



ICRC International Committee of the Red Cross

Arms Trade Treaty, ICRC statement, 21 March 2013

22-03-2013 Statement

Statement of the ICRC, Final Diplomatic Conference on the Arms Trade Treaty 21 March 2013.

Thank you, Mr. President, for giving the International Committee of the Red Cross (ICRC) the opportunity to speak during this session. At the outset, I wish to recall that the ICRC is a neutral and independent humanitarian organization mandated by States to protect and assist the victims of international and other armed conflicts or of internal strife, and to work for the faithful application of international humanitarian law, the body of law that applies in armed conflicts.

Mr. President, we appreciate very much the efforts you and your team have put into the “legal scrub” of the draft treaty text (your non-paper of 20 March). The ICRC has some concerns about the fifth paragraph of the Principles section, which as currently drafted creates confusion regarding the source of the obligations to respect and ensure respect for international humanitarian law. It should be recalled that the main source of this obligation is Common Article 1 to the Geneva Conventions of 1949, to which virtually all States are party. This obligation is also a norm of customary international law.

We would therefore recommend, for the sake of accuracy and clarity, that reference to the Geneva Conventions in paragraph 5 of the Principles section be moved up to after the terms “respecting and ensuring respect for international humanitarian law”, and moreover be referred to as “the Geneva Conventions of 1949”, for consistency with how those Convention are referred to elsewhere in the draft treaty text.

Regarding new article 4(3), the ICRC considers this provision crucial to achieving the humanitarian goals and objectives of the Arms Trade Treaty. Its aim is to ensure that arms are not transferred to those who would use them to commit the gravest of crimes, namely genocide, crimes against humanity and war crimes. Nevertheless, this provision as currently drafted contains two important flaws that would undermine that aim.

First, the expression “for the purpose” requires specific intent that the arms to be transferred will facilitate one of these crimes. This expression is found in the Rome Statute of the International Criminal Court, which states that a person shall be criminally responsible if that person assists in the commission of a crime. The ICRC does not consider it appropriate to provide a standard of individual criminal liability in a transfer prohibition that is of the responsibility of States. In addition, as it is currently worded, the provision would be inoperable: A State party to the treaty that intends to facilitate crimes against humanity, genocide, or war crimes is unlikely to admit that a transfer of arms is “for the purpose” of facilitating these acts, and would therefore never apply the prohibition. This standard of intent could not effectively serve the purpose of preventing transfers that would facilitate the mentioned crimes. In light of this, the ICRC recommends applying the standard of knowledge, which would be compatible with Article 16 of the International Law Commission’s Draft Articles on State Responsibility, which governs a State’s responsibility for aiding or assisting in the commission of an internationally wrongful act, and represents customary international law binding on all States.

A second important flaw lies in the range of war crimes, which is significantly narrower than the range set out in both treaty and customary international law. By limiting its application to crimes under the 1949 Geneva Conventions, this provision omits a number of war crimes that are typically carried out with conventional arms in the conduct of hostilities, such as directing attacks against the civilian population, civilian objects or humanitarian assistance personnel. If this provision is to effectively prevent transfers of weapons that would be used in the commission of these acts, then it is essential that the range of war crimes be comprehensive.

The ICRC stands ready to work with delegations to find formulations that would satisfy these and other concerns. We wish to stress that the majority of war crimes involve death or injury of protected persons, notably civilians, and destruction or unlawful taking of civilian property. They include but are not limited to “grave breaches” as specified under the four Geneva Conventions of 1949 and other serious violations of the Geneva Conventions. In addition, a number of war crimes are considered as customary international humanitarian law, and therefore binding on all States.

Mr. President, shifting now to export criteria in new Article 5, paragraph 2 of that Article requires that each State Party assess whether there is a risk that the weapons will be used to commit a serious violation of international humanitarian law (IHL) or international human rights law. The ICRC welcomes this obligation to carry out an assessment of such a risk and would consider it a valuable development of international law.

However, the rule in draft Article 5(5) suggests that a weighing exercise is at play between on the one hand the risk of serious violations, and on the other hand considerations relating to peace and security in Article 5(1) and risk mitigation measures in Article 5(4), to be assessed by the exporting country. As a result, this provision would allow States to permit exports despite the existence of a high risk of serious violations of international humanitarian law or of international human rights law. This is likely to undermine States’ existing obligation in the Geneva Conventions to “ensure respect” for international humanitarian law. It would also be incompatible with the position adopted by States at three International Conferences of the Red Cross and Red Crescent since 2003. In order to mitigate this danger, the ICRC would recommend replacing the word “overriding” with the word “substantial.”

Thank you, Mr. President

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