

## **“All’s Well That Ends Well” or “Much Ado About Nothing”?: A Commentary on the *Arms Trade Treaty***

Marlitt Brandes\*

### Table of Contents

A. Introduction.....	400
B. Background.....	402
C. Scope .....	406
I. Categories of Arms.....	406
II. Definition of Trade .....	407
III. Ammunition/Munitions and Parts and Components .....	408
IV. Concluding Remarks on Scope .....	409
D. Substantive Obligations.....	409
I. Prohibitions of Transfer.....	409
II. Export and Export Assessment .....	416
1. Assessment of Risks of the Export .....	416
2. Consideration of Mitigation Measures.....	420
3. Decision on the Export Authorization .....	421
4. Other Factors to Be Considered in the Assessment .....	421
III. Other Substantive Obligations .....	422
IV. Concluding Remarks on Substantive Obligations.....	424
E. Implementation and Compliance .....	424
F. Conclusion.....	428

\* PhD candidate and Research Associate at the Walther Schücking Institute for International Law, University of Kiel, Germany. The author would like to thank Prof. Dr. Nele Matz-Lück, LL.M., Erik van Doorn as well as the anonymous reviewer for valuable comments on an earlier version of the article.

## Abstract

To date no international treaty comprehensively regulates the international trade in conventional arms. In 2012 and 2013, two conferences were convened under the auspices of the United Nations to adopt an 'Arms Trade Treaty' putting an end to this state of affairs. Both failed to reach consensus on the final treaty draft before them. Nevertheless, on 2 April 2013, the UN General Assembly adopted the final draft submitted by the President of the second conference and the *Arms Trade Treaty* (ATT) is now open for signature and will enter into force after its fiftieth ratification. This article analyzes the legal value of the provisions enshrined in the ATT by concentrating on its scope, substantive obligations, and implementation. It concludes that while much criticism is in order with regard to ambiguous language and potential loopholes in the treaty, it still represents progress as it will provide for written obligations which States Parties must follow when deciding on arms transfer authorizations. Whether the treaty will actually help victims of violations of international human rights and humanitarian law on the ground, however, depends on its ratification by major supplier States and on how far States Parties will be willing to go when implementing and enforcing its provisions.

## A. Introduction

According to the former UN Secretary-General Ban Ki-moon it was "a victory for the world's people" and "the culmination of long-held dreams and many years of effort".<sup>1</sup> On 2 April 2013, only days after the failure of the UN Final Conference on the *Arms Trade Treaty* (Final Conference) to reach consensus on the draft text submitted by its President Peter Woolcott, the UN General Assembly adopted the draft by a vast majority.<sup>2</sup> In contrast to the Final Conference, which was required to decide by unanimity,<sup>3</sup> the UN General

<sup>1</sup> UN Secretary-General, "Arms Trade Treaty Will Generate 'Much-Needed Momentum' for Other Global Disarmament, Non-Proliferation Efforts, Secretary-General Says", UN Press Release SG/SM/14919-DC/3426, 2 April 2013, available at <http://www.un.org/News/Press/docs/2013/sgsm14919.doc.htm> (last visited 31 January 2014).

<sup>2</sup> GA Res. 67/234 B, UN Doc A/RES/67/234 B, 11 June 2013.

<sup>3</sup> Cf. GA Res. 67/234 A, UN Doc A/RES/67/234 A, 4 January 2013 and United Nations Conference on the Arms Trade Treaty, *Provisional Rules of Procedure of the Conference*, UN Doc A/CONF.217/L.1, 7 March 2012, 8, Rule 33 [Provisional Rules of Procedure].

Assembly was able to decide by a majority of the members present and voting in accordance with Article 18 (3) *Charter of the United Nations* (UN Charter).<sup>4</sup>

Up to this point and despite its dreadful consequences, no common and binding international rules have been put in place to control the international trade in conventional arms. This is particularly relevant to the trade in small arms and light weapons (SALW) which fall outside of the scope of most international agreements on specific weapons but account for the majority of civil casualties in current conflicts.<sup>5</sup> Each year, half a million people are killed at the hands of SALW.<sup>6</sup> Former UN Secretary-General Kofi Annan therefore asserted that small arms “could well be described as ‘weapons of mass destruction’”.<sup>7</sup> The *Arms Trade Treaty* (ATT)<sup>8</sup> aims to close the regulatory gap by establishing common standards upon which all States Parties base their conventional arms transfers.

The ATT will enter into force ninety days after its fiftieth ratification.<sup>9</sup> At the signing event, several States emphasized the importance of a prompt entry into force of the treaty and pledged to ratify it as fast as possible.<sup>10</sup> 115 States have signed the ATT and 31 have already ratified it as of writing.<sup>11</sup> These are all signs for support for the ATT from the international community. However, it remains to be seen how soon other States will fulfill their promises. With a view to the seven year long negotiation and drafting process, it seems at least questionable whether States will now rush to ratify the ATT. Also, albeit universal ratification is desirable, the treaty’s success will largely depend on its ratification by major arms suppliers such as the United States, Russia, Germany, France, and China

<sup>4</sup> *Charter of the United Nations*, 26 June 1945, Art. 18 (3), 1 UNTS XVI.

<sup>5</sup> Graduate Institute of International and Development Studies, *Small Arms Survey 2005: Weapons at War* (2005), 248.

<sup>6</sup> SC, *Small Arms: Report of the Secretary-General*, UN Doc S/2002/1053, 20 September 2002, 2, para. 4.

<sup>7</sup> UN Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century* (2000), 52.

<sup>8</sup> *Arms Trade Treaty*, UN Doc A/CONF.217/2013/L.3, 27 March 2013 [ATT]. The ATT opened for signature on 3 June 2013.

<sup>9</sup> Art. 22 (1) ATT.

<sup>10</sup> See, e.g., the statement of the Permanent Representative of France to the United Nations (Gérard Araud), available at <http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/france.pdf> (last visited 31 January 2014), 3. See also the statement of the Permanent Representative of Burkina Faso to the United Nations (Der Kogda), available at <http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/Burkina-Faso.pdf> (last visited 31 January 2014), 2, para. 2.

<sup>11</sup> See United Nations Office for Disarmament Affairs (UNODA), ‘Status of the Arms Trade Treaty’, available at <http://disarmament.un.org/treaties/t/att> (last visited 2 May 2014).

which account for over seventy percent of the global arms trade.<sup>12</sup> Even if the ATT enters into force in the next couple of months and major supplier States ratify it, its regulatory value remains doubtful. The general euphoria among States, scholars, and non-governmental organizations following the adoption of the UN General Assembly Resolution quickly diminished as critics voiced concern about the compromise reached by the Conference. It is the purpose of this article to discuss whether the ATT upon entry into force will be able to live up to the great expectations attached to its realization.

In order to understand both the accomplishments and the deficiencies of the ATT, it is necessary to first shed light on the background and the historic development of the ATT (B.). Thereafter, the main points of criticism are addressed. First, the scope of the ATT is examined (C.). Second, the article considers the quality of substantive obligations States Parties will face upon ratification of the treaty (D.). Third, the provisions on implementation of and compliance with the treaty are analyzed (E.). The article concludes with an overall assessment of the ATT (F.).

## B. Background

Multilateral efforts to control the international arms trade date back to the end of the nineteenth century. The *Brussels Act* of 1890<sup>13</sup> was designed both to combat slave trade and to regulate the transfer of arms to colonial territories.<sup>14</sup> In the inter-war period, the international community undertook several attempts to establish binding rules on arms transfers. Mainly due to the opposition of the United States neither the *St. Germain Convention* of 1919,<sup>15</sup> designed to

<sup>12</sup> A list of the top arms suppliers is available at <http://armstrade.sipri.org/armstrade/page/toplist.php> (last visited 31 January 2014). For the market share of the top 5 arms exporters, see Stockholm International Peace Research Institute, 'Market Share of Top 5 Arms Exporters', available at <http://www.sipri.org/research/armaments/transfers/measuring/at-images/Market%20share%20of%20top%20%205%20arms%20exports.png> (last visited 31 January 2014).

<sup>13</sup> *General Act for the Repression of the African Slave Trade*, 2 July 1890, Arts 8-10, 27 Stat. 886, 894-896.

<sup>14</sup> K. Krause & M. K. MacDonald, 'Regulating Arms Sales Through World War II', in R. D. Burns (ed.), *Encyclopedia of Arms Control and Disarmament*, Vol. 2 (1993), 707, 712. See in detail R. Yakemtchouk, 'Les Antécédents de la Réglementation Internationale du Commerce d'Armes en Afrique', 13 *Revue Belge de Droit International* (1977) 1& 2, 144, 151-161.

<sup>15</sup> *Convention for the Control of the Trade in Arms and Ammunition, and Protocol*, 10 September 1919, 7 LNTS 331.

prevent arms exports to territories under colonial control or League mandates,<sup>16</sup> nor the *Geneva Arms Traffic Convention* of 1925,<sup>17</sup> building upon the latter but allowing exports to non-signatories,<sup>18</sup> entered into force.<sup>19</sup> The events leading to the Second World War also put an end to a *Draft Convention*<sup>20</sup> proposed by the United States in 1934.<sup>21</sup> In the 1950s and 1960s emphasis was generally placed on the non-proliferation of weapons of mass destruction.<sup>22</sup> During the Cold War, export control regimes such as the Coordinating Committee on Export Controls (COCOM) were established to prevent arms traffic between the blocs while transfers amongst members of the same bloc remained unregulated.<sup>23</sup> In this regard, the *Tripartite Declaration* of 1950<sup>24</sup> between France, the United Kingdom, and the United States was an exception directed at the regulation of arms sales to the Middle East.<sup>25</sup>

It was only after the end of the Cold War that the regulation of the international trade in conventional arms was put back on the agenda of the international community. At this time, the invasion of Kuwait by Iraq made

<sup>16</sup> Krause & MacDonald, *supra* note 14, 714.

<sup>17</sup> *Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*, 17 June 1925, 6 LNOJ 1117.

<sup>18</sup> D. R. Stone, 'Imperialism and Sovereignty: The League of Nations' Drive to Control the Global Arms Trade', 35 *Journal of Contemporary History* (2000) 2, 213, 221.

<sup>19</sup> Krause & MacDonald, *supra* note 14, 717.

<sup>20</sup> *Draft Articles for the Regulation and Control of the Manufacture of and Trade in Arms and the Establishment of a Permanent Disarmament Commission*, League of Nations Doc Conf. D. 167, 20 November 1934.

<sup>21</sup> D. G. Anderson, 'The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War', 7 *American University Journal of International Law and Policy* (1991) 4, 749, 764.

<sup>22</sup> E. Kytömäki, 'Promoting Discussion on an Arms Trade Treaty – European Union-UNIDIR Project: Final Report', available at <http://www.unidir.ch/files/medias/pdfs/final-report-eng-0-145.pdf> (last visited 31 January 2014), 32. Examples for the regulatory successes with regard to weapons of mass destruction are the *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 [NPT]; the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972, 1015 UNTS 163; and the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, 3 September 1992, 1974 UNTS 45.

<sup>23</sup> M. Bromley, N. Cooper & P. Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History', 88 *International Affairs* (2012) 5, 1029, 1033.

<sup>24</sup> *Tripartite Declaration Regarding the Armistice Borders*, 25 May 1950, 22 Department of State Bulletin 886.

<sup>25</sup> Bromley, Cooper & Holtom, *supra* note 23, 1034.

the potential outcome of an unregulated international arms trade tragically apparent.<sup>26</sup> In 1991, the five permanent members of the UN Security Council agreed on the *P5 Guidelines for Conventional Arms Transfers*,<sup>27</sup> a set of criteria upon which they would base their arms export decisions. Later that year, the UN General Assembly adopted a resolution establishing the UN Register of Conventional Arms (UN Register) which was to promote transparency in the trade of conventional weapons.<sup>28</sup> The UN Disarmament Commission adopted guidelines for international arms transfers in 1996.<sup>29</sup> However, participation in the Register is inconsistent<sup>30</sup> and all of the abovementioned instruments are of a non-binding nature. Another soft law mechanism is the *Wassenaar Arrangement* of 1995,<sup>31</sup> which built upon the COCOM system but removed its adversarial nature.<sup>32</sup> At the same time, the UN also started targeting the issue of SALW, which led to the adoption of a *Programme of Action* at the UN Conference on the Illicit Traffic in Small Arms and Light Weapons in All Its Aspects in 2001.<sup>33</sup>

The adoption of the *Programme of Action* was largely attributable to successful campaigning by non-governmental organizations<sup>34</sup> and the process leading to the negotiation of the ATT was equally promoted by civil society.<sup>35</sup> In

<sup>26</sup> GA, *Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms*, UN Doc A/46/301 annex, 9 September 1991, 2, 49-50, para. 149; Anderson, *supra* note 21, 752.

<sup>27</sup> UN, 'Guidelines for Conventional Arms Transfers' (18 October 1991), available at [http://archives.sipri.org/contents/expcon/unp5\\_london91.html](http://archives.sipri.org/contents/expcon/unp5_london91.html) (last visited 31 January 2014).

<sup>28</sup> GA Res. 46/36 L, UN Doc A/RES/46/36L, 9 December 1991.

<sup>29</sup> GA, *Guidelines for International Arms Transfers in the Context of the General Assembly Resolution 46/36 H of 6 December 1991: Report of the Disarmament Commission*, UN Doc A/51/42, 22 May 1996.

<sup>30</sup> See in detail P. Holtom, L. Béraud-Sudreau & H. Weber, 'Reporting to the United Nations Register of Conventional Arms', *SIPRI Fact Sheet* (May 2011), available at <http://books.sipri.org/files/FS/SIPRIFS1105.pdf> (last visited 31 January 2014).

<sup>31</sup> *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Guidelines and Procedures, Including the Initial Elements* (as amended and updated in 2001, 2003, 2004, 2007, and 2011), available at <http://www.wassenaar.org/guidelines/docs/Guidelines%20and%20procedures%20including%20the%20Initial%20Elements.pdf> (last visited 31 January 2014).

<sup>32</sup> Bromley, Cooper & Holtom, *supra* note 23, 1035.

<sup>33</sup> United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects*, UN Doc A/CONF.192/15, 20 July 2001, 7 [Programme of Action].

<sup>34</sup> Bromley, Cooper & Holtom, *supra* note 23, 1037.

<sup>35</sup> *Ibid.*, 1038.

1997, a group of Nobel Peace Laureates led by the former Costa Rican President Óscar Arias Sánchez published an *International Code of Conduct on Arms Transfers*,<sup>36</sup> which was developed into a *Framework Convention on International Arms Transfers* in 2001.<sup>37</sup> In the following years, a network of non-governmental organizations initiated the *Control Arms* campaign advocating for a maximalist ATT.<sup>38</sup>

It took several years for the UN to react. In 2006, the UN General Assembly adopted a resolution calling on the UN Secretary-General to establish a working group of governmental experts to examine the feasibility of a comprehensive and legally binding instrument on the conventional arms trade.<sup>39</sup> The report of the group of governmental experts<sup>40</sup> was endorsed by the UN General Assembly and it established an open-ended working group to continue with the task in 2008.<sup>41</sup> Following another report by the latter, the UN General Assembly in 2009 decided to convene a UN Conference on the ATT (First Conference) in 2012 to elaborate a treaty “on the highest [...] possible standards”.<sup>42</sup> It also decided that the First Conference should be held on the basis of consensus.<sup>43</sup> This was to be decisive for the outcome of the Conference in 2012. Several States, among them major suppliers of conventional weapons such as the United States and Russia, rejected a revised draft of the ATT on 27 July 2012. As a result, the First Conference collapsed. Nevertheless, the UN General Assembly voted to convene the Final Conference on the ATT in 2013 to be governed by the same rules of procedure as the First Conference.<sup>44</sup> When the Final Conference failed to reach consensus on the draft treaty again due to the negative votes of Syria, North Korea, and Iran, a group of over a hundred States took the draft treaty to

<sup>36</sup> *Nobel Peace Laureates’ International Code Of Conduct On Arms Transfers* (29 May 1997) (copy on file with author).

<sup>37</sup> *Framework Convention on International Arms Transfers* (2001), available at [http://www.seesac.org/sasp2/english/publications/2/4\\_1\\_Framework.pdf](http://www.seesac.org/sasp2/english/publications/2/4_1_Framework.pdf) (last visited 31 January 2014).

<sup>38</sup> For details see Control Arms, ‘The Story so Far’, available at <http://www.controlarms.org/en/about-controlarms/> (last visited 31 January 2014).

<sup>39</sup> GA Res. 61/89, UN Doc A/RES/61/89, 18 December 2006.

<sup>40</sup> GA, *Report of the Group of Governmental Experts to Examine the Feasibility, Scope and Draft Parameters for a Comprehensive, Legally Binding Instrument Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, UN Doc A/63/334, 26 August 2008, 2.

<sup>41</sup> GA Res. 63/240, UN Doc A/RES/63/240, 8 January 2009.

<sup>42</sup> GA Res. 64/48, UN Doc A/RES/64/48, 12 January 2010, 3, para. 4.

<sup>43</sup> *Ibid.*, 3, para. 5. See also *Provisional Rules of Procedure*, *supra* note 3, 8, Rule 33.

<sup>44</sup> GA Res. 67/234 A, *supra* note 3.

the UN General Assembly for vote. Here, a majority of 154 States voted in favor of the Resolution, Syria, North Korea, and Iran declared themselves against it again and 23 States abstained from voting.<sup>45</sup>

## C. Scope

A central point of discussion throughout the negotiation process was the scope of the treaty. Not only were States of different opinions about which arms should be covered by the ATT. Controversy also existed as to what was meant by 'trade'. Furthermore, States disagreed on whether to include ammunition and parts and components in the treaty's scope.

### I. Categories of Arms

According to Article 2 (1) ATT, the treaty applies to conventional arms within eight listed categories. Among them are the seven categories of the UN Register, i.e. battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships as well as missiles and missile launchers. Article 5 (3) ATT clarifies that national definitions of any of the categories shall not cover less than the descriptions used in the UN Register at time of entry into force of the ATT.

SALW, only an optional category under the UN Register, form the eighth category under Article 2 (1) ATT. While some States had been opposed to SALW being included in the ATT's scope from the beginning of the negotiations, the draft treaty text of 2012 already incorporated them and this was upheld during the negotiations at the Final Conference. With regard to SALW, Article 5 (3) ATT states that national definitions shall not cover less than the descriptions used in relevant UN instruments at the time of entry into force of the ATT. In this respect, one can draw on the *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons* according to which SALW means

“any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch

<sup>45</sup> A detailed record of the vote is available at <http://www.un.org/disarmament/update/20130402/ATTVotingChart.pdf> (last visited 31 January 2014).



a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas”.<sup>46</sup>

More precisely, it defines small arms as “weapons designed for individual use” and light weapons as “weapons designed for use by two or three persons serving as a crew”.<sup>47</sup>

When comparing with the final draft of 2012,<sup>48</sup> the scope of the ATT has been reduced. While Article 2 (A) (1) of the 2012 draft ATT stated that the treaty should apply “at a minimum” to all conventional arms within the eight categories,<sup>49</sup> thereby leaving room for other already existing categories of conventional weapons as well as those still to be developed, the scope of the ATT now appears to be defined conclusively. Admittedly, an Indian proposal to expressly limit the treaty’s application to the eight categories mentioned in Article 2 was not considered and Article 5 (3) ATT encourages States Parties to apply its provisions to the broadest range of conventional arms.<sup>50</sup> However, proposals to ‘future proof’ the ATT by way of periodic reviews of the treaty’s scope were not considered in the final treaty text. Whether States will voluntarily apply the ATT’s provisions to armaments other than those listed in Article 2 ATT remains to be seen. With a view to a comprehensive application of the treaty, the deletion of ‘at a minimum’ still constitutes a setback.

## II. Definition of Trade

Article 2 (2) ATT stipulates that the term ‘transfer’ is used for all “activities of the international trade” within the ATT and is composed of “export, import, transit, trans-shipment and brokering”.<sup>51</sup> In spite of claims by many States that the treaty should also explicitly cover non-commercial transfers such as gifts,<sup>52</sup>

<sup>46</sup> *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, GA Decision 60/519, UN Doc A/60/88 annex, 27 June 2005, 6, 7, para. 4 [International Tracing Instrument].

<sup>47</sup> *Ibid.*, 7, para. 4 (a) & (b).

<sup>48</sup> United Nations Conference on the Arms Trade Treaty, *Draft of the Arms Trade Treaty*, UN Doc A/CONF.217/CRP.1, 26 July 2012 [2012 Draft ATT].

<sup>49</sup> *Ibid.*, Art. 2 (A) (1), 3.

<sup>50</sup> M. Brzoska & U. Kühn, ‘Vertrag über den Waffenhandel: Staatenkonferenz 18.-28. März 2013’, 61 *Vereinte Nationen* (2013) 3, 128, 128.

<sup>51</sup> ATT, Art. 2 (2), *supra* note 8, 4.

<sup>52</sup> See United Nations Conference on the Arms Trade Treaty, *Compilation of Views on the Elements of an Arms Trade Treaty: Background Document Prepared by the Secretariat*, UN Doc A/CONF.217/2, 10 May 2012, e.g., 9 (para. 11) (view of Australia), 23 (view of Costa

the text stays silent on the matter, thereby leaving the decision up to the States Parties.<sup>53</sup>

### III. Ammunition/Munitions and Parts and Components

One of the most controversial subjects during the negotiations at both Conferences on the ATT was whether the treaty should cover ammunition/munitions and parts and components. The majority of States took a stand for incorporating both in the treaty's scope but several major supplier States such as the United States persistently argued against it.<sup>54</sup> The main argument for including ammunition/munitions and parts and components in the treaty's scope is that failing to do so would allow for opportunities to circumvent the ATT's provisions on the weapons listed in Article 2 (1) ATT. For instance, restrictions on the export of weapons would be rendered meaningless if States Parties could unconditionally transfer their components to another State where they would be assembled and used.

The compromise reached is laid down in Articles 3 and 4 ATT. According to them, States Parties have to establish and maintain national control systems to regulate the export of both ammunition/munitions fired, launched, or delivered by the conventional arms covered under Article 2 (1) ATT and of parts and components where the export is in a form that provides for the capability to assemble those arms. States Parties are further required to apply the provisions of Articles 6 and 7 ATT<sup>55</sup> prior to the export of such ammunition/munitions and parts and components. Articles 3 and 4 ATT are thus only applicable to the export of ammunition/munitions and parts and components. The ATT does not provide for substantial obligations with regard to the other activities listed in

Rica), 49 (view of Kenya), & 55 (view of Malawi) [United Nations Conference on the Arms Trade Treaty, Background Document]. See also the statement by New Zealand on the President's non-paper of 22 March 2013 at the Final Conference on the Arms Trade Treaty (25 March 2013), available at [http://www.un.org/disarmament/ATT/statements/docs/20130326/20130325\\_NewZealand\\_E.pdf](http://www.un.org/disarmament/ATT/statements/docs/20130326/20130325_NewZealand_E.pdf) (last visited 31 January 2014), 1 as well as 'Final UN Conference on the ATT: Statement Delivered by Ghana on Behalf of 103 States' (25 March 2013), available at [http://www.un.org/disarmament/ATT/statements/docs/Joint\\_Statement\\_ATT\\_25\\_Mar\\_13\\_103\\_Countries.pdf](http://www.un.org/disarmament/ATT/statements/docs/Joint_Statement_ATT_25_Mar_13_103_Countries.pdf) (last visited 31 January 2014), 2 [ATT Conference: Statement Delivered by Ghana].

<sup>53</sup> Brzoska & Kühn, *supra* note 50, 128.

<sup>54</sup> *Ibid.*; S. Casey-Maslen, G. Giacca & T. Vestner, 'The Arms Trade Treaty (2013)' (June 2013), available at <http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB%282%29.pdf> (last visited 31 January 2014), 21.

<sup>55</sup> Cf. *infra*, section D. I. & II.

Article 2 (2) ATT, namely the import, transit, trans-shipment, and brokering of ammunition/munitions and parts and components of conventional arms.

#### IV. Concluding Remarks on Scope

The scope of the ATT is a true compromise between the claims of those States and non-governmental organizations that had called for a comprehensive regulation of the international arms trade and those rather reluctant States guided by economic interests, matters of national or international security or sovereignty over arms trade decisions. With a view to the horrendously high death toll caused by SALW, their inclusion in the treaty's scope was an absolute prerequisite for the treaty's success. By at least making Articles 6 and 7 ATT applicable to ammunition/munitions and parts and components, the Final Conference has further ensured that States Parties will not be able to circumvent the treaty's obligations regarding exports of conventional weapons as easily. While the forms of transfer and categories of arms covered by Article 2 ATT do not fully correspond to the realities of the international trade in arms, the wording of the provision leaves room for an extensive interpretation by States Parties. In sum, the scope of the ATT is therefore far from comprehensive but sufficiently broad to serve as a starting point for an efficient regulation of the international trade in arms.

### D. Substantive Obligations

Next to the scope of the ATT, the elaboration of concrete obligations for arms transfers was a focal point at the Conferences on the ATT. It was also the topic on which States' views were divided the most. Discussions focused on which arms transfers should be prohibited by the treaty and which criteria should lead States' decisions on exports of conventional weapons. Other issues were the regulation of other activities covered by Article 2 (2) ATT, the prevention of arms diversion, and the possible inclusion of a prohibition of arms transfers to non-state actors.

#### I. Prohibitions of Transfer

Article 6 ATT contains several absolute prohibitions regarding transfers of conventional arms listed in Article 2 (1) ATT as well as of items covered under Article 3 or 4 ATT.

Article 6 (1) ATT prohibits any transfer which would contradict the States Party's obligations under measures adopted by the UN Security Council acting under Chapter VII *UN Charter*, in particular arms embargoes. Article 41 *UN Charter* provides for the Security Council's right to decide on measures other than the use of armed force in face of a threat to or breach of the peace or an act of aggression according to Article 39 *UN Charter*. Among the measures listed in Article 41 *UN Charter* is the complete or partial interruption of economic relations. The Security Council is using embargoes on arms and related materials as a measure according to Article 41 *UN Charter* on a regular basis.<sup>56</sup> States are bound to accept and carry out decisions of the UN Security Council under Article 25 *UN Charter*. Article 6 (1) ATT therefore does not create a new obligation for States regarding decisions of the UN Security Council under Chapter VII of the *UN Charter* but merely reiterates an already existing obligation.<sup>57</sup>

According to Article 6 (2) ATT, States Parties shall not authorize any transfer infringing on their relevant obligations under international agreements, in particular those relating to the transfer of or illicit trafficking in conventional weapons. Again, the provision does not establish a new prohibition on arms transfers but amounts to nothing more than a confirmation of the relevant obligation under another treaty. There are various restrictions on arms transfers contained in conventions dealing with specific weapons,<sup>58</sup> which fall outside the scope of the ATT and to which Article 6 (2) ATT therefore does not apply. In contrast, the prohibition to transfer cluster munitions<sup>59</sup> is applicable in this context as cluster munitions are conventional munitions designed to disperse or release explosive submunitions<sup>60</sup> usually dropped by combat aircraft in accordance with Article 2 (1) (d) ATT or delivered by artillery, missiles, or rockets

<sup>56</sup> N. Krisch, 'Article 41', in B. Simma *et al.* (eds), *The Charter of the United Nations*, Vol. II, 3rd ed. (2012), 1305, 1312, para. 15.

<sup>57</sup> Cf. Casey-Maslen, Giacca & Vestner, *supra* note 54, 23.

<sup>58</sup> For instance, the transfer of nuclear weapons is forbidden by Art. 1 NPT (*supra* note 22, 171) whereas the transfer of anti-personnel mines is prohibited under the *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as Amended on 3 May 1996) Annexed to 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*, 3 May 1996, Art. 8 (1), 2048 UNTS 93, 138 as well as under the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997, Art. 1, 2056 UNTS 211, 242.

<sup>59</sup> *Convention on Cluster Munitions*, 3 December 2008, Art. 1 (1) (b), 48 ILM 357, 358.

<sup>60</sup> *Ibid.*, Art. 2 (2), 359.

pursuant to Article 2 (1) (c), (g) ATT.<sup>61</sup> The *Firearms Protocol*<sup>62</sup> provides for an obligation of States Parties to criminalize the illicit trafficking in firearms, its parts and components and ammunition.<sup>63</sup> While firearms are within the ATT's scope and the obligation to criminalize illicit trafficking in them is certainly an obligation relating to illicit trafficking within the meaning of Article 6 (2) ATT, it appears questionable whether the authorization of a transfer could be considered a breach of said obligation. A transfer is only considered illicit trafficking under Article 6 (e) *Firearms Protocol* if it is not authorized by any of the States Parties concerned. The authorization of a transfer is therefore decisive for determining whether it is considered illicit trafficking and cannot constitute a violation of the duty to criminalize illicit trafficking itself. Article 6 (2) ATT is framed broadly enough so as to include general human rights treaties as well<sup>64</sup> although to date none of them explicitly prohibits the transfer of conventional arms. Interestingly, restrictions on arms transfers under customary international law were disregarded when drafting Article 6 (2) ATT but they evidently continue to apply next to the ATT as well.<sup>65</sup>

Finally, Article 6 (3) ATT requires any States Party not to authorize a transfer

“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”.<sup>66</sup>

<sup>61</sup> For a detailed description of the means of delivery see V. Wiebe, 'Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law', 22 *Michigan Journal of International Law* (2000) 1, 85, 89.

<sup>62</sup> *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, 31 May 2001, 2326 UNTS 211 [Firearms Protocol].

<sup>63</sup> *Ibid.*, Art. 5 (1) (b), 239.

<sup>64</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 24.

<sup>65</sup> *Ibid.* For instance, the principle of non-intervention may impose restrictions on the international trade in arms. Cf. B. Tavakoli, 'Small Arms, International Restrictions on the Trade in', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (2012), 236, 239, para. 14 [Wolfrum, *Encyclopedia of Public International Law*, Vol. IX].

<sup>66</sup> ATT, Art. 6 (3), *supra* note 8, 5.

As the only absolute prohibition on arms transfers the ATT creates by itself, it constitutes one of the ATT's key provisions and has undergone some major changes in the course of the two Conferences on the ATT.

Some of the changes to the provision have considerably enhanced the treaty's potential impact. For instance, Article 3 (3) of the 2012 draft ATT only prohibited arms transfers "for the purpose of" facilitating the commission of any of the listed crimes, thereby requiring an element of express intent on the part of the States Party.<sup>67</sup> Due to the opposition of several States during the negotiations at the Final Conference, the requirement of intent was lifted. Under Article 6 (3) ATT, a States Party must only have knowledge that the arms or items would be used for the commission of any of the listed crimes. While the ATT does not provide for a definition of 'knowledge' itself, one can possibly draw on the one contained in Article 30 (3) *Rome Statute of the International Criminal Court* (Rome Statute), which defines the term as the "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".<sup>68</sup> According to Article 6 (3) ATT the States Party needs to have knowledge of the use of the arms or items at the time of the authorization in order for the transfer to be prohibited. Some delegations had opposed this wording and instead argued for the transfer itself being the relevant time as the situation could change substantially in the meantime.<sup>69</sup> However, this proposal was not considered in the further drafting process. Although Article 7 (7) ATT deals with the situation that a States Party becomes aware of new relevant information after the authorization of an export has been granted, it only encourages – but does not oblige – the States Party to reassess the authorization. Despite this, the threshold

<sup>67</sup> 2012 Draft ATT, Art. 3 (3), *supra* note 48, 4. For an analysis of what was meant by 'for the purpose of', see International Committee of the Red Cross (ICRC), 'ICRC Analysis of Articles 2, 3, 4 and 5 of the July 2012 Draft Arms Trade Treaty' (12 March 2013), available at <http://www.icrc.org/eng/assets/files/2013/icrc-analysis-draft-att.pdf> (last visited 31 January 2014), 3-5 [ICRC, Analysis].

<sup>68</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 30, 2187 UNTS 3, 107 [Rome Statute]. See Casey-Maslen, Giacca & Vestner, *supra* note 54, 24.

<sup>69</sup> For example South Africa and Spain made statements in this regard. In the absence of official records from the Final Conference on the Arms Trade Treaty, see R. Acheson, 'News in Brief', *Arms Trade Treaty Monitor No. 6.7* (26 March 2013), available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor6.7.pdf> (last visited 31 January 2014), 5, 6 and R. Acheson, 'News in Brief', *Arms Trade Treaty Monitor No. 6.8* (27 March 2013), available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor6.8.pdf> (last visited 31 January 2014), 7, 7.

for a prohibition of transfers under Article 6 (3) ATT is considerably lower than in the 2012 draft ATT.

As to the crimes for which the arms or items would be used, Article 6 (3) ATT first refers to genocide the definition of which is firmly established in international treaties. According to Article 2 *Genocide Convention* as well as Article 6 *Rome Statute* 'genocide' means

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [and] (e) Forcibly transferring children of the group to another group”.<sup>70</sup>

Furthermore, the International Court of Justice (ICJ) held that “the principles underlying the Genocide Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” as early as in 1951.<sup>71</sup> It is disputed whether the ICJ herewith found the prohibition of genocide to be part of customary international law or rather to constitute a general principle of law<sup>72</sup> but either way the definition of genocide contained in the *Genocide Convention* is universally accepted and is therefore to be used for the purposes of the ATT.

Second, Article 6 (3) ATT mentions crimes against humanity. Crimes against humanity are “particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons”.<sup>73</sup> They must be committed as part of a widespread or systematic attack directed against a civilian population.<sup>74</sup> Whereas Article 5 *ICTY Statute*

<sup>70</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Art. 2, 78 UNTS 277, 280 (emphasis omitted); *Rome Statute*, Art. 6, *supra* note 68, 93.

<sup>71</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, 23.

<sup>72</sup> Cf. W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (2009), 4.

<sup>73</sup> A. Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (2013), 90.

<sup>74</sup> *Ibid.*, 91. See also *Prosecutor v. Duško Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997, 235, para. 648; *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-T, 3 March 2000, 66-67, para. 202.

requires crimes against humanity to be committed in an armed conflict,<sup>75</sup> this does not apply to contemporary customary international law.<sup>76</sup> Article 7 (1) *Rome Statute* contains a list of acts that are able to qualify as crimes against humanity such as murder, extermination, and enslavement. While most of the acts listed in Article 7 (1) *Rome Statute* also constitute crimes against humanity under customary international law, it is unclear whether this is also the case with acts such as enforced prostitution, forced pregnancy, or enforced disappearance.<sup>77</sup> In this respect, it should be pointed out that, according to most commentators, Article 7 (1) *Rome Statute* does not codify customary international law but in certain aspects deviates from it.<sup>78</sup>

Third, Article 6 (3) ATT refers to grave breaches of the *Geneva Conventions* of 1949, attacks directed against civilian objects or civilians protected as such, and other war crimes as defined by international agreements to which the relevant State is a Party. Compared to the 2012 draft ATT which only mentioned “grave breaches of the Geneva Conventions of 1949, or serious violations of [their] common Article 3”,<sup>79</sup> the reference to war crimes in Article 6 (3) ATT has been extended considerably. The inclusion of attacks directed against civilian objects or civilians protected as such was considered particularly important as those acts are typically carried out by way of conventional arms.<sup>80</sup> Next to the *Geneva Conventions* of 1949,<sup>81</sup> which are already expressly mentioned in Article 6 (3)

<sup>75</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Art. 5, SC Res. 827, UN Doc S/RES/827 (1993), 25 May 1993 (as last amended 7 July 2009) [ICTY Statute].

<sup>76</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, paras 141-142; G. Acquaviva & F. Pocar, ‘Crimes Against Humanity’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. II (2012), 855, 858, para. 13.

<sup>77</sup> Acquaviva & Pocar, *supra* note 76, para. 19.

<sup>78</sup> See, e.g., W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 144; M. Boot, R. Rixon & C. K. Hall, ‘Article 7’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (2008), 159, 170-174, para. 5; Cassese *et al.*, *supra* note 73, 105.

<sup>79</sup> *2012 Draft ATT*, Art. 3 (3), *supra* note 48, 4.

<sup>80</sup> See, e.g., ICRC, ‘Arms Trade Treaty: Statement’ (21 March 2013), available at <http://www.icrc.org/eng/resources/documents/statement/2013/03-21att-arms-availability-statement.htm> (last visited 31 January 2014) [ICRC, Statement].

<sup>81</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 [Geneva Convention II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75



ATT, its additional protocols<sup>82</sup> as well as the *Rome Statute, inter alia*, serve to define the other war crimes the provision refers to if the relevant State has ratified them. Article 6 (3) ATT makes no reference to the definition of war crimes in customary international law by which all States Parties to the ATT are bound. The inclusion of customary international law might have provided the article with a more solid basis for uniform interpretation and application. Furthermore, the explicit reference to common Article 3 of the *Geneva Conventions* applicable in non-international armed conflicts has been deleted during the negotiations at the Final Conference. Admittedly, common Article 3 does not regulate the situation of non-international armed conflicts conclusively but outlines the “fundamental standard rules of protection that must be observed in all armed conflicts”.<sup>83</sup> The *Additional Protocol II* was specifically designed to supplement it.<sup>84</sup> However, the deletion of the only specific reference to the law regulating non-international armed conflicts in a world where the vast majority of armed conflicts is not of an international character in the strict legal sense is astonishing.

Finally, Article 6 ATT does not establish a prohibition of arms transfers to non-state actors in spite of claims by several State delegations to this effect.<sup>85</sup> This arguably caused several States to vote against or to abstain in the vote on the draft resolution on the ATT in the General Assembly.<sup>86</sup> Likewise Article 6 ATT does not contain an express prohibition of transfers if the relevant States Party has knowledge that the arms or items would be used to commit systematic human rights violations although many State delegations had called for such a provision.<sup>87</sup> Human rights treaties could therefore only constitute an

UNTS 135 [Geneva Convention III]; and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 [Geneva Convention IV].

<sup>82</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [Additional Protocol I] and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 [Additional Protocol II].

<sup>83</sup> See, e.g., T. Marauhn & Z. F. Ntoubandi, ‘Armed Conflict, Non-International’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. I (2012), 626, 630, para. 18.

<sup>84</sup> *Additional Protocol II*, Art. 1 (3), *supra* note 82, 7.

<sup>85</sup> United Nations Conference on the Arms Trade Treaty, *Background Document*, *supra* note 52, e.g., 4 (Section IV, para. 4) (view of Algeria) & 26 (view of Cuba).

<sup>86</sup> For the explanations of vote of States see GA, *Verbatim Record of the 71st Plenary Meeting (67th Session)*, UN Doc A/67/PV.71, 2 April 2013.

<sup>87</sup> See ‘ATT Conference: Statement Delivered by Ghana’, *supra* note 52, 2.

absolute barrier to arms transfers if they were to be considered as international agreements under Article 6 (2) ATT and would be breached by the transfer. In any event, human rights concerns are relevant to the export assessment under Article 7 ATT.

## II. Export and Export Assessment

Article 7 ATT provides for a multi-step procedure to be followed by States Parties regarding export authorizations.

### 1. Assessment of Risks of the Export

Article 7 (1) ATT stipulates that – if an export is not already prohibited pursuant to Article 6 ATT – each exporting States Party, prior to the decision whether or not to authorize an export, has to assess whether the exported arms or items would contribute to or undermine peace and security (a) or could be used to commit or facilitate serious violations of international humanitarian or human rights law or an act of terrorism or transnational organized crime (b). The provision further provides for the assessment to be carried out in an objective and non-discriminatory manner to which end it shall also include information provided by the importing State in accordance with Article 8 (1) ATT.

Article 7 (1) (a) ATT requires States Parties to assess whether the arms or items to be transferred could contribute to or undermine peace and security. The reference to a possible contribution to peace and security has been a contentious issue during both Conferences on the ATT. Read together with Article 7 (3) ATT, it could lead States Parties to disregard the risk of the usage of exported weapons or items for violations of international law due to their possible contribution to peace and security under Article 7 (1) (a) ATT.<sup>88</sup>

Article 7 (1) (b) ATT obliges States Parties to consider potential negative uses of exported arms but does not further define them. Article 7 (1) (b) (i) ATT refers to serious violations of international humanitarian law. Serious violations of international humanitarian law correspond to war crimes.<sup>89</sup> They consist of a serious infringement of an international rule under customary international or treaty law entailing the individual criminal responsibility of the person breaching the rule.<sup>90</sup> Violations of international humanitarian law are serious if

<sup>88</sup> See *infra*, section D. II. 3.

<sup>89</sup> Cassese *et al.*, *supra* note 73, 65.

<sup>90</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 94.

they “endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian objects or infrastructure) or if they breach important values”.<sup>91</sup> This is the case with grave breaches as specified under the four *Geneva Conventions* of 1949<sup>92</sup> and its first *Additional Protocol*<sup>93</sup> respectively, war crimes as defined in Article 8 *Rome Statute* as well as with other war crimes in international and non-international armed conflicts in customary international law.<sup>94</sup> As opposed to Article 6 (3) ATT, the scope of Article 7 (1) (b) (i) ATT is not limited to war crimes as defined by international agreements to which the State is a Party. It therefore also applies to serious violations of customary international humanitarian law, which gives the provision an importance of its own next to Article 6 (3) ATT.

Under Article 7 (1) (b) (ii) ATT, States have to assess the risk of exported weapons being used for serious violations of international human rights law. There is a wide range of human rights protected under international human rights treaties and customary international law that are potentially affected by the international trade in conventional arms and are therefore to be considered in the assessment. They include the right to life, the freedom from torture and other forms of cruel, inhuman or degrading treatment, the rights to liberty and security of person, the freedom from slavery, the freedom of thought, conscience and religion, the freedom of assembly and of expression, as well as the rights to health, education, food, and housing.<sup>95</sup> However, it is unclear what amounts to a ‘serious’ violation of international human rights law as required by the provision. No universally accepted definition of the term has come into existence.<sup>96</sup>

In any event, violations of those human rights that have attained the status of *jus cogens*, i.e. peremptory norms of customary international law from which

<sup>91</sup> ICRC, ‘What Are “Serious Violations of International Humanitarian Law”?: Explanatory Note’ (2012), available at <http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf> (last visited 31 January 2014) (emphasis omitted) [ICRC, Explanatory Note].

<sup>92</sup> *Geneva Convention I*, Art. 50, *supra* note 81, 62; *Geneva Convention II*, Art. 51, *supra* note 81, 116; *Geneva Convention III*, Art. 130, *supra* note 81, 238; and *Geneva Convention IV*, Art. 147, *supra* note 81, 388.

<sup>93</sup> *Additional Protocol I*, Arts 11 & 85, *supra* note 82, 11-12 & 41-42.

<sup>94</sup> ICRC, ‘Explanatory Note’, *supra* note 91.

<sup>95</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 27.

<sup>96</sup> *Ibid.*

no derogation by treaty is possible,<sup>97</sup> must be considered ‘serious’.<sup>98</sup> Although it is disputed which specific human rights belong to the body of *ius cogens*, it is commonly acknowledged that the “core rights which are directly related to human existence” qualify as such.<sup>99</sup> Among those relevant with a view to the trade in arms are the rights to freedom from torture,<sup>100</sup> slavery,<sup>101</sup> and arguably the freedom from arbitrary deprivations of life.<sup>102</sup> The violations of these rights would therefore always amount to serious human rights violations under Article 7 (1) (b) (ii) ATT.

Nevertheless, there is no indication that serious human rights violations are limited to breaches of peremptory norms of human rights law. With regard to those human rights not forming part of *jus cogens*, violations can still be serious due to the manner in which they have been committed.<sup>103</sup> In this respect, ‘serious human rights violations’ might be tantamount to ‘gross’ or ‘systematic’ violations of human rights, both of which are terms used in various resolutions of UN organs.<sup>104</sup> ‘Gross violations of human rights’ have been described to be

<sup>97</sup> See, e.g., *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 35, 1155 UNTS 331, 341 [VCLT]; J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), 594.

<sup>98</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 27.

<sup>99</sup> C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (2008), 38.

<sup>100</sup> See e.g. *Prosecutor v. Anto Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998, 58-59, para. 153; *Al-Adsani v. the United Kingdom*, ECtHR Application No. 35763/97, Judgment of 21 November 2001, 18-19, paras 59-61; E. de Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law’, 15 *European Journal of International Law* (2004) 1, 97.

<sup>101</sup> See, e.g., L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), 446-447; R. Higgins, ‘Derogations Under Human Rights Treaties’, 48 *British Yearbook of International Law* (1976-1977), 281, 282.

<sup>102</sup> The freedom from arbitrary deprivations of life constitutes the core of the right to life. The latter refers to those deprivations of life which cannot be justified under international human rights law as opposed to legal exceptions to the right provided for by international human rights law such as acts of self-defense or defense of a third person or even (still) the death penalty. It is argued that similar to the core of the prohibition of the use of force, the prohibition of aggression, from which no derogation is possible, the core of the right to life belongs to the body of *jus cogens*. For a detailed analysis, see S. Oeter, ‘Ius cogens und der Schutz der Menschenrechte’, in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), 499, 512; Hannikainen, *supra* note 101, 514-519.

<sup>103</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 28.

<sup>104</sup> For instance, the term ‘gross violations of [...] human rights’ is used in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian*

distinct from ‘simple’ human rights violations due to their nature and scope.<sup>105</sup> The systematic violation of human rights implies a consistent pattern, i.e. a “repeated occurrence of violations over a substantial period of time”, and an element of planning.<sup>106</sup> However, no precise definitions of these terms have been agreed upon either.

In summary, there is no clear-cut definition of ‘serious human rights violations’ in international law. As with ‘gross’ or ‘systematic’ human rights violations, whether a violation of human rights is ‘serious’ pursuant to Article 7 (1) (b) (ii) ATT needs to be determined on a case-by-case basis. Relevant factors may include the frequency of violations, the number of victims, the nature of the breached obligation and the character of the violations, e.g. whether it shows a massive disregard or a general questioning of the human rights concerned.

According to Article 7 (1) (b) (iii) and (iv) ATT, the exporting State has to assess the potential that the transferred arms or items could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism or transnational organized crime to which it is a Party. Among the relevant treaties relating to terrorism are the *Convention for the Suppression of Unlawful Seizure of Aircraft*,<sup>107</sup> the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*,<sup>108</sup> the

*Law*, GA Res. 60/147 annex, UN Doc A/RES/60/147, 21 March 2006, 2; in ECOSOC Res. 1503 (XLVIII), 27 May 1970; and in *Institution-building of the United Nations Human Rights Council*, Human Rights Council Res. 5/1 annex, 18 June 2007, para. 85. Human rights violations have been qualified as ‘systematic’ in various resolutions of UN bodies. See, e.g., SC Res. 161, UN Doc S/RES/161 (1961), 21 February 1961 and Human Rights Council Res. 23/1, UN Doc A/HRC/RES/23/1, 19 June 2013, 1, para. 1.

<sup>105</sup> V. Dimitrijevic, ‘Dimensions of State Responsibility for Gross Violations of Human Rights and Fundamental Freedoms Following the Introduction of Democratic Rule’, in T. van Boven *et al.* (eds), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1992), 214, 216. Similarly Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993, 6, para. 8.

<sup>106</sup> Cf. C. Medina Quiroga, *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System* (1988), 13-16.

<sup>107</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 UNTS 105.

<sup>108</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.

*International Convention Against the Taking of Hostages*,<sup>109</sup> the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*,<sup>110</sup> and the *International Convention for the Suppression of Terrorist Bombings*.<sup>111</sup> With regard to acts constituting transnational organized crimes the *United Nations Convention Against Transnational Organized Crime*<sup>112</sup> and its protocols<sup>113</sup> are pertinent.

## 2. Consideration of Mitigation Measures

According to Article 7 (2) ATT, States Parties must consider means to mitigate the risks listed in Article 7 (1) (a) and (b) ATT, “such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States”.<sup>114</sup> A mitigation measure already practiced by many States is the issuance of end-user certificates. They state the final user and the end-use of imported arms and primarily serve to verify that the arms will not be further transferred to a third Party without the exporting State’s consent.<sup>115</sup> However, the risk of forgery is high and often authorities of the exporting State do not examine certificates properly.<sup>116</sup>

<sup>109</sup> *International Convention Against the Taking of Hostages*, 17 December 1979, 1316 UNTS 205.

<sup>110</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 201.

<sup>111</sup> *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 UNTS 256.

<sup>112</sup> *United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209.

<sup>113</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319; *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 480; *Firearms Protocol*, *supra* note 62.

<sup>114</sup> ATT, Art. 7 (2), *supra* note 8, 6.

<sup>115</sup> M. Bromley & H. Griffiths, ‘End-User Certificates: Improving Standards to Prevent Diversion’, *SIPRI Insights on Peace and Security No. 2010/3* (March 2010), available at <http://books.sipri.org/files/insight/SIPRIInsight1003.pdf> (last visited 31 January 2014), 2.

<sup>116</sup> See in detail *ibid.*

### 3. Decision on the Export Authorization

Article 7 (3) ATT prohibits the authorization of an export should the States Party conclude that there is an “overriding risk” of any of the negative consequences listed in Article 7 (1) ATT.<sup>117</sup> The term ‘overriding risk’ is ambiguous. It could be understood to imply that the negative consequences as outlined in Article 7 (1) (a) and (b) ATT are to be balanced against a potential contribution of the export to peace and security according to Article 7 (1) (a) ATT and against mitigation measures pursuant to Article 7 (2) ATT.<sup>118</sup> Following this reading, a States Party could deem the contribution of the arms transfer to peace and security more important and authorize the export even if there was a very high risk that the arms would be used in violation of international law.

The term has been subject to criticism and intense discussions at the Final Conference with a majority of States urging to replace it with ‘substantial’ or ‘clear’ risk.<sup>119</sup> Having failed to achieve such a change of the wording, some States already declared their intention to interpret ‘overriding’ as ‘substantial’ at the vote on the ATT in the General Assembly.<sup>120</sup> In any case, the exporting States Party is required to conduct the whole export assessment in good faith.<sup>121</sup> Thus it could not simply assert that the risk of negative consequences is outweighed by other considerations but would have to substantiate this allegation in order to authorize the export.

### 4. Other Factors to Be Considered in the Assessment

Article 7 (4) ATT states that the exporting State in making the assessment shall also take into account the risk of the arms or items being used to commit or facilitate serious acts of gender based violence or serious acts of violence against women and children. However, Article 7 (2) and (3) ATT only apply to the risks listed in Article 7 (1) ATT. As a result, States Parties must neither consider mitigation measures with regard to such risk nor are they under an obligation not

<sup>117</sup> ATT, Art. 7 (2), *supra* note 8, 6.

<sup>118</sup> ICRC, ‘Statement’, *supra* note 80.

<sup>119</sup> See, e.g., ‘ATT Conference: Statement Delivered by Ghana’, *supra* note 52, 2.

<sup>120</sup> GA, *Overwhelming Majority of States in General Assembly Say ‘Yes’ to Arms Trade Treaty to Stave off Irresponsible Transfers That Perpetuate Conflict, Human Suffering*, UN Press Release GA/11354, 2 April 2013, available at <http://www.un.org/News/Press/docs/2013/ga11354.doc.htm> (last visited 31 January 2014).

<sup>121</sup> A. Clapham, ‘The Arms Trade Treaty: A Call for an Awakening’, 2 *ESIL Reflections* (2013) 5, available at [http://www.esil-sedi.eu/sites/default/files/Clapham%20Reflection\\_0.pdf](http://www.esil-sedi.eu/sites/default/files/Clapham%20Reflection_0.pdf) (last visited 31 January 2014), 4.

to authorize an export if they determine such risk exists. Many State delegations and non-governmental organizations had advocated for a stronger consideration of the risks of serious acts of gender based violence or violence against women and children in the assessment and called for including them in the factors under Article 7 (1) ATT. Admittedly, serious acts of gender based violence or violence against women and children will often also constitute serious violations of international humanitarian or human rights law resulting in Article 7 (2) and (3) ATT to be applicable.<sup>122</sup> However, it appears unfortunate to provide for a mandatory assessment of the risk of those acts occurring due to an arms export while not attaching any consequences to it.

### III. Other Substantive Obligations

Other substantive obligations are set out in Articles 8 to 11 ATT. While Articles 8 to 10 ATT serve to regulate the other forms of arms transfers as enshrined in Article 2 (2) ATT, Article 11 ATT concerns the prevention of diversion.

Article 8 ATT deals with the import of arms as defined in Article 2 (1) ATT. Article 8 (1) ATT complements Article 7 ATT by obliging importing States to provide appropriate and relevant information to exporting States Parties for their export assessment. According to Article 8 (2) ATT, States shall take measures allowing it to regulate, where necessary, arms imports under its jurisdiction. As it is for the importing States Party to decide on whether regulation is necessary, the provision leaves the State quite an extensive margin of discretion. Article 8 (3) ATT permits an importing States Party which is the final destination of an arms transfer to request information from the exporting State on the progress of an authorization. However, the exporting States Party's obligation to inform the importing State is somewhat limited by Article 7 (6) ATT, which states that appropriate information shall be made available subject to the exporting State's "national laws, practices and policies".<sup>123</sup>

Article 9 ATT stipulates that States Parties shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under their jurisdiction of conventional arms listed in Article 2 (1) ATT. Similarly, Article 10 ATT requires States to take measures, pursuant to their national laws, to regulate brokering for such arms taking place under their jurisdiction. Again, with references to necessity and feasibility of appropriate measures and

<sup>122</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 30.

<sup>123</sup> ATT, Art. 7 (6), *supra* note 8, 6. Casey-Maslen, Giacca & Vestner, *supra* note 54, 32.



national laws, the regulation of transits and brokering activities is to a great extent left to the States Parties' discretion. While this can partly be explained with the technical difficulties to control these activities, the obligations under Articles 9 and 10 ATT still fall short of those enshrined in the *Programme of Action*. For instance, the latter calls for establishing "adequate laws, regulations and administrative procedures to exercise effective control" over the transit of SALW.<sup>124</sup> With respect to brokering, it prescribes the development of adequate national legislation or administrative procedures which "should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State's jurisdiction and control".<sup>125</sup> Despite the fact that the *Programme of Action* constitutes a soft law instrument and is therefore not binding upon States, the ATT has not been able to establish rules on transits and brokering as concrete and detailed as those already in place within the *Programme of Action*.

The prevention of diversion is an object of the treaty pursuant to Article 1 ATT and is dealt with in Article 11 ATT. Article 11 (1) ATT stipulates that States Parties shall take measures to that end but fails to define what the term diversion means. It has been described as

"a breakdown in the transfer control chain such that, either before or after arriving at their intended destination, exported weapons are transferred to unauthorized end-users or used in violation of commitments made by end-users prior to export".<sup>126</sup>

Article 11 (2) ATT requires exporting States Parties to assess the risk of diversion thereby making the prevention of diversion another relevant factor within the export assessment. Just as in Article 7 (2) ATT, exporting States Parties also have to consider mitigation measures with regard to diversion. Next to confidence-building measures and jointly developed and agreed programs these include "examining parties involved in the export, requiring additional documentation, certificates, [and] assurances" and the denial of authorization of the export.<sup>127</sup> Article 11 (3) ATT obliges all States Parties to cooperate

<sup>124</sup> *Programme of Action*, *supra* note 33, 10 (Section II., para. 2).

<sup>125</sup> *Ibid.*, 11 (Section II., para. 14).

<sup>126</sup> Graduate Institute of International and Development Studies, *Small Arms Survey 2008: Risk and Resilience* (2008), 156.

<sup>127</sup> ATT, Art. 11 (2), *supra* note 8, 7.

and exchange information with a view to mitigating the risk of diversion but only “pursuant to their national laws” and “where appropriate and feasible”.<sup>128</sup> According to Article 11 (4) ATT, States Parties need to take appropriate measures to address any detected diversion, such as “alerting potentially affected States Parties, examining diverted shipments [...] and taking follow-up measures through investigation and law enforcement”.<sup>129</sup> Article 11 (5) and (6) ATT encourage States Parties to share relevant information with and to report to other States Parties on measures to address diversion. This is complemented by Article 13 (2) ATT encouraging States Parties to report to other States on successful measures in combating diversion.

#### IV. Concluding Remarks on Substantive Obligations

The effectiveness of the ATT in regulating international arms transfers is most dependent on the scope and consequences of the substantive obligations for States Parties provided therein. As has been pointed out above, the only absolute prohibition the ATT establishes by itself is incorporated in Article 6 (3) ATT. However, its scope of application is not comprehensive due to the fact that it does not refer to war crimes under customary international law. With regard to the regulation of exports, the fact that Article 7 ATT only prohibits authorizations where the States Party determines an ‘overriding risk’ of any of the listed negative consequences occurring significantly limits its possible impact. Unfortunately, the regulation of other forms of transfer is dealt with rather superficially and no concrete obligations are provided for. Despite some adjustments to the 2012 draft ATT which have enhanced the scope of the substantive obligations, they are still in large parts imprecise and leave the States Parties a big margin of discretion, which makes it difficult to implement them in a coherent way.

#### E. Implementation and Compliance

Article 5 ATT sets out standards for the implementation of the ATT. Most importantly, Article 5 (2) ATT requires States Parties to establish and maintain a national control system that has to include a national control list. Apart from that, its specific design is left to the States Parties’ discretion. In this context, Article 5 (5) ATT only specifies that States shall “designate competent

<sup>128</sup> *Ibid.*, Art. 11 (3), 7.

<sup>129</sup> *Ibid.*, Art. 11 (4), 7.

national authorities in order to have an effective and transparent national control system”.<sup>130</sup> Pursuant to Article 5 (4) ATT, States Parties have to provide their national control lists to the Secretariat established in accordance with Article 18 ATT, which in turn makes them available to other States Parties. States Parties are encouraged but not obliged to make the national control lists publicly available as well. Article 5 (5) ATT further requires States Parties to “take measures necessary to implement the provisions of [the] treaty”.<sup>131</sup> By contrast, the 2012 draft ATT referred to “all appropriate legislative and administrative measures”<sup>132</sup> thereby entailing a stronger obligation resting on States Parties. In general, it seems questionable if Article 5 (5) ATT as it is now framed has an importance of its own as Article 14 ATT also provides for States Parties to “take appropriate measures to enforce national laws and regulations that implement the provisions of the treaty”.<sup>133</sup>

Article 12 ATT deals with record-keeping by States Parties. According to Article 12 (1) ATT, they must maintain national records of export authorizations or actually conducted exports of conventional weapons covered by Article 2 (1) ATT “pursuant to [their] national laws and regulations”.<sup>134</sup> As has been described with regard to other obligations within the ATT, the reference to national laws and regulations of the States Party concerned significantly limits the scope of its obligation under the provision and has been opposed by several State delegations throughout the Final Conference on the ATT.<sup>135</sup> Article 12 (2) ATT incites States Parties to also keep records on imports and authorized transits or trans-shipments taking place under their jurisdiction. Article 12 (3) ATT further defines what States Parties are encouraged to include in those records, e.g. information on the quantity, value and model/type of authorized transfers. Finally, Article 12 (4) ATT stipulates that records are to be kept for a minimum of ten years. In comparison, the *Firearms Protocol* provides for the same length of record keeping,<sup>136</sup> whereas the *International Tracing Instrument* – albeit being of a non-binding nature – requires States to keep records indefinitely “to the extent possible”.<sup>137</sup>

<sup>130</sup> *Ibid.*, Art. 5 (5), 5.

<sup>131</sup> *Ibid.*

<sup>132</sup> *2012 Draft ATT*, Art. 5 (3), *supra* note 48, 5.

<sup>133</sup> Cf. Casey-Maslen, Giacca & Vestner, *supra* note 54, 22.

<sup>134</sup> ATT, Art. 12 (1), *supra* note 8, 8.

<sup>135</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 35.

<sup>136</sup> *Firearms Protocol*, Art. 7, *supra* note 62, 240.

<sup>137</sup> *International Tracing Instrument*, *supra* note 46, 9 (Section IV, para. 12).

Article 13 ATT concerns reporting obligations of States Parties. Pursuant to Article 13 (1) ATT, a States Party needs to provide an initial report to the Secretariat within the first year after entry into force of the treaty for the respective State. In the report, the State has to illustrate measures undertaken in order to implement the ATT, in particular national laws, national control lists, and other regulations and administrative measures. Afterwards, the State shall report on any new measures when appropriate. Article 13 (3) ATT further requires States Parties to report on an annual basis on authorized or actual exports and imports of those conventional weapons covered under Article 2 (1) ATT. However, they may exclude commercially sensitive or national security information from the reports. In the absence of a definition of what is deemed commercially sensitive or national security information, this exception might be interpreted by States Parties broadly and potentially lead to attempts to circumvent the annual reporting obligation. The Secretariat distributes every State report to the other States Parties. However, it is not mandatory to make reports or key information on arms transfers publicly available despite the fact that many State delegations at the Final Conference had called for such an obligation.<sup>138</sup>

According to Article 17 (4) ATT, the Conference of States Parties shall review the treaty's implementation. Among others, the latter is also tasked with considering recommendations regarding the implementation and operation of the treaty and amendments to it in accordance with Article 20 ATT. Apart from specific regulations on the adoption of the Conference's rules of procedure<sup>139</sup> and amendments to the treaty,<sup>140</sup> the ATT does not expand on how the Conference is to reach decisions.

Finally, it is worth mentioning the relationship of the treaty with other international agreements addressed in Article 26 ATT. In accordance with Article 26 (1) ATT, the implementation of the ATT shall not affect States Parties' obligations under existing or future international treaties to which they are Parties provided that those obligations are compatible with the ATT. The respective provision in the 2012 draft ATT was considerably broader and stated that the "implementation of this Treaty shall not prejudice obligations undertaken

<sup>138</sup> 'ATT Conference: Statement Delivered by Ghana', *supra* note 52, 2.

<sup>139</sup> According to Art. 17 (2) ATT, the rules of procedure are to be adopted by consensus at the first session of the Conference of States Parties.

<sup>140</sup> Art. 20 ATT (*supra* note 8, 11) states that "States Parties shall make every effort to achieve consensus on each amendment". In the absence of agreement, the amendment may, *ultima ratio*, be adopted by a three-quarters majority vote of the States Parties present and voting.

with regard to other instruments”.<sup>141</sup> This provision had been opposed by many State delegations and non-governmental organizations due to its ambiguity.<sup>142</sup> On the one hand, it could have been interpreted to mean that the ATT should not “prejudice the application of stricter, more rigorous obligations found under other instruments”.<sup>143</sup> On the other hand, it could have been understood to permit States to circumvent the treaty’s obligations by incurring obligations under other international treaties.<sup>144</sup> In this regard, Article 26 (1) ATT clarifies that only those obligations under another agreement which are consistent with the ATT are not affected by its implementation. It appears self-explanatory that the implementation of the ATT does not prejudice obligations contained in other agreements which are compatible with it as no conflict between the treaties exists in the first place.<sup>145</sup> However, should an obligation contained in another agreement be incompatible with a provision of the ATT, Article 26 (1) ATT *argumentum e contrario* provides for the latter to be implemented nevertheless. It therefore constitutes a conflict clause giving priority to the ATT in that it obliges States Parties to implement the ATT even if this inevitably amounts to a violation of their obligations under another treaty.<sup>146</sup>

Article 26 (2) ATT is almost entirely identical with the second sentence of Article 5 (2) of the 2012 draft ATT. It states that the ATT may not be cited as grounds for voiding defense cooperation agreements concluded between States Parties. Some delegations and non-governmental organizations voiced concern about this provision fearing it could suggest “that arms transfer obligations arising under any existing or future contract concluded under a ‘defence cooperation agreement’ would be exempt from the treaty’s application”.<sup>147</sup> However, such a

<sup>141</sup> 2012 Draft ATT, Art. 5 (2), *supra* note 48, 5.

<sup>142</sup> ‘ATT Conference: Statement Delivered by Ghana’, *supra* note 52, 2.

<sup>143</sup> ICRC, ‘Analysis’, *supra* note 67, 7.

<sup>144</sup> S. Haumer, ‘Die Verhandlungen zu einem Waffenhandelsvertrag’, 25 *Journal of International Law of Peace and Armed Conflict* (2012) 4, 180, 183.

<sup>145</sup> For an in-depth analysis of conflicts between treaties see W. Czapliński & G. Danilenko, ‘Conflict of Norms in International Law’, 21 *Netherlands Yearbook of International Law* (1990), 3; N. Matz-Lück, ‘Treaties, Conflicts Between’, in Wolfrum, *Encyclopedia of Public International Law*, Vol. IX, *supra* note 65, 1096; J. B. Mus, ‘Conflicts Between Treaties in International Law’, 45 *Netherlands International Law Review* (2005) 2, 208.

<sup>146</sup> Cf. on conflict clauses in detail A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (2013), 194-204; Czapliński & Danilenko, *supra* note 145, 12-18; N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge* (2005), 260-274; N. Matz-Lück, ‘Treaties, Conflict Clauses’, in Wolfrum, *Encyclopedia of Public International Law*, Vol. IX, *supra* note 65, 1093; Mus, *supra* note 145, 214-217.

<sup>147</sup> ICRC, ‘Analysis’, *supra* note 67, 8.

reading runs contrary to both the wording and the object and purpose of the treaty stipulated in Article 1 ATT, namely “to [...] [e]stablish the highest possible common international standards” for regulating the international arms trade.<sup>148</sup> The provision can therefore hardly be interpreted in a way which allows States to circumvent their obligations under the treaty but rather states the obvious, namely that the ATT does not automatically void States Parties’ conflicting defense cooperation agreements.<sup>149</sup>

## F. Conclusion

It is obvious from the foregoing that with the adoption by the General Assembly and the possible entry into force of the ATT the international community has not reached a situation in which “all’s well that ends well”.<sup>150</sup> The scope of the treaty is non-exhaustive and does not cover ammunition/munitions and parts and components in the same way as conventional weapons listed under Article 2 (1) ATT. The substantive obligations the treaty imposes are often drafted in an imprecise or ambiguous way, which potentially allows for States Parties to circumvent them. The provisions on implementation are just as vague and even though the Conference of States Parties is tasked with reviewing the implementation of the ATT, it is only vested with the authority to adopt recommendations regarding it. The formation of the ATT is therefore not the last step in an already very long-lasting process to impose restrictions on the flow of conventional arms but rather the first obstacle the international community has finally overcome.

However, one must only think of the dreadful consequences of the international trade in conventional arms in order to realize that the process leading to the adoption of the treaty can hardly be considered “much ado about nothing”.<sup>151</sup> As big as the shortcomings of the ATT may be, it provides for the first common and binding rules on transfers in conventional arms. It entails minimum standards for the authorization of arms transfers every States Party

<sup>148</sup> ATT, Art. 1, *supra* note 8, 3. According to Art. 31 (1) VCLT (*supra* note 97, 340), which has also obtained customary status, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

<sup>149</sup> This interpretation is also in line with the provision on the termination or suspension of the operation of a treaty implied by conclusion of a later treaty contained in Art. 59 VCLT (*supra* note 97, 345-346).

<sup>150</sup> W. Shakespeare, *All’s Well That Ends Well* (1601-1608).

<sup>151</sup> W. Shakespeare, *Much Ado About Nothing* (1598-1599).

must adhere to, whether it has previously controlled arms transfers from, to or through its territory or not. This being said, for the ATT to have a significant effect on the international arms trade, it first needs to be ratified by major supplier States. Whether the treaty will further have a profound impact on the flow of arms to perpetrators of violations of human rights and international humanitarian law and consequently will succeed to reduce human suffering, will largely depend on the willingness of States Parties to interpret its provisions in the broadest sense possible and to implement them in this way at the national level.

