

Prohibitions and Export Assessment: Tracking Implementation of the Arms Trade Treaty

Geneva Paper 23/19

Tobias Vestner

March 2019



GCSP
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Security Policy

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Executive Summary

Four years after the entry into force of the Arms Trade Treaty (ATT), how do states parties implement its core provisions regarding the authorization of arms transfers? Rather than looking at what transfer decisions states are taking, this study examines how states implement Articles 6 and 7 of the ATT by national legislation, policies and practice.

This Geneva Paper shows that ATT states parties generally implement the ATT's prohibitions set forth in Article 6 through national laws and policies. This paper also demonstrates that exporting states implement the ATT's obligations regarding export assessment contained in Article 7 in many different ways. While the spectrum of how exporting states parties consider an arms exports' potential effect on peace and security is very broad, their national frameworks contain similar or nearly identical export criteria on assessing the risk of arms being used for serious violations of international humanitarian law and international human rights law. Few states parties have national export criteria regarding terrorism, transnational organized crime and gender-based violence. States also consider national criteria other than those specified in Article 7 before authorizing arms exports, including positive consequences of arms exports. Finally, states parties' national frameworks mostly do not define clear thresholds for denying arms exports.

Given this divergence in states party implementation, in addition to a remaining lack of clarity on how states apply the ATT provisions in practice, this paper recommends reinforcing dialogue on ATT implementation. This could lead to better understanding and implementation guidance that strengthens the emergence of common standards and improves the quality of national export assessments. To increase states parties' knowledge on risks to be avoided, institutionalizing cooperation with human rights bodies and establishing an ATT internal information exchange mechanism is also recommended.

I. Introduction

The ATT was adopted by a large majority of United Nations member states in April 2013. The ATT's object is to establish common international standards for regulating or improving the regulation of the international trade in conventional arms as well as prevent and eradicate the illicit trade in arms and prevent their diversion. It aims to contribute to international and regional peace, security and stability as well as reduce human suffering. Furthermore, it aims to promote cooperation, transparency and responsible action by its states parties, thereby building confidence.

The ATT entered into force in December 2014. As of March 2019, 100 states have adhered to the ATT and 35 states have signed but not ratified the treaty. Four years after its entry into force, it is worth asking how the ATT makes a difference and how its impact can be strengthened. One major part of the response to this question is how states parties decide which arms transfers they authorize. Tracking states parties' implementation of the ATT's provisions provides relevant insights.

This Geneva Paper sheds light on treaty implementation of the provisions on prohibitions and export assessment, namely Articles 6 and 7 of the ATT (see Annex for the treaty text). This paper does not survey transfer decisions to assess compliance with the treaty's provisions. Rather, this study examines how states implement their ATT obligations by looking at national legal regimes, policies, and practice that serve as the basis for deciding whether or not to authorize arms transfers.

This paper analyses all 58 publicly available initial reports of the ATT states parties¹ as well as 20 selected states parties' national laws and policies.² The analysis was complemented by questionnaires and interviews with state representatives.³ Based on the survey of all publicly available initial reports and the sample of selected states, this study extrapolates central tendencies of ATT implementation by states parties. The sample selection and survey of reports indeed allow for the generalization of identified tendencies as applying to the entire set of all ATT states parties.⁴

Section II of this paper discusses the relevant treaty provisions as well as interpretation challenges and existing implementation guidance. Section III reports tendencies regarding states parties implementation of Articles 6 and 7 of the ATT. Section IV deduces implications of the findings for the treaty regime and states parties. It also provides policy recommendations to support the regime's further development and to strengthen state implementation, in light of the ATT's aim to establish common international standards for regulating arms trade, fostering cooperation and transparency, as well as improving existing national regulations.

II. Treaty Obligations

A. Lex Lata

States parties to the ATT are bound under international law to implement and comply with the Treaty's provisions. A failure to do so triggers states' international responsibility, allowing harmed states to request reparation and conduct retorsion.⁵ The ATT lays out various obligations, thereby establishing common international standards for regulating the international trade in conventional weapons. The fundamental provision pertaining to domestic implementation is Article 5: states parties are obliged to establish and maintain a national control system, including a national control list, to give effect to their treaty obligations.

Articles 6 and 7 of the ATT represent the heart of the treaty as they concern standards for transfer and export authorizations. Article 6 establishes prohibitions on international arms transfers; namely exports, imports, transits, transshipments and brokering of conventional arms, ammunition and parts and components (hereafter: 'arms' or 'weapons'). Article 6(1) prohibits the authorization of arms transfers that would violate legally binding measures established by the UN Security Council, notably arms embargoes. Article 6(2) forbids states to authorize arms transfers that would violate the states' obligations under other international agreements, such as the 1997 Anti-Personnel Mine Ban Convention or 2008 Convention on Cluster Munitions. Article 6(3) proscribes states parties' authorization of arms transfers when they know that the arms or items would be used to commit genocide, crimes against humanity or certain war crimes.

Article 7(1) establishes criteria for states to assess before they authorize an export of arms. First, authorities need to assess the potential that the weapons or items in question would either contribute to, or undermine, peace and security. They must also evaluate if the arms could be used to commit or facilitate (i) a serious violation of international humanitarian law, (ii) a serious violation of international human rights law, (iii) an act of terrorism, or (iv) an act of transnational organized crime. Second, risk mitigation measures must be considered. Third, according to Article 7(3), the state shall not authorize the export when there is an 'overriding' risk of the negative consequences. The authorities shall also take into account the risk of serious acts of gender-based violence or serious acts of violence against women and children, per Article 7(4).

Furthermore, all export authorizations must be detailed and issued prior to export (Article 7(5)). The exporting state must make available all information on the exports to importing and transiting states (Article 7(6)). Exporting states are also called upon to reassess authorizations if new information on the assessed risks becomes available (Article 7(7)). The ATT's provision

on diversion (Article 11) calls upon states parties to also assess the risk of diversion before authorizing transfers.

Finally, the object and purpose of the ATT enshrined in Article 1 and the treaty's preamble and principles are pertinent regarding implementation of Articles 6 and 7 as they guide their interpretation. Interpretation, application and implementation as well as arms transfer decisions are left to states parties within the realm of their international legal obligations.

B. Interpretation Challenges

Challenges to the interpretation of Articles 6 and 7 of the ATT may lead to difficulties in implementation and application.⁶ Article 6 contains very few aspects that are legally ambiguous. The major issue regarding interpretation is the level of 'knowledge' that is required under Article 6(3) for a state to be prohibited from authorizing a transfer. A restrictive interpretation is that there needs to be actual knowledge of the future commission of international crimes. Another interpretation is that there needs to be constructive knowledge, which means that the State knows or should know that international crimes would be committed.⁷

Article 7, on the other hand, contains a number of ambiguous legal terms, some of which have been clarified by academic or policy-oriented work. Although Article 7 was deliberately drafted so as to have its criteria couched in legal terms, there is no legal definition of 'peace and security' in international law. The national security of an exporting or importing state, for instance, can be considered as falling within the notion of 'peace and security'. This allows states a very considerable margin of appreciation to permit potential arms exportation. Furthermore, the exact scope of 'serious violations of international human rights law' has not been settled.⁸

The most contentious notion, however, is the term 'overriding risk' in Article 7(3). The literal interpretation of this term is that an arms export cannot be authorized if its negative consequences specified in Article 7(1) outweigh its contribution to peace and security. If the latter outweigh the former, the export can be authorized. Switzerland, however, has stated that it interprets the meaning of 'overriding risk' in such a way that the negative consequences of Article 7(1) are more likely to materialize than not.⁹ New Zealand's interpretation of Article 7(3) holds that no authorizations are allowed when there is a 'substantial' risk of any of the negative consequences.¹⁰ Official statements of interpretation concerning the term 'overriding risk' remain exceptions, however.

Finally, serious acts of 'gender-based violence' and 'violence against women and children' are not legally defined terms. Since this form of violence only needs to be taken into account according to Article 7(4), the respective violence is only subject to the previous paragraphs of Article 7

when it constitutes a serious violation of international humanitarian law or international human rights law.

C. Implementation Guidance

Various documents and reports offer guidance for ATT implementation. So far, the ATT's Conference of States Parties has adopted few tools and guidelines. Regarding implementation of Articles 6 and 7, the fourth Conference of States Parties (CSP4) in August 2018 adopted 'Possible voluntary guiding and supporting elements in implementing the obligations under Article 6(1)' and a 'List of possible reference documents to be considered by States Parties in conducting a risk assessment under Article 7.'¹¹ It is noteworthy that these documents are not legally binding. States parties therefore have full discretion over their application.

Unofficial implementation guidance can be found from a host of sources. The edited volume 'The Arms Trade Treaty – A Practical Guide to National Implementation'¹² explains how the ATT, including Articles 6 and 7, can be implemented at the national level. Similarly, Saferworld and other organizations' work suggest which measures should be taken to comply with a state party's treaty obligations.¹³ Specifically pertaining to Articles 6 and 7, the International Committee of the Red Cross (ICRC) offers guidance on how to implement the ATT criteria on international humanitarian law and international human rights law,¹⁴ whereas Amnesty International focuses on the protection of human rights.¹⁵ Control Arms published a guide for implementation pertaining to gender-based violence.¹⁶

For a complete database on useful resources for implementation, see the 'Document Database' established by the Stockholm International Peace Research Institute (SIPRI) in cooperation with the United Nations Office for Disarmament Affairs through its Regional Centre for Peace and Disarmament in Africa (UNREC) and United Nations Regional Centre for Peace, Disarmament and Development in Latin America and the Caribbean (UNLIREC).¹⁷

III. Current Implementation

A. General Findings

In general, ATT states parties apply domestic legislation, regulations and policies as the basis for arms transfer assessments and decisions. This is in line with dualist legal systems of international law, which requires that international treaties must be appropriately incorporated into domestic legal framework so as to have legal effects at the domestic level. Far fewer states directly apply the ATT's criteria contained in Articles 6 and 7 in line with monist legal systems, which allows international law to have direct legal effects at the national level.

As of March 2019, the ATT Secretariat has received an initial report from 69 states out of the 100 states parties on their measures to implement the treaty, including national laws, national control lists and other regulations and administrative measures.¹⁸ Surveying all 58 publicly available initial reports submitted as of March 2019, only nine states parties report that they had amended or planned to amend their national legislation, regulations and policies following their adherence to the ATT.¹⁹ The ATT has led to additional legal and policy developments at the national level, however this mostly applied to states that did not previously have any specific legislation or control authorities on international arms transfers prior to treaty adherence.²⁰

Few states parties had adjusted their domestic framework related to Articles 6 and 7 because many states, notably European exporting states parties, concluded that their legislation and state practice was already in conformity with the ATT prior to their adherence. Member states of the European Union (EU) apply the EU Common Position Defining Common Rules Governing Control of Exports of Military Technology and Equipment (EU Common Position),²¹ which they understand as appropriately implementing the ATT provisions on prohibitions and export assessment.²² New Zealand - more of a general exception - integrated all of the ATT export criteria directly into its national legislation. States parties with only occasional trans-border movements of conventional weapons needed minimal adjustments to their legislation to comply with Article 6.

In cases where states directly apply the ATT criteria as the basis for their arms transfer assessment and in cases where states implement the ATT criteria via related but not identical national criteria (see below), interviews with state officials and answers to questionnaires did not allow a robust conclusion as to how exactly these are applied in practice. Effective implementation of Articles 6 and 7 in these cases can only be verified with access to confidential information on states' internal processes or extensive case studies on arms transfer decisions that are beyond the scope of this paper.²³ Assessments of states parties' ATT compliance regarding specific cases and states are published by the ATT Monitor.²⁴

B. Overarching Prohibitions

A general tendency regarding the prohibitions under Article 6 is that states' domestic legal frameworks mostly do not contain specific criteria explicitly restating the ATT prohibitions as such. States generally prevent arms transfers subject to embargoes (Article 6(1)) by national sanctions-specific legislation, such as sanctions acts, as well as sanctions lists and sanctions-related administrative measures. Many states avoid authorizing arms transfers prohibited by international agreements to which they are a party (Article 6(2)) through national legislation - specifically adopted to implement those agreements - that outlaws such transfers. Often, such national legislation is applied through sanctions-related measures and export controls.

The prohibitions regarding genocide, crimes against humanity and war crimes are mostly implemented through national export criteria regarding serious violations of international humanitarian law and international human rights law similar to those in Article 7(1)(b). This fulfils Article 6(3), as genocide, crimes against humanity and war crimes are clearly covered by the broader notions of serious violations of international humanitarian law and international human rights law. States generally do not conduct standard risk assessments of arms transits, transshipments and brokering. However, even a limited assessment should normally be sufficient to indicate a possible violation of Article 6 and trigger a more thorough examination.

C. Peace and Security

There are a large variety of criteria at the national level implementing the obligation to assess the potential that an export would contribute to or undermine peace and security (Article 7(1)(a)). Moreover, few national laws or publicly accessible guidelines specify the terms and their measurement. This reflects the broad, legally undefined term 'peace and security'.

States' national regulations often-times contain 'international' and 'regional' security and stability as export criteria. Yet states generally do not refer to the United Nation Security Council's designations of situations as threats to 'international peace and security'. Many states assess whether or not a country of destination is involved in an armed conflict, while some states categorically exclude any transfers to states in conflict or to conflict zones. States also examine if there are any identifiable trends or potential future events that might heighten tensions or lead to aggressive actions. Similarly, states assess if an export would lead to destabilizing accumulations of weapons in a region. Likewise, at least one state tests whether an export would introduce a new capability into a region or internal security situation. This particular state evaluates whether the export would significantly enhance capabilities already employed and, if so, how it would materially affect an already unstable

situation. Some states also take into account whether the country of destination is committed to peace and reconciliation processes.

‘National’ security is a recurrent factor in national legislation. When assessing an export, states look first and foremost at whether it would be detrimental to their own national security. In line with the EU Common Position, many states assess whether the arms would be used against their own forces. States also apply the logic of national security more widely. National security concerns include the security of, and relations with, allies and partners. Although ‘human’ security is a form of ‘peace and security’, very few states use this as a reason for denying arms exports.

Interestingly, many states do explicitly consider positive ramifications of exports with regard to peace and security. Some states take into account whether arms would be used in multinational peace operations, thereby supporting international security. At least two states make an exception to their prohibition on exporting weapons to conflict zones if the weapons would be used to fight terrorism or would contribute to other significant security interests.

The core push-factor in relation to peace and security, however, is arms exports’ ramifications for national defence industries. At least two states policies’ prohibit arms exports unless a special foreign policy or security policy interest exists. Acceptable interests include the maintenance of an appropriate national defence industry. Another state’s policy uses the same logic but in reversed terms; unless there are reasons for denying an export, it must be authorized to ensure the maintenance of national defence capacities. Most states’ legislation and policies, however, simply call for the export’s ramifications on the national defence industry to be taken into account in the export licensing process.

D. Serious Violations of IHL and IHRL

The ATT criteria on serious violations of international humanitarian law (Article 7(1)(b)(i)) – which cover war crimes – are often similar or nearly identical at national level. Many exporting states assess the destination state’s general respect of international humanitarian law. Few states refuse any exports to states that are involved in armed conflicts which potentially could serve as a precautionary measure to prevent violations of international humanitarian law. It is noteworthy, however, that in these cases transfers to allies and major security partners that are involved in armed conflicts are typically authorized. While this practice could lead to export authorizations in violation of Article 7(1)(b)(i), state representatives confirmed in interviews that such exceptions would only be granted to allies and partners that do not commit war crimes. Similarly, at least one state that prohibits exports to states in armed conflict nonetheless allows exports to states that are involved in an armed conflict extra-territorially.

Although this is a questionable application of international humanitarian law, this does not necessarily violate Article 7 as long as the weapons' potential use for serious violations of international humanitarian law has undergone an assessment.

In addition to assessing the destination state's general respect for international humanitarian law, most states parties explicitly deny export licenses when the weapons would be used to commit serious violations of international humanitarian law. This would exclude, however, potential cases in which weapons are used to facilitate war crimes, such as the use of small arms to gather individuals together following which they are subjected to torture.²⁵ At least one state's legislation is limited to denying the export of arms that would be used against the civilian population. Arguably, such a formulation does not cover exports that would be used to cause unnecessary suffering, kill or wound combatants who have surrendered or are otherwise *hors de combat*, or to attack military medical personnel, for instance. This state, however, may deny such transfers under its criterion that calls for the assessment of the destination state's general respect of international law, which includes any violations of international humanitarian law. Some states also assess whether child soldiers are being used in conflicts.

States' implementation of the ATT's criteria on serious violations of international human rights law (Article 7(1)(b)(ii)) resembles their implementation of the criteria on serious violations of international humanitarian law. Many states assess a country of destination's general human rights record. Few states categorically deny arms transfers to countries that violate human rights in a systematic and widespread manner. The majority, however, deny exports where the weapons in question are likely to be used to commit human rights violations. In this context, particular attention is given to exports of small arms and light weapons because they can more easily be used for violating human rights. Again, states' legislation and policies do not explicitly require the assessment of the potential that weapons could facilitate the commission of serious violations of international human rights law.²⁶

The EU Common Position lists in its criterion 2 a number of elements of internal repression - such as torture and other forms of cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions - that it considers cause for an arms export's denial. This very specific and thorough list of serious violations of international human rights violations reduces uncertainties regarding the interpretation and applicability of human rights law in the assessment process.

E. Terrorism, Transnational Organized Crime and Gender-Based Violence

At the national level, few states have explicit criteria on terrorism (Article 7(1)(b)(iii)), transnational organized crime (Article 7(1)(b)(iv)) and gender-based violence (Article 7(4)). EU member states often-times refer to the EU Common Position's criterion 6 on terrorism and international organized crime. However, the EU Common Position requires only that these factors, i.e. the record of the buyer country with regard to support and encouragement of terrorism and international organized crime, be taken into account. There is no mandatory denial as in the ATT, where there is an overriding risk of the weapons being used to commit or facilitate acts of terrorism or transnational organized crime in contravention of international agreements to which the exporting state is a party. This implies that EU member states need to apply the EU Common Position's criterion 6 according to the ATT's obligation set out in Article 7 - or based on national legislation, regulations or policies directly implementing Article 7(1)(b)(iii) and (iv).

Some states assess the potential contribution to terrorism during their larger assessment of an export's impact on 'peace and security'. Other states have argued that their exports are sent to governmental forces, thus the risk of exporting weapons that would be used for terrorist acts is minimal. In this context, EU member states in particular assess a country of destination's general attitude towards terrorism. At least one state does not directly assess the potential use of weapons for terrorist acts, but does so indirectly during their assessment of an export's potential of diversion.

Similarly, states rarely have explicit national criteria on transnational organized crime. In this context, at least one state also assesses the importance of gun-related deaths in the country of destination. Another state does not assess the potential use of weapons for transnational organized crime, because it deems its requirement for import authorizations issued by the importing state a sufficient preventive measure. EU member states assess whether the recipient country supports or encourages international organized crime.

States also rarely have explicit export criteria on gender-based violence and violence against women and children. These criteria are often met when assessing export impact on human rights and international humanitarian law. Given that gender-based violence is generally perceived as a broader concept than violence that constitutes serious violations of international human rights law and international humanitarian law, this means that states arguably only take a limited spectrum of gender-based violence into account. Some states, however, have experts on gender-based violence at their Ministry of Foreign Affairs or Embassies that provide information and advice on any types of gender-based violence.

F. Additional Criteria

ATT states parties also consider other consequences of arms exports beyond those specified in Article 7.²⁷ In line with Article 11 of the ATT, most states assess the risk of arms' diversion before authorizing the given exports, including whether an importing state had previously respected end-user assurances.²⁸ Many states also assess whether the procurement of weapons could have significant economic costs detrimental for the social and economic development of an importing country.

Foreign policy interests are often-times also taken into account. This may be used as a catch-all criterion to be able to deny any export that would have negative ramifications on the international relations of a state or contravene a state's international efforts. Similarly, at least one state has considerable leeway to deny an export license based on 'other significant reasons'. Many states also assess if an arms export would violate their international obligations. This is a means of ensuring that they do not infringe on any legally binding commitments, including the ATT's prohibitions and export criteria. While some states put eased export conditions into place for allies and partners of export control regimes,²⁹ few states also take into account the allies and partners' licensing decisions regarding similar exports.

Some states also have introduced criteria that favour arms exports. Specific interests vis-à-vis strategic foreign policy partners, friendly states and allies as well as general foreign policy considerations are criteria that may give states reasons to decline or permit exports. Economic, financial and commercial interests, however, are clear push-factors for arms exports. Although few states have explicit criteria stating that these factors need to be taken into account, arguably all exporting states consider them to some degree during their licensing processes.

States that generally do not export arms often prohibit arms exports writ large unless they fall within narrowly defined exceptions. These exceptions can include exports contributing to international cooperation for humanitarian purposes or the temporary export of firearms by private citizens for sporting events. Many states that generally do not export major conventional weapons have specific criteria for the export of small arms and light weapons.³⁰ As of March 2019, some of these states are considering the adoption of new legislation to also regulate potential exports of any type of conventional weaponry.

G. Threshold for Export Denial

Many ATT states parties have absolute thresholds for denying arms export authorizations in their national framework. Indeed, national legislation and policies proscribe exportation when there is a ‘clear’, ‘high’ or ‘substantial’ risk of pre-defined negative consequences. Similarly, at least one state has ‘reasonable suspicion’ as a - somewhat lower - threshold for denial, whereas another must ‘avoid’ the authorizations of exports leading to negative consequences. Many states also ‘take into account’, ‘consider’ or ‘assess’ export criteria. States rarely specify the exact meaning and measurement of these thresholds, however.

Notably the legal effect of ‘taking into account’, ‘considering’ and ‘assessing’ national criteria is vague. This has two consequences: first, when states interpret ‘overriding risk’ as an absolute threshold, i.e. ‘clear’, ‘high’ or ‘substantial’ risk, they need to apply this threshold to all criteria of Article 7(1). As discussed above, however, some states parties simply ‘take into account’, ‘consider’ and ‘assess’ certain ATT criteria, notably the risk of weapons’ use for acts of terrorism and transnational organized crime. If ‘overriding risk’ is interpreted as an absolute threshold, this is an insufficient implementation - or at the very least an inconsistent application - of the ATT.

Second, given their inherent flexibility, such thresholds allow for a balancing of negative consequences of arms exports with positive consequences, even when national criteria do not explicitly mention incentives for exports such as national security or economic interests. While this is not a violation of the ATT *per se*, it is an application of ‘overriding risk’ in its literal sense as specified in Article 7(3). How the balancing is actually carried out in these cases, including the specific weight of different factors in the final decision, does not clearly result from national legislation and policies, however. Interviews and questionnaires also did not allow more insight into this process.

H. Risk Mitigation Measures, Timely Authorization, Re-Assessment and Information-sharing

Requiring end-user certificates are a common risk-mitigation (Article 7(2)) practice by ATT states parties.³¹ This may indirectly prevent weapons transfers leading to negative consequences as it prevents diversion to unauthorized end-users. Some states verify that the weapons have arrived at their intended destination, and a few states conduct post-shipment verification of exported weapons. Although these are preventive measures executed after the export of weapons has occurred, they arguably facilitate a positive export decision. They do so by mitigating risk that otherwise would not be acceptable during the licensing stage.

A few states explicitly mention in the end-user certificates that the weapons cannot be used for committing certain violations of international human rights and humanitarian law. Other than that, states rarely use measures specifically and directly addressed to mitigate risks listed in Article 7, such as Security Sector Reform or training in international humanitarian law, due to the limited resources typically available.³²

States generally issue detailed authorizations prior to the delivery of arms (Article 7(5)).³³ This is increasingly an electronic process, and states usually have the option to suspend previously authorized exports (Article 7(7)).³⁴ Most exporting states parties can share relevant information on authorizations with importing and transiting states (Article 7(6)).³⁵ Many states also allow a state of final destination to request information concerning pending or actual export authorization in line with Article 8(3).³⁶

IV. Implications and Policy Recommendations

A. Information-sharing and Due Diligence Regarding Prohibitions

States parties that export conventional arms generally have domestic legislation, regulations and policies in place that prevent them from authorizing arms transfers in violation of Article 6 of the ATT. States that maintain a general prohibition on transnational transfers of conventional weapons and do not impose mandatory licensing procedures do not risk violating Article 6 because they do not allow any transfers at all. States generally comply with arms embargoes (Article 6(1)) and transfer prohibitions imposed by other agreements (Article 6(2)) through means they had established prior to the ATT.³⁷ The essential question regarding the ATT's prohibitions thus concerns measures that strengthen the application of Article 6(3).

States' responsibility regarding Article 6(3) is triggered when they have 'knowledge at the time of authorization' that the arms would be used to commit genocide, crimes against humanity and war crimes. Increased knowledge of general risks and potential future use of transferred weapons can thus bolster states' application of ATT prohibitions. While a list of general sources was adopted by the ATT Conference of States Parties in 2018,³⁸ it is important that the agencies responsible for authorizing arms transfers receive the relevant information. An ATT internal information exchange mechanism could reinforce awareness and foster confidence among states parties.³⁹ Information exchange could notably allow importing and transiting states to flag problems and concerns specific to their own region or domestic situation. This would provide intelligence that exporting states might not otherwise obtain through existing information-gathering or information exchange mechanisms, such as those of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies and the EU Council Working Party on Conventional Arms Exports (COARM).

In addition, international commissions of inquiry, fact-finding missions, and other investigations into human rights violations could be encouraged or even mandated to inquire and report on the types and provenance of weapons used to commit international crimes. Human rights bodies could also be requested to provide specific information necessary for triggering Article 6(3).⁴⁰ This could be demanded notably by states that are members of the Human Rights Council and parties to human rights treaties. The President of the ATT Conference of States Parties - or the ATT Secretariat - could be mandated to liaise with these institutions. Alternatively, a state or non-governmental organization could volunteer to monitor and share relevant information arising from human rights bodies and mechanisms.

ATT states parties could also agree on a common interpretative statement that Article 6(3) implies a due diligence obligation for states to actively seek information to be able to identify arms that would be used in the commission of genocide, crimes against humanity and war crimes. Such a due diligence obligation would be in line with the ATT's object and purpose.

B. Clarity regarding Export Assessment

There is a large spectrum of different national export criteria implementing Article 7 of the ATT. Generally, states parties' criteria are in line with those of the ATT. Publicly accessible documents, questionnaires and interviews have not allowed an identification of how states concretely assess and measure the potential consequences of arms transfers, however.

The ATT's criterion on 'peace and security' in particular takes many different forms in states parties' national frameworks. A detailed typology of what states classify as international, regional, national and human security would allow for a better understanding of what states actually do take into account – and what they do not. This would be particularly useful in understanding what factors states view as positively contributing to peace and security. The meaning and application of national criteria related to the maintenance of defence industry also remains vague. Greater clarity could contribute to the identification of common standards, with the added benefit of increased transparency.

States generally implement the ATT criteria regarding serious violations of international humanitarian law and international human rights law in a comprehensive and coherent manner, mostly with national criteria similar to those of Article 7. States that in principle exclude any arms exports to states engaged in armed conflicts or those that violate human rights in a widespread and systematic manner, however, need to have measures to ensure that any exceptions to this, such as if arms transfers support the fight against terrorism, do not violate the respective export criteria under the ATT. In particular, arms transfers to armed non-state actors have a high-risk potential. Such transfers generally entail a high risk of subsequent diversion, which ultimately could lead to serious violations of international humanitarian law and international human rights law. Moreover, states need to ensure that short-term assessments, such as favouring arms transfers to support the fight against terrorism, are compatible with the ATT criteria in the long-term perspective as well.

As discussed, states often do not have explicit national export criteria on transnational organized crime, terrorism or gender-based violence. Such states could share how they fulfil their ATT obligations in this area without such criteria, as a comparison could lead to the identification of standard practices among ATT states parties. Requiring import authorizations for exports to individuals, for instance, may be a cornerstone for such a

practice on transnational organized crime. The same is true for actively assessing the importing state's record regarding its support for terrorism as well as the risk of diversion of arms to armed non-state actors.

States parties' national implementation of the ATT's export criteria demonstrates that these criteria are all interlinked. In practice, many states first assess the most likely reason for denial, and if this does not exclude an export, then the second most likely, and so on. While no export criterion should be inadvertently overlooked, it is also crucial that the criteria are systematically considered. The ATT Conference of States Parties could adopt guidelines on how to systematically assess risks, as they seek to promote thoroughness in export assessments and foster best practices. A potential sequence for every criterion under Article 7 could be the assessment of (1) the regional political situation; (2) the situation in the country of destination and its international relations as well as track record regarding weapons; (3) the mission and track record of the recipient unit; and (4) the function and possible use of the weapons to be exported. A matrix could describe in detail which aspects of the ATT's export criteria are to be assessed at which stage of analysis.⁴¹

C. Transparent Threshold for Export Denial

Many exporting states parties assert that they apply the ATT's 'overriding risk' in Article 7(3) as an absolute threshold, i.e. if a potential arms export results in a 'clear' or 'high' risk of the negative consequences, the authorities do not authorize the export. This, then, needs to be applied to all negative consequences listed in Article 7(1). Yet national legislation and policies established criteria overlapping with the ATT's export criteria that only need to be 'avoided', 'assessed', 'taken into account' or 'considered'. For the EU Common Position, for instance, this is the case regarding terrorism and transnational organized crime. While these thresholds may indeed lead to export denials where there is a high level of risk that negative consequences come about, their flexibility allows a considerable margin for appreciation. Accordingly, states could share the reasons for why they give different intrinsic weight to different factors and how they understand and apply national thresholds for denials that require them to 'avoid', 'assess', 'take into account' or 'consider' the negative consequences of arms exports.

ATT states parties' national legislation and policies also allow for the consideration of the positive consequences of arms exports. If 'overriding risk' is interpreted as an absolute threshold, this requires that any positive implications of an arms export considered can never outweigh negative ramifications. Not all states' national legislation and policies, however, clearly spell this out. Thus, in these cases, states actually do balance between positive and negative consequences of arms exports according to the literal meaning of 'overriding'. Arguably, given international arms

transfers' inherent push-factors (such as their support for maintaining national defence capacities, economic benefits and maintaining good bilateral relations with the importing state), even states that do not consider positive factors for exporting in their legislation and policies are very likely to do so in practice. Where states do not balance positive versus negative consequences, this may still result in the positive factors elevating the threshold for denial, i.e. pushing further the limit for denying exports by narrow interpretation and application of the negative consequences according to Article 7(1). Accordingly, states could discuss how they assess and weigh positive consequence of arms exports - including those not explicitly listed in national export criteria - and how they relate them to the negative consequences.

V. Conclusion

The ATT represents the highest possible common international standards for the regulation of the international arms trade. Yet as states and civil society disclaimed at the ATT's adoption in 2013, the ATT is a process, not an end in and of itself. Four years after its entry into force, states have implemented the treaty in diverse fashion. Few of the major exporting states have changed their legislation and policies following their adherence to the treaty. Interviews with state representatives revealed, however, that many states continue to discuss internally how they can best implement and comply with the ATT. Moreover, states parties do feel the need to justify that they assess and uphold ATT criteria for authorizing arms transfers. This confirms that the ATT process continues to promote momentum at the domestic and diplomatic level.

Yet much remains to be done. It remains unclear how exactly states apply Articles 6 and 7 in practice. A better understanding of 'peace and security' and states' application of the threshold for denial according to Article 7(3) would be useful as regards an effective treaty regime that fosters cooperation, transparency and improvements in national controls. This includes a better - and eventually a common - understanding of how exactly the negative and positive consequences enshrined in Article 7 are assessed. Increased dialogue, sharing of experiences and approaches, as well as a review of implementation and adoption of respective recommendations by the Conference of State Parties as stipulated by Article 17 of the ATT are the means to reach these ends. The same applies to the establishment of a potential ATT internal information exchange mechanism. Greater institutionalized cooperation with human rights bodies could further augment the level of knowledge concerning weapons' potential use for international crimes. For the purpose of strengthening application and enabling common standards, the Conference of State Parties could also adopt common interpretations, such as the recognition of an implicit due diligence obligation in Article 6(3).

States parties generally seem to know how to implement the ATT. To improve implementation and to ensure better compliance, however, more clarity and cooperation would be beneficial. State parties have the key to this - and they have the responsibility to achieve this by virtue of their international legal obligations. Moreover, it should be in their own interest to further develop the treaty's concepts and agree to common understandings that serve national efforts to avoid harmful flows of weapons.

Endnotes

- 1 The publicly available initial reports surveyed are from the following states: Albania, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Finland, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Mexico, Moldova, Monaco, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Panama, Paraguay, Peru, Poland, Portugal, Republic of Korea, Romania, Samoa, Serbia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Trinidad and Tobago, United Kingdom, and Uruguay.
- 2 The states assessed were Argentina, Australia, Austria, Belgium, Côte d'Ivoire, France, Germany, Japan, Republic of Korea, New Zealand, Panama, Paraguay, Peru, South Africa, Togo, Romania, Sierra Leone, Sweden, Switzerland, and United Kingdom. To best represent the practice of ATT states parties, the composition of this sample was selected based on regional representation and quantity of national arms transfers. While additional states were initially selected according to these two criteria, they were dropped from the sample due to missing data, i.e. no access to initial reports and/or no access to domestic legislation and policies.
- 3 To collect as much relevant information as possible, state representatives were assured that this study would not nominally attribute any state's answers to the questionnaires and interviews.
- 4 The sample selection of states (see n. 2) as well as the survey of the initial reports allows for the generalization of identified tendencies as applying to the entire set of all ATT states parties. Since the findings apply *stricto sensu* only to the selected states and because the information contained in the publicly available initial reports is very limited, it should be noted this generalization is an estimate with a certain margin of error. Where the initial reports allowed quantitative analysis, the results are indicated in the following footnotes: n. 27, 28, 29, 31, 33, 34, 35, 36. These results only concern export assessments: because the 58 publicly available reports comprise the information of all major exporting states, these quantitative results accurately reflect the general state practice.
- 5 See: International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001 and *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986. A potential case of international responsibility arising under the ATT is where one state party exports weapons to a non-state armed group located within the jurisdiction of another (importing) state party in violation of the ATT's prohibitions or provision on export assessment, where the non-state armed group's use of weapons results in harm to the (importing) state party.
- 6 For an excellent legal analysis and discussion of the provisions, see: Casey-Maslen, Stuart, Andrew Clapham, Gilles Giacca, and Sarah Parker. 2016. *The Arms Trade Treaty: A Commentary*. New York: Oxford University Press. See also: Da Silva, Clare and Brian Wood, eds. 2015. *Weapons and International Law: The Arms Trade Treaty*. Brussels: Larcier.
- 7 Liechtenstein, for instance, declared upon ratification of the treaty that 'knowledge' would be understood in light of the object and purpose of the treaty and according to its ordinary meaning as reliable information providing substantial grounds to believe that the arms would be used in the commission of international crimes. See: Declaration of Liechtenstein upon ratification of the ATT, 16 December 2014.
- 8 For an analysis on the meaning of 'serious violations of international human rights law', see: Karimova, Takhmina. 2014. *What amounts to a serious violation of human rights law? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*. Geneva Academy of International Humanitarian Law and Human Rights.
- 9 Declaration of Switzerland upon ratification of the ATT, 30 January 2015. For the same interpretation, see also: Declaration of Liechtenstein upon ratification of the ATT, 16 December 2014.
- 10 Declaration of New Zealand upon ratification of the ATT, 2 September 2014.
- 11 Documents Annexed to the Draft Report to the Fourth Conference of States Parties (CSP4) (ATT/CSP4.WGETI/2018/CHAIR/355/Conf.Rep) presented by the Chair of the Working Group on Effective Treaty Implementation (WGETI); retrievable at the official Arms Trade Treaty website.

- 12 Parker, Sarah, ed. 2016. *The Arms Trade Treaty - A Practical Guide to National Implementation*. Geneva: Small Arms Survey.
- 13 See e.g.: Saferworld. 2016. *Implementing the ATT - Essential Elements of an Effective Arms Transfer Control System*; Isbister, Roy and Elizabeth Kirkham. 2016. *Ensuring Effective Implementation of the Arms Trade Treaty - A National Assessment Methodology*. Saferworld; Alpers, Philip and Laura Spano. 2017. *Implementing the Arms Trade Treaty and the UNPoA - A Guide to Coordinating an Effective Arms Control System*. The Centre for Armed Violence Reduction; and Coetzee, Ben. 2014. *Arms Trade Treaty: Ratification and Implementation Guide for African States*. Institute for Security Studies.
- 14 International Committee of the Red Cross. 2016. *Arms Transfer Decisions: Applying International Humanitarian Law and International Human Rights Law Criteria - A Practical Guide*.
- 15 Amnesty International. 2015. *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights*.
- 16 Control Arms. 2018. *How to Use the Arms Trade Treaty to address Gender-Based Violence: A Practical Guide for Risk Assessment*. See also: Gerome, Rebecca. 2016. *Preventing gender-based violence through arms control - Tools and guidelines to implement the Arms Trade Treaty and the UN Programme of Action*. Reaching Critical Will.
- 17 See the web page of the Mapping ATT-relevant Cooperation and Assistance Activities Project.
- 18 For a summary analysis of the 46 publicly available initial reports submitted by 15 June 2016, see: Holtom, Paul and Rachel Stohl. 2016. *Reviewing Initial Reports on ATT Implementation - Analysis and Lessons Learned*. The Stimson Center.
- 19 Argentina, Côte d'Ivoire, El Salvador, Liberia, Panama, Paraguay, Sierra Leone, Trinidad and Tobago, and Uruguay. All these states indicated legislative or policy changes in their initial reports. It is noteworthy that the template for the initial reports did not explicitly ask if the given state had adapted or would adapt its domestic framework following its adherence to the ATT.
- 20 See indications in, e.g.: Brockmann, Kolja, Mark Bromley and Giovanna Maletta. 2018. *Promoting effective implementation of the Arms Trade Treaty: Mapping outreach and assistance in East and South East Asia*. Stockholm International Peace Research Institute (SIPRI); Bromley, Mark, Giovanna Maletta and Kolja Brockmann. 2018. *Arms transfer and SALW controls in the Middle East and North Africa: Mapping capacity-building efforts*. Stockholm International Peace Research Institute (SIPRI); and Bromley, Mark and Alfredo Malaret. 2017. *ATT-Related Activities in Latin America and the Caribbean: Identifying Gaps and Improving Coordination*. Stockholm International Peace Research Institute (SIPRI).
- 21 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment. *Official Journal of the European Union*. L335, 8 Dec. 2008. See also: Council of the European Union. 2015. *User's Guide to Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment*. General Secretariat of the Council.
- 22 The User's Guide to the EU Common Position (n. 21) was adapted in 2015 following the entry into force of the ATT, however, to incorporate the ATT's provision on gender-based violence. The EU Common Position is currently undergoing review.
- 23 In a particular case of weapons transfers to Saudi Arabia, for instance, the U.K. High Court did not find a violation of the United Kingdom's domestic regulatory framework and the EU Common Position regarding serious violations of international humanitarian law, though it did not examine compliance with the ATT. See: *THE QUEEN* on the application of *CAMPAIGN AGAINST ARMS TRADE* and *THE SECRETARY OF STATE FOR INTERNATIONAL TRADE*, (Approved Judgment of the High Court of Justice, Queen's Bench Division) CO/1306/2016 (10 July 2017). The Court of Appeal granted leave to appeal, however, on 4 May 2018, see: *THE QUEEN* on the application of *CAMPAIGN AGAINST ARMS TRADE* and *THE SECRETARY OF STATE FOR INTERNATIONAL TRADE*, (Ruling of the Court of Appeal Civil Division on Appeal from the High Court of Justice, Queen's Bench Division) T3/2017/2079 and 2079B (4 May 2018). For a discussion on how the ATT applies to the case, see: Sands, Philippe, Andrew Clapham and Blinne Ni Ghralaigh. 2015. *Legal Opinion - The Lawfulness of the Authorization by the United Kingdom of Weapons and Related Items for Export to Saudi Arabia in the Context of Saudi Arabia's Military Intervention in Yemen*. Matrix Chambers, Gray's Inn, London.
- 24 See notably: ATT Monitor. 2018. *ATT Monitor Report 2018*. Control Arms; ATT Monitor. 2016. *Dealing in Double Standards: How Arms Sales to Saudi Arabia Are Causing Human Suffering in Yemen*. Control Arms; ATT Monitor. 2015. *Arms Transfers to South Sudan*. Control Arms.

- 25 Arguably, in practice, states implicitly assess the risk of the weapons facilitating the commission of war crimes by assessing their potential use for the commission of war crimes.
- 26 Arguably, states implicitly assess this risk in practice when assessing the risk of violations being directly committed with the weapons. This is less obvious, however, when states consider the export of conventional weapons, such as battle tanks and armoured personnel carriers, that are usually not used to directly commit serious human rights violations, such as enforced disappearances and arbitrary deprivation of life, but may well facilitate them.
- 27 Twenty-seven (47 %) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that their risk assessment procedures included other criteria not mentioned in Article 7.
- 28 Fifty-one (88 %) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that their national control system foresees the assessment of the risk of diversion.
- 29 Twenty-nine (50%) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that their national control system allows exports of controlled equipment without a license or under simplified procedure under certain circumstances.
- 30 State members of the Economic Community of West African States (ECOWAS), for instance, have adopted national export criteria reflecting those of the 2006 ECOWAS Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials (ECOWAS Convention). Similarly, the 2010 Central African Convention for the Control of Small Arms and Light Weapons (Kinshasa Convention) serves as the basis for state members' national legislation on the export of small arms and light weapons.
- 31 Thirty-five (60%) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that their national risk assessment procedures included the consideration of risk mitigation measures.
- 32 Another point made during the treaty negotiations was that mitigation measures that take the form of training courses rarely have observable effects until long after a license is issued, and sometimes may not have sustainable effects at all.
- 33 Fifty (86%) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that they had measures in place to ensure that authorizations are detailed and issued prior to export.
- 34 Forty-six (79%) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that authorizations could be reassessed if new and relevant information becomes available.
- 35 Fifty-two (90%) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that their national control system allowed appropriate information about export authorizations to be made available, upon request, to the importing state party.
- 36 Forty (70%) of the 58 states that had submitted publicly available initial reports by March 2019 indicated that their national control system allowed a state of final destination to request information concerning pending or actual export authorizations.
- 37 This suggests that ATT Conference of States Parties and their Preparatory Meetings may not focus too much on these issues. Sanctions Committees and related institutions are appropriate fora for addressing issues on implementation of Article 6(1). For the implementation of Article 6(2), the specific regimes to which ATT states parties have adhered are appropriate venues for state collaboration on implementation. For an overview of these treaty regimes and their respective prohibitions, see Casey-Maslen, Stuart and Tobias Vestner. June 2019. *A Guide to International Disarmament Law*. London: Routledge.
- 38 *Op. cit.*, n. 11. While the list of sources was assembled for compliance with Article 7, it is also useful for the application of and compliance with Article 6(3).
- 39 Notably the 'General Information Exchange' of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies could be a basis for discussing a potential ATT internal information exchange mechanism. For a broader discussion, see: Vestner, Tobias. Forthcoming. *Brothers in Arms: The Arms Trade Treaty and the Wassenaar Arrangement*. Geneva Centre for Security Policy.

- 40 This is already done to a limited extent. See: Karlen, Kevin. *Ausfuhr und deren Bewertung im Vertrag über den Waffenhandel*, unpublished paper.
- 41 If applied to assessing the potential to contribute to serious violations of international humanitarian law, for instance, this could result in the following (herewith simplified) assessment: (1) is there an armed conflict between states of the region or is any international armed conflict likely to erupt? (2) is there a non-international armed conflict in the country (or likely to erupt) and how well has the country respected international humanitarian law in the past? (3) which unit will acquire the weapon, what is the unit's mission, how well is it trained in international humanitarian law and how has it respected international humanitarian law in the past? And (4) for what use is the weapon designed and is the weapon easily used to seriously violate international humanitarian law or facilitate any such violation?

Annex: Treaty Text of Articles 6 and 7 ATT

Article 6 - Prohibitions

1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if it 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.

Article 7 - Export and Export Assessment

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), 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.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.
3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.
4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms or of items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.
5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.
6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.
7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

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