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The legal and regulatory framework for UK arms exports

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Summary

From arms-to-Iraq to today's framework

This briefing provides an overview of the legal and regulatory framework for arms exports that has been introduced in the UK since 1997. This has developed on the basis of the recommendation made in Sir Richard Scott's 1996 report on the arms-to-Iraq inquiry that a thorough review of the existing framework should be carried out.

The main elements of today's framework are the Consolidated EU and National Arms Export Licensing Criteria; the *Export Control Act 2002;* and a number of EU measures.

Developments under the 2015-17 Conservative Government

There were two important changes to the UK's regulatory framework for arms exports under the 2015-17 Conservative Government.

Firstly, the Government announced the creation of an 'Export Controls Joint Unit', which will provide a "coordinated cross-government operation of export controls while maintaining a prompt and high quality licensing service for UK exporters." However, DFID is not represented on the new unit.

Secondly, since July 2016 responsibility for export controls moved from the defunct Department for Business, Innovation and Skills to the new Department for International Trade (DIT).

The main controversy over UK arms export control policy during the last Parliament arose from the use of UK-manufactured arms in Yemen by Saudi Arabia. Concerns that UK arms may have been used to commit violations of International Humanitarian Law in Yemen led to calls from a range of quarters for the suspension of arms exports to Saudi Arabia. The Government rejected these calls. A judicial review of the UK Government's decision was heard in February 2017.

Parliament's Committees on Arms Export Controls, which scrutinises UK arms export policy, held an inquiry into this controversy. However, there was a split within the Committees on the key issue of whether or not to endorse the suspension of UK arms exports to Saudi Arabia that could be used in Yemen. This led ultimately to the publication of two separate reports. However, both reports included recommendations that the UK's licensing system should be made more robust and transparent. The Committees effectively ceased to function after it split over the issue.

Issues for a future UK Government

Brexit and the Consolidated Criteria

Since it was agreed in 2008, European Council Common Position 2008/944/CFSP has been widely cited as the basis on which the Consolidated EU and National Arms Export Licensing Criteria (henceforth, Consolidated Criteria) became legally binding in the UK.

The 2008 Common Position contains eight criteria against which export licensing applications can be approved or refused by EU Member States. The wording used in the Common Position is very similar to that used in the Consolidated Criteria. Successive UK governments have considered them to be fully consistent with each other (although successive Committees on Arms Export Controls up to 2015 did not).

The European Union (Withdrawal) Bill has plenty to say about the future of EU Regulations, Directives and Decisions, but how it treats the many Common Positions – or

as they are called today, CFSP Decisions – to which the UK has committed itself during its EU membership requires some teasing out.

The Bill appears to indicate that, for its purposes, CFSP Decisions are not considered EU law by the UK Government, but are instead "international obligations" as defined in Clause 8.

Clause 8 gives Ministers

> the power to make secondary legislation to enable continued compliance with the UK's international obligations by preventing or remedying any breaches that might otherwise arise as a result of withdrawal.

Given this, the question then arises of whether secondary legislation might be required to enable the UK to meet its "international obligations" in this sphere of policy. It is likely that – although it has not said so explicitly – the UK Government does not think that it is necessary.

The UK Government appears to be of the view that the Consolidated Criteria, which are "guidance" provided for by a piece of primary legislation, The *Export Control Act 2002*, "enable continued compliance with the UK's "international obligations".

However, some might argue that, under the 2002 Act, it is the duty to provide guidance, rather than the content of the guidance itself, that is binding in UK law – and that this represents insufficient compliance with the UK's "international obligations."

Some might also be concerned that, as things stand, a post-Brexit UK government could change the content of the guidance – potentially weakening or scrapping the Consolidated Criteria – through the exercise of administrative powers under the 2002 Act.

In fact, this has been possible while the 2008 Common Position has been in force. Indeed, when the Coalition Government (2010-15) issued a new version of the Consolidated Criteria in March 2014, it was not subject to prior debate or a vote in parliament.

Given all this, some might ask whether it would be desirable, if the 2008 Common Position is not to be part of "retained EU law", for the UK Government to confirm through new legislation the binding status in UK law of the current version of the Consolidated Criteria.

In December 2016, a senior FCO official indicated that she expected the Consolidated Criteria to "stand" after Brexit, but did not set out her reasons for saying so. The UK Government may eventually provide a fuller explanation of its position.

Judicial review: High Court finds for the government but there may be an appeal

The Campaign Against Arms Trade (CAAT) asked the High Court to order the government to reconsider its decision in the last parliament not to suspend arms exports to Saudi Arabia following concerns that UK arms may have been used to commit violations of IHL in the course of Saudi military operations in Yemen. In July 2017 the High Court found in favour of the government. CAAT is seeking permission to appeal.

Future of parliamentary scrutiny

Parliament has to decide how best to scrutinise UK arms export policy in future. It can resurrect the Committees on Arms Export Controls or give the role to a different body.

See also Commons Library Briefing Paper No. 5802, "The Arms Trade Treaty" (last updated November 2014).

This title of this briefing paper used to be 'UK Arms Export Control Policy'.

1. Overview of the current UK and EU legal and regulatory framework

Sir Richard Scott's report of the *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution*,[1] of February 1996, recommended that a thorough review of strategic export controls (i.e. controls on military and dual-use goods) and export licensing procedures be carried out.[2]

In response to the recommendations of the Scott Report, the Labour Party's 1997 general election manifesto pledged that:

> Labour will not permit the sale of arms to regimes that might use them for internal repression or international aggression. We will increase the transparency and accountability of decisions on export licences for arms. And we will support an EU code of conduct governing arms sales.[3]

1.1 The Consolidated Criteria and the Consolidated List

After the May 1997 election, the Labour Government introduced new national export licensing criteria and supported the creation of a voluntary EU Code of Conduct on Arms Exports. The Code came into effect in 1998 (see also section 1.3 of this note).

In October 2000 the Labour Government introduced the *Consolidated EU and National Arms Export Licensing Criteria* (henceforth, Consolidated Criteria), which brought together the UK's national export licensing criteria with those of the EU Code of Conduct on Arms Exports.[4]

The Criteria considered whether the proposed export would:

- contravene the UK's international commitments
- be used for internal repression
- provoke or prolong armed conflicts or aggravate existing tensions in the destination country
- be used aggressively against another country
- adversely affect the national security of the UK or allies
- be diverted or re-exported under undesirable conditions
- seriously undermine the economy

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1 *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution*, HC115, 15 February 1996
2 'Dual-use' refers to goods which can be used for both civilian and military purposes.
3 *New Labour because Britain deserves better*, Labour Party 1997 General Election manifesto
4 The full text of the 2000 Consolidated Criteria can be accessed by clicking on this link.

- seriously hamper the sustainable development of the recipient country

Since then, all applications to export arms and other strategically controlled goods that appear on what is known as the UK's Strategic Export Control Lists, also called the *Consolidated List of Strategic Military and Dual-Use Items that require Export Authorisation* (henceforth, Consolidated List) have been considered, on a case-by-case basis, against the Consolidated Criteria.[5]

Licences are issued by the Export Control Organisation (ECO), which today is part of the Department for International Trade (DIT), following consultation with the Foreign and Commonwealth Office (FCO), the Ministry of Defence (MOD) and – when deemed necessary – the Department for International Development (DFID).[6] The first three government departments come together in a body called the Export Control Joint Unit to decide on licensing applications. Ministers can become involved. The ultimate decision-maker is the Secretary of State for International Trade.

The Consolidated List brings together into one document the UK's own lists and those that derive from the EU. It includes the UK Military List, the UK Dual-Use List, the EU Human Rights List, the UK Security and Paramilitary List, the EU UK Radioactive Sources List and the EU Dual-Use List. It is regularly updated.

The full texts of both the Consolidated List (last updated February 2017), which is a highly complex and technical document, and the Consolidated Criteria, which were updated for the first time since 2000 in March 2014 (see below for further details) can be accessed by clicking on these links. The full text of the Consolidated Criteria at March 2014 can also be found in the Appendix.

In July 2002 the Government introduced a number of additional factors for consideration when assessing arms export licences, which have been commonly referred to as the 'incorporation policy'. This policy was intended to respond to the fact that, increasingly, defence goods were manufactured from components sourced in several different countries. This meant that many export licence applications were for goods which were to be incorporated in defence equipment in a second country, after which they would be exported to a third country.

1.2 The *Export Control Act 2002*

The then Labour Government also took steps to review the UK statutory framework governing export controls. The result was the *Export Control Act 2002*. The Act replaced all of the export control provisions

[5] The phrase used by Peter Hain, then Minister of State in the FCO, when announcing the establishment of the Consolidated Criteria, about how they should be used was: "they will not be applied mechanistically but on a case-by-case basis, using judgment and common sense".

[6] The DIT took over the role in July 2016 when the Department for Business, Innovation and Skills was abolished.

contained in the *Import, Export and Customs Powers (Defence) Act 1939*.

As well as maintaining the Government's power to control the physical export of goods, the *Export Control Act 2002* gave the Government new powers, allowing controls to be imposed in the following areas: Intangible transfer of military and other sensitive technology; transfer by any means of WMD-related technology; trade in controlled goods between overseas countries (trafficking/brokering); and the provision of technical assistance overseas.

The Act came into force in May 2004. The specific controls introduced under the Act are found in the main secondary legislation, the Export Control Order 2008 (SI 2008/3231)

The Act required the Secretary of State to issue guidance on the exercise of licensing powers. The Consolidated Criteria have been issued in fulfilment of this duty.

The Act was also intended to increase the transparency and accountability in the export control regime by setting limits on the Government's overarching power to control exports.

It did this by providing that controls may be introduced only on categories of equipment and technology specified in the Schedule of the Act, or in order to implement an international or EU obligation. Temporary controls could be introduced for reasons outside the Schedule of the Act, although only with the approval of Parliament.

Additionally, the Act provided for parliamentary scrutiny of new Export Control Orders contained in the secondary legislation introduced under the Act. A Statutory Instrument containing a Control Order must be approved by affirmative Resolution in each House within 40 days of the Instrument being laid. However, the Act does not provide, as some had hoped, for prior parliamentary scrutiny of the export licensing regime.

The Act also formalised the requirement on the Government to report annually to Parliament on the controls imposed on both strategic and cultural exports (Section 10, Clauses 1 and 2). This is achieved through the *Strategic Export Controls: Annual Report*, which is published by the Government, usually every July. Click on this link for the most recent report – the 2015 Report.

Since the beginning of 2004 the Government has also published annual and quarterly reports detailing export licences approved and refused during that period. All of these reports are also available online.

The Government's reports have been scrutinised by the members of the four Commons Select Committees with a direct interest in the UK's regulatory framework for arms exports: the Foreign Affairs, Defence, International Trade and International Development Committees. Originally known as the Quadripartite Committee, in March 2008 it was renamed the Committees on Arms Export Controls. Its reports, along with the Government's published responses, are also available online. However, its future is currently uncertain.

In 2007 there was a review of the *Export Control Act* by the then Labour Government. The aim of the review was to examine the effectiveness of the controls introduced under the Act, in particular with respect to brokering, trafficking and licensed production, and determine whether further changes needed to be made to the legislation without imposing a disproportionate burden on business. Key official documents relating to this review are available online.

The review led to a series of changes to the UK's legal and regulatory framework for arms exports. The extraterritorial provisions of export control legislation were extended by the introduction of a new three-tier system of trade controls.

- Trade in Category A goods – security and paramilitary goods – by UK persons anywhere in the world is prohibited.[7]
- Trade in Category B goods, which on the basis of international consensus have been identified as being of heightened concern – for example, small arms, light weapons and man-portable air defence systems – is prohibited by UK persons anywhere in the world unless they obtain a licence.
- Trade in Category C goods – any item on the UK Military List not included in Categories A and B – is not controlled unless it is carried out by persons within the UK.

The Labour Government rejected proposals by the Committees and by NGO and industry stakeholders to apply extra-territorial controls to Category C goods by extending them to UK persons overseas as part of efforts to combat international arms brokering.

The review also led to measures being implemented to bring aspects of transport and ancillary services, and transit and transhipment, within the ambit of the UK's legal and regulatory framework for arms exports. For example, Category B goods in transit or being transhipped through the UK to "destinations of concern" would in future require a licence.

1.3 EU measures

After a long period of negotiation, a revised, legally binding, version of the EU Code of Conduct on Arms Exports was adopted by EU member states in December 2008.

European Council Common Position 2008/944/CFSP is an Act under Title V of the EU Treaty. Called "The Common Rules Governing the Control of Exports of Military Technology and Equipment", these new Rules incorporated measures that increased the scope of the Code to include brokering, intangible technology transfers and licensed production in third countries. It also expanded and strengthened the criteria against which export licences are assessed. An in-depth "users guide" to the Common Position has also been published.

[7] Aspects of export control legislation apply to persons of British nationality regardless of where they reside – that is, they are extraterritorial in character.

The UK Government views the Common Rules as fully consistent with the Consolidated Criteria. But others have disagreed (see Appendix 1).

The EU publishes an annual "Common Military List of the European Union" (last updated March 2017), which sets out equipment covered by the Common Position.

Most EU Member States publish annual reports on their implementation of the Common Position, which draw upon in the EU's own annual reports on implementation. However, the licensing of defence exports remains at the discretion of Member States and the Common Rules do not prevent EU Member States from adopting more restrictive national policies should they so wish.

In 2012 the European Council undertook a review of the Common Position, concluding that it "still serves the objectives set in 2008."[8]

In 2009, the European Council also adopted Regulation 428/2009, which is now the basis for the EU Dual-Use List, which includes brokering and transit controls for dual-use items, as well as end-use controls in relation to certain items or technology.

In 2011, the European Commission began a review of the EU system of export control of dual-use items. In 2014, a set of review options was proposed that included consideration of how to simplify the regulatory framework and reduce the administrative burden imposed on stakeholders.[9] In 2015, the European Commission undertook an impact assessment of the costs and benefits associated with those options and conducted a public consultation process, the outcome of which was published in November 2015.[10]

The next step was for the Commission to publish a proposal for changes to Regulation 428/2009 during 2016. It did so on 28 September 2016. The proposed changes will involve adopting a new Council Regulation. The objectives are to make the control regime:

> *more efficient*– simplifying the administration of controls by optimising licensing processes, introducing EU General Export Authorisations, and simplifying the controls on technology transfers, while ensuring a high level of security and adequate transparency to prevent illicit use of the exported items;
>
> *more consistent*– avoid divergent levels of controls throughout the EU by e.g. harmonising the controls on brokering, technical assistance and transit of dual-use items;
>
> *more effective*– by introducing specific provisions preventing the misuse of dual-use items in relation to terrorism.[11]

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8 Council conclusions on the review of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, 19 November 2012

9 Commission Communication to the Council and the European Parliament, COM (2014)244 Final, 24 April 2014

10 Results of Public Consultation, 23 November 215

11 "Commission proposes to modernise and strengthen controls on exports of dual-use items", European Commission press release, 28 September 2016. The full proposal can be found via this link.

Since 2005, there has also been an EU Regulation in force specifically concerning the trade in certain goods that can be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

The vote to leave the EU in the referendum of 23 June 2016 placed a question-mark against the applicability of laws derived from the UK's membership of the EU after Brexit has happened. Addressing this issue could have implications for some EU-derived elements of the UK's legal and regulatory framework for arms exports. For a more detailed discussion of this issue, see section 3.1 of this briefing.

2. Developments under the 2015-17 Conservative Government

2.1 Official actions

Adjustments to the regulatory framework

There were two important changes to the EU and UK regulatory framework for arms exports under the 2015-17 Conservative Government.

Creation of the Export Controls Joint Unit

In its 2015 Strategic Arms Export Controls report, published in July 2016, the Government announced the creation of an 'Export Controls Joint Unit', which:

> […] will bring together expertise from BIS, the Foreign & Commonwealth Office, and the Ministry of Defence, to provide coordinated cross-government operation of export controls while maintaining a prompt and high quality licensing service for UK exporters.[12]

DFID is not represented in the new Unit.[13]

Creation of the Department for International Trade

Later in July 2016 – in the aftermath of the vote to leave the EU and the arrival in office of a new Prime Minister, Theresa May – BIS was abolished, with its roles and responsibilities parcelled out to two new government departments. One of them was the Department for International Trade (DIT). It took over responsibility for strategic export controls.

Other actions

Having considered arguments for and against establishing a pre-licensing register of arms brokers since 2014, the Government decided not to proceed with one in July 2015.[14]

During 2015 and 2016, the Government reviewed the quality of data collected under reporting requirements introduced in 2014 for the use of Open General and Open Individual Licences. The intention is to publish information about which of these licences was approved or refused, as it already does for other types of licence.[15]

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12 UK Strategic Arms Export Controls Annual Report 2015, 7 July 2016, p1

13 For more information on how the Unit works today, see the FCO's December 2016 written evidence to the Foreign Affairs Committee inquiry on FCO policy on arms exports and oral evidence to the same inquiry in the same month.

14 UK Strategic Arms Export Controls Annual Report 2015, p3

15 Ibid

Arms Trade Treaty

In its 2015 Strategic Arms Export Controls Annual Report, the Government claimed that it was maintaining "its leading role in the Arms Trade Treaty".[16]

The Government went on to say in the report that it attended the First Conference of States Parties in Mexico in August 2015:

> As a Vice-President of the Conference, the UK helped to deliver several key outcomes, including on the rules of procedure and financing, setting the future direction of ATT implementation and operation.

It continued:

> Our focus now is to ensure that the Treaty remains a top international priority in order to help deliver the expected step-change in the rules-based international system governing conventional arms controls.

In accordance with Article 13 (1) of the Treaty, the UK submitted its initial report on its implementation of the Treaty on time in December 2015.[17] It submitted its second report by the deadline of May 2016. The Government also attended the Second Conference of States Parties in Switzerland in August 2016.[18]

2.2 Establishment of the New Committees on Arms Export Controls

A new Committees on Arms Export Controls was established in February 2016 under the chairmanship of Chris White MP.

There was some parliamentary and public concern about the fact that it took a relatively long time to establish the new Committees on Arms Export Controls after the May 2015 general election.[19]

The new Committees took a different approach to its predecessors. The previous Committees conducted a single inquiry each year, examining exports over the preceding year and the main developments in export policy, before publishing an omnibus report. The new Committees instead looked at a controversial bilateral relationship (see below) and launched two thematic inquiries, all of which were intended to result in publishing a set of discrete reports.

The two thematic inquiries were on the Arms Trade Treaty[20] and the UK's approach to defence export promotion.[21]

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16 Ibid, p1
17 Ibid, p6
18 UK Strategic Export Controls Annual Report 2016, p7
19 "UK arms exports escape scrutiny under Tory government", *Guardian*, 3 January 2016
20 For more information, see the Committees' inquiry webpage. The FCO submitted written evidence to this inquiry on 29 June 2016
21 For more information, see the Committees' inquiry webpage.

A country-based inquiry on UK arms exports to Saudi Arabia in the context of alleged violations of International Humanitarian Law during its military operations in Yemen was completed in 2016. However, the inquiry fractured the unity of the Committees (see 3.3 below) and it never resumed work after the four Committees which comprise it were unable to agree new arrangements for the scrutiny of arms exports.[22] The only report it published subsequently was one about the leaking of a draft version of the report.[23] The two thematic inquiries scheduled were never completed.

2.3 The use of UK-manufactured arms in Yemen

The main controversy over UK arms export control policy between May 2015 and June 2017 arose from the use of UK-manufactured arms in Yemen by Saudi Arabia. Saudi Arabia has been accused of committing violations of International Humanitarian Law (IHL) during its military operations in Yemen.[24]

Concerns that UK arms may have been used to commit violations of IHL in Yemen led to calls from a range of quarters for the suspension of arms exports to Saudi Arabia pending the results of an independent, UN-led inquiry.

The Government rejected these calls, accepting Saudi Arabia's assurances that, based on its own investigations, it has been operating in a manner consistent with international law.[25] The Government said that it would continue to assess arms export licence applications for Saudi Arabia against the Consolidated Criteria on a case-by-case basis and would not approve licences where there is a clear risk that items might be used in the commission of a serious violation of IHL – as required under Criterion 2 (for the full text, see Appendix 3).

Judicial Review launched

At the end of June 2016 the English High Court granted lawyers for the Campaign Against the Arms Trade permission for a judicial review of the UK Government's decision not to suspend arms sales to Saudi Arabia.[26]

CAAT said in response:

> This is a historic decision and we welcome the fact that arms exports to Saudi Arabia will be given the full scrutiny of a legal review, but they should never have been allowed in the first place.

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22 For more information, see the Committees' inquiry webpage.
23 This report was published in January 2017. The full text can be accessed here.
24 For further background on the conflict in Yemen and the controversy over the use of UK-manufactured arms there by the Saudi-led coalition, see Commons Library Briefing Paper 7184, Yemen at war (April 2017)
25 "Joint Incidents Assessment Team inquiry into Yemen", Embassy of the Kingdom of Saudi Arabia in the UK, press release, 5 August 2016
26 "Permission granted for judicial review into legality of UK arms exports to Saudi Arabia", Campaign Against the Arms Trade, 30 June 2016

> The fact that UK aircraft and bombs are being used against Yemen is a terrible sign of how broken the arms export control system is. For too long government has focused on maximising and promoting arms sales, rather than on the human rights of those they are used against.

The judicial review was heard on 7-10 February 2017 but the High Court had not issued its judgment by the time of the June 2017 general election.[27]

The Committees publish two separate reports and ceases to function

As stated earlier, the Committees held an inquiry into this controversy. However, after a draft of the report was leaked to the media, there was a split within the Committees on the key issue of whether or not to endorse the suspension of UK arms exports to Saudi Arabia that could be used in Yemen until the UN had carried out its own investigation into alleged violations of IHL. This led ultimately to the publication of two separate reports.

Two of the four select committees represented on it – the International Development Committee and Business, Innovations and Skills Committee – came out in favour of suspending all such arms exports. One of the select committees represented on it – the Foreign Affairs Committee – did not endorse suspending all such arms exports.

The fourth select committee – Defence – did not associate itself with either report.

The International Development Committee and Business, Innovation and Skills Committees argued in their joint report:

> Given that the UK has a long history of defence exports to Saudi Arabia and its coalition partners, and considering the evidence we have heard, it seems inevitable that any violations of international humanitarian and human rights law by the coalition have involved arms supplied from the UK.[28]

They went on to say:

> […] the Government's arms export licensing regime is relatively opaque to the public, to whom it appears that the Government too often relies on assertion rather than positive evidence. [29]

The two select committees added:

> The credibility of the Government's policy and practice of its arms export licensing regime has been called into question. In response, we recommend it issue a public explanation of its risk assessment process and what level of risk would trigger the refusal of a licence.[30]

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27 Legal documents relating to the Judicial Review can be accessed via the CAAT website at: https://www.caat.org.uk/resources/countries/saudi-arabia/legal-2016

28 The use of UK-manufactured arms in Yemen, Business, Innovation and Skills and International Development Committees, HC 679, 15 September 2016, p3

29 Ibid

30 Ibid, p34

Finally, they argued that there is a tension between the UK's substantial humanitarian and development support for Yemen over recent years and the possible negative impact of recent UK arms sales to Saudi Arabia on the same country, they said:

> The transfer of arms to Saudi Arabia for use in Yemen has highlighted the limited role of DFID in arms licensing decisions which can ultimately have a significant impact on development and the work of the Department.

DFID is currently only involved where an application directly invokes Criterion 8 of the Consolidated Criteria – that is, where an arms transfer "would seriously undermine the economy or seriously hamper the sustainable development of the recipient country." The two select committees asserted that DFID should be involved much more widely in the decision-making process.[31]

Apart from being unwilling to recommend the suspension of UK arms exports to Saudi Arabia that might be used in Yemen, the Foreign Affairs Committee echoed many of the arguments and recommendations made in the report of the Business, Innovation and Skills and International Development Committees. It said:

> Given that the UK has a long history of defence exports to Saudi Arabia and its coalition partners, and considering the evidence we have heard, it is possible that alleged violations of international humanitarian and human rights law by the coalition have involved arms supplied from the UK. HM Government has obligations under the Arms Trade Treaty, as well as European and domestic law, to ensure there is no risk that arms it has licensed might be used in contravention of international humanitarian law. The legality of the Government's actions will now be determined by the High Court, which granted The Campaign Against Arms Trade, represented by Leigh Day lawyers, a judicial review into arms exports to Saudi Arabia. The outcome of this case will have potential ramifications for British arms exports to all members of the Saudi-led coalition, including Jordan, Egypt, Kuwait, the UAE, Bahrain, and Qatar, amongst others.
>
> […] the Government's arms export licensing regime is relatively opaque to the public, to whom it appears that the Government too often relies on assertion rather than positive evidence. We have made a number of recommendations for measures which could be introduced to make the system of licensing considerably more transparent than is currently the case. This would be a significant step forward in terms of our international obligations, not least under the Arms Trade Treaty, in the creation of which the UK was a leading player.[32]

In an accompanying press release, the chair of the Foreign Affairs Committee, Crispin Blunt, said:

> The appropriateness of the current framework of the law is a separate, yet pertinent, question, on which we did not take

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31 Ibid, pp40-41

32 The use of UK-manufactured arms in Yemen, Foreign Affairs Committee, HC 688, 15 September 2016

> evidence. I believe that there is a clear need for a wider discussion on the suitability of the laws governing arms exports.[33]

Dr Julian Lewis, the chair of the fourth committee represented on the Committees on Arms Export Controls, the Defence Committee, issued a press release explaining why it had decided not to associate itself with either report:

> If the work of the Committees on Arms Export Controls is to be successful, it must proceed on the basis on consensus. This did not happen in the case of this inquiry, where a Report was drafted without the customary process of circulating themes, conclusions and recommendations in advance. Instead, a draft Report was produced which was then leaked. The leaking of that draft Report and the subsequent media controversy about the Committees' deliberations fatally undermined any possibility of the four Committees coming to an agreed position. This is evident in the differing and indeed contradictory conclusions contained in the Reports which have been published today.
>
> Anticipating such an outcome, the Defence Committee agreed at its meeting on Tuesday 13 September that it would not be considering, endorsing or publishing the leaked Report.[34]

In November 2016 the Government responded to these reports, reiterating its position that it was satisfied that extant licences for Saudi Arabia were compliant with the Consolidated Criteria.[35]

Subsequent developments

In December 2016, the Secretary of State for Defence, Sir Michael Fallon, told the House that an investigation by the Saudi-led coalition had confirmed that a small number of UK-supplied cluster munitions exported to Saudi Arabia in the 1990s had been used by the coalition in Yemen in January 2016. The UK Government had until then denied these allegations. The coalition had also told the Government that the munitions had been used against a legitimate military target and did not therefore violate IHL. Sir Michael Fallon also said that Saudi Arabia had undertaken not to use UK-supplied cluster munitions again.[36]

In December 2016, the Foreign Affairs Committee took evidence on the FCO's policy on arms exports.[37] The Committee did not publish a report or statement based on this inquiry ahead of the June 2017 general election.

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33 "British courts should decide legality of Government arms exports to Saudi Arabia", Foreign Affairs Committee press release, 15 September 2016

34 "Select Committee reports on the use of UK-manufactured arms in Yemen", Defence Committee press release, 15 September 2016

35 Government response to the BIS and IDC report (Cm 9349); Government response to the FAC report (Cm 9353)

36 HC Deb 19 December 2016 c1215-6

37 For more information, see the inquiry webpage.

3. Issues for the new UK Government

3.1 Implications of Brexit

The vote to leave the EU in the referendum of 23 June 2016 placed a question-mark against the applicability of laws derived from the UK's membership of the EU after Brexit has happened.

Addressing this complex issue has implications for EU-derived elements of the UK's legal and regulatory framework for arms exports. At the time of writing, we still cannot be entirely certain what all of these will be. Accordingly, the commentary below should not be considered definitive or comprehensive.

EU-derived laws that are currently part of the UK's legal and institutional framework for arms exports include:

- **EU Regulation 428/2009**, which sets out brokering and transit controls for dual-use items, as well as end-use controls in relation to certain items or technology; and **Regulation 2016/2134** concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (known for short as the Torture Regulation)
- **Council of the European Union Directives 91/477/EEC** (on control of the acquisition and possession of weapons); and **2009/43/EC** (on simplifying terms and conditions of transfers of defence-related products within the Community)
- **European Council Common Position 2008/944/CFSP** ("The Common Rules Governing the Control of Exports of Military Technology and Equipment")

Regulations 428/2009 and 2016/2134

Almost all EU Regulations become directly enforceable in the UK under Section 2(1) of the 1972 European Communities Act (ECA).

The ECA will be repealed through the European Union (Withdrawal) Bill, which was published in July 2017 and which is now beginning its journey through Parliament.[38]

As it stands, Clause 3 of the Bill provides that the above Regulations will be converted into UK domestic law on the day that the UK leaves the EU. If this is passed into law, it would mean that there need be no changes in the operation of these elements of the UK's arms export control policy on day one of Brexit.

[38] See also Library briefing paper 8079, The European Union (Withdrawal) Bill, 1 September 2017

Directives 91/477/EEC and 2009/43/EC

Most EU Directives are implemented by Statutory Instruments under the authority of the ECA (Section 2(2)). Other Directives are implemented by other UK Acts, or Statutory Instruments made under a different 'parent Act'.

Clause 2 of the Bill provides that existing domestic legislation which implements EU law obligations will remain on the UK statute-book after the UK leaves the EU.

These two Directives have been incorporated into UK law under the authority of the ECA via Statutory Instruments: in the case of the former, article 15 of the Export Control Order 2008 (SI 2008/3231); in the case of the latter, the Export Control (Amendment) (No. 2) Order 2012 (SI 2012/1910). As a minimum, these SIs will require amendment to remove all reference to the authority of the ECA.

However, Directive 2009/43/EC relates to an important aspect of the UK's current membership of the EU Single Market, which may end with Brexit. If this is what happens, this Directive looks highly unlikely to remain applicable under UK law post-Brexit. The question of future UK trade in defence-related products with EU Member States will be part of the wider negotiation on the future trading relationship, out of which a new UK legal and institutional framework will eventually emerge.

So, while the European Union (Withdrawal) Bill, as it stands, means that there may not need to be any immediate change in the operation of these Directives after Brexit, it is likely that at some point there will have to be significant changes to the UK's arms export control policy on transfers of defence-related products to and from EU member states.

Common Position 2008/944/CFSP

Since it was agreed in 2008, this Common Position has been widely cited as the basis on which the Consolidated EU and National Arms Export Licensing Criteria (henceforth, Consolidated Criteria) became legally binding in the UK.

The 2008 Common Position contains eight criteria against which export licensing applications can be approved or refused by EU Member States. The wording used in the Common Position is extremely similar to that used in the Consolidated Criteria. Successive UK governments have considered them to be fully consistent with each other (although successive Committees on Arms Export Controls up to 2015 did not).

The European Union (Withdrawal) Bill has plenty to say about the future of EU Regulations, Directives and Decisions, but how it treats the many Common Positions – or as they are called today, CFSP Decisions – to which the UK has committed itself during its EU membership requires some teasing out.

The Bill appears to indicate that, for its purposes, CFSP Decisions are not considered EU law by the UK Government, but are instead "international obligations" as defined in Clause 8.

Clause 8 gives Ministers

> the power to make secondary legislation to enable continued compliance with the UK's international obligations by preventing or remedying any breaches that might otherwise arise as a result of withdrawal.

Given this, the question then arises of whether secondary legislation might be required to enable the UK to meet its "international obligations" in this sphere of policy.

It is likely that – although it has not said so explicitly – the UK Government does not think that this will be necessary.

In this context, the argument of the English High Court in paragraph 6 of its July 2017 judgement in the judicial review (see section 3.3 below) may also be relevant:

> The Common Position built upon the Consolidated Criteria of 1998. It sounds only in international law as an agreement between the Member States, rather than being part of EU law.[39]

3.2 Will the Consolidated Criteria be sufficiently solidly based in UK law after Brexit?

The Criteria are "guidance" under the *Export Control Act 2002*

The UK Government appears to be of the view that the Consolidated Criteria, which are "guidance" provided for by a piece of primary legislation, The *Export Control Act 2002*, "enable continued compliance with the UK's "international obligations".

This was suggested by a 20 March 2017 parliamentary answer:

> **Kevan Jones**
>
> To ask the Secretary of State for International Trade, what basis European Council Common Position 2008/944/CFSP has in UK law.(67726)
>
> **Mark Garnier**:
>
> The UK acts in accordance with Common Position 2008/944/CFSP in its application of the Consolidated EU and National Arms Export Licensing Criteria. These Criteria were set out in a written ministerial statement by the former Business Secretary on 25 March 2014 as guidance given under section 9 of the Export Control Act 2002.

Section 9 of the 2002 Act says:

> *Guidance about the exercise of functions under control orders*
>
> (1)This section applies to licensing powers and other functions conferred by a control order on any person in connection with controls imposed under this Act.

[39] Para 6

> (2)The Secretary of State may give guidance about any matter relating to the exercise of any licensing power or other function to which this section applies.
>
> (3)But the Secretary of State must give guidance about the general principles to be followed when exercising licensing powers to which this section applies.
>
> (4)The guidance required by subsection (3) must include guidance about the consideration (if any) to be given, when exercising such powers, to—
>
> (a)issues relating to sustainable development; and
>
> (b)issues relating to any possible consequences of the activity being controlled that are of a kind mentioned in the Table in paragraph 3 of the Schedule;
>
> but this subsection does not restrict the matters which may be addressed in guidance.
>
> (5)Any person exercising a licensing power or other function to which this section applies shall have regard to any guidance which relates to that power or other function.
>
> (6)A copy of any guidance shall be laid before Parliament and published in such manner as the Secretary of State may think fit.
>
> (7)In this section "guidance" means guidance stating that it is given under this section.
>
> (8)The consolidated criteria relating to export licensing decisions announced to Parliament by the Secretary of State on 26th October 2000 shall (until withdrawn or varied under this section) be treated as guidance which—
>
> (a)is given and published under this section; and
>
> (b)fulfils the duty imposed by subsection (3) in respect of any export controls and transfer controls which may be imposed in relation to goods or technology of a description falling within paragraph 1 or 2 of the Schedule.

However, some might argue that, under the 2002 Act, it is the duty to provide guidance, rather than the content of the guidance itself, that is binding in UK law – and that this represents insufficient compliance with the UK's "international obligations."

Some might also be concerned that, as things stand, a post-Brexit UK government could change the content of the guidance – potentially weakening or scrapping the Consolidated Criteria – through the exercise of administrative powers under the 2002 Act.

In fact, this has been possible while the 2008 Common Position has been in force. Indeed, when the Coalition Government (2010-15) issued a new version of the Consolidated Criteria in March 2014, it was not subject to prior debate or a vote in parliament. The government of the day considered that the changes were relatively minor and did not involve "any substantive changes in policy". However, at the time, the

Committees on Arms Export Controls were not convinced. Civil society groups were also sceptical.[40]

Given all this, some might ask whether it would be desirable, if the 2008 Common Position is not to be part of "retained EU law", for the UK Government to confirm through new legislation the binding status in UK law of the current version of the Consolidated Criteria.

This may be an issue that future parliamentary committees with an interest in the UK's legal and institutional framework for strategic exports could look at ahead of Brexit.

Official position on the Consolidated Criteria post-Brexit

Giving oral evidence before the Foreign Affairs Committee in December 2016, Jessica Hand, the FCO's head of arms export policy, said:

> Colleagues in the Department for International Trade are working in a very focused way at the moment on the implications of Brexit for the criteria. As I understand it at the moment, the inclination is they stand. Whether in the longer term we may adjust further is an issue for speculation, but I think in the short term, come whatever date is set where we finally make that break, these will stand.

The UK Government may eventually provide a fuller explanation of its position.

The Arms Trade Treaty and the Consolidated Criteria

Although they are not identical, successive UK governments since 2013 have considered the provisions of the Arms Trade Treaty and the Consolidated Criteria to be mutually reinforcing and consistent with each other.

But some might ask whether the fact of the treaty means that the Consolidated Criteria are not really needed anymore.

It is true that even if the Consolidated Criteria were to be weakened or scrapped in future, the UK's continuing obligations under the treaty mean that a legal framework for UK arms exports would remain in place after Brexit.

Nonetheless, many experts would likely take the view that there is a continuing need for the Consolidated Criteria – or something equivalent – in addition to the treaty.

They might argue that while the Arms Trade Treaty establishes general legal principles and obligations, greater detail is required when it comes to national implementation – and the Consolidated Criteria helps to provide it.

They might also note that the ambit of the Consolidated Criteria is occasionally broader than that of the treaty, further strengthening the UK's legal and regulatory framework.

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40 For a more detailed discussion, see Appendix 1.

For example, Criterion Eight of the Criteria stipulates that an export licence application may be refused where it is deemed that it would "seriously undermine the economy or seriously hamper the sustainable development of the recipient country".

3.3 Outcome of the judicial review… but there may be an appeal

For further background, see section 2.3 of this briefing.

It was widely accepted that if the High Court found against the Government and ordered it to reconsider its decision during the last parliament not to suspend arms exports to Saudi Arabia in response to concerns that UK arms may have been used to commit violations of IHL in the course of Saudi military operations in Yemen, this could have implications for the UK's legal and regulatory framework for arms exports

The previous Government accepted that there could be "consequences" but said that it "would not be appropriate to speculate" about what they might be. It also said that it would "respect the decision of the Court and assess its options in the light of that decision."

The High Court issued its judgment on 10 July 2017, finding in favour of the government. In a detailed ruling which revealed much about the inner workings of the government's decision-making[41], the Court found against the Campaign Against Arms Trade (CAAT) on all three of the grounds on which it had challenged the decision, namely:

- That the government had failed "to ask correct questions and make sufficient enquiries";
- That the government had "wrongfully failed to suspend arms licences to Saudi Arabia";
- That the government had acted "[I]rrationally in concluding that there was no 'clear risk' under Criterion 2c" of the Consolidated Criteria"

Criterion 2c says a licence should not be granted "if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law." (See Appendix 3 for the full text of the Criteria)

While this favourable ruling means that no immediate action needs to be taken by the UK government to change the current legal and institutional framework for arms exports, the possibility has not yet receded entirely. CAAT is seeking permission to appeal the verdict. It was refused permission by the High Court but has now applied to the Court of Appeal.

In response to the judgment, CAAT said:

[41] Although important parts of the evidence heard by the High Court were given in closed hearings and it made clear that this evidence had been significant in shaping its verdict.

> This is a very disappointing verdict, and we are pursuing an appeal. If this verdict is upheld then it will be seen as a green light for government to continue arming and supporting brutal dictatorships and human rights abusers like Saudi Arabia that have shown a blatant disregard for international humanitarian law. Every day we are hearing new and horrifying stories about the humanitarian crisis that has been inflicted on the people of Yemen. Thousands have been killed while vital and lifesaving infrastructure has been destroyed. This case has seen an increased scrutiny of the government's toxic relationship with Saudi Arabia. It is a relationship that more than ever needs to be examined and exposed. For decades the UK has been complicit in the oppression of Saudi people, and now it is complicit in the destruction of Yemen.

The government welcomed the judgment. In a Commons debate in response to the verdict, Secretary of State for International Trade, Dr Liam Fox, said:

> We welcome the divisional court's judgment today dismissing the claim by the Campaign Against Arms Trade for a judicial review of decisions regarding exports to Saudi Arabia for possible use in the conflict in Yemen. We are grateful to the court for the careful and meticulous way in which the evidence from both sides has been considered in reaching this judgment.
>
> […]
>
> The claim challenged decisions not to suspend extant licences for the sale or transfer of arms or military equipment and to continue to grant new licences for such transfers. The judgment states that these decisions were lawful and rational. It describes the Government's decision making about export licensing as
>
> "highly sophisticated, structured and multi-faceted".
>
> We note the application to appeal and will continue to defend the decisions challenged. We remain confident that the UK operates one of the most robust export control regimes in the world. […] We do not receive this court judgment as a signal to do anything other than to continue to take our export control responsibilities very seriously.

3.4 The future of parliamentary scrutiny remains uncertain

For further background, see section 2.3 of this briefing.

The Committees on Arms Export Controls ceased to function during the last parliament and no consensus was reached about future arrangements for the parliamentary scrutiny of UK arms exports. The new parliament will have to decide how to address the 'scrutiny gap' that has emerged.

Since the June 2017 election, some MP's have called for the Committees to be re-formed as a matter of urgency. It is possible that we will find out in September/October whether this is going to happen, or whether Parliament will opt for a different arrangement.

Appendix 1: Developments under the Coalition Government (2010 – 2015)

On taking office in May 2010, the Conservative-Liberal Democrat Coalition Government signalled that promoting arms exports would be a high priority.

Peter Luff, then Minister for Defence Equipment, Support and Technology, said in June 2010:

> There will be a very, very, very heavy ministerial commitment to the process. There's a sense that in the past we were rather embarrassed about exporting defence products. There's no such embarrassment in this Government.[42]

Controversy over arms exports to the Middle East and North Africa

During the first half of 2011 there was enormous controversy over UK arms exports to Middle Eastern and North African countries caught up in the Arab Spring, including Bahrain and Libya.

This led to an urgent internal review of those exports and a large number of revocations of licences. There was also a broader internal review of the rules relating to the export of goods that might be used for internal repression.

On 18 July 2011, the then Foreign Secretary, William Hague, announced that, "while there was no evidence of any misuse of controlled military goods exported from the United Kingdom", the broader review had concluded "that further work is needed on how we operate certain aspects of the controls".

Licensing suspension mechanism announced

The outcomes of this 'further work' were subsequently announced by Mr Hague on 13 October 2011:

Mr Hague said that the Government would introduce

> [...] a mechanism to allow immediate licensing suspension to countries experiencing a sharp deterioration in security or stability. Applications in the pipeline would be stopped and no further licences issued, pending ministerial or departmental review.
>
> [...] a revised risk categorisation, based on objective indicators and reviewed regularly, that keeps pace with changing circumstances; enhances our assessment against all export control criteria, including human rights violations; and allows specifically for ministerial scrutiny of open licences to ensure that the benefits of open licensing can be maintained while keeping the associated risks to acceptable levels. This will increase oversight by Ministers, including of individual licence applications.

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42 "Coalition is not 'embarrassed' to sell defence industry abroad", *Times*, 24 June 2010

In addition:

> [...] guidance will be issued for all HMG officials on assessing the human rights implications of our overseas security and justice assistance. We will make this guidance public later this year.

On 7 February 2012, the then Secretary of State for Business, Innovation and Skills, Vince Cable, provided further details about the suspension mechanism, which was now in place:

> [...] The new suspension mechanism will allow the Government to quickly suspend the processing of pending licence applications to countries experiencing a sharp deterioration in security or stability. Suspension will not be invoked automatically or lightly, but triggered for example when conflict or crisis conditions change the risk suddenly, or make conducting a proper risk assessment difficult. A case-by-case assessment of a particular situation will be necessary to determine whether a licensing suspension is appropriate.
>
> Any decision to suspend will be taken by the Licensing Authority based on advice from relevant Government Departments and reporting from our diplomatic posts. Parliament, industry and the media will be informed of any suspension.
>
> Suspension will be tailored to the circumstances in play and will not necessarily apply to all export licence applications to a country, but may instead be for applications for particular equipment (for example crowd control goods), or for applications for equipment going to a particular end-user.
>
> If a decision to suspend is made, work on licence applications in the pipeline will be stopped and no further licences issued pending ministerial review. Once the suspension is lifted, applications will not be required to be resubmitted.
>
> The Ministry of Defence will apply any licensing suspension decision to MOD Form 680 applications, for which it is the Government authority, and to the assessment against the consolidated criteria of gifting cases, which it co-ordinates on behalf of the Government.
>
> Suspension will be lifted (or partially lifted) where the Licensing Authority considers it appropriate to do so.

Improvements in transparency

In his February 2012 statement, Vince Cable also announced proposals to improve the transparency of the export licensing system:

> The first proposal is to insert into all open export licences a provision requiring the exporter to report periodically on transactions undertaken under these licences. The Government will then publish this information.
>
> The second proposal concerns information contained in standard export licence applications. Currently all such applications are made in confidence, which makes it difficult to make public any more information than is already disclosed in the Government's annual and quarterly reports. The Export Control Organisation considers that certain additional information contained in licence applications could be made public without causing concern to exporters. I will explore ways of making this additional information public while protecting any sensitive material.

> The third proposal is to appoint an independent person to scrutinise the operation of the Export Control Organisation's licensing process. The role of this independent person would be to confirm that the process is indeed being followed correctly and report on their work [...]

On 13 July 2012, Mr Cable provided further information regarding the proposals on transparency that he had set out in February. He said:

> Taking each proposal in turn:
>
> A facility will be provided on Spire, the export licensing database, for exporters to upload data on their usage of open-general and open-individual export licences. The data will include a description of the items exported or transferred, the destination, value and/or quantity, and some information about the end-user. This data will be published in aggregated form, by destination, in the Government's quarterly and annual reports on strategic export controls, and will be searchable through the strategic export control: reports and statistics website.
>
> When submitting a licence application, applicants will be required to indicate whether any information in their applications is sensitive and should not be made public, and give reasons why. In considering whether to release this information the Government will take the applicant's wishes into account but will not be bound by them. I envisage that certain information will always be considered sensitive, such as a product's unit price and its technical specifications, and in some circumstances the name of the exporter and end-user might also be considered sensitive. The mechanism by which we make this additional information public is still to be decided.
>
> There was less of an understanding of how an independent reviewer would operate and the benefits that this role would bring. We will therefore return to this issue at a later date.

The Committees on Arms Export Controls and the 'Arab Spring'

The Committees on Arms Export Controls during the 2010-15 Parliament were highly critical of the UK's record on arms exports to the Middle East and North Africa and pursued the issue energetically.

They were primarily concerned about insufficiently cautious and "flawed judgments within the system" and the fact that decisions made through the mechanism to suspend licences may come into effect only after "the bullets have bolted and are in the hands of an authoritarian regime."[43]

The Committees reiterated their position following further controversy during August-September 2013 about the approval of export licences to Syria by British companies of chemicals that might be used in the production of chemical weapons.

The controversy over UK arms exports to the Middle East and North Africa led the Committees to explore an issue of wider application. A significant number of countries in these regions were on the FCO's list

[43] As argued by the current Chair of the Committees, Sir John Stanley, in a Westminster Hall debate on the Committees' 2011 report. HC Deb 20 October 2011 c341WH

of "Countries of Concern" due to their human rights record.[44] But some of these countries – for example, Saudi Arabia – were also on the "Priority Markets List for UK arms exports" of UK Trade and Investment's Defence and Security Organisation (UKTI DSO).

The Committees argued that there was an "inherent conflict" between promoting arms exports to authoritarian regimes while criticising their human rights records, but the Coalition Government rejected this view.[45]

Changes to the legal and regulatory framework due to the Arms Trade Treaty

The Arms Trade Treaty (ATT), the final text of which was adopted by the UN General Assembly on 2 April 2013, represents an attempt to establish legally binding international standards for the regulation of the global conventional arms trade. The prolonged negotiating process that led to the ATT is described in Commons Briefing Paper 05802. The treaty came into force on 24 December 2014.

The Labour Government of 2005-2010 and the Coalition Government of 2010-15 were strong supporters of the ATT during the negotiating process.

The treaty was opened for signature on 3 June 2013. The UK signed on that day and ratified it on 2 April 2014, following a ten-month ratification process. The treaty was laid before the UK Parliament as Command Paper 8680 on 15 July 2013.

Amending secondary legislation

In the Explanatory Memorandum which accompanied the laying of the treaty before Parliament, the Coalition Government stated that no primary legislation was required for ratification but acknowledged that secondary legislation under the *Export Control Act 2002* would have to be amended "to ensure consistency between the treaty's scope and the UK's existing controls on brokering of conventional arms when carried out by UK persons located overseas (i.e. "extra-territorial" brokering controls)."

This was done under the Export Control (Amendment) Order 2014, which was made on 18 March 2014, laid before Parliament on 19 March and which came into force on 9 April 2014.

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44 The FCO subsequently changed this terminology to "priority countries".

45 For more detailed information about the stance of the Committees on the controversy over UK arms exports to the Middle East and North Africa, along with the many other issues that the Committees raised during the last Parliament, see the Committees' reports of April 2011, July 2012, July 2013 (Vol. 1 and Vol. 2), July 2014 and March 2015 (Vol. 1, Vol. 2 and Vol. 3), as well as the previous Government's responses of July 2011, October 2012, October 2013 and October 2014.

Revising the Consolidated Criteria

The Coalition Government had also said that the Consolidated Criteria might require amendment in the light of the treaty. The Criteria were also due to be reviewed to ensure that they were fully consistent with the 2008 EU Common Rules Governing the Control of Exports of Military Technology and Equipment (usually described for short as the 'Common Position').

The Coalition Government published the updated Consolidated Criteria on 25 March 2014. It took the view that the amended version did not amount to a "substantive change" in policy (but see section 2.3 below).

According to Notice to Exporters 2014/08:

> This statement of the Criteria replaces the original version which was announced to Parliament in October 2000. There have been many developments within export controls since then, most notably:
>
> - entry into force of the Export Control Act 2002
>
> - extension of the controls to electronic transfers of software and technology and to trade (brokering) in military goods between overseas destinations
>
> - adoption by the EU of Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment
>
> - further development of EU export control law adoption by the UN General Assembly on 2 April 2013 of an international Arms Trade Treaty, which the UK signed on 3 June 2013.
>
> 4. The updated version reflects these developments and brings the Consolidated Criteria fully into line with the EU Common Position and the UN Arms Trade Treaty. The principal changes are:
>
> - the list of international obligations and commitments in Criterion 1 has been updated
>
> - there is explicit reference to international humanitarian law in Criterion 2
>
> - the risk of reverse engineering or unintended technology transfer is now addressed under Criterion 7 rather than Criterion 5
>
> - minor changes to improve the clarity and consistency of the language used throughout the text.
>
> 5. None of these changes represents a substantive change in policy. We do not expect these changes to lead to any difference in the outcomes of licence applications. They are simply intended to bring the Criteria into line with our international obligations and to reflect developments in the 13 years since the original Criteria were announced.

The Consolidated Criteria: a change of policy?

In their July 2014 report on arms exports and arms controls, the Committees on Arms Export Controls argued that the new version of the Consolidated Criteria was still not fully consistent with the 2008 EU Common Rules Governing the Control of Exports of Military Technology and Equipment. In its response in October 2014, the Coalition Government disagreed.

The Committees also concluded that the deletion of an important passage from the October 2000 version of the Criteria represented a "substantive weakening of the UK's arms export controls" and recommended that the wording should be reinstated. Once again, the Government disagreed.

This wording of the deleted passage was:

> An export licence will not be issued if the arguments for doing so are outweighed…. by concern that the goods might be used for internal repression.

Below is an extract from the Coalition Government's response to the Committees' July 2014 report, setting out the exchange of views on this issue. The Government response to each conclusion of the Committees is in bold:

> 27. The Committees conclude that the Government's insertion into the Criteria that it will "not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international law" is welcome. (See paragraph 81 of Volume II of this Report.)
>
> 28. However, the Committees also conclude that the Government's deletion of the policy in the October 2000 UK Consolidated Criteria that: "An export licence will not be issued if the arguments for doing so are outweighed…. by concern that the goods might be used for internal repression" represents a substantive weakening of the UK's arms export controls and recommend that this wording is re-instated. (See paragraph 82 of Volume II of this Report.)
>
> **The Government does not accept the Committees' conclusions. As the Business Secretary explained in his letter to the Chairman of 14 May 2014: "The statement you refer to was a general statement that formed part of the introductory text, it did not form part of the Consolidated Criteria itself. Licence applications have always been assessed against the eight Criteria and not against general statements contained in the introductory text." There has been no substantive change in policy.**
>
> 29. The Committees finally conclude that the Government's assertion in relation to the new Arms Export Criteria announced on 25 March 2014 that: "None of these amendments should be taken to mean that there has been any substantive change in policy" is not sustainable. (See paragraph 83 of Volume II of this Report.)
>
> **The Government does not accept the Committees' conclusions. As the Business Secretary explained in his letter to the Chairman of 14 May 2014: "The statement you refer to was a general statement that formed part of the introductory text, it did not form part of the Consolidated Criteria itself. Licence applications have always been assessed against the eight Criteria and not against general statements contained in the introductory text." There has been no substantive change in policy.**

This disagreement was further rehearsed in a 30 October 2014 Westminster Hall debate on the Committees' July 2014 report.

In this debate, the then Chair of the Committees, Sir John Stanley, noted that the author of the 2000 version of the Consolidated Criteria, Peter Hain (then a Minister of State in the FCO), in giving evidence to the Committees, had said that the deletion of this passage had corresponded with "a more relaxed approach to arms exports" (c116WH).

Sir John Stanley argued that the Committees remained of the view that this trend should be reversed, particularly with regard to arms exports to countries where there was a risk of internal repression.

The Committees reiterated their views on the revised Consolidated Criteria in their final report of the 2010-15 Parliament, which was published in March 2015. The Coalition Government did not publish a response to this report before the general election but it made it clear in the course of its evidence to the Committees that it had not changed its position.

Increase in the number of licences revoked

In the October 2014 Westminster Hall debate, Sir John Stanley pointed to the rise in the number of existing licences revoked by the Coalition Government in recent years as evidence that it had adopted an insufficiently cautious approach to arms exports:

> Under the previous Government, going right back to their election in 1997—shortly after which came the foundation of the Committees, thanks to the initiative of the late Robin Cook, who was the first Foreign Secretary to produce an annual report on arms exports—the number of revocations or suspensions of existing licences stood at a mere handful. However, during the lifetime of the present Government, there has been a massive use of some 400 revocations and suspensions. I do not think that can be attributed only to the fact that there has been a considerable amount of international turbulence and conflict during this Parliament, as there were wars and turbulence during the previous Government's lifetime.
>
> I make it clear to the Government and the Minister that I am in no way critical of the huge number of revocations—indeed, I believe they are entirely justified. The key question, and the issue that has been exercising the Committees, is whether export approval should have been given to all the licences in the first place. To reflect what was said by the right hon. Member for Gordon (Sir Malcolm Bruce), in broad-brush terms, the Government's policy on the export of goods that could be used for internal repression to authoritarian regimes has been that if the situation in a particular country looks to be reasonably quiescent, there is a fairly considerable presumption that the export should be approved, with the Government no doubt saying to themselves, "Well, if things turn really nasty in that country we can always revoke the export licence."

He cited Libya as a case in point (c117-8WH):[46]

[46] UK arms exports to other countries, including Russia, Israel and Hong Kong, were also discussed in the course of the debate.

I suggest to hon. Members that nothing illustrates the weakness and limitations—and indeed the perils—of that policy more clearly than what has happened in Libya. Prior to the Arab spring, there was a significant arms export trade, approved by the Government, to Libya under the Gaddafi regime. Not surprisingly, when the Arab spring came and the Government announced their total list of revocations of arms export licences to Arab spring countries, the greatest single number—a total of 72 licences—was for licences for Libya.

We all know what happened when Gaddafi fell from power. Back in the UK, the Government had imposed their revocations, but they were of very limited effect, for the simple reason that they are of no use whatever for exports that have already been shipped. As I have said before, it was an exercise in shutting the stable door after the arms had bolted. What happened in Libya itself? The security arrangements around Gaddafi's arms dumps vanished and people ransacked them, principally for financial gain, as they saw an opportunity to make quick and substantial money. As UN experts have reported, those stockpiles were then sold on and dispersed all over the middle east and north and west Africa.

I suggest that nothing better illustrates the cogency of the Committees' recommendation for a significantly more cautious policy when dealing with arms export licence applications for arms that can be used for internal repression than what has happened in Libya. It is regrettable that, in their response to successive reports, the Government have failed to accept our recommendation for caution. I certainly hope that a future Government will take a different view.

Appendix 2: Other relevant international treaties, agreements and forums

A wide range of multilateral treaties, agreements and forums have significantly shaped, and will continue to shape in future, the UK's regulatory framework for arms exports. Several are UN-based; others are not. Below is a summary list.

In 1968, the Nuclear Non-Proliferation Treaty (NPT) was signed. The treaty came into force in 1970. The UK is a State Party.

In 1971, what came to be known as the Zangger Committee was established. The Zangger Committee, named after its first Chairman, Prof. Claude Zangger, was formed to serve as the 'faithful interpreter' of Article III, paragraph 2, of the NPT, which provides for the harmonisation of the interpretation of nuclear export control policies amongst NPT States Parties.

In 1972, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction was signed. It entered into force on 26 March 1975. The UK is a State Party.

In 1974, the Nuclear Suppliers Group was established. Closely co-ordinated with the NPT process, it is a group of nuclear supplier countries which seeks to contribute to the non-proliferation of nuclear weapons through the implementation of Guidelines for nuclear exports and nuclear related exports. The Guidelines are implemented by each Participating Government in accordance with its national laws and practices.

In 1980, a UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (henceforth, the Convention on Certain Conventional Weapons) was adopted. It is legally binding. There are currently five Protocols to the Convention on Certain Conventional Weapons (the UK has signed but not ratified the Protocol V on explosive remnants of war, which has not yet come into force).

In 1985, the Australia Group was established. It is an informal forum of countries which, through the harmonisation of export controls, seeks to ensure that exports do not contribute to the development of chemical or biological weapons. Coordination of national export control measures assists Australia Group participants to fulfil their obligations under the Chemical Weapons Convention and the Biological and Toxin Weapons Convention to the fullest extent possible.

In 1987, the Missile Technology and Control Regime (MTCR) was established. It is an informal and voluntary association of countries which share the goals of non-proliferation of unmanned delivery systems capable of delivering weapons of mass destruction, and which

seek to coordinate national export licensing efforts aimed at preventing their proliferation. The UK is a founding partner of the MTCR.

In 1991, the Guidelines for Conventional Arms Transfers agreed by the Permanent Five Members of the UN Security Council and other UN Security Council Resolutions were agreed. These began a process of establishing a set of criteria for assessing whether to approve arms exports. They are not legally binding.

In 1992, the UN General Assembly agreed to establish the UN Register on Conventional Arms, a voluntary reporting mechanism for participating states which covers seven categories of major conventional arms.

In 1993, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) was signed. It came into force in 1997. The Convention aims to eliminate an entire category of weapons of mass destruction by prohibiting the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons by States Parties. States Parties, in turn, must take the steps necessary to enforce that prohibition in respect of persons (natural or legal) within their jurisdiction. The UK is a State Party.[47]

In 1996, the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was established by a group of States which included most of the world's major conventional arms exporters and importers. A voluntary arrangement, 40 countries currently participate, including the US and Russia, which have often been sceptical about or hostile to legally binding agreements. There is a strong correspondence between the EU's regulatory framework (see above) and the voluntary arrangements that apply under the Wassenaar Arrangement.

In 1997, the Convention on the Prohibition of Anti-Personnel Mines (Mine Ban Treaty) was signed in Ottawa, Canada. It has been in force since 1999. It is legally binding. The UK has been a strong supporter and in 1998 the *Landmines Act* was passed, incorporating the Convention's provisions into national law.

In 2001, at a UN Conference, Member States agreed a Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects. It is not legally binding. The Programme of Action is a non-legally binding political agreement that proceeds on the basis of consensus.

In 2005, the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition

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47 The Chemical Weapons Convention builds upon and extends the provisions of the 1925 Geneva Protocol, which banned the use of chemical and biological weapons in war. However, some States that signed the 1925 Protocol have not signed or ratified the Convention – including Syria.

entered into force. It was the first legally binding instrument on small arms adopted at the global level.

Also in 2005, the UN General Assembly agreed an International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons. It is not legally binding. There have also been discussions about a similar instrument that would cover illicit brokering.

In December 2008 a new Convention on Cluster Munitions was signed in Oslo, Norway. It bans the production, use, stockpiling or trade in cluster munitions. In 2010 the *Cluster Munitions (Prohibitions) Act* was passed, incorporating the Convention's provisions into national law. The Convention came into force in 2010.

In April 2013, the final text of the Arms Trade Treaty was adopted by the UN General Assembly in April 2013. It came into force on 24 December 2014.

As the example of the EU demonstrates (see section 1.3), there are also an expanding number of regional frameworks intended to counter the proliferation of conventional weapons. Another with direct implications for the UK is the 1993 Principles Governing Arms Transfers agreed by the Forum for Security Co-operation of the Conference for Security and Co-operation in Europe.[48]

Finally, it is important to note that there are also arms export restrictions imposed as a result of sanctions or embargoes. Under the Consolidated Criteria the UK has an obligation to enforce country embargoes imposed by the UN, the Organisation for Security and Co-operation in Europe (OSCE) or the EU. The Government provides a list (last updated July 2016) of sanctions and embargoes to which the UK conforms on its website. Click this link to go to the list.

[48] The Conference for Security and Co-operation in Europe is now called the Organisation for Security and Co-operation in Europe (OSCE)

Appendix 3: The Consolidated Criteria (updated 25 March 2014)

HC Deb 25 March 2014 c9-14WS

The Secretary of State for Business, Innovation and Skills (Vince Cable):

The UK's defence industry can make an important contribution to international security, as well as provide economic benefit to the UK. The legitimate international trade in arms enables Governments to protect ordinary citizens against terrorists and criminals, and to defend against external threats. The Government remain committed to supporting the UK's defence industry and legitimate trade in items controlled for strategic reasons. But we recognise that in the wrong hands arms can fuel conflict and instability and facilitate terrorism and organised crime. For this reason it is vital that we have robust and transparent controls which are efficient and impose the minimum administrative burdens in order to enable the defence industry to operate responsibly and confidently.

The Government's policy for assessing applications for licences to export strategic goods and advance approvals for promotion prior to formal application for an export licence was set out on behalf of the then Foreign Secretary on 26 October 2000, *Official Report*, column 199W. Since then there have been a number of significant developments, including:

- the entry into force of the Export Control Act 2002
- the application of controls to electronic transfers of software and technology and to trade (brokering) in military goods between overseas destinations
- the adoption by the EU of Council common position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment
- further development of EU export control law, including: the adoption of Council regulation (EC) 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment; directive 2009/43/EC of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community; and the re-cast Council regulation (EC) 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items
- the adoption by the UN General Assembly on 2 April 2013 of an international arms trade treaty, which the UK signed on 3 June 2013.

The Government believe that the procedures for assessing licence applications and our decision-making processes are robust and have stood the test of time. We also believe that the eight criteria continue

adequately to address the risks of irresponsible arms transfers and are fully compliant with our obligations under the EU common position and the arms trade treaty. Nevertheless it is appropriate to update these criteria in light of developments over the last 13 years. In particular:

- the list of international obligations and commitments in criterion 1 has been updated;
- there is explicit reference to international humanitarian law in criterion 2; and the risk of reverse engineering or unintended technology
- transfer is now addressed under criterion 7 rather than criterion 5.

There are also minor changes to improve the clarity and consistency of the language used throughout the text. None of these amendments should be taken to mean that there has been any substantive change in policy.

These criteria will be applied to all licence applications for export, transfer, trade (brokering) and transit/transhipment of goods, software and technology subject to control for strategic reason—referred to collectively as "items"; and to the extent that the following activities are subject to control, the provision of technical assistance or other services related to those items. They will also be applied to MOD form 680 applications and assessment of proposals to gift controlled equipment.

As before, they will not be applied mechanistically but on a case-by-case basis taking into account all relevant information available at the time the licence application is assessed. While the Government recognise that there are situations where transfers must not take place, as set out in the following criteria, we will not refuse a licence on the grounds of a purely theoretical risk of a breach of one or more of those criteria. In making licensing decisions I will continue to take into account advice received from FCO, MOD, DFID, and other Government Departments and agencies as appropriate. The Government's strategic export controls annual reports will continue to provide further detailed information regarding policy and practice in strategic export controls.

The application of these criteria will be without prejudice to the application to specific cases of specific criteria as may be announced to Parliament from time to time; and will be without prejudice to the application of specific criteria contained in relevant EU instruments.

This statement of the criteria is guidance given under section 9 of the Export Control Act. It replaces the consolidated criteria announced to Parliament on 26 October 2000.

CRITERION ONE

Respect for the UK's international obligations and commitments, in particular sanctions adopted by the UN Security Council or the European Union, agreements on non-proliferation and other subjects, as well as other international obligations.

The Government will not grant a licence if to do so would be inconsistent with, inter alia:

a) the UK's obligations and its commitments to enforce United Nations, European Union and Organisation for Security and Co-operation in Europe (OSCE) arms embargoes, as well as national embargoes observed by the UK and other commitments regarding the application of strategic export controls;

b) the UK's obligations under the United Nations arms trade treaty;

c) the UK's obligations under the nuclear non-proliferation treaty, the biological and toxin weapons convention and the chemical weapons convention;

d) the UK's obligations under the United Nations convention on certain conventional weapons, the convention on cluster munitions (the Oslo convention), the Cluster Munitions (Prohibitions) Act 2010, and the convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (the Ottawa convention) and the Land Mines Act 1998;

e) the UK's commitments in the framework of the Australia Group, the missile technology control regime, the Zangger committee, the Nuclear Suppliers Group, the Wassenaar arrangement and The Hague code of conduct against ballistic missile proliferation;

f) the OSCE principles governing conventional arms transfers and the European Union common position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment.

CRITERION TWO

The respect for human rights and fundamental freedoms in the country of final destination as well as respect by that country for international humanitarian law.

Having assessed the recipient country's attitude towards relevant principles established by international human rights instruments, the Government will:

a) not grant a licence if there is a clear risk that the items might be used for internal repression;

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

c) not grant a licence if there is a clear risk that the items might be used in the commission of a serious violation of international humanitarian law.

For these purposes items which might be used for internal repression will include, inter alia, items where there is evidence of the use of these or similar items for internal repression by the proposed end-user, or where there is reason to believe that the items will be diverted from their stated end use or end user and used for internal repression.

The nature of the items to be transferred will be considered carefully, particularly if they are intended for internal security purposes. Internal repression includes, inter alia, torture and other cruel, inhuman and degrading treatment or punishment; summary or arbitrary executions; disappearances; arbitrary detentions; and other major violations of human rights and fundamental freedoms as set out in relevant international human rights instruments, including the universal declaration on human rights and the international covenant on civil and political rights.

In considering the risk that items might be used for internal repression or in the commission of a serious violation of international humanitarian law, the Government will also take account of the risk that the items might be used to commit gender-based violence or serious violence against women or children.

CRITERION THREE

The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts.

The Government will not grant a licence for items which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

CRITERION FOUR

Preservation of regional peace, security and stability.

The Government will not grant a licence if there is a clear risk that the intended recipient would use the items aggressively against another country, or to assert by force a territorial claim.

When considering these risks, the Government will take into account, inter alia:

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

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

c) the likelihood of the items being used other than for the legitimate national security and defence of the recipient;

d) the need not to affect adversely regional stability in any significant way, taking into account the balance of forces between the states of the region concerned, their relative expenditure on defence, the potential for the equipment significantly to enhance the effectiveness of existing capabilities or to improve force projection, and the need not to introduce into the region new capabilities which would be likely to lead to increased tension.

CRITERION FIVE

The national security of the UK and territories whose external relations are the UK's responsibility, as well as that of friendly and allied countries.

The Government will take into account:

a) the potential effect of the proposed transfer on the UK's defence and security interests or on those of other territories and countries as described above, while recognising that this factor cannot affect consideration of the criteria on respect of human rights and on regional peace, security and stability;

b) the risk of the items being used against UK forces or against those of other territories and countries as described above;

c) the need to protect UK military classified information and capabilities.

CRITERION SIX

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

The Government will take into account, inter alia, the record of the buyer country with regard to:

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

b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;

c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament instruments referred to in criterion one.

CRITERION SEVEN

The existence of a risk that the items will be diverted within the buyer country or re-exported under undesirable conditions.

In assessing the impact of the proposed transfer on the recipient country and the risk that the items might be diverted to an undesirable end-user or for an undesirable end-use, the Government will consider:

a) the legitimate defence and domestic security interests of the recipient country, including any involvement in United Nations or other peace-keeping activity;

b) the technical capability of the recipient country to use the items;

c) the capability of the recipient country to exert effective export controls;

d) the risk of re-export to undesirable destinations and, as appropriate, the record of the recipient country in respecting re-export provisions or consent prior to re-export;

e) the risk of diversion to terrorist organisations or to individual terrorists;

f) the risk of reverse engineering or unintended technology transfer.

CRITERION EIGHT

The compatibility of the transfer with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

The Government will take into account, in the light of information from relevant sources such as United Nations Development Programme, World Bank, IMF and Organisation for Economic Co-operation and Development reports, whether the proposed transfer would seriously undermine the economy or seriously hamper the sustainable development of the recipient country.

The Government will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid, and its public finances, balance of payments, external debt, economic and social development and any IMF or World Bank-sponsored economic reform programme.

OTHER FACTORS

Article 10 of the EU common position specifies that member states may, where appropriate, also take into account the effect of proposed exports on their economic, social, commercial and industrial interests, but that these factors will not affect the application of the criteria in the common position.

The Government will thus continue when considering licence applications to give full weight to the UK's national interest, including:

a. the potential effect on the UK's economic, financial and commercial interests, including our long-term interests in having stable, democratic trading partners;

b) the potential effect on the UK's international relations;

c) the potential effect on any collaborative defence production or procurement project with allies or EU partners;

d) the protection of the UK's essential strategic industrial base.

In the application of the above criteria, account will be taken of reliable evidence, including for example, reporting from diplomatic posts, relevant reports by international bodies, intelligence and information from open sources and non-governmental organisations.

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