

# IPIS Insights

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## **The Arms Trade Treaty. Prospects and Challenges as it “enters into force”**



The entry into force of the Arms Trade Treaty (ATT) on 24 December 2014<sup>1</sup> is seen as a sign of hope that irresponsible transfers of conventional arms will at last begin to be eradicated. Declarations of commitment by states around the world to implement the ATT have snowballed over the past year since the UN General Assembly voted decisively on 2 April 2013 to adopt the treaty.<sup>2</sup>

The ATT represents a paradigm shift in international law on arms transfers because for the first time in history international human rights standards have been codified alongside other international standards to form the benchmarks for assessing the authorisation of exports and other transfers of conventional arms. Nevertheless, the ATT is not a panacea. Some of its provisions are weak or vague and leave a wide margin for interpretation by States Parties. The treaty encompasses norms drawn from different bodies of international law and other international instruments applicable to the transfer and use of conventional arms, hence raises some questions of interpretation regarding the hierarchy of such norms and their application.<sup>3</sup> Moreover, political power and commercial interests in increasingly global markets for arms have both shaped and influenced the design of the treaty.<sup>4</sup> It is also significant for the ATT's future potential that the inception of the treaty in its modern form arose from civil society, which continues to actively partner with champion states in developing the implementation of the treaty regime.<sup>5</sup>

### Historical Perspective

It is important to understand why previous efforts in the 1920s and 1930s by the imperial powers under the auspices of the League of Nations to develop a convention to limit arms transfers, initially to Africa, Turkey and the Middle East, had floundered.<sup>6</sup> The roots of these difficulties go back at least to the Covenant of the League, the St Germaine Treaty and the First World Disarmament Conference of 1932.<sup>7</sup> Draft Articles proposed by the US with support from France and Switzerland were adopted by the Committee on arms manufacture and trade limitations in July 1934.<sup>8</sup> Their aim was to establish a system of "graduated control" of prohibited and regulated arms, including of the private international arms trade and government to government sales, and also to address levels of quantitative and qualitative reductions in arms and the reporting of such trade. However the reduction levels and universal criteria for transfers were not agreed. By the end of 1939, unbridled conventional arms races had helped propel those states into yet another world war.

At the United Nations almost nothing was done between 1945 and 1990 to establish international arms trade control systems or standards. This task was overshadowed by the threat of nuclear war, the plunge into politics of the Cold War and the proxy wars during the 1950s, 60s, 70s and 80s.<sup>9</sup> The dominant states were not able to devise universal rules to limit excessive arms production or agree objective and non-discriminatory legal criteria to stop the likely misuse and harm of an arms transfer. The decision by 150 states

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<sup>1</sup> On 25 September 2014 eight more states deposited their instruments of ratification bringing the total number to 53 and surpassing the threshold of 50 ratifications required under Article 22 for the ATT to enter into force 90 days later, hence on 24 December 2014. The total number of signatory states is currently 130 and the total number of states parties has now reached 60.

<sup>2</sup> For updated lists of Arms Trade Treaty ratifications and signatures of states, see <http://www.un.org/disarmament/ATT>

<sup>3</sup> For a general discussion of the hierarchy of international norms, see Dinah Shelton, 'International Law and 'Relative Normativity'', chapter 6, *International Law*, edited by Malcolm Evans, Oxford University Press, fourth edition, 2003

<sup>4</sup> An example of the role of the defence industry during the development of the treaty is summarised by Elli Kytömäki, 'The Defence Industry, Investors and the Arms Trade Treaty' Chatham House, International Security Department | December 2014

<sup>5</sup> Andrew Clapham, 'The Arms Trade Treaty: A Call for an Awakening', *Antonio Cassese Initiative – A Letter*, May 2013, issue no. 2, who wrote "What this author finds remarkable is that international lawyers and human rights advocates (inside and outside government) have shown such little interest in this new treaty. With the exception of Amnesty International, few of the large international human rights organizations have lobbied in a meaningful way for this treaty."

<sup>6</sup> *Convention for the Control of the Trade in Arms and Ammunition*, 10 September 1919, amended in 1925 to include the USA and its concerns, so retitled the *Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War (Geneva Arms Traffic Convention)*; David Anderson, "The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War." *American University International Law Review* 7, no. 4 (1992): 749-805. See also *Security Council Report*, The Security Council's Role in Disarmament and Arms Control: Conventional Weapons and Small Arms, 24, September 2009 at [www.securitycouncilreport.org](http://www.securitycouncilreport.org)

<sup>7</sup> Some of the following historical account was developed in Sergio Finardi, Brian Wood, Peter Danssaert, Ken Matthysen 'The Arms Trade Treaty: Building a Path to Disarmament', *Solutions Journal*, Volume 4, Issue 3, March 2013

<sup>8</sup> See *League of Nations, Conference for the Reduction and Limitation of Armaments*, document D./C.G. 171; subsequent yearbooks, of the League, the Conference and its Committee, pertaining to the 1919 League of Nations Covenant, Article 8

<sup>9</sup> This paralysis on the conventional arms trade was reflected in the largely dysfunctional Conference on Disarmament.

in December 1990 to set up the UN Register of Conventional Arms was an important transparency measure for reporting on seven categories of offensive weapons<sup>10</sup> that gathered support after the Gulf War. But the voluntary “rules of restraint” agreed in 1991 by Permanent Members of the Security Council<sup>11</sup> who had supplied most of the arms used in the Gulf War<sup>12</sup> were vague, as were the ‘Guidelines for international arms transfers’ agreed by the UN General Assembly in 1996.<sup>13</sup> As under the arms trade treaty negotiations in the League of Nations, no clear legal criteria were elaborated to enable states to fairly and objectively exercise such restraint.

### **The Nobel Laureates and NGO campaign**

The initial development of the modern arms trade treaty concept was as a result of efforts by civil society. In the London offices of Amnesty International in the late 1993, four NGO arms control advocates conceived the original idea that led to the ATT.<sup>14</sup> The NGOs drafted a legally binding code with inputs from lawyers at the Universities of Cambridge and Essex, and began to promote and develop the concept. Drawing upon the European Union Guidelines of Arms Exports and the OSCE Principles on Arms Transfers,<sup>15</sup> the drafts contained sets of rules to be adopted by states that would ensure any international transfers of conventional arms would only be lawfully permitted if the sending state could demonstrate the arms would not be used for gross violations of human rights or other serious breaches of international law.

For logistical and strategic reasons, the initial NGO advocacy effort was conducted in the European Union (EU) and the USA, but soon the idea began to spread much wider. In 1996, former President of Costa Rica and Nobel Peace Laureate Oscar Arias convened a group of other Nobel Peace Laureates including Amnesty International, and they worked with a small group of NGOs to promote a proposal for a legally binding International Code of Conduct on Arms Transfers.<sup>16</sup> They met with Foreign Ministers, parliamentarians and government officials in Europe and the United States as well as UN Ambassadors from over 25 countries. However, international attention was focused almost exclusively on disarmament affairs, especially weapons of mass destruction but also on the international campaign to ban landmines.

In 1997 EU leaders began to respond to political pressure from the civil society and in May 1998 the Council adopted the EU Code of Conduct on Arms Exports. This set out human rights and other criteria for exports, but was not legally binding. In the USA, then Senator John Kerry worked with others in the US Congress during 1997 and 1998 to achieve a law mandating the President to negotiate an International Code to regulate arms transfers while respecting human rights principles, but President Clinton’s administration made minimal efforts to begin such negotiations. By 1999, most civil society efforts focused on the negotiation of the UN Programme of Action on the illicit trade in small arms and light weapons,<sup>17</sup> and two other UN small arms instruments,<sup>18</sup> but these contained no references to the application of international human rights and humanitarian law to international arms transfer decisions so as to curb the misuse of such arms...

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<sup>10</sup> *UN General Assembly Resolution 673*, December 1990 published 1991

<sup>11</sup> Communiqué by the Permanent 5 Members of the UN Security Council to the Conference on Disarmament – Guidelines on conventional arms transfers CD1113 (London, 1991)

<sup>12</sup> See Anderson, *op cit*, and also Congressional Research Service, US Library of Congress, *Conventional Arms Transfers to the Third World 1983-90*, edited by R Grimmitt, 1991

<sup>13</sup> UN Guidelines on international arms transfers were produced by the UN Disarmament Commission in its substantive session on 22 April–7 May 1996 and were formally endorsed by the General Assembly in consensus Resolution 51/47B on 10 December 1996

<sup>14</sup> The four NGOs were Amnesty International, the Campaign Against the Arms Trade (CAAT), Saferworld and the World Development Movement. By 1994, CAAT had dropped out of the initiative and been replaced by the British American Security Information Council. Amnesty International had been awarded the Nobel Peace Prize in 1977.

<sup>15</sup> EU Common Criteria for arms exports agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992; OSCE Criteria for Conventional Arms Transfers, 1993

<sup>16</sup> In October 1996, the Laureate Commission and its International Support Group (Amnesty International’s International Secretariat, British American Security Information Council, the Council for Economic Priorities, and Saferworld) met to develop the text. The Code contained a wide list of prohibitions, full transparency and called for a verification commission. It was launched in May 1997 at the UN headquarters.

<sup>17</sup> Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, adopted in July 2001 at the UN Conference held in accordance with UN General Assembly Resolution 54/54V

<sup>18</sup> 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, and the 2005 International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons

Thus, the NGOs decided to step up their campaigning efforts. Amnesty International, Oxfam and the International Network on Small Arms (IANSA) launched the Control Arms Campaign in October 2003, generating publicity through events, new publications and popular mobilization.<sup>19</sup> Over subsequent years, hundreds of thousands of people worldwide called on governments across the world to agree a strong ATT with robust rules. By 2005 support for an ATT had grown from a handful to over 50 governments, so a move was made to begin a formal process in the UN General Assembly. Emboldened by the civil society advocacy and some champion governments, on 6 December 2006, 153 states voted in favour (with only the USA against) to adopt Resolution 61/89 requesting the UN Secretary General “to seek the views of Member States on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms...”<sup>20</sup>

A record number of States submitted their views on elements to include in the treaty during 2007<sup>21</sup> and the majority called for the transfer criteria to respect human rights, international humanitarian law and the prohibitions on acts terrorism, and for the treaty’s scope to be wide-ranging. There was almost no support for a formalised treaty verification mechanism. During 2008 and 2009 government experts discussed various elements for the treaty in a series of UN governmental experts meetings.<sup>22</sup> Amnesty International and other NGOs argued for strong criteria that recognised many existing international law standards and applied them to the arms trade.<sup>23</sup> In December 2009 the General Assembly approved a formal treaty negotiation process.<sup>24</sup> Five UN preparatory committee meetings developed a framework for the treaty and substantive proposals that formed the basis of the negotiations at the UN Conference on the ATT in July 2012.

Draft discussion papers were tabled during 2009-11 by the president of the UN process, Ambassador Moritán of Argentina.<sup>25</sup> Many of his proposals, particularly his 14 July 2011 paper, reflected views promoted by Amnesty International and the Control Arms coalition<sup>26</sup> though elements were changed by 3 July 2012 in new draft treaty texts presented at the UN Conference.<sup>27</sup> Stymied by opposition from Algeria, Egypt, Iran, North Korea and Syria, and facing unresolved questions from the US, Russia and China, the Conference ran out of time to agree a text by consensus.<sup>28</sup> Nevertheless, following a further round of negotiations at the Final United Nations Conference on the ATT from 18 to 28 March 2013 under the presidency of Ambassador Woolcott of Australia, the final treaty text was adopted by the UN General Assembly on 2 April 2013.<sup>29</sup>

### **Basic Strengths and Weaknesses in the Treaty Text<sup>30</sup>**

The scope of the ATT covers the transfer of seven major conventional arms considered ‘offensive’ weapon systems as defined under the UN Register of Conventional Arms, as well as all small arms and light weapons as defined by UN instruments – this definition of scope became known informally as the “7+1” formula.<sup>31</sup> These categories of conventional arms as well as others are frequently used and misused for unlawful acts, but during the negotiations states did not agree a more comprehensive list of categories. China and other

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<sup>19</sup> See Brian Wood and Daniel Mack, “Civil society and the drive towards an Arms Trade Treaty,” United Nations Institute for Disarmament Research, February 2009 to August 2010

<sup>20</sup> UN General Assembly Resolution 61/89 adopted on 18 December 2006.

<sup>21</sup> See A/62/278 (Parts I and II) and Addendum 1-4

<sup>22</sup> See Report of the Group of Governmental Experts, A/63/334, UN General Assembly Resolution 63/240, 8 January 2009, and United Nations, “Open-ended Working Group towards an Arms Trade Treaty New York, 13-17 July 2009”, New York 20 July 2009, A/AC.277/2009/1

<sup>23</sup> See for example Amnesty International, ‘How to Apply International Human Rights Standards to Arms Transfer Decisions’, 2008 a report largely written by Clare da Silva a legal consultant

<sup>24</sup> UN General Assembly Resolution 64/48, 23 December 2009

<sup>25</sup> *President’s Draft Papers*, 1 December 2009, 3 March 2010; 14 July 2010; 22 July 2010; 17 February 2011; 3 March 2011 and 14 July 2011

<sup>26</sup> This is evident by comparing the President’s drafts with texts issued by Amnesty International and the Control Arms coalition

<sup>27</sup> President’s “Discussion Paper”, dated 3 July 2012, accompanied by informal papers with optional elements

<sup>28</sup> “Draft of the ATT submitted by the President of the Conference” on 26 July 2012, A/Conf.217/CRP.1, August 1, 2012

<sup>29</sup> ATT text adopted on 2 April 2013 by the UN General Assembly in Resolution 67/234B by 154 states in favour to 3 against (Iran, North Korea and Syria), with 23 abstentions (including by China, Russia, India and Gulf states.)

<sup>30</sup> The final ATT text adopted was A/CONF.217/2013/L.3

<sup>31</sup> Article 2 on Scope; definitions for weapons that are included in the UN Register of Conventional Arms can be found at <http://www.un.org/disarmament/convarms/Register/>; and UN definitions for small arms and light weapons can be found in the UN Firearms Protocol, op cit, the UN Programme of Action on small arms and light weapons, op cit, and the Instrument on marking and tracing, op cit

states initially opposed the inclusion of small arms and light weapons but eventually succumbed to pressure from the overwhelming majority of states, especially from Africa. Nevertheless, States Parties are “encouraged to apply the provisions of this treaty to the broadest range of conventional arms” which in any case is already a common practice amongst many arms producing states.<sup>32</sup>

In addition, the scope covers the export, import, transit, trans-shipment and brokering of conventional arms as the ‘activities of the international trade’ which are defined as ‘transfers’ and must be regulated.<sup>33</sup> Gifts, loans, leases of arms are not explicitly mentioned in the treaty mainly because of opposition from China, but such transactions already fall under UN definitions of international trade.<sup>34</sup> States Parties must have a system for prohibiting certain transfers and thoroughly assessing the specific risks of an export before deciding whether to authorise that export.<sup>35</sup> However, the treaty does not require States Parties to adopt specific means of regulation for imports, transit and transshipments and brokering other than to have an effective and transparent national control system, including a national control list, anti-diversion measures and designated competent national authorities to exchange information.

States Parties must also establish and maintain a national control list to regulate the export of ammunition and munitions “fired, launched or delivered” by the 7+1 types of conventional arms,<sup>36</sup> and regulate the export of parts and components “in a form that provides the capability to assemble” those types of arms.<sup>37</sup> Despite opposition from the US and some other states to the inclusion of these related items, it was eventually agreed the items must fall under both the export control provisions and the transfer prohibitions set out in the treaty. However, these related items do not necessarily need to be covered by measures to prevent diversion or to regulate import, transit, trans-shipment and brokering, nor included in national records or annual reports.<sup>38</sup>

A centrepiece of the treaty is the obligation of States Parties to prohibit any transfer of conventional arms or related items if (i) the transfer would violate a Chapter VII measure such as an arms embargo;<sup>39</sup> (ii) the transfer would violate that State’s “relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms”;<sup>40</sup> or (iii) the State has “knowledge at the time of authorization” that the arms or related items “would be used in the commission” of genocide, crimes against humanity, grave breaches of the Geneva Conventions 1949, attacks against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party”.<sup>41</sup> US negotiators insisted upon the latter qualification (“as defined by international agreements to which it is a party”) so as to exclude the application of international customary law.<sup>42</sup> Nevertheless, it has been argued that the scope of ‘relevant international obligations under international agreements to which it is a Party’ is potentially broad.<sup>43</sup>

The treaty also stipulates that, provided the export is not deemed to be a prohibited transfer, States Parties are required to conduct an objective risk assessment in a non-discriminatory manner of the potential that an

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<sup>32</sup> Article 5.3. The Munitions List of the Wassenaar Arrangement of 41 arms exporting states is used by many other states as well: see <http://www.wassenaar.org/controllists/index.html>.

<sup>33</sup> Article 2.2 on “activities of the international trade”, and Articles 3, 4, 5, 6,7,8, 9, 10 and 11

<sup>34</sup> The UN General Assembly resolution that set up the UN Register on Conventional Arms refers to arms exports and imports as “all forms of arms transfers under terms of grant, credit, barter or cash” (Resolution 46/36 L of 9 December 1991, paragraph 2). The UN Statistical Commission adopted trade definitions in 1997 that for example include the following: “Goods traded on government account. This category includes goods for both civilian and military use which cross borders as a result of, for instance, regular commercial transactions of Governments, goods under government foreign aid programmes (whether or not the goods constitute a grant, a loan, a barter or a transfer to an international organization) and war reparations and restitutions.” (International Merchandise Trade Statistics: Concepts and Definitions, Studies in Methods, Series M, No.52, Rev.2, UN Department of Economic and Social Affairs, 1998. Note that the World Trade Organisation, the World Customs Organisation and International Monetary Fund were consulted about these definitions, as were many States, including China.

<sup>35</sup> Article 7.5 on detailed export authorizations prior to export and Article 5 on General Implementation

<sup>36</sup> Article 3 on Ammunition/Munitions

<sup>37</sup> Article 4 on Parts and Components

<sup>38</sup> Articles 8, 9, 10, 11, 12 and 13

<sup>39</sup> Article 6.1 on Prohibitions.

<sup>40</sup> Article 6.2 on Prohibitions; this is discussed further below

<sup>41</sup> Article 6,3 on Prohibitions and see further below

<sup>42</sup> The extent to which international customary law is used in US courts has been the subject of dispute.

<sup>43</sup> See Geneva Academy of International Humanitarian Law and Human Rights, ‘The Arms Trade Treaty’, Academy Briefing No. 3, May 2013

export of conventional arms or related items “would” undermine peace and security or contribute to peace and security,<sup>44</sup> and also to assess the potential that the arms or related items “could” be used to commit or facilitate a serious violation of international human rights law or of international humanitarian law, or an act constituting an offence under the exporting state’s international conventions and protocols relating to terrorism or to transnational organised crime.<sup>45</sup> If available mitigation measures, such as confidence-building measures and jointly developed and agreed programmes, cannot be taken by the exporting and importing states to remove an “overriding risk of any of these negative consequences” outlined above, then no authorisation can be given by the state party to proceed with that export.<sup>46</sup>

The term ‘overriding risk’ is an innovation in international law and requires a careful and legal weighing up of the various risks.<sup>47</sup> The EU has used the term ‘clear risk’ to set a threshold for the denial of an export in its agreed common position on arms exports and many states preferred the more established term ‘substantial risk’ as proposed in a previous draft concept paper for the treaty but that term was ultimately removed from the revised text during negotiations in 2012 and 2013 in the face of determined opposition from the US, Russia, China and other states. Assessing ‘overriding risk’ is made difficult by the unqualified use of the phrases “contribute to or undermine” and “peace and security” in the export assessment provision of the final ATT text leaving that provision somewhat vague about the level at which particular risks and hence “overriding risk” can be assessed, mitigated and hence judged. Nevertheless, it is evident from object and purpose, the principles, the preamble, the prohibitions and other provisions of the ATT regarding transfers that at the very least a determination of an ‘overriding risk of any of these negative consequences’ to refuse an arms export under consideration should also presuppose a finding of some sort of substantial risk of a serious violation or criminal offence in relation to one or more of the export assessment criteria listed in the treaty and, moreover, that the authorisation of an export of arms or related items must only be permitted by States Parties for purposes consistent with international law.

The definitions of acts constituting an offence under international conventions and protocols relating to terrorism and to transnational organized crime are defined in those specific legal instruments,<sup>48</sup> while the meaning of “serious violations” of international humanitarian law and especially of international human rights law must be derived from those bodies of customary and treaty law. The International Committee of the Red Cross (ICRC) has asserted that ‘war crimes’ and ‘serious violations of international humanitarian law’ are the same if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian objects or infrastructure) or if they breach important values.<sup>49</sup> The ICRC has defined serious violations of international humanitarian law as: (a) grave breaches as specified under the four 1949 Geneva Conventions (Articles 50, 51, 130, and 147 of Conventions I, II, III, and IV, respectively); (b) serious violations of Common Article 3 to the 1949 Geneva Conventions; (c) grave breaches as specified under Additional Protocol I of 1977 (Articles 11 and 85); (d) war crimes as specified under Article 8 of the ICC Statute; and (e) other war crimes in international and non-international armed conflicts under customary law.<sup>50</sup>

There is no universal definition or agreement on what constitutes a “serious violation of international human

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<sup>44</sup> Article 7.1 (a) and Article 7.3

<sup>45</sup> Article 7 on Export and Export Assessment

<sup>46</sup> Article 7.1 and 7.2 and 7.3; this is discussed further below

<sup>47</sup> The term ‘overriding risk’ has been translated as ‘prépondérant’ (predominant) in the French version and, similarly, in the Spanish version as ‘preponderante’

<sup>48</sup> The nine conventions, four protocols and one amendment relating to acts of terrorism all have common elements. Each requires: (a) criminalization of the conduct defined in a particular agreement as a punishable offence; (b) establishment of specified grounds of jurisdiction over that offence; and (c) the ability and obligation to refer a case against a suspected or accused offender to domestic authorities for prosecution if extradition is not granted. The offences under the UN Convention against Transnational Organised Crime and its three Protocols are: participation in an organized criminal group, laundering of proceeds of crime, corruption, obstruction of justice, trafficking of persons, smuggling of migrants, illicit manufacturing and trafficking of firearms, their parts and components and ammunition, falsifying firearm markings at the time of manufacture, import or transfer from government stocks to permanent civilian use; and obliterating, removing or altering firearm markings.

<sup>49</sup> See ICRC, ‘What are “serious violations of international humanitarian law? Explanatory Note’; <http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

<sup>50</sup> Statement of the ICRC to the United Nations Diplomatic Conference on the Arms Trade Treaty, New York, 12 July 2012. See also ‘What are “serious violations of international humanitarian law?”; Explanatory Note’; available at <http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

rights". But while all violations of human rights are somehow 'serious' for the victim, from the point of view of the international community as a whole, only some types of violations meet the threshold of being "serious" in relation to the direct or indirect use of armed force.<sup>51</sup>

Firstly, serious violations of international human rights law include those acts violating human rights that have attained the status of *jus cogens* – i.e. peremptory norms of general international law from which no derogation by agreement is permitted.<sup>52</sup> The UN Human Rights Committee has, for example, referred to the following as acts which would violate peremptory norms: arbitrary deprivations of life, torture and inhuman and degrading treatment, taking hostages, imposing collective punishments, arbitrary deprivations of liberty or deviating from fundamental principles of fair trial, including the presumption of innocence. These violations could deny victims their economic, social and cultural rights as well as their political and civil rights. Under the International Covenant of Civil and Political Rights (ICCPR) no derogation may be made by a State Party from the right not to be arbitrarily deprived of life, the prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent, the prohibition of slavery, slave-trade and servitude, the prohibition of imprisonment because of inability to fulfill a contractual obligation, the recognition of everyone as a person before the law, and freedom of thought, conscience and religion.<sup>53</sup>

'Serious violations of human rights' also include those human rights violations recognized as criminal under international law, such as acts of summary and arbitrary killing, enforced disappearances, torture and similar cruel, inhuman and degrading treatment. Such violations of human rights are nevertheless serious criminal acts and even more so when constituting a consistent pattern. If a pattern of human rights violations is emerging where it is not clear that there is a policy or an identifiable group of civilians being targeted as part of a widespread or systematic attack, a State should nevertheless not wait for the elements of crimes against humanity to be established before refusing to authorize an arms export.<sup>54</sup>

As a general rule, exporting States Parties must consider a possible serious violation of any human right, whether civil, cultural, economic, political or social rights. Serious violations of international human rights law would also be manifest where a proposed end user of an export of conventional arms under consideration is engaging in violations of an especially harmful nature or in persistent or pervasive violations of particular gravity through the use of conventional arms.

The ATT is also the first global treaty to recognise the specific risks associated with conventional arms to commit or facilitate gender-based violence. The risk of the proposed export of conventional arms or related items being used to commit or facilitate serious acts of gender-based violence, or of violence against women, or violence against children must be taken into account in assessing the risks of violations of international human rights law and humanitarian law.<sup>55</sup>

Gender-based violence is understood by many states to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'.<sup>56</sup> UN Member

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<sup>51</sup> Space here does not allow a full elaboration of the concept of 'a serious violation of international human rights law'. A useful analysis of this concept is by Takhmina Karimova, 'What amounts to 'a serious violation of international human rights law'?', Geneva Academy of International Humanitarian Law and Human Rights, Briefing No. 6, August 2014; I am also grateful for discussion on this subject with Clare da Silva as well as Andrew Clapham and Stuart Casey Maslen of the Geneva Academy when discussing the draft of Takhmina Karimova's briefing paper.

<sup>52</sup> According to the International Court of Justice, obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination": *Barcelona Traction*, at p. 32, para. 34. See also *East Timor* (footnote 54 above); *Legality of the Threat or Use of Nuclear Weapons* (*ibid.*); and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections* (*ibid.*).

<sup>53</sup> Article 4.2

<sup>54</sup> This point was made repeatedly by Amnesty International to state negotiators and to civil society advocates during the treaty negotiations in order to strengthen what became Article 6, but to no avail.

<sup>55</sup> Article 7.4.

<sup>56</sup> This definition is included, for example, in Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

States have agreed by consensus that violence against women “means any act of gender-based violence that results in, or is likely to result in, physical, sexual, psychological harm or suffering to women and girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>57</sup>

Violence against children is defined primarily by the Convention on the Rights of the Child which defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained later” and defines violence as: “all forms of physical or mental violence, injury and abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”<sup>58</sup> As serious acts of gender-based violence and serious acts of violence against women and children also constitute serious violations of international human rights law or international humanitarian law, the risk of such violations should also be fully considered in the export assessment procedure.

Moreover, States Parties involved in the transfer of conventional arms covered by the scope of the treaty must take measures to prevent their diversion and must assess the risk of diversion of an arms export.<sup>59</sup> All States Parties involved in the export, import, transit or trans-shipment of arms must cooperate and where appropriate exchange information in order to mitigate the risk of diversion of a transfer of arms.<sup>60</sup> However, States Parties are not required to include ammunition and munitions or parts and components defined by the treaty in their measures to prevent diversion, an omission insisted upon in particular by the US negotiators. Other measures by exporting states to prevent diversion of arms may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, or not authorizing the export.<sup>61</sup> For example, States Parties are encouraged to share relevant information with one another on effective measures to address diversion, including information on illicit activities, including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion of arms.<sup>62</sup>

States Parties are required to take measures to enforce national laws and regulations to implement the treaty.<sup>63</sup> They must cooperate with each other on the implementation of the treaty including to prevent illicit arms trafficking and violations of the treaty.<sup>64</sup> States Parties are required to afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to the treaty.<sup>65</sup> If they detect a diversion of an arms transfer States Parties must take appropriate measures which may include alerting potentially affected States Parties, examining diverted shipments and follow up action through investigation and law enforcement.<sup>66</sup>

All States Parties must also make available annual reports on their export and import authorisations and/or their country’s deliveries of the conventional arms covered by the treaty, reports which will be distributed to other states parties by the treaty secretariat,<sup>67</sup> and must maintain national records on all exports, imports, transits and trans-shipments of those arms.<sup>68</sup>

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<sup>57</sup> UN Commission on the Status of Women, 57th Session, March 2013, Elimination and prevention of all forms of violence against women and girls, Agreed Conclusions, 18 March 2013; note that the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is the main international treaty focused on women’s human rights but CEDAW does not include an explicit reference to violence against women as such. Nevertheless, progressive interpretations of CEDAW have recognised such violence as a violation of human rights.

<sup>58</sup> Article 19 of the UN Convention on the Rights of the Child defines violence against children; also relevant are the two Optional Protocols to this Convention one of which sets the minimum age for compulsory recruitment or direct participation in hostilities at 18 years and calls upon states parties to raise the minimum age for voluntary recruitment to at least 16 years;

<sup>59</sup> Articles 11.1 and 11.2 on Diversion

<sup>60</sup> Article 11.3

<sup>61</sup> Article 11.2

<sup>62</sup> Article 11.5

<sup>63</sup> Article 14 on Enforcement

<sup>64</sup> Article 15 on International Cooperation

<sup>65</sup> Article 15.5

<sup>66</sup> Article 11.4

<sup>67</sup> Article 13 on Reporting

<sup>68</sup> Article 12 on Record Keeping

## Prospects of compliance

The measures that States Parties take to implement the ATT must be reviewed when States Parties meet regularly in the Conference of States Parties, and there when they must also consider developments in the field of conventional arms, issues arising from the interpretation of the treaty, the establishment of subsidiary bodies and any proposed amendments to the treaty.<sup>69</sup> In 2020 and every three years thereafter, States Parties can consider amending the treaty provisions by consensus or with a three-quarters majority vote.<sup>70</sup> States parties are required to settle disputes through negotiation, mediation, conciliation, judicial settlement or other peaceful means.<sup>71</sup>

There are currently 130 state signatories and 60 States Parties to the Arms Trade Treaty. They will meet at the first Conference of States Parties to be held in Mexico in late August and early September 2015 following preparatory and informal meetings to set the conference agenda and agree a procedure for participation and decision-making. By 24 December 2015 each state party must submit an initial report to the newly established secretariat on measures they have taken to implement the treaty, and by 31 May 2016 each State Party must submit their first annual report for the preceding calendar year concerning their authorized or actual exports and imports of conventional arms.

Clearly, for States Parties to uphold the treaty's prohibitions and to implement the export assessment procedure consistently while ensuring respect for their obligations under international law will sometimes require a complex investigation and involve legal judgment by governments. This will require greater awareness of relevant international legal obligations and awareness of proven good practice in arms control by political leaders, officials and other stakeholders as well as more institutional capacity to carry out essential tasks responsibly. Given the plethora of existing national control systems, for States Parties to meet the treaty's object '*to establish the highest possible common international standards for regulating and improving regulation of the international trade in conventional arms*', practical guidelines to assist in implementation should be developed. As far as possible such guidelines should be developed and harmonized at the international level, especially to clarify "the highest possible common international standards" for implementation between states to ensure in every instance that a proposed arms transfer or export would not be authorized unless in all respects it would be fully lawful and for agreeing effective measures to take in order to prevent diversion and to mitigate risks. International cooperation and assistance should therefore focus on effective ways to establish and develop such common understandings in practical guidelines and to build greater awareness and capacity for operational implementation. This is especially true given the evidence of weak arms trade regulations in many states.<sup>72</sup>

At the global level, the world will require much greater political commitment from the major powers that dominate the bulk of the world's conventional arms trade and technologies to fully establish the rule of law in all its aspects to govern that international trade. The USA signed the ATT in September 2013 and the subsequent US Presidential Directive in January pledges to "promote control, restraint, and transparency of arms transfers" and ensure transfers do not contribute to violations of human rights" while maintaining an "appropriate balance" with "legitimate transfers". Unlike the EU and most of the close allies of the USA that have become States Parties, the US Senate seems unlikely to ratify the treaty in the foreseeable future. Meanwhile, Russia and China have not signed the treaty but there are prospects that they might do so in the foreseeable future, if only to give Moscow and Beijing a voice in the Conference of States Parties as the majority of States push ahead with implementation. Thus, the jury is still out on whether the ATT will establish an international regime strong enough to eradicate blatantly irresponsible transfers of conventional arms and related items, and to actually achieve its stated purpose in Article 1 of the treaty which is to promote control, restraint, and transparency in the international arms trade, and to reduce human suffering and contribute to peace, security and stability.

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<sup>69</sup> Article 17 on the Conference of States Parties

<sup>70</sup> Article 20 on Amendments

<sup>71</sup> Article 19 on Dispute Settlement

<sup>72</sup> See for example Sarah Parker and Katherine Green, 'A Decade of Implementing the United Nations Programme of Action on Small Arms and Light weapons' United Nations Institute of Disarmament Research and Small Arms Survey, Geneva and New York, 2012; also Brian Wood and Peter Dansseart, 'Study on the Development of a Framework for Improving End Use and End-User Control Systems', Occasional Paper No 21, United Nations Office for Disarmament Affairs, New York 2011

*About the author:*

*Brian Wood is a founder in 1993 of the idea of an international treaty with rules to respect international human rights and humanitarian law as criteria to govern international arms transfers. He is on sabbatical from his post as manager of arms control at the International Secretariat of Amnesty International in London, and working with the International Peace Information Service in Antwerp. He is grateful to Clare da Silva in particular for some of the legal analysis in this article, while nevertheless accepting responsibility for the final text presented.*