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## The Arms Trade Treaty: A Call for an Awakening

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On 2 April 2013 the UN General Assembly adopted the Arms Trade Treaty by 154 votes in favour, 3 against, and 23 abstentions. The three negative votes were Syria, the Democratic People's Republic of Korea, and Iran. The adoption of this treaty represented the culmination of a long campaign initiated by a group of Nobel peace prize laureates and backed by a broad alliance of civil society organizations (Control Arms). Along the way the United Kingdom introduced an initial resolution at the General Assembly, the United States voted against the idea, and then subsequently changed its mind under the Obama Administration. Different coalitions of states resisted the adoption of the treaty at various points, but the overwhelming support for the final text suggests that ratifications will be relatively swift, and that arms transfers will be subject to greater scrutiny in the future.

What this author finds remarkable is that international lawyers and human rights advocates (inside and outside government) have shown such little interest in this new treaty. With the exception of Amnesty International, few of the large international human rights organizations have lobbied in a meaningful way for this treaty. Very little input came from the various UN agencies that have an interest in reducing the structural violence and obstacles to development that flow in the wake of arms transfers. And the academic community of international lawyers seems to have sat this one out. This reflection piece is aimed as a wake-up call – an appeal for an awakening – as this is not really a treaty about prohibiting weapons or disarmament, nor is it a trade treaty; it is a treaty about human rights, a treaty about preventing violations of international

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humanitarian law, and a treaty which aims at halting terrorist offences and the worst atrocity crimes: genocide, crimes against humanity and war crimes. If we care about the horrific violence in Syria – we should surely care about a treaty designed to cut off the supply of arms and ammunition.

I will not attempt a detailed explanation of the working of the treaty,<sup>2</sup> rather in the space available I should like to concentrate on two key Articles which represent what has been called the ‘heart’ of the treaty.

Article 6 concerns an outright prohibition on arms transfers where the transfer would violate a state party’s obligations with regard to Security Council embargoes, other obligations under treaties it is a party to, or where the state party ‘has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.’

The first thing to note is that the reference to war crimes ‘defined by international agreements’ obviously covers, not only grave breaches under Protocol I to the Geneva Conventions, but also all the war crimes included in the Statute of the International Criminal Court (ICC). For states that are not parties to the ICC it has been suggested that the war crimes reflected in other treaties would be included in this context. It is worth mentioning here that Switzerland made a statement following adoption of the treaty where it stated that the war crimes in these international agreements ‘encompass, among others, serious violations of Common Article 3 to the 1949 Geneva Conventions—instruments that enjoy universality. The war crimes defined in the 1977 Additional Protocols and the Rome Statute of the International Criminal Court are also encompassed for States Parties to these agreements.’<sup>3</sup>

A second point which is worthy of detailed consideration concerns the scope of the phrase ‘attacks against civilian objects or civilians protected as such’. This is not a phrase that we find elsewhere in international humanitarian law. As is well known, the rule in Article 51(2) of Additional Protocol I (API) is that ‘The civilian population as such, as well as individual civilians, shall not be the object of attack.’ It is often assumed that by speaking of prohibiting attacks on the ‘civilian population as such’ one does not prohibit attacks on military objectives which cause excessive damage to the civilian population (disproportionate collateral damage). In this case the civilian population was part of the attack but was not attacked as such. The prohibition on attacks which might be expected to result in disproportionate civilian damage is contained in a separate rule (Article 51(5)(b) of API). Determining whether or not one can expect such excessive damage has proven particularly challenging and the ad hoc International Criminal

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<sup>2</sup> See for further background the Academy Briefing No.2 on the Draft Arms Trade Treaty, and the forthcoming Briefing on the final treaty. Available at <http://www.geneva-academy.ch/academy-publications/academy-briefings>.

<sup>3</sup> Statement to the UN General Assembly 2 April 2013.

Tribunals have preferred to focus on the prohibition on attacking civilians in a broad sense.

Stepping back from the wording of the text we might ask what was the harm that the Arms Trade Treaty was intended to address. Surely the indiscriminate and disproportionate attacks on the civilian population in Syria must provide the context for these negotiations? It would seem to the present author absurd if a state party to this new treaty could argue that there is no prohibition under this treaty to arm the Syrian Government or anyone else with arms that would be used in an indiscriminate or disproportionate way against the civilian population..

The second Article to look at briefly is Article 7. This provision states that, if after conducting a national assessment, the exporting state party determines that there is an overriding risk of certain enumerated negative consequences the exporting State Party shall not authorize the export. The State has to assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to:
  - (i) commit or facilitate a serious violation of international humanitarian law;
  - (ii) commit or facilitate a serious violation of international human rights law;
  - (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
  - (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.<sup>4</sup>

Again we can speculate what should be the content of the categories of serious violations of human rights law and serious violations of international humanitarian law (IHL). Much will surely be written to flesh out these categories which are not specifically defined elsewhere. The ICRC helpfully distributed at the Conference a document explaining that serious violations of IHL covers grave breaches of the 1949 Geneva Conventions and 1977 Additional Protocol I, war crimes under Article 8 of the 1998 Rome Statute of the International Criminal Court, and other war crimes in customary international humanitarian law.<sup>5</sup> Just as complex however is understanding the meaning of the word 'overriding'. This caused considerable controversy at the Conference and the term now falls to be interpreted.

For some, absent any further explanation, the word overriding is synonymous with the word substantial. One simply needs to determine that there is a substantial risk of one of these negative consequences to be obligated to deny authorization of the Arms Transfer. In its explanation of vote New Zealand stated that "the concept of "overriding"

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<sup>4</sup>Article 7(1).

<sup>5</sup> See '[What are "serious violations of international humanitarian law"? Explanatory Note](http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf)', available at <http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

risk would be interpreted by New Zealand as “substantial” risk.’<sup>6</sup> For others, however, there seems to be a sense that the risk of serious violations of IHL (or any of the other negative consequences) is to be weighed against the positive contribution that the arms could make to ‘peace and security’ which is mentioned as a possible positive consequence of an arms transfer. This might present a huge loophole as a state determined to override human rights or IHL concerns could determine that the possible security benefits would outweigh the possible human rights or IHL violations and authorize the transfer, and then claiming that its actions were in conformity with the treaty. Again we should resist interpretations which would lead to absurd results. Clearly the obligation to make a national assessment would require more than a simple assertion that human rights were trumped by security. The assessment has to weigh the various risks and future scenarios in good faith. One can of course construct a scenario where the transfer of arms could be considered useful to protect peace, security and even human rights, and so argue that one should override the risk of human rights violations being committed by those same arms. But such reasoning comes very close to consequentialist reasoning claiming that the ‘end justifies the means’. In turn this flies in the face of the theory and practice of human rights.

Clearly the problem with the world is not that there are not enough arms being transferred to ensure peace and security, but rather that arms are being abused and are ending up in the wrong hands. The issue is urgent, this treaty will take some time to enter into force, and states will take years to make the necessary changes in their national practices to fulfill all the requirements set out in the treaty. But, in closing let me draw attention to an interesting Article on provisional application. Article 23 states: ‘Any State may at the time of signature or the deposit of instrument of its ratification, acceptance, approval or accession, declare that it will apply provisionally Article 6 and Article 7 pending the entry into force of this Treaty for that State.’ It is well known that it may take years before the United States Senate would be willing to approve this treaty. But during the negotiations the United States delegation hinted several times that it hoped to sign the treaty very soon; one might hope that the pressure would be building for the United States and other nations to make such declarations so that this new legal regime is applied as soon as possible by as many states as possible. Of course nothing much will happen without massive public pressure. Wake-up international lawyers – consider this a call to arms.

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<sup>6</sup> See UN Doc DPI GA/11354 of 2 April 2013.