

THE BIRTH AND THE HEART OF THE ARMS TRADE TREATY

Brian Wood & Rasha Abdul-Rahim

- *The ATT could advance the protection of human rights, if states robustly assess their arms' exports* •

ABSTRACT

The Arms Trade Treaty (ATT) represents a paradigm shift in international law on arms transfers. For the first time in history international human rights standards have been codified alongside other international benchmarks for assessing and preventing the authorisation of exports and other transfers of conventional arms. The treaty encompasses norms drawn from different bodies of international law and other instruments applicable to the transfer and use of conventional arms. In this article, the authors outline how key provisions in the ATT could advance the protection of human rights - if those provisions are implemented robustly by states.

KEYWORDS

ATT | Arms Trade Treaty | United Nations | International Law | Trade | Export

1 • How the Arms Trade Treaty (ATT) was won

The initial development of the modern arms trade treaty concept was as a result of efforts by civil society.¹ In the London offices of Amnesty International in late 1993, four NGO arms control advocates conceived the original idea that led to the ATT.² They drew up a draft legally binding Code of Conduct with common rules to restrict international arms transfers – for tactical reasons aimed initially at European Union (EU) member states.

A series of shocking crises in the late 1980s and 1990s – the first Gulf War, the Balkans conflicts, the 1994 Rwanda genocide and conflicts in Africa's Great Lakes region, West Africa, Afghanistan and in Central America amongst others – drove home the urgency of moving forward with attempts to control the global arms trade, NGOs and lawyers became increasingly concerned about the serious human rights and humanitarian impact of irresponsible arms transfers.³ The EU – shocked by the post-Gulf War revelations about transfers of weapons and munitions – had just agreed to a list of eight criteria for arms exports. This was followed by a set of principles on arms transfers agreed in the Organisation for Security and Cooperation in Europe (OSCE) in November 1993. The NGOs viewed the EU guidelines and OSCE principles as poorly drafted while the mechanisms were entirely voluntary. What NGOs proposed was a set of legally binding standards building on existing international law to strictly control all conventional arms transfers.

The NGOs attempted to build political support amongst large arms exporters in the EU and North America for the legally binding Code, revising it to overcome points of resistance.⁴ In 1995, former President of Costa Rica and Nobel Peace Laureate Oscar Arias convened a group of other Nobel Peace Laureates including as individuals Desmond Tutu, the Dalai Lama, and as organisations Amnesty International, the American Friends Service Committee and the International Physicians for Prevention of Nuclear War. They worked with a small group of NGOs to promote a proposal for a legally binding International Code of Conduct on Arms Transfers amongst foreign ministers, parliamentarians and officials with the help of the Costa Rican government. In May 1998 the European Council adopted the EU Code of Conduct on Arms Exports setting out human rights and other criteria for arms exports, but it was not legally binding. In the USA, then Senator John Kerry worked with others in Congress during 1997 and 1998 to achieve a law mandating the US 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.

The NGOs decided to step up their campaigning efforts. Amnesty International, Oxfam and the International Action Network on Small Arms (IANSA - a network of hundreds of NGOs) launched the Control Arms Campaign in October 2003, generating publicity through events, publications and popular mobilisation.⁵ Hundreds of thousands of people worldwide called on all governments to agree an ATT with robust rules and by 2005 support had grown from a handful to over 50 governments. Emboldened

by the civil society advocacy and some champion governments, on 6 December 2006 in the UN General Assembly, 153 states voted in favour (with only the US against) of a resolution to begin a process of consultation for an ATT. A record number of Member States submitted their views to the UN Secretary General. The arms transfer parameters with the most support from States set up the criteria to prevent violations of human rights, international humanitarian law and treaties on terrorism. Following further UN expert meetings and working group consultations, in December 2009 the General Assembly approved a formal treaty negotiation process.

Four 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 held throughout July 2012. Proposals from the chairperson of the process, Ambassador Moritán of Argentina, in 2011 reflected many views promoted by the Control Arms coalition but these were watered down before and during the July 2012 Conference to accommodate sceptical states. Stymied by opposition from Algeria, Egypt, Iran, North Korea and Syria, and facing unresolved questions from the US, Russia and China, the Conference was unable to agree a text by consensus. Nevertheless, following a further round of negotiations at the Final UN Conference on the ATT held from 18 to 28 March 2013 under the presidency of Ambassador Woolcott of Australia, the final amended treaty text was supported by the US and not opposed by Russia and China. To overcome the remaining objections to the text by Iran, North Korea and Syria, Ambassador Woolcott simply transferred the process to the UN General Assembly where the ATT was adopted on 2 April 2013 by 154 states in favour to 3 against (Iran, North Korea and Syria), with 23 abstentions (including by China, Russia, India and Gulf states).⁶

Under the ATT, national control systems and arms transfer decisions should conform to the highest possible common international standards and contribute to international peace and security; the main purpose of the arms transfer prohibitions and risk assessments of exports is to reduce human suffering; and States must take responsible action in the transfer and control of conventional arms. Thus the treaty ties together international security and human security in arms transfer decisions.

The treaty takes the term “transfer” to encompass export, import, transit, trans-shipment and brokering (Article 2.2). The arms and other items covered by the treaty are the seven major conventional weapons defined at a minimum under the 1991 UN Register of Conventional Arms, plus small arms and light weapons defined at a minimum by relevant UN instruments (Article 2.1). The major weapons cover: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft attack helicopters; warships; missiles and missile launchers.⁷ The treaty provisions also cover, but to a lesser extent, munitions and ammunition “fired, launched or delivered” by these types of arms (Article 3) and parts and components “in a form that provides the capability to assemble those arms” (Article 4). 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, if these related items are not prohibited or subject to export regulation, they do not need to be covered by measures to prevent diversion or to regulate import, transit, trans-shipment and brokering, nor be included in national records or annual reports.⁸

Article 5 on General Implementation nevertheless encourages States Parties to cover the widest range of conventional arms and requires States Parties to maintain an effective and transparent national control system to regulate the transfer. As part of this, States Parties must establish a national control list, a system for detailed authorisations prior to export, and designated competent national authorities to regulate the transfer of the arms and related items.

2 • The ATT's Heart: Transfer Prohibitions and Export Regulation

The ATT represents a significant paradigm shift in the world of arms control, in particular through its prohibitions on certain arms transfers and the establishment of a detailed export assessment mechanism (Article 7). For the first time in history international human rights customary and treaty law as well as international humanitarian customary and treaty law must form benchmarks for assessing the authorisation of an export of a wide range of conventional arms and related ammunition/munitions and parts and components.

Article 6 on Prohibitions

Article 6 is one of the core articles of the ATT and is the key starting point for assessing the legality of a potential transfer of conventional arms, ammunition/munitions or parts and components as defined by the treaty.⁹ Article 6 places an obligation on States Parties to prohibit any transfer of conventional arms or related items in certain circumstances.¹⁰ All forms of transfer defined in Article 2(2) apply to the prohibitions, including not only the export of relevant arms and other items but also their import, transit, transshipment and brokering. States Parties are prohibited from authorising any such transfer that would violate UN Security Council Chapter VII measures (including arms embargoes), or a State Party's existing relevant obligations under international agreements to which it is a party. In particular this includes those relating to the transfer of, or illicit trafficking in, conventional arms (such as a prohibition on the transfer of landmines or cluster munitions if the state was party to the Landmines Convention or Cluster Munitions Convention, or the transfer of unauthorised or unmarked firearms if the state is a party to the United Nations Firearms Protocol). A number of regional treaties expressly prohibit unauthorised transfers, including unauthorised brokering, of conventional arms, in particular small arms and light weapons, so the ATT reinforces these agreements for states that are party to them.¹¹

In addition, transfers are prohibited where a State has knowledge at the time of authorisation that the arms being considered 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 any other war crime as defined by international agreements to which the State is a party. Crimes against humanity are distinguished from genocide in that they do not require the specific intent to destroy a target population group.¹²

The wording in this article is extremely important. It has been suggested that the word “knowledge” invokes individual criminal responsibility for an international crime,¹³ but the international law of State responsibility does not yet make a distinction between criminal and civil wrongs by States. The term “would” places a level of probability of the breaches outlined in Article 6 akin to a reasonable basis or substantial grounds for believing the arms would be used for that illegal purpose. The ATT is predicated on due diligence and measures to establish the “highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms.” In this sense, a breach of Article 6 would include cases where a State Party should have known about the illegal use of the arms but there was a failure to follow up reasonable suspicions by seeking further information. Authorisation procedures required by the ATT oblige applicants to disclose all relevant information so it is almost inconceivable that a State which is properly implementing the ATT will neither have considered actual relevant knowledge nor knowledge of the circumstances which are widely known or are reasonably suspected.

Article 6 on prohibited transfers was a major accomplishment and could make a considerable difference in stopping arms transfers to those countries where Amnesty International and other organisations have documented the devastating effects of irresponsible and illegal arms transfers.

Article 7 on Export Assessments and Denial

If an export under consideration is not prohibited under Article 6, States Parties are required to conduct an objective and non-discriminatory assessment, taking into account relevant factors of whether an arms or related items “would” undermine or contribute to peace and security (Article 7.1 (a)).¹⁴ The concept of peace and security is expanded upon later in this article. A State is also required to assess the potential that these 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 (Article 7.1 (b)). Measures to mitigate risk of any of the negative consequences outlined above are to be considered by the exporter. When it is determined that there is an overriding risk of any of the negative consequences outlined above, then no export authorisation can be granted by a State Party to the ATT.

States Parties must also ensure their assessment takes into account the risk that the arms or related items could be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children (Article 7.4). This is the first time that an assessment for the potential of gender-based violence appears in an

international treaty dealing with arms control. The inclusion of a criterion on gender-based violence is consistent with the broader UN practice of mainstreaming gender issues by paying attention to differing impacts on women and men in all frameworks, policies and programmes, and indeed, with international human rights treaties which include an article emphasising the requirement for men and women to have equal access to human rights. Article 7(4) of the ATT is demonstrative of this mainstreaming approach requiring States Parties to ensure they have conducted a gender analysis in their assessment of the risks of international human rights law violations in Article 7(1).¹⁵

In addition, under Article 11 an exporting State Party is also required to assess objectively the risk of diversion of the conventional arms covered by the Treaty's scope. However, the State Party is not specifically required to assess the risk of diversion of munitions/ammunition or parts and components, an omission that was created at the insistence of the US and some other negotiators (Article 11.2).

The significance of Article 7 cannot be overstated. Traditional efforts by states to address the international supply of conventional arms for use in serious violations of international human rights and humanitarian law focused on the imposition of belated arms embargoes. Now Article 7 of the ATT seeks to take a proactive and preventive approach by defining the mandatory assessment in terms of a threshold of risk, rather than states simply reacting to violations once they have occurred.

3 • How Article 7 should be applied to protect human rights

In its practical guide, *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights*,¹⁶ Amnesty International has proposed a methodology for assessing the risk of an arms export being used to commit or facilitate serious violations of international human rights law and sets out a number of elements to consider when forming a judgment. This is a 3-step methodology.

Step 1: An Assessment of the Risks

“Objective and non-discriminatory”

In order to be objective and non-discriminatory, each State Party to every potential export of arms and/or related items must apply consistently assessments of the risks, as set out in Article 7. The risk assessment must be applied to a potential export to any country, without distinction, using verifiable and detailed information from credible and reliable sources on the arms and/or related items, the intended recipients, the likely uses, the route and all those stakeholders involved in the export (e.g. licencing officials, transport officials, brokers, etc.). Up-to-date information on international human rights and international humanitarian law standards and on the incidence and nature of relevant violations should be used to ensure that proper assessments are made. Complete and accurate documentation should be a regular component of all assessment processes.

Potential for contributing to or undermining international peace and security

Article 7 acknowledges that arms exports have the potential to either contribute to or undermine international peace and security. If conventional arms and related items are used to violate relevant international law referred to in the principles set out in the Preamble of the treaty and international legal obligations reflected in Article 6, then clearly they cannot be seen to be contributing to peace and security.

However, certain types of conventional arms and related items can be legitimately acquired by States to exercise the lawful use of force consistent with international standards on law enforcement,¹⁷ in order to protect and safeguard all persons and institutions under its jurisdiction. UN Member States, in their international relations, also have an inherent right to collective or individual self-defence under the UN Charter.¹⁸ Therefore, the ability to legitimately acquire certain conventional arms and related items is key in exercising that right as long as the arms are not used for acts that would otherwise violate the UN Charter regarding the use of force, and the prohibition on acts of aggression.¹⁹ It should also be noted that national security considerations are not mentioned in the treaty, thus only international peace and security concerns form the basis for assessment.

To make this assessment States should consider various factors, including whether the recipient State is involved in an international or non-international conflict, if it is under preliminary examination by the Office of the Prosecutor of the International Criminal Court or if the proposed export is compatible with the technical and economic capacity of the recipient country and its military, security and police forces.

A “serious violation” of international human rights or humanitarian law

According to the International Committee of the Red Cross (ICRC), “serious violations of international humanitarian law” are “war crimes” and the two terms are interchangeable. War crimes are perpetrated in situations of armed conflict and can include conduct that endangers protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian buildings such as hospitals or infrastructure). The majority of war crimes involve death, injury, destruction or unlawful taking of property.²⁰

Although there is no formal definition of what constitutes a serious violation of international human rights law, for the purpose of the ATT, such violations should be assessed against the nature of the right violated and harm suffered, and the scale or pervasiveness of the violation.

This means that States Parties should be required to consider a possible serious violation of any human right (be it civil, cultural, economic, political or social), as well as the severity of the impact of the violation(s) on the affected individual(s). In addition to this, States Parties should consider both the severity and gravity of a singular violation of human rights using conventional arms or munitions, as well as recurring and foreseeable patterns of violations, or in the institutional nature of violations that are condoned by the authorities. In this case, States Parties should examine whether the violations in question occur on a widespread or systematic basis.²¹

Assessing the risk of a serious violation of international human rights or humanitarian law

The starting point for assessing if a serious violation of such law could occur is to examine the recipient State's respect for international human rights law. The exporting State assessment must include whether the recipient State is a State Party to the key human rights instruments (e.g. ICCPR, ICESCR, UNCAT, etc.) and international humanitarian law treaties (e.g. not only the Geneva Conventions but also their Additional Protocols, the ICC Statute and other instruments); if there is an ordinary civilian, independent, impartial and functioning judicial system in the recipient country, capable of investigating and prosecuting serious human rights violations; and whether the recipient State educates and trains key sectors such as its security forces and police officers in the content and application of international human rights and humanitarian law.

It should also be borne in mind that "serious acts of gender-based violence" and "serious acts of violence against women and children" are serious violations of international human rights law when committed by State agents or by persons acting with the authorisation, support or acquiescence of the State or when the State fails to act with due diligence to prevent violence by non-state actors and/or fails to effectively investigate and prosecute cases and provide reparations to victims.

States then must determine whether there have been previous serious violations or abuses of human rights or international humanitarian law using arms or related items and the risk that such violations are likely to be facilitated or committed by the particular export of conventional arms or related items under review. This requires an assessment of the end-users, in particular, their propensity for abuse and violations of international human rights law or humanitarian law and/or their capacity to use arms lawfully, as well as to what extent they effectively control their arms and munitions (e.g. stockpile management capacity and security procedures). A crucial question is whether there exists a state of impunity with regard to those suspected of criminal responsibility for violations of international human rights or humanitarian law. For example, the following questions could be asked: does the recipient state have an established mechanism for independent monitoring and investigations into alleged serious international humanitarian law and serious violations of human rights and abuses?; Are crimes under international law properly defined in national legislation?; Is there an effective, independent and impartial complaint mechanism capable of investigating and prosecuting cases of allegations against law enforcement officials?

Step 2: Mitigation Measures

Under Article 7(2), the States Parties must consider whether there are measures that could be undertaken to mitigate the risk of any serious violations of international human rights or humanitarian law (as well as of offences under treaties on terrorism and transnational organised crime). Confidence-building measures or jointly developed and agreed programmes by the exporting and importing States are suggested as possible measures.

Some mitigation measures could include requiring specific assurances on the use and re-transfer of the arms or other items; requiring a valid import licence as part of the arms export license application; applying a “new for old” principle that as a condition of sale requires that the end-user destroys small arms that are to be replaced by the new consignment; and requiring a delivery verification certificate to confirm the arrival of arms at the customs territory of the recipient State or a specific location in that State.

To assist in the accountability of the use of conventional arms and related items, exporting States could enhance the effectiveness of the systems in place for the use, storage and registration of weapons and ammunition by law enforcement officers, security forces and other security personnel and ensure that all small arms and light weapons are uniquely marked in compliance with the UN Firearms Protocol (2001) and the International Tracing Instrument (2005).

An assessment of to what extent the relevant international human rights and IHL standards have been effectively integrated in doctrines, policy, manuals, instructions and training is also crucial in increasing the levels of compliance with international human rights law and IHL.

Step 3: Making a Decision on Overriding Risk

At the end of the July 2012 UN Conference, the draft treaty text introduced the concept of “overriding risk” to define the threshold whereby a State Party would be bound to refuse an export authorisation for arms and related items. This appeared to be an attempt to reach a compromise between those States, such as the US, Russia, China, India and others who opposed the concept of “substantial risk” and the many other States opposed to the concept of a “presumption against authorisation” or “overriding presumption against authorisation” previously proposed by the Conference President. The concept of “overriding risk” is not well defined under international law. Thus, in the ATT, the perceived benefit of tangible peace and security must be weighed against the potential risks of an arms export having any of the five negative consequences set out in Article 7.

The introduction of the “overriding risk” threshold to govern export decisions was viewed by States as an effort to capture the complexity of decision making in the real world whereas civil society saw it as a way that states could continue to export arms despite significant risks that the arms would be used for serious violations or offences. Amnesty International and the Control Arms coalition had been proposing the term “substantial risk” to determine the threshold for an arms export, meaning more likely than not, however, there was an attempt to water down the language.

No significant change was made to the text regarding “overriding risk” until the end of the 2013 UN Conference when on 27 March the President introduced the word “negative” to the operative provision on “overriding risk” so it reads: “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” (Article 7(3)). The reference to “any of the negative consequences” was seen as strengthening the provision.

States Parties have an obligation to implement the treaty in good faith, in line with its object and purpose. According to Article 7, the analysis of “overriding risk” should be carried out by competent national authorities based on an objective and non-discriminatory consideration of all available evidence of the past and present circumstances in the recipient country regarding the proposed end-use and end-user. It should include an assessment of the levels of existing peace and security across various contexts, for example, post-conflict situations or those where military, security and police forces operate under the rule of law.

It has been suggested, for example, that “if a potential export ‘would’ undermine peace and security, then that would be an overriding risk. If, in a given circumstance, there is a risk that one or more of the five negative consequences in Article 7(1) ‘could’ occur despite consideration of available mitigating measures, then this real danger must take precedence over any potential contribution to peace and security. If the assessment concludes there is a reasonable and credible risk that the export of items under consideration could be used for or facilitate any of the negative consequences set out in Article 7(1), thereby also undermining peace and security, then the authorisation must be refused. It is also possible in some circumstances that the exporting State knows at the time that the potential exports will be used specifically for one or more of the negative consequences, in which case the authorisation of the export must be refused. Equally, if the contribution to peace and security clearly outweighs the risk of negative consequences, and none of the risks are reasonable and credible, then the export should be approved.”²²

The likelihood of overriding risk becomes greater where there is evidence of a pattern of serious violations, or where the recipient has not taken appropriate steps to end systematic violations, ensure accountability for those violations and prevent their recurrence.

4 • Prospects for future compliance

With 78 States Parties and 130 signatories so far in a short period since it was adopted by the General Assembly in April 2013, it is clear the ATT is an emerging arms control regime that has the potential to save countless lives and prevent serious violations of human rights. Whether it will achieve a significant and lasting impact depends upon political commitment to bring the international arms trade truly under the rule of law. Five of the top ten arms exporters – France, Germany, Italy, Spain and the UK – have already ratified the ATT. The remaining major arms producers should be pressed to join the treaty. Although the US has signed the treaty, its Senate seems unlikely to approve the ratification of the treaty in the foreseeable future. There has been resistance to signing the treaty from other major arms producers such as Russia, while China has recently been giving indications through a statement

it delivered during the UN First Committee in 2015 that it is considering joining the treaty. Major importers such as India and Saudi Arabia have also been resistant to join the treaty.

As States Parties move towards implementation of the ATT, they must not lose sight of the object and purpose of the treaty, namely to promote control, restraint, and transparency in the international arms trade, and to reduce human suffering and contribute to peace, security and stability. Pursuant to Article 13 of the ATT, States Parties must submit an initial report to the newly established ATT Secretariat by 23 December 2015 on measures they have taken to implement the treaty. By 31 May 2016 States Parties must submit their first annual report for the preceding calendar year concerning their authorised or actual exports and imports of conventional arms.

It is yet to be seen whether and how soon all States Parties will make their reports publicly available but global civil society believes public reporting is a key means by which the ATT will be effectively implemented. Fully transparent reporting would build confidence amongst States, allowing them to demonstrate that they are indeed implementing the treaty, and would provide a basis for States and civil society to assess how the ATT is being applied in practice.

As Article 20 of the ATT states, “Six years after the entry into force of this Treaty, any State Party may propose an amendment to this Treaty. Thereafter, proposed amendments may only be considered by the Conference of States Parties every three years.” This means that in 2020 and every three years thereafter, States Parties can consider amending the treaty provisions by consensus, but if consensus fails then amendments may be adopted by a three-quarters majority of State Parties present and voting at the meeting. This will be very important for future proofing and strengthening of the treaty. Potential areas for improvement could include expanding the scope of equipment that must be covered by the treaty to include a wider range of munitions as well as law enforcement weapons; requiring States Parties to adopt specific means of regulation for imports, transit and transshipments and brokering; introducing criminal sanctions for violating the treaty’s provisions; and making it mandatory for States Parties to publish annual reports on exports and imports.

Accountability for arms transfer decisions will be crucial for the effective implementation of the treaty and will act as an important check for those who continue to suffer as a result of irresponsible arms transfers and the illicit trade. The suffering of those people must remain at the forefront of the decision-making process regarding arms transfers. A lesson learned during the “birth” of the ATT is that only strong, ongoing global pressure from civil society will provide the context to improve the treaty, and key to the substantial improvement of the treaty will be to strengthen the provisions and implementation of Articles 6 and 7 - the “heart” of the treaty.

NOTES

1 • 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, floundered. This was because of the failure to devise universal rules to limit excessive arms production or to agree objective and non-discriminatory legal criteria to stop the likely misuse and harm of an arms transfer. Following the Second World War almost nothing was done between 1945 and 1990 at the United Nations to establish international conventional arms trade control systems or standards as the world was plunged into politics of the Cold War and the proxy wars during the 1950s, 60s, 70s and 80s. The voluntary “rules of restraint” agreed in 1991 by Permanent Members of the Security Council who had supplied most of the arms used in the Gulf War were left vague, as were the “Guidelines for international arms transfers” agreed by the UN General Assembly in 1996.

2 • 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.

3 • For a more detailed account on how the ATT was won, see “The long journey towards an Arms Trade Treaty,” *Amnesty International*, March 27, 2013, accessed October 3, 2015, <http://www.amnestyusa.org/news/news-item/the-long-journey-towards-an-arms-trade-treaty>.

4 • EU Common Criteria for arms exports agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992; Organization for Security and Co-operation in Europe (OSCE), *Criteria for Conventional Arms Transfers*, November 1993.

5 • For a resume of the Control Arms campaign see Brian Wood and Daniel Mack, *Civil society and the*

drive towards an Arms Trade Treaty (Geneva: United Nations Institute for Disarmament Research, February 2009 to August 2010).

6 • <http://www.un.org/disarmament/update/20130402/ATTVotingChart.pdf>.

7 • United Nations Conference on the Arms Trade Treaty, “President’s Non-Paper,” New York, March 27, 2013, 4 (Article 2: Scope), accessed October 3, 2015, [http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_\(ATT_Final_Conference\).pdf](http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_(ATT_Final_Conference).pdf).

8 • Brian Wood, “IPIS Insights: The Arms Trade Treaty - Prospects and Challenges as It ‘Enters Into Force’,” *International Peace Information Service – IPIS*, December 23, 2014, accessed October 3, 2015, <http://ipisresearch.be/publication/ipis-insights-arms-trade-treaty-prospects-challenges-enters-force/>.

9 • For a detailed analysis of Article 6 of the ATT, see Clare da Silva and Penelope Nevill, “Article 6 Prohibitions,” in *Weapons and International Law The Arms Trade Treaty*, ed. Clare da Silva and Brian Wood, Ghent: Larcier Group, August 2015), 88–115.

10 • Article 6 Prohibitions reads as follows (United Nations Conference, “President’s”, 5–6):

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.

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.

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.

11 • These include, for example, the 2004 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, the 2006 ECOWAS Convention on Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa and the EU 2008 Common Position on arms exports and 2003 EU Common Position on arms brokering.

12 • See for example Geneva Academy of International Humanitarian Law and Human Rights, "The Arms Trade Treaty," *Academic Briefing* 3, June 2013, accessed October 3, 2015, http://www.snis.ch/system/files/academy_briefing_3_2013_arms_trade_treaty.pdf; which cites Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC Statute).

13 • As in Article 30(3) of the ICC Statute and the general comments included in the Elements of Crimes adopted by the States Parties to the ICC Statute.

14 • Article 7 Export and Export Assessment (United Nations Conference, "President's", 6-7):

1 – If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), 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.

2 – The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

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.

4 – 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.

5 – Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

6 – Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

7 – If, after an authorization has been granted,

an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

15 • *Amnesty International*, "The long journey", 13–14.

16 • See: "Applying the Arms Trade Treaty to Ensure the Protection of Human Rights," *Amnesty International*, February 01, 2015, accessed October 3, 2015, <https://www.amnesty.org/en/documents/act30/0003/2015/en/>.

17 • See: United Nations Office of the High Commissioner for Human Rights (OHCHR), *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Havana, Cuba: OHCHR, 27 August to 7 September 1990), accessed October 3, 2015, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>; United Nations Office of the High Commissioner for Human Rights (OHCHR), *Code of Conduct for Law Enforcement Officials* (Geneva: OHCHR, December 17, 1979), accessed October 3, 2015, <http://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf>; and the United Nations, Standard Minimum Rules

for the Treatment of Prisoners (Geneva: UN, 1955), accessed October 3, 2015, https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

18 • United Nations, *Charter of the United Nations* (New York, 1945), Article 51.

19 • United Nations, *Charter of the United Nations* (New York, 1945), Article 2.

20 • International Committee of the Red Cross (ICRC), *What are 'serious violations of international humanitarian law'? Explanatory Note*, accessed October 3, 2015, <https://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

21 • If these violations involve widespread or systematic attacks that target a particular population they would constitute crimes against humanity and thereby fall under the prohibition described above in Article 6.

22 • Clare da Silva and Brian Wood, 'Article 7: Export and Export Assessment', in *Weapons and International Law The Arms Trade Treaty*, ed. Clare da Silva and Brian Wood (Ghent: Larcier Group, August 2015), 131.

**BRIAN WOOD** – UK

Brian Wood leads Amnesty International's campaign for a strong global Arms Trade Treaty. An expert on the global arms trade, he has acted as a consultant to the United Nations on the prevention of illicit brokering in small arms and light weapons and on end-use control systems. He has researched and provided policy analysis on the subject for over two decades, including to inter-governmental organisations, national governments and NGOs.

**RASHA ABDUL-RAHIM** – Palestine

Rasha Abdul-Rahim is an Advocate/Adviser in the Arms Control, Security Trade and Human Rights Team at the International Secretariat of Amnesty International in London, and works on various arms control issues, including the Arms Trade Treaty. She holds a BA in Modern and Medieval Languages from the University of Cambridge and a MA in International Relations and Diplomacy from SOAS in London.

Received in December 2015.

Original in English.

This article draws extensively on Amnesty International's Applying the Arms Trade Treaty to Ensure the Protection of Human Rights, authored by Clare da Silva and on Clare da Silva and Brian Wood (editors) Weapons and International Law The Arms Trade Treaty, Larcier Group, Ghent, August 2015, chapters 6 and 7.



"This paper is published under the Creative Commons Noncommercial Attribution-Share Alike 4.0 International License"