

# The Devil is in the Detail

The importance of comprehensive and legally binding criteria for arms transfers

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## Summary

- **The absence of comprehensive, international legal obligations to prevent irresponsible transfers of arms has resulted in at least \$2.2bn worth of arms and ammunition being imported by countries under arms embargoes between 2000 and 2010;**
- **To have real impact, a prospective Arms Trade Treaty (ATT) must include legally binding criteria that prevent arms transfers to abusers of human rights or into situations where there is a substantial risk that they will undermine development or exacerbate armed violence;**
- **The ATT can build on existing regional and sub-regional initiatives: as of 2012, 100 countries are already party to various regional agreements that include legally binding criteria to control the trade of arms and ammunition.**

## The case for regulation of the arms trade

The global trade in most consumer goods is internationally regulated and carefully controlled. In contrast, the global trade in arms and ammunition is not. Currently, there are no legally binding, robust, and universally applicable criteria governing the transfer of weapons across borders. This is despite the fact that more than 2,000 people are killed every day due to armed violence.<sup>1</sup> This lack of regulation has profound implications for the lives and livelihoods of millions of women, men, and children throughout the world.

**Between 2000 and 2010, and despite the 26 UN, regional, and multilateral arms embargoes in force during this period,<sup>2</sup> Oxfam estimates that at least \$2.2bn worth of arms and ammunition was imported by countries under arms embargoes.<sup>3</sup>** The arms trade urgently needs a set of legally binding international rules to control the transfer of weapons. These rules, or criteria, must be based on thresholds defined by legally binding obligations in international human rights law, international humanitarian law, the UN Charter, and relevant UN conventions, covenants, and treaties. Without this, some states have little incentive to prevent the irresponsible trade in arms.

In order to have meaningful impact, arms embargoes and other prohibitions require a global regime with clear, unambiguous legal obligations on states to refrain from certain types of activities, such as 'states shall not transfer arms...' The UN Diplomatic Conference on the Arms Trade Treaty (ATT DipCon) will take place in July 2012. This offers member states of the UN a historic opportunity to create a global, comprehensive, rules-based mechanism to control the global trade in arms. For these negotiations to be successful and achieve real humanitarian impact, states must agree a set of rules that prevent the transfer of arms where there is a substantial risk that those arms would:

- Be used to perpetrate gross violations of international human rights law, or serious violations of international humanitarian law;
- Undermine socio-economic development, or involve corrupt practices; or
- Provoke or exacerbate armed conflict or armed violence, including gender-based armed violence.

# Why is this important?

## 1. Stopping human rights abuses

The lack of robust and legally binding obligations governing the sale and transfers of arms allows those perpetrating human rights abuses to continue to stock their arsenals. In 2010, for example, Syria imported more than \$1m<sup>4</sup> worth of small arms and light weapons, ammunition, and other munitions, as well as air defence systems and missiles worth an additional \$167m.<sup>5</sup> Some of these arms have played a central role in the Syrian government's crackdown on protesters,<sup>6</sup> in which the UN estimates that as many as 7,500 civilians were killed in 2011.<sup>7</sup> A report from the UN Office of the High Commissioner for Human Rights outlined a litany of government abuses, including apparent 'shoot-to-kill' policies against protesters by snipers.<sup>8</sup> The report further stated that, 'Information provided to the commission illustrates the extensive resources that the government and armed forces have devoted to efforts to control protests. In addition to regular military units armed with automatic weapons, the military deployed snipers, Special Forces units, tanks, armoured personnel carriers and intelligence units during operations to end demonstrations.'<sup>9</sup>

## 2. The failure of embargoes and other instruments to prevent arms transfers

Oxfam's estimate, that \$2.2bn worth of arms was imported by states in contravention of embargoes, is conservative; the actual amount is likely to be much higher. There is a lack of data on arms transfers for many of the relevant countries. In addition, Oxfam's estimates do not capture the substantial volumes of arms transfers into fragile situations just *before* arms embargoes were imposed, as took place in Côte d'Ivoire, Iran, and Syria.<sup>10</sup> They also do not include cases where arms embargoes could not be agreed multilaterally, despite the existence of a strong moral and humanitarian case for doing so. The failure by the UN Security Council in 2011-2012 to impose an arms embargo on Syria – while the Syrian government continues to import arms and ammunition freely – is just the most recent illustration of this.

The humanitarian impact of the arms transfers to Cote d'Ivoire while it was under an arms embargo is stark. In 2006, approximately 26,000 Ivoirians sought refuge in other countries, and 709,000 remained internally displaced.

Source: UNHCR 2006 Statistical Yearbook: <http://www.unhcr.org/478ce34a2.html>;

UNHCR Global Report 2006 <http://www.unhcr.org/4666d2340.html>

Furthermore, states must learn the lessons of previous efforts at arms control – particularly the UN Programme of Action on Small Arms and Light Weapons (UNPoA). The UNPoA is not a legally binding mechanism, and so has not been able to develop a globally applicable rules-based system. As a result, the UNPoA has generated little or no meaningful humanitarian impact since its establishment in 2001.

## 3. Ensuring clear guidance on legal obligations

The ATT must include unambiguous legal obligations and clear guidance to member states. This will minimise the scope that states have for interpretation of their responsibilities. Space for interpretation can result in dangerous oversight or inaction. For example, the EU has imposed an arms embargo on Syria, which all member states have been obliged to enforce since May 2011. However, lack of specific guidance on how to enforce this resulted in Cypriot authorities failing to stop a cargo vessel containing arms and ammunition from Russia bound for Syria when it transited through the port of Limassol in January 2012.<sup>11</sup>

## 4. Minimising opportunities for the misuse of arms

Unambiguous guidelines for governments making risk assessments when considering the transfer of arms and ammunition are critical to the success of the ATT. Recent transfers of arms to the Middle East and North Africa suggest that European arms exporters did not believe that there was a significant likelihood of these heavy weapons being used against domestic civilian populations.<sup>12</sup> This assumption was used to justify arms sales to the governments of Libya as recently as 2010, despite credible evidence to the contrary.<sup>13</sup> Subsequently, some of these weapons were used to deliberately target civilian protesters and were also used in indiscriminate attacks in civilian areas.

### How could the ATT help?

The ATT must create a legally binding instrument that includes a comprehensive set of risk-assessment criteria for all future arms transfers. The criteria must be robust, covering the potential consequences of arms transfers for human rights law, humanitarian law, socio-economic development, corruption, and armed violence. But most importantly, these criteria must be unambiguous and legally binding. Without this, the status quo will not change.

If a robust and comprehensive mechanism controlling arms transfers had been in place, it would have been very difficult for non-state armed actors like the Liberation Tigers of Tamil Eelam (LTTE) to acquire sophisticated Chinese weapons and ammunition during the 20-year conflict in Sri Lanka. There is evidence that the LTTE purchased both small arms and ammunition for heavier weapons (such as mortars and artillery) from China. One report stated that, 'Recent photographs of rebel troops available on pro-LTTE websites show a range of evidently new Chinese weaponry including the modern 5.56 mm QBZ-95 bullpup-design assault rifle, which cannot have been captured from government forces.'<sup>14</sup> This contributed to the escalation of the conflict between the LTTE and government forces with devastating consequences for civilians in Sri Lanka. The UN estimates that between 80,000 and 100,000 people have been killed and more than 200,000 people displaced since the war in Sri Lanka began in the 1980s.<sup>15</sup>

The ATT represents a historic opportunity to bring together complementary, thematic, regional, and parallel initiatives on arms transfer controls under one comprehensive framework. Legally binding criteria enacting high standards are not an anomaly: **100 countries that are party to various regional mechanisms have already agreed to robust, legally binding criteria to control the trade of arms and ammunition.**<sup>16</sup> A further 35 countries are party to arms control instruments that seek to create a common operational standard: the Wassenaar Arrangement and the OSCE instrument on small arms and light weapons. Each of these mechanisms articulate the key elements necessary to make the ATT effective – namely, prohibitive decision-making processes if there is a risk that the arms would negatively impact on human rights and development or contribute to corruption or armed violence. The ATT would harmonise these initiatives into one comprehensive, legally binding, and universal instrument.

# Call to action and recommendations for negotiators

The UN preparatory process towards the ATT has revealed that there is a considerable appetite amongst member states to agree a treaty. The challenge will be to ensure that the treaty is of sufficient quality and substance. To be effective, the ATT must deliver a comprehensive, robust, and legally binding global mechanism that is as unambiguous as possible.

This can be achieved in three ways.

## 1. Language of ‘shall not’

If the ATT is to have any significant humanitarian value it must emphasise prohibitive language. It must use the terms ‘shall not’, ‘should not’, ‘must not’, or ‘will not’ – and their equivalents in all other languages. Where this will matter most is in the wording of the criteria; the individual and contextual considerations that allow or deny specific arms transfer requests.

## 2. Comprehensive criteria linked to ‘shall not’

Prospective arms transfers must be prohibited under the ATT where there are substantial risks that they will:

- Be used to perpetrate gross violations of international human rights law, or serious violations of international humanitarian law;
- Undermine socio-economic development or involve corrupt practices; or
- Provoke or exacerbate armed conflict or armed violence, including gender-based armed violence.

## 3. Global standards must not be lower than existing regional and multilateral agreements

A global treaty must build on existing agreements to avoid any uncertainty about acceptable thresholds for arms transfers. The criteria for arms transfers in the ATT must be wholly consistent with – and no less ambitious than – existing mechanisms such as the EU Common Position, the ECOWAS Convention, the Nairobi Protocol, and the OAS Model Legislation. All of these regional agreements include comprehensive criteria and legally binding obligations built on ‘shall not’ language in their respective texts.

The 2012 ATT DipCon is an historic opportunity for UN member states to define acceptable parameters for arms transfers, and to make these legally binding. To this end, negotiators must not compromise on the robustness of the transfer criteria. In situations where there is a high risk of negative consequences, arms transfers must be explicitly prohibited.

# Notes

<sup>1</sup> Whereas the headline figure from the 2011 Report of the Geneva Declaration Secretariat is 526,000 people who are directly killed by armed violence each year, the figure dramatically increases when the indirect conflict deaths are added to the figure, to give an estimate of 742,000 per year – averaging to about 2092 deaths per day. Geneva Declaration Secretariat (2011), 'Global Burden of Armed Violence 2011: Lethal Encounters', Geneva, Geneva Declaration Secretariat, pg.70.

<sup>2</sup> SIPRI Arms Embargoes Database <http://www.sipri.org/databases/embargoes>

<sup>3</sup> This figure is derived by an analysis of all arms embargoes that were in force between 2000 and 2010, including UN, regional organisations, and multilateral initiatives. Only full embargoes on UN member states were considered, all partial embargoes or those placed on non-governmental forces were disregarded. Only full years when these embargoes were in effect were counted, disregarding partial years when embargoes were either imposed or lifted. Data from two sources was used: the UNCOMTRADE (<http://comtrade.un.org/>) and the SIPRI Arms Transfers Database (<http://www.sipri.org/databases/armstransfers>), relying on figures from one or the other to determine imports and/or purchases. In the case of Zimbabwe, where the available data from COMTRADE and the SIPRI database were conflicting, the SIPRI data was used because it more accurately reflected the reality on the ground. The figure of \$2.2bn is therefore a conservative estimate, based on the data available for four countries under UN embargoes, five countries under EU embargoes, and one country under an OSCE embargo. Data from a further eight countries under UN embargoes, two countries under EU embargoes, and six embargoes on non-government forces were not available at the time of research. Furthermore, import data from China is not included because China is not under a complete embargo by the EU. However, there is concrete evidence to suggest that EU members have consistently broken the terms of this partial embargo during the period in question. According to the SIPRI database, China has imported in excess of \$22bn over the period in question.

<sup>4</sup> United Nations Commodity Trade Statistics Database (UN COMTRADE), <http://comtrade.un.org/db/default.aspx>. Customs codes referenced: [HS1996 code 930100] Military weapons, other than hand guns, swords, etc; [HS1996 code 930200] Revolvers and pistols; [HS1996 code 930510] Parts and accessories of revolvers or pistols; and [HS1996 code 930690] Munitions of war, ammunition/projectiles and parts.

<sup>5</sup> SIPRI Arms Transfer Database, TIV (trend indicator value) tables of arms exports to Syria, 2006-2010', <http://armstrade.sipri.org/armstrade/page/values.php>

<sup>6</sup> United Nations (2011), 'Top UN human rights body orders inquiry into Syrian violence', 23 August, <http://www.un.org/apps/news/story.asp?NewsID=39357&Cr=Syria&Cr1> (last accessed 2 April 2012).

<sup>7</sup> UN Department of Public Information (2012), 'Top UN Political Official tells Security Council Talks Started between Israelis, Palestinians in Amman Have 'Stalled', Time not on Side of Either Party: In Briefing, B. Lynn Pascoe also updates on "Rapidly Deteriorating" Syria Situation, Transfer of Power in Yemen, Impact of Syria Crisis on Lebanon', Security Council, 6725th Meeting (AM), 28 February, <http://www.un.org/News/Press/docs/2012/sc10560.doc.htm> (last accessed 2 April 2012).

<sup>8</sup> Human Rights Council (2011), 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic', p.15, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/SpecialSession/Session18/A-HRC-S-17-2-Add1.pdf>

<sup>9</sup> *Ibid.*, p.20.

<sup>10</sup> According to COMTRADE data, Côte d'Ivoire imported \$36m of heavy weapons in 2004, just prior to the establishment of the UN embargo on 15 November that year. SIPRI data show that Syria imported \$167m worth of air defence systems and missiles in 2010, just prior to the start of the civilian protests in 2011 and the EU Embargo of 09 May 2011. Finally, according to SIPRI data, Iran imported \$423m worth of aircraft, air defence systems, armoured vehicles, engines, and missiles in 2006, just prior to the UN embargo established on 06 December 2006.

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<sup>11</sup> T. Grove and M. Kambas (2012), 'Russian-operated ship with bullets reaches Syria', *Reuters*, January 13.

<http://www.reuters.com/article/2012/01/13/syria-russia-ship-idUSL6E8CD4DD20120113>

<sup>12</sup> A. Vranckx, Slijper, F., and R. Isbister (eds.) (2011), 'Lessons from MENA: Appraising EU Transfers of Military and Security Equipment to the Middle East and North Africa', Gent: Academia Press, pp.10-11,

<http://www.saferworld.org.uk/downloads/pubdocs/Lessons%20from%20MENA%20Nov%202011.pdf>

<sup>13</sup> See for example, the UK justification for the transfer of armoured personnel carriers to Libya in 2007: Foreign and Commonwealth Office (2008), 'United Kingdom Strategic Export Controls Report – 2008', London, pp.13-14.

<sup>14</sup> A. Webb-Vidal and A. Davis (2008), 'Lords of war - running the arms trafficking industry', *Jane's Intelligence Review*, May

<sup>15</sup> *Ibid.*

<sup>16</sup> EU Common Position (binding on 25 countries); OAS Model Legislation on Brokering (binding on 35 countries); ECOWAS Convention (binding on 15 countries); the Nairobi Protocol (binding on 12 countries); and the SADC Firearms and Ammunition Protocol (binding on 16 countries, three of which are also signatory to the Nairobi Protocol). The EU Common Position proposes a tiered system which must not be adopted in the ATT.

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