made of whether the import is an appropriate and proportionate response to the recipient country's need to defend itself, to ensure internal security, and assist in international peace-keeping and humanitarian operations. The following questions should be considered:

- Is there a plausible threat to security that the planned import of military technology or equipment could meet?
- Are the armed forces equipped to meet such a threat?
- Is the planned import a plausible priority considering the overall threat?

Least diversion for armaments of human and economic resources

8.6. What constitutes "least diversion" is a matter of judgement, taking all relevant factors into consideration. Member States should consider *inter alia* the following questions:

- Is the expenditure in line with the recipient country's Poverty Reduction Strategy or programmes supported by the International Financial Institutions (IFIs)?

- What are the levels of military expenditure in the recipient country? Has it been increasing in the last five years?
- How transparent are state military expenditures and procurement? What are the possibilities for democratic or public involvement in the state budget process? Are other governance issues relevant?
- Is there a clear and consistent approach to military budgeting? Is there a well-defined defence policy and a clear articulation of a country's legitimate security needs?
- Are more cost-effective military systems available?
- Is defence procurement covered by government anti-corruption practices and/or programmes? Are there indications of corruption regarding the proposed export?

Relative levels of military and social expenditure

8.7. Member States should consider the following questions in assessing whether the purchase would significantly distort the level of military expenditure relative to social expenditure:

- What is the recipient country's level of military expenditure relative to its expenditure on health and education?
- What is the recipient country's military expenditure as a percentage of Gross Domestic Product (GDP)?

- Is there an upward trend in the ratio of military expenditure to health and education and to GDP over the last five years?
- If the country has high levels of military expenditure, does some of this "hide" social expenditure? (e.g. in highly militarised societies, the military may provide hospitals, welfare etc.)
- Does the country have significant levels of "off-budget" military expenditure (i.e. is there significant military expenditure outside the normal processes of budgetary accountability and control)?

Aid Flows

8.8. Member States should take into account the level of aid flows to the importing country and their potential fungibility[11].

- Is the country highly dependent on multilateral as well as EU and bilateral aid?
- What is the country's aid dependency as a proportion of Gross National Income?

[11] Fungibility refers to the potential diversion of aid flows into inappropriate military expenditure.

Cumulative Impact

8.9. An assessment of the cumulative impact of arms imports on a recipient country's economy can only be made with reference to exports from all sources, but accurate figures are not usually available. Each Member State may wish to consider the cumulative impact of its own arms exports to a recipient country, including recent and projected licence requests. It may also wish to take into account available information on current and planned exports from other EU Member States, as well as from other supplier states. Potential sources of information are, *inter alia*, the EU Annual Report, Member States' annual national reports, the Wassenaar Arrangement, the UN Arms Register and the annual reports of the Stockholm International Peace Research Institute.

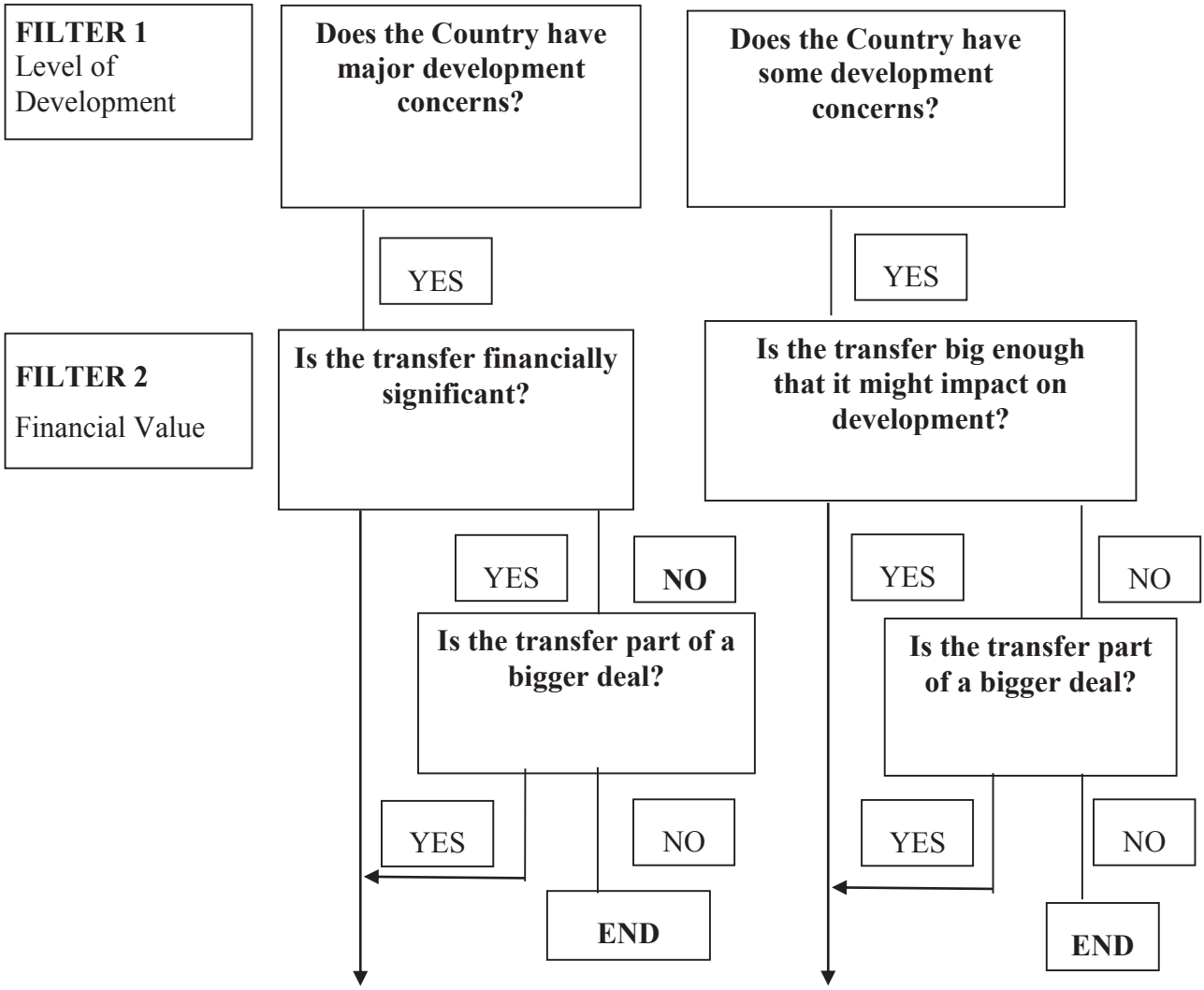
8.10. Data on cumulative arms exports may be used to inform a more accurate assessment of:

- Historical, current and projected trends in a recipient country's military expenditure, and how this would be affected by the proposed export.
- Trends in military spending as a percentage of the recipient country's income, and as a percentage of its social expenditure.

8.11. ***Arriving at a judgement:*** Based on data and assessment of critical elements suggested under paragraphs 8.3 to 8.10 above, Member States will reach a judgement as to whether the proposed export would seriously hamper the sustainable development in the recipient country.

Annex A (to Chapter 2 Section 8)

In order to make an initial decision as to whether an export licence application merits consideration under Criterion 8, Member States will need to consider the level of development of the recipient country and the financial value of the proposed export. The following graph is designed to assist Member States in their decision-making process:



FURTHER ANALYSIS REQUIRED BASED ON THE QUESTIONS AND ISSUES SET OUT IN SECTIONS 8.3 TO 8.10 AND SUBJECT TO THE AVAILABILITY OF THE INFORMATION

The overall assessment will pay special attention to the security situation of the recipient country and to the relevance of the specifics of the transaction under review (e.g. type of equipment (offensive/defensive/use in territorial surveillance and border control), type of end-user (police , armed forces), maintenance and operational costs over life, cycle…)

Annex B (to Chapter 2 Section 8)

Member States may wish to consider a number of social and economic indicators relating to recipient countries, and their trend in recent years which are listed below, along with data sources.

Indicator	Data source
Level of military expenditure relative to public expenditure on health and education	IISS Military Balance, SIPRI, WB/IMF Country Reports, WDI
Military expenditure as a percentage of Gross Domestic Product (GDP)	IISS Military Balance, SIPRI, WB/IMF Country Reports, WDI
Aid dependency as a proportion of GNI	WDI
Fiscal sustainability	WDI, WDR, IFI Country Reports

LIST OF ABBREVIATIONS

IFI : International Financial Institutions Watchnet

IISS : International Institute For Strategic Studies

IMF : International Monetary Fund

SIPRI: Stockholm International Peace Research Institute

Indicator	Data source
Debt sustainability	WB/IMF, including Country Reports
Performance against Millennium Development Goals (post-2005)	UNDP, Human Development Report
Governance Issues	WB (notably Worldwide Governance Indicators, Country Policy and Institutional Assessment (CPIA) and Revenue Data)

UNDP: United Nations Development Programme

WB : World Bank

WDI : World Development Indicators

WDR: World Development Reports

LIST OF SOURCES (WEBSITES)

IFI : http://www.ifitransparency.org

IISS : http://www.iiss.org

IMF : http://www.imf.org

SIPRI: http://www.sipri.org

UNDP: http://www.undp.org.in

WB : http://www.worldbank.org

WDI : http://data.worldbank.org/products/wdi

WDR: http://econ.worldbank.org/wdr

CHAPTER 3 – TRANSPARENCY

Section 1: Requirements for submission of information to the EU Annual Report

1.1. In implementing article 8, through the COARM Online System, each Member State shall provide to the EEAS on an annual basis information on all its exports, regardless of the destination, the type of end-user and the type of licence on the basis of which the export was performed.

In the context of article 8, "exports" is understood as:

- permanent physical exports, including those for the purpose of licensed production of military equipment in third countries; and
- intangible transfers of software and technology by means such as electronic media, fax or telephone.

1.2. Each Member State shall provide the following information to the EEAS on its exports through the COARM online system:

a) Number of export licences granted to each destination, broken down by Military List category (if available);
b) Value of export licences granted to each destination, broken down by Military List category (if available); and
c) Value of actual exports to each destination, broken down by Military List category (if available).

In the context of article 8, "export licences" is understood as decisions to authorise the actual sale or export of the military technology or equipment concerned, or the conclusion of the relevant contract. "Actual exports" are those that have effectively taken place.

1.3. The following additional information will be automatically generated in the COARM online system:

a) Number of denials issued for each destination, broken down by Military List category;
b) Number of times each criterion of the Common Position is used for each destination, broken down by Military List category;
c) Number of consultations initiated;
d) Number of consultations received.

The information mentioned under a) and b) will not be published separately for each Member State in the EU Annual Report, but in an aggregated manner.

1.4. A Member State that is not able to provide certain information mentioned under point 1.2 shall provide a detailed explanation of the reasons. Member States shall also provide any other explanation thought to be of value concerning the information they submit. These explanations will be included in the EU Annual Report.

1.5. In addition to the abovementioned information on its exports, each Member State shall provide separate information to the EEAS on licenses granted and denied in the preceding year for brokering activities and for exports to UN-mandated or other international missions.

1.6. Member States shall provide the abovementioned information annually by 30 June. Member States and the EEAS will aim for adoption of the EU Annual Report by the Council and publication on the website of the EEAS no later than 31 October.

1.7. Further guidance on reporting, as well as instructions on the use of the COARM online system for these purposes, will be made available in the COARM online system.

Section 2: Searchable online database

2. The information mentioned under point 1.2. a) to c) and under point 1.3. a) to b) will be made publicly available in a searchable online database on the website of the EEAS.

Section 3: National reports on exports of military technology and equipment

3. National reports of Member States will be made available on the website of the EEAS by a link to the report on the national website. To this end, Member States shall provide the EEAS with the address of their relevant website.

CHAPTER 4 – EU COMMON MILITARY LIST

1.1. The EU Common Military List has the status of a political commitment in the framework of the Common Foreign and Security Policy. The most recent version of the EU CML is available on the EEAS website at :

http://www.eeas.europa.eu/non-proliferation-and-disarmament/arms-export-control/index_en.htm

1.2. The list will be updated to reflect changes in relevant international lists, and to incorporate any other changes agreed upon by Member States.

CHAPTER 5 – INFORMATION EXCHANGE AMONG MEMBER STATES

Section 1: Denial notifications and consultations

Requirements and timelines

1.1. In implementing article 4 of the Common Position, when an arms export or brokering licence is denied, the denying Member State shall introduce a denial notification in the COARM online system without undue delay after the licence has been refused.

Consultations on denied essentially identical transactions shall also be introduced in the COARM online system and answered no more than three weeks after the notification of the consultation. If more than 3 weeks are required, the consulted Member State shall notify the consulting Member State. In case it receives no answer or notification after three weeks, the consulting Member State can consider that there is no objection to it granting a licence. The consulting Member State shall inform other Member States of its final decision no more than one month after it was taken.

Definitions of "denial" and "essentially identical transaction"

1.2. Article 4(2) of the Common Position states that *"A denial of a licence is understood to take place when the Member State has refused to authorise the actual sale or export of the military technology or equipment concerned, where a sale would otherwise have come about, or the conclusion of the relevant contract. For these purposes, a notifiable denial may, in accordance with national procedures, include denial of permission to start negotiations or a negative response to a formal initial enquiry about a specific order."*.

In applying this provision, Member States shall issue a denial notification when the government authority has refused an application for export approval made in writing (email, fax, or letter) with a certain degree of precision giving the competent authority enough information on which to make a decision. Such written requests could be licence applications, but also applications for permission to start negotiations, formal enquiries, etc. The minimum level of information that the written request has to contain is:

a) country of destination;
b) full description of the goods concerned, including quantity and where appropriate technical specifications;
c) buyer (specifying whether the buyer is a government agency, branch of the armed forces, paramilitary force or a private natural or legal person);
d) proposed end-user.

A denial notification should also be issued when:

a) a Member State revokes an extant export licence;
b) a Member State denies an export licence that is relevant to the scope of the Common Position, and has already circulated a denial notification relating to this denial in other international export control regimes;
c) a Member State has refused an export transaction deemed essentially identical to a transaction previously refused by another Member State and notified as a denial.

1.4. In the case of a licence being refused exclusively on the basis of a national policy that is stricter than that required under the Common Position, a denial notification will be issued and will specify that the reason for denial is a national policy consideration.

Such denial will be introduced in the COARM online system, but will not be subject to the usual consultation procedure in case another Member State intends to authorise an essentially identical transaction nor a detailed explanation should be provided in case of undercut.

1.5. Among the points to be assessed more particularly in order to determine whether a transaction is "essentially identical" are the technical specifications, the quantities and volumes, and the customers and end-users of the goods concerned.

Denial information to be notified

1.7. Member States shall, as a minimum, provide the following substantive information in its denial notifications:

a) Country of final destination;
b) Consignee and end-user;
c) Description of the goods;
d) Control List reference;
e) Stated end-use;
f) Reason for denial (applicable criteria of the Common Position);
g) Information underpinning the denial decision, if possible.

1.8. Further guidance on denial notifications and consultations, as well as instructions on the use of the COARM online system for these purposes, will be made available in the COARM online system.

Section 2: Additional information exchange

2.1.In implementing articles 7 and 9 of the Common Position, Member States are encouraged to share additional information on their arms export policies. Member States willing to share such information shall use COARM meetings, the COARM online system, or, if the classification "Restricted" is deemed appropriate, COREU messages.

2.2. The COARM online system as a minimum facilitates the following additional information-sharing and exchange:

a) Sharing concrete export-related information, such as information on problematic end-users and intermediaries, convicted exporters, risk analyses that are thought to be of value to other Member States, detected diversion routes, etc.;
b) Sharing general national information and policies that are thought to be of value to other Member States, such as updates to export policies or the national control system, national policy papers, etc.;
c) Exchanging information and policies concerning specific destinations or recipients, or on issues of concern ("tour-de-table"). This could also include: i) voluntary and temporary real-time exchanges of information on granted licences for countries that Member States have commonly classified as destinations of concern for this specific purpose; ii) urgent requests for information on granted licences and eventual suspension of licenses for countries undergoing a situation of immediate concern (with indication of a short deadline for comments); and iii) voluntary exchanges on concrete anonymised cases.

Instructions on the use of the COARM online system for these purposes are available in the COARM online system.

2.3. When appropriate, Member States shall communicate relevant changes to their national export policies or to their national control system to other Member States during a COARM meeting, through the COARM online system or, if the classification "Restricted" is deemed appropriate, COREU messages.