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International Law Summary

Adoption of a Global Arms Trade Treaty: Challenges Ahead

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INTRODUCTION

Every year, because of the inadequately regulated availability and misuse of conventional weapons, hundreds of thousands of civilians are displaced, injured, or killed. In many parts of the world, weapons are so easy to obtain and armed violence is so prevalent that even after an armed conflict, civilians face many of the same threats as when it was ongoing. This deplorable reality is being addressed internationally through the adoption of an Arms Trade Treaty (ATT).

In an event at Chatham House on 16 April, the International Committee of the Red Cross (ICRC) provided its perspective on the recently adopted treaty. The presentation by Knut Doermann, the head of the ICRC's Legal Division, focused on elements that were of particular interest to the ICRC in light of its mandate. The ICRC's exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles.

Through his presentation and discussion Mr Doermann explained the ICRC's approach to the development of international law – which starts from first-hand experience in the field, and proposes on the basis of that analysis ways to address humanitarian concerns.

Since 2006 states have been discussing a global ATT. In January 2010, the UN General Assembly decided to convene the 2012 UN Conference on the Arms Trade Treaty to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms. A first Diplomatic Conference in July 2012 failed. A final Diplomatic Conference on the Arms Trade Treaty was convened for March 2013. After nine working days of intensive negotiations, it ended without states reaching consensus on the text of the treaty as required by the conference's rules of procedure.

On 2 April, the UN General Assembly voted by a large majority (154) in favour of adopting the ATT. Three states voted against and 23 states abstained.

The ICRC is very pleased that the ATT is now a reality after its commitment over so many years to awareness raising, advocating and preparatory discussions.

There is now overwhelming support for a treaty that can truly serve to reduce the human cost of irresponsible arms transfers.

The ICRC always knew it would be very difficult to reach consensus among all UN member states, but the exercise of trying to reach consensus ensured that as many as possible would be able to accept the treaty's standards. It is clear that agreeing to the treaty's adoption in the UN General Assembly does not equate to signing or ratifying it, but in light of the fact that it was negotiated in a consensus-based setting, it is to be hoped that the treaty will be acceptable to a larger number of states.

It is also significant that the absence of consensus did not actually block the treaty's adoption, and that there was another forum in which to let the treaty come to life.

A number of countries abstained because their interests, often political, were not adequately reflected in the treaty. The fact that 20 per cent of countries did not vote in favour signals that there is still a lot of work to do to promote high standards in arms transfers. But the fact that there is now a treaty will surely help.

It is truly historical that 80 per cent of UN member states have voiced their agreement to establish human rights and international humanitarian law (IHL) standards for conventional arms transfers.

The ICRC is grateful to the United Kingdom for its determined and proactive involvement in the ATT negotiation process from the very beginning and until the very end.

¹ Angola later changed its vote from an abstention to a vote in favour, making it 155 yes votes and 22 abstentions.

Historical involvement of the International Red Cross and Red Crescent Movement in the ATT since the mid-1990s

The objective of the ICRC's and the Red Cross Red Crescent (RCRC) Movement's work since the late 1990s has been to reduce the human cost of the widespread, poorly regulated availability of weapons by promoting stricter regulation of arms transfers.

States party to the Geneva Conventions first expressed concern at the rapid expansion of the arms trade and the uncontrolled proliferation of weapons during the 26th International Conference of the Red Cross and Red Crescent in 1995. Both the Intergovernmental Group of Experts for the Protection of War Victims and the 26th International Conference called upon the ICRC to

examine, on the basis of first-hand information available to it, the extent to which the availability of weapons is contributing to the proliferation and aggravation of violations of IHL in armed conflicts and the deterioration of the situation of civilians.²

Following this request, the ICRC carried out a study on its own experience and an analysis of the implications of unregulated arms availability for civilian populations and for compliance with IHL. In 1999, the ICRC documented its humanitarian concerns posed by the unregulated availability of weapons in a report entitled 'Arms Availability and the Situation of Civilians in Armed Conflict'.³ The study concluded that the widespread availability of arms can facilitate violations of IHL and lead to a deterioration of the situation of civilians in armed conflicts. In addition, ICRC operations are frequently suspended or delayed because of armed security threats, thereby hampering delivery of assistance to victims.

The study, along with effective parallel campaigns by other organizations such as Amnesty International, helped illustrate that arms availability is indeed a humanitarian issue. In fact, it was in a report issued in 2000 that then-UN Secretary-General Kofi Annan wrote that 'in terms of the carnage they cause, small arms, indeed, could well be described as 'weapons of mass destruction'.⁴

At the International Conferences of the Red Cross and Red Crescent in 2003, 2007 and 2011, states party to the Geneva Conventions recognized the need for effective controls on the availability of arms and ammunition. More specifically, they proposed to have respect for IHL become an arms transfer criterion in national laws or policies and in regional and global norms on arms transfers. In light of the obligation of states to respect and ensure respect for international humanitarian law, states saw that adequate measures to control the availability of arms and ammunition were required so that the weapons would not end up in the hands of those who may be expected to use them in violation of international humanitarian law.

The ICRC is very satisfied to see that awareness of the human cost of arms availability has finally led to a global treaty that has reducing human suffering as one of its core objectives.

ICRC'S VIEWS ON THE ATT

Throughout discussions on the ATT over the past several years, the ICRC position on the ATT has consistently been as follows:

- The treaty should have a humanitarian purpose (as described above).
- Weapons transfers should be considered in light of states' existing obligation to 'ensure respect' for IHL. In light of this obligation, an ATT should include a requirement to (a) assess the likelihood that serious violations of IHL will be committed with the weapons being transferred, and (b) not authorize transfers if there is a clear risk that the arms will be used to commit serious violations of IHL.

² Meeting of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 1995), Recommendation VIII, as endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 1995, reprinted in *IRRC*, No. 310, January-February 1996, pp. 88 and 58 respectively.

³ *Arms Availability and the Situation of Civilians in Armed Conflict*, ICRC publication 1999 ref. 0734, pp 23-24.

⁴ *We the Peoples: The Role of the United Nations in the 21st Century*, UN Doc. A/54/2000, p. 52.

- The scope of weapons and transactions covered by an ATT should be a function of its object and purpose. If the object and purpose is to reduce the human cost of the poorly regulated, global trade of weapons, then it is difficult to imagine any particular conventional weapon or type of transfer that would not entail a risk to the convention's object and purpose and that would not require regulation. All conventional weapons, including small arms and light weapons, and ammunitions should be included in the scope of an ATT.
- In addition, the scope of an ATT should include all transfers, including by sale, loan, gift, or lease.

For years, the ICRC has played a proactive role in discussions and negotiations on the ATT. We have worked hard to ensure that the prohibitions and criteria relating to IHL were as strong as they could be.

THE CONTENT OF THE ATT

1. The introductory part of the ATT confirms that the instrument has a solid humanitarian basis.

The preamble of the treaty recognizes 'that civilians, particularly women and children, account for the vast majority of those affected by armed conflict and armed violence' and 'the challenges faced by victims of armed conflict and their need for adequate care, rehabilitation and social and economic inclusion.'

The treaty's preamble explicitly refers to respecting and ensuring respect for IHL and human rights as key 'principles.' It is interesting to note two things: first, the reference to ensuring respect for IHL is not commonly referred to in treaties other than the Geneva Conventions and Additional Protocol I, and is particularly welcome here as recognition that the ATT's standards for arms transfers flow from this obligation. Second, the reference to ensuring respect for human rights would appear to be a novelty in international law.

One of the purposes of the treaty as indicated in Article 1 is to reduce human suffering by establishing the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms.

2. The scope of the ATT is broad but not comprehensive.

The treaty covers a broad scope of conventional arms, but it is not comprehensive (it does not cover all conventional arms, and there is still debate as to whether hand grenades or armed drones would fall within the categories listed in the treaty).

The treaty encompasses the seven categories of weapons set out in the UN Register of Conventional Arms, plus small arms and light weapons. These weapons are subject to all the obligations in the treaty, whereas ammunition and parts and components for these weapons are only subject to the prohibitions on transfers in Article 6 and the export criteria in Article 7.

Article 2 also establishes the scope of activities to which the treaty shall apply. These are 'activities of the international trade' that comprise export, import, transit, trans-shipment, and brokering. China has every intention of excluding gifts from the notion of 'trade', however a very large number of countries, including EU members and the United States, have said that 'trade' encompasses all possible activities, including non-commercial ones such as gifts and loans.

Interpretive declarations on such a broad interpretation are both encouraged and expected upon signature and/or ratification of the treaty.

3. At its core, and of greatest interest to the ICRC, are two articles that link the decision to transfer arms to the likelihood of serious violations of IHL or international human rights law (IHRL).

Article 6(3) prohibits the transfer of conventional arms, their ammunition and parts and components when the transferring state has knowledge that they will be used to commit genocide, crimes against humanity or a limited set of war crimes ('grave breaches of the Geneva Conventions, attacks directed against civilian objects or civilians, or other war crimes defined by international agreements to which the State is a party').

Unfortunately a specific reference to serious violations of Common Article 3 to the four Geneva Conventions, which cover prohibited acts that have been recognized in the International Criminal Court (ICC) Statute and the case law of International Criminal Tribunals as amounting to war crimes in non-international armed conflict, did not make it into this provision, even though it had appeared in the July 2012 draft treaty. Countries like Switzerland (and the ICRC) made huge efforts till the very end of the conference to preserve the reference to Common Article 3, but in the end the requirements of certain countries prevailed and the reference did not survive.

On this issue, Switzerland made an interpretive declaration when the treaty was adopted on April 2: 'It is our understanding that the words "other war crimes as defined by international agreements to which it is a Party" encompass, among others, serious violations of Common Article 3 to the 1949 Geneva Conventions – instruments that enjoy universality.'⁵ Ireland endorsed the Swiss statement, and New Zealand said that the full range of IHL should apply to prohibited transfers. It is expected that other countries will voice similar positions when they sign and/or ratify the treaty.

4. Even in the absence of knowledge that crimes covered by Article 7 would be committed, under that article, each state must carry out an assessment of the risk that the weapons to be exported could be used to commit serious violations of IHL, IHRL, acts of terrorism or transnational organized crime. If there is an overriding risk of such violations, then the export must not be authorized.

The term 'overriding' would suggest that the risk would have to be significant. For many states, the word 'overriding' will mean 'substantial', but at least one state intends to carry out a balancing exercise between the risk of serious violations on the one hand and the contribution to peace and security (and potentially other interests) on the other. Interestingly, in its statement on April 2, Lichtenstein pointed out that in Spanish, 'overriding' had been translated to 'manifest' and to 'significant' in Russian. In light of this, Lichtenstein declared that only negative consequences should be taken into account in deciding whether or not to export arms.

It should also be noted that this provision applies only to exports, whereas Article 6 applies to all types of transfer covered in the scope of the treaty.

Some states are already planning to make interpretive declarations to the effect that 'overriding' means 'substantial' under Article 7, and that the range of war crimes considered under Article 6(3) must be as broad as possible. The ICRC would certainly encourage states to adopt such interpretations upon signing and/or ratifying the ATT, as it would be more in line with the undertaking to ensure respect for IHL as found in common Article 1 to the four Geneva Conventions and Article 1 of their first Additional Protocol.

Specific measures states must take to implement the treaty

Under Article 5 on general implementation, each state party 'shall establish and maintain a national control system, including a national control list, in order to implement the provisions of this Treaty.' In addition, each state party 'shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2(1) and of items covered under Article 3 and Article 4.' Each state party 'shall designate

⁵ See UN General Assembly Department of Public Information, 'Overwhelming Majority of States Say Yes to Arms Trade Treaty,' available at <http://www.un.org/News/Press/docs/2013/ga11354.doc.htm>.

one or more national points of contact to exchange information on matters related to the implementation of this Treaty.'

In addition, states will need to keep records and deliver reports of their export authorizations or actual exports, pursuant to Articles 12 and 13.

The treaty is a living instrument

The amendment procedure ensures that the treaty is a living instrument that can adapt to the times.

The amendment provision (Article 20) states that:

1. 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. [...]
3. The States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall, as a last resort, be adopted by a three-quarters majority vote of the States Parties present and voting at the meeting of the Conference of States Parties. [...]

Importance of interpretation and next steps

While the provisions are not perfect, the ICRC trusts that progressive interpretations and good faith implementation will ensure that the human cost of arms availability is reduced through stricter controls on arms transfers.

The next steps are just as important as the adoption of the treaty: the ATT opens for signature on 3 June, and the ICRC is encouraging as many states as possible to sign the treaty at the ceremony at UN headquarters in New York.

Obviously, it will also be important for countries to ratify the treaty as swiftly as possible, both because implementation is what will make a difference on the ground, and because the treaty will only enter into force once 50 countries have ratified it.

Of course, the ICRC would encourage all states to start implementing the highest standards reflected in the ATT as soon as they can.