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U.N. Arms Trade Treaty and the Customary International Law Standard

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One of the most important disputes in the negotiation of the Arms Trade Treaty (ATT) at the United Nations is the question of whether the treaty should include a customary international law (CIL) criterion. This is a complex question. It is also one fraught with considerable risks for the United States, which should firmly oppose the introduction of such a criterion into the treaty.

The Current Draft Criteria. Article 6.3 of the current (March 22) draft of the treaty reads as follows:

> A State Party shall not authorize any transfer of conventional arms covered under Article 2(1) or of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, or war crimes as defined by international agreements to which it is a Party, including grave breaches of the Geneva Conventions of 1949.

This phrasing has problems of its own: Accusations of the commission of "crimes against humanity" are too often politically motivated and frequently targeted at the U.S. and Israel, as in the case of the Goldstone Report on the 2008–2009 Gaza War, which was later retracted by its lead author.[1] But many nations at this conference view the current text as too weak, because, as one nation put it on March 26, it does not cover offenses that are supposedly committed outside of an armed conflict (and thus are not war crimes) and are not part of a generalized and systemic attack on a civilian population (and thus are not crimes against humanity).

The Proposed CIL Criterion. Many nations therefore want Article 6.3 to include a CIL criteria. A number of relevant proposals have circulated, but the most widely supported one was made by Ghana, speaking on behalf of 103 nations, on March 25. According to the Ghana group, the ATT must "better reflect existing international legal norms and standards. The provision on prohibitions must capture all war crimes and systematic human rights violations."

A somewhat narrower Swiss proposal on March 25, backed by 56 nations, urged that the ATT cover "war crimes under customary international law." Other nations have called for the ATT to incorporate a reference to an "armed violence" standard that would, through a reference in the treaty preamble, offer guidance on how the CIL criterion, and other relevant criteria, should be interpreted.

The Problems with a CIL Criterion. The CIL criterion poses three serious problems for the United States.

First, the phrase "armed violence" is not well-defined under international law, and as currently used, its reach is extremely broad. The Small Arms Survey, a Geneva-based nongovernmental

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organization, draws on the Geneva Declaration, a 2006 statement against armed violence signed by over 100 nations, to define "armed violence" as "the intentional use of illegitimate force (actual or threatened) with arms or explosives, against a person, group, community, or state that undermines people-centred security and/or sustainable development."[2] By this standard, a single murder with a firearm would rise to the level of the "armed violence" standard in an ATT.

Second, the U.S. is not solely responsible for defining what constitutes CIL and thus what constitutes the broader human rights standards the discontented nations seek to incorporate under its banner. Under its older name, "the law of nations," CIL was the standard that nations set by their own well-established conduct. Understood in this way, the law of nations won respectful reference from James Madison in the *Federalist Papers*.[3]

But that is no longer how CIL is understood. Instead, as legal analyst Ed Whelan points out, the "new CIL is now less tied to state practice. It is now generated from United Nations resolutions, multilateral treaties, and other international pronouncements."[4] By allowing a CIL criterion in the ATT, the U.S. would be accepting an open-ended obligation to remake its commitments under the treaty as the U.N., other nations, nongovernmental organizations, or professors of law devised new CIL obligations.

The scope for dangerous innovations here is extremely broad. For example, as the Discovery Institute's Wesley Smith notes,[5] the U.N. Special Rapporteur on Torture now argues that mandatory HIV testing for prostitutes constitutes torture—and most nations at the ATT conference would agree that torture is one of the broader human rights violations that they want the ATT to take into account. In short, there is very little that could not, in time, be swept up into a new CIL prohibition and thus become a way to expand the ATT into currently unimagined realms.

The third problem flows directly from the second. One of the main strategies of liberal activists who dislike various parts of the Constitution and the Bill of Rights (in particular the First and Second Amendments) is to argue that U.S. courts have an obligation to use CIL to reinterpret the Constitution, reshape U.S. laws, and remake U.S. policies. In a phrase, this is a strategy of "bringing international law home,"[6] with the additional proviso that the international law in question is being invented to advance the political aims of the elites doing the inventing.

In the context of the ATT, this raises the obvious risk that the treaty will become an instrument of gun control. Right now, those risks are largely prudential and indirect,[7] but a CIL criteria would immensely increase the dangers posed by the ATT. It would also create a dangerous precedent for future treaties and would allow activists to argue that, in this central area of the import and export of the means of national defense, the U.S. had accepted CIL as a legally binding criterion that must govern its conduct.

Vigorously Resist. There is little that the U.S. could do in the treaty-making context that would pose more serious long-term risks than accepting a CIL criterion in the ATT. The U.S. should vigorously resist such a criterion and ensure that, if the conference does regrettably adopt a treaty, it contains only clear and well-defined criteria that are fully compatible with existing U.S. practice and the standards it

1. Richard Goldstone, "Reconsidering the Goldstone Report on Israel and War Crimes," *The Washington Post*, http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (accessed March 27, 2013).
2. Small Arms Survey, "Armed Violence," http://www.smallarmssurvey.org/armed-violence.html (accessed March 27, 2013).
3. James Madison, *The Federalist* No. 42, *at* http://thomas.loc.gov/home/histdox/fed_42.html (accessed March 27, 2013).
4. Ed Whelan, "Harold Koh's Transnationalism—Customary International Law," National Review Online, April 6, 2009, http://www.nationalreview.com/bench-memos/50307/harold-kohs-transnationalism-mdash-customary-international-law/ed-whelan (accessed March 27, 2013).
5. Wesley J. Smith, "'Torture' Inflation," National Review Online, March 23, 2013, http://www.nationalreview.com/corner/343766/torture-inflation-wesley-j-smith (accessed March 27, 2013).
6. Harold Hongju Koh, "1998 Frankel Lecture: Bringing International Law Home," Yale Law School Faculty Scholarship Series, 1998, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2883&context=fss_papers (accessed March 27, 2013).
7. See Ted R. Bromund and John G. Malcolm, "The Arms Trade Treaty and the Second Amendment: Too Risky to Ratify," The Heritage Foundation, The Foundry, *March 18, 2013,* http://blog.heritage.org/2013/03/18/the-arms-trade-treaty-and-the-second-amendment-too-risky-to-ratify/.

has accepted through the full operation of the U.S. treaty-making process.

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