A Humanitarian Assessment of the Arms Trade Treaty: Reducing the Proliferation of Conventional Weapons to Civilian Combatants

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Abstract

The Arms Trade Treaty, enacted in 2013, aims to decrease human suffering by limiting the international supply of conventional weapons. However, this treaty has not created a positive obligation on states to respect international humanitarian law due to competing interests, lack of enforcement, and ambiguity. This paper analyzes the proliferation of violence resulting in violations of both international humanitarian law and international human rights law attributable to the availability of conventional weapons supplied through the international arms trade. By analyzing the cases of Saudi-Arabia, Iraq, Syria and Sudan, this paper highlights the urgency of creating more legal obligations on States to stop the widespread availability of weapons. At the root of the problem is the fact that the weapons intended to provide security for the State and its civilians are being used by the very people that International Humanitarian Law seeks to protect.
I. Introduction

With the transition into a type of warfare where the distinction between combatants and non-combatants is virtually nonexistent, civilians acting with a combatant function are becoming more common. Historically, soldiers wore very recognizable uniforms and were the primary actors engaged in armed conflict. We now live in an era in which the vast majority of combatants are not easily identifiable and are often civilians. These civilians, while being bound by international humanitarian law (“IHL”), are typically unaware of or unwilling to abide by its rules and principles. The widespread availability of conventional weapons supplied through the international arms trade fuels these civilian-combatants thus rendering “IHL civilian protections largely meaningless in many of these conflicts.”¹ It becomes problematic when weapons intended to provide security for the State and its civilians are being used by the very people that IHL seeks to protect.

The proliferation of violence resulting in violations of both international humanitarian law and international human rights law attributable to the availability of weapons has not gone unnoticed by the UN. In 2010, the International Committee of the Red Cross (ICRC) stated that:

The proliferation of weapons in the hands of new and often undisciplined actors has outpaced efforts to ensure compliance with basic rules of warfare. The result is appalling levels of wanton violence and a stream of horrific images which threaten to immunize the public and decision-makers to ongoing violations of humanitarian law.²

Since 2010, when this report was written, there have been developments in the realm of arms control, most notably, implementing the Arms Trade Treaty in 2013. This international treaty

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² ICRC (1999), Arms availability and the situation of civilians in armed conflict: A Study by the International Committee of the Red Cross: 1.
was a significant development in IHL because it sets forth a humanitarian goal - to decrease human suffering. The treaty has humanitarian aspirations, but is mixed with practical international law elements, resulting in a treaty comprised of competing interests.

The question raised by the ICRC still remains an issue for International Humanitarian Law. This paper will demonstrate that the implementation of this treaty, while being a step in the right direction, has not created a positive obligation on states to respect international humanitarian law due to competing interests, lack of enforcement, and ambiguity. This paper concludes that International Humanitarian Law needs to keep up with the ever-changing circumstances of war and armed conflict, including the shift to civilian combatants.

II.

The Development of the Arms Trade Treaty of 2013

The Lieber Code of 1863 was the first official codification of the rules of warfare. Although the Code was written for U.S. soldiers during the civil war and was therefore only binding upon them, the Lieber Code influenced further codification of the laws of war by other states. Limiting certain weapons in warfare was established by the 1868 Declaration of St. Petersburg which banned explosive weapons due to the unnecessary suffering they can cause. The Land Mine ban of 1997 and the Chemical Weapons ban of 1993 are also examples of treaties that ban weapons either because they are indiscriminate or because they cause unnecessary suffering. Humanitarian disarmament has been developing alongside International Humanitarian Law for quite some time. Humanitarian disarmament is defined by Bonnie Docherty as “the protection of individual civilians from the suffering caused by armed conflict.”

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The Arms Trade Treaty ("ATT") follows a pattern of similar treaties that can be classified as humanitarian disarmament treaties.

After the St. Petersburg declaration of 1868, humanitarian disarmament became more common. In 1899 and 1907, the Hague Conventions and Declarations sought to prohibit the use of asphyxiating gases, expanding bullets, and the discharge of projectiles or explosives from balloons.\(^4\) This movement towards protecting both civilians and combatants from unnecessary suffering continued into the twentieth century. In 1925, the Geneva Protocol prohibited the use of asphyxiating, poisonous or other gases, or the bacteriological methods of warfare. A hiatus in disarmament law was followed by the 1949 Geneva Conventions and the subsequent addition of Protocols I and II. More recently, the Biological Weapons Convention and the Chemical Weapons Ban were adopted in 1972 and 1993 respectively.

This shift towards humanitarian disarmament with the goal of human security gained momentum in 2001 with the United Nations Program of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects. This ambition to eradicate illicit trade in small arms then led to the implementation of resolution 61/89 titled “Towards an Arms Trade Treaty.” Initially, 153 states voted for the resolution, 23 countries abstained, and the United States was the only State that voted against the resolution.\(^5\) In 2009 however, the United States reversed its position and by 2012 the world witnessed the first Conference on the Arms Trade Treaty. While the 2012 conference did not result in passing the

\(^4\) Id., 10.
\(^5\) Muggah Robert, (2013) “Making History: How the Arms Trade Treaty was Won” *IPI Global Observatory.*
treaty, by 2013 another conference did result in passing the Arms Trade Treaty. The treaty is one of the first to have a humanitarian goal, specifically:


The preamble specifies that there are security, economic, and humanitarian consequences to the “illicit and unregulated trade in conventional weapons.” The treaty is comprised of 28 Articles. The most important articles in terms of their implications for international humanitarian law are Articles 6 and 7. These articles are titled “Prohibitions” and “Export Assessment.”

**III. Prohibitions, Risk Assessment, and Ambiguity**

Article 6 identifies three primary situations in which the transfer of arms would violate the Arms Trade Treaty. They are:

1. if the arms transfer would violate any measure adopted by the UNSC under its Chapter VII powers of the UN Charter,

2. if a state is prevented from transferring arms due to existing international obligations, or

3. if the exporting state has knowledge at the time of authorization that the arms or items would be used in the commission of 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.

The first two situations the treaty identifies are clear and rarely violated. They reference other well known legal obligations upon States to uphold the UN Charter and other international agreements.

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6 Ibid.
8 Ibid.
9 Id., Article 6(1-3): 4-5.
treaties. It is the third situation - prohibiting the transfer of arms - that causes problems in IHL and International Human Rights Law (IHRL). The treaty contains a requirement for "knowledge," but does not identify what "knowledge" signifies. The absence of a concrete definition of "knowledge" in this treaty allows for actors to abuse this prohibition by selective interpretation of the term "knowledge." Various definitions of knowledge have been outlined in other legal documents and by scholars. The Rome Statute defines knowledge as the "awareness that a circumstance exists or that a consequence will occur in the ordinary course of events."\(^\text{10}\) While this appears to be the most basic definition of knowledge to which most states can agree, it does not account for wilful blindness. What about states that refuse information so as not to gain knowledge? Does the deliberate attempt to avoid knowledge affect the appropriate implementation of Article 6? The fact that the ATT is ambiguous in its knowledge requirement can cause an inconsistent implementation of Article 6.

Even without a clear definition of the word "knowledge" in Article 6, the treaty gives states a list of criteria they must evaluate prior to authorizing the transfer of arms in Article 7. Article 7, entitled "Export Assessment" outlines how states must conduct risk assessments when deciding whether to transfer arms to another state. A state is encouraged to not authorize an arms transfer if the transfer:

(a) would contribute to or undermine peace and security,

(b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(ii) commit or facilitate a serious violation of international human rights law;

(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or

(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.\footnote{The UN, The Arms Trade Treaty Article 7(1): 5.}

In conducting risk assessments, the State must also consider whether or not the transfer of arms could result in gender-based crimes and violent acts against women and children. This is an important humanitarian addition to the treaty because it demonstrates the shift in focus from a State security centered paradigm to one with an emphasis on human security and civilian protection.

States must make IHL the primary focus when making transfer decisions. However, it is unlikely that states will not also take into account their economic and political interests when conducting Article 7 risk assessments. Article 7 expresses that States must weigh the risks of receiving States using the supplied weapons to commit violations of IHL and IHRL and if that risk is “overriding” then the State may not authorize the transfer of arms. This requirement does not bar a State from supplying weapons that could then be used to commit breaches of IHL; a State may supply the weapons so long as the risk is not “overriding.”\footnote{O’Connor Susan, (2013) “Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and Its New Zealand Application” New Zealand Yearbook of International Law vol. 11: 87.} Thus, Article 7 allows for states to continue transferring arms largely based on political and economic interests.

The use of the phrase “serious violations of IHL” is another problematic aspect of this article. Article 7 is unclear about what is meant by “a serious violation of international humanitarian law.” Annyssa Bellal observes the confusion on whether the word “serious” refers “to the nature of the right being violated – e.g. torture – or to the nature of the violation – e.g. is
it widespread and systematic?"\(^{13}\) The two definitions are distinct and can cause different applications of Article 7. Regardless of the definition intended by Article 7, States will continue to use this ambiguity to their advantage when attempting to further their political and economic interests at the expense of their international treaty obligations under international humanitarian law.

While Articles 6 and 7 are the primary focus of this essay, Article 3 should also be considered when analyzing the ambiguity of the ATT. Article 3 reads:

> Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions.\(^{14}\)

At the outset it might appear this article is justifiable and uncontroversial; but the usage of the phrase “fired, launched, or delivered by … conventional arms” is problematic. Bombs, shells, missiles, and bullets are covered by the treaty, whereas “manually positioned landmines or grenades thrown by a person are not.”\(^{15}\) While there are specific rules of warfare to which States must adhere under IHL (such as the prohibition on Land Mines or the Chemical Weapons Ban), non-state belligerents are not bound by those treaties.

When a state is conducting a risk assessment it must consider not only the likelihood that the weapons will be used to commit war crimes prohibited by the Geneva Convention of 1949, but also several other factors. The ICRC outlines 7 criteria that must be considered by the sending state to complete a thorough risk assessment: (1) whether the recipient has formally...


\(^{15}\) O’Conner, 85.
engaged in upholding the rules of IHL, (2) whether the recipient has trained forces in applying
IHL, (3) whether the recipient has taken appropriate measures to suppress violations of IHL, (4)
whether the recipient has previously failed to punish those responsible for violations of IHL, (5)
whether stable authority structures capable of ensuring respect for IHL are in place, (6) whether
the recipient has complete control over the internal distribution of arms and ammunition, and (7)
whether the recipient is the actual end user of the weapons and there is no third party involved.\footnote{16}
This multi-step process in conducting a risk assessment should usually result in a successful arms
transfer with no threat of violations of the Geneva Conventions or Treaty obligations. However,
as seen in various instances, this is often not the case. It is these instances to which I turn next.

\textit{IV.}

\textit{Case Studies}

\textbf{A. Saudi Arabia}

On March 25, 2015 Saudi Arabia led a military coalition against the Houthi rebels in
Yemen, which resulted in airstrikes primarily in Sana’a. These airstrikes resulted in civilian
casualties and civilian targets being hit. Some argued that Saudi Arabia violated international
humanitarian law by conducting an indiscriminate and disproportional attack.\footnote{17} A UN-led
investigation into Saudi Arabia’s bombing campaign in Yemen has exposed widespread and
systematic targeting of civilians which inherently violates international humanitarian law.\footnote{18}

\footnotetext[16]{ICRC, “Arms availability and the situation of civilians in armed conflict: A Study Presented by the
ICRC” \textit{International Committee of the Red Cross}: 22-23.}

killed scores of civilians,” \textit{Amnesty International}: 2.}

Health, Education, and Adequate Housing – Extraterritorial Obligations of France Under CESCR: A
Shadow report to the CESCR 58th session,”: 6.}
According to Amnesty International, Saudi Arabia’s top five weapons suppliers are the UK, the US, France, Spain, and Germany.

The UK has long been a supplier of conventional weapons to Saudi Arabia. Britain has sold over 3.3 billion Euros’ worth of aircrafts, helicopters, drones, grenades, bombs, missiles and cluster munitions. It should be noted however, that including cluster munitions in the UK’s arms exports is problematic because cluster munitions have been banned by the Convention on Cluster Munitions of 2008 to which the UK is a party. It has been confirmed by Saudi Arabia that it used British manufactured cluster bombs in the Yemen war.¹⁹ This admission of violating international humanitarian law obligates Britain to cease arms transfers to the Saudi Arabian government pursuant to Articles 6 and 7 of the Arms Trade Treaty. However, Britain -- one of the top arms exporters in the international sphere -- continues to supply weapons to Saudi Arabia.²⁰ Britain’s economic and political interests have won out over its duty to ensure respect for IHL under the ATT. Britain has argued that its choice to continue supplying arms to Saudi Arabia is political; its stated goal is to maintain and uphold its strongest Middle East alliance. The UN has concluded that the Saudi-led coalition and the Houthi insurgents are both guilty of serious breaches of IHL. Despite this knowledge, the High Court of London deemed Britain’s transfer of arms to be legal. These arms transfers will continue to proceed despite clearly violating Articles 6 and 7 of the arms trade treaty.

France, another supplier of conventional weapons to Saudi Arabia, has also been questioned on the legality of these transfers under the ATT. France has supplied close to US$2 billion worth of conventional weapons to Saudi Arabia since their coalition began in 2015. These

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²⁰ Ibid.
weapons have included “23 Airbus H145 helicopters worth US$500 million and naval patrol boats.” 21 Use of these weapons in the airstrikes makes France complicit in Saudi Arabia’s violations of IHL. Extraterritorial responsibility applies because the missiles and helicopters supplied by the French are necessary “to plan and carry out airstrikes such as those mentioned above.” 22 It is noteworthy that:

[France’s] obligations to not export weapons when they are likely to be used to violate human rights to education, health, and adequate housing can already be found under its commitments within the ICESCR. 23

While its commitments within the ICESCR (International Covenant on Economic, Social, and Cultural Rights) are not the focus of this essay, France’s export of conventional weapons to Saudi Arabia violates multiple international agreements, and demonstrates that France’s commitment to ensure respect for International Law does not appear to be exceptionally strong.

The conduct of the United States, another supplier of conventional weapons to Saudi Arabia, is not much different. Between 2010 and 2014, there were “just over US$90 billion worth of proposed major U.S. defense sales between Washington and Riyadh.” 24 While these transfers slowed down just after the passage of the Arms Trade Treaty, the U.S. is now concerned with modernizing Saudi Arabia’s stockpile of missiles. 25 The United States has authorized the transfer of high explosives, rockets, propellant charges, detonating fuses and Guided Precision Aerial Delivery Systems, and missiles and associated parts. Two main provisions of IHL are its prohibition of methods of warfare that:

23 Id., 4.
25 Ibid.
fail to discriminate between those taking part in the fighting and those, such as civilians, who are not, the purpose being to protect the civilian population, individual civilians and civilian property; [and]

cause superfluous injury or unnecessary suffering.\(^{26}\)

Airstrikes being conducted by Saudi Arabia and its coalition have been indiscriminate in that civilian populations are being targeted. There have been 19 airstrikes documented in which internationally banned British and Brazilian-manufactured BL755 cluster munitions have been used by Saudi-Arabia and its coalition.\(^{27}\) The continued supply of weapons to Saudi Arabia despite explicit knowledge and confirmation that such weapons are being used to commit violations of international humanitarian law should warrant cessation of all arms transfers. By either the failure of States to conduct appropriate risk assessments, or blatant disregard of violations of IHL (i.e. the “knowledge” provision), the Arms Trade Treaty has largely been undermined in the instance of Yemen and Saudi Arabia. Amnesty International calls for States to adopt a preventive approach and apply strict safeguards in order to mitigate and remove the substantial risk of the arms being used to commit or facilitate serious violations of international human rights law and international humanitarian law.\(^{28}\)

The case of Saudi Arabia highlights the faults of the ATT, most notably, the lack of enforcement with respect to the UK, US, and France for violating the terms of the treaty.

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\(^{28}\) Id., 3.
B. Syria and Iraq

Syria and Iraq also exemplify failed implementation of the Arms Trade Treaty. Unlike the previous case study of Saudi Arabia, in Syria and Iraq it is not so easy to identify who is supplying weapons to whom. Amnesty International notes that:

Arms transfers that were initially legitimate are now being used to facilitate summary executions, enforced disappearances, rape and torture by a range of actors including the armed group calling itself the Islamic State (IS), amongst other serious human rights violations.29

While the U.S. and other exporting States are not directly supplying arms to these various groups throughout the region, the arms are being spread rapidly, resulting in serious human rights violations by both Syria and Iraq. The arms are mainly being looted from Iraqi and Syrian military stocks. For this reason, Amnesty International suggests that all states who are parties to the ATT that are supplying Kurdish Peshmerga forces in Iraq and the People’s Protection Units of the Kurdish Democratic Union Party should conduct a more thorough risk assessment aligned with Article 7 of the ATT.30 Amnesty International suggests applying the term “potential risk” broadly and urges any State that is a party to the ATT to consider Article 11, which deals with diversion in order to “mitigate the risk of future proliferation.”31 States must prevent, to the best of their ability, the diversion of arms. If a State believes that the weapons being supplied will be proliferated to non-state actors or to human rights abusers, then the State is encouraged to not authorize such a transfer. Article 11 (2) notes that if there are other methods besides arms transfer, then those should be taken into consideration:

30 Id., 6.
31 Ibid.
prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.\textsuperscript{32}

As the case of Syria and Iraq represent, there is a question of whether supplying rebel groups with weapons can ever be aligned with international humanitarian law. Iran has been supplying the Syrian government with conventional weapons whereas prior to the ATT, the U.S. was supplying weapons to the rebel forces. However, under the ATT, the United States may have to halt exportation to rebel forces which would leave one side of the conflict with legal access to weapons. The rebel forces will be much more vulnerable and at a distinct disadvantage, which may result in a higher number of civilian casualties.

\textbf{C. South Kordofan, Sudan}

Since 2011, armed conflict in Sudan between the Sudanese Government and the Sudan People’s Liberation Movement/Army – North has resulted in ongoing indiscriminate attacks against civilians and civilian areas such as hospitals and schools. Russia, China, Belarus and Ukraine have been identified as the largest arms suppliers to Sudan. These countries continue to export arms to Sudan despite concrete knowledge of human rights violations being committed by the supplied weapons. China has been responsible for the supply of US$35 million a year in military equipment. China’s most recent deal has been to export the HJ-8 anti-tank missile system.\textsuperscript{33} Given the severity of the ongoing violations of international humanitarian law and international human rights law, the EU has called for an embargo on all arms transfers to Sudan. The EU resolution reads:

\begin{itemize}
\item \textsuperscript{32} The UN, \textit{The Arms Trade Treaty}. Article 11(2): 7.
\end{itemize}
(1) whereas the European Parliament resolution of 25 February 2016 on the humanitarian situation in Yemen called on the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy (VP/HR) to launch an initiative to impose an EU arms embargo on Saudi Arabia;

(2) whereas the situation in Yemen has since further deteriorated also due to military action carried out by the Saudi-led coalition; whereas some Member States have stopped providing arms to Saudi Arabia because of its actions in Yemen while others have continued supplying military technology contrary to criteria 2, 4, 6, 7 and 8.34

To ensure respect for IHL in such a conflict-filled region, a mandatory arms embargo would be the only effective means available to the international community. However, despite the fact that an arms embargo would be ideal in terms of human security, the challenge would be to persuade exporting states to place human security concerns above political and economic interests.

V.

Issues of Enforcement and State Responsibility

The ongoing violations of the ATT bring forth accountability and complicity in terms of IHL. Can States that supply weapons to places where actors are likely to use those weapons to violate IHL or IHRL be deemed responsible? Some would argue that the supplying states cannot be held accountable for what is done with the weapons they supply, but if there is no threat that states will be held accountable, then there is little incentive for them to abide by their obligations under the Arms Trade Treaty. If States conduct thorough risk assessments and cease all trading of arms with countries likely to use those weapons to breach IHL, then there will be no possible complicity by those states. Annyssa Bellal notes that:

Even if the transfer is lawful under the national legislation applicable in both the transferring and receiving States, the State that has transferred the weapons which are

then used to commit a violation may still have committed an internationally wrongful act through its ‘aid and assistance’ to the State.\(^{35}\)

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts outlines state complicity and describes how and when states can be held responsible for wrongful acts. If States knowingly supply weapons to a state that in turn uses those weapons to commit crimes against humanity, then legally the transferring state is equally as complicit as the State committing the violation of IHL.

As outlined in the Articles of Responsibility, Article 16 recognizes that a state is responsible for an internationally wrongful act if “(a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.”\(^{36}\) Given this, states should be held criminally liable if their arms transfer results in genocide, crimes against humanity, war crimes, gender-based violence, or any other violation of IHL or IHRL. With Sudan, the International Criminal Court issued an arrest warrant for the Sudanese President al-Bashir on charges of genocide, war crimes, and crimes against humanity; however, perhaps any State that is party to the ATT is also complicit in the genocide either because of direct knowledge of these acts, or for failing to stop the actions of al-Bashir.

This is not to say that every state that supplies weapons to another state is complicit in violations of IHL or IHRL, because under Article 6 of the ATT states must have “knowledge” of the intended use of the weapons in order for the transfer to be illegal. Perhaps it is impossible to establish intent for the weapons’ use. The link between the supply of weapons and their

\(^{35}\) Bellal, 3.

subsequent unlawful use, though direct, is not always so clear cut. Provided that states conduct a thorough risk assessment though, there should be a greatly decreased risk that the weapons will be used unlawfully.

The ATT does not specifically outline measures of responsibility on exporting states. Despite this lack of specificity on state responsibility, it is assumed that the State will consider its possible complicity if it transfers arms to a particular state. However, states have been largely focused on the economic and political advantages of arms transfers, which to them is of greater importance than analyzing the behavior of belligerents. The ICRC states that:

The availability of weapons is increasingly governed by the laws of supply and demand with little or no regard to the behaviour of recipients. In the current ‘buyers market’ suppliers, whether States or companies, are notably reluctant to condition sales on the behaviour or purposes of belligerents.37

The overriding economic and political interests directly conflict with the aspirations of the Arms Trade Treaty. This is one of the key failures of the ATT: its humanitarian aspirations are not strong enough to compete with existing economic and political interests of States. Balancing humanitarian aspirations against economic or political aspirations will almost always result in the economic and political aspirations holding more weight.

Besides States being potentially complicit in an arms transfer leading to violations of IHL or IHRL, there are broader implications of the arms trade on international humanitarian law. International humanitarian law protects non-combatants and prohibits the use of indiscriminate weapons. As conventional weapons become more widely available, there is increased indiscriminate use which results in an increased number of civilian casualties. Because these civilians are deemed unprotected combatants, they do not benefit from the protections of

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international humanitarian law. Not only are these civilians not awarded the combatant’s privilege, but they are usually untrained in the principles of IHL and are unlikely to adhere to these principles. This seeks to further blur the line between combatants and non-combatants. The vast majority of these weapons end up in the hands of non-state actors, and while combatants are not supposed to kill civilians, when the civilians are the ones with the conventional weapons it becomes increasingly more difficult to obtain compliance with the principles established by international humanitarian law. In this regard, IHL is undermined and can be rendered meaningless.

[T]he frequent use of weapons in violation of the basic rules of international humanitarian law threatens to undermine international legal norms designed to protect civilians from suffering and abuse in combat situations.\(^{38}\)

While the ATT tries to decrease human suffering by providing stricter rules on the proliferation of conventional weapons, it can only work in an environment where non-state actors and state actors alike are bound with legal force and have an equal incentive to comply with IHL. As is problematic with all forms of international law, enforcement becomes a serious issue for this treaty because no part of the treaty outlines the consequence for a breach. The only mention of enforcement in the treaty is under Article 14 which says simply that states should take appropriate measures to enforce the treaty.\(^{39}\) International law rarely provides effective enforcement mechanisms, and this treaty is no exception. Even if states were to fully comply with the provisions in the treaty for the humanitarian goal of decreasing human suffering, this would not stop the proliferation of weapons because States that are not parties to the treaty will continue to supply weapons to actors likely to use those weapons to violate IHL or IHRL.

\(^{38}\) Id., 23.
\(^{39}\) The UN, *The Arms Trade Treaty* Article 14: 8.
Common Article 1 of the Geneva Conventions of 1949 states. “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”\(^{40}\) The question then arises: does this promise to ensure respect for the convention create a positive legal obligation on states? If it creates a legal obligation on states, then does that obligation extend to states not currently involved in an armed conflict? If a state is only obligated to ensure respect for IHL when the State itself is engaged in an armed conflict, then when it is not, its supply of weapons to a state engaged in armed conflict would not be seen as a breach of Common Article 1 to the Geneva Conventions of 1949.

There are differing views on the meaning of Common Article 1. One view, posited by Maya Brehm notes that respect is aimed at a state’s agents, and ensuring respect creates an obligation on the state to abide by all treaty provisions by the entire population.\(^{41}\) Viewing “respect” from this perspective, states must ensure respect for IHL, but only insofar as they are applying the laws to their own population. This would imply that states are not legally obligated to police the conduct of other states.

Condorelli and Boisson de Chazournes take a different position. They posit that the term “to respect” extends to the persons under a State’s jurisdiction and not only the State’s organs. They go further and say that:

The expression ‘to ensure respect’ should be given a meaning that differs from the obligation ‘to respect’ and should, hence, be interpreted as obligating states to ensure that other states respect the conventions.\(^{42}\)


\(^{42}\) Ibid.
If we are to believe that “to ensure respect” refers to ensuring that other states also respect the convention, then the obligation to ensure that human rights abusers do not have access to conventional weapons should create a legal obligation on the exporting state. Kessler conducted a study and found that this treaty is not of a bilateral nature and obligates states as part of the international community. These obligations are what Kessler calls *erga omnes partes.* The conventions seek to codify certain customary international norms of a *jus cogens* nature. Because the conventions are similar to the concept of *erga omnes,* it can be concluded that the responsibility to ensure respect for IHL should be extended to third parties.

Even with this perspective, it is unclear whether Common Article 1 simply entitles third party states to ensure respect for IHL, or if it actually places an obligation on them to do so. Given the current armed conflict situation, it would appear that third party states exercise their entitlement to ensure respect for IHL, but only insofar as doing so simultaneously works to their economic, political, or social advantage. If State A’s respect for IHL does not benefit State B and State A’s conduct is not directly affecting State B, then State B likely will not take any active measures to exercise its entitlement to ensure respect for IHL. The 1949 Geneva Conventions entitles third party states to ensure that State A respects IHL, but it has not created a legal obligation for third party states to ensure respect for IHL when they are not themselves involved.

Whether or not the 1949 Geneva Conventions create a legal obligation on third-party states to ensure respect for IHL in the international community, the Arms Trade Treaty does not make this issue any clearer. The preamble of the ATT states that parties to the treaty have a duty to ensure respect for international humanitarian law, but it does not mention whether this legal obligation extends to third-party States not directly affected by armed conflict. The ATT advises

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43 Id., 370.
States to conduct strict risk assessments to prevent the proliferation of conventional weapons to those likely to commit violations of IHL and IHRL, but it does not have a strong enough enforcement mechanism or incentive for states to comply. The UK’s arms sales to Saudi Arabia were questioned not only by the British population, but also in a case brought to the High Court. The High Court dismissed the claim stating that the arms transfer was legal. This shows that even with clear violations of the ATT occurring, States need not take responsibility for their complicity in human rights abuses. This lack of enforcement of the ATT contributes to the undermining of international legal norms and international humanitarian law.

VI.

Ambiguity: A Cause of Noncompliance or a Justification?

This essay has thus far criticized the ATT for its ambiguity, and has related these legal ambiguities to the lack of compliance. However, it should be noted that noncompliance with the treaty and ambiguity are not necessarily correlated. Compliance is an issue that plagues international law in all aspects, not just the transfer of conventional weapons. Thus, it cannot be definitively proven that the sole reason for lack of compliance is ambiguous wording of the international legal obligations. There are many instances where the law is perfectly clear and yet States still choose noncompliance. This phenomenon was outlined by the case studies above. Jacob Katz Cogan, when discussing the causes of noncompliance, stated that a State’s decision to violate international law can be based on the state’s calculation of its interests, costs and benefits to the State, and “a complicated amalgam of advantages and disadvantages.”\(^{44}\) Given this, a

state’s decision to wilfully violate an international legal obligation is not caused by legal ambiguities. Deficiencies in international laws - whether it be ambiguous language or a lack of enforcement mechanisms - are not an excuse for their violation. It is true that ambiguities in the law may not be directly responsible for noncompliance with the international legal obligations, but it is also true that these ambiguities create a justification for States that seek to legitimize their decision for noncompliance. States, when faced with repercussions for noncompliance are able to cite the legal ambiguities in the treaty itself to strengthen their reasoning for noncompliance.

Without these legal ambiguities, while noncompliance would still be an issue, a state’s claim to legitimacy for its noncompliance would be substantially diminished. By resolving the legal ambiguities, the responsibility on behalf of States would increase thereby increasing the positive obligation on States to abide by treaty obligations. It is for this reason that resolving the legal ambiguities could help mitigate the challenges of enforcement. Thus, noncompliance and ambiguity can be connected, but must be addressed independently.

Some positive amendments to the Arms Trade Treaty might bring the problem of noncompliance to the forefront while tightening requirements designed to further protection for human rights. “Knowledge” in Article 6 of the Arms Trade Treaty should be defined broadly to include the subsequent use of weapons once they are received by a State. The definition put forth in the Rome Statute appears to be the most robust - “awareness that a circumstance exists or that a consequence will occur in the ordinary course of events.”45 Additionally, definitional limitations should be placed on the term “overriding” risk. Paragraph three of Article 7 reads:

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If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.\textsuperscript{46}

An important amendment to the ATT would be to define what an overriding risk consists of, this would perhaps hinder a State’s ability to claim that their personal interests supersede the potential risk of supplying weapons. The ATT should also describe or define the term “serious violation of IHL.” Determining whether a serious violation refers to the right being violated or the magnitude of the violation would place more responsibility on States when conducting their export assessments. While not eliminating the problem of noncompliance, such changes would bring the ATT current and better able to address the shift in the use of illegal arms, from use by the receiving State to use by non-state combatants.

Strengthening the language itself would give the ATT a degree of authority it currently lacks. States may still choose noncompliance (as they have on multiple occasions when the law was in fact quite clear), but with a clear law, States open themselves up to major criticism from the international community and those criticisms will carry more legitimacy. As with all enforcement mechanisms in international law, it is hoped that legitimizing international criticism will stem the tide and encourage non-compliant States to conform their behavior to align with international human rights norms. Given this, resolving the ambiguities of the ATT would be an instrumental step in decreasing the proliferation of conventional weapons insofar as it would place a larger responsibility on behalf of exporting States.

\textsuperscript{46} The UN, \textit{Arms Trade Treaty} Article 7(3), 5.
VII.

Conclusion

The humanitarian aspirations of the Arms Trade Treaty, while being important for the development of IHL, face obstacles in creating an enforceable legal obligation to abide by it. A primary challenge to this treaty is the legal ambiguity which enables states to use loopholes to avoid compliance. The treaty does not include enforcement mechanisms that would create a positive obligation on states to abide by the treaty. The treaty’s attempt to put humanitarian regulations on something that is largely viewed as a business or an economic transaction further encourages noncompliance with IHL. The economic or political gains from arms sales largely override the humanitarian consequences. The ambiguity of the treaty itself leaves room for abuse and misinterpretation which can only add to the proliferation of conventional weapons. Were these legal ambiguities to be remedied, states would not have as great a justification for noncompliance.

Of course, compliance issues would not be entirely resolved by solving legal ambiguities. Compliance is difficult with all aspects of international law due to the absence of legitimate enforcement mechanisms. However, resolving the legal ambiguities in the treaty would be a crucial first step towards mitigating compliance issues. While the widespread availability of conventional weapons is not entirely due to illegal arms transfers from States who are parties to the ATT, these exporting states set the norms and customs for transferring weapons.

This is not to say that as is, the treaty is entirely useless or serves no purpose in the international system. It sets precedent for the future of IHL and introduces the use of humanitarian aspirations to create legal obligations on States. It can always be argued that the weapons are not responsible for the incredible increase in civilian casualties, but rather, the
people using the weapons are responsible; however, the fact is that the increased human suffering would not be so prominent were it not for the proliferation of conventional weapons. There is a need for more legal obligations on States to stop the widespread availability of weapons. It becomes very difficult to control these weapons when most are diverted and end up in civilian hands. Perhaps there is no solution to the proliferation of weapons or the increasingly blurred lines between combatant and non-combatant, but there is a new way of conceptualizing these conflicts. By framing the arms trade in a humanitarian perspective, there is a glimmer of hope for a future where human security is the primary focus.
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