



INSTITUTE FOR  
SECURITY STUDIES

# National implementation of selected arms control instruments

A legislative guide for African states

Sarah Parker, Nelson Alusala, Mothepa Shadung and Noël Stott



ISS GUIDE

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# Acronyms

ATT	Arms Trade Treaty
ISACS	International Small Arms Control Standards
ISS	Institute for Security Studies
ITI	International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons or International Tracing Instrument
SADC	Southern African Development Community
UN	United Nations
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNPoA	United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects
UNROCA	United Nations Register of Conventional Arms
UNSCAR	United Nations Trust Facility Supporting Cooperation on Arms Regulation

# Preface

The Institute for Security Studies (ISS) is a leading African organisation that enhances human security to enable sustainable development and economic prosperity in Africa. Established in 1991, the ISS is now the continent's preeminent organisation on human security with offices in East Africa (Nairobi), Francophone West Africa (Dakar), Southern Africa (Pretoria), and the Horn of Africa (Addis Ababa). The ISS works across the continent, doing authoritative research, providing expert policy advice, and delivering training and technical assistance, including on the implementation of international and continental measures to regulate the trade in conventional weapons.

Conventional arms (and in particular, small arms and light weapons) drive and enable conflict and violence in Africa. The UN General Assembly has acknowledged the destructive impact of armed violence on development and recognises armed violence as one of the most important challenges to the achievement of the Sustainable Development Goals (SDG). The need to control the proliferation, circulation and trafficking of small arms and light weapons is therefore also a key theme for the African Union (AU), which argues for a renewed focus on preventing the proliferation of legal and illicit conventional weapons and for a strategy to strengthen coordination and cooperation between and among all regional bodies with the objective of improving implementation at the national, regional and continental levels.

It is within this context that both the ISS and the Geneva-based Small Arms Survey aim to contribute to making Africa a continent that effectively manages conventional weapons by supporting African local, national and regional implementation processes to control proliferation and share lessons from these efforts at the international level.



This legislative guide provides African states with clear guidance on the obligations they have to ensure the effective implementation of relevant conventional arms regimes and the measures they can take to be in a position to ratify and effectively implement such regimes. It focuses on the Arms Trade Treaty (ATT), the first legally-binding treaty to regulate the legal trade in conventional arms and which lays down provisions inter alia on arms transfers related to export, import, transit, transshipment and brokering activities. The guide also makes reference to the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UNPoA) and its by-products, namely, the legally-binding sub-regional instruments in Africa such as the 2001 Protocol on the Control of Firearms, Ammunition and other related Materials in the Southern African Development Community (SADC) Region and the 2004 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (involving the East African Community). These are all important initiatives to reduce human suffering caused by the trade and misuse of conventional arms and in particular small arms and light weapons.

The ISS is grateful to the Small Arms Survey for its assistance in the compilation of the Guide and to the United Nations Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR) for its financial support of both this publication and for the four national workshops held in Botswana, Namibia, Rwanda and Uganda and the regional workshop in South Africa.

ISS trusts that African states will find this guide useful as they undertake the process of drafting or amending their domestic laws to tighten controls over weapon acquisition, stockpiles, arms transfers and the criminalization of unauthorised production, possession and trade.

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# PART I

## Setting the scene

### Section 1 – Introduction

#### 1.1 About this guide

##### *1.1.1 Purpose*

This guide is designed to assist national lawmakers, particularly those in Africa who have been tasked with reviewing and amending conventional arms control legislation, to ensure that this legislation is consistent with the country's international and regional commitments. Although it was compiled primarily to assist countries participating in the regional workshop on 'Developing effective national legislation on the ATT, UNPoA and ITI' held in Pretoria, South Africa, from 28–30 September 2016, it is useful to all national lawmakers. It may also be used by others, including civil society organisations, who may be involved in arms control processes or who advocate for legislative change in their particular countries. It provides practical information on key issues and elements that states should consider when reviewing national legislation. Specifically, the guide will help practitioners to:

- Understand the provisions and requirements of the main international and regional instruments governing conventional arms, including small arms and light weapons;
- Assess the comprehensiveness and level of compliance of their respective national legal frameworks governing conventional arms with selected international and regional commitments; and
- Address gaps and deficiencies within their existing legal frameworks.

### **1.1.2 Scope**

This guide focuses on the measures covered in the international instruments that can and should be incorporated into national legislative and regulatory frameworks. These include the following thematic areas:

- Manufacture;
- Marking;
- Record-keeping;
- International transfer controls (including export, import, transit, transshipment and brokering);
- National control lists; and
- Criminal offences.

The focus of this guide is limited only to those provisions and commitments in the international instruments that are generally implemented through national legislation, and the equivalent or related provisions in the selected regional instruments. Other commitments – including those involving other forms of diversion prevention, reporting under the different instruments, and international cooperation and assistance – are not covered in this guide and should be implemented through the adoption of other measures.

In addition, the guide does not touch on issues such as regulating civilian access to small arms and light weapons (civilian possession regulation) that may contribute directly or indirectly to addressing the proliferation of small arms and light weapons, but are not specifically or directly addressed in the three international instruments that are the main focus of the guide.

### **1.1.3 Methodology**

The guide covers the commitments in the following international and regional instruments:

#### **International**

- United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (UNPoA);

- International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (ITI); and
- Arms Trade Treaty (ATT).

## Regional

- Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa (Nairobi Protocol); and
- Protocol on the Control of Firearms, Ammunition and other related Materials in the Southern African Development Community (SADC) Region.

The guide reflects emerging international norms with respect to arms control legislation for each issue addressed. The content of this guide is drawn from the following sources:

- International Small Arms Control Standards (ISACS);<sup>1</sup>
- United Nations Office on Drugs and Crime (UNODC) Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (UNODC Model Law);<sup>2</sup>
- Model Law to Assist Pacific States to Implement the Arms Trade Treaty (Pacific Model Law);<sup>3</sup>
- United Nations Development Programme (UNDP) *How to Guide: Small Arms and Light Weapons Legislation* (UNDP Guide);<sup>4</sup> and
- The Arms Trade Treaty: A Practical Guide to National Implementation (ATT Handbook).<sup>5</sup>

## 1.2 Structure and content

In addition to this introduction, the guide comprises the following sections:

- PART I – SETTING THE SCENE
  - Instruments covered by the guide;
  - Reviewing national legislation to ensure compliance with international commitments;

- PART II – MANUFACTURE, MARKING, AND RECORD-KEEPING
  - Manufacture;
  - Marking;
  - Record-keeping;
- PART III – INTERNATIONAL TRANSFER CONTROLS
  - Export controls;
  - Import controls;
  - Transit and transshipment controls;
  - Brokering controls; and
  - National control lists;
- PART IV – PENAL PROVISIONS
  - Criminal offences.

Each section provides readers with:

- An overview of the international and regional commitments relevant to the theme (derived from the UNPoA, ITI, ATT, SADC Protocol, and Nairobi Protocol);
- Legislative guidance including:
  - Policy considerations: a summary of some of the policy decisions a state will need to make before drafting and adopting legislation on the issue;
  - Definitions: an overview of some of the terms that will need to be defined in national legislation; and
  - Elements of the control system and procedures relevant to each topic.

## **Section 2 – Instruments covered by the guide**

### **2.1 The United Nations Programme of Action on Small Arms**

The Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects<sup>6</sup> – known as the Programme of Action, or UNPoA – was adopted by United Nations (UN) member states in 2001 and covers a comprehensive range of small arms control measures that states have agreed to implement at global, regional,

and national levels to combat the illicit trade in small arms and light weapons. The UNPoA is a politically binding instrument that establishes a normative framework for small arms control covering a broad spectrum of issue areas including manufacture and international transfers; criminal offences; marking, record-keeping, and tracing; stockpile management; surplus identification and disposal; brokering controls; disarmament, demobilisation, and reintegration; public awareness programmes; and international cooperation and assistance.

## **2.2 The International Tracing Instrument**

The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons<sup>7</sup> – known as the International Tracing Instrument, or ITI – is a politically binding instrument that UN member states adopted in 2005. The ITI is the ‘sister’ instrument to the UNPoA and focuses on the issues of marking, record-keeping, and tracing of small arms and light weapons.

## **2.3 The Arms Trade Treaty**

The Arms Trade Treaty (ATT) is a legally binding instrument that regulates the international transfer of conventional arms, including small arms and light weapons and, to a limited extent, ammunition and parts and components. UN member states adopted the ATT on 2 April 2013 in General Assembly Resolution 67/234 B and it entered into force on 24 December 2014.<sup>8</sup>

## **2.4 The Southern African Development Community Protocol**

Under the Protocol on the Control of Firearms, Ammunition and other related Materials in the Southern African Development Community (SADC) Region, states in the region have agreed to implement a series of legislative measures, mutual legal assistance and law enforcement cooperation activities with respect to the control of firearms and ammunition within the SADC region in an effort to combat illicit manufacture, illicit trafficking, and unlawful possession in the region. The SADC Protocol is a legally binding instrument that states in the SADC region adopted on 14 August 2001 and which entered into force on 8 November 2004.

## 2.5 The Nairobi Protocol

Member states of the Regional Centre on Small Arms, with the addition of the Seychelles, agreed to the Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region, the Horn of Africa and Bordering States on 21 April 2004, and it entered into force on 5 May 2006 as a legally binding instrument. The Nairobi Protocol requires certain national legislative measures, the strengthening of operational capacity, and measures to control state-owned and civilian small arms and light weapons, as well as tracing, safe disposal, international transfer and brokering. The member states agree to cooperate in the areas of mutual legal assistance, law enforcement and transparency, information exchange and harmonisation.

### **Section 3 – Reviewing national legislation to ensure compliance with international commitments**

There are a range of issues to consider and steps to take when reviewing and amending laws and regulations governing the control of small arms and light weapons. One of the key steps in the legislative process is information collection. Data analysis on the distribution and availability of small arms and light weapons, who holds such weapons in a country, and which stakeholders are operating in the country – such as manufacturers and brokers – is crucial to informing legislative review and policy development.

In addition, a thorough review of the current state of laws governing the issue and an assessment of how well those laws are being implemented and what enforcement challenges the state faces are essential. If the state is already facing human and financial capacity constraints in implementing the current legislative framework, then the resource implications of changes to the laws should be a factor in the reform process. When conducting an assessment of the current legislative framework, states need to bear in mind that, while the bulk of small arms and light weapons measures may be incorporated in a single piece of legislation governing firearms – such as a ‘Firearms Act’ or ‘Arms Control Act’ – other pieces of legislation may contain relevant measures, including customs legislation (for import and export regulations),



laws governing police powers and use of force, and environmental legislation (e.g. covering hunting). Other legislation may also be indirectly relevant, such as laws that address domestic violence, youth crime and public nuisance.

It will also be necessary to hold consultations during the review process, involving intra-governmental consultations (between all relevant government ministries, departments and agencies) and public consultations (e.g. involving human rights groups, women's groups, as well as manufacturers, dealers, hunters and sports shooters). Such consultations not only help ensure the quality and adequacy of the legislative reforms, but also help build awareness of proposed new laws.

- ★ Further detailed guidance on how to conduct a review of national small arms and light weapons legislation can be found in chapter 2 of the UNDP Guide.

# PART II

## Manufacture, marking and record-keeping

### Section 4 – Manufacture

#### 4.1 Overview of commitments

##### 4.1.1 *International commitments*

Under the UNPoA, UN member states have undertaken to establish ‘adequate laws, regulations and administrative procedures to exercise effective control over the production of small arms and light weapons within their areas of jurisdiction... in order to prevent illegal manufacture of... small arms and light weapons’.<sup>9</sup> They have also undertaken to criminalise illegal manufacture; take enforcement action against persons involved in illegal manufacture; ensure that manufacturers apply certain markings to newly manufactured weapons and adopt measures to prevent the manufacture of unmarked or inadequately marked weapons; and to keep records on the manufacture of small arms and light weapons for as long as possible.<sup>10</sup> Similarly, under the ITI, UN member states have undertaken to ensure manufactured arms are marked in a particular way and to keep records of manufactured arms indefinitely, or for at least 30 years.<sup>11</sup>

According to the Report of the Sixth Biennial Meeting of States to Consider the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons

in All Its Aspects (BMS6 Report), UN member states are called upon to take note of the emerging technologies in arms manufacturing, particularly 3D-printing technology, and to apply the commitments in the ITI to all small arms and light weapons regardless of the method of manufacture.<sup>12</sup> In formulating legislation, therefore, states should consider this element.

The ATT does not contain provisions specific to the manufacture of small arm and light weapons. However, adequate regulations governing the marking and record-keeping of manufactured arms would contribute to detecting and preventing their diversion, something states parties are required to do under Article 11 of the treaty.

#### **4.1.2 Regional commitments**

States parties to the SADC Protocol and Nairobi Protocol are required to incorporate into their national laws measures ensuring that proper controls are exercised over the manufacture of ‘firearms, ammunition and other related materials’, in the case of the SADC Protocol,<sup>13</sup> and small arms and light weapons in the case of the Nairobi Protocol.<sup>14</sup> They are also required to include provisions that promote legal uniformity and minimum standards in respect of the manufacture of these items;<sup>15</sup> and to incorporate provisions that adequately provide for the seizure, confiscation and forfeiture to the state of all weapons and other items that are manufactured without or in contravention of licences, permits or written authority.<sup>16</sup>

## **4.2 Legislative guidance**

This section provides guidance to drafters on the content of legislative provisions governing the manufacture of small arms and light weapons. It addresses the requirements under the UNPoA and ITI to control the production of small arms and light weapons. References to relevant provisions under selected regional instruments are indicated when applicable. The UNPoA and ITI do not specify in detail *how* states should control manufacture, and this is left largely to the states’ discretion. The legislative guidance provided here reflects best practices and principles derived from national practice, as well as from the discussions of the SADC Protocol and Nairobi Protocol states parties that participated in the workshop on the drafting of this guide.

- ★ Further optional guidance is also available in ISACS, Module 03.10, ‘National controls over the manufacture of small arms and light weapons’ and the UNODC Model Law, Part Two, Chapter III.

*Drafting note:* this section addresses the manufacture of small arms and light weapons only, not conventional arms generally. This is because the instruments under consideration that include commitments with respect to controlling manufacture apply to small arms and light weapons only.

#### 4.2.1 Policy considerations

There are several policy decisions to take when drafting or amending national legislation to regulate manufacture, including:

- Whether to prohibit or regulate:** does the state wish to prohibit the manufacture of small arms and/or light weapons altogether, as well as parts and components and ammunition, such that no individual or private entity under its jurisdiction may lawfully manufacture these items and/or only state-owned enterprises may manufacture arms? Or does the state wish to permit the manufacture of these items, provided it takes place in accordance with certain legal requirements? If a (formal) manufacturing industry already exists, a prohibition will be harder to impose.
- Craft production:** in many countries the informal, small-scale production of ‘homemade’ weapons – known as ‘craft production’ – takes place outside of government control, either because there are no relevant controls in place or because they are difficult to enforce. Craft producers should be brought under the national legislation governing manufacture that a country establishes; awareness-raising and outreach to craft producers may be required in association with the adoption of new laws governing the manufacture of small arms and light weapons.

#### 4.2.2 Definitions

National legislation regulating or prohibiting the manufacture of small arms and light weapons should include a definition of the term ‘manufacture’. The definition should clearly indicate:

- The **scope of items included** in the definition and whether and to what extent it covers the making, production or assembling of not

only a *complete* small arm or light weapon; but also an integral *part or component* (e.g. a frame or receiver), and/or *ammunition* for a small arm or light weapon;

- c) The **scope of activities included** in the definition and whether it includes *reactivating* a deactivated small arm or light weapon; and substantially modifying the function of a small arm or light weapon (e.g. converting a semi-automatic weapon to fully-automatic);
- d) The **scope of activities excluded** from the definition, such as repair, restoration, maintenance or cosmetic enhancement or alteration of a small arm or light weapon; or the non-commercial reloading of ammunition (e.g. by hunters and sport shooters) where this is permitted by domestic law.<sup>17</sup>

The following example of a definition of ‘manufacture’ for the purposes of national legislation is adapted from the UNODC Model Law:

‘Manufacture’ consists of the development, production, reverse engineering, assembly and licensed production of small arms and light weapons, their parts and components and ammunition, as well as the conversion or transformation of something that is not a small arm or light weapons into a small arm or light weapon and the reactivation of a deactivated small arm or light weapons.<sup>18</sup>

### **4.2.3 Licensing or authorisation**

If a state decides to regulate rather than prohibit the manufacture of small arms and light weapons, then it should ensure that national legislation requires a person who wishes to manufacture small arms and light weapons to obtain a licence or authorisation from the competent authority of the state.

The legislation will then need to include provisions establishing the licensing system, including the following elements and considerations:

#### **4.2.3.1 Application for a manufacturer’s licence**

The legislation should stipulate that a person applying for a manufacturer’s licence must do so on a particular form, and such a form should be included in a schedule to the legislation or secondary legislation or regulations. The legislation should also specify the agency – licensing authority – to which to

submit applications, as well as the prescribed fee for the licence application, which may also be detailed in the secondary legislation or regulations, because they may change.

#### 4.2.3.2 Information required for an application for a manufacturer's licence

The legislation should specify what information and documentation a person must provide as part of a licence application. A list of the information and documentation that may be required as part of an application by a natural or legal person for a licence to manufacture small arms and light weapons is included in Annex C.1.

*Drafting note:* drafters may wish to consider including the details of the information required for an application for a manufacturer's licence in secondary legislation or regulations rather than in the primary legislation.

#### 4.2.3.3 Licensing criteria

The legislation should stipulate the criteria persons (natural or legal) must fulfil before they can obtain a licence or authorisation to manufacture small arms and light weapons. Licensing criteria are generally linked to three categories, related to personal character (moral attitude, criminal record, the absence of any link to criminal or mafia-like organisations, etc.), competence and ability. They include:

- **Age:** applicants should have reached a certain age (e.g. country's age of majority or above). Drafters will need to consider whether provisional or restricted licences may be issued to persons who are below the age of majority in countries where supervised apprenticeships to learn the trade of small arms manufacture may be taken up at an age that is below the age of majority.
- **Suitable facilities, premises and practices:** applicants should be required to show they have premises that are safe and suitable for the manufacture of small arms and light weapons, as well as ammunition and other related materials, for states parties to the SADC Protocol, including ensuring the safety of workers in accordance with relevant health and safety laws, as well as ensuring the security of the premises to prevent unauthorised

access. The scope of the requirements ranges from simply ensuring that members of the public cannot access stock to detailed provisions regarding the dimensions of storage units, number of security guards and surveillance equipment that must be employed. The specifications of the storage requirements are often contained in separate, subsidiary regulations that can be easily updated as security technology develops.

- **Qualifications:** only applicants who have passed a competency test or acquired requisite qualifications (prescribed by the regulations) for the manufacture of small arms and light weapons should be eligible to obtain a licence.
- **Background checks:** all applicants should be subjected to background checks to ensure they:
  - Do not have a criminal record or connections to organised criminals;
  - Do not have a history of mental illness or mental disability; and
  - Are of good character.

Background checks are designed to ensure applicants are not a threat to public safety or security and are 'suitable' to be a small arms manufacturer.

*Drafting note:* given the level of detail involved, licensing criteria may be better suited to subsidiary legislation or regulations rather than primary legislation.

#### 4.2.3.4 Particulars of a manufacturer's licence

The legislation could include a list of the particular (information) to be included on the licence, once granted, including details of the holder, any conditions or restrictions that apply, and the date of issuance and date of expiry.

#### 4.2.3.5 Review of a decision not to issue a licence

The legislation could give applicants the right to ask the licensing authority to review a decision not to grant a licence or to impose certain conditions on the licence.

#### 4.2.3.6 Restrictions on a manufacturer's licence

Licensing authorities may impose restrictions on manufacturers' operations that should be reflected in the national legislation and on the licence itself. For example, restrictions may be imposed on:

- The quantity of arms or ammunition that can be manufactured;
- Types of small arms and light weapons or ammunition that can be manufactured (e.g. in some jurisdictions, certain types of weapon such as automatic weapons are prohibited and manufacturers may only be authorised to manufacture small arms that civilians can legally possess);
- Sale or transfer of small arms (e.g. manufacturers may only be authorised to sell small arms to licensed individuals or dealers, or for export);
- Activities manufacturers can engage in (e.g. manufacturers may be prohibited from reactivating, converting or reactivating small arms); and/or
- Transferability of the licence (i.e. it should not be lawful to transfer the licence to another person. Exceptions may be made, for example, for the transfer of the licence to an executor or administrator in the event of the death of the manufacturer or to the trustee in bankruptcy if the manufacturer becomes bankrupt or insolvent, for the purposes of winding up the business).

#### **4.2.3.7 Licence conditions for a manufacturer's licence**

The legislation should include provisions noting that a manufacturer's licence is subject to conditions, including compliance with marking requirements (see section 5.2.3), compliance with record-keeping requirements (see section 6.2.3), and compliance with storage requirements (see section 4.2.3.3). Drafters may also consider additional conditions that would require a licensee to:

- Permit inspection of the information and records held by the licensee;
- Submit regular reports on activities;
- Permit inspection of the licensee's storage facilities;
- Notify licensing authority of:
  - Theft or loss of items (within a specific timeframe; e.g. 24 hours);
  - Change of address of premises; and
  - Change in storage facilities; etc.



#### **4.2.3.8 Variation of licence conditions**

The legislation could contemplate that the licensing authority may vary a licensing condition upon giving notice to licensees. It should also contemplate that a licensee has the right to request a review of a decision to vary a condition.

#### **4.2.3.9 Duration of licences**

The legislation should specify the length of time a licence remains valid (e.g. five years).

#### **4.2.3.10 Renewal of a manufacturer's licence**

The legislation should include a process for renewing a manufacturer's licence, including the form to be completed (and annexed in a schedule or included in the regulations), and the other details provided in section 4.2.3.2. It should also include a procedure allowing an applicant to request a review of a decision not to renew a licence.

### ***4.2.4 Suspension, cancellation and transfer of a manufacturer's licence***

#### **4.2.4.1 Suspension of a manufacturer's licence**

The legislation should include provisions giving the licensing authority the power to suspend a manufacturer's licence in certain circumstances; namely, if it thinks there may be grounds for cancelling the licence (see section 4.2.4.2) and wants to suspend the licence while it completes its investigations or assessment.

#### **4.2.4.2 Cancellation of a manufacturer's licence**

The legislation should contemplate that the licensing authority may cancel a manufacturer's licence before it expires in specified circumstances, including:

- a) The licensee has ceased to carry on business as a manufacturer (and the licence has not been lawfully transferred to another person or entity);
- b) The licensee knowingly gave information that was false or misleading in relation to the application for the licence or withheld relevant information;

*Drafting note:* the SADC Protocol and Nairobi Protocol require states parties to include in national laws provisions that prohibit the misrepresentation or withholding of information given with a view to obtaining a licence or permit.<sup>19</sup> States parties to the SADC Protocol and/or the Nairobi Protocol must ensure this is included in the list of reasons for cancelling a manufacturer's licence.

- c) The licensee no longer fulfils all of the licensing criteria;
- d) The licensee has committed a material violation of one of the restrictions imposed on the licence;
- e) The licensee has committed a material violation of one of the conditions imposed on the licence;
- f) The licensee has contravened a provision of the relevant law; or
- g) The licensing authority determines that the licensee is otherwise unfit to hold a licence to manufacture.

An ability on the part of the licensing authority to cancel a licence before it expires is a necessary element of an effective licensing regime, to ensure that if a person violates the conditions of the licence or, for example, is convicted of illicit manufacturing by virtue of failing to mark manufactured weapons, permission to carry on manufacturing activities can be withdrawn.

#### **4.2.4.3 Right of appeal against a suspension or cancellation**

The legislation should also contemplate that a person has the right to appeal against a suspension or cancellation, and should stipulate the procedure for making such an appeal.

#### **4.2.4.4 Surrender and disposal of property**

The legislation should contemplate that small arms and light weapons, as well as documentation, held by a licensed manufacturer must be surrendered to the licensing authority within a specified time period (e.g. seven days) in the event the licence expires, is suspended or cancelled.

The legislation may also stipulate how the licensing authority will dispose of the weapons and documentation surrendered (e.g. through destruction or some other form of disposal, provided they are marked and recorded appropriately (see section 5.2.6)).

## Section 5 – Marking

### 5.1 Overview of commitments

#### 5.1.1 *International commitments*

Under the UNPoA, UN member states have undertaken to take the necessary measures to prevent the manufacture, stockpiling, transfer and possession of any unmarked or inadequately marked small arms and light weapons, to ensure manufacture markings are applied during the production process (identifying the country of manufacture, manufacturer and serial number), and to ensure all confiscated, seized or collected small arms and light weapons that are not destroyed are duly marked and registered.<sup>20</sup>

Similarly, under the ITI, UN member states have undertaken to:

- a) Ensure manufacture markings are applied to small arms and light weapons, identifying the country of manufacture, manufacturer and serial number, as well as the year of manufacture, weapon type/model and calibre, if possible;
- b) Apply import markings to imported weapons (to the extent possible), permitting identification of the country of import and, where possible, the year of import and a unique marking, if the small arm or light weapon does not already bear such a marking;
- c) Ensure appropriate markings are applied to weapons transferred from government stocks to permanent civilian use if they are not already marked in a manner that allows tracing;
- d) Ensure that all small arms and light weapons in the possession of government armed and security forces for their own use are duly marked; and
- e) Ensure that all illicit small arms and light weapons that are found in their territory are uniquely marked and recorded, or destroyed, as soon as possible.<sup>21</sup>

The ITI also prescribes the nature and location of markings and calls on states to encourage manufacturers to develop measures against the removal or alteration of markings.<sup>22</sup>

The ATT does not contain provisions specific to the marking of small arms and light weapons. However, adequate regulations governing the marking of arms would contribute to detecting and preventing their diversion, something states parties are required to do under Article 11 of the treaty.

### **5.1.2 Regional commitments**

The SADC Protocol and Nairobi Protocol require states parties to include provisions ensuring the standardised marking and identification of firearms, small arms and light weapons respectively, with the SADC Protocol specifying that these markings be applied at the time of ‘manufacture, import or export’.<sup>23</sup> Specifically, states parties are required to ensure firearms, small arms and light weapons are marked at the time of manufacture with the country of manufacture, manufacturer and serial number; and such markings must be applied on the barrel, frame and where applicable, slide.<sup>24</sup> The SADC Protocol also indicates states parties must ensure these markings appear on firearms at the time of import, while the Nairobi Protocol requires states parties to apply import markings to small arms and light weapons, including the country of import and year of import, as well as an individual serial number if the weapon does not already have one.<sup>25</sup> As per the ITI, the Nairobi Protocol also requires states parties to ensure all small arms and light weapons in the possession of the state are marked with a unique mark.<sup>26</sup>

## **5.2 Legislative guidance**

This section provides guidance to drafters on the content of legislative provisions governing the marking of small arms and light weapons, addressing the requirements under the UNPoA and the ITI. References to relevant provisions under selected regional instruments are indicated when appropriate. The legislative guidance that is provided here reflects international standards and best practice derived from ISACS, Module 05.30, ‘Marking and record-keeping’ and the UNODC Model Law.

*Drafting note:* this section addresses the marking of small arms and light weapons only, not conventional arms generally. This is because the instruments under consideration that include commitments with respect to marking apply to small arms and light weapons only.

### 5.2.1 Policy considerations

There are several policy decisions to take when drafting or amending national legislation to regulate the marking of small arms and light weapons, including:

**1. Scope of the marking obligation:** states should consider whether they want to include a requirement in the legislation that markings are applied to parts and components and/or ammunition (or at least ammunition packaging) for small arms and light weapons. Although this is not required under the UNPoA or ITI, it is encouraged under ISACS.<sup>27</sup>

★ Further guidance on how to incorporate such requirements under the national legislative framework can be found in the UNODC Model Law and ISACS, Module 05.30.

**2. Permitting the transfer of state stocks to civilians:** while the ITI contemplates that states *may* transfer government stocks (e.g. state-held weapons that are surplus to requirements) to civilians (provided they are properly marked), ISACS stipulates that light weapons in state stockpiles that are surplus to national requirements should be destroyed and should never be transferred to civilians.

*Drafting note:* the SADC Protocol and Nairobi Protocols require states parties to prohibit the possession and use of light weapons by civilians.<sup>28</sup> So states that are parties to these instruments must, at a minimum, prohibit the transfer of surplus light weapons to civilians. This is in line with national practice throughout most of the world.

ISACS stipulates that small arms should also be destroyed, as a preferred form of disposal, and should certainly not be transferred to civilians if there is a clear risk that this would have a negative impact on internal security.<sup>29</sup> States will need to decide whether they will allow state stocks to be transferred to civilians; and if they decide to permit this, the regulations must include provisions to ensure such transferred arms are adequately marked.

*Drafting note:* the SADC Protocol and Nairobi Protocol require states parties to ensure that state-held weapons that are rendered surplus, redundant or obsolete should be destroyed or disposed of in a way that prevents them entering the illicit market or flowing into regions in conflict.<sup>30</sup>

## **5.2.2 Definitions**

'Marking' per se is not defined in the instruments under consideration and does not tend to be defined in national legislation. However, the ITI and some regional instruments define the physical characteristics,<sup>31</sup> content<sup>32</sup> and placement of markings.<sup>33</sup> In these important areas, states can draw upon international norms and guidelines in developing legislation. The methods of marking that a state contemplates in its national legislation (i.e. the mechanism used to impart a mark, such as stamping, etching, etc.,) will, inadvertently, define what marking means under the national law.

## **5.2.3 Marking at the time of manufacture**

The primary legislation or main act should include an obligation that every individual or business that manufactures a small arm or light weapon shall ensure that the small arm or light weapon is marked at the time of manufacture in accordance with the relevant regulations (see section 5.2.3.1).

The secondary legislation or regulations should, in turn, prescribe the content, form, location, physical characteristics, and the method of marking to be applied.

### **5.2.3.1 Content of manufacture markings**

The secondary legislation or regulations should include details of what information must be marked on a small arm or light weapon at the time of manufacture and the manner of the marking.

The information that should be marked on a small arm or light weapon at the time of manufacture (and included in the regulations) is:

- a) The name of the manufacturer;
- b) Country of manufacture (which should be expressed in accordance with ISO 3166-1<sup>34</sup>); and
- c) A serial number unique:
  - i. To the manufacturer; or
  - ii. To the type/model of weapon produced by the manufacturer.<sup>35</sup>

This is the minimum information that must be marked on a weapon at the time of manufacture in accordance with the ITI. The ITI also encourages the marking of such additional information as:

- a) The year of manufacture (which may be incorporated into the serial number);
- b) Weapon type/model; and
- c) Calibre.<sup>36</sup>

The state may also require manufacturers to mark this information at the time of manufacture through the regulations.

ISACS also recommends adding the following information to the marking:

- d) Proof marks (in accordance with the requirements of national regulations).<sup>37</sup>

The regulations could also require the following information to be included in the marking, if known at the time of manufacture:

- e) The country to which the weapon is to be exported, (which should be expressed in accordance with ISO 3166-1); and
- f) Year of export.<sup>38</sup>

In other words, the import markings (see section 5.2.4) could be marked on the weapon at the *time of manufacture* rather than the time of import, if known in advance. This would avoid the need to re-mark the weapon at the time of import.

Likewise, the regulations could require manufacturers to mark weapons that are intended for a domestic state entity (e.g. the defence force or police) with:

- g) The identity of the domestic state entity for which the weapon is intended.<sup>39</sup>

### **5.2.3.2 Form of manufacture markings**

The regulations should stipulate the form that the markings should take (i.e. alphanumeric, consisting of both Latin (alphabet) letters and Arabic numerals). It could also specify the country code that must be applied (e.g. 'ZA' for South Africa).

### **5.2.3.3 Location of manufacture markings**

Markings should be applied to the component of a small arm or light weapon that is most essential to its operation, such as the frame or receiver. Markings

may also be applied to other essential parts of the weapon, including the barrel, and slide, cylinder, bolt or breech block. The regulations should specify the part of the weapon that must be marked.

*Drafting note:* as noted in section 5.1.2, states parties to the SADC Protocol and Nairobi Protocol are required to apply markings on the barrel, frame and, where applicable, the slide.<sup>40</sup>

Where a weapon is made using a frame made from non-metallic materials (e.g. polymers), the marking should be applied to a metal plate permanently embedded in the material of the frame in such a way that: a) the plate cannot be easily or readily removed; and b) removing the plate would destroy a portion of the frame. There should also be enough space left to receive at least one import marking.<sup>41</sup>

#### **5.2.3.4 Physical characteristics**

According to ISACS, markings shall be applied to an exposed surface of the small arm or light weapon and shall be:

- a) Conspicuous without technical aids or tools (i.e. visible without the need to disassemble the weapon);
- b) Easily recognisable;
- c) Readable or legible;
- d) Durable (i.e. resistant, throughout the expected lifetime of the weapon, to normal operational wear and tear in the environment in which the weapon is deployed); and
- e) Recoverable (as far as is technically possible).<sup>42</sup>

These elements should be incorporated in the manufacturer's obligations to mark weapons in the regulations.

#### **5.2.3.5 Method of marking**

In accordance with ISACS, markings should be applied using a stamping method, to a depth of at least 0.20mm. This should be specified in the regulations.



## **5.2.4 Marking at the time of import**

The primary legislation or main act should include an obligation that every individual, business or public agency that imports a small arm or light weapon ensures that the small arm or light weapon is marked, at the time of import, in accordance with the relevant regulations (see section 5.2.4.1). The legislative provision will also need to specify the timeframe within which the arm must be marked (e.g. before it is released from customs authorities or before the arm is transferred, whichever occurs first).

The provision should also specify the circumstances when an import marking is *not* required, such as where it is being imported after being temporarily exported (e.g. by an individual for a hunting expedition overseas, or by a public agency for use in peacekeeping operations overseas).

### **5.2.4.1 Content of import markings**

The regulations should specify that, where imported small arms and light weapons already possess manufacture markings (consistent with those described in section 5.2.3), then the following additional markings should be added at the time of import:

- a) Country of import; and
- b) Year of import.

The regulations should also stipulate that if the imported arms do not possess adequate manufacture markings, then the following additional markings should also be added at the time of import:

- c) A serial number unique in relation to a) and b) above.<sup>43</sup>

### **5.2.4.2 Location of import markings**

Import markings should be applied to the part of the weapon that is most essential to its operation (e.g. the frame or receiver) and, in addition, may be applied to other essential parts (e.g. the barrel, slide, cylinder, bolt or breech block). Import markings should be applied adjacent to the weapon's existing markings but should be visibly distinguishable from the existing markings.

As in the case of manufacture markings (see section 5.2.3.3), where a weapon is made using a frame made from non-metallic materials (e.g. polymers), the

marking should be applied to the embedded steel plate containing the main marking. If this is not possible (e.g. there is insufficient space), the import marking may be applied directly to the non-metallic frame. Where this occurs:

- a) It should be applied to a part of the frame that is least likely to suffer from wear and tear during the course of normal operational use; and
- b) The same import marking should also be applied to at least one essential metallic component of the weapon (e.g. barrel, slide, cylinder, bolt, or breech block).<sup>44</sup>

#### **5.2.4.3 Method of import marking**

If import markings are applied at the time of manufacture, they should be stamped on to a weapon as per the manufacture markings (see section 5.2.3.1). If they are applied at the time of import, mechanical or laser engraving may be used. In such cases, they should have a depth of at least:

- a) 0.10mm when applied to metal; and
- b) 0.20mm when applied to non-metallic materials (e.g. polymers).<sup>45</sup>

#### **5.2.4.4 Exceptions**

Import markings need not be applied to small arms or light weapons when they are:

- a) Temporarily imported for lawful purposes (e.g. hunting, sport shooting or exhibitions);
- b) Imported following a temporary export for lawful purposes; or
- c) Permanently imported as museum artefacts.<sup>46</sup>

#### **5.2.5 *Markings on transfers from government stocks to permanent civilian use***

As noted in section 5.2.1, states should make a policy decision about whether to prohibit or allow the transfer of state-held weapons to civilians, and reflect that decision in the relevant legislation and regulations. In the event a state allows the transfer of state stocks to civilians to occur, it should ensure the regulations include a requirement that such weapons are marked, at the time of their transfer, with a marking identifying:

- a) The state transferring the weapons, which should be expressed in accordance with ISO 3166-1; and
- b) Year of transfer.

The regulations should also stipulate that if transferred arms do not possess adequate manufacture markings, then then the following additional marking should also be added at the time of transfer:

- c) A serial number unique in relation to a) and b) above.<sup>47</sup>

#### **5.2.5.1 Marking methods**

Mechanical or laser engraving may be used to mark weapons that are transferred from government stocks to permanent civilian use.<sup>48</sup>

#### **5.2.6 Marking of permanently confiscated weapons**

Small arms and light weapons that have been permanently confiscated by the state because, for example, they have been illicitly manufactured or trafficked or used in crime, should be disposed of through destruction.<sup>49</sup>

*Drafting note:* States parties to the SADC Protocol undertake to develop joint operations across borders to locate, seize and *destroy* caches of firearms, ammunition and other related materials left over from conflict and civil wars.<sup>50</sup>

If confiscated weapons are not destroyed, the legislation and regulations should stipulate that security agencies or other state entities that confiscated the arms will apply additional markings identifying the:

- a) Confiscating state; and
- b) Year of confiscation.

The regulations should also stipulate that if the arms do not possess adequate manufacture markings, then then the following additional markings should also be added at the time of import:

- c) A serial number unique in relation to a) and b) above.<sup>51</sup>

#### **5.2.7 Marking of deactivated weapons**

The legislation and regulations should also contemplate that small arms and

light weapons that are deactivated should have markings applied to them identifying:

- a) The state where the deactivation took place;
- b) Year of deactivation; and
- c) A marking indicating that the weapon has been deactivated.<sup>52</sup>

## **Section 6 – Record-keeping**

### **6.1 Overview of commitments**

#### **6.1.1 *International commitments***

Under the UNPoA, UN member states have undertaken to ensure that comprehensive and accurate records are kept for as long as possible on the manufacture, holding and transfer of small arms and light weapons under their jurisdiction, and to ensure all confiscated, seized or collected small arms and light weapons that are not destroyed are duly marked and registered.<sup>53</sup>

Similarly, under the ITI, UN member states have undertaken to ensure that accurate and comprehensive records are established for all marked small arms and light weapons within their territory; and are kept indefinitely, to the extent possible, but for at least 30 years with respect to manufacturing records, and at least 20 years for all other records, including records of import and export.<sup>54</sup> States have also undertaken to ensure that all illicit small arms and light weapons that are found on their territory are uniquely marked and recorded, or destroyed, as soon as possible; and that records pertaining to small arms and light weapons held by companies that go out of business are forwarded to the state in accordance with its national legislation.<sup>55</sup>

Under the ATT, states parties are obliged to maintain national records of export authorisations issued or actual exports of conventional arms; and are encouraged maintain records of conventional arms that are imported into or that are authorised to transit or tranship territory under their jurisdiction.<sup>56</sup> The ATT requires states to keep such records for 10 years<sup>57</sup>

### 6.1.2 Regional commitments

The SADC Protocol requires states parties to keep proper records of markings made at the time of manufacture and import.<sup>58</sup> The Nairobi Protocol requires states parties to keep records of information necessary to trace and identify weapons, including markings and information pertaining to international transactions including licences.<sup>59</sup> It requires states to keep such records for 10 years.<sup>60</sup>

## 6.2 Legislative guidance

This section provides guidance to drafters on the content of legislative provisions governing the keeping of records pertaining to the manufacture of small arms and light weapons, and transfer of conventional arms (including small arms and light weapons), addressing the requirements under the UNPoA, ITI, and ATT. References to relevant provisions under selected regional instruments are indicated where appropriate. The legislative guidance that is provided here reflects international standards and best practice derived from ISACS, Module 05.30, the ATT Handbook and the UNODC Model Law.

*Drafting note:* This section addresses record-keeping with respect to conventional arms only, including small arms and light weapons, not ammunition/munitions, or parts and components. This is because the instruments under consideration that include commitments with respect to record-keeping apply to conventional arms only.

This section does not contain provisions regarding keeping records relating to state-held arms because such provisions do not often appear in national legislation on small arms, but rather in standard operating procedures and manuals pertaining to defence and security forces. Nevertheless, a comprehensive record-keeping system that facilitates tracing will need to include records of state-held stocks and their movement, and states should consider including provisions regarding the record-keeping of state-held weapons in defence acts or administrative guidelines, and army and police manuals governing the management of inventory.

★ Further optional guidance on this issue may be found in ISACS, Module 05.30, 'Marking and record-keeping'.

## 6.2.1 Policy considerations

There are several policy decisions to take when drafting or amending national legislation to regulate record-keeping, including:

- 1. Duration:** under the terms of the ITI, records of small arms and light weapons are, ‘to the extent possible’, to be kept *indefinitely*, but in any case, with respect to manufacturing records, for at least 30 years; and for all other records, including records of import and export, for at least 20 years (see section 6.1.1). Under the ATT, states parties are only obliged to keep records of transfers of conventional arms for 10 years. States will need to decide how long they will keep records, and how long they will require manufacturers, importers, exporters, etc. to keep records. Given the durable nature of arms and the importance of record-keeping in facilitating traceability, especially of older weapons, best practice would suggest that records should normally be kept indefinitely, which is facilitated by the use of electronic record-keeping. A reasonable minimum, in line with the ITI, would be 30 years for manufacture and 20 years for everything else.
- 2. Scope of the records:** the UNPoA and ITI do not specify that records of the manufacture, holding, or transfer of ammunition or parts and components must be kept. Similarly, the ATT does not require states parties to keep records of ammunition/munitions and parts and components pertaining to conventional arms. States should consider whether to extend the obligation to keep records for these items. Note that states that are also states parties to the Firearms Protocol, however, *are* required, ‘where appropriate and feasible’, to keep records of information on parts and components and ammunition of firearms.<sup>61</sup>
- 3. Who has primary responsibility for keeping records?** The ITI and ATT do not specify whether records should be kept by the state itself (and at what level of government) or by persons (natural and legal) engaged in manufacturing, importing, exporting and so on. It is up to each state to determine whether and which records should be kept by the state and/or by persons engaged in arms-related activities. The legislative provisions will differ depending on which approach a state takes. If a state decides it will have primary responsibility for maintaining records, its obligation to keep records extends to recording details of all small arms manufactured

and all transactions involving small arms within its jurisdiction. If persons and entities engaged in arms-related activities have primary responsibility for maintaining records, the state's obligation to keep records is limited to, for example, information obtained through licensing applications and inspections, as well as records from companies that go out of business that should be forwarded to the state.<sup>62</sup> Nevertheless, the state still has the responsibility to ensure that records are kept, if not by it then by private actors.

## **6.2.2 Definitions**

Record-keeping is understood to involve the collection and maintenance of data and is not a term that tends to be formally defined in national legislation or the small arms instruments under consideration.

## **6.2.3 Records of manufacture and disposal**

### **6.2.3.1 Information on items manufactured**

One of the conditions attached to a licence to manufacture arms (see section 4.2.3.7) should be that the licensee maintains records of arms, as well as parts and components and ammunition. The legislation should also require that the manufacturer forward all records to the state in the event it ceases to carry on business.<sup>63</sup> The obligation to maintain records should be included in the primary legislation in the list of conditions attached to a manufacturer's licence. The list of information that must be recorded and other particulars, including the duration of record-keeping, should be included in secondary legislation or regulations.

The information that manufacturers should record includes a description of every small arm or light weapon manufactured, including:

- a) The markings made at the time of manufacture;
- b) Location of markings on the weapon (e.g. on the frame, receiver, barrel, etc.);
- c) Name/identity of the manufacturer;
- d) Year the arm was manufactured;
- e) Make of the weapon manufactured;

- f) Model of weapon manufactured;
- g) Quantity/number of small arms manufactured;
- h) Serial number of each weapon manufactured; and
- i) Calibre of each weapon manufactured.<sup>64</sup>

The main aim of record-keeping, as highlighted in the ITI, is to 'to enable their competent national authorities to trace illicit small arms and light weapons in a timely and reliable manner',<sup>65</sup> and accordingly, states must keep 'accurate and comprehensive records'.<sup>66</sup> The ITI does not specify what or how much information is needed to trace small arms and light weapons. The details identified in subparagraphs (a)–(i) are the minimum information necessary to identify illicit weapons, but states have discretion to decide.

If a state chooses to require manufacturers to also keep records of information pertaining to manufactured ammunition, the regulations should stipulate that manufacturers record the following information:

- a) The markings applied at the time of manufacture (if the state requires ammunition to be marked at the time of manufacture);
- b) Name/identity of the manufacturer;
- c) Type of ammunition manufactured;
- d) Quantity of ammunition manufactured; and
- e) Date of manufacture, if possible.<sup>67</sup>

Equally, if a state chooses to require manufacturers to also keep records of information pertaining to manufactured parts and components, the regulations should stipulate that manufacturers record the following information:

- a) The markings applied at the time of manufacture (if the state requires the marking of individual parts and components);
- b) Name/identity of the manufacturer;
- c) Type of parts and components manufactured;
- d) Quantity of parts and components manufactured; and
- e) Date of manufacture, if possible.<sup>68</sup>



### **6.2.3.2 Information on items transferred from government stocks to permanent civilian use**

If a state decides to allow the transfer of government stocks to civilians (see section 5.2.1) then it should ensure the legislation or regulations – or operating procedures and protocols of the relevant government entities – require records of the following information to be kept:

- a) The date of transfer;
- b) Transferring government entity;
- c) Transfer serial number; and
- d) Recipient of the transfer.<sup>69</sup>

### **6.2.3.3 Information on items destined for destruction**

Where small arms and light weapons that have been seized, confiscated, or collected by the state have been designated for destruction, the legislation should require any public agencies involved in the destruction to keep records of:

- a) The date of destruction;
- b) Method of destruction;
- c) Entity that carried out the destruction;
- d) Entity that verified the destruction; and
- e) Destruction verification certificate number.<sup>70</sup>

★ For further guidance see ISACS, Module 05.50, 'Destruction: Weapons'.

### **6.2.3.4 Information on small arms and light weapons disposed of other than by destruction**

The legislation should require any public agencies involved in the disposal of seized or confiscated weapons (e.g. the police and security agencies) to keep records of all weapons disposed of, including the method of disposal. The ITI and UNPoA do not specify what information should be recorded, but they specify that such arms should be marked (see section 5.2.6), and so it is logical that states would record the details of those markings as well as other

identification information pertaining to the small arm or light weapon upon disposal. Accordingly, states may consider keeping records of the following information regarding small arms disposed of other than by destruction:

- a) A description of every small arm or light weapon that is the subject of disposal, including make, model, calibre, name of the manufacturer, serial number and all markings;
- b) The date of disposal; and
- c) Reason for the disposal.<sup>71</sup>

*Drafting note:* The power to seize and destroy or confiscate weapons may appear in criminal legislation or regulations governing police administrative records and asset forfeiture, rather than the national small arms law or arms control act. Accordingly, the obligation to record information on small arms disposed of other than by destruction may need to appear in that legislation instead.

#### **6.2.3.5 Information on ammunition disposed of other than by destruction**

States may choose to extend the obligation to keep records of disposed weapons to the disposal of ammunition. In such cases, the legislation should require the relevant agencies to keep records of the following information:

- a) A description of the ammunition that is the subject of disposal, including the type of ammunition, lot/batch number, name of the manufacturer and any markings;
- b) The date of disposal;
- c) Reason for disposal; and
- d) Quantity of disposed ammunition.<sup>72</sup>

#### **6.2.3.6 Information on seized and confiscated small arms and light weapons, their parts and components and ammunition**

States may also choose to keep records of information pertaining to the seizure or confiscation of arms, parts and components and ammunition. In such cases, the legislation should require the relevant agencies to keep records of the following information:

- a) The date of seizure or confiscation;
- b) Reason for seizure or confiscation;
- c) Entity that seized or confiscated the item;
- d) Name and address of the person from whom the weapon, part or component or ammunition was seized or confiscated;
- e) Where the item seized is a small arm or light weapon, a description of every arm seized or confiscated, including:
  - i. Make;
  - ii. Model;
  - iii. Calibre;
  - iv. Name of the manufacturer;
  - v. Serial number; and
  - vi. All markings;
- f) Where the item seized is a part or component, a description of every part or component seized or confiscated, including:
  - i. The type of part or component;
  - ii. Name of the manufacturer; and
  - iii. Any markings;
- g) Where the item seized is ammunition, a description of all ammunition seized or confiscated, including:
  - i. The type of ammunition;
  - ii. Lot/batch number;
  - iii. Name of the manufacturer; and
  - iv. Any markings.<sup>73</sup>

### **6.2.3.7 Information on deactivated small arms and light weapons**

If a state includes provisions in its national law allowing for the deactivation of small arms (e.g. to be retained by museums or collectors), then it should ensure the relevant authority keeps records of all requests for authorisation to deactivate small arms made in accordance with the relevant legislation including the following information:

- a) Proof that the person requesting the deactivation is the lawful owner of the arm;
- b) The name of the lawful owner of the arm;
- c) Residential address of the lawful owner of the arm;
- d) Details of the arm that is the subject of the deactivation, including:
  - i. Make;
  - ii. Model;
  - iii. Calibre;
  - iv. Name of the manufacturer;
  - v. Serial number; and
  - vi. All markings.

Where the deactivation is authorised/permited, the relevant authority should keep records of:

- a) The date of deactivation;
- b) Method of deactivation;
- c) Entity that carried out the deactivation;
- d) Entity that verified the deactivation;
- e) Deactivation verification certificate number;
- f) Recipient of the deactivated weapon (in jurisdictions that require licences for deactivated weapons); and
- g) Markings applied to the deactivated arm in accordance with the regulations.<sup>74</sup>

The keeping of such records acts as an additional safeguard against illicit reactivation. This would assist in the tracing of small arms that have been reactivated.

#### **6.2.4 Records of international transactions**

The legislation should include provisions requiring that records of all arms transferred under a licence or authorisation granted under the legislation be kept by every licensed importer or exporter (as appropriate) and/or the state itself.

#### **6.2.4.1 Information on exports of conventional arms**

Records of export authorisations granted and actual exports should include the information listed in Annex A.

#### **6.2.4.2 Information on imports of conventional arms**

Records of import authorisations issued should include the information listed in Annex A. Records of actual imports should include the information listed in Annex B.

#### **6.2.4.3 Information on the transit and transshipment of conventional arms**

Records of transit and transshipment notifications and of actual transits and transshipments should include the information listed in Annex A.

#### **6.2.4.4 Information on brokers and brokering activities**

If a state requires brokers to register as a prerequisite for applying for a licence or authorisation to conduct brokering activities (see section 10.2.3), it should maintain a registration of brokers, and this should be reflected in the legislation.

Records of brokering authorisations should include the information listed in Annex A.

#### **6.2.4.2 Information on international transactions in parts and components and ammunition**

Equally, if a state decides to require records to be kept with respect to ammunition and parts and components, the legislation should include provisions requiring that records of all ammunition and parts and components transferred under a licence granted under the legislation be kept by every licensed importer or exporter (as appropriate) and/or the state itself. The information to be recorded should include that listed in Annex A.

#### **6.2.4.3 Administrative requirements**

##### **Duration of record-keeping**

The legislation should clearly indicate how long records must be kept by the different entities that are obliged to keep records, depending on the policy decision the state has made (see section 6.2.1).

## **Format of records**

None of the instruments stipulate the form that records should be kept in (i.e. manual or electronic), but the legislation could stipulate that all records be maintained in electronic form, which would facilitate prompt responses to tracing requests and make it easier to keep the records for longer periods.

# PART III

## International transfer controls

### **Section 7 – Export controls**

#### **7.1 Overview of commitments**

##### ***7.1.1 International commitments***

Under the UNPoA, UN member states have undertaken to establish and maintain adequate laws, regulations and administrative procedures to exercise effective control over the export of small arms and light weapons, including a system of export licensing or authorisation; and to assess applications for export authorisations according to strict national regulations and procedures that are consistent with the existing responsibilities under relevant international law.<sup>75</sup>

Under the ATT, states parties are obliged to prohibit the export of conventional arms, ammunition/munitions, and parts and components in certain circumstances; to conduct a risk assessment before granting an export licence or authorisation; and deny exports if there is an 'overriding risk' of certain consequences<sup>76</sup>.

The ITI does not contain provisions specific to the export of small arm and light weapons.

##### ***7.1.2 Regional commitments***

States parties to the Nairobi Protocol are required to establish and maintain an effective system of export licensing or authorisation for the transfer of small arms and light weapons.<sup>77</sup> They are also required to ensure that, before

issuing export licences or authorisations, they verify that the importing state has issued import licences or authorisations, and that any transit states have given notice that they do not object to the transit.<sup>78</sup> States parties must also ensure that the authenticity of any licensing or authorisation documentation can be verified or validated,<sup>79</sup> a requirement that is echoed in the SADC Protocol.<sup>80</sup> Such documentation must also include the following information: place and date of issuance; date of expiration; country of export; country of import; final recipient; a description and the quantity of the small arms and light weapons; and, whenever there is transit, the countries of transit.<sup>81</sup>

## 7.2 Legislative guidance

This section provides guidance to drafters on the content of legislative provisions governing the export of conventional arms (including small arms and light weapons), ammunition/munitions, and parts and components. It addresses the requirements under the UNPoA and ATT to regulate the export of these arms and items. References to relevant provisions under selected regional instruments are indicated when appropriate. The UNPoA and ATT do not specify in detail *how* states should control export – other than conducting a risk assessment before authorisation – and this is largely left to the discretion of states. The legislative guidance that is provided here reflects best practices and principles derived from national practice.

- ★ Further optional guidance is also available in ISACS, Module 03.20, ‘National controls over the international transfer of small arms and light weapons’; the Pacific Model Law; the ATT Handbook and the UNODC Model Law.

### 7.2.1 Policy considerations

There are several policy decisions to take when drafting or amending national legislation to control exports, including:

- **Prohibit or regulate?** Does the state wish to prohibit the export of arms (as well as parts and components and ammunition) altogether, such that no individual or private entity under its jurisdiction may lawfully export these items and/or only state entities may export arms? Or does the state wish to permit the export of these items by individuals and private entities provided it takes place in accordance with certain legal requirements?



- **Pre-registration of exporters:** does the state want to require importers and exporters to be registered or hold an operating licence *before* they can apply for a licence to import or export specific items?
- **Scope:** the state will need to determine the scope of items to be covered by the export control system, including possible distinctions between military and non-military small arms and light weapons in terms of licence approval procedures.
- **Licensing authority:** the lead agency that will have primary responsibility for authorising exports must be identified, as well as the inter-agency mechanism and consultation process to be followed in assessing an export licence.
- **Listing licensing criteria:** does the state wish to list the licensing criteria that will be applied to an export licensing decision in the legislation or regulations? Or are such considerations better suited to protocols and guides pertaining to the competent authority? Broader issues of transparency will also need to be considered including the level of public access to information on exports and imports and what level of parliamentary oversight is contemplated.

### 7.2.2 Definitions

National legislation regulating the export of conventional arms, ammunition/munitions, and parts and components should include definitions of ‘export’ and ‘exporter’.

None of the international instruments under consideration define the terms export or exporter and there is no internationally agreed definition of these terms. However, an export is generally understood to involve the physical movement of goods to a place outside the territory of the state that is exporting them or a transfer of control or ownership, or both the movement and the transfer. It does not require financial consideration and so arms or other items that are donated or gifted to another state still constitute exports.

- ★ Further useful guidance on ‘What is an export?’ can be found in section 5.2 of the ATT Handbook. In addition, the UNODC Model Law offers the following model definition of exporter: “Exporter” shall mean any person

engaged in the business of exporting or sending firearms, their parts and components and ammunition from [name of State]'.<sup>82</sup>

### **7.2.3 Licensing or authorisation**

Once a state decides whether and what items are banned from being exported by persons or entities other than state agencies (prohibited items), then it should ensure that national legislation absolutely prohibits the export of those items. At the same time, it must ensure that those arms or items that *may* be exported (controlled items), can only be exported under a licence or authorisation granted by a competent authority of the state.

The legislation will then need to include provisions establishing the licensing system, including the following elements and considerations.

#### **7.2.3.1 Application for an export licence or authorisation**

The legislation should stipulate that a person applying for an export licence must do so in a particular form, which should be included in a schedule to the legislation or secondary legislation or regulations. The legislation should also specify the agency – licensing authority – that applications must be submitted to, as well as the prescribed fee for the licence application, which may also be detailed in the secondary legislation or regulations (because it may change).

#### **7.2.3.2 Information required for an application for an export licence**

The legislation should specify what information and documentation a person must provide as part of a licence application. A list of the information and documentation that may be required as part of an application for a licence to export is included in Annex C.2.

#### **7.2.3.3 Assessment of application for an export licence**

The legislation should contemplate that the competent authority of the exporting state will assess each application for an export licence, and may grant or refuse to grant an export licence, and shall inform the applicant of the outcome.

The legislation may specify the criteria the competent authority will apply in making the decision, depending on the level of transparency or 'openness'

of the licensing system; however, such decisions may be made on policy grounds that are not made public. At a minimum, drafters may choose to include a (non-exhaustive) list of some of the circumstances under which an import licence will be refused (grounds for denial), including, for example, if the information required as part of the application process has not been provided.

Drafters may also choose to list the criteria outlined in Article 6 of the ATT, which identify the circumstances in which states parties are required to deny a transfer (including an export), namely:

- a) If the export would violate the state's obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the UN, in particular arms embargoes;
- b) If the export would violate the state's relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; or
- c) If the state has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.

Drafters may also choose to list the criteria outlined in Article 7 (Export and Export Assessment) of the treaty and Article 11 (Diversion), which identify the criteria states parties must apply to an export licensing decision in the event it is not refused on the basis of the prohibitions in Article 6 (listed above). This involves an assessment of the risk that the arms or items that are the subject of the export licence application:

- a) Would undermine peace and security; or
- b) Could be used to commit or facilitate:
  - i. A serious violation of international humanitarian law;
  - ii. A serious violation of international human rights law;
  - iii. An act constituting an offence under international conventions or protocols relating to terrorism to which the state is a party;

- iv. An act constituting an offence under international conventions or protocols relating to transnational organised crime to which the state is a party; or
  - v. Serious acts of gender-based violence or serious acts of violence against women and children; or
- c) Could be diverted prior to, or after, delivery to their intended end user.

#### **7.2.3.4 Particulars of an export licence**

The legislation could include a list of the particular (information) to be included on the export licence, once granted. A list of the information that may be included in an export licence is provided in Annex D.

#### **7.2.3.5 Conditional export authorisation (due to unavailable information)**

There may be situations when certain information required as part of an export licence application is not yet available or is pending when the application is made. In such situations, the competent national authority may decide to issue an export licence on the condition that the missing information is provided to it before the export takes place. When this occurs, the competent national authority should establish a fixed deadline for the missing information to be provided and should revoke the conditional authorisation if the applicant fails to provide the information by the deadline, or the information provided creates grounds for denial (see section 8.2.3.9).<sup>83</sup>

#### **7.2.3.6 Review of a decision not to issue a licence**

The legislation could give applicants the right to ask the licensing authority to review a decision not to grant a licence or to impose certain conditions.

#### **7.2.3.7 Licence conditions for an export licence**

The legislation should include provisions noting that an export licence is subject to conditions including compliance with record-keeping requirements (see section 6.2.4.1). Drafters may also consider other conditions that would require a licensee to:

- Permit inspection of the information and records held by the licensee;
- Submit regular reports on activities;

- Permit inspection of the licensee's storage facilities;
- Notify the licensing authority of:
  - Theft or loss of items (within a specific timeframe, e.g. 24 hours);
  - Change of address of premises;
  - Change in storage facilities; etc.<sup>84</sup>

### **7.2.3.8 Duration of an export licence**

The legislation should specify the length of time an export licence remains valid, which should be of sufficient duration to ensure that the transfer can be completed. It may also contemplate that the period of validity may be extended on application to and approval from the competent authority, provided the application for an extension takes place before the licence expires.

### **7.2.3.9 Revocation of an export licence**

The legislation should contemplate that the licensing authority may revoke an export licence before it expires in specified circumstances, including if:

- a) The licensee no longer qualifies to hold the licence;
- b) The licensee has contravened or failed to comply with any provision of the relevant law or any condition specified in the licence;
- c) New facts become evident that, had they been known or existed at the time of the review of the initial application for the licence, would have resulted in a refusal;
- d) False information has been supplied to obtain the licence;
- e) The licensee contravenes the provisions of a binding UN Security Council, regional or national arms embargo;
- f) The licensee is convicted of a criminal offence (this may relate to general criminal offences or criminal offences related to arms trafficking); or
- g) There has been a material change in circumstances since the licence was issued.<sup>85</sup>

### 7.2.3.10 Temporary export licence

If the state allows the temporary export of small arms for sports shooting and hunting purposes, it could consider establishing simplified licensing procedures for such exports in the legislation. This might contemplate that a person may export a limited number of small arms (and ammunition) for personal or professional use overseas for a limited period of time.

*Drafting note:* the Nairobi Protocol stipulates that states parties ‘may adopt simplified procedures for the temporary import and export and the transit of small arms and light weapons for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs’.<sup>86</sup>

★ Further guidance on drafting provisions for temporary transfers is available in the UNODC Model Law, Part Three, Section B, Chapter XVII.

## Section 8 – Import controls

### 8.1 Overview of commitments

#### 8.1.1 *International commitments*

Under the UNPoA, UN member states have undertaken to establish and maintain adequate laws, regulations and administrative procedures to exercise effective control over the import of small arms and light weapons, including a system of import licensing or authorisation.<sup>87</sup>

Under the ATT, states parties are obliged to regulate imports of conventional arms and to prohibit the import of conventional arms, ammunition/munitions, and parts and components in certain circumstances.<sup>88</sup>

The ITI does not contain provisions specific to the import of small arm and light weapons, other than a requirement to mark such arms at the time of import (see section 5.2.4).

#### 8.1.2 *Regional commitments*

States parties to the Nairobi Protocol are required to establish and maintain an effective system of import licensing or authorisation for the transfer of small

arms and light weapons.<sup>89</sup> States parties must also ensure that the authenticity of any licensing or authorisation documentation can be verified or validated.<sup>90</sup>

## 8.2 Legislative guidance

This section provides guidance to drafters on the content of legislative provisions governing the import of conventional arms, including small arms and light weapons. It addresses the requirements under the UNPoA and ATT to regulate the import of these arms. References to relevant provisions under selected regional instruments are indicated when appropriate. The UNPoA and ATT do not specify in detail *how* states should control imports – other than prohibiting them in certain circumstances – and this is left largely to the discretion of states. The legislative guidance that is provided here reflects best practices and principles derived from national practice. Further optional guidance is also available in ISACS, Module 03.20, ‘National controls over the international transfer of small arms and light weapons’; the Pacific Model Law; ATT Handbook; and UNODC Model Law.

*Drafting note:* This section addresses the import of conventional arms only, including small arms and light weapons, not ammunition/munitions, or parts and components. This is because the international instruments under consideration that include commitments with respect to import controls apply to conventional arms only.

### 8.2.1 Policy considerations

There are several policy decisions to take when drafting national legislation to control imports, including:

- **Whether to prohibit the import of certain types of weapons:** does the government want to ban or prohibit the import of certain weapons or items (e.g. the state may choose to ban the import of attack helicopters by non-state entities)?
- **Whether to prohibit or regulate imports:** does the state wish to prohibit the import of arms altogether, as well as of parts and components and ammunition, such that no individual or private entity under its jurisdiction may lawfully import these items and/or only state entities may import arms? Or does the state wish to permit the import of these items by

individuals and private entities provided it takes place in accordance with certain legal requirements?

- **Pre-registration of importers:** does the state want to require importers and exporters to be registered or hold an operating licence *before* they can apply for a licence to import or export specific items?
- **Scope:** the state will need to determine the scope of items to be covered by the import control system, including possible distinctions between military and non-military small arms and light weapons in terms of licence approval procedures.
- **Licensing authority:** the lead agency that will have primary responsibility for authorising imports must be identified, as well as the inter-agency mechanism and consultation process to be followed in assessing an import licence.

### **8.2.2 Definitions**

National legislation regulating the import of conventional arms should include definitions of ‘import’ and ‘importer’.

None of the international instruments under consideration define these terms and there is no internationally agreed definition. However, an import is generally understood to involve the physical movement of goods from a place outside the territory of the state that is importing them or a transfer of control or ownership, or both the movement and the transfer. It does not require financial consideration and so arms or other items that are donated or gifted by another state still constitute ‘imports’.

- ★ Further useful guidance on ‘What is an import?’ can be found in section 6.2 of the ATT Handbook. In addition, the UNODC Model Law offers the following model definition of ‘importer’: “‘Importer’ shall mean any person engaged in the business of importing or bringing firearms, their parts and components and ammunition into [name of State]”.<sup>91</sup>

### **8.2.3 Licensing or authorisation**

Once a state decides whether and what items are banned from being imported by persons or entities other than state agencies (prohibited items), then it should ensure that national legislation absolutely prohibits the import



of those items. At the same time, it must ensure that those arms or items that *may* be imported (controlled items), can only be imported under a licence or authorisation granted by a competent authority of the state.

The legislation will then need to include provisions establishing the licensing system, including the following elements and considerations:

### **8.2.3.1 Application for an import licence or authorisation**

The legislation should stipulate that a person applying for an import licence must do so in a particular form, and this form should be included in a schedule to the legislation or secondary legislation or regulations. The legislation should also specify the agency – licensing authority – to which applications must be submitted, as well as the prescribed fee for the licence application, which may also be detailed in the secondary legislation or regulations, because it may change.

### **8.2.3.2 Information required for an application for an import licence**

The legislation should specify what information and documentation a person must provide as part of a licence application. A list of the information and documentation that may be required as part of an application for a licence to import is included in Annex C.2.

### **8.2.3.3 Assessment of application for an import licence**

The legislation should contemplate that the competent authority of the importing state will assess each application for an import licence, and may grant or refuse to grant an import licence, and shall inform the applicant of the outcome.

The legislation may specify the criteria the competent authority will apply in making the decision, depending on the level of transparency or ‘openness’ of the licensing system, though such decisions may be made on policy grounds that are not made public. At a minimum, drafters may choose to include a (non-exhaustive) list of some of the circumstances under which an import licence will be refused (grounds for denial), including, for example, if the information required as part of the application process has not been provided.

Drafters may also choose to list the criteria outlined in Article 6 of the ATT, which identify the circumstances in which states parties are required to deny a transfer (including an import), namely:

- a) If the import would violate the state's obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the UN, in particular arms embargoes;
- b) If the import would violate the state's relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; or
- c) If the state has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.

#### **8.2.3.4 Particulars of an import licence**

The legislation could include a list of the particular information to be included on the import licence, once granted. A list of the information that may be included in an import licence is provided in Annex D.

#### **8.2.3.5 Review of a decision not to issue a licence**

The legislation could give applicants the right to ask the licensing authority to review a decision not to grant a licence or to impose certain conditions.

#### **8.2.3.6 Licence conditions for an import licence**

The legislation should include provisions noting that an import licence is subject to compliance with record-keeping requirements (see section 6.2.4.2). Drafters may also consider other conditions that would require a licensee to:

- Permit inspection of the information and records held by the licensee;
- Submit regular reports on activities;
- Permit inspection of the licensee's storage facilities;
- Notify the licensing authority of:
  - Theft or loss of items (within a specific timeframe, e.g. 24 hours);
  - Change of address of premises;
  - Change in storage facilities; etc.<sup>92</sup>

### **8.2.3.7 Duration of an import licence**

The legislation should specify the length of time an import licence remains valid, which should be of sufficient duration to ensure that the transfer can be completed. It may also contemplate that the period of validity may be extended on application to and approval from the competent authority, provided the application for an extension takes place before the licence expires.

### **8.2.3.8 Revocation of an import licence**

The legislation should contemplate that the licensing authority may revoke an import licence before it expires in specified circumstances, including if:

- a) The licensee no longer qualifies to hold the licence;
- b) The licensee has contravened or failed to comply with any provision of the relevant law or any condition specified in the licence;
- c) New facts become evident that, had they been known or existed at the time of the review of the initial application for the licence, would have resulted in a refusal;
- d) False information has been supplied to obtain the licence;
- e) The licensee contravenes the provisions of a binding UN Security Council, regional or national arms embargo;
- f) The licensee is convicted of a criminal offence (this may relate to general criminal offences or criminal offences related to arms trafficking); or
- g) There has been a material change in circumstances since the licence was issued.<sup>93</sup>

### **8.2.3.10 Temporary import licence**

If the state allows the temporary import of small arms for sports shooting and hunting purposes, it could consider establishing simplified licensing procedures for such imports in the legislation. This might contemplate that a person may import a limited number of small arms (and ammunition) for personal or professional use for a limited period of time.

*Drafting note:* the Nairobi Protocol stipulates that states parties ‘may adopt simplified procedures for the temporary import and export and the transit of small arms and light weapons for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs’.<sup>94</sup>

- ★ Further guidance on drafting provisions for temporary transfers is available in the UNODC Model Law, Part Three, Section B, Chapter XVII.

## **Section 9 – Transit and transshipment controls**

### **9.1 Overview of commitments**

#### **9.1.1 International commitments**

Under the UNPoA, UN member states have undertaken to establish and maintain adequate laws, regulations and administrative procedures to exercise effective control over the transit of small arms and light weapons, and establish measures on international transit.<sup>95</sup>

Under the ATT, states parties are obliged to regulate the transit and transshipment of conventional arms, and to prohibit the transit and transshipment of conventional arms, ammunition/munitions, and parts and components in certain circumstances.<sup>96</sup>

The ITI does not contain provisions specific to the transit or transshipment of small arms and light weapons.

#### **9.1.2 Regional commitments**

States parties to the Nairobi Protocol are required to establish and maintain measures on international transit for the transfer of small arms and light weapons.<sup>97</sup> In addition, states parties to the SADC Protocol are required to incorporate provisions that adequately provide for the seizure, confiscation and forfeiture to the state of all firearms, ammunition and other related materials, in the case of the SADC Protocol; and, in the case of the Nairobi Protocol, small arms and light weapons that are conveyed in transit without or in contravention of licences, permits or written authority.<sup>98</sup>

## 9.2 Legislative guidance

This section provides guidance to drafters on the content of legislative provisions governing the transit and transshipment of conventional arms, including small arms and light weapons. It addresses the requirements under the UNPoA and ATT to regulate the transit and transshipment of these arms. References to relevant provisions under selected regional instruments are indicated when appropriate. The UNPoA and ATT do not specify in detail *how* states should control transit and transshipment – other than prohibiting transit and transshipment in certain circumstances – and this is left largely to the discretion of states. The legislative guidance that is provided here reflects best practices and principles derived from national practice. Further optional guidance is also available in ISACS, Module 03.20, ‘National controls over the international transfer of small arms and light weapons’; the Pacific Model Law; ATT Handbook; and UNODC Model Law.

*Drafting note:* this section addresses the import of conventional arms only, including small arms and light weapons, not ammunition/munitions, or parts and components. This is because the international instruments under consideration that include commitments with respect to transit and transshipment controls apply to conventional arms only.

### 9.2.1 Policy considerations

States have several options for regulating the transit and transshipment of arms through their territories, and different types of transit may require different control measures. Options include: licensing or authorisation; systematic prior notification requirement; and ad hoc controls on potentially illicit or undesirable transfers (i.e. measures the state could adopt to maximise its chances of identifying illicit transfers, with least resources). Capacity as well as legal constraints may affect a state’s ability to enforce different control measures; for example, the right of innocent passage under the UN Convention on the Law of the Sea means that a state may not impose a requirement that ships transiting through its territorial seas carrying arms as cargo must obtain a transit licence or authorisation before transit. States will need to consider what control measures will be most effective in detecting illicit activity and feasible in the circumstances.

## **9.2.2 Definitions**

National legislation regulating the transit and transshipment of conventional arms should include definitions of 'transit' and 'transshipment'.

None of the international instruments under consideration define the terms 'transit' or 'transshipment' and there is no internationally agreed definition of these terms. However, transit is generally understood to mean the movement of goods through a state's territory, where there is no change in the mode of transportation; whereas transshipment is understood to be a form of transit where there is a change in the mode of transportation. In both scenarios, the goods neither originate in the state whose territory they move through nor do they stay there permanently.

★ Further useful guidance can be found in sections 7.2 and 7.3 of the ATT Handbook.

## **9.2.3 Licensing or authorisation**

If a state decides to require a licence or permit for certain types of transit (e.g. transit by road or rail) and/or transshipment it will need to include provisions establishing the licensing or permit system, including the following elements and considerations:

### **9.2.3.1 Application for transit or transshipment licence or permit**

The legislation should stipulate that a person applying for a transit or transshipment licence or permit must do so in a particular form, and this form should be included in a schedule to the legislation or secondary legislation or regulations. The legislation should also specify the agency – licensing authority – to which applications must be submitted, as well as the prescribed fee for the licence application, which may also be detailed in the secondary legislation or regulations, because it may change.

### **9.2.3.2 Information required for an application for a transit or transshipment licence or permit**

The legislation should specify what information and documentation a person must provide as part of a licence application. This could include:

a) The applicant's name, address and telephone number;

- b) Details of the exporter;
- c) Details of the consignee;
- d) Details of the end user;
- e) States of origin, shipment, and end use, and of transit or transshipment if the arms or items transit or are transhipped through other countries along the way;
- f) Particulars of the intended transport route and mode of transport, the proposed entry and exit and likely date of the entry and exit, to the extent known at the time of application;
- g) Expected duration and location of shipment while in bond, if applicable;
- h) Description of the arms or items in question, including their weight and/or quantity (reference to the tariff code can also be useful);
- i) Final destination of the arms and description of the end use (demonstrated through an export licence, end use certificate or other official documentation showing the final destination and the legal authority for the items to be imported into the country of final destination); and
- j) A consignment note of the items to be carried in transit through the state.<sup>99</sup>

To substantiate this information, the following documentation should be required at a minimum:

- a) A copy of the export licence or authorisation; and
- b) A copy of the import licence or authorisation, if applicable, or a copy of the end user certificate or both.

States might also consider providing an enabling clause in their regulations to allow the relevant authorities to demand other necessary information and documentation, such as air waybills, manifests or contracts.

### **9.2.3.3 Assessment of application for a transit or transshipment licence or permit**

The legislation should contemplate that the competent authority of the transit state will assess each application for a transit or transshipment licence or

permit, and may grant or refuse to grant a transit or transshipment licence or permit, and shall inform the applicant of the outcome.

The legislation may specify the criteria the competent authority will apply in making the decision, depending on the level of transparency or 'openness' of the licensing system, though such decisions may be made on policy grounds that are not made public. At a minimum, drafters may choose to include a (non-exhaustive) list of some of the circumstances under which an import licence will be refused (grounds for denial), including, for example, if the information required as part of the application process has not been provided.

Drafters may also choose to list the criteria outlined in Article 6 of the ATT, which identify the circumstances in which states parties are required to deny a transfer (including transit and transshipment), namely:

- a) If the transit or transshipment of the arms or items would violate the state's obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the UN, in particular arms embargoes;
- b) If the transit or transshipment of the arms or items would violate the state's relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; or
- c) If the state has knowledge at the time of authorisation that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.

#### **9.2.4 Prior notifications of transit and transshipment**

As an alternative to requiring a transit or transshipment permit in respect of arms or other items moving across a state's territory, a state may require advance notification of the transit or transshipment instead and this should be reflected in the legislation. In accordance with ISACS, such a notification of transit or transshipment to the transit or transshipment state should contain, at a minimum:

- a) The name and contact details of the entity making the notification;



- b) Import authorisation;
- c) Export authorisation;
- d) End user certificate or certified end user statement;
- e) Intended end use of the consignment; and
- f) A description of the consignment including, in the case of assembled small arms or light weapons, their:
  - i. Quantities;
  - ii. Makes;
  - iii. Models;
  - iv. Calibres;
  - v. Serial numbers;
  - vi. Countries of manufacture;
  - vii. Import markings (if present);
  - viii. Types (e.g. revolver, pistol, rifle, sub-machine gun, light machine gun, heavy machine gun, grenade launcher, mortar, recoilless rifle, anti-aircraft gun, anti-tank gun, anti-tank rocket system, anti-tank missile system, anti-aircraft missile system (e.g. MANPADS, etc.)); and
  - ix. Actions (e.g. manual, semi-automatic or automatic. If a weapon has a selective fire capability, the highest capability, automatic being the highest, should be indicated).<sup>100</sup>

### **9.2.5 Ad hoc controls on potentially illicit or undesirable transfers**

Ad hoc controls allow relevant authorities to control certain transfers that are not subject to a systematic licensing or notification requirement. The circumstances in which these ad hoc controls can be applied should be listed in the national legislation. These controls generally entail:

- a) Inspecting the shipment and/or (temporarily) seizing it; or
- b) Subjecting the transaction to an authorisation procedure or prohibition.<sup>101</sup>

The state must have a reasonable suspicion that one of the listed circumstances is occurring or about to occur before the ad hoc controls are triggered. The prohibitions in Article 6 of the ATT are prime examples of situations that could be dealt with using ad hoc controls. Accordingly, the

legislation could stipulate that a state may request information or seek to inspect a vessel when the state has a reasonable suspicion that a ship in transit through its territorial sea or aircraft in transit through its airspace is carrying conventional arms, ammunition, or parts and components:

- a) In contravention of the state's obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the UN, in particular arms embargoes;
- b) In contravention of the state's relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; or
- c) That may be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which the state it is a party.

Essentially the legislative provisions need to give the state the power to intervene in some way if a transit or transshipment violates any of the prohibitions in Article 6 of the ATT.

## **Section 10 – Brokering controls**

### **10.1 Overview of commitments**

#### ***10.1.1 International commitments***

Under the UNPoA, UN member states have undertaken to establish and maintain adequate laws, regulations and administrative procedures to regulate the activities of those who engage in small arms and light weapons brokering, including registration of brokers, licensing or authorisation of brokering transactions, and appropriate penalties for all illicit brokering activities performed within the state's jurisdiction and control.<sup>102</sup>

Under the ATT, each state party is obliged to regulate brokering taking place under its jurisdiction with respect to conventional arms. Measures adopted may include requiring brokers to register or obtain written authorisation

before engaging in brokering.<sup>103</sup> States parties are also required to prohibit the brokering of conventional arms, ammunition/munitions, and parts and components in certain circumstances.<sup>104</sup>

The ITI does not contain provisions specific to the brokering of small arm and light weapons.

### **10.1.2 Regional commitments**

The SADC Protocol and Nairobi Protocol require states parties to include provisions regulating brokering in their national laws.<sup>105</sup> The Nairobi Protocol further stipulates that the system for controlling brokers must include: registration of all brokers operating within a state's territory, ensuring registered brokers seek and obtain authorisation for each individual transaction; and ensuring that all brokering transactions provide full disclosure on import and export licences or authorisation and accompanying documents of the names and locations of all brokers involved in the transaction.<sup>106</sup> The Nairobi Protocol also stipulates that the brokering control system should also include regulation of all manufacturers, dealers, traders, financiers and transporters of small arms and light weapons through licensing, as well as licensing, registering and checking regularly and randomly all independent manufacturers, dealers, traders and brokers.<sup>107</sup>

## **10.2 Legislative guidance**

This section provides guidance to drafters on the content of legislative provisions governing brokering of conventional arms, including small arms and light weapons. It addresses the requirements under the UNPoA and ATT to regulate brokers and brokering activities relating to these arms, namely, through a process of registration of brokers and licensing of individual brokering activities or transactions. References to relevant provisions under selected regional instruments are indicated when appropriate. Additional optional guidance is also available in ISACS, Module 03.20, 'National controls over the international transfer of small arms and light weapons'; the Pacific Model Law; ATT Handbook; and UNODC Model Law.

*Drafting note:* this section addresses the brokering of conventional arms only, including small arms and light weapons, not ammunition/munitions, or parts and components. This is because the international instruments under consideration that include commitments with respect to brokering controls apply to conventional arms only.

### **10.2.1 Policy considerations**

There are several policy considerations to take into account drafting national legislation to control brokers and brokering activities, including:

- **Whether to prohibit or regulate brokering:** does the state wish to prohibit brokers from operating in its territories or prohibit brokering activities being carried out by any of its citizens? Does it want to prohibit private brokering but allow the state-sponsored kind? Or does it want to allow the conduct of brokering activities by individuals and private entities as a controlled activity that is regulated? Should that regulation consist of a requirement to register as a broker? Or to obtain a licence for each brokering activity? Or both?
- **The scope of the definition of ‘brokering activities:** in drafting their national legislation regulating brokers and brokering activities, states will need to decide how broadly they wish to define brokering, and what the implications of this are for enforcement (see section 10.2.2).
- **Whether to apply extraterritorial jurisdiction:** Brokering activities may be conducted in the broker’s state of nationality, residence, or registration, but they may also be conducted by its citizens overseas. In such a scenario, the arms or items that are subject to the brokering activity do not necessarily pass through the territory of the state where the broker is located or where the brokering activity is conducted. Accordingly, a state may not only wish to exercise jurisdiction over individuals and entities that conduct brokering activities from its own territory, but it may decide to extend the controls to cover its nationals, permanent residents, and companies when they conduct arms brokering activities abroad.

## 10.2.2 Definitions

National legislation regulating brokers and brokering activities should include definitions of 'broker' and 'brokering activities'.

None of the international instruments under consideration define these terms. The report of the Group of Governmental Experts established pursuant to General Assembly Resolution 60/81 to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons (A/62/163 and Corr.1)<sup>108</sup> provides some useful guidance, but there is no internationally agreed definition.

The definition of brokering activities – and the scope of activities to be regulated under the national legislation – may cover only direct or primary activities, such as serving as a finder of business opportunities to one or more parties; putting relevant parties in contact with each other; assisting parties in proposing, arranging or facilitating agreements or possible contracts between them; assisting parties in obtaining the necessary documentation; or assisting parties in arranging the necessary payments.<sup>109</sup> Or it may also cover activities that are closely associated with brokering but 'that do not necessarily in themselves constitute brokering', although they might be undertaken by brokers as elements of a deal. These 'ancillary' or 'secondary' activities do not form part of the main contract negotiation but nevertheless contribute to the eventual supply of the goods. They can include acting as dealers or agents, 'providing for technical assistance, training, transport, freight forwarding, storage, finance, insurance, maintenance, security and other services'.<sup>110</sup> Other examples would include obtaining necessary documentation or authorisations, such as export, import, or transit licenses or clearances.

With respect to the regional instruments, the Nairobi Protocol includes the following definition of broker:

'broker' is a person who acts:

- a) For a commission, advantage or cause, whether pecuniary or otherwise;
- b) To facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of small arms and light weapons; or

- c) As an intermediary between any manufacturer, or supplier of, or dealer in small arms and light weapons and any buyer or recipient thereof.<sup>111</sup>

And both the SADC Protocol and the Nairobi Protocol include a definition of brokering with the following elements:

- a) Acting for a commission, advantage or cause, whether pecuniary or otherwise;
- b) To facilitate the transfer, documentation and/or payment in respect of any transaction relating to the buying or selling of small arms and light weapons; or
- c) Thereby acting as intermediary between any manufacturer, or supplier of, or dealer in small arms and light weapons and any buyer or recipient thereof.<sup>112</sup>

★ Further useful guidance can be found in section 8.2 of the ATT Handbook and section 10.3 of ISACS, Module 03.20.

### **10.2.3 Registration**

The legislation should include a requirement that any person who wishes to engage in brokering activities must first be registered with the relevant authority.

*Drafting note:* as an alternative to a formal registration process of brokers, a state could use the record of information that a broker has provided when applying for an individual brokering activity licence as a de facto registration.

#### **10.2.3.1 Application for registration as a broker**

The legislation should stipulate that a person applying to register as a broker must do so in a particular form, and this form should be included in a schedule to the legislation or secondary legislation or regulations. The legislation should also specify the agency that applications must be submitted to, as well as the prescribed fee for the registration application, which may also be detailed in the secondary legislation or regulations, because it may change.

### 10.2.3.2 Information required for an application for registration as a broker

The legislation should specify what information and documentation a person must provide as part of an application to register as a broker. An application form included in the regulations is the simplest option.

#### 10.2.3.3 Registration criteria

The legislation should stipulate the criteria a person (natural or legal) must fulfil before he/she can be registered as a broker. Registration criteria for brokers generally include consideration of whether the applicant is a ‘fit and proper’ person to conduct brokering activities. In determining whether an applicant is a fit and proper person, the competent authority should have regard to:

- **Age:** applicants should have reached a certain age (e.g. country’s age of majority or above).
- **Background checks:** applicants should be subjected to background checks to ensure:
  - a) They do not have a criminal record or connections to organised criminals;
  - b) They do not have a history of mental illness or mental disability;
  - c) If a person has been previously registered as a broker – whether the person breached a condition of that registration or whether that registration was cancelled or whether the person has breached a condition of a brokering authorisation; and
  - d) The financial position of the person or, when the person is a body corporate, the financial position of the director, manager or other similar officer.<sup>113</sup>

*Drafting note:* given the level of detail involved, registration criteria may be better suited to subsidiary legislation or regulations rather than primary legislation.

#### 10.2.3.4 Review of a decision not to register a broker

The legislation could give applicants the right to ask the competent authority to review a decision not to register him/her as a broker.

### **10.2.3.5 Duration of registration**

The legislation should specify how long a broker will remain on the register, as well as the process for applying for a renewal of the registration.

### **10.2.3.6 Conditions of registration**

Broker registration may be conditional on, for example, notifying the relevant authority of any changes in information or circumstances.

### **10.2.3.7 Cancellation of registration as a broker**

The legislation should contemplate that the competent authority may cancel a broker's registration before it expires in specified circumstances, including:

- a) At the request of the registered person;
- b) If new facts become evident that, had they been known or existed at the time of the review of the initial application for registration, would have resulted in a refusal to register the person;
- c) If the registered person fails to comply with the relevant legislation relating to the import, export and transit of arms, their parts and components and ammunition;
- d) If the registered person violates or is reasonably believed to have violated a binding UN Security Council, regional or national arms embargo;
- e) If a legal registered person is dissolved or a registered natural person dies;
- f) If false or misleading information has been supplied to obtain the registration;
- f) If the conditions on the registration or a brokering authorisation are not fully complied with; or
- h) If the broker is convicted of a criminal offence.<sup>114</sup>

## **10.2.4 Licensing or authorisation**

In addition to requiring brokers to register with the competent authority before they can conduct brokering activities, the state should also require that they obtain a licence, permit or some form of authorisation for each brokering activity they wish to conduct. The legislation will need to include provisions



establishing the process for obtaining an authorisation to conduct brokering activities, including the following elements and considerations below.

#### **10.2.4.1 Application for brokering authorisation**

The legislation should stipulate that a person applying for a brokering authorisation must do so in a particular form, and this form should be included in a schedule to the legislation or secondary legislation or regulations. The legislation should also specify the agency or authority that applications must be submitted to, as well as the prescribed fee for the licence application, which may also be detailed in the secondary legislation or regulations, because it may change.

#### **10.2.4.2 Information required for an application for a brokering authorisation**

The legislation should specify what information and documentation a person must provide as part of an application for brokering authorisation. A list of the information and documentation that may be required as part of an application for a brokering authorisation is included in Annex C.2.

#### **10.2.4.3 Assessment of an application for brokering authorisation**

The legislation should contemplate that the competent authority will assess each application for a brokering authorisation, and may grant or refuse to grant a brokering authorisation, and shall inform the applicant of the outcome.

The legislation may specify the criteria the competent authority will apply in making the decision, depending on the level of transparency or ‘openness’ of the licensing system; however, such decisions may be made on policy grounds that are not made public. At a minimum, drafters may choose to include a (non-exhaustive) list of some of the circumstances under which a brokering authorisation will be refused (grounds for denial), including, for example, if the information required as part of the application process has not been provided.

Drafters may also choose to list the criteria outlined in Article 6 of the ATT, which identify the circumstances in which states parties are required to deny a transfer (including brokering activities), namely:

- a) If the brokering activity would violate the state's obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the UN, in particular arms embargoes;
- b) If the brokering activity would violate the state's relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms; or
- c) If the state has knowledge at the time of authorisation that the arms or items the subject of the brokering activity would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party.

*Drafting note:* states parties are required to apply the above considerations (the prohibitions in Article 6 of the ATT) to decisions to grant or deny brokering authorisations. They are not required to apply the criteria in Article 7 (Export and Export Assessment) or Article 11 (Diversion) to brokering decisions only to exports. However, states that want a coherent and effective international transfer control system have a clear interest in applying Article 7 to brokering activities, as well as exports. Further, since a brokering activity may involve the *export* of arms or other items, states should consider applying the criteria in Article 7 to brokering authorisation decisions also.

If a state chooses to apply the criteria in Article 7 to brokering decisions, it could include provisions in the legislation that stipulate that, if a brokering authorisation is not refused under the criteria covered in Article 6 of the ATT (listed above), then the competent authority will assess the risk that the arms or items that are the subject of the brokering authorisation application:

- a) Would undermine peace and security; or
- b) Could be used to commit or facilitate:
  - i. A serious violation of international humanitarian law;
  - ii. A serious violation of international human rights law;
  - iii. An act constituting an offence under international conventions or

- protocols relating to terrorism to which the state is a party;
- iv. An act constituting an offence under international conventions or protocols relating to transnational organised crime to which the state is a party; or
  - v. Serious acts of gender-based violence or serious acts of violence against women and children; or
- c) Could be diverted before, or after, delivery to their intended end user.

If on the basis of the assessment conducted the authority determines that there is an ‘overriding’ risk of one of the negative consequences outlined, it will refuse to grant the authorisation.

#### **10.2.4.4 Particulars of a brokering authorisation**

The legislation could include a list of the particular (information) to be included on the brokering authorisation, once granted. A list of the information that may be included in a brokering authorisation is provided in Annex D.

#### **10.2.4.5 Review of a decision not to issue a brokering authorisation**

The legislation could give applicants the right to ask the competent authority to review a decision not to grant a brokering authorisation.

#### **10.2.4.6 Licence conditions for a brokering authorisation**

The legislation should include provisions noting that an import licence is subject to conditions, including compliance with record-keeping requirements (see section 6.2.4.4). Drafters may also consider other conditions that require a licensee to:

- Permit inspection of the information and records held by the licensee;
- Submit regular reports on activities;
- Notify the licensing authority of any change in circumstances or address.

#### **10.2.4.7 Duration of a brokering authorisation**

The legislation should specify the length of time a brokering authorisation remains valid, which should be of sufficient duration to ensure that the brokering activity can be completed. It may also contemplate that the period of validity may be extended on application to and approval from the competent authority,

provided the application for an extension takes place before the licence expires.

#### **10.2.4.8 Revocation or amendment of a brokering authorisation**

The legislation should contemplate that the competent authority may revoke or amend a brokering authorisation before it expires in specified circumstances, including if:

- a) The licensee no longer qualifies to hold the licence;
- b) The licensee has contravened or failed to comply with any provision of the relevant law or any condition specified in the licence;
- c) New facts become evident that, had they been known or existed at the time of the review of the initial application for the licence, would have resulted in a refusal;
- d) False information has been supplied to obtain the licence;
- e) The licensee contravenes the provisions of a binding UN Security Council, regional or national arms embargo;
- f) The licensee is convicted of a criminal offence (this may relate to general criminal offences or criminal offences related to arms trafficking); or
- g) There has been a material change in circumstances since the licence was issued.<sup>115</sup>

## **Section 11 – National control list**

### **11.1 Overview of commitments**

#### **11.1.1 *International commitments***

Under the ATT, states parties are required to establish and maintain a national control list as part of their national control systems, and are encouraged to make them publicly available.<sup>116</sup> The ATT encourages states parties to apply the treaty 'to the broadest range of conventional arms' and, at a minimum, their national definitions of conventional arms – other than small arms and light weapons – should not cover less than the descriptions used in the UN Register of Conventional Arms (UNROCA) at the time of the

entry into force of the ATT (December 2014); and their national definitions of small arms and light weapons should not cover less than the descriptions used ‘in relevant United Nations instruments’ at the time of entry into force of the ATT (i.e. the ITI).<sup>117</sup>

Given that the export of ammunition/munitions and parts and components must also be regulated as part of states parties’ national control systems under the ATT,<sup>118</sup> these items must also be included in a national control list.

### **11.1.2 Regional commitments**

Neither the SADC Protocol nor the Nairobi Protocol expressly require states parties to maintain national control lists.

## **11.2 Legislative guidance**

States may choose to include their national control list in a schedule to the main arms control law or in regulations, because the list of controlled items is likely to undergo more frequent changes and amendments than the main law. In terms of the scope or level of detail of the national control list, states have discretion to take a minimalist approach – whereby the national definitions of conventional arms reflected in their national control lists cover only the definitions used in UNROCA and the ITI (as stipulated in Article 5(3)) – or they may choose to establish and maintain a more detailed, comprehensive national control list. Examples of more detailed national control lists include the Wassenaar Arrangement Munitions List<sup>119</sup> and the European Union Common Military List.<sup>120</sup> Further guidance on establishing a national control list can be found in the ATT Handbook.

# PART IV

## Penal provisions

### **Section 12 – Criminal offences**

#### **12.1 Overview of commitments**

##### ***12.1.1 International commitments***

The UNPoA is the only instrument under consideration that explicitly calls on states to criminalise certain activities pertaining to small arms and light weapons. Namely, it stipulates they should adopt and implement, where they have not already done so:

the necessary legislative or other measures to establish as criminal offences under their domestic law the illegal manufacture, possession, stockpiling and trade of small arms and light weapons within their areas of jurisdiction, in order to ensure that those engaged in such activities can be prosecuted under appropriate national penal codes.<sup>121</sup>

##### ***12.1.2 Regional commitments***

States parties to the SADC Protocol are required to enact the necessary legislation and take other measures to establish the illicit manufacturing of ‘firearms, ammunition and other related materials’ as a criminal offence under their national law.<sup>122</sup> The SADC Protocol goes on to define ‘illicit manufacturing’ as:

The manufacturing or assembly of firearms, ammunition and other related materials, without a licence or permit from a competent

authority of the State Party where the manufacture or assembly takes place.<sup>123</sup>

States parties to the Nairobi Protocol are required to enact the necessary legislation and take other measures to establish the following as criminal offences under their national law:

- a) Illicit trafficking in small arms and light weapons;
- b) Illicit manufacturing of small arms and light weapons;
- c) Illicit possession and misuse of small arms and light weapons; and
- d) Falsifying or illicitly obliterating, removing or altering the markings on small arms and light weapons as required by the Protocol.<sup>124</sup>

The Nairobi Protocol goes on to define ‘illicit manufacturing’:

‘illicit manufacturing’ shall mean the manufacturing or assembly of small arms and light weapons:

- a) From parts and components illicitly trafficked;
- b) Without a licence or authorisation from a competent authority of the state party where the manufacture or assembly takes place; or
- c) Without marking the small arms and light weapons at the time of manufacture, in accordance with Article 7 of this Protocol.<sup>125</sup>

The SADC Protocol and Nairobi Protocol also stipulate that states parties must enact legislation to sanction criminally, civilly or administratively violations of UN Security Council arms embargoes.<sup>126</sup>

Accordingly, these elements should be included in criminal offences established under the national legislation where the state is a state party to the SADC Protocol or Nairobi Protocol.

## 12.2 Legislative guidance

Depending on its existing laws and the measures chosen to implement the manufacturing, record-keeping, marking, licensing and other requirements of the international instruments under consideration in this guide, and as stipulated in the Nairobi Protocol and SADC Protocol, a state may wish to

consider establishing additional criminal offences including those outlined in the UNPoA (see section 12.1), namely:

- a) Illegal manufacture of small arms and light weapons;
- b) Illegal possession of small arms and light weapons;
- c) Illegal stockpiling of small arms and light weapons; and
- d) Illegal trade in small arms and light weapons.

They may also wish to consider extending these criminal offences to conventional arms, not just small arms and light weapons, as well as ammunition/munitions and parts and components, if they are states parties to the SADC Protocol and/or extend their entire control system to these items.

They should also consider establishing criminal offences in relation to other contraventions of other measures discussed and outlined in this guide, such as:

- a) Illicit brokering (i.e. brokering without being registered or without holding a brokering authorisation for a particular transaction, in several areas, although this is not a mandatory requirement);
- b) Illicit trafficking (i.e. transfer without authorisation);<sup>127</sup>
- c) Providing false or misleading information as part of a licensing application;
- d) Failing to comply with the conditions of a licence (including failing to mark small arms and light weapons adequately, or failing to keep requisite records, etc.);
- e) Falsification of records; and
- f) Destruction of records, etc.

The legislation or regulations should stipulate the prison sentence and/or fine applicable in relation to each offence, and the relevant penalties that apply where the offence is committed by a natural or legal person.

States will also need to ensure they have appropriate legislative and other measures to establish as criminal offences actions by persons attempting to commit or participating as an accomplice and organising, directing, aiding,



abetting, facilitating or counselling the commission of the offences that are established above. Such ancillary offences may already be covered under the existing penal code.

- ★ Further guidance on the establishment of criminal provisions pertaining to small arms and light weapons can be found in Part One, Section B and Annex I, Section E of the UNODC Model Law.

# ANNEX A

## Records of international transactions

Records of export authorisations granted and actual exports, records of import authorisations, records of transit and transshipment notifications and of actual transit and transshipments, as well as records of brokering authorisations should include the following information as indicated in the relevant column(s) (see section 6.2.4).

	<b>Information to be recorded</b>	<b>Exports<sup>128</sup></b>	<b>Imports<sup>129</sup></b>	<b>Transit and transshipment<sup>130</sup></b>	<b>Brokering<sup>131</sup></b>
1.	Export authorisation: 1) Number; 2) Issuing agency (in the exporting state); 3) Issue date; 4) Expiry date; and 5) Recipient (name and contact details)	X	–	X	–

	<b>Information to be recorded</b>	<b>Exports<sup>128</sup></b>	<b>Imports<sup>129</sup></b>	<b>Transit and transshipment<sup>130</sup></b>	<b>Brokering<sup>131</sup></b>
2.	Import authorisation: 1) Number; 2) Issuing agency (in the importing state); 3) Issue date; 4) Expiry date; and 5) Recipient (name and contact details)	X	X	X	X
3.	Brokering authorisation: 1) Number; 2) Issuing agency; 3) Issue date; 4) Expiry date; and 5) Recipient (name and contact details)	–	–	–	X
4.	Country of export	–	–	–	X
5.	Country of import	X	–	X	X
6.	Countries of transit and transshipment	X	–	–	–
7.	End user certificate (or certified end user statement): 1) Number; 2) Issuing (or certifying) agency in the importing state; 3) End user (name and contact details); and 4) End use	X	–	X	X
8.	Authorised end use	–	X	–	–
9.	Names and contact details of the: 1) Brokers; 2) Freight forwarding agents; 3) Transport/shipping carriers; and 4) Intermediate consignees	X	–	–	–

	<b>Information to be recorded</b>	<b>Exports<sup>128</sup></b>	<b>Imports<sup>129</sup></b>	<b>Transit and transshipment<sup>130</sup></b>	<b>Brokering<sup>131</sup></b>
10.	Name and contact details of the authorised end user	–	X	–	–
11.	Name and contact details of the exporter	–	–	–	X
12.	Value of the export/consignment	X	–	X	X
13	Description of the small arms or light weapons authorised for export, including their: 1) Quantities; 2) Makes; 3) Models; 4) Calibres; 5) Serial numbers; 6) Countries of manufacture; 7) Import marking (if present); 8) Types (e.g. revolver, pistol, rifle, sub-machine gun, light machine gun, heavy machine gun, grenade launcher, mortar, recoilless rifle, anti-aircraft gun, anti-tank gun, anti-tank rocket system, anti-tank missile system, anti-aircraft missile system (e.g. MANPADS, etc.)); and 9) Actions (e.g. manual, semi-automatic or automatic. If a weapon has a selective fire capability, the highest capability, automatic being the highest, should be indicated)	X	X	X	X

# ANNEX B

## Information to be recorded on actual imports

Records of actual imports should include the:

- a) Date of import;
- b) Export authorisation:
  - i. Number;
  - ii. Issuing agency;
  - iii. Issue date;
  - iv. Expiry date; and
  - v. Recipient (name and contact details);
- c) End user certificate (or certified end user statement):
  - i. Number; and
  - ii. Issuing (or certifying) agency; and
- d) Description of the small arms or light weapons imported, including, for assembled small arms or light weapons, their:
  - i. Serial numbers;
  - ii. Country of manufacture; and
  - iii. Import markings.<sup>132</sup>

# ANNEX C

## Information required for licence applications

### C.1 Information required for an application for a manufacturer's licence

#### *Natural person*

Where the applicant for a licence to manufacture is a natural person or individual as opposed to legal person or entity, the applicant should be required to provide:

- a) Proof of the identity of the applicant, including:
  - i. The applicant's name;
  - ii. Physical address; and
  - iii. A recent photograph;
- b) A full set of the applicant's fingerprints;
- c) Proof of the identity of any person the applicant proposes to employ in the business, together with:
  - i. The person's name;
  - ii. Physical address; and
  - iii. A recent photograph;
- d) A full set of the fingerprints of any person the applicant proposes to employ in the business;

- e) A competency certificate demonstrating satisfactory completion of any competency test prescribed by regulations;
- f) References demonstrating good character (see section 4.2.3.3);
- g) Any medical certificate required demonstrating the person is not an alcoholic or substance abuser;
- h) Information on the weapons to be manufactured, including type and expected quantity to be manufactured each year; and
- i) The address of the premises where the business will be conducted.<sup>133</sup>

### ***Legal person***

Where the applicant for a licence to manufacture is a legal entity as opposed to natural person, the applicant should be required to provide:

- a) Original or certified copies of the company's founding documents, articles of incorporation or other proof of licensed business;
- b) Information on the weapons to be manufactured, including type and expected quantity to be manufactured each year;
- c) Proof that the company meets state standards for protection of proprietary and state classified information;
- d) Information on foreign control and/or ownership in the applicant company;
- e) The identity of each of the officers of the body corporate, including:
  - i. Their name;
  - ii. Physical address; and
  - iii. A recent photograph;
- f) The identity of the person who will be responsible for the day-to-day management of manufacturing facility;
- g) With respect to the responsible person and any person the applicant proposes to employ in the business:
  - i. Proof of the identity, including:
    - 1. The person's name;
    - 2. Physical address; and

3. A recent photograph;
  4. A full set of fingerprints;
- ii. A competency certificate demonstrating satisfactory completion of any competency test prescribed by the regulations;
  - iii. References demonstrating the good character;
  - iv. Any medical certificate pertaining to the responsible person; and
- h) The address of the premises where the business will be conducted.<sup>134</sup>

## **C.2 Information required for an application for an export or import licence or brokering authorisation**

The legislation should specify what information and documentation a person must provide as part of an application for an export licence (see section 7.2.3.2), an import licence (see section 8.2.3.2) or brokering authorisation (see section 10.2.4.2). In accordance with ISACS, this should include:

- a) The name and contact details of the applicant for authorisation (the exporter, importer or broker);
- b) The applicant's operating licence (if the state requires exporters, importers or brokers to hold an operating licence or be registered as a prerequisite before they can apply for an export or import licence or brokering authorisation for a particular transaction);
- c) The import authorisation (issued by the importing state);
- d) The export authorisation;
- e) The transit and transshipment notifications;
- f) End user documentation (i.e., end user certificate or end user statement);
- g) The intended end use of the consignment;
- h) The names, contact details and roles of all parties involved in the transfer, including:
  - i. Brokers;
  - ii. Freight-forwarding agents;
  - iii. Transport/shipping carriers; and
  - iv. Intermediate consignees;



- i) Details of the transport route, including the means of transport to be used for each segment;
- j) The value of the consignment; and
- k) A description of the consignment including, in the case of assembled small arms or light weapons, their:
  - i. Quantities;
  - ii. Makes;
  - iii. Models;
  - iv. Calibres;
  - v. Serial numbers;
  - vi. Countries of manufacture or most recent import;
  - vii. Import markings (if present);
  - viii. Types (e.g. revolver, pistol, rifle, sub-machine gun, light machine gun, heavy machine gun, grenade launcher, mortar, recoilless rifle, anti-aircraft gun, anti-tank gun, anti-tank rocket system, anti-tank missile system, anti-aircraft missile system (e.g. MANPADS, etc.)), and
  - ix. Actions (e.g. manual, semi-automatic or automatic. If a weapon has a selective fire capability, the highest capability should be indicated).<sup>135</sup>

# ANNEX D

## Particulars of licences and authorisations

In accordance with ISACS, the information that should be included in an export licence (see section 7.2.3.4), an import licence (see section 8.2.3.4) or a brokering authorisation (see section 10.2.4.4) includes:

- a) A unique transfer authorisation number;
- b) The identity of the competent national authority issuing the authorisation, which can include its official stamp;
- c) Signature, printed name and position of the designated official of the competent national authority issuing the authorisation;
- d) Name and contact details of the recipient of the authorisation;
- e) Date of issuance;
- f) Date of expiration;
- g) Country of export;
- h) Name and contact details of the exporter;
- i) Countries of transit and/or transshipment;
- j) Country of import;
- k) Import authorisation number (for export licences);
- l) Name and contact details of the authorised end user;

- m) Authorised end use of the consignment;
- n) Names and contact details of all parties involved in the transfer, including:
  - i. Brokers,
  - ii. Freight-forwarding agents,
  - iii. Transport/shipping carriers, and
  - iv. Intermediate consignees;
- o) Details of the transport route, including the means of transport to be used for each segment;
- p) Value of the consignment; and
- q) A description of the consignment including, in the case of assembled small arms or light weapons, their:
  - i. Quantities;
  - ii. Makes;
  - iii. Models;
  - iv. Calibres;
  - v. Serial numbers;
  - vi. Countries of manufacture or most recent import;
  - vii. Import markings (if present);
  - viii. Types (e.g. revolver, pistol, rifle, sub-machine gun, light machine gun, heavy machine gun, grenade launcher, mortar, recoilless rifle, anti-aircraft gun, anti-tank gun, anti-tank rocket system, anti-tank missile system, anti-aircraft missile system (e.g. MANPADS, etc.)); and
  - ix. Actions (e.g. manual, semi-automatic or automatic. If a weapon has a selective fire capability, the highest capability should be indicated).<sup>136</sup>

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# Notes

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### About the ISS

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