

The Arms Trade Treaty – Basic Ideas and Key Principles¹

Basic Ideas

1. The ATT crystallises states existing obligations under international law

The basic principles of the ATT bear in mind the wording in the UN Programme of Action. In particular, Part II, paragraph 11 of the PoA states that at the national level, participating states undertake to:

“assess applications for export authorizations according to strict national regulations and procedures that cover all small arms and light weapons and are **consistent with the existing responsibilities of States under relevant international law...**”

Therefore, all States that have signed on to the Program of Action have undertaken to assess all export applications in consistency with their existing responsibilities under international law.

But what are these existing responsibilities?

There is a large body of international law that States have committed themselves to oblige by and many of these are applicable to any arms transfers that a state might authorise. The difficulty is for states to know what those obligations are and to systematically apply them to arms transfers.

The main objective of the ATT is to “crystallize” these *existing* obligations into one framework convention.

2. The ATT is a Framework Treaty

The objective of the Treaty is to first provide a legal framework. Important other issues – such as brokering, end-use certification etc - can be addressed later and added to the treaty in the form of protocols which over time would have a series of instruments that would form a comprehensive system of arms controls.

Why a framework treaty?

1. **A sense of urgency:** the international community urgently needs to agree a set of common **core** principles to regulate and control the arms trade.
2. **Important to start within the realm of the possible:** rather than attempting to regulate all aspects of the arms trade in one single instrument, a Framework contemplates the elaboration of a binding regime in a step-by-step manner,

¹ These basic ideas and principles have been drafted on behalf of NGOs by a group of international lawyers and illustrate what the proposed treaty could look like.

starting first with identifying core principles that reflect **existing** international legal commitments.

3. **Other key issues can be added over time:** important related issues, such as brokering, licensed production and end-use certification can be addressed in protocols to the treaty with a view to developing, over time, an integrated legal regime related to the arms trade.
4. **Detailed technical issues might bog down the process:** these issues can be addressed by means of subsequent instruments rather than encumbering the framework text.
5. **Provides States have flexibility:** once a State has acceded to the Framework treaty, it can decide which additional protocols it wishes to ratify and can do so in a progressive manner.

The use of framework treaties is common. Other examples include:

- *The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 1980 has four key protocols dealing with specific weapons
- *The United Nations Convention Against Transnational Crime* has 3 protocols, one of which is the Protocol Against the Illicit Manufacturing and Trafficking in Arms (not yet in force)

The objective of the Treaty is to create a legal framework to which other important issues can be addressed in the form of protocols over time to form a comprehensive system of arms controls.

3. The current draft of the ATT is a 'Process' Text

This is a “process draft” which sets out **key principles**. It is not meant to be a viewed as a final text of a treaty. The idea was to come up with a process document which could move the discussion around an Arms Trade Treaty forward. As a consequence, the exact wording of the text is left open for States to negotiate with the focus now being on gaining support for the key principles.

This is a “process draft” setting out key principles. It is not meant to be a viewed as a final text. Support should be for the key principles, not acceptance of the exact language of the text.

4. The ATT has no regional bias

The ATT is based on existing and emerging obligations under international law. It is therefore, by definition, an international document which is not biased to one particular region of the world. It is not based upon regional codes of conduct or other norms which have been developed to suit a particular region – its principles apply universally to all states.

The ATT is based on international law and therefore applies equally to all states – it has no regional bias.

Key principles

The basic principle of the ATT, set out in **Article 1**, is that States must authorise all international arms transfers by the issuing of licences.

There are three main criteria that States must comply with when authorising an arms transfer:

Article 2: Existing limitations: UN Security Council resolutions, treaty obligations, customary international law, international humanitarian law

Article 3: Limitations based on the use or likely use that would be made of the weapon by the recipient – ie. cannot be used in breach of use of force, or to commit genocide, crimes against humanity, and serious breaches of human rights

Article 4: Other factors to be considered including whether the arms will be used in violent crimes, will adversely affect regional security, or adversely affect sustainable development

ARTICLE 1

“Contracting Parties shall adopt and apply in accordance with their national laws and procedures a requirement that all international arms transfers be authorised by the issuing of licences.”

Basic obligation: Contracting Parties are to adopt national licensing mechanisms (laws) for the authorization of all international transfers of arms.

National licensing laws need to include:

1. Procedural criteria - There should be minimum procedural criteria included in these licensing laws to ensure that they function properly. i.e. each application for an authorization should be reviewed and licensed individually. This is addressed further in Article 5.
2. Substantive criteria - The actual granting of licenses should be assessed within the substantive criteria set out in Articles 2, 3 and 4.

ARTICLE 2 – EXPRESS LIMITATIONS

“A Contracting Party shall not authorise international transfers of arms which would violate its obligations under international law. These obligations include those arising under or pursuant to:

- a) the Charter of the United Nations, including decisions of the United Nations Security Council;*
- b) international treaties by which that Contracting Party is bound;*
- c) the prohibition on the use of arms that are incapable of distinguishing between combatants and civilians or are of a nature to cause superfluous injury or unnecessary suffering;*
- d) customary international law.”*

- **Article 2a - obligations “arising under the Charter of the United Nations”:**

This includes decisions of the United Nations Security Council such as those imposing arms embargoes (sanctions).

Sanctions

The UN Security Council can resort to mandatory sanctions as an enforcement tool when peace has been threatened and diplomatic efforts have failed. The range of sanctions has included comprehensive economic and trade sanctions and/or more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions. All UN members must comply with these sanctions.

- **Article 2b. obligations “arising under or pursuant to other international treaties by which the particular Contracting Party is bound”:**

This includes:

- Embargoes (“sanctions”) adopted by other international and regional bodies (i.e. the EU imposes sanctions that are binding on all EU Member states)
- Prohibitions on arms transfers that arise in particular treaties which a state is party to, such as:
 - 1980 Convention on the Use of Certain Conventional Weapons Which May Be Considered Excessively Injurious and the protocols
 - 1997 Anti-personnel Mines Convention
- **Article 2c: Obligations arising from “the prohibition on the use of arms that are incapable of distinguishing between combatants and civilians or are of a nature to cause superfluous injury or unnecessary suffering”:**

This prohibition is a universally accepted principle of international humanitarian law (IHL). IHL is embodied in two key principles:

- Prohibition on weapons or methods of warfare that cause unnecessary losses or excessive suffering
- Obligation to distinguish between combatants and civilians and prohibition on indiscriminate attacks

These principles, and other areas of IHL are considered customary international law. There is an obligation on all states to comply international humanitarian law.

IHL also includes controls on the use of particular weapons, including for example:

- St. Petersburg Declaration, 1869, banned exploding projectiles
- 1925 Protocol prohibiting the use of poisonous gas
- 1972 Biological Weapons convention
- 1980 Convention on the Use of Certain Conventional Weapons which are excessively injurious
- 1993 Chemical Weapons Convention
- The Ottawa Convention on Landmines prohibits the use, stockpiling, production and transfer of anti-personnel land mines

Some of these conventions prohibit the use **and** the transfer of the weapons (ie. Protocol to the 1980 Conventional Weapons Convention on booby traps and blinding lasers, landmines convention).

Other treaties may refer only to the **use** of a weapon, but this should not be equated with freedom to transfer the weapons. A prohibition under IHL on the **use** of a particular weapon, logically includes a corresponding prohibition on the **transfer** of those weapons. Thus article 2 c) would cover those weapons in specific treaties that are banned but the question of transfer has not been addressed

- **Article 2d. Obligations under “Customary international law”**

Examples: Arms transfers from one State to persons in the territory of another State, without the latter State’s consent may amount to a violation of obligations under customary international law relating to the threat or use of force.

Rules governing the resort to force are a central element in international law. There is a general prohibition on the use of force by States under both customary law and under the United Nations Charter (Article 2(4)). The only exception is in self-defence (Article 51 of the United Nations Charter) or with agreement of the Security Council. All States are bound by these laws.

ARTICLE 3 - LIMITATIONS BASED ON USE

“A Contracting Party shall not authorise international transfers of arms in circumstances in which it has knowledge or ought reasonably to have knowledge that transfers of arms of the kind under consideration are likely to be:

- a) used in breach of the United Nations Charter or corresponding rules of customary international law, in particular those on the prohibition on the threat or use of force in international relations;*
- b) used in the commission of serious violations of human rights;*
- c) used in the commission of serious violations of international humanitarian law applicable in international or non-international armed conflict;*
- d) used in the commission of genocide or crimes against humanity;*
- e) diverted and used in the commission of any of the acts referred to in the preceding sub-paragraphs of this Article.”*

Article 3 addresses limitations on the freedom to transfer arms based on the **use or likely use** that would be made of the arms by the recipient.

The responsibility of the Contracting Party of arms export to prohibit arms transfers under this principle flows from State Responsibility Principles and the obligation not to participate in the internationally wrongful acts of another State.

This means if a state knows or should know that an importing State will use weapons to commit an international wrong, they cannot transfer those weapons. If they do transfer those weapons they can be internationally responsible

Article 16 of the U.N. International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts* (adopted in 2001) codified this obligation. It states:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) the act would be internationally wrongful if committed by that State.”

There is a responsibility on a State to not knowingly aid or assist another State in the commission of any unlawful act. This principle of law is now widely accepted.

Therefore, where a State has knowledge that weapons would be or are likely to be used in breach of a fundamental principle of international law, the responsibility of the authorising State is to prohibit the proposed transfer.

- **Article 3a. Breaches of the UN Charter and customary law rules relating to the use of force:**

Was covered in the discussion of article 2.

- **Article 3b. Violations of human rights:**

This includes, for example:

- the non-derogable provisions of the 1966 International Covenant on Civil and Political Rights (i.e the Right to Life)
- the non-derogable provisions in regional human rights instruments such the 1980 African Charter on Human and Peoples' Rights
- 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
- **Article 3c and 3d - Crimes against Humanity and Genocide:**

A state that transfers weapons to a state where it knows or ought to know that they will be used to carry out genocide or crimes against humanity, may be internationally responsible for genocide as is the State where the weapons were transferred to and used in the commission of the crime of genocide.

ARTICLE 4: OTHER CONSIDERATIONS

"In considering whether any international transfer of arms may be authorised in accordance with Article 1 of this Convention, Contracting Parties shall take into account whether transfers of arms of the kind under consideration are likely to:

- a. be used for or to facilitate the commission of violent crimes;*
- b. adversely affect regional security;*
- c. adversely affect sustainable development; or*
- d. be diverted and used in a manner contrary to the preceding subparagraphs*
and in such circumstances there shall be a presumption against authorisation."

This article reflects the growing body of international instruments which identify circumstances that must be taken into account when assessing licensing applications. These elements are identified expressly in the Programme of Action. Article 4 does not prohibit the authorisation of transfers but requires states to take into account the possible adverse effects of the transfers on regional security or sustainable development or whether the weapons will be used for violent crimes. Where such circumstances are apparent, Article 4 establishes a presumption against authorisation.

PART III: PROCEDURAL SECTION OF THE ATT

It addresses the mechanisms to be adopted at the municipal and international levels to facilitate the effective implementation and application of Articles 2,3, and 4 the substantive provisions of the convention

Article 5

This requires the establishment of national law as are necessary to ensure that the licensing authorization provisions of the treaty will be effectively applied. It contemplates that minimum standards for these laws will be set out in an Annex to

the Convention (to be drafted). The Annex would address issues such as the need for a transaction-by-transaction licensing mechanism, minimum disclosure requirements by applicants for licences, mechanisms for parliamentary scrutiny, etc.

Article 6

The overall objective of this article is increased transparency in the transfer of arms. It requires the establishment of an International Registry of International Arms Transfers. Parties shall submit to the International Registry an annual report on arms transfers from or through their territory or subject to their authorization.

Article 7 – Definitions

This article provides definitions for the types of arms covered and defines 'international transfers'.

The definition included in the text of the ATT is focused on small arms and light weapons and uses the definition that was used in the 1997 UN Report of the Panel of Government Experts on Small Arms.

The use of this definition is in recognition of working within the framework of the UN Programme of Action on Small Arms and the fact that the majority of the political debate and willingness to address these issues is currently focused on small arms and light weapons. This is a pragmatic decision and does not detract from the belief that the principles in the ATT apply to all conventional weapons.

It is possible that an ATT could subsequently be broadened in scope to include all conventional weapons. Legally, this is a relatively straightforward procedure, whereby a subsequent protocol could be added to expand the definition. Broadening the scope of the definition has been done before – the definition of refugees in the Geneva Refugees Convention was originally narrow in scope but was enlarged by a subsequent protocol.

'International transfers' includes the transfer, shipment or other movement, or whatever form, of arms from or across a territory of a Contracting Party.

Article 8

These principles are to be applied as a **minimum** and shall not prejudice the application of any more stringent national, regional or international rules, instruments or requirements.

Article 9

Article 9 addresses the issue of protocols to the Convention, providing that participation in any protocol to the Convention will only be open to Contracting Parties to the Convention. It is consistent with the object of the Convention as establishing a framework within which other rules on arms transfers may be elaborated.

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