



ICRC

ICRC Analysis of Articles 2, 3, 4 and 5 of the July 2012 Draft Arms Trade Treaty 12 March 2013

Summary

The July 2012 Diplomatic Conference on the Arms Trade Treaty (ATT) concluded with a draft treaty¹ that would have addressed some of the human costs of inadequately regulated arms transfers but still contains some provisions and ambiguous terms that could be detrimental to its humanitarian objectives. This document sets out the ICRC's views on aspects of some of these provisions – Articles 2, 3(3), 4(1),(2),(4) and (5) and 5(2).

The ICRC considers these provisions crucial to achieving the humanitarian goals and objectives of the draft treaty. Some of the ICRC's key concerns with the current wording of these provisions are outlined here:

- Among several other concerns with Article 2 defining the scope of weapons and activities covered by the treaty, the scope of activities (in paragraph (B)(3)) could be interpreted as limiting these to commercial transactions.
- In Article 3(3), which aims to prevent arms transfers in cases of genocide, crimes against humanity or war crimes, the definition of war crimes excludes serious violations of international humanitarian law (IHL) committed in the conduct of hostilities, i.e. those typically carried out with conventional weapons, such as direct attacks against civilians or humanitarian workers or indiscriminate attacks. Moreover, the provision sets a threshold of intent that renders it inoperable.
- Article 4 would allow a State Party to transfer weapons even if there is a risk that they would be used to commit serious violations of IHL or of international human rights law, where such risk does not "override" considerations relating to peace and security (Article 4(1)) and risk mitigation measures (Article 4(2)).
- Article 5(2) as currently worded could be interpreted as allowing a State Party to enter into agreements that would be incompatible with its obligations under the treaty.

An effective Arms Trade Treaty will depend on a text that is clear and easy to implement. The ICRC urges States to address the ambiguities in the current draft text, described in this paper, which may give rise to loopholes that can undermine the treaty's humanitarian objectives.

Below is a more detailed description of the ICRC's concerns about the current wording of these provisions taken individually. Also included are some recommendations for improvement.

¹ The July 2012 Draft Arms Trade Treaty is available here: <http://www.un.org/disarmament/ATT/>

Article 2

Scope

A. Covered Items

1. *This Treaty shall apply to all conventional arms within the following categories at a minimum:*

- 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*

The scope of weapons to which the Treaty "shall apply" is limited to the seven categories of weapons set out in the UN Register of Conventional Arms plus Small Arms and Light Weapons. This scope is broad, and is complemented in article 6(4) by the reference to ammunition, and in article 6(5) by the reference to parts and components, for these conventional arms.

The ICRC welcomes the inclusion of ammunition and of parts and components for conventional arms in the draft treaty, albeit in Article 6. This inclusion is crucial if one of the goals is to ensure that transfers of these items do not fuel the misuse of weapons that are already in circulation.

Nevertheless, placing ammunition and parts and components outside Article 2 on "Scope" could lead States to interpret certain provisions in the treaty, such as Articles 7, 8, 9 and 10 (on import, brokering, transit, transshipment, reporting and record-keeping), as not applicable to ammunition or parts and components. In order to avoid any ambiguity as to whether ammunition and parts and components are covered in the "scope" of the treaty, these items should be included in article 2(A)(1) with other "covered items." More generally, as conventional weapons of every kind can be used to commit serious violations of international humanitarian law and international human rights law, the ICRC recommends ensuring that the scope of the treaty be as comprehensive as possible.

2. *Each State Party shall establish or update, as appropriate, and maintain a national control list that shall include the items that fall within paragraph 1 of this article, as defined on a national basis and, at a minimum, based on relevant United Nations instruments. Each State Party shall publish its control list to the extent permitted by national law.*

The effect of this provision could be to exclude certain weapons from the treaty's application because UN instruments or national definitions do not adequately capture them. For instance, certain weapons such as hand grenades would not necessarily fall within a State Party's definition of Small Arms and Light Weapons (SALW) if a UN instrument doesn't include them explicitly (e.g. the International Tracing Instrument² (ITI) defines SALW loosely with the words "broadly speaking" and "inter alia"³) and the State Party chooses to define SALW restrictively. Article 2(A)(2) poses a

² See http://www.poa-iss.org/InternationalTracing/ITI_English.pdf

³ Article 4 of the ITI defines "small arms and light weapons" as "any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive (...)

real danger that many weapons will effectively be excluded from the treaty's application because of a State Party's discretion in defining the items that fall within the categories of weapons listed in article 2(A)(1).

The current wording of Article 2(A)(2) could lead to inconsistency and lack of transparency in the implementation of the treaty: The terms "as defined on a national basis" could lead to different State Parties applying the treaty to different conventional weapons. Moreover, the final sentence on publishing control lists "to the extent permitted by national law" could render it impossible to know to which conventional arms a State Party is applying the treaty.

B. Covered Activities

3. *This Treaty shall apply to those activities of the international trade in conventional arms set out in articles 5, 6, 7, 8 and 9, hereafter referred to as "transfer," for the conventional arms covered under the scope of this Treaty.*

There is a danger that States will interpret the expression "international trade" as including only activities that entail a commercial transaction, thereby excluding gifts and loans from the scope of the treaty. Nevertheless, the provision's reference to other provisions covering export, import, brokering, transit and transshipment could also suggest that the treaty governs these activities regardless of whether they entail a commercial exchange. The scope of this provision is therefore unclear. In order to mitigate this ambiguity, the ICRC would recommend replacing the word "trade" with the word "transfer."

In the view of the ICRC, in order to address the human cost of poorly regulated arms transfers, this provision should make clear that it applies to all types of transfer of all conventional weapons.

Article 3

Prohibited Transfers

3. *A State Party shall not authorize a transfer of conventional arms within the scope of this Treaty for the purpose of facilitating the commission of genocide, crimes against humanity, war crimes constituting grave breaches of the Geneva Conventions of 1949, or serious violations of Common Article 3 of the Geneva Conventions of 1949.*

The ICRC considers this provision crucial to achieving the humanitarian goals and objectives of the draft treaty. Nevertheless, it contains some important flaws. Below is a description of these flaws and some suggestions for improvement.

A. "For the purpose"

The expression "**for the purpose**" requires specific intent that the arms will facilitate one of these crimes. This expression is found in instruments of international criminal law, in particular article 25(3)(c) of the Rome Statute of the International Criminal Court (ICC), which states that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person, "for the purpose of facilitating the

(a) "Small arms" are, broadly speaking, weapons designed for individual use. They include, inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns;

(b) "Light weapons" are, broadly speaking, weapons designed for use by two or three persons serving as a crew, although some may be carried and used by a single person. They include, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti-tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres."

commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."

In examining the meaning of the expression, the pre-trial Chamber of the ICC has acknowledged that "purpose" represents a higher threshold than "knowledge."⁴ Various commentaries on the Rome Statute have also proposed that purpose entails a specific subjective requirement that is stricter than mere knowledge,⁵ and that the perpetrator must know as well as wish that his assistance will facilitate the commission of the crime.⁶

As it is currently worded, Article 3(3) would be inoperable: Any State that intends to facilitate crimes against humanity, genocide, or war crimes is unlikely to admit that a transfer of arms is "for the purpose" of facilitating these acts, and would therefore never apply the prohibition. This standard of intent could not effectively serve the purpose of *preventing* transfers that would facilitate the mentioned crimes.

The ICRC does not consider it appropriate to apply a criminal law standard to a matter of State responsibility. Moreover, it is generally understood that Article 3(3) is meant to reflect Article 16 of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles on State Responsibility). Article 16 sets out a State's liability for aiding or assisting in the commission of an internationally wrongful act in the following terms:

"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State."⁷

While it is clear that the terms of Article 16 require that the aiding or assisting State have "knowledge" of the circumstances, it is not universally recognized that knowledge also entails intent.⁸ While the 2001 Commentary on Article 16 says that the "State is not responsible for aid or assistance under article 16 unless the relevant State organ *intended*, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct" (emphasis added),⁹ an ILC report of 2001 says that "some requirement of knowledge,

⁴ ICC, Pre-Trial Chamber 1, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10, 16/12/2011 at para. 274. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 [Genocide Case] § 241.

⁵ K. Ambos in *Commentary on the Rome Statute of the ICC*, O. Triffterer (ed.), Baden Baden Nomos, 1999, p. 760.

⁶ A. Eser in Antonio Cassese, P. Gaeta and J. R.W.D Jones, *The Rome Statute of the International Criminal Court: A commentary*: Oxford University Press, Vol. 1 2002, p. 801.

⁷ The ICJ recognized Article 16 as a customary obligation in its 2007 judgement in the *Genocide Case* § 420.

⁸ The preceding version of article 16 (article 27 at the time) used the term "if it is established that it is rendered for the commission of an internationally wrongful act" and was interpreted by the ILC to impose an *intent* requirement (See Report of the International Law Commission on the work of its Thirtieth session, 8 May-28 July 1978, Official Records of the General Assembly, Thirty-third session, A/33/10, p. 99).

⁹ See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). The report, which also contains commentaries on the draft articles, appears in the *Yearbook of the International Law Commission, 2001, vol. II, Part Two, Article 16* <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf >

or at least notice, seems inevitable."¹⁰ Moreover, in the *Genocide*¹¹ case, the International Court of Justice (ICJ) held that aid or assistance is not complicity unless the organ or person "acted knowingly, that is to say, in particular, was aware of the specific intent of the principal perpetrator."

Moreover, "for the purpose" is unduly restrictive in light of the standard of responsibility under the obligation to prevent genocide pursuant to the Genocide Convention.

To render Article 3(3) operable, the ICRC recommends that the standard of responsibility in Article 3(3) follow the wording of Article 16 of the ILC Draft Articles on State Responsibility. As this provision reflects customary international law, the wording of Article 16 should prove acceptable to all States.

Some alternatives to "for the purpose of " could include:

- "if the transfer would amount to aiding or assisting in the commission of"
- "if the State party knows that the arms will be used to facilitate the commission of"

B. The scope of war crimes

The scope of war crimes specified in this provision is significantly narrower than the range of war crimes set out in both treaty and customary international law. One reason put forward for limiting the formulation to breaches under the Geneva Conventions is that certain States would prefer to refer only to those IHL instruments that are universally ratified, i.e. the Geneva Conventions of 1949.

However, by limiting its application to crimes under the Geneva Conventions, this provision omits a number of war crimes that are typically carried out with conventional arms in the conduct of hostilities, such as intentionally directing attacks against the civilian population, civilian objects or humanitarian assistance personnel.¹² These other crimes are specified in the First Additional Protocol¹³ to the Geneva Conventions, the Rome Statute of the International Criminal Court (hereafter Rome Statute),¹⁴ and customary international law.¹⁵

¹⁰ Annex, Specific amendments to the draft articles in the light of comments received, to the Fourth report on State responsibility, by J. Crawford, Special Rapporteur, International Law Commission Fifty-third session Geneva, 23 April-1 June and 2 July-10 August 2001, A/CN.4/517/Add.1, p. 3.

¹¹ *Genocide Case* § 421.

¹² Violations of the rules of IHL on the conduct of hostilities are not included in serious violations of Article 3 common or grave breaches in the Geneva Conventions. This is stated in commentaries to Additional Protocol I (AP I). See Bothe M., Partsch K. J., Solf W. A., *New rules for victims of armed conflicts*, Commentary on the two 1977 Protocols additional to the Geneva Conventions of 1949, Martinus Nijhoff Publishers, The Hague/Boston/London, 1982, p. 667; Sandoz Y., Swinarski C., Zimmermann B. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, with the collaboration of Jean Pictet, C. Pilloud, J. de Preux, H. P., p. 993-994, § 3472. It is reaffirmed by the separation of the two different types of war crimes in domestic legislation of many States such as Armenia, Australia, Belarus, Belgium, Bosnia and Herzegovina, Canada, China, Colombia, Cook Islands, Croatia, Cyprus, Estonia, Georgia, Indonesia, Ireland, Lithuania, the Netherlands, New Zealand, Niger, Norway, Slovenia, Spain, Sweden, Tajikistan, the United Kingdom, Yugoslavia, and Zimbabwe. The separation of the war crimes in international criminal courts are further evidence of this distinction: see Rome Statute, Statute of the International Criminal Tribunal for the Former Yugoslavia, Statute of the Special Court for Sierra Leone, and UNTAET Regulation No. 2000/15.

¹³ The First Additional Protocol to the Geneva Conventions has 172 States Parties.

¹⁴ The Rome Statute has 122 States Parties and 139 Signatories.

¹⁵ See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, International Committee of the Red Cross and Cambridge University Press, 2005 at rule 156. Also available here: http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.

While not all States recognize the customary nature of all war crimes listed in Article 8 of the Rome Statute, States negotiated this provision based on the premise that these war crimes amount to violations of customary international law. In addition, even States not party to the Statute recognize the criminal nature of a very broad range of these acts.

If this provision is to effectively prevent transfers of weapons that would aid or assist in the commission of war crimes, then it is essential that the range of war crimes be comprehensive.

Some alternatives to "war crimes constituting grave breaches of the Geneva Conventions of 1949, or serious violations of Common Article 3 of the Geneva Conventions of 1949" could include:

- "war crimes"
- "war crimes, including grave breaches of the Geneva Conventions of 1949 and serious violations of Common Article 3 of the Geneva Conventions of 1949"
- "grave breaches of the Geneva Conventions of 1949 or other serious violations of the laws and customs of war"
- "war crimes in violation of its obligations under international law"

The expression "laws and customs of war" suggested in the third alternative is based on a series of international instruments on IHL, such as the 1907 *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, the *Statute of the International Criminal Tribunal for the Former Yugoslavia* (Article 3) and the *Rome Statute of the International Criminal Court* (Articles 8(2)(b) and 8(2)(e)). The third alternative is also based on the latter two Statutes, which separate grave breaches of the Geneva Conventions from other serious violations of the laws and customs of war.

The fourth alternative follows the logic of Article 16(b) of the ILC Draft Articles on State Responsibility, quoted above.

Article 4

National Assessment

1. In considering whether to authorize an export of conventional arms within the scope of this Treaty, each State Party shall assess whether the proposed export would contribute to or undermine peace and security.

2. Prior to authorization and pursuant to its national control system, the State Party shall assess whether the proposed export of conventional arms could:

- a. be used to commit or facilitate a serious violation of international humanitarian law;*
- b. be used to commit or facilitate a serious violation of international human rights law; or*
- c. be used to commit or facilitate an act constituting an offense under international conventions and protocols relating to terrorism to which the transferring State is a Party.*

(...)

4. In assessing the criteria set out in paragraph 2 of this article, the exporting State Party may also take into consideration the establishment of risk mitigation measures, including confidence-building measures and jointly developed programmes by the exporting and importing States.

5. If, after conducting the assessment called for in paragraph 1 and 2 of this article, and after considering the mitigation measures provided for in paragraph 4 of this article, the State Party finds that there is an overriding risk of any of the consequences under paragraph 2 of this article, the State Party shall not authorize the export.

(...)

Draft article 4(2) requires that each State Party assess whether there is a risk that the weapons will be used to commit a serious violation of IHL or international human rights law (IHRL). The ICRC welcomes this obligation to carry out an assessment and would consider it a valuable development of international law.

Another positive aspect is that this formulation covers a broader range of violations than those captured in draft article 3(3). However, Article 4 only relates to exports, while no other activity under the treaty is subject to the assessment or any of the transfer criteria set out in this provision.

The rule in draft article 4(5) would suggest that a weighing exercise is at play between the risk of serious violations on the one hand, and other factors found in Article 4(1) and 4(4) to be assessed by the exporting country on the other. As a result, there is a real danger that States will interpret the word “overriding” such that exports will be permitted despite the existence of a high risk of serious violations of IHL or IHRL.

If an Arms Trade Treaty were to permit arms transfers where there is a clear risk that serious violations of IHL or IHRL will be committed with the weapons being transferred, its humanitarian value would be seriously undermined. Such a scenario would effectively sanction the transfer of weapons where there is a clear risk of war crimes, an outcome incompatible with the position adopted by States at three International Conferences of the Red Cross and Red Crescent since 2003.

In order to mitigate the risk that the word “overriding” entail a balancing exercise, the ICRC would recommend replacing it with the word “substantial.”

Article 5

General Implementation

2. The implementation of this Treaty shall not prejudice obligations undertaken with regard to other instruments. This Treaty shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements concluded by States Parties to this Treaty.

A. “Shall not prejudice obligations undertaken with regard to other instruments”

On the one hand, this sentence can mean that the treaty will not prejudice the application of stricter, more rigorous obligations found under other instruments. This would be consistent with the paragraph in the preamble that states that “nothing in this Treaty prevents States from exercising their right to adopt additional and more rigorous measures consistent with the purpose of this Treaty.” This is also consistent with draft article 24, which says that “States Parties shall have the right to enter into agreements in relation to the international

trade in conventional arms, provided that those agreements are compatible with their obligations under this Treaty and do not undermine the object and purpose of this Treaty."

On the other hand, this first sentence can also mean that the treaty will not prejudice obligations that are weaker or that conflict with the ATT. This would not be consistent with the requirement under draft article 24 that other instruments be compatible with the treaty's obligations and object and purpose. In the view of the ICRC, such a formulation would allow States Parties to circumvent this treaty's obligations by applying incompatible obligations "with regard to" (or under) any other instrument. This would clearly undermine the object and purpose of the treaty.

An alternative formulation could be:

"The implementation of this Treaty shall not prejudice stricter obligations undertaken with regard to other instruments."

B. "Shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements"

This sentence would suggest that, where a transfer would be contrary to the treaty's obligations, an exporter would not be able to cite the ATT to void a contractual obligation to carry out such a transfer under a "defence cooperation agreement", but would nevertheless be in violation of the treaty for authorizing the transfer.

On the other hand, this sentence could suggest that arms transfer obligations arising under any existing or future contract concluded under a "defence cooperation agreement" would be exempt from the treaty's application, thereby allowing exporting States to circumvent its treaty obligations by entering into such contracts.

In the view of the ICRC, any provision that could effectively allow a State Party to circumvent its obligations under the treaty should not be included, or should be re-worded to make clear that States Parties entering into other agreements remain bound by their core treaty obligations, in particular those under Articles 3 and 4.