

SECTION 5

THE ARMS TRADE TREATY AND HUMAN RIGHTS



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This section outlines the broader benefits of the ATT to international human rights law (IHRL). It examines how the ATT complements regional treaties and UN declarations and resolutions that, in part, form IHRL. It then considers how the ATT risk assessment can be guided by concerns outlined in various declarations and resolutions. First, however, this section begins by examining how the ATT defines human rights violations for use in the risk-assessment process.

In 1948, the UN General Assembly adopted the Universal Declaration of Human Rights. This defined the concept of 'basic civil, political, economic, social and cultural rights that all human beings should enjoy'¹ and is considered to be the founding mechanism for IHRL.² Since the Universal Declaration of Human Rights, a series of legally binding international treaties and other instruments have been adopted, establishing the body of international human rights.³ The Universal Declaration of Human Rights together with the focused and specialised Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966) form the so-called International Bill of Rights.⁴

With the subsequent addition of a large number of regional human rights conventions, there are now more than 80 international human rights treaties and declarations in place.⁵ Human rights are strengthened as legal commitments through treaties, customary international legal norms, general principles and regional agreements that are translated into domestic law.⁶

The ATT contributes to the protection of people by prohibiting the authorisation of arms or items that:

'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'.⁷

The ATT risk-assessment approach also prospectively seeks to protect people by making it incumbent upon exporting States Parties to assess the potential that a transfer could be used to 'commit or facilitate a serious violation of international human rights law'.⁸ The ATT therefore reinforces international law and enhances it by bringing it into the risk-assessment process throughout the conventional arms trade.



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THE BROADER BENEFITS: HUMAN RIGHTS

Human rights protections contribute to human security. People have a right to live free from violence and free from the threat or fear of violence. Conflict zones can witness uniformed, pro-government and opposition militias and armed groups committing violence that violates peoples' individual rights and terrorises populations, creating fractures within and between communities.⁹ Attacks on civilians can take 'place any time civilians come into close proximity with armed actors'.¹⁰ This can have a long-term effect on individuals, causing physical and psychological injury.¹¹ At the community and state levels, armed violence can fuel continued cycles of abuse by contributing to inter-ethnic animosity.¹²

*'Our lives are connected to one another. Actions and decisions in one country affect many other States; they shake the lives of many people, no less important and no less human than you and I. When the fundamental principles of human rights are not protected, the centre of our institution no longer holds. It is they that promote development that is sustainable; peace that is secure; and lives of dignity.'*¹³

UN High Commissioner for Human Rights
Zeid Ra'ad Al Hussein (2015)

One case study exemplifies how IHRL gives protection and redress during a breakdown of law and order. In one ongoing non-international armed conflict uniformed and opposition forces stand accused of having committed war crimes and other serious human rights violations and abuses.¹⁴ The factors exacerbating this conflict include the general militarisation of society and the increased availability of weapons, resulting in a culture of lawlessness.¹⁵ Accusations of violations of IHRL and international humanitarian law (IHL) include:

*'rape and gang rape, sexual slavery, sexual mutilation including castration, forced pregnancy, and forced abortion [...] deliberate killing of civilians, often based on ethnicity; destruction and looting of hospitals, schools, civilian homes and means of livelihood; attacks on humanitarian personnel and assets; recruitment of child soldiers; arbitrary detention; and the killing of captured soldiers.'*¹⁶

The country in question does not criminalise or adequately define as crimes rape and other varied forms of sexual violence, torture, crimes against humanity or genocide.¹⁷



UN Photo: Mark Garten

This country has, however, acceded to the African Charter on Human and People's Rights, the Convention Against Torture (CAT), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). It also acceded to the Geneva Conventions of 1949 and their Additional Protocols.¹⁸ Inadequate domestic legal protections will not provide impunity in serious violations of IHRL, though.

Violations of IHRL will apply to this conflict through a planned Hybrid Court. This court will have a mandate 'to investigate and prosecute individuals bearing criminal responsibility for violations of international law'.¹⁹ Many of the legal mechanisms listed above regarding the mandate of the Hybrid Court will be retrospectively applied to redress human rights violations.

Where the ATT approach differs in situations such as this is that it seeks to form a process that can help prevent serious violations of IHRL by diminishing the supply of arms, ammunition, parts and component that fuel conflict.

Human rights relevant to ATT risk assessment

The most directly relevant provisions of the Universal Declaration of Human Rights, regarding arms misuse, is that everyone has the right to life, liberty and security of person.²⁰ As examined in *Section 4*, irresponsible transfers, diversions and illicit trade in conventional arms contribute to these violations.



UN Photo: Harandane Dicko

Life and personal security can be jeopardised in both conflict and non-conflict situations, for example:

**THE RIGHT TO LIVE FREE FROM VIOLENCE AND FREE FROM THREAT OR FEAR OF VIOLENCE:
THE IMPACT OF CONVENTIONAL ARMS IS NOT ONLY AN ISSUE IN CONFLICT**

Approximately 60% of human rights violations documented by Amnesty International (2010) 'have involved the use of small arms and light weapons'.²¹

Non-Conflict

- During 2010–2015, 83% of the victims of violent death were outside conflict zones.²²
- On average, firearms were used in an estimated 50% of homicides between 2010–2015.²³
- 396,000 intentional homicides occur every year.²⁴
- Approximately 2 million people globally are living with firearm injuries sustained in non-conflict situations over the past decade.²⁵
- Between 1999–2003 almost ½ of traded conventional arms were transferred to states with poor human rights standards.²⁶

Conflict

- During 2010–2015, 17% of violent deaths were conflict casualties.²⁷
- One in ten of all reported violent deaths worldwide occur in conflicts or during terrorist activities (2011).²⁸
- In one recent conflict rockets, mortars, tank shells and air-dropped bombs accounted for 90% of civilian deaths.²⁹
- Large-scale diversions of weapons can exacerbate conflicts and violations of human rights. Diversions can also facilitate the collapse of the rule of law.³⁰
- Irresponsible arms transfers can prolong conflict, destabilise fragmenting countries, hinder post-conflict reconstruction and make local people's lives more dangerous.³¹

In addition to the Universal Declaration of Human Rights, violations of socio-political and cultural rights may also be affected by irresponsible arms transfers, diversions and illicit trade. Violations of international law established through these conventions might also be considered in a State Party's ATT risk-assessment process:

- International Covenant on Economic, Social and Cultural Rights (1976)
- International Covenant on Civil and Political Rights (1966).

As will be seen in *Section 6* on Sustainable Development, armed violence arrests both social development and human development indicators:³² armed violence can have significant adverse impacts on access to education, livelihood and healthcare, and can cause displacement and poverty.

These are protected under the Universal Declaration of Human Rights and the Declaration on the Right to Development (1986).³³ This indicates that the ATT risk-assessment process might also consider that people have a right to:

- education;³⁴
- a standard of living adequate for the health and well-being of the individual and family, including:
 - food;
 - housing;
 - medical care;
 - necessary social services.³⁵

These basic public goods and services are demonstrated in *Section 6* to be adversely affected by armed violence. Armed violence in conflict and non-conflict situations also:

- inhibits access to markets;
- can cause displacement;
- diminishes access to healthcare, or
- restricts government's ability to adequately resource healthcare.

Armed violence has also been demonstrated to damage civilian infrastructure, diminishing the quality of life for local people. The ATT can help to prevent the arming of groups that target civilians or damage government provision of public services.³⁶ In this way, the ATT can contribute to adequate safe and secure standards of living.

The ATT, Gender and Community Participation

Armed violence can also have an impact on people's ability to participate freely in the social sphere of a community. For example, this may particularly affect women and children in situations characterised by high levels of sexual violence by armed groups.³⁷ The Universal Declaration of Human Rights requires that everyone 'has the right freely to participate in the cultural life of the community ...'.³⁸

The UN's Committee on the Elimination of Discrimination Against Women recommends that Parties to the Convention should accede or ratify the ATT as one of the 'international instruments relevant to the protection of women's rights in conflict prevention, conflict and post-conflict ...'.³⁹

The ATT reiterates that States Parties are guided by considerations of the adverse effects of armed conflict and armed violence on women and children.⁴⁰ This principle is explicitly highlighted as a risk-assessment criterion in the treaty text.⁴¹ An exporting state must consider the risk of the conventional arms transfer being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.⁴² There is therefore duplicate protection: serious violations of this nature that disproportionately affect women and children are already covered under serious violations of IHRL.⁴³

In assessing the gender impact of a transfer, a state may consider how a transfer would have an impact on international norm-building mechanisms such as:

- Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974);
- Convention on the Rights of the Child (1989).

Light-weight weapons, children associated with armed forces and armed groups and the ATT

*'The proliferation of inexpensive and light-weight small arms and light weapons in conflict regions contributed to the recruitment of children as combatants.'*⁴⁴

Children associated with armed forces and armed groups (CAAFAG), particularly those used in armed violence, are at high risk of being killed or maimed. CAAFAGs also suffering serious psychological and reintegration problems.⁴⁵ Children are often exposed to killing and sexual exploitation that can cause physical injuries, reproductive difficulties and mental health problems.⁴⁶ Military training is designed to alter psychology until a soldier will obey commands without question. This can damage children's long-term personality and educational development.⁴⁷ CAAFAGs may also be disproportionately recruited from disadvantaged communities and troubled family backgrounds.⁴⁸

An increasing number of international legal instruments protecting children can be assisted by the ATT:

- Additional Protocol I and II to the Geneva Conventions 1949 (1977)—prevents children under 15 years from participating in hostilities.⁴⁹
- Rome Statute of the International Criminal Court (2002)—establishes the recruitment of children under 15 years as a war crime. This applies to both government-controlled armed forces and non-state armed groups.⁵⁰
- Convention on the Rights of the Child (1989)—prohibits recruiting children under 15 years to take part in hostilities. This Convention specifies for the first time that a 'child' is a person under 18 years of age.⁵¹
- International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)—in part, prohibits forced or compulsory recruitment of children for use in armed conflict.⁵²

- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)⁵³—This protocol allows state armed forces to recruit from 16 years of age, but prohibits the compulsory recruitment of children and children under 18 years old from participating in hostilities.⁵⁴

The ATT risk assessment can prevent 'light-weight' arms from being transferred to end-users engaged in the recruitment and use of CAAFAGs. Considering that use of children in conflict is a war crime, the ATT can prohibit transfers where the exporter has knowledge at the time of authorisation, that the arms would be used in grave breaches of the Geneva Conventions of 1949.⁵⁵ The obligations of States Parties also apply to other war crimes as defined by international agreements to which the exporting state is a Party.⁵⁶

The exporting State Party would also be required to 'assess the potential that the conventional arms or items could be used to commit or facilitate a serious violation of international human rights law'.⁵⁷ This would apply specifically when the arms could be used to commit or facilitate serious acts of violence against women and children.⁵⁸ The exporting Party may also consider where there is knowledge of diversions equipping unauthorised end-users, such as organised criminal or terrorist groups, that recruit and use children in their operations.⁵⁹ In this way the ATT can assist in preventing the use of children by inhibiting supply of specifically light-weight small arms and light weapons that enable their recruitment, training and deployment.

Establishing the seriousness of a human rights violation

There are many mechanisms in place for the protection of human rights, with the ATT being a comparatively new addition. The ATT is a legally binding mechanism that complements existing IHRL and expands legal protections into the field of arms trade. It does this by explicitly seeking to establish IHRL as a criterion that State Parties should consider in the risk-assessment process for transfer authorisation.⁶⁰

In evaluating how the ATT contributes to IHRL, we must also establish how the treaty refers to human rights principally and explicitly in the text. The ATT Preamble assumes that States Parties are guided by a desire to ensure 'respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights'.⁶¹ This requires that the intent and objectives of the treaty provisions are actioned in good faith.

The treaty text refers to human rights again as an explicit criterion under the ATT risk-assessment process. Article 7 requires states to:

'assess the potential that the conventional arms or items could be used to commit or facilitate a serious violation of international human rights law'.⁶²

However, the ATT does not define how the concept of the seriousness of a violation ought to be established, leaving the definition to be established through practice by States Parties.⁶³ This raises the question: What constitutes a 'serious violation'?

While there is no consistent definition of 'serious' in the application of international law, the Geneva Academy⁶⁴ has sought to provide guidance on consistent themes that States Parties could consider. Establishing the seriousness of violations may commonly involve considering:

- the number of persons that the violations affect;
- the number of breaches that have occurred;
- whether violations are potentially spread over a period of time;

- whether an 'element of planning or of sustained will on the part of the perpetrator' is present;
- whether according to a qualitative test, the violation must inherently have an 'inhuman and degrading character'.⁶⁵

States Parties may note that establishing what constitutes a 'serious violation' would require investigating both the volume or scale of the violation and the level of planning or intent by perpetrators.⁶⁶ The Geneva Academy cautions that in international practice violations do not necessarily need to be 'systematic' in order to be considered serious.⁶⁷

The significance of the ATT for IHRL is that the treaty requires the exporting states to assess the likely consequences of an arms transfer in relation to human rights before it is authorised.⁶⁸ This includes doing due diligence by exchanging information, initiating investigations and mitigation programmes, including with the importing state, when suspicion arises that a serious violation of IHRL could occur.⁶⁹ Therefore, serious human rights violations include customary international law such as peremptory norms to prevent torture, but also arguably some socio-economic and political rights.⁷⁰

To assist with ascertaining risk prior to transfer authorisation, an exporter may use Human Rights Council Resolutions and the Universal Periodic Review to assess importing states' human rights records and efforts at addressing human rights violations.⁷¹ If there is 'overriding risk' that an IHRL violation could occur, then mitigation measures must be undertaken.⁷² If the risk factors can be mitigated to below an 'overriding risk', then authorisation can proceed at the state's discretion. This process will help to enhance human rights protections by not allowing arms transfers to end-users who commit or facilitate serious human rights abuses.

Summary

There are many conventions and declarations that form IHRL. Some, but not all, have been identified in this section. The relationship between these human rights mechanisms and the ATT is mutually reinforcing, coalescing as they do around building security and human rights protections. While some of these mechanisms can provide guidance in the ATT risk-assessment process, the ATT is a legally binding treaty that will extend human rights protections into the trade in conventional arms.

This section has demonstrated that the ATT provides broader benefits to human rights protections in the following ways:

- It principally supports human rights through the Universal Declaration of Human Rights.
- It recognises 'the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms ... Bearing in mind that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict and armed violence.'⁷³
- It extends human rights protections into the trade in conventional arms by requiring States Parties to assess the risk of potential serious IHRL violations before authorising a transfer.⁷⁴
- Where there is an 'overriding risk' that a serious IHRL violation could occur, the exporting state, potentially in collaboration with the importing state, must take measures to mitigate those risks.⁷⁵

This has the potential to prevent transfers to end-users engaged in serious human rights abuses through misusing conventional arms. The ATT, as an international legally binding instrument, helps to ensure that international human rights standards are respected, implemented and enforced in the conventional arms trade.



UN Photo: JC McIlwaine

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REINVIGORATING THE NARRATIVE

THE BROADER BENEFITS OF
THE ARMS TRADE TREATY



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