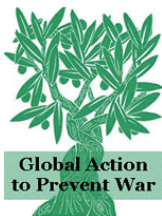


ARMS TRADE TREATY MONITOR

Civil society perspectives on the Arms Trade Treaty negotiation process

27 July 2012
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Editorial: Demanding more from an arms trade treaty

Ray Acheson | *Reaching Critical Will of WILPF*

On Thursday afternoon, the president of the arms trade treaty (ATT) conference released a new draft text. After two days of nearly round-the-clock negotiations, however, the new text is still full of potential loopholes. Several areas of the text need to be amended before this treaty could be considered as a step toward plugging holes in the poorly regulated arms trade.

One of the most egregious loopholes is article 5.2, which says that the implementation of the ATT “shall not prejudice obligations undertaken with regard to other instruments.” This language is even weaker than in the previous draft, which at least qualified that such obligations could not be inconsistent with the goals and objectives of the ATT. This paragraph further says that the ATT “shall not be cited as grounds for voiding contractual obligations under defence cooperation agreements concluded by States Parties to this Treaty.” This means that exporters can continue selling weapons to governments even when it is known that the weapons will be used to commit violations of IHL or IHRL or even genocide or other crimes.

This article also appears to be inconsistent with article 6.3 of the draft treaty, as pointed out by the delegation of Zambia. 6.3 says that if, after an authorization has been granted, a state party reassesses the situation on the basis of new information and does find an “overriding risk” based on the treaty’s criteria, it may suspend or revoke the authorization. Article 6.3 must certainly be retained, but 5.2 must be deleted. As the Swiss delegation argued, governments cannot normally “contract out” of international treaties.

Another problem remains in article 4 and the national assessment mechanism for determining whether or not to make transfers. Article 4.1 stipulates that when a state party is considering whether or not to authorize an export, it shall assess whether that export “would contribute to or undermine peace or

security”. There is indication in 4.5 that a risk of violations of IHL, IHRL, or terrorism can “override” a potential “contribution” to peace and security; however, a decision-maker could assess that the risk does *not* override such a “contribution”. This would undermine states’ existing obligation to ensure respect for IHL, among other things. There could be criminal or civil law implications of knowingly authorizing an export while there is a substantial possibility of violations of IHL and IHRL.

Article 4 also permits the possibility of establishing “risk mitigation measures” in order to cultivate the circumstances in which an authorization could be made. However, it does not specify that these measures must be undertaken *before* the transfer is authorized, which is imperative to ensure that the measures are indeed actually undertaken and that the risk is effectively mitigated.

Article 4 also continues to segregate criteria related to diversion, gender-based violence, violence against children, transnational organized crime, corruption, and development (article 4.6). Rather than including these in the risk assessment process that can result in a transfer denial, they are in a separate paragraph stipulating that when considering authorizing an export, states parties “shall consider taking feasible measures” to avoid the weapons being used to any of those ends. The text still does not indicate what measures this might entail, nor does it make such measures mandatory. As argued in the editorial in *ATT Monitor Vol. 5, No. 16*, all of these criteria should be fully included in a risk assessment process, the result of which is that if a substantial risk is found, the transfer shall not be authorized.

Ammunition is *still* not in the scope, despite the insistence of the majority of delegations. However, it is at least in the export section in article 6.4, which says that states parties shall establish and maintain a national control system to regulate the export

continued on next page

Editorial, cont'd

of ammunition. Most importantly, when considering an export of ammunition, states would have to apply the criteria for risk assessment in articles 3 and 4. However, the elements that are included in the separate paragraph (4.6) are specifically excluded, as is also the case for assessments related to export of parts and components (6.5).

In addition, article 23 stipulates that when exporting to non-states parties, states parties “shall apply articles 3 and 4 to all exports of conventional arms within the scope of this Treaty”. As written, this would mean that the risk assessment criteria and the prohibitions would not apply to export of ammunition, parts, or components. This is a major loophole, but it also provides a disincentive to joining the treaty, as it could be easier to obtain ammunition, parts, and components by remaining outside of the treaty. Article 23 should in fact simply say that states that have ratified this treaty should not transfer arms to states that have not ratified the treaty.

The draft treaty also fails in becoming a robust transparency mechanism, as the provisions on reporting and record-keeping no longer require records to be made public. Records are stipulated to include export authorizations or actual exports of arms and, “where feasible,” details of imports, transit, and transshipments of arms. According to the current draft, the reports on exports must be submitted annually to an ATT secretariat, but this is not enough. These records must also be made public, as was provided for in earlier drafts.

The treaty’s “enforcement” mechanisms are still weak. Enforcement in international treaties generally does not refer to national measures. If the term is to be used here it should also include measures for international enforcement mechanisms, such as an appropriate channel for states to challenge transfers that are made despite wide recognition of a substantial risk that it violates the treaty’s criteria or other provisions. If this paragraph is to refer to national enforcement the title should be changed and it should require states parties to criminalize breaches of national law associated with treaty implementation.

Other problems from earlier drafts still remain. The scope is too narrow and does not capture many of the weapon systems used to commit atrocities around the world. The references to the Geneva Conventions in article 3.3 are still too narrow. Furthermore, article 3.3 still only prohibits transfers when the weapons are “for the purpose of facilitating the commission of genocide, crimes against humanity, war crimes,” etc (emphasis added). This threshold for prohibiting transfers when faced with these crimes is much too high.

According to the International Committee on the Red Cross, “article 3(3) is very restrictive and is not an accurate reflection of international law. In order to effectively encapsulate existing law, the text would be strengthened by changing it to: *A State Party shall not authorize a transfer of conventional arms within the scope of this Treaty if the transfer **would** facilitate the commission of genocide, crimes against humanity, war crimes, **including** grave breaches of the Geneva Conventions of Common Article 3 of the Geneva Conventions of 1949.*”

There is still no provision for victims’ assistance or even reference to existing obligations in this regard. The draft text’s measures on regulating arms brokers are likewise insufficient, though a slight improvement notes that registration or authorization of brokers “may” be required. The activities covered in the treaty’s scope are still limited to those related to “trade,” which means that weapons that are transferred as gifts or loans or through military assistance programmes could be exempt from the regulations mandated by the treaty. Furthermore, the term export is often used when the term transfer should be used to avoid loopholes.

These are not all of the problems with the draft. There are many others that need to be addressed, some of which may only be revealed once states parties begin implementing the treaty. Of course, the stipulation that all amendments must be adopted by consensus (rather than also having the option to adopt them by a 2/3 majority, as was the case in the previous draft), provides for very little flexibility in using the amendment process as a means for improving the treaty.

That said, there are a few improvements to the draft. For example, point 5 in the principles section notes states parties must act in accordance with the “duty to respect and ensure respect for international humanitarian law and to respect and ensure human rights”. This paragraph is imperative as a guiding principle for implementation of this treaty.

Indeed, this treaty, if adopted, must be interpreted in the broader context of existing international law. The provisions of this treaty cannot be read in a way to legitimize and make legal actions that would otherwise be illegal. Furthermore, using this treaty to provide cover for irresponsible transfers is not acceptable. A treaty designed to regulate international transfers of arms must have as its core objective the protection of human life and dignity, not the protection of economic or political interests associated with the arms trade. •

Accommodating the major ‘sceptical’ states in the ATT

Owen Greene | *Saferworld*

In the final days of the arms trade treaty (ATT) negotiations, difficult compromises are being discussed to accommodate the concerns of states in the hopes of still achieving a worthwhile treaty text. Several highly sceptical states have been very vocal in the negotiating sessions. Behind the scenes, there have been concerted efforts to address the key concerns of some major arms exporters and importers, including China, Russia, India, and the USA. Even if it is not widely expected that such ‘reluctant’ states will quickly ratify an ATT, it is important to try to gain their acceptance of a treaty text, especially if it is forwarded to the General Assembly First Committee.

At the time of this writing, the outcome hangs in the balance. But we can now trace and assess the evolving positions and roles of such major and ‘emerging’ states through these final weeks of ATT negotiations.

The substance of each of these major states’ declared ‘red lines’ varied substantially during the sessions of the Preparatory Committee. The USA called for exclusion of ammunition from the treaty’s scope and reiterated its opposition to strong norms against licensing exports where risk assessments find “a substantial risk” of negative consequences. China argued for a modest treaty limited to ‘trade’ (i.e. not ‘transfer’) of the seven categories of the UN Register of Conventional Arms, objected to ‘subjective’ criteria, emphasised norms including “non-interference in states’ internal affairs”, objected small arms and light weapons (SALW) and ammunition, and objected to specific references to international humanitarian law (IHL) and international human rights law (IHRL).

India had several reservations similar to those of China, and was especially committed to avoiding a treaty that could help to legitimise arms export denials to arms importing states based on ‘subjective’ or ‘discriminatory’ assessment criteria. Russia expressed great scepticism regarding the value of an ATT, made various unilateral proposals relating to its specific national concerns as an arms exporter (such as on bilateral licensed production agreements), and emphasised that goals and objectives—which Russia asserted needed to be agreed upon before negotiations could proceed—should focus on preventing the illicit trade in conventional arms.

Efforts to adequately address such concerns of these states have taken many twists and turns. The text preferred by the majority of ‘like-minded,’ progressive states has been ‘re-balanced’, diluted, and undermined by significant loopholes in an effort to accommodate the “requirements” of these major arms exporters and importers; and the final negotiations are ongoing.

However, their contrasting negotiating approaches have had real consequences for the end-game discussions. Although the major elements of the USA’s position have long been understood, only in the last days has the US negotiating team explicitly outlined the concerns that would need to be addressed in relation to ammunition and criteria. Furthermore, India is insistent on including a clause on defence co-operation agreements, which a number of states regard as a highly problematic loophole. There is, even at this last moment, great uncertainty regarding what the Russian position is on much of the text.

This is in contrast with China’s negotiating approach in the ATT negotiations. China has negotiated toughly throughout, and has been able to ensure that most of its key concerns are addressed in the draft treaty text. Nonetheless, China has proved willing to make compromises, and, furthermore, in an orderly and timely way that has facilitated the complex, final stages of the multilateral negotiating process. For example, the deals through which China conceded inclusion of SALW and ammunition as well as specific references to IHL and IHRL—in recognition of African countries stated concerns and in exchange for concessions by others—were made with adequate negotiating time and not left until the last minute.

End-game brinkmanship is a well-established negotiating tactic, but, in UN negotiations, this often leads to unnecessary loopholes and weaknesses. This has become a major risk factor for the ATT and is particularly irritating where it appears to be the result more of domestic politics and indecision than in defence of clear national interests.

There are several ironies. These states continue to resist a comprehensive scope for the ATT, even though they themselves have relatively comprehensive national controls. Further, many concessions to weaken the ATT text are being made to these and other states that are ultimately unlikely to ratify the Treaty any time soon.

A severe price is being paid to keep them on board. This can be justified if the ATT at least retains adequate integrity; and if it means that all P5 and ‘emerging’ powers at least respect the ATT and support its key practices and norms. The effectiveness of the ATT will depend on active follow-up and good faith implementation, even by countries that have not yet become states parties. China, for example, has important experience on how to reform and strengthen its national arms transfer control systems from the past decade. Hopefully, China and other existing and emerging players in the international arms trade will follow-up these negotiations with active co-operation to promote ATT implementation. •

News in Brief

Maj Rørdam Nielsen | *Global Action to Prevent War*

15:00–18:00 plenary

Preamble

- Cuba stated that the preambular paragraph on private ownership should be deleted.

Principles

- Cuba said that the sentence “Have agreed as follows” should be moved back to between the preamble and principles sections.
- Algeria, Cuba, and Palestine called for a reference to the right to self-determination, with Palestine and Cuba urging the reference be to people under foreign occupation.
- Spain said the right to territorial integrity should be included to ensure that the treaty is balanced.
- Cuba said there should be a general reference to international law instead of a specific reference to IHRL and IHL.
- Ireland said that any reference to self-defence should include “in accordance with its obligations under international law”.

Scope: items

- Côte d’Ivoire, Ireland, Nigeria, South Sudan, Spain, and Zambia called for ammunition to be included in the scope section.
- France said ammunition would be more logically placed under scope.
- Australia said the inclusion of ammunition is now acceptable under article 6.4.
- Finland said it would study whether ammunition was adequately included in art 6.4
- Cuba said the sentence “at a minimum” in the items chapeau should be deleted.
- Ireland and Finland insisted that “as a minimum” remain.
- Palestine said that unmanned aerial vehicles should be included to the scope.

Scope: activities

- Australia and France said that the provisions on transit and brokering were stronger than in the 24 July draft and acceptable.
- Finland said it would study the provisions on activities.

Prohibitions

- DPRK said article 3.1 on UNSC embargoes did not have anything to do with arms trade.
- Cuba, Côte d’Ivoire, and Russia called for stronger provisions against transfers to non-authorized non-state actors in article 3.
- Cuba said article 3 should include a para on prohibiting transfers that would be used for crimes of aggression.

- Palestine said that article 3.3 should also refer to the additional protocols of the Geneva Conventions.
- Palestine also said that transfers to occupying powers should be prohibited.

National assessment

- Pakistan said the national assessment section should include safeguards on potential misuse of the assessments and suggested paras on self-defence and non-discrimination from the President’s July 2011 paper.
- France said the new article 4.1 on peace and security was clearer than in the 24 July paper.
- Cuba said the new article 4.1 could easily be abused and changed the status of other criteria.
- Nigeria said that points on risk assessments of undermining peace and security and transfers to un-authorized end-users should be included in article 4.2.
- Brazil and Cuba called for the deletion of the Art 4.6.e on development.
- Cuba also called for the deletion on the Art 4.6.d on corruption.
- Ireland welcomed the inclusion of gender-based violence in 4.6.b.
- Holy See said that the reference to gender-based violence was ambiguous and that it could not accept this inclusion in art 4.6.b. It said a reference to violence against women could be included.

Other contractual obligations

- Australia said that in accordance with article 24 it should be reflected throughout the treaty that obligations under other agreements should be compatible with the ATT and not undermine its goals and objectives.

Amendments

- Ireland said that in was essential that amendments could be decided by a 2/3 majority.

Other

- Nigeria, Brazil, and Zambia said all references to end-use should be changed to end-users.
- Spain, Ireland, France, and Finland called for the possibility for regional integration organisations to be signatories to the treaty.
- France, Australia, and Finland supported the draft.
- Cuba said the draft was unbalanced and did not enjoy consensus.

22:00–01:30 plenary

Preamble

- Israel and India suggested that a reference to terrorism be re-inserted in the preamble.

Principles

- CARICOM, Iran, and Morocco said that the sentence

“have agreed as follows” should be moved to before the principles section.

- Armenia, Egypt, and Iran called for inclusion of principles of self-determination of people under foreign occupation.
- Netherlands and Israel disagreed as they said these were political concepts.
- Morocco and DRC called for a reference to territorial integrity.
- Iran said the principle on self-defence should refer to the inherent right to acquire weapons instead of their interest, and that the reference to peacekeeping should specify UN operations.

Goals and objectives

- Israel said that 1.b on end-use should include phrase “such as terrorism”.

Scope: items

- Austria, Cyprus, CARICOM, Peru, Argentina, Iceland, Botswana, DRC, Costa Rica, and Guatemala called for the inclusion of ammunition under scope.
- Morocco, Japan, and Mexico also called for stronger proposals on ammunition.
- UK said that ammunition was now unambiguously included in the scope.
- CARICOM, Bahamas, Chile, Colombia, El Salvador, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, Uruguay, Portugal, and Costa Rica said munitions should be added to ammunition.
- Iran said missiles should be deleted under 2.A.
- Mexico said it is important to ensure that scope can be enhanced and updated.
- Costa Rica, Germany, and Guatemala called for inclusion of parts and components under scope.
- India said it is problematic that the scope of 7+1 was extended by inclusion of ammunition and parts and components in 6.4 and 6.5.
- Iran said that 2.B.4 on exempting transfer to national troops abroad should be deleted as arms could be used for aggression.
- India said that 2.B.4 should also refer to UN peacekeeping.

Scope: activities

- Bahamas, Chile, Colombia, El Salvador, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, Uruguay, Botswana, and Costa Rica said the reference to “trade” in 2.b.3 and throughout the treaty should be replaced with “transfer”.

Prohibitions

- Uruguay, Morocco, Switzerland, and Costa Rica called

for deletion of the words in 3.3 “for the purpose of”.

- Switzerland suggested inserting “including those” before war crimes in 3.3.
- Egypt said article 3.3 should refer to both the Geneva Conventions and their protocols.
- Iran said article 3.1 on Security Council embargoes has no room in the treaty.
- Israel and India said that article 3 should prohibit transfers to terrorists.
- Iran said that article 3 should prohibit transfers based on acts of aggression and foreign occupation.

National assessments

- CARICOM and Mexico called for article 4 to refer to transfer instead of export.
- Belarus said there should be safeguards regarding criteria assessments.
- DRC and Germany said criteria should be added regarding undermining of peace and security in article 4.
- Belarus said a criterion should be added regarding unauthorized non-state actors.
- Uruguay, Botswana, and Switzerland called for deletion for the words “contribute to or” in 4.1.
- India said that 4.2.c. was concerning as it allowed states not parties to conventions on terrorism to transfer arms to terrorists.
- Switzerland said the words “overriding risk” in 4.5 should be clarified or amended.
- Sweden, Austria, CARICOM, Iceland, Portugal, Botswana, and Belgium welcomed reference to gender-based violence and violence against children in 4.6.b.
- Tanzania and India did not support the reference to gender-based violence.
- CARICOM said that armed violence should among in the criteria in 4.6.
- Iceland said that the reference in 4.6.c should be to organized crime in general, not transnational.
- Morocco said it could not accept 4.6.d and 4.6.e under the current chapeau but maybe under a different chapeau stressing dialogue between importers and exporters.
- Belarus and India called for deletion of 4.6.e.
- Costa Rica and UK said they were content with the inclusion of 4.6.d and 4.6.e.

General implementation and activities

- Austria, Netherlands, and Germany said that 5.2 would need the added wording “in accordance with the treaty’s goals and objectives”.
- CARICOM, Bahamas, Chile, Colombia, El Salvador, Guatemala, Jamaica, Mexico, Peru, Trinidad and To-

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News in Brief, cont'd

bago, Uruguay, Tanzania, Switzerland, and Costa Rica suggested that 5.2 would be deleted, at a minimum its last sentence.

- India said the paragraph was needed to ensure that legitimate trade was not hindered by the treaty but that it could consider Switzerland's proposal.
- Belarus called for stronger importing state obligations regarding non-state actors in 7.2.
- Japan and Singapore said that 9.1 on transit and transshipment obligations should state that it would be in accordance with existing international law, including maritime law.

Reporting and secretariat

- The Netherlands, Japan, and Costa Rica said that 10.4 and 10.5 should state that reports be public.
- CARICOM said that funding for the secretariat and the first conference of state parties should be agreed upon in the text.
- Tanzania said the staff over the secretariat should be chosen representatively of the member states.

Final provisions

- The EU and its member states called for an addition of regional integration organisations as possible signatories to the treaty.

- Iran and Belarus said they supporting not letting regional integration organisations be parties.
- EU said that 65 was a good number for entry into force.
- CARICOM and Costa Rica called for a lower number.
- Iran said the number should include the 10 biggest importers and exporters.
- The EU, CARICOM, Netherlands, Greece, Tanzania, Costa Rica, and Germany said that amendments should not require consensus but be made with 2/3 majority.
- Iran said amendments should be made by consensus.
- Egypt said the treaty needed a mechanism for conflict resolution.
- Uruguay said a reference should be made to ICJ in article 22 on dispute settlement.
- Iran said article 23 on non-state parties should be deleted.
- Botswana said the reference to financial obligations under 18.3 should be deleted.

Others

- Bahamas, Chile, Colombia, El Salvador, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, and Uruguay said references should be to end-users, not end-use.



Art by Lin Evola



75 UN Member States have called for the term **gender-based violence** to be included in the text of a future Arms Trade Treaty. These include:

- | | | |
|------------------------|-------------------|------------------------------------|
| 1. Antigua and Barbuda | 28. Guinea | 54. Portugal |
| 2. Australia | 29. Guinea Bissau | 55. Romania |
| 3. Austria | 30. Guyana | 56. Samoa |
| 4. Bahamas | 31. Haiti | 57. Saint Lucia |
| 5. Barbados | 32. Hungary | 58. Slovakia |
| 6. Belize | 33. Iceland | 59. Slovenia |
| 7. Belgium | 34. Ireland | 60. St. Kitts and Nevis |
| 8. Benin | 35. Italy | 61. St. Vincent and the Grenadines |
| 9. Botswana | 36. Jamaica | 62. Sierra Leone |
| 10. Bulgaria | 37. Kenya | 63. Somalia |
| 11. Burkina Faso | 38. Latvia | 64. South Korea |
| 12. Cape Verde | 39. Liberia | 65. Spain |
| 13. Côte d'Ivoire | 40. Liechtenstein | 66. Suriname |
| 14. Cyprus | 41. Lithuania | 67. Senegal |
| 15. Czech Republic | 42. Luxembourg | 68. Sweden |
| 16. Denmark | 43. Malawi | 69. Switzerland |
| 17. Djibouti | 44. Malta | 70. Togo |
| 18. Dominica | 45. Mexico | 71. Trinidad and Tobago |
| 19. Estonia | 46. Netherlands | 72. Turkey |
| 20. Finland | 47. New Zealand | 73. United Kingdom |
| 21. France | 48. Nigeria | 74. Uruguay |
| 22. Gabon | 49. Mali | 75. USA |
| 23. Gambia | 50. Niger | |
| 24. Germany | 51. Norway | |
| 25. Ghana | 52. Peru | |
| 26. Greece | 53. Poland | |
| 27. Grenada | | |

The term “gender-based violence” has been used in many UN resolutions and international legal instruments. It is a widely recognized term by the UN Security Council and General Assembly. More than 100 civil society organisations from all over the world have supported the inclusion of this term in the ATT.

The term “gender-based violence” recognises the broader context and some of the fundamental root causes of the violence. It acknowledges the gender dimensions of armed violence, from the perspective of both perpetrators and victims.

Statistics show that men account for around 80-90% of homicide victims globally and that gender-based violence disproportionately impacts women and girls.

However, there are variations to this across cultures, countries, and regions. Not all victims of GBV are female; men are harassed, beaten, or killed because they fail to conform to a socially acceptable view of masculinity.

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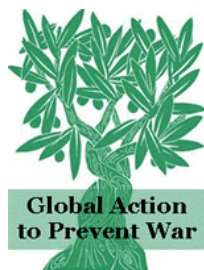
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