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Transparent Reporting for a Successful Arms Trade Treaty

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RECOMMENDATIONS

\ Transparency as a key issue for the ATT

The ATT needs a reporting mechanism that increases transparency of the international arms trade. Transparency is a precondition to monitoring the adherence of signatory states to the criteria of the ATT and provides the basis for the further development of international norms for arms transfers.

\ Minimum standards

At a minimum, states parties to the ATT should aim to report on authorised and actual exports of conventional arms covered under Article 2 (1) of the ATT. Information provided should include the numbers and description of transferred weapons, the financial value of the licence, transit countries and the recipient country.

\ Opportunities for optional reporting

A standardised reporting template should provide the opportunity to offer additional information, such as more details on the end-users and on the condition of the weapons. Such a voluntary segment should further include the exports of ammunition/munitions, parts and components, production licences, technologies and equipment for the manufacturing of conventional arms.

\ Incentives for voluntary reporting

Creating incentives is vital for such an approach. A commitment to voluntary reporting should have a positive effect on the level of assistance that states receive in the framework of the ATT. Furthermore, participation in the reporting system should be taken as an indicator for the trustworthiness of states as partners on the international arms market.

\ Denial reporting

States parties to the ATT should discuss how a system of denial reporting could look like. States could start to provide information on denials of arms export licences confidentially and on a voluntary, rather informal, basis, possibly leading to a more standardised process in the future. Later on stage, this might be complemented by an aggregated report on denials that would be made public.

Transparent Reporting for a Successful Arms Trade Treaty

With the entry into force of the International Arms Trade Treaty (ATT) on 24 December 2014, there is, for the first time ever, a legally binding, international treaty that sets norms and rules for the regulation of the international arms trade. At the centre of the ATT is a set of rules assessing all and prohibiting certain arms transfers. A state, for example, shall not authorise transfers, if it "has knowledge" that the arms would be used to commit genocide or other crimes against humanity and war crimes [Art. 6 (3)]. The list of factors that states shall take into account when assessing their arms transfers includes, among others, the potential that these arms would undermine peace and security or that they could be used to commit serious violations of international humanitarian law or international human rights law [Art. 7]. If a state concludes that there is an "overriding risk" that an arms transfer would have such consequences, then it must not authorise it.

A central challenge for the states parties to the ATT will be to find a mode to operationalise the assessment criteria of arms transfers so that they can be applied to their export decisions. As these criteria leave room for interpretation, and as the assessment process remains completely in the hands of the states, it is to be feared that many states will make use of this leeway to justify arms transfers they deem in their interest. This might not always be in line with the aims and the spirit of the ATT. If this happens, the ATT will not live up to one of the major reasons for having such an international treaty, which is to hinder the states from undercutting their standards for arms exports to sell their arms on the international arms market, which is becoming more and more of a buyer's market. Stopping the race to the bottom and instead levelling the playing field for all actors involved is a central goal of the ATT. Whether there will be a chance to reach this goal will heavily depend on the procedures that will be set up for the implementation of the ATT.

The first Conference of States Parties will take place in Mexico City from 24 to 27 August 2015. At this conference, states will have to decide about several issues, such as financing, the rules of procedures and the set-up of the secretariat. Of central importance for the successful implementation of the ATT is the issue of reporting, which is closely related to the issue of transparency. Article 13 requires states to provide an initial report on the implementation of the Treaty (i.e. with respect to national laws and regulations) as well as an annual report on their conventional arms exports. The first annual report will be due by 31 May 2016, covering the ex- and imports of 2015.

Transparency is key to successful ATT implementation

Interest in the international arms trade has grown steadily over the past years. As a consequence, transparency has become more important. Transparency should be assessed not only by the quantity of available information, but even more so by its quality.

A lot of interest among civil society, NGOs and academia has led to changes in the level of transparency and reporting on the arms trade. Yet, even today, the level of transparency varies from state, to state as some provide very detailed and timely information on their arms exports and imports through national reports or regional and international instruments, while others constantly refrain from reporting. Publishing reports on arms exports and imports remains a sensitive issue for most states, and official information given by governments remains sketchy, is often inconsistent, with some specific information still not being available.

Transparency is not an end in itself. It is a necessary tool that allows external observers as well as signatory states to the ATT to verify the adherence of states parties to the criteria and obligations of the Treaty. Access to information is indispensable for monitoring the implementation of treaties such as the ATT. A timely reporting of exports and imports of all arms would encourage democratic accountability as it opens up the opportunities for scrutinising governments. Additionally, transparency may also dissuade states from engaging in illegal arms transfers. It enables building confidence among states, especially when states parties to the ATT need the assurance that others will respect the rules of the Treaty. Increased transparency also allows states to reject unfair criticism if they have acted within the law or based their decisions on justifiable political reasons.

Due to the vagueness of the criteria of the ATT, transparency is of particular importance because only in an incremental process, in which governments discuss the appropriateness of their arms transfers and civil society is in the position to observe this process, can the criteria become more concrete over time. Only on the basis of the knowledge about state's arms export practice can their adherence to the norms of the ATT be assessed, their interpretation of the criteria be retraced and eventually questioned. Societies and civil society organisations have played a crucial role in the creation of the ATT. They can play an important role in the implementation process, too, by holding (their) governments accountable for their decisions on arms transfers. In order to do so, they need detailed information about the export practices of governments.

The ATT reporting mechanism can contribute to increased transparency and make a difference here. The level of transparency as well as reporting patterns, however, will be key issues for the effectiveness of the ATT. In this regard, and with the first Conference of States Parties approaching, several questions have to be addressed. Looking at existing instruments for reporting on international arms transfers, such as the UN Register of Conventional Arms (UNROCA) and the annual report of EU Member States in the framework of the EU Common Position on Arms Exports agreed upon in 2008, provide useful hints to an answer to these questions as well as examples of well-established reporting instruments.

Minimum standard plus optional reporting

UNROCA is a key international mechanism for official and public transparency on arms transfers. It was established in 1992 after an intense debate about the transparency of arms transfers within the United Nations. It requests all UN Member States to annually report information on arms exports and imports of seven categories of conventional weapons. It provides states with a standardised reporting template allowing external observers to assess comprehensive and comparable information. Such a standardised template should be established for the ATT reporting mechanism, too. It could be designed as a 'flexible blueprint', subject to changes after regular reviews and identified needs. Such a template would specify the minimum standards for reporting, i.e. the information that all states parties to the Treaty are required to provide in their annual report. In addition to the minimum standards, there should be a segment for optional reporting, providing states with the opportunity, and encouraging them, to provide additional information on a voluntary basis. Experience from UNROCA shows that states indeed use that opportunity.

Such a system has the advantage that it does not overburden states. To insist on very high standards for reporting runs the danger of jeopardising an agreement among the states parties to the Treaty. Furthermore, it could compromise future efforts to strengthen the universality of the ATT. In other words, states should not be discouraged from joining the ATT because they are reluctant to provide as much information on their arms transfers as EU Member States, for example. Thus setting minimum standards that most states feel they can comply with and, at the same time, providing the opportunity to voluntarily go beyond these minimum standards and setting incentives for states to actually make use of this opportunity could be the way forward.

Which categories of weapons shall states report on?

States parties to the ATT are required to report on the exports and imports of the following conventional weapons that fall under the scope of the treaty according to Article 2 (1): battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and finally, small arms and light weapons. These are, basically, the seven categories of the UN Register of Conventional Arms (UNROCA) plus small arms and light weapons (SALW). UNROCA considers reporting on transfers of SALW as well as on procurement from domestic production and on states' military holdings to be voluntary. A major weakness of the Register, according to critics, is the items covered by it. Whereas most states report major conventional weapons, not all weapons are covered by the seven categories of the Register. Over the last twenty years, different expert groups have suggested changes to include

new weapon systems. However, except for the introduction of the optional reporting of SALW in 2003, not much has happened in this regard. The ATT reporting is an opportunity to overcome some of the shortcomings of UNROCA. Making SALW reporting mandatory is already an important step.

In contrast to these categories of weapons, explicit reporting requirements do not exist for ammunition/ munitions or for parts and components. While the ATT requires states parties to establish national control systems to regulate the export of these items, they do not have to report on their exports. This is unfortunate, because often it is the (re-)supply with ammunition/ munitions and/or parts of and components for certain weapons that allows state or non-state actors to make effective use of these weapons in the first place. Other issues that were debated in the preparatory process of the ATT, but did not make their way into the scope of the Treaty, are, for instance, production licences, technologies and equipment for the manufacturing of conventional weapons. Transparency with regard to these issues is very important, because they enable the recipient countries to build up their own defence industry and later on become an arms exporter as well. This is legitimate if these countries can be expected to adhere to the principles and norms of the ATT. Otherwise, the transfer of technology and knowledge can, in the medium to long term, do more harm than the export of the weapons themselves.

Generally, it is important to separate reporting under the ATT and as part of UNROCA, as both instruments are different in scope. Yet, when states compile information for reporting under the ATT they should be encouraged to also report to UNROCA.

Drawing on the experience of reporting under the EU Common Position might be one way to overcome a few of those difficulties as EU Member States' reporting follows the 21 categories agreed under the EU common military list. These categories cover a broad range of military goods ranging from SALW up to armoured vehicles and fighter aircrafts. In contrast to other reporting instruments, the EU common military list also includes additional items such as ammunition, components and surveillance technology.

With Art. 2 (1) of the ATT, the minimum standard for the categories of weapons that states shall report on is set: the seven categories of UNROCA plus small arms and light weapons. However, it will be important to open up the definition of these categories to cover more military goods (such as drones), to lower the threshold for artillery calibre, as well as the threshold for the displacement of vessels and submarines, especially to allow for a better coverage of technological developments.

The considerations for the reporting mechanism of the ATT should not stop here. The standardised reporting template should give governments the opportunity to go beyond these minimum standards and to report also on their transfers of ammunition/munitions, parts and components, production licences, technologies and equipment for the manufacturing of conventional weapons. Reporting on these categories should be voluntary. Otherwise, this procedure could alienate too many ATT states parties and keep other states from joining the ATT.

How detailed should the information be?

While the minimum standards for weapons categories to report on are largely set by the ATT text, there is more leeway with regard to the information that has to be provided on the transfers of those weapons. The value or the numbers of the weapon systems exported must be reported. While the number and type of weapons in particular can be a useful indicator for assessing the fighting capacity and hence the increase in military power of the recipient state, to make such an assessment, however, additional information on the condition of the weapons, such as whether they are used or new, would also be important.

Other very important issues are information about the designated end user (military, police, industry, other actors) of the weapons and their transit countries and routes as well as the companies involved. This information would provide a considerable increase in transparency and would allow for a better evaluation

of the safety of transit routes and the reliability of actors involved in the logistics. This could also contribute to limiting the risk of an unintended proliferation of weapons.

Here, the ATT reporting mechanism could make a real difference by providing information beyond existing instruments. Whereas UNROCA and the EU Common Position list the transferred items in the respective categories, occasionally with a short description of the item, they fall short of providing detailed information about the transit route or the end-user. They only mention the recipient country. Both instruments do not provide any information about the condition of transferred weapons or goods.

While the minimum standards should include the type, value, and number of the weapons, as well as the recipient and transit countries, information on the end user and condition of the weapons should be part of the optional segment of the reporting template, as several states will probably deem this information to be too sensitive.

With regard to the details on those categories that are not part of the minimum standards, an optional segment would allow states much flexibility. They could provide those details that they deem to be in accordance with their best interests. At the end of the day, it is better that a government states that it has exported ammunition to a certain country, without mentioning any further details, than to report nothing at all on this transfer.

The case of the EU annual report illustrates that it can work to start with few details and to increase transparency in an incremental, step-by-step process. The detail of reporting in the EU has increased quite substantially since the first publication of the report in 1999 with more and more disaggregated data being provided for the 21 categories of the military list.

Which transfers are to be reported?

This question should not be underrated. According to Art. 13 (3) of the ATT, each state party shall submit an annual report on its exports and imports of conventional arms in the preceding calendar year to the secretariat by 31 May of the following year. The Treaty text, however, leaves it at the discretion of the states to report either on the authorised or the actual exports and imports. For UNROCA, states are requested to report on their actual exports and imports of conventional weapons only. For the consolidated annual EU report on arms exports, states are required to report on the number of arms export licences, the financial value of their export licences approved and on the financial volume of actual exports. However, they do not have to provide information on the numbers of weapon systems as is the case for UNROCA. The ATT reporting can significantly contribute to an increase in transparency by combining the strengths of both of these instruments.

Authorised exports are particularly suited as the central criterion for assessing a government's adherence to the norms of the ATT because it is the government's sole responsibility to decide about the authorisation, while actual exports can be influenced by other factors. Furthermore, most states will probably find it easier to report on the authorised exports because governments need to issue export licences, which they record whereas the financial volume of actual exports is more difficult to monitor. Yet, the degree of transparency is highest when both, authorised and actual exports, are reported. There might be, and in fact often are, differences between the authorised and actual exports due to lacking capacities in compiling the necessary data or as a result of usual fluctuations within the arms trade. Consequently, it is acceptable that minimum reporting requirements tolerate the reporting of either. Still, reporting on the authorised and on the actual ex- and imports must be the aim. States parties to the ATT should set themselves a deadline to achieve this goal and improve their capacities to report on both. More experienced states with sufficient resources should assist other states in doing so.

A tricky issue is the question of the reporting of loans, leasing and gifts of weapons. While these are not explicitly mentioned in the ATT's definitions of

"transfer" [Art. 2 (2)] or "exports" and "imports" [Art. 12 (3)], a majority of states considers them to fall under the scope of the ATT, too. Therefore, these activities should become part of the reporting and indeed be included in the minimum standards. Excluding them would mean to accept a significant gap in transparency.

Should denials be reported?

It would be important to report not only on the exports authorised but also on those denied. Such denial-reporting was originally foreseen by the Chair of the ATT Preparatory Committee in a non-paper of July 2011, but was removed during the first round of official negotiations in 2012. From a legal point of view, there are hardly any obstacles to reporting on licence denial, as long as these are official and not just rejected preliminary enquiries. Politically, however, it might be difficult for states to publically report on licence denials, as this could affect diplomatic relations. While reporting on denials could be politically sensitive, such information is a crucial indicator to assess the interpretation of the Treaty's criteria.

While UNROCA does not include any reporting on denials, the annual EU report requires states to provide such information referring to the criteria of the EU Common Position on which the denial is based. In addition, EU Member States have agreed to a regular and confidential exchange of information on their denials of arms export licences. A major reason behind this rationale is to avoid "undercutting" export standards within the EU. The annual report only indicates the aggregated number of denials for each recipient country, referring to the category of the military list and stating the criteria that were the reason for the denial. The annual report does not indicate which EU Member State has issued the denial.

Surely, it will be difficult to find a majority among states parties to the ATT in favour of establishing a system of denial reporting. Such an endeavour might create too much resistance at the moment, which might hamper the entire process of agreeing on a common reporting scheme for the ATT and on achieving universality. Nevertheless, governments should at least start to discuss what such a system of denial reporting for the ATT could look like. Similar to the EU mechanism, states could start to provide information on denials confidentially and on a rather informal basis. It would not be mandatory for states parties to the ATT to participate in this process, yet, to create an incentive for participation only those states that provide information would receive information. At a later stage, this might be complemented by reporting the aggregated number of denials for each recipient country to the ATT secretariat, which, in turn, could compile an aggregated report on denials that would be made public.

Should the reports be made public or not?

The text of the ATT does not contain any requirement for states parties to make their reports or the information contained in them available to the public. The annual reports are to be submitted to the secretariat. Whether it will make them publicly available is still an open question. Seen purely from the perspective of transparency, answering this question would be straightforward: all information of the ATT reporting process should be available to the public. The example of the EU is interesting here, too. As a result of more political awareness, arms export scandals within EU Member States and against the background of bloody conflicts in the first half of the 1990s, EU Member States agreed on an EU Code of Conduct on Arms Exports in 1998. Interestingly, first planned as a confidential information-sharing procedure among EU Member States, it was the Finnish Presidency that immediately served the interest in transparency and accountability, paving the way for a publicly available consolidated report.

However, we should expect many states to be very reluctant to provide certain information if it was publically available. So, there is a trade-off between the degree of detail of information and the public availability of it. What states are willing to publicly report and what kind of information they would like to share with other states confidentially needs to be carefully assessed. Again, the distinction between minimum standards and optional reporting might be useful. Reported data of the minimum standards must be available to the

public. Otherwise, the whole idea of increasing transparency by the ATT will be undermined. Clearly, it would be the best option to make the optional information public, too. However, if there is not enough support for that, it would be better to provide this kind of information to the secretariat on a confidential basis, than not to provide it at all. This does not preclude the option to make more and more information public in a step-by-step process.

Setting incentives

Experiences from UNROCA illustrate that several states use the opportunity to provide more information than is required. However, a closer look also shows that the reporting morale varies significantly among states and has decreased over the years. In order to prevent the ATT reporting mechanism from a similar fate, states parties to the Treaty must create incentives for reporting in general and to optional reporting in particular.

While this is a major challenge, there are several starting points. First of all, those states that already do provide this information, i.e. EU Member States as well as a number of NATO countries and other states, should lead the reporting process by providing all the information included in the voluntary segment of the template, thereby setting the standard. States can learn from each other's practices, and more experienced states may share their knowledge with others. They should encourage other states to follow their example and assist them in building up their national systems for the control of their arms transfers to have the capacity to provide this information in the first place. Eventually, such assistance could be conditional upon a commitment of the respective states to increase transparency on their arms transfers.

Probably, a particularly strong incentive would be created if participation in the reporting mechanism by states parties to the ATT was taken into account by states when authorising export licences. In other words, fulfilling the ATT reporting minimum standards, and even going beyond them, would have to become a means for states to show that they are trustworthy partners on the international arms market. Of course, this would mean that not even being a state party to the ATT will have to be considered negatively. Otherwise, the incentive to improve reporting would create a disincentive to join the ATT.

FURTHER READING

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