

# ***A Code of Conduct for Arms Transport by Air***

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# ***A Code of Conduct***

## **Editorial**

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**Caption:** Multipurpose All Terrain Vehicles are o&oaded from an Atlas Air 747 cargo aircraft at Bagram Air!eld (Afghanistan) November 9, 2009. (Credit: U.S. Air Force photo/Senior Airman Felicia Juenke )

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## **Foreword**

This report was originally written as part of a TransArms project financed by the UNDP in December 2006. The report remained unpublished. The authors believe that the information and considerations this report offers may benefit the present debate on how to regulate the transport of arms and the work of the U.N. Sanctions Committees.

The authors did not change the original text and therefore certain information is not updated to 2012. Notwithstanding, they believe that the core considerations remain valid and useful.

Chicago and London, August 2012

## **1. The Report - Executive Summary**

The following is a discussion of some key considerations for the development of and “Air Cargo Industry Voluntary Code of Conduct relating to the transport of arms, ammunition and other military equipment” (ACI Code). The purpose of such a Code is to encourage as many aviation companies and other actors as possible in the air cargo industry to adhere to existing and new standards relating to the *transport of arms, ammunition and other military equipment* (abbreviated here as “transport of arms”).

The key points summarized below should be taken into account in developing an ACI Code. These points should not be regarded as exhaustive or complete but rather as points of departure for the discussion of such a Code. The subsequent sections of this paper elaborate on the reasons for selecting these key points.

### **1.1 Key points**

Air cargo operators should demonstrate their willingness to:

- ✧ Actively promote respect for existing national and international laws, regulations and agreements applicable to the conduct of the aviation industry and the transfer of arms including the provisions of UN Security Council arms embargoes and the U.N. General Assembly’s Arms Trade Treaty when it is established.<sup>1</sup>
- ✧ Refrain from engaging the services of shippers whose activities violate U.N. or other international arms embargoes or those who are known to have been in breach of national and/or international law on the international arms trade.

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<sup>1</sup> December 8, 2006, 153 States represented in the U.N. General Assembly voted in favor of the proposal. The United States was the only government that voted against.

- ✧ Support the maximum circulation to industry members of updated information on relevant laws, U.N. arms embargoes, countries at risk of war and concern for the respect of human rights.
- ✧ Carefully check the authenticity of all necessary documents related to shipments of arms and other military equipment, such as the end-user certificates.
- ✧ Refrain from exploiting weak arms export and import controls, vague legal frameworks inconsistent with international law, poor licensing procedures, and lack of institutional capacity to enforce customs and other controls.
- ✧ Avoid using poorly regulated aviation registries (flags of convenience); operations in poorly regulated free trade zones and airports; financial assets and aircraft transaction documents under the control of shell companies in tax-heavens and off-shore banking facilities lacking financial accountability and scrutiny.
- ✧ Follow the best practices of the aviation industry as agreed by the relevant national and international air carriers associations.
- ✧ Adhere to best labor practices and industrial relations, including respect for employees' rights to organize in trade unions and to work in a safe work environment. Respect the highest safety standards for crew and aircraft.
- ✧ Exclude or discharge personnel who have been engaged in unlawful practices in dealing with arms shipments, such as accepting or offering bribes and other forms of corruption.
- ✧ Promote initiatives that improve transparency and public scrutiny of the activity and business practices of the air cargo industry, while refraining from the unnecessary use of legal opportunities to keep shipping documents confidential.<sup>2</sup>

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<sup>2</sup> For example, one of the world largest legal firms (Sonnenschein Nath & Rosenthal LLP) advertises in its website: "Customs regulations provide a procedure for importers to file confidentiality certification for themselves and their suppliers, directing Customs not to disclose their cargo manifest information. Sonnenschein offers a unique, simple and inexpensive system designed to obtain confidential treatment for your commercial information (e.g., shipper name, shipper address, consignee name, consignee address, notify party name and notify party address)." [www.sonnenschein.com](http://www.sonnenschein.com), last checked December 16, 2006.

## 2. Background reasons for such a Code of Conduct

In the last two decades, various factors have contributed to raise the number of actors competing in the market for arms transport service and which may lower the standards in which these services are performed. These factors include the liberalization and deregulation of the aviation industry, rapidly growing demand for cargo services, access to air cargo markets of dozens of newly-formed and low-cost air cargo companies from poorly regulated countries (many in the former-USSR and Eastern Europe), and an increasing tendency by defense logistics agencies to outsource transport services.

National and international regulations on the transport of arms have not kept pace with these new trends. Public scrutiny of cargo companies involved in such transportation has become more difficult than in the past. For example, a number of air cargo companies hired by defense logistics agencies have been found to breach elementary safety and security standards, while other companies have been responsible for shipments of military equipment that have violated U.N. and other international arms embargoes.<sup>3</sup> Recently, initiatives carried out on aviation safety grounds by ICAO<sup>4</sup> (in conjunction with the State Aviation Administration of Ukraine<sup>5</sup>) and by EASA<sup>6</sup> have targeted air cargo carriers that operated highly unsafe aircraft or could not guarantee the proper maintenance of their fleets. A number of these companies have in the recent past provided transport services for

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<sup>3</sup> See, for example, "Sudan: Arming the perpetrators of grave abuse in Darfur" (Amnesty International, November 16, 2004); "Democratic Republic of Congo: Arming the East" (Amnesty International, July 5, 2005, with contribution by the International Peace Information Service and TransArms - Research Center for the Logistics of Arms Transfers); "Dead on Time: arms transportation, brokering and the threat to human rights" (Amnesty International and TransArms, May 10, 2006); "Greed & Guns: Uganda's Role in the Rape of the Congo" (Peter Danssaert & Brian Johnson Thomas, IPIS, July 13, 2006).

<sup>4</sup> International Civil Aviation Organization.

<sup>5</sup> The State Aviation Administration of Ukraine, "in its capacity as the executive authority on federal flight safety oversight," has authorized the "publication of information on the status and continued airworthiness of aircraft designed by the Antonov Aviation Scientific Technical Complex in accordance with a list, prepared by the designers, of aircraft which allegedly are being operated in violation of the requirements for continued airworthiness procedures." See: "List of Antonov aircraft no longer considered to be to be airworthy by the Antonov Aviation Scientific Technical Complex." at [www.icao.int/fsix/airwth\\_Info.cfm](http://www.icao.int/fsix/airwth_Info.cfm). See also ANDnetwork.com, September 4, 2006: "ICAO bans 43 African Aircraft, 31 others."

<sup>6</sup> European Aviation Safety Agency.

defense logistics agencies or for arms traffickers, and sometimes for both of them.

In July 2006, ICAO declared 71 Antonov aircraft of various types no longer airworthy.<sup>7</sup> In October 2006, EASA published a list of 139 airlines which were banned from European skies, most of them cargo carriers, and also restricted operations by another four companies.<sup>8</sup> Even though these initiatives are well intended, and can hamper a number of actors involved in dubious arms shipments, the methodology used to identify such air cargo firms and aircraft, as well as the procedures used to ban such firms and certain aircraft, are not transparent or coherent.

Equipment imports and exports should comply with all applicable law and regulations. Companies in the aviation industry involved in such transfers should act in a manner consistent with the laws of the countries within which they are present, and be mindful of the highest applicable international law and standards regarding arms transfers.<sup>9</sup> Such companies should promote awareness and the observance of applicable national and international law and regulations on aviation and on arms control. For example, all personnel should know how to identify signs of the trafficking of

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<sup>7</sup> Twenty-six AN-12; six AN-24; one AN-24B; eight AN-26; two AN-26B; twenty-two AN-28; three AN-32; one AN-72; one AN-74; one AN-8. This aircraft were based in 16 countries. For twenty-five aircraft based in Angola, Democratic Republic of the Congo, Kenya, Moldova, Sierra Leone, Togo, and Uganda the operator was "unknown." The remaining forty-six aircraft were operated by either active or extinct companies, namely Ababeel (Sudan); ACA Airlines (Kazakhstan); Aero Freight Partner (D.R. Congo); Aeriocharter Airlines of Nicaragua (Nicaragua); Aerocom Airlines (five aircraft, Moldova); Aero-Service (Republic of the Congo); Air Moldova Airlines (four aircraft, Moldova); Angar 74 (two aircraft, Venezuela); AU/AMIS (two aircraft, Sudan); Aviatrade Congo (Republic of the Congo); Azza Transport (Sudan); Badr Airlines (Sudan); Blue Airlines (four aircraft, D.R. Congo); Blue Wing Airlines (five aircraft, Surinam); G. Wings, Poland (Sudan); Imtrec Aviation Airlines (Cambodia); Inter Sky Airline, Swaziland (South Africa); Malu Aviation Airlines (D.R. Congo); Natalco Congo (Republic of the Congo); Pecotex Airlines (Moldova); Renan, Kishinev (Moldova); Saffar Aviation Services Airlines (two aircraft, Iran); SPD Savran P.V. (Kenya); Sudanese State (Sudan); Tiramavia Airlines (Moldova); Trans Air Congo (three aircraft, Republic of the Congo); Valan Airlines, Moldova (Kenya). ICAO also warned that 362 AN-2 operated by 35 airlines based in Kazakhstan had their airworthy life extended by national rules without the assistance of the manufacturer, in contravention of ICAO regulations.

<sup>8</sup> See EASA, October 6, 2006 ([www.easa.eu.int/](http://www.easa.eu.int/)): "List of Air Carriers of which all operations are subject to a ban within the Community." The list included companies based in Afghanistan, Democratic People Republic of Korea, D.R. Congo (51 companies); Equatorial Guinea (37 companies); Kazakhstan (2 companies); Kenya; Kyrgyz Republic (27 companies); Liberia; Rwanda; Sierra Leone (8 companies); Surinam; Swaziland (6 companies); Thailand; and Uganda. The companies with restricted operations were based in four countries (Bangladesh, Comors, Sudan, and D.R. Congo).

<sup>9</sup> See the "Voluntary Principles on Security and Human Rights", December 19, 2000, which was agreed by several large companies operating in the extractive industry and was partly influenced by Amnesty International's publication "Human Rights Principles for Companies", January 1998 AI Index: 70/01/98. These are two examples of arguments for corporate code of responsibility that attempt to promote respect for international human rights standards. Some arguments in these two documents are drawn upon by the authors of this paper.



arms and the bribery of officials which are likely to be serious offences that can affect themselves and the company.<sup>10</sup>

Air cargo companies may argue that they should not take action to establish voluntary rules for their transfer of arms because to do so would be to interfere in domestic politics or offend the values of other countries. However, apart from considerations of immediate self interest of the company, the international community has decided, through a variety of covenants and agreements, that the promotion and protection of inherent human rights transcends national and cultural boundaries. The Universal Declaration of Human Rights calls on “*every individual and every organ of society*” to play its part in securing universal observance of human rights. Companies and financial institutions are “organs of society”, and as their operations come under scrutiny around the world, this is increasingly demanded by consumers, shareholders and the communities with whom they interact.

Companies that deliver military equipment should therefore take all appropriate and lawful measures to mitigate any foreseeable negative consequences of such deliveries. Insofar as the transportation of arms, ammunition and related military items is a dangerous activity with potentially far-reaching effects, the aviation industry should recognize the importance of the promotion and protection of human rights when engaging in such activity and the constructive role business and civil society (including non-governmental organizations, labor/trade unions and local communities) can play in advancing these goals. All companies have a direct responsibility to respect human rights in their own operations. Their employees and other people with whom they work are entitled to rights such as freedom from discrimination, the right to life and security, freedom from slavery, freedom of association, including the right to form trade unions,

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<sup>10</sup> See for example, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the United Nations Convention against Corruption.

and fair working conditions. Particular care needs to be taken by companies to ensure that their security arrangements do not lead to human rights abuses. For example, standards relating to labour rights have been developed by a variety of international organizations, notably the International Labour Organisation (ILO). These include such matters as health and safety, freedom of association and the right to collective bargaining, non-discrimination, disciplinary practices, and avoidance of child labour and forced labour.

Those companies delivering arms or other military or security equipment also need to help ensure that their consignments are not used to seriously violate national or international laws, including international human rights and humanitarian law. Where such companies transport and deliver military equipment to legitimate end users, they should consider the risk of such transfers being used to facilitate such violations. Particular attention should be given to any relevant licensing requirements for their carrier, crew and cargo, and the feasibility of measures to mitigate foreseeable negative consequences, including misappropriation or diversion of such equipment which may lead to such violations. In making risk assessments, companies should consider any relevant past incidents involving previous military equipment transfers and the competence of their crews to deal responsibly with certain operating environments.

Thus, companies should also, when recruiting security staff, screen their backgrounds for any previous involvement in unlawful activity or serious human rights violations and companies should decline to hire any person determined to have been responsible for such activities or violations.

### **3. Present situation in the air cargo industry and industry associations**

In 2006, among the nearly 6,000 active airlines registered under 204 aviation registries, there were more than 600 *main* cargo carriers, flying with their own or leased standard-body (less than 45 tons), medium wide-body (40 to 75 tons), and large wide-body (more than 75 tons) freighters. Substantial cargo capacities were also offered by dozens of small air cargo carriers and by an increasing number of wide-body combi (passenger/cargo aircraft). In the same year, there were 1,789 Western-built freighters in service,<sup>11</sup> in addition to about 300 Soviet-built freighters in service with companies based in the Commonwealth of Independent States (CIS) and hundreds more in service with companies based outside the CIS.<sup>12</sup>

The use of “flags of convenience” has been a common practice for registering freighters and combi aircraft. In 2004, for example, a substantial share of the 140 air cargo carriers with fleets of freighters (262 aircraft) and combi planes (103 aircraft) registered in 37 African countries were actually based outside Africa. In 2005, more than 12% of cargo tonnage transported by carriers domiciled in the CIS served markets with no connection to the CIS.<sup>13</sup> Harsh price competition and large regional imbalances in the availability of freighters has favored the international activities of air cargo carriers based in poorly regulated countries. In 2006, for example, only 33 freighters were registered in the Balkan countries,<sup>14</sup> of which 28 were in Bulgaria alone. Yet, in the same year, among the 197 aircraft registered in neighboring Moldova,

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<sup>11</sup> Boeing Co., World Air Cargo Forecast 2006/2007; ACAS database.

<sup>12</sup> JP Airline-fleets International 2006/2007: Aerotransport Databank.

<sup>13</sup> Boeing Co., World Air Cargo Forecast 2006/2007.

<sup>14</sup> Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Macedonia, Romania, Serbia and Montenegro, Slovenia.

there were 73 freighters<sup>15</sup> belonging to companies whose real bases of operation were mostly abroad.

Another important consideration is that the majority of the air cargo companies engaged in international freight markets still remain outside international aviation industry associations such as IATA<sup>16</sup> and TIACA.<sup>17</sup> The activities of these associations include aspects of oversight and guidance for membership, as well as the organization of professional and educational programs in various fields of aviation often held in conjunction with other transport industry associations such as FIATA,<sup>18</sup> the main international freight forwarders association.

Despite being responsible for a substantial share of the world air cargo traffic (in particular scheduled traffic), the number of airlines associated with either IATA or TIACA are relatively small compared to the number of airlines currently in the air cargo industry. In 2006, IATA membership totalled 259 airlines in 137 countries, but air cargo companies were less than 3% of the total. In this respect it may be noted that becoming a member of IATA entails a disbursement of about US\$50,000. In the same year, air cargo carriers enrolled in TIACA amounted to no more than 55, based in 29 countries, out of a total of about 400 TIACA members. In Europe, the AEA<sup>19</sup> includes very few all-cargo carriers among its 30 members.

These international associations focus mainly on the promotion of fairly narrow commercial interests and aviation safety standards,

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<sup>15</sup> According to Moldova, Civil Aviation Authority Register, updated to June 2006, there were two Ilyushin IL-18, four Antonov AN-72/74, eight Antonov 32 (A and B), ten Ilyushin Il-76 (T and TD), thirteen Antonov AN-12 of various models (B, PB, BK), sixteen AN-24 (mostly freighters), twenty Antonov AN-26/AN-26B, in addition to several cargo helicopters.

<sup>16</sup> International Air Transport Association, based in Montreal (Canada) and Geneva (Switzerland). IATA membership is open to both scheduled and non-scheduled airlines, freight forwarders, industry suppliers (through the IATA Strategic Partnership program) and travel agents.

<sup>17</sup> The International Air Cargo Association, based in Miami (FL, USA). The membership includes airlines, forwarders, airports, ground handlers, all-cargo carriers, road carriers, customs brokers, third party logistics companies, integrators, shippers, and educational institution.

<sup>18</sup> Fédération Internationale des Associations de Transitaires et Assimilés or International Federation of Freight Forwarders Associations, based in Glattbrugg (Switzerland).

<sup>19</sup> Association of European Airlines,, based in Brussels (Belgium).

with little attention given to the relevance of other specific standards relevant to regulating the responsible shipment of military cargoes to authorized end users.

For example, the mission of TIACA, as stated in its website,<sup>20</sup> is to “advance the interests of the air cargo industry and strengthen its contribution to world trade expansion” and “support and assist progressive liberalization of the global market and easier, enhanced trade between developing and developed economies.” In order to pursue these general goals, TIACA defines its objectives as to: “(a) widen market access by the removal or reduction of constraints imposed on air cargo by its current dependence on bilateral traffic rights agreements focused primarily on passenger services; (b) identify and oppose any new regulations that could increase air cargo operational costs or hamper its performance capabilities; (c) support security measures that are effective, workable, and affordable and *create a minimum of disruption to the flow of air cargo* that essentially relies on speed; (d) construct and promote strategies and principles that will reconcile legitimate public concern for sound environmental policies with the continuing need for economic growth, supported by competitive airfreight services, particularly in developing economies; (e) secure consistent progress in the efficiency and integrity of relevant regulatory agencies, especially customs services; (f) raise industry performance standards. No explicit mention is made to develop, observe and improve international standards for the responsible shipment of arms cargoes in the objectives of the association.

In the IATA questionnaire/form for candidates who wish to obtain and maintain the status of IATA Cargo Agents, out of 55 main questions, the only question that could be related to ethical standards is as follows: “Been found guilty of any shipping

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<sup>20</sup> [www.tiaca.org/](http://www.tiaca.org/)

regulations?"<sup>21</sup> According to IATA, the general criteria for acquiring and maintaining the status of Cargo Agent are as follows: (a) staff qualifications; (b) financial requirements; (c) suitability of premises and cargo handling equipment; (d) appropriate license to trade, etc.<sup>22</sup> However, IATA - after receiving an application to become a cargo agent - send its investigators to visit the "operational installations indicated by the applicant in order to ascertain that all the criteria are met. Particular attention is paid to ensure that the premises, cargo handling equipment and staff meet the requirements in order to prepare air cargo ready for carriage on behalf of Member Airlines."<sup>23</sup>

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<sup>21</sup> [www.iata.org/whatwedo/cargo/cass\\_agency/accreditation\\_procedures.htm](http://www.iata.org/whatwedo/cargo/cass_agency/accreditation_procedures.htm)

<sup>22</sup> *Idem.*

<sup>23</sup> [www.iata.org/whatwedo/cargo/cass\\_agency/accreditation\\_qualifications.htm](http://www.iata.org/whatwedo/cargo/cass_agency/accreditation_qualifications.htm)

#### 4. Actors and Documentation: the issue of transparency

The logistics chain for the transport of arms and other military equipment by air may include all or some of the following actors: manufacturer; buying agent; banking institutions for the Letter of Credit; freight forwarders or consolidators; origin Customs officials and airports authorities; asset-based air cargo carriers; officials of destination Customs and other governmental regulatory agencies; customs brokers; destination warehouse/distribution entities; and the importer's representatives. Air transport companies need to be capable of assessing the reliability of such actors and the risk of actors being involved in illicit or irresponsible activity. In making risk assessments, companies should consider any relevant past incidents involving previous equipment transfers.

Documents accompanying such shipments vary and compliance with national and international regulations in filling these documents is an essential part of any policy aimed at improving transparency and ethical standards in the air cargo industry. The main categories of documentation involved in a shipment of arms and other military equipment by air should include:

- ⤴ *Documents related to the transaction* (commercial invoices; enquiry/request for quote, offer; invitation; offer/quotation; pro-forma invoice; "despatch" advice<sup>24</sup>);
- ⤴ *Documents related to payments* (Documentary credit application and documentary credit, ICC, such as the Letter of Credit<sup>25</sup>);

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<sup>24</sup> A "despatch" advice is a message sent by the seller to advise the buyer of the dispatch of goods and the detailed contents of the shipment in order to enable the receiving location to control the incoming flow of material. The "despatch" advice relates one buyer to one seller and will always be sent by the seller to the buyer before the goods are physically delivered. As a shipping term, dispatch is also used to mean that the "loading and/or unloading has been completed in less than the number of days specified in the charter-party (the document containing the contract of affreightment, i.e. the conditions of chartering the mean of transport), in which case the charterer is rewarded by the ship-owner for each day saved at a rate as specified in the charter-party."

<sup>25</sup> The ICC has developed a set of rules nearly universally accepted in the banking sector and known as Uniform Customs and Practices for Documentary Credits (1993), or UCP500. Other set of rules are the Uniform Rules for Collections (URC 522), the Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR 525) and the Uniform Rules for Demand Guarantees (URDG 458). Whereas UCP500 essentially deals with paper documentation, the ICC has recently moved in the direction of studying, clarifying, and setting rules for trade transactions online and electronic documentation, the so-called e- UCP. A common definition of the Letter of Credit is as follows: "A document issued by the bank per instructions by a buyer of goods authorizing the seller to draw a specified sum of money under specified terms, usually the receipt by the bank of certain shipping documents, within a given time."

- ✧ *Documents related to forwarding and cargo-handling*<sup>26</sup> (Standard consignment instructions; FIATA forwarding instructions; Forwarder's certificate of receipt; FIATA warehouse receipt);
- ✧ *Documents directly related to transport* (Government Bill of Lading, GBL; Universal Air Waybill, IATA,<sup>27</sup> Non-negotiable FIATA multimodal transport Way Bill; FIATA Forwarders certificate of transport; FIATA Shippers inter-modal weight certificate);
- ✧ *Documents related to the official controls sector* (Dangerous goods declaration; Goods declaration for export Goods declaration for transit; and the Single Administrative Document, or SAD<sup>28</sup>).

One of the most important categories of document related to shipments of arms and other military equipment is the Dangerous Goods declaration. There are nine classes of dangerous cargo and *Class 1* includes explosives such as substances or devices having an explosive effect, e.g. toy caps, detonators, igniters, grenades, fireworks, and cartridges and, because of the special precautions required, such items may nowadays only be transported on cargo planes and not passenger aircraft. The transport of dangerous goods by air should be regulated by *ICAO Technical Instructions, Transportation of Dangerous Goods Regulations (Part 3, Chapter 2)*, while detailed instructions are included in the so-called Orange Book (United Nations, *Transport of Dangerous Goods, Model*

<sup>26</sup> UNCTAD Secretariat/Geneva, United Nations Conference on Trade and Development, 1992.

<sup>27</sup> The most common definition of an Air Waybill is: "Shipping document used by the airlines for air freight. It is a contract for carriage that includes carrier conditions of carriage that include such items as limits of liability and claim procedures. The air waybill also contains shipping instructions to airlines, a description of the commodity, and applicable transportation charges. Air waybills can be used by truckers as through documents for coordinated air/truck service. Air waybills are not negotiable. The airline industry has adopted a standard formatted air waybill that accommodates both domestic and international traffic

<sup>28</sup> The SAD is a customs document that the European Union, the European Free Trade Area (Switzerland, Liechtenstein, Norway and Iceland) and the Visegrad group (Poland, Hungary, the Czech Republic and Slovakia) require the exporter, importer, or transporter of "goods in transit" to fill out. Exporters are required to provide information about themselves, the destination country, the goods being exported, the mode of transport being used and the export licenses being used. An export license from appropriate authorities is usually required for military arms, ammunition, bombs, tanks, imaging devices, military aircraft and warships; Nuclear-related goods including materials, reactors and processing plants; Dual-use goods, such as certain materials, machine tools, electronic, computing, telecommunication, cryptographic, navigation, avionic, marine, space and propulsion equipment; Goods used for the delivery of weapons of mass destruction and missiles; Goods subject to trade sanctions and embargoes; Chemicals, related equipment and technology, biological equipment and technology; Components, spare parts and technology for controlled goods.



*Regulations*<sup>29</sup>) and in other documents such as the *Recommendations on the Transport of Dangerous Goods: Manual of Tests and Criteria* (United Nations<sup>30</sup>), IATA's *Dangerous Goods Regulations* (and updates<sup>31</sup>), as well as in national government regulations such as the U.S. Department of Defense's *Defense Transportation Regulation, Part II Cargo Movement and Appendix CC-8* (Procedures For Transporting Government-Owned Small Arms, Ammunition, and Hazardous Materials aboard commercial aircraft in Scheduled and Charter Service).<sup>32</sup>

Regrettably, most of this documentation is either hidden from public scrutiny on the grounds of commercial confidentiality or it is very difficult to retrieve. By contrast in the maritime shipping industry, Cargo Manifests related to ship voyages are already published regularly by Customs authorities and by industry intelligence databases such as Journal of Commerce's PIERS,<sup>33</sup> but no similar initiatives and dispositions seem to exist for the air cargo industry. Transparency in the use of a public resource such as the national air space is an essential part of the process to make the air cargo industry accountable, beginning with the publicity of official and updated data on airport cargo traffic and flight origins and destinations.

The ability to assess accurately risks present in a company's operating environment is critical to the security of personnel, local communities and assets; the success of the company's short and long-term operations; and to the promotion and protection of human rights. In some circumstances, this is relatively simple; in others, it is important to obtain extensive background information from different sources; monitoring and adapting to changing, complex political, economic, law enforcement, military and social

<sup>29</sup> New York, United Nations, 12th edition, 2001.

<sup>30</sup> New York, United Nations, 3rd Revised Edition, 2002.

<sup>31</sup> [www.iata.org/whatwedo/cargo/dangerous\\_goods/index](http://www.iata.org/whatwedo/cargo/dangerous_goods/index), "Significant changes and amendments to the 48th edition (2007)," and "2007, Dangerous goods checklist for a radioactive shipment."

<sup>32</sup> Washington DC, DoD 4500.9-R, December 2000.

<sup>33</sup> By statute, Customs is required to make cargo manifest information available to the public. Information on cargo manifests is transmitted to service providers who make it available to subscribers.

situations; and maintaining productive relations with local communities, civil society and government officials. The quality of complicated risk assessments associated with security and arms is largely dependent on the assembling of regularly updated, credible information from a broad range of perspectives, and sharing this information as far as possible. Air transport companies therefore have a manifest interest in promoting greater transparency.

## **5. Respecting the rule of law and avoiding illicit logistic activities**

Any voluntary ACI Code for the transfer of arms, ammunition and military equipment should be designed to uphold existing law and regulations regarding the operation of the aviation industry as well as the transfer of arms. Companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights. At an elementary level, the provision of transportation and arrangement of logistics for arms transfers by air cargo companies will be deemed illicit if it constitutes, or directly contributes to, a violation of national and/or international law. The sanctioning of such violations may be a complex issue, not least because of the question of the gravity and deliberateness of any particular violation.

In general, the illicit nature of transportation and logistics for arms transfers will arise when activities to facilitate a transaction for the transport of such items are conducted without the necessary State authorisation, or are conducted in contravention of international treaties, binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations or the principles and purposes of that Charter, to which a state is bound.<sup>34</sup> Moreover, for the purposes of developing a voluntary code it should be noted that regional and multilateral instruments contain criteria for the national authorization of brokering activities and which reflect obligations of subscribing States under international law.

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<sup>34</sup> According to the United Nations Guidelines for International Arms Transfers, endorsed by the General Assembly in resolution 51/47 of 10 December 1996, "*illicit arms trafficking is understood to cover that international trade in conventional arms, which is contrary to the laws of States and/or international law*", and "*limitations on arms transfers can be found in international treaties, binding decisions adopted by the Security Council under Chapter VII of the Charter of the United Nations and the principles and purposes of the Charter [of the United Nations]*." Reflecting this commitment in 2001, Member States agreed in the UN Programme of Action [short title] that they will "*assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are consistent with the existing responsibilities of States under relevant international law*".

Supplying weapons can be an obvious way of facilitating, encouraging, supporting or assisting in the commission of an illegal act. In public international law, the notion of “complicity” has been developed in two separate branches: state responsibility and individual criminal responsibility. The first exclusively concerns inter-State relations<sup>35</sup> while the second relates exclusively to the responsibility of individuals. Rules of **international criminal law** prohibit persons from aiding and abetting in the commission of an international crime.<sup>36</sup> For example, if committed as part of a widespread or systematic attack against the civilian population, a violation of the right to life or a violation of the prohibition of torture may amount to a crime against humanity.<sup>37</sup> There are also international laws, for example, against transnational organized crime.

Regarding the responsibility of individuals involved in arms transportation and logistics, it should be noted that under international criminal law, the activities of arms traffickers are most likely to fall into the category of the crime of “complicity”. The test for accomplice liability was set out in 1997 by the Trial Chamber of the International Criminal Tribunal on Yugoslavia (ICTY) in the *Tadic* case: “*First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that*

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<sup>35</sup> The participation of a State in illegal acts of individuals may raise questions of attribution but cannot be qualified as complicity in the law of state responsibility.

<sup>36</sup> The following analysis draws heavily upon the work of Alexandra Boivin of the Henry Dunant Centre for Humanitarian Dialogue in February 2005.

<sup>37</sup> Rome Statute of the International Criminal Court, 17 July 1998, article 7(1) [hereinafter *Rome Statute*]. According to the Rome Statute, the following acts can form the basis of a crime against humanity: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe, deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds, in connection with any crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

*there was participation in that the conduct of the accused contributed to the commission of the illegal act.*"<sup>38</sup>

The notion of "aiding and abetting" was further defined by the same Chamber in a 1998 decision: "[T]he legal ingredients of aiding and abetting in international criminal law [are as follows]: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist in the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate."<sup>39</sup>

While neither the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) or the International Criminal Court (ICC) specifically identify the provision of weapons or other concrete military assistance as constituting practical assistance for the purposes of establishing criminal liability for "aiding" in the commission of a crime, there is a relatively strong basis in international law for interpreting them as such.

In a 1998 decision, the Trial Chamber of the ICTR stated that the elements of the crime of complicity in genocide included "procuring means, such as *weapons*, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose."<sup>40</sup> In 2003, the Prosecutor of the SCSL indicted Charles Taylor, charging the former Head of State of having "aided and abetted" abuses perpetrated by Sierra Leonean rebels - including acts that terrorized the civilian population, unlawful killings, widespread

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<sup>38</sup> *Prosecutor v. Dusko Tadic* (Case IT-94-1), Trial Chamber, 7 May 1997, at para. 674 [emphasis added].

<sup>39</sup> *Furundzija*, *supra* note 9 at para. 249 [emphasis added].

<sup>40</sup> *Prosecutor v. Akayesu*, (Case ICTR-96-4-T), Trial Chamber, 2 September 1998, at para. 537 [emphasis added].

sexual violence, extensive physical violence, the use of child soldiers, abductions and forced labour, looting and burning, and attacks on peacekeepers and humanitarian workers - through the provision of financing, training, *weapons*, and other support and encouragement.<sup>41</sup>

A leading expert in the field of international criminal law reflecting on who might be criminally liable for complicity in Sierra Leone, posited: "Given the intense publicity about war crimes and other atrocities in Sierra Leone, made known not only in specialized documents such as those issued by the United Nations and international non-governmental organizations but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, *small arms suppliers* and so on have knowledge of their contribution to the conflict and to the offences being committed."<sup>42</sup> This hypothesis appears to be confirmed by the SCSL's Chief of Investigations, Alan White, who, in an interview with Human Rights Watch, stated: "*If a person is the principal supplier of arms and also knows that the weapons will be misused, then this person certainly would have individual criminal responsibility and would be prosecuted [by the Court].*"<sup>43</sup>

The "aiding and abetting" provision of the ICC Statute establishes criminal responsibility if a person aids, abets or otherwise assists in the commission or the attempted commission of a crime, including by *providing the means* for its commission.<sup>44</sup> In other words, providing the weapons used to commit or attempt to commit one of the crimes for which the ICC has jurisdiction is sufficient to give rise to responsibility as an accomplice.<sup>45</sup> In terms of the *actus reus* (objective element), there is no requirement that

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<sup>41</sup> *Prosecutor v. Charles Ghankay Taylor* (Case SCSL-03-I), Indictment, 7 March 2003, at para. 26 [emphasis added].

<sup>42</sup> W. Schabas, "Enforcing international humanitarian law: Catching the accomplices" (2001) 83 *International Review of the Red Cross* 439 at 451, cited in Clapham, "On Complicity", *supra* note ? at 256.

<sup>43</sup> Misol, *supra* note 44.

<sup>44</sup> Rome Statute, article 25(3)(c) [emphasis added].

<sup>45</sup> Clapham, "On Complicity", *supra* note 40 at 254.

the means have contributed to the ensuing crime nor is there a requirement that the means have had a substantial effect on the crime. Clearly, the Rome Statute defines the crime of complicity in a wider manner than its *ad hoc* counterparts since "a direct and substantial assistance is not necessary and [...] the act of assistance need not be a *condition sine qua non* of the crime."<sup>46</sup> Nevertheless, the *culpa* (subjective element) remains higher than what is provided for in the context of State responsibility for the obvious reasons that the consequences of a finding of guilt are far greater. Mere knowledge is not enough; the accomplice must *intend* to facilitate the perpetration of the crime. In sum, "[t]he formulation confirms the general assessment that subparagraph (c) provides for a relatively low objective but relatively high subjective threshold (in any case higher than the ordinary *mens rea* requirement [...])."<sup>47</sup>

In December 2006, the UN General Assembly voted overwhelmingly in favour of a UN process to develop a global Arms Trade Treaty to govern states' decisions on the international transfer of conventional arms. The UNGA resolution affirmed the need to respect international law, including international human rights law, international humanitarian law and the purposes and principles of the UN Charter. Should such a treaty be established, it would affect the terms of a voluntary Code of Conduct for the air cargo industry when involved in the transfer of such arms. Meanwhile a series of UN and other multilateral legal and political instruments are applicable to the regulation of arms transfers, and these would need to be somehow acknowledged and respected in such a voluntary Code of Conduct.

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<sup>46</sup> K. Ambos, "Article 25" in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, 475 at 483.

<sup>47</sup> *Ibid.*

## **6. Voluntary codes of conduct and other initiatives**

If it is not well framed and based on the effective rule of law, the adoption of voluntary codes of conduct by commercial companies may inadvertently lower the public scrutiny of an industry without changing the real business practices of such industry to conform with agreed high standards. Voluntary codes of conduct should not be considered as an alternative to strict national and international regulations on transfers of arms and other military equipment, especially to destinations where the arms are likely to be used to perpetrate serious violations of international human rights law and international humanitarian law.

On the other side, the adoption of a well designed and monitored voluntary code of conduct by a substantial share of companies in a certain industry could foster the growth of a business climate in which disrespect for the code could be denounced and even sanctioned by the relevant trade association. If other bodies in the industry, such as trade unions and professional associations, as well as organizations concerned with the industry, such as those working to prevent violations of human rights , are actively involved in monitoring compliance of companies with the code then such a voluntary code could be of value .

When it comes to the arms trade in particular, the adoption of voluntary codes of conduct could be of particular importance if it was associated with parallel initiatives aimed at the prevention of arms transfers to areas at high risk of conflict and to those who would use the arms for severe human rights violations. For example, International Transport Workers' Federation "*Flags of Convenience Campaign*" for the maritime sector should be supported and encouraged to extend their reach to the air cargo sector. A large number of air cargo companies founded to contribute to fuel conflicts and violate arms embargoes are in



effect registered in countries whose aviation authorities either lack the means or the will to oversight their activities and aircraft.

To be effective, the adoption of voluntary codes of conduct in the field of arms transportation should be also associated with instruments of independent scrutiny of the air cargo traffic. The Convention on International Civil Aviation<sup>48</sup> states in its article 67 (Part III, International Air Transport, Chapter IV, Information and Reports, File reports with the Council<sup>49</sup>) that *"each contracting State undertakes that its international airlines shall, in accordance with requirements laid down by the Council, file with the Council traffic reports, cost statistics and financial statements showing among other things all receipts and the sources thereof."*

Equally important should be the ability of international organizations to sanction air cargo carriers' unlawful activities. Transport companies that are suspected to have provided logistics support for the violation of U.N. arms embargoes or to foreign military interventions carried out in violation of the United Nations Charter and Resolutions, and other international laws, should be investigated by specialist UN teams and if found to be complicit then sanctioned and excluded from bidding for government, military alliances, and UN contracts.

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<sup>48</sup> Last amended text, document 7300/9, 2006 edition. ICAO, November 2006.

<sup>49</sup> Idem. According to the amended text of the Convention, "the Council shall be a permanent body responsible to the Assembly. It shall be composed of thirty-six contracting States elected by the Assembly. An election shall be held at the first meeting of the Assembly and thereafter every three years and the members of the Council so elected shall hold office until the next following election

## 7. Key recommendations from UN Sanction Reports

A voluntary Code of Conduct on this subject should also draw upon considerations of the UN Security Council regarding aviation. The following recommendations on aviation are extracted from United Nations reports on the violation of arms embargoes. Such embargoes constitute an elementary part of international law regarding arms transfers. The recommendations of UN investigative panels and UN Sanctions Committees give an indication of how the Security Council has been considering the question of air cargo operators involved in illicit arms transfers. Each point below is taken verbatim from the UN report cited: <sup>50</sup>

- ✧ In view of aircraft registration fraud, the Panel recommended that the Civil Aviation Authorities transmit to Interpol the court documents about airlines involved; publish court documents on the Government's web site; coordinate with concerned countries over the use by airlines of forged documents, and put the issue of false registrations as an agenda item for its future meetings<sup>51</sup>.
- ✧ All aircraft, airport authorities and operators of planes operating in conflict regions are advised to keep all their documentation, log books, operating licenses, way bills and cargo manifests for inspection by the Sanctions Committee<sup>52</sup>.
- ✧ All operators of aircraft in conflict zones are required to file their airworthiness and operating licenses and their insurance documents with the International Civil Aviation Organization's headquarters in Montreal, including documentation on inspections carried out during the past years. The aircraft of all operators failing to do so should be grounded

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<sup>50</sup> TransArms is grateful to Valery Yankey of Unidir for extracting these recommendations from UN investigative reports

<sup>51</sup> See recommendations made on Liberia, S/2001/1015, paragraph 9

<sup>52</sup> S/2000/1195, para, 255

permanently. Aircraft that do not meet ICAO standards should be grounded permanently<sup>53</sup>.

- ✧ Specialized United Nations monitors should be placed at major airports in conflict regions (and perhaps further afield), focusing on sensitive areas and coordinating their findings with other airports. This would enable better identification of suspect aircraft. It would also create a deterrent against illicit trafficking, and would generate the information needed to identify planes, owners and operators violating United Nations sanctions and arms embargoes<sup>54</sup>.
- ✧ International Civil Aviation Organization's (ICAO) member States computerize their registration lists and centralize them on the ICAO web site so that users could check the situation and status of each aircraft; and ICAO's Safety Oversight programme should place greater emphasis on aircraft registration<sup>55</sup>.
- ✧ All aircraft implicated in the investigations should be grounded immediately. The grounding order could be lifted gradually for each individual aircraft, provided all the records (ownership of the plane, operator, operating license, insurance, airworthiness certificate, certificate of registration and the location of the aircraft) are inspected by both the Civil Aviation Authority in the country of registration and in the country where the aircraft has its maintenance base<sup>56</sup>.
- ✧ The Security Council, through ICAO, IATA and the World Customs Organization (WCO) should create a centralized information bulletin, making the list of grounded aircraft known to all airports in the world<sup>57</sup>.
- ✧ The establishment of a list of individuals who are deemed to be in **clear violation of UN embargoes**. "Listed indi-

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<sup>53</sup> S/2000/1195, para, 256.

<sup>54</sup> S/2000/1195, para, 268

<sup>55</sup> See recommendations made on Liberia, S/2001/1015, paragraph 12

<sup>56</sup> See recommendations made on Liberia, S/2001/1015, paragraph 13

<sup>57</sup> S/2000/1195, para, 257.

viduals may be subject to freezing of all funds and other financial assets or economic resources of groups, undertakings and entities, including funds derived from property owned and controlled, directly or indirectly by them or persons acting on their behalf or their direction. States should ensure that neither these nor any other funds, financial assets nor economic resources are made available, directly or indirectly, for such persons' benefit, by their national or by any persons within their territory. Additionally, States may be asked to revoke all business licenses and any other certificates or titles that enable those individuals to remain economically active. The United Nations and its agencies may also consider canceling current agreements with these individuals.

- ✦ Targeted travel bans should be introduced for violators of arms embargoes. This may include "a temporary revocation by the issuing State of all passports and other travel documents. This step may be warranted in cases where individuals are found to be in violation of the arms embargo and where financial sanctions are not likely to have the desired effect of stopping future violations".