

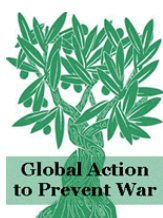
ARMS TRADE TREATY MONITOR

Civil society perspectives
on the Arms Trade Treaty
negotiation process

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The second draft: a treaty behind its time

Ray Acheson | *Reaching Critical Will of WILPF*

The President's second draft of the arms trade treaty (ATT) released Friday evening fails to resolve almost all of the major problems in the draft text. While some language has been tweaked to improve clarity and a new section has been added on diversion, the most fundamental loopholes remain. The draft as it stands is ultimately inadequate to truly prevent human suffering or enhance peace and security.

This draft reads like one drafted by a few of the major exporting states, not one drafted by the majority of countries that have demanded a strong ATT. It legitimizes the status quo, and, if adopted as is, will provide legal cover for states to sell arms regardless of the consequences for human lives and well-being, for true peace and security.

This article will only highlight a few of the remaining challenges related to scope; IHL and human rights; contracting out; and transparency.

Scope

Article 2(1) continues to list only the seven categories of conventional arms included in the UN Register plus small arms and light weapons. Furthermore, the phrase "at a minimum" has been deleted.

This, coupled with the deletion of the provision noting that states can adopt "more rigorous measures" than those in the ATT, puts the treaty in danger of becoming the ceiling rather than the floor for many countries. Article 5(4) in the implementation section mitigates this somewhat by encouraging states parties to apply the provisions of the ATT "to the broadest range of conventional arms". But this is insufficient to make up for the lack of a ro-

bust scope and for the lack of future proofing of definitions and types of weapons. It also doesn't address the loopholes in other aspects of the treaty that could be filled by adopting "more rigorous measures" at a national level.

Parts and components and ammunition/munitions still have separate articles outside of the scope. This means these items are not covered by the import, transit, transshipment, brokering, or diversion provisions of the treaty. And while the treaty's prohibitions and "primary" export assessment criteria are applied to transfer decisions on items, the "second tier" export assessment criteria are not.

In the scope of activities, gifts, loans, and leases are still not covered. The majority of states have demanded the inclusion of these types of transfers because a large number of weapons are indeed transferred as such every year.

IHL and IHRL

The provisions related to international humanitarian law (IHL) and international human rights law (IHRL) throughout the text remain inadequate.

Principle 5 now refers only to the Geneva Conventions of 1949 and not the Additional Protocols, including those agreed after 1949, and is thus too narrow.

Article 6(3) in the prohibitions section has improved so that there is now a knowledge-based standard rather than a purpose or intent standard. However, the assessment is limited to the time of authorization rather than transfer and does not make mention of customary international law. It is far weaker than the language proposed by Norway on behalf of 25 states.

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The second draft: a treaty behind its time, cont'd

Article 7 on export assessment continues to pit the idea that arms could “contribute to peace and security” against IHL and human rights. This makes it seem like human rights and IHL detract from rather than contribute to peace and security. It also maintains the tiered approach to risk assessment. This means that some consequences of the irresponsible arms trade, such as gender-based violence, violence against children, diversion, development, and corruption, are only subject to risk mitigation measures. For the particular problems related to the criterion preventing gender-based violence, please see the article “New ATT text fails in preventing armed gender-based violence” in this edition of the *ATT Monitor*.

The new draft also continues, in articles 7(7) and 7(10), to refer to an “overriding risk” rather than “substantial risk”. As pointed out in previous editions of the *ATT Monitor*, this would allow states to undertake a transfer even if there is a risk of violations of IHL or IHRL. The vast majority of states have called for the use of “substantial” rather than “overriding”. The US delegation is the only one to have vocalized in plenary its preference for overriding.

Contracting out

Article 5(2) remains unchanged. It still subordinates the ATT to other “obligations” and prohibits the ATT from overriding defence cooperation agreements. This article has been described by the majority of delegations as a joke, as the most egregious loophole in the treaty, as rendering the rest of the treaty meaningless. Yet it remains.

Transparency

One of the original objectives behind this treaty was to enhance the transparency of the international arms trade.

However, the draft text does not obligate public reporting, despite a concerted effort by the majority to ensure that it would.

Overall

Despite having undergone a “legal scrub” in the previous round, this new draft text still retains vague and ambiguous obligations such as “measures may include”, “where necessary and feasible”, “as appropriate”, “encouraged to”, etc. A general reading of the text is still less like a binding treaty and more like a political declaration or resolution.

In some cases, such as those highlighted above and elsewhere in this edition of the *Monitor*, the provisions of the treaty undermine existing international obligations. This is unacceptable and such issues *must* be fixed if this treaty is to be adopted. The vast majority of states have demanded changes to strengthen the treaty that are not reflected in this draft. National positions of just a few countries cannot allow international law to be eroded just so that they can continue profiting from poor regulation.

The ATT could be a constructive element in a larger human security architecture. Instead, it is being used to perpetuate the status quo of irresponsible arms transfers and an outdated concept of state-centric security. This concept no longer makes sense in our interconnected world where policies that enhance human security are much better suited to addressing current challenges.

In short, this treaty as currently drafted is behind its time. If it is not substantially fixed by the end of this week, it will represent a tragically lost opportunity. •

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All views expressed in this publication are solely those of the contributing authors and do not necessarily reflect the positions of the supporting organizations.

Gift wrapped

Dr. Robert Zuber | Global Action to Prevent War

The most significant change to the new text is the section on diversion. While the text still reflects language that more tentatively than definitively binds, there is at the very least a reinforcement of the responsibility to end diversion as a key rationale for the years of preparation and negotiations which will—this week or sometime soon—result in a series of formally acknowledged obligations within the realm of arms transfers.

This reinforcement is most welcome. A focus on diverted transfers is not a distraction from the core purposes of a treaty, but is indeed central to the collective responsibility which the final ATT text must embody. Ending the practice of diverted weapons, as we have heard many times during preparatory and negotiating sessions, is key to making good on the promise of reduced levels of weapons-related violence, a promise that has inspired so many to follow and/or engage this process so energetically.

It would seem almost ludicrous to endorse a Treaty that did not continually reference and propose remedies for the scourge of diverted transfers, a scourge that continues to fuel corruption through the illicit market and massive violence through criminal and terrorist acts. As we easily recognize, this has little in common with the benign practice of re-gifting the least wanted of our birthday or Christmas presents. Diverted transfers are often the fruit of calculated efforts to manipulate a highly profitable and already inflated arms market. This is re-gifting of a sort, but with full potential to inflict the deadliest possible consequences.

We are extremely grateful to Ambassador Woolcott and his colleagues for pressing through revisions to this Treaty text that highlight further the central problem of diverted transfers. That said, we are reminded that most of the remedies proposed in this revision are activities that we did not (and should not) need a fully entered-into-force treaty to commence. We shouldn't need a treaty to tell us that state-to-state assistance focused on developing viable, reliable national control systems is helpful. We shouldn't need a treaty to motivate us to provide information sharing on transfers, or to highlight best practices with regard to identifying and addressing diversion potential, or to further develop our 'understanding' of the problems and potential solutions related to diverted transfers. Our fear has been and remains that the pursuit of these and other practical measures to address diversion has been needlessly sidetracked due in part to our preoccupation with achieving a paper treaty.

In reviewing the draft text on diversion, we welcome the specific mention of terrorism as an unintended recipient of transferred weapons, though we recognize that there are other 'screens' for diversion that should be applied with similar vigor. For instance, paramilitary activities which often serve state interests and thus might not be labeled 'terrorist acts' inflict grave violence that, to victims, would largely be indistinguishable from more generally recognized terror activities. There are, sadly, many ways to terrorize populations with diverted weapons beyond those that would formally and immediately warrant a terrorist designation.

But the basic issue at hand is not with definitions but with urgent and sustained response. As mentioned in previous issues of the Monitor, the understandable and often helpful dissection of Treaty text has inadvertently obscured the urgency around creating viable cultures on transfers. Through this important, but protracted Treaty process, some of its stakeholders have, in essence, practiced their own form of diversion, averting our gaze from a range of remedial activities on transfers that could help create the practical context for fully implemented Treaty provisions long before such provisions fully enter into force.

While an adopted ATT could be a most welcome development in the very near future, it is only the start of what will be some very heavy lifting towards bringing an end to diverted transfers. Stakeholders are urged to establish a complementary process (perhaps modeled on or even directly utilizing the Group of Interested States) at the earliest possible moment where we can discuss together how best to practice more collaborative vigilance on diverted transfers. Above all else, we must not wait for entry into force in order to begin creating viable, sustainable, multi-stakeholder 'cultures' that can address diversion concerns on an ongoing basis. The stakes are too high and too many weapons will continue to find their way into the wrong hands during what might well be a decade-long lag between adoption and entry into force.

Indeed, in hindsight, we should probably have ramped up such a process several years ago. There is still both opportunity and advantage to doing so now. •

New ATT text fails in preventing armed gender-based violence

Ray Acheson | *Reaching Critical Will of WILPF*

The provisions for preventing gender-based violence (GBV) in the President's second draft arms trade treaty (ATT) text continue to undermine existing international law and obligations.

While the reference to GBV in the preamble is welcome, the language unfortunately opens up potentially incorrect interpretations of international law. The use of the word "may" could be misinterpreted as meaning some acts of GBV are not violations of international humanitarian law (IHL) and international human rights law (IHRL) even when those legal regimes are applicable.

It is also regrettable that the preamble continues to highlight women as particularly vulnerable. An attempt does seem to have been made to highlight that civilians, rather than women per se, are the majority adversely affected by armed conflict and armed violence. However, the "women and children as vulnerable" trope remains. This is despite years of effort on the part of academics and activists to offer statistical evidence that is in fact men, especially young men, who are the vast majority of victims of armed violence, including during conflict. These facts are an expression of the gendered dimensions of armed violence. So is the armed violence that women and others are exposed to, perpetrated by men with impunity, due to gendered roles, norms, and structures.

Women are not vulnerable. We are targeted. So are others that do not conform to "traditional" gender roles. Being targeted does not make one inherently vulnerable, it makes one subject to *unique effects* of a common threat—in this case, armed violence or armed conflict.

WILPF and others are advocating for a gender-sensitive ATT not because women are vulnerable. We do it because states have repeatedly and continually failed to assess the substantial risk of violations of IHL and IHRL related specifically to gender-based violence, such as conflict-related sexual violence against women. This is what the ATT must prevent.

The reference to GBV in the export assessment criteria is of course even worse. An historically large number of states support the strengthening of the GBV prevention criterion, in particular lifting it out of the "second tier" of export assessment criteria that would subject it only to voluntary, undefined, risk reduction measures.

As noted above, GBV is a violation of IHRL and of IHL where it applies. An explicit and binding reference to GBV prevention is necessary given GBV's prevalence and impact and in order to capture perpetration of GBV by

non-state actors (excluding those covered under customary international law, e.g., Common Article 3). States must ensure that export assessment specifically includes the prevention of GBV. Gender-sensitive assessments are a necessary measure for states to take in their efforts to prevent human suffering.

The question this week is unfortunately once again: are the rights of women and other victims of GBV important enough, or will we receive the weakest of protections? In this case the stakes are high and the question could be life-saving: is the prevention of armed GBV important enough to screen for in export assessments?

Over 90 states have said "yes" so far. Hundreds of civil society groups have also said "yes". WILPF and many others thus believe that the current draft text is unacceptable in terms of GBV prevention and that both the preamble and export assessment must be revised to correct this.

The **preamble** should recognize that acts of gender-based violence constitute violations of IHL and human rights law when those legal regimes are applicable. It should also recognize the gendered dimensions and impacts of the arms trade, particularly the frequency with which arms are used to facilitate gender-based violence. It should not use the patronizing term "women and children" but instead promote the equal, full, and effective participation of both women and men in the prevention and reduction of armed violence and armed conflict.

The **GBV criterion** should be subject to mandatory risk assessments as well as to transfer prohibitions. An effective ATT must require states to assess whether there is a substantial risk that the conventional arms to be transferred could be used to commit or facilitate acts of gender-based violence. This should be done as part of assessing the risk of diversion, including to non-state actors, and without prejudice to the assessment in 7(4).

The reference to violence against children must be kept separate in both situations.

WILPF members Maria Butler (Director, WILPF Peace-Women programme), Sofia Tuvestad (Political Officer, WILPF Sweden), and Vanessa Farr contributed to this article. •

Control Arms reaction to President's Non-Paper of 22 March

Control Arms is highly disappointed with the first 'substantive' draft from ATT Final Conference President, Amb. Peter Woolcott of Australia. After extensive and broad consultations—following seven years of deliberations inside the UN—the draft should have clearly reflected the voice of the overwhelming majority of Member States.

Rather, the text closely resembles an ATT wanted by a small number of powerful states—incidentally, the world's largest arms exporters. For the final draft text, a choice must be made: will the ATT actually be negotiated by 193 countries—or by only a handful? Who makes the rules, the affected and concerned—or those who profit most from the arms trade?

In the March 22 Non-Paper, we were expecting a bold, swift stride, not a minimal incremental step. In addition to dozens of fixes and textual changes necessary, the Non-Paper has kept ALL the major loopholes identified by large groups of governments over the past week.

Though Scope is better structured, the range of weapons covered is arguably narrower—certainly there has been no real movement towards the needed "all conventional arms" (even if the addition of "munitions" is positive).

In addition to no 'future-proofing', the Non-Paper actually 'past-proofs' the Scope, as Article 5.4 freezes the definitions of the UN Register at the time of entry into force, with no possibility of future evolution. Though now covered in stand-alone articles, ammunition and parts/components are still inadequately covered, with no risk assessment for diversion, gender-based violence and violence against civilians (among others) and absolutely no reporting requirements.

Likewise, the criteria for assessing whether to go ahead with an arms transfer remains very weak.

'Prohibitions' has improved marginally, as the draft now prohibits transfers when the exporters have knowledge, rather than intent, that the weapons would be used to commit war crimes. But problems remain: knowledge is restricted to time of authorization, not time of transfer, which can often be months later; and still only applies to obligations that states are explicitly bound by and not customary international law. Moreover, an obligation regarding violations of international human rights law is woefully still missing.

Under Export Assessment, we welcome the essential addition of the criterion on transnational organized crime, though remain extremely concerned that diversion has not followed suit. As a whole, Article 7 is completely inadequate—indeed dangerous—if not strongly amended.

Article 7.3 still has a requirement to assess if arms transfers would contribute to or undermine peace and security, but, incredibly, no explicit consequence for a negative assessment outcome! Article 7.7 has retained the unacceptably high threshold of "overriding" rather than the proper "substantial" or "clear" risk. In 7.8 (in addition to diversion), gender-based violence/violence against civilians, development and corruption are still not grounds for a decision to refuse a license—but must be. Likewise, in light of new information regarding criteria violations, States "shall suspend or revoke" authorizations—not be encouraged to do so.

Finally, through Implementation to Final Provisions, many changes are needed to strengthen the 3rd draft text. At least one amendment, however, is essential to make the draft **acceptable**: there must be mandated public reporting on transfers under Article 12. The information contained therein must not be open to the current get-out clause that enables States to withhold anything under the guise of "commercially sensitive or national security" information.

There is very little time left, and very little left to say: all the dangerous gaps above **must** be fixed for the third and final draft to have a chance to become an Arms Trade Treaty that can make a difference in "reducing human suffering"—as has always been the clear intention of the overwhelming majority of the 193 UN member states. •

Principle pays

Christopher Edelman | Arias Foundation for Peace & Human Progress

Monie, age eight, lay shaking among a pile of dead corpses, waiting for the safety of nightfall to come so that she could make her way to Kigali. Only weeks earlier, she had witnessed Tutsis beating and shooting her father and raping and killing both her mother and sisters. Monie was now alone in the world, but somehow she managed to find shelter in an orphanage, after being taken for dead like the many bodies strewn around her.¹

During the Rwandan Genocide in 1994, between half a million and a million civilians were killed, and guns played an instrumental role in rounding people up, intimidating them into cooperation, and shooting those who fled. If ever there was a situation in which states should have acted on *principle* to prevent human suffering, this was it. And yet there were plenty of overlooked *practical* reasons, too, why it would have been smart for weapons exporting countries to enforce stricter arms regulation.

First, the unregulated trade of arms poses a significant threat to the national security of producer nations. The world is more interconnected now than ever, and violence anywhere threatens people everywhere. Unregulated arms risk “the hindering of peace-keepers, peace-building, and economic and social development that undermines ... efforts to improve stability and governance.”²

As President Arias said in a speech prior to the last ATT diplomatic conference in 2012, “If it is legitimate for us to worry about the possibility that terrorist networks gain access to a nuclear weapon, it is also legitimate for us to worry about the rifles, grenades, and machine guns that are given into their hands, not to mention the hands of young people, gangs, and drug cartels.”

Second, the development of conflicts abroad threatens to embroil rich nations in conflicts they would prefer to avoid or else risk severely damaging their reputations. All too often, arms shipments are used to perpetrate genocide and crimes against humanity. Then, the same nations that exported those arms are left to intervene to end an atrocity to which they themselves contributed.

During the Rwandan genocide, if governments such as those of France, the UK, and the US had enforced stricter controls on the licensing of arms shipments, those arms would not have fallen into the hands of Hutus. In turn, Western nations would not have found themselves in the difficult position of having to decide whether to declare the situation in Rwanda “genocide” and to intervene. As a result, the US government in particular, along with others, suffered severe reputation consequences that could have

been averted if it had done the principled thing in the first place.

Finally, arms producing countries should support a strong ATT because doing so will prevent these countries and their weapons manufacturers, which generally already have *stronger* export controls than most states, from being put at a competitive disadvantage.

Though some ATT opponents argue that the arms export market is too competitive for companies to turn down *any* buyers, no matter how corrupt, Western suppliers are currently being undercut by the poor practices of other suppliers. The ATT would hold all States to the same set of standards of arms transfer authorization. When producers worldwide are held to the same standards, when one producer rejects a sale that is unauthorized, another one cannot pick up that same sale.

Thus, with a strong ATT, arms exporters will not risk losing business by being ethical.

Governments with strong export controls would also benefit because current regulation inconsistencies permit actors involved in the illicit arms trade to transplant their operations to countries with more favorable conditions for illegal activities. By establishing universal standards, the ATT would discourage the proliferation of the illegal arms trade and ensure that the controls established by one government are not undermined by the lack of controls elsewhere.

Although every country is entitled to input under this conference’s consensus-based operating procedure, major weapons exporting nations have a special responsibility to pass a strong treaty and ensure its ratification. Even if these nations are not concerned with alleviating human suffering like that of Monie in Rwanda, they ought to protect their own stakes and fight for a bulletproof ATT for the tangible benefits that it will provide.

In other words, this is one situation in which principle pays.

This article is a modified version of the original, part of Distilled Magazine’s third edition, titled ‘The Origins of Principles’. The full contents of this issue will be available on Monday, 25 March at distilledmagazine.com. •

1. Kabiza Wilderness Safaris. “Surviving the Rwanda Genocide – the story of one Girl.” Available: <http://kabiza.com/Surviving-Rwanda-Genocide-story-of-girl.html>. Accessed 4 March 2013. 2. “The Arms Trade Treaty: An Unparalleled Opportunity to Improve U.S. National Security.” Arms Control Association. Accessed 6 March 2013. Available at: http://www.armscontrol.org/system/files/ACA_NationalSecurity_ATT.pdf

Summary of main changes in second President's Non-Paper

Katherine Prizeman | *Global Action to Prevent War*

*Denotes a new article

Preamble

- The title "Preamble" has been deleted.
- A reference to "individuals or groups who would commit terrorist acts" has been added to the end of preambular paragraph (pp) 3 with regards to the need to prevent illicit trade and diversion.
- The reference to women and children has been changed to "civilians, particularly women and children".
- There has been an addition of a reference to preventing gender-based violence (GBV) in pp 10 that "recognizes that acts of gender-based violence may constitute violations of international humanitarian law and human rights law."
- "and lawful ownership" has been added to pp 12.
- The reference to the role of civil society in pp 13 has been expanded to include "raising awareness" and "supporting" implementation.

Principles

- Principle 5 on international humanitarian law (IHL) has been re-worded to include explicit reference to the Geneva Conventions of 1949.
- In principle 7, the reference to peacekeeping operations has been expanded to also include "peace support operations"

Article 1 Object and Purpose

- The term "combat" has been removed from the "object" section and the term "prevent" has been added. There is now also a reference to preventing terrorist acts.
- The second line under the "purpose" has been simplified to read only "Reducing human suffering."

Article 2 Scope

- The phrase "at a minimum" has been deleted.

*Article 3 Parts and Components

- A new article 3, drawn from the old article 6(6), requires that states parties establish a national control system to regulate the export of parts and components "that are in a form which provides the capability to assemble" into the items covered in 2(1) as well as obligates states parties to apply the criteria set forth in articles 6 and 7 prior to their export.

*Article 4 Ammunition/Munitions

- A new article 4, drawn from the old article 6(5), requires states parties to establish a national control system to regulate the export of ammunition/munitions "fired, launched, or delivered by" the conventional arms covered under article 2(1) as well as to apply the criteria set forth in articles 6 and 7 prior to export.

Article 5 General Implementation

- A new paragraph, 5(4), "encourages" states parties to apply the provisions of the Treaty to the "broadest range of conventional arms" and requires that no national definitions of the articles covered in article 2(1) "cover less than the descriptions used in the United Nations Register on Conventional Arms" at the time of entry-into-force (EIF).
- The reference to specific items "covered under Article 2(1)" has been deleted from 5(5).
- Articles 5(7) and 5(8) related to diversion have been deleted.

Article 6 Prohibitions

- All three prohibitions (6(1)–(30) now apply to the items in article 2(1) as well as parts and components and ammunition/munitions (under new articles 3 and 4).
- Article 6(4) has been re-drafted to include a knowledge-based test and refers generally to the 1949 Geneva Conventions, as the specific reference to Common Article 3 has been deleted.

Article 7 Export and Export Assessment

- This article was previously separated into two—"National Assessment" and "Export".
- Article 7(1) requiring the establishment of a national control list now covers parts and components and ammunition/munitions as well as items under the scope in 2(1).
- A new article 7(2) requires that states parties submit their national control list to the Secretariat to be made available to other states parties and "encourages" states parties to make such lists publicly available.
- The reference to transnational organized crime has been moved up to 7(4) as new provision (d).
- The wording on risk reduction measures has been slightly changed as it no longer references "feasible" measures. It now reads: "In making this assessment, each exporting State Party shall consider taking measures,

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Summary of changes, cont'd

including joint actions with other States involved in the transfer, to reduce the likelihood of the conventional arms..."

- The sub-criterion related to development has been re-drafted so that it now references "socio-economic development" and takes into account "legitimate domestic and security defence needs."
- The information sharing provision in former article 6(3) (now 7(9)) related to importing and transit and trans-shipment states has been deleted.
- Former articles 6(5) and 6(6) on ammunition/munitions and parts and components have been deleted.

Article 8 Import

- The reference to diversion in para 2 has been deleted.
- New suggested measures to regulate imports are referenced as "national control lists or import systems."

Article 9 Transit or trans-shipment

- Para 2 related to information sharing and cooperation to mitigate diversion risk has been deleted.

Article 11 Record keeping

- The reference to other international obligations applicable to the states parties has been deleted from para 4.

Article 12 Reporting

- Paragraph 1 encouraging states parties to report to the Secretariat on actions taken to combat diversion has been deleted.
- A reference to "national control lists" has been added to the new paragraph 1.

Article 13 Enforcement

- The reference to "legislative and other" has been replaced with "appropriate".

***Article 14 Diversion**

- This article has 6 paragraphs and does not cover parts and components and ammunition/munitions (articles 3 and 4).
- Paragraph 1 obligates states parties to prevent the diversion of items covered under article 2(1) from diversion into the illicit market or from the "unauthorized terms of export between the importer and exporter" and makes specific reference to terrorist acts.

- Paragraph 2 requires state parties to "seek to prevent" diversion of items covered by 2(1) through establishment of a national control list and through validating, "where appropriate," the actors involved through certificates, importer assurances or other measures.

- Paragraph 3 encourages importing and exporting states to exchange information in order mitigate diversion risks.

- Para 4 requires states parties to act, "to the extent permitted by national laws and in accordance with international law," to address detected instances of diversion.

- Paragraphs 5 and 6 include provisions encouraging states to share relevant information to "understand better" the risks of diversion and to report to the Secretariat actions taken to address diversion of weapons covered under article 2(1), respectively.

Article 15 International Cooperation

- The qualifier "consistent with their respective security interests and national laws" has been added to first para.
- An additional reference to terrorist acts has been added to paragraph 4 in relation to eradicating diversion of the items covered under 2(1).
- A new reference to "stockpile management" has been added to paragraph 5 regarding information sharing.

Article 16 International Assistance

- A new paragraph 3 requires states to, where jointly agreed and pursuant to national laws, assist each other in investigations, prosecutions, and judicial proceedings regarding violations of the Treaty.

Article 17 Conference of States Parties

- A new sub-paragraph 17(4)(c) provides the Conference of States Parties with the ability to review implementation of the Treaty and to consider issues arising from the interpretation of the Treaty.

Article 19 Dispute Settlement

- This article refers now to "States Parties involved in the transfer of conventional arms".

Article 20 Amendments

- EIF of an amendment for states parties is now 90 days following the date of deposit by a majority of states parties at the time of the amendment's adoption rather than "upon deposit". EIF for any remaining state party is now also 90 days following the date of deposit. •

Analysis of key changes in second President's Non-Paper

Katherine Prizeman | *Global Action to Prevent War*

I. Issues improved

- Scope now has a better structure with the addition of new articles 3 (Parts and Components) and 4 (Ammunition/Munitions).
- Article 6(3) has improved so that there is now a knowledge-based standard rather than a purpose or intent standard, although it is limited to the time of authorization rather than transfer and does not make mention of customary international law.
- Article 14 on diversion is welcome and is an improvement from the various (and separate) references to diversion throughout the previous text.
- The new provision in 17(4)(c) that allows for the Conference of States Parties to review implementation and issues of interpretation of the Treaty is a positive addition.

II. New ambiguities introduced

- The reference to preventing gender-based violence (GBV) in pp 10 opens up GBV, international humanitarian law, and human rights law to potentially incorrect interpretations.
- The reference to women and children as those that “account for the vast majority of those adversely affected by armed conflict and armed violence” in pp 10 is misleading as women are uniquely affected by armed conflict and armed violence, while men are still the most affected overall.
- Principle 5 now refers only to the Geneva Conventions of 1949 and not the Additional Protocols, including those agreed after 1949 and is, therefore, too narrow.
- With the deletion of “at a minimum” in the chapeau of article 2, the scope has been narrowed.
- Article 5(4) freezes definitions of the conventional arms covered in the UN Register at the time of entry-into-force (EIF) with no possibility of future amendment.

III. Main issues still requiring amendment

- Ammunition, parts and components are still not covered in the “primary” scope of the Treaty so that these items are not covered by the import, transit and transshipment, brokering, or diversion provisions. Nor do the “second tier” criteria apply to transfer decisions of these items.
- Activities such as gifts, loans, and leases are still not covered.

- There is no provision for “future proofing” of the definitions of the conventional arms found in the scope.
- Article 5(2) relating to “defence cooperation agreements” has been left unchanged.
- Article 7(3) still refers to a balancing between “undermining” or “contributing” to peace and security.
- The criteria in article 7(8) are still treated as second-class criteria subject only to voluntary risk mitigation measures.
- Article 7(7) referring to an “overriding risk” is still a major concern that would allow for states to move ahead with a transfer even if there is a risk of violations of IHL or IHRL.
- Article 7(10) still refers to an “overriding” risk and “encourages” the state party to suspend or revoke the authorization rather than require it once new information has been obtained.
- Public reporting (Article 12) is still not mandated.
- The number of ratifications required for entry into force (65) is still too high.
- Reservations can be made on any part of the Treaty, including scope and criteria, the core operational parts of the Treaty.
- Amendments still require consensus.

News in Brief

Katherine Prizeman | *Global Action to Prevent War*

The following is not a comprehensive account of all positions or interventions but a snapshot of negotiations from Friday, 22 March.

Scope

- South Africa and Vanuatu said that national control systems must also apply to ammunition, parts, and components, therefore the specific references throughout the text to “conventional arms covered under Article 2(1)” are insufficient.

- Vanuatu also called for inclusion of gifts, loans, and leases under covered activities.

“Contracting out”

- Austria, Chile, Germany, Ghana, Liechtenstein, Norway, the US, Sierra Leone, and South Africa expressed concern over article 3(2), with most calling for its deletion.
- The US said 3(2) “comes very close” to undermining the entire purpose of the negotiations and that the Treaty cannot create an inherent conflict between international and commercial obligations.
- Chile noted that article 24 must address existing treaties and agreements and proposed the language, “This treaty shall not prejudice obligations undertaken by States with regards to other instruments to which they are parties.”

Prohibitions

- For article 4(3), Spain suggested the language, “A State Party shall not authorize a transfer (export) of conventional arms, munitions, or ammunition within the scope of Treaty if the State Party knows that the transfer may facilitate the commission of genocide, crimes against humanity, war crimes or consistent violations of human rights constituting violations of international law.”
- Côte d’Ivoire and India supported Japan’s proposal on 4(3) from yesterday; and India suggested adding a reference to terrorism.
- Côte d’Ivoire supported adding a prohibition of transfers to non-state entities.
- Liechtenstein supported a knowledge standard to be required in 4.3.

Criteria/National Assessment

- Vanuatu supported the replacement of “overriding” with “substantial” and the movement of gender-based violence up to article 5(2).

Export/Import

- India proposed adding a reference to “non-state actors” in the last sentence of 7(2) in reference to prevention of diversion.
- India proposed new language for 7(3) that would allow for importing states to seek information on authorizations and denials.

Transit or trans-shipment/Brokering

- France proposed additional paragraphs in articles 8 and 9 that would require states parties to conduct national assessments based on article 5 criteria for brokering, transit, and trans-shipment.
- Nigeria called for an expansion of article 9 to also include a provision on illicit brokering and a requirement for end-user certifications.
- Norway supported the end-use certificate proposal from Nigeria.
- In 8(2) Japan suggested deleting “upon request” to be replaced with “where feasible,” since it is unrealistic to assume transit states will always have the needed information.

Final Provisions

- Spain proposed an amendment to article 15 that requires that the Conference of States Parties adopt its own financial rules governing the budget and functioning of any subsidiary body created by consensus and that such financing would be based on the principle of voluntary contributions.
- France proposed new language for article 15 that says, “The Conference of States Parties shall consider the impact of the evolution in the field of conventional arms and the impact on relevant categories in article 2(1) and consider recommendations for their possible update.”
- Nigeria proposed including a provision that would establish a five-year review process and give the responsibility of adoption of amendments to the Review Conference.
- South Africa said the current formulation of article 17 was “as far as it could go” and having mandatory dispute settlement for transfer denials is a “slippery slope”.
- Liechtenstein supported the inclusion of a provision for voluntary and optional ICJ recourse with regards to dispute settlement. •

Side event report: Preventing diversion through the Arms Trade Treaty

Jingjing Wu | NYU Law Students for Human Rights and Reaching Critical Will of WILPF

On Friday, the Permanent Missions of Argentina and Switzerland, along with the Control Arms Coalition, hosted a side event on the prevention of diversion. The panel, which was moderated by Daniel Mack, Arms Control Policy Coordinator of Instituto Sou da Paz, included presentations by Ambassador Envin Bollinger, Head of the Swiss Delegation; Paul Holtom, Senior Researcher for Stockholm International Peace Institute (SIPRI); and Cynthia Ebbs, Project Coordinator for ATT Legal Response Network.

Mr. Mack set the tone of the discussion by emphasizing the importance of the Arms Trade Treaty (ATT) as an essential and politically feasible mechanism for preventing arms from being diverted to unauthorized states and non-state actors.

Dr. Bollinger introduced recent experience of Switzerland as an arms exporter in taking active measures to prevent potential diversion to unauthorized entities. The Swiss government has established a system of criteria to deny authorization of export of arms in certain situations when they assess that the arms might be diverted. The risk of diversion can often be assessed by a matrix of indicators, including the nature of the arms and past dealings with the importing country. Switzerland requires the receiving country to provide a statement of non-diversion, and more importantly, ask the importing country to give Switzerland the right to verify the whereabouts of the arms as a post-shipment authorization measure. Switzerland also divides different recipient countries into various groups according to the degree of risk. There are cases in recent years in which the Swiss government, based on clear, public information, assessed that the risk of diversion was so high that the transfer of arms was denied. Switzerland has also established a joint investigative commission to promote ongoing dialogue with authorities of questionable countries.

Dr. Bollinger held that three elements are crucial in preventing diversion: cooperation between the exporting and importing parties; information sharing; and confidence building.

Mr. Holtom talked about a possible combination of general measures and specific import control measures for diversion prevention. Among the general measures are improvements in record keeping, marking of arms in transfer, risk-profiling, and a comprehensive cooperation and information-sharing mechanism with all participants in arms transfer, including transporters and shippers, and involving both state actors and corporations.

As to import control measures, Mr. Holtom emphasized the importance of end user documentation in confidence building, particularly through mandatory End User Certification (EUC). Mr. Holtom pointed out that the EUC should contain assurances against potential diversion and be certified by authorities of the recipient states. In addition, there needs to be easy access for countries that are seeking guidelines. Shared samples, information, and other measures to build confidence are important.

Ms. Ebbs, from the perspective of a lawyer and treaty drafter, discussed establishing international standards with respect to diversion. Based on the Wednesday text of the treaty, Ms. Ebbs explained all the references to diversion in different articles of the document. She praised the strengthening of the language in several provisions as positive changes. For example, “appropriate” is taken out from “appropriate measures” in Article 3(5).

However, many loopholes remain to be filled and equivocality to be specified. For example, as drafted, risk of diversion is not required to be considered in the risk assessment in exporting decision under Article 2, even if the exporting country has knowledge that the arms may be diverted. Moreover, the term of “feasible” in “feasible measures” in Articles 5 and 6 is not defined; information sharing is permitted but not required under Article 6. In general, the legal text of ATT in the post-transfer context signals mitigation rather than prevention of diversion. No clear obligation is imposed upon the involving parties. Furthermore, none of the diversion provisions will be applied to ammunition, parts or components. As to the possibility of a separate article to address diversion, Ms. Ebbs admitted that it would not be particularly problematic from the perspective of drafting. However, she warned about the potential strengthening or weakening effect by extracting the diversion language in different provisions to put them into one.

Among the issues raised during the Q & A session, the problem of burden sharing was raised as to risk assessment of diversion. On the one hand, it could be great burden for individual countries to seek information from all recipient countries, and thus information and burden sharing could be desirable. On the other hand, the panelists did not see it promising due to confidential information and sovereign rights issue. Mr. Holtom pointed out that confidence among different countries may not be sufficient at this point. •

ATT MONITOR 6.6



Art by Lin Evola

CALENDAR OF EVENTS

Time	What	Where	Who
10:00-13:00	Plenary	Conference Room 1 North Lawn Building	
13:15-14:30	Visualizing the small arms trade: the need for transparency in the Arms Trade Treaty	Conference Room B North Lawn Building	Permanent Mission of Norway to the UN and the Peace Research Institute Oslo (PRIO)
15:00-18:00	Plenary	Conference Room 1 North Lawn Building	
19:00-22:00	Plenary	Conference Room 1 North Lawn Building	



Reaching Critical Will

