

PROHIBITIONS UNDER THE ATT

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Outline

- Broad Principles
- Article 6 Prohibitions
- Export Assessment
- Other Legal Obligations

Broad Principles

- State sovereignty
- Right of self defence
- Prohibition on the use of force in international relations
- Pacific settlement of disputes
- Respecting and ensuring respect of IHL and IHRL.
- Non-discriminative implementation

Article 6 Prohibitions

- Arms stipulated in article 2
- Ammunition/munitions
- Parts and components – assembly capability.
- Control measures to be put in place.
 - Control list
 - Regulatory Procedures
 - Enforcement Procedures.

Art. 6(1) ATT: Transfer Prohibitions

A State Party **shall not authorize** any transfer ... if the transfer would **violate its obligations** under measures adopted by the United Nations Security Council acting under Chapter VII of the **Charter of the United Nations**, in particular arms embargoes.



Article 6(2) ATT: Transfer Prohibitions

A State Party **shall not authorize** any transfer... if the transfer would **violate** its relevant **international obligations** under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms."



Relevant international obligations under international agreements to which it is a Party

- Weapons law treaties (Mines, Clusters, CCW)
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime.
- UN Charter
- Geneva Conventions
- Regional and international human rights treaties.
 - ATT principle: Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights;

Article 6(3) ATT: Transfer Prohibitions

3. A State Party **shall not authorize** any ... if it has **knowledge** ... that the arms or items would be used in the commission of

- genocide,
- crimes against humanity,
- grave breaches of the Geneva Conventions
- 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.

Art. 6(3) ATT

'Knowledge'

Strict interpretation:
Actual knowledge

Broad interpretation: 'knows or should
have known'
Constructive knowledge

+ Humanitarian purpose of the ATT

Recommendation for a broad interpretation: a State 'knows
or should have known' =

CONSTRUCTIVE KNOWLEDGE

Genocide

Art.6 Rome Statute and Art. 2 Genocide Convention

“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;
- (e) Forcibly transferring children of the group to another group.”

Crimes against humanity

Art. 7 Rome Statute

“any of the following acts when committed as part of a **widespread or systematic attack directed against any civilian population**, with knowledge of the attack;

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation (...);
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender (...);
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

War crimes

Only in International
Armed Conflict

International and Non-
International Armed
Conflict

"[...] 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."

Additional Protocol I (IAC) and
Art. 8 ICC Statute (IAC and NIAC)
Common Article 3 Geneva Conventions
Hague Convention IV of 1907 and its Regulations

...

What about arming non-state Actors?

Not expressly included in the ATT

But strongly embodied in the international legal order:

Article 2(1) UN Charter: principle of respect for state sovereignty

Article 2(4) UN Charter: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

Article 7 (1) ATT: Export Assessment

"1. If the **export** is not prohibited under Article 6, ... **assess the potential** that the **conventional arms or items**:

(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."

Export Assessment

- Undermine Peace and Security
 - Both positive and Negative outcomes assessment

Serious violation of IHL

"Serious violations of international humanitarian law" are "war crimes." The two terms are today interchangeable. They can take place in international or non-international armed conflicts.

Violations are serious, and are war crimes, if 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**.

The majority of war crimes involve death, injury, destruction or unlawful taking of property.

Acts can amount to war crimes because they breach important universal values, even without physically endangering persons or objects directly. These include, for example, abusing dead bodies and recruiting children under 15 years of age into the armed forces.

Risk assessment (art. 7(1) ATT)

Assessing the potential that arms will be used to commit serious violations requires examining

- Record of respect for IHL / HR
- Formal commitments to respect IHL/HR
- Legal and administrative structures
- Capacity
-



The indicators are as follows:

- Whether a recipient which is, or has been, engaged in an armed conflict, has committed serious violations of IHL;
- Whether a recipient has committed serious violations of human rights law;
- Whether a recipient which is, or has been, engaged in an armed conflict has taken all feasible measures to prevent violations of IHL or cause them to cease, including by punishing those responsible;

Export Assessment

- Whether the recipient has made a formal commitment to apply the rules of IHL and human rights law and taken appropriate measures for their implementation;
- Whether the recipient disseminates IHL, in particular to the armed forces and other arms bearers, and has integrated IHL into its military doctrine, manuals and instructions;

Export Assessment

- Whether the recipient has taken steps to prevent the recruitment of children into the armed forces or armed groups and their participation in hostilities;
- Whether the recipient country has in place the legal, judicial and administrative measures necessary for the repression of serious violations of IHL and human rights law;

Export Assessment

- Whether accountable authority structures exist with the capacity and will to ensure respect for IHL and human rights law;
- Whether the arms or military equipment requested are commensurate with the operational requirements and capacities of the stated end-user;
- Whether the recipient maintains strict and effective control over its arms and military equipment and their further transfer.

Data sources?



Mitigating measures (art. 7(2) ATT)

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks (...), such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. (Art. 7(2))."

For example:

- Information exchanges and transparency provisions
- End-use / end-user assurances
- Post-shipment controls
- Training of relevant actors in the application of IHL and IHRL

Overriding risk (art. 7(3) ATT)

Art. 7 (3) ATT:

"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."

=> Prohibition of export



Risk assessment – overriding risk

‘balancing exercise’ between the risk of violations and the contribution to peace and security?

-> humanitarian purpose of ATT: ‘more likely than not’, ‘clear’ or ‘substantial risk’

(As interpreted by State declarations, ICRC Practical Guide, EU Users Guide)

Recommendation for States to refuse export when any of the negative consequences materializing as being higher than the likelihood of them not materializing

Gender based violence 7(4)

The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms ...being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.



Other Legal Obligations

- Keeping detailed provisions of all authorizations
 - Quantity and Value
 - Model/type/serial number
 - Authorized conventional arms to be transferred and Conventional arms actually transferred
 - Details of importing State(s), transit and trans-shipment State(s) and End-users.

Other Legal Obligations

- Availing authorization information to transit and transshipment states.
- Reassessing authorization if new information becomes available.

