

The Arms Trade Treaty

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'Shit happens'

- International Humanitarian Law (IHL) or the Law of Armed Conflict (LOAC) apply to situations that reach the threshold of an armed conflict
- International Agreements (treaties) on how to carry out killings and destruction
- Three broad positions:
 - Pacifists
 - Realists
 - Just War Tradition
- The UN Charter: the end of war? (No IHL references by the Security Council until 1967)

Violations of IHL can be a threat to peace

- Security Council Resolution 2286/2016, Protection of civilians in armed conflict:
- *'Reiterating its primary responsibility for the maintenance of international peace and security and, in this context, the need to promote and ensure respect for the principles and rules of international humanitarian law,'*
- Security Council Resolution 808/1994 on establishing the Yugoslavia Tribunal:
- reference to 'widespread violations of international humanitarian law' and *'Determining that this situation constitutes a threat to international peace and security,'*

Regulation (not prevention)

- **Key rules under IHL:**
 - The rule on **distinction** (between combatants and civilians) including a prohibition against **indiscriminate attacks**
 - The rule on **proportionality** (excessive injury etc. to civilians)
 - The rule on superfluous injury and **unnecessary suffering** (protection of combatants)
 - The rule on **precautions** on attack
- **These rules are codified in AP I to the Geneva Conventions and are also part of customary international law**

International Law and Arms

- The law regulating which weapons it is prohibited/allowed to use:
 - Prohibitions (BWC, CWC, MBC, CCM, CCW I, IV)
 - Restrictions (CCW II, III, V)
- The law regulating transfer (export/import) of arms
- Disarmament law

Arms transfers – not covered by standard trade agreements

- Security concerns: arms and ammunition are fundamentally the basis for national defense – sensitive information
 - One does not necessarily want potential enemies to know what kind of weapons one has got
 - One does not necessarily want potential enemies to buy one's arms (where one has technological lead for example)
 - One does not want buyers to potentially sell arms to enemies or for weapons or ammunition to reach the illegal market
- Non-proliferation concerns: dual use objects and components subject to strict export control
- In fact - arms trade is characterized by *discrimination* – not non-discrimination

The Arms Trade Treaty (ATT)

- Not really a trade agreement
- “Export” of existing *arms export regimes*
- Negotiations since 2010, based on a rule of consensus
- Predictable failures at the July 2012 and 2013 Diplomatic conferences in NY
- Adopted by the GA in April 2013

The dynamics of the negotiations

- Four "groups" of negotiating states:
- "Progressive" states (focus on humanitarian goals)
- States in favour of an ATT, but keen to keep the P5 on board
- Sceptical States
- Opposing States

How the consensus rule worked

- History of the "consensus" rule and its relationship to treaty law
- No one expected the diplomatic conference to reach consensus: the issue was to get the "right" states to block
- The text represented the Chair's best guess at what could be achieved with only the "usual suspects" blocking (Consensus minus 3-4)
- This implied a watered down text compared to a 2/3 vote (according to VCLT art.9)

Scope

- Conventional arms - (meaning NOT weapons of mass destruction) as listed
- Small arms and light weapons
- Ammunition
- Parts and components

- This Treaty shall apply to all conventional arms within the following categories:
 - (a) Battle tanks;
 - (b) Armoured combat vehicles;
 - (c) Large-calibre artillery systems;
 - (d) Combat aircraft;
 - (e) Attack helicopters;
 - (f) Warships;
 - (g) Missiles and missile launchers; and
 - (h) Small arms and light weapons.

....**ammunition**/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1),

.....**parts and components** where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1)

National implementation

- Article 5
- State Parties must *maintain or adopt* national export control systems that gives the state an **obligation to control/authorise** all arms exports covered by the treaty – and consistent with the requirements of the treaty
- All public or private arms exporters (including arms producers and arms brokers) must apply to public authorities and get permission before selling arms to someone outside the territory of the state

State authorities must assess conditions in the recipient state before authorizing export

- Two sets of rules on the criteria for arms export:
- Absolute prohibitions (Article 6)
- Conditioned prohibitions (Article 7)

Article 6 (1)

- A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would
- violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, **in particular arms embargoes.**

Article 6 (2)

- A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its 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.
- (For example IHL or HRL treaties)

- This pertains to both:
 - How the arms would be used
 - AND
 - Whether the exported arms **themselves** are consistent with IHL requirements
-
- (Has for example been some discussion in Norway on 12,7 mm calibre rifle 'multi purpose' ammunition)

Article 6 (3)

- A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Which conflicts does article 6 (3) apply to?

- The text was subject to hard negotiations
- There was a strong resistance against framing the wording in a way that implies that the prohibition applies in both international and **non-international armed conflict**
- The term international agreements to which it is a Party does arguably cover the four Geneva Conventions – and therefore also its Common Article 3 which applies to non-international armed conflict
- **(constructive ambiguity)**

Article 7 (1)

- 1. If the export is not prohibited under Article 6, each exporting State Party,..., shall, ..., **assess** the potential that the conventional arms or items:
 - (a) would contribute to or undermine peace and security;
 - (b) could be used to:
 - (i) commit or facilitate a serious violation of **international humanitarian law**;
 - (ii) commit or facilitate a serious violation of **international human rights law**;
 - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating **to terrorism** to which the exporting State is a Party; or
 - (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to **transnational organized crime** to which the exporting State is a Party.

Article 7 (3)

- If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an **overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.**

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

Import, transit, trans-shipment, brokering

- Politically important (providing a certain balance in the ATT between arms producers and arms buyers – and making it appear to be a TRADE agreement) but not very clear obligations:
- “...take measures....as appropriate...where necessary.....etc.”
- There is no *obligation* on any state party to export arms to anyone, and there is no *right* for any state party to import arms (for obvious reasons)

Diversion

- Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall **take measures** to prevent their **diversion**.
- Important provision, but not very strong
- Globally, **armed violence kills around 508,000 people every year**, most in non-conflict settings – mostly by small arms – and to a large extent by arms and ammunition that have been diverted to the illegal market.

Recording and reporting

- State parties have to keep **records** of arms export (but not export of ammunition or parts and components)
- State parties must **report** on arms exports (but not export of ammunition or parts and components)
- Not clear that the reports must be made public – but many states publicize their annual and initial reports

ATT and peace

- A strict implementation of articles 6 and 7 would contribute greatly to enhanced observance of IHL and IHRL, and would thus, implicitly, contribute to peace
- US (and others') arms sales to groups in Syria??
- Presidential directive 15 January 2013: '*actual* knowledge'

US presidential directive

- The United States will not authorize any transfer if it has **actual knowledge** at the time of authorization that the transferred arms will be used to commit: genocide; crimes against humanity; grave breaches of the Geneva Conventions of 1949; serious violations of Common Article 3 of the Geneva Conventions of 1949; *attacks directed against civilian objects or civilians who are legally protected from attack or other war crimes as defined in 18 U.S.C. 2441.*
- Not clear what this says about applicability to IAC/NIAC

Arms export regulations – a paradox?

- Why regulate arms transfers – the export control framework in EU/Norway specifies that one cannot sell arms to states where there is an armed conflict (stricter than the ATT) – but then – what is the point with selling arms?
- Back to the ‘shit happens’-paradigm: one can avoid some of the worst consequences of arms exports by applying the ATT to all arms exports – but even as low as the ATT sets the bar; there is no reason to expect universal accession or application in the near future