

Non-State Actors and the ATT *Challenges and Opportunities*

25 November 2009

Non-State Actors and the Arms Trade Treaty Initiative: Challenges and Opportunities

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Seminar Summary Report

On 25 November 2009, the United Nations Institute for Disarmament Research (UNIDIR) held a lunchtime seminar entitled “Non-State Actors and the Arms Trade Treaty Initiative: Challenges and Opportunities”. The seminar was organized as part of UNIDIR’s activities to support discussions on the international initiative on an Arms Trade Treaty (ATT).

Non-state actors (NSAs) are often mentioned as groups of users of conventional arms that are of importance when elaborating possibilities to negotiate an international, legally binding treaty on the transfer of these weapons. However, given the number of important issues on the table with regard to the future negotiations on an ATT, not much time and effort have so far been devoted to discussing this specific aspect at the UN or at the regional level. The seminar, held at the Palais des Nations, provided a possibility to deepen discussion and understanding on this specific issue related to the ATT and to see how NSAs could or should be implicated in an ATT.

NSAs have also been discussed at activities organized as part of a project that UNIDIR is implementing for the European Union on “Promoting Discussion on an Arms Trade Treaty”. The project consists of a series of regional seminars, organized to integrate national and regional contributions to the international process underway on an ATT and to contribute to identifying the scope and implications of a treaty on the trade in conventional arms. In order to achieve this goal, the project aims to facilitate the exchange of views among states, regional organizations and civil society by encouraging discussions on different aspects of a possible international treaty on the arms trade. Given the wide scope of discussions at these regional seminars, and the fact that NSAs were brought up in different ways in the regional seminars, it was considered that a further event devoted specifically to NSAs and their relevance to the ATT initiative should be organized to increase knowledge on NSAs within the ATT and to contribute to further discussions.

The lunchtime seminar was open to all states and international non-governmental organizations (NGOs) and other interested parties. Over 70 representatives of government and international organizations attended the meeting. The seminar heard presentations by representatives from the University of Calgary, Geneva Call and the International Committee of the Red Cross (ICRC). These speakers presented

issues related to the diversity of NSAs, both armed and non-armed, the proliferation of arms to NSAs, the possible need to address NSAs within the ATT, and different ways to address NSAs in the arms trade in securing adherence to the norms and regulations of the possible treaty. This report provides a summary of the presentations and discussions from the seminar. It reflects the impressions and views of the organizers at UNIDIR, based on our account of the proceedings and exchanges of views.

Summary of seminar proceedings

The seminar was chaired by Christiane Agboton-Johnson, Deputy Director of UNIDIR. To start the meeting, Agboton-Johnson gave a brief introduction of UNIDIR, its recent research on ATT, as well as its role as an implementing agency for the European Union of the project “Promoting Discussion on an Arms Trade Treaty”. As she mentioned, the mandate of UNIDIR is to facilitate the process, through negotiations, toward greater security and social and economic development, promote the disarmament process, and conduct in-depth and long-term research on disarmament. Agboton-Johnson noted that UNIDIR has been involved in the ATT process for a number of years, has produced two analyses of states’ submissions of views on the treaty, and has organized a series of meetings on the subject. She then went on to discuss NSAs and highlighted the difficulties in addressing them in the ATT process, given different uses of the term depending on context, and adding the complexity related to NSAs’ motivation, composition, activities, geostrategic and economic interests, and so forth. Agboton-Johnson noted that the ATT was a window of opportunity to promote human security in a more holistic manner. Finally, she presented the speakers of the seminar.

Ambassador Hannu Himanen, Permanent Representative of Finland to the United Nations in Geneva, delivered the seminar’s opening remarks. He welcomed all participants to the event, which in his view took place at a strategic time, right before the formal passing of the new resolution on an ATT in the UN General Assembly, following a very encouraging vote in the First Committee meeting. He emphasized that, according to Finland, one of the co-authors of the ATT resolutions, a treaty must be global, comprehensive, embody the highest possible international standards and promote fair trade conditions for all. Ambassador Himanen also pointed to the importance of keeping the work toward an ATT as inclusive as possible, and called for discussions and later negotiations to concentrate on forming concrete recommendations. The introduction of a consensus rule to the 2012 ATT Conference is undoubtedly a challenge to the process, and has, according to Ambassador Himanen, lead some to fear that an ATT would be formed around the lowest common denominator. He strongly countered this claim and stressed that the consensus was chosen so that the negotiations would lead to the highest possible common rules, and that excluding the main producing states from the process would prove negative to the end product.

The seminar also heard three presentations followed by general discussion. First, Valery Yankey-Wayne, from the Armed Groups Project at the Centre for Military and Strategic Studies, University of Calgary, discussed the proliferation of arms to NSAs in general, presented a matrix of various types of armed NSAs and the complexity of defining these and their legality, as well as their implications in a possible ATT. Nicolas Florquin, Programme Officer and researcher at Geneva Call, presented the work by Geneva Call to negotiate with armed NSAs on commitments to International Humanitarian Law (IHL). Peter Herby, Head of the Legal Division of the Mines-Arms Unit of the ICRC, reported on contact between the ICRC and non-

state actors, how IHL is relevant to an ATT and that a regulation of arms transfers should be based on how weapons are used rather than focus on the user. The three presentations and the subsequent discussion are summarized in the following section.

Presentations and discussions

Armed Groups and the ATT initiative—elaboration of different aspects

Valerie Yankey-Wayne introduced different types of arms actors, dynamics of weapons transfers with regard to NSAs, challenges to monitoring the activities of these groups, as well as some key considerations related to NSAs in the proposed ATT. She began by underlining the importance of focusing on the full range of armed groups as end-users of weapons. According to her, for regulatory and implementability purposes, it makes no sense to strictly divide between state and non-state groups, since a wide range of different actors beyond states buy, sell and use weapons. The best available research shows that both state and non-state armed groups have access to illicit weapons through sophisticated criminal networks ; and potentially misuse weapons.

The ATT process, as Yankey-Wayne noted, involves only states, since the treaty is designed to be an international instrument within the United Nations. According to her, trying to include NSAs in the proposed ATT negotiations will be politically contentious and controversial. However, since NSAs also buy, sell and use weapons, they have to somehow be implicated in the process as well. As a solution to the question of addressing NSAs indirectly in an ATT, Yankey-Wayne referred primarily to monitoring the end-use of weapons. Monitoring end-use, particularly among states, promises to address a significant part of the problem of illicit weapons diversion to undesirable groups—whether state or non-state groups. However, she also pointed out that regulating the end-use of weapons by only state actors would create loopholes in the system and not solve the problem of weapons diversion from so-called legal and responsible NSAs such as private security companies or private militias. Regulating and oversight over weapons transfers to NSAs should be the primary responsibility of national authorities.

Yankey-Wayne also put forth some questions related to NSAs and an ATT that require further thought and elaboration: If NSAs are included in the ATT process, how should they be addressed within a treaty to ensure objectivity and implementability? How will a treaty deal with the definitions of non-state armed groups since such groups span from legal to illegal groups? So far, there is little agreement internationally on legal and illegal armed groups. Additionally, how will the controversial question of quasi-state groups such as private government militias be addressed?

Through her presentation, Yankey-Wayne repeatedly stressed the importance of always keeping the objective of an ATT—humanitarian space—in sight. Unregulated trade in conventional arms and the diversion of arms to illicit markets contributes to conflict, terrorism, crime and the displacement of people and undermines social and economical development and peace and security. The dynamics of arms transfers and the flows from legitimate to illicit markets should be the primary concern. According to Yankey-Wayne, research has shown that most diversions of weapons to NSAs originate from poorly controlled national stockpiles,

making stockpile management and security sector governance as a whole issues of crucial importance for an ATT.

Yankey-Wayne further noted the emerging codes of conduct particularly for armed groups sanctioned by, or associated with, the state such as state armed forces, police and special forces, paramilitary/militia groups, and private security companies or mercenaries. Moreover, many international humanitarian organizations have long recognized the benefits of engaging armed groups in dialogue on the principles of IHL. The humanitarian community is increasingly urging and engaging non-state armed groups to respect international humanitarian norms. But the question is how to hold armed groups responsible or accountable when they are not in a position to sign regional or international agreements. However, long-standing experience of major humanitarian organizations engaging with various armed groups has demonstrated the potential benefits of such an engagement.

Yankey-Wayne concluded her presentation by stating some key considerations for the ATT process. A treaty should choose not to address in any way the controversial issue about the legality of non-state groups; however, this should not be interpreted as condoning or making lawful otherwise unlawful acts of non-state groups. Yankey-Wayne stressed that states must rather focus on prohibiting transfers of weapons to any group that is likely to commit serious violations of international human rights or IHL. To effectively address weapons diversion at the national level, states should adopt appropriate internal monitoring measures, and legislation at the national level to severely penalize criminal acts related to weapons diversion. They should cooperate to take practical measures to improve coordination, oversight, end-use certification, as well as security sector governance and stockpile management. Finally, Yankey-Wayne called for states to recognize the complementary role of humanitarian and research organizations in helping to monitor the activities of non-state armed groups.

Non-state actors and regulating transfers of conventional arms

Nicolas Florquin started his presentation by introducing Geneva Call, an organization dedicated to engaging armed NSAs to comply with humanitarian norms, starting with the Ottawa Convention. As of November 2009, 39 NSAs had signed Geneva Call's "Deed of Commitment" banning anti-personnel landmines. Overall, signatory NSAs have abided by core prohibitions on the use, production, acquisition and transfer of anti-personnel landmines. Most signatories have also undertaken humanitarian mine action activities such as demining, stockpile destruction, mine risk education and victim assistance, often collaborating with humanitarian organizations.

With regard to conventional arms, Florquin offered some insights on the applicability of an ATT that would ban transfers to any end-user, state or non-state, that risks using the arms to violate IHL, international human rights law and other applicable standards—as advocated for by segments of civil society. Just like states, NSAs can "misuse" arms by using them indiscriminately, by handling *or* storing them in ways that threaten the safety of civilians, and by re-transferring them to other entities that are likely to misuse them.

Assessing the risk that NSAs will misuse conventional arms is a delicate and challenging task. As suggested by the ICRC, states, when considering transfers to any entity, should take into account the recipient's record of behaviour, its stated intent and commitments to international law, as well as its capacity to enforce and implement proper control and monitoring of weapons.

While a number of NSAs have issued declarations or codes of conduct addressing their management and use of weapons, no central repository of such commitments exists, making any in-depth analysis particularly challenging. Furthermore, the experience of humanitarian actors, such as Geneva Call, engaging NSAs to comply with humanitarian norms, shows that, like states, NSA commitments often need to be accompanied by regular external monitoring and substantial support for implementation if they are to be respected.

Florquin concluded by noting that current knowledge on the extent to which NSAs' arms management and use policies overlap with international standards is sparse, and would benefit from further research. Gathering NSAs' own perspectives on the issue, for instance, might be a useful contribution to the discussion. In considering the feasibility of an ATT, early consideration should also be given to the accompanying measures that would need to be taken to ensure that any recipient implements and enforces its commitments, and complies with an ATT's parameters well after receiving the arms.

Non-state actors and international humanitarian law

Peter Herby began his presentation by explaining that the ICRC has a major interest in the role of NSAs in armed conflict, as most of the contexts in which it operates involve one or more groups of NSAs. The ICRC engages regularly in activities to encourage NSAs' compliance with IHL. Relations with NSAs are also important for ensuring access to victims and the security of staff members. Herby then emphasized that IHL does not look at who is using the weapon but rather at how a weapon is used and what its effects are. IHL binds all parties to an armed conflict—both state and non-state actors. In addition, common article 1 of the Geneva Conventions and customary IHL set out the duty of all states to ensure that IHL is respected by all parties to a conflict, including NSAs.

Owing to their ability to provide or withhold the means by which IHL violations may be committed, states that export arms can be considered particularly influential in “ensuring respect” for IHL. According to the ICRC, ensuring respect for IHL should be one of the main goals of an ATT. It is important that an ATT prohibit weapons transfers if there is a clear risk that IHL will be violated with the weapons being transferred. In fact, states parties to the Geneva Conventions have agreed to this on the basis of their obligation to ensure respect of IHL, whether the violations would be committed by a state or NSA. This approach is based on the behaviour of the arms-bearer, and not on who the arms-bearer is. Such an IHL parameter for arms transfers is already explicit in various regional arms transfer instruments such as the legally binding EU Common Position on Arms Exports and the Economic Community of West African States Convention on Small Arms and Light Weapons, as well as several non-legally binding instruments on arms transfers such as the Document of the Organization for Security and Co-operation in Europe on Small Arms and Light Weapons and the Best Practice Guidelines for the Implementation of the Nairobi Declaration and the Nairobi Protocol on Small Arms and Light Weapons.

Herby ended his presentation with a review of the problems associated with deciding what type of behaviour should result in a ban of arms transfers to a particular end-user. Including criteria based on IHL and human rights with other criteria in an ATT could move a transfer decision from one based on respect for international law to one that is more dependent on political considerations. This, in turn, might pose new kinds of problems to negotiating and implementing an ATT. Echoing the presentation of Yankey-Wayne, Herby referred to additional

criteria in an ATT, such as stockpile security and management as well as efficient end-user controls, and noted that in pragmatic terms these might be better means of addressing the problems related to the use of weapons by NSAs.

Discussion

After the presentations, the floor was opened for questions and discussion. Several participants stressed that the issue of NSAs is complex, and that trying to address it explicitly in an ATT could lead to political debates and bickering. This is why in the views of many it would be advisable to avoid any direct reference to NSAs in a treaty in order not to risk its future. Reference was made to the difficulties of defining NSAs, since the same group might for some represent a criminal or terrorist organization, and be a legitimate group of freedom fighters for others. The discussion came back to the notion that states and NSAs may both violate IHL and be involved in illegal transfers of weapons. However, it was also noted that non-state entities that produce and trade weapons should somehow be included in the ATT debate. Many seemed to be of the view that the focus in an ATT should be on controlling the end-use of conventional arms. Risks related to transfers of weapons from states to non-state actors were mentioned, as well as the importance of including states' right to self-determination in any possible ATT. One participant referred to the presentation made by Geneva Call and noted that the Deed of Commitment might provide helpful and relevant ideas from a tactical and short-term perspective on how to set some rules of engagement with NSAs in terms of controlling transfers and the use of conventional arms.

Questions for the speakers included queries about their views on the possibility of establishing a voluntarily code of conduct for arms brokers, whether arms transfers are addressed in Geneva Call's work and whether they could be, and what the role of NGOs could or should be in the implementation of an ATT. In reply, it was noted that the monitoring of an ATT does not necessarily have to be done in the traditional way, and that NGOs could possibly have a role in supporting practical implementation, just as there might be a role for international and regional organizations.

The importance of NGOs in the whole ATT process was underlined. Further, hope was expressed that controlling the end-use of weapons under an ATT would solve many of the problems currently discussed. Concerning evaluation of NSAs and their behaviour, it was further noted that in some cases evaluating the possible behaviour of an actor is difficult, and therefore assessment has to be primarily based on previous behaviour. Regarding the regulation of brokering activities it was noted that further efforts are needed, but that again this is an issue where states bear the primary responsibility.

Closing Remarks

In her closing remarks, Agboton-Johnson highlighted the fact that the NSA issue is a challenge relevant to many international treaties, not only to the proposed ATT. She also reminded everyone that an ATT is not designed to be a panacea that would solve all problems concerning arms, but a means to significantly improve transfer controls by establishing the highest possible common denominators to guide transfer decisions. Echoing the words of Herby she stressed the point of creating humanitarian space and expanding this motion of responsibility in human security. Finally, she pointed out that the lunchtime seminar was just one step

forward in promoting thinking and discussions in the process toward better regulations on the transfers of conventional weapons.

Ambassador Himanen ended the seminar with some closing remarks, concentrating mainly on NSAs and IHL, and building on arguments made in the presentations as well as during the discussion. He stressed the difficulty of approaching NSAs in an international process, and referred to the political implications and complexities that dealing with them as part of the problem would imply. Coming back to the presentations of Yankey-Wayne and Herby, Ambassador Himanen stressed again the importance of taking humanitarian space and human security into account in any arms control and disarmament negotiations, and engaging positively with all stakeholders. Further, he underlined the importance of IHL in arms transfers considerations, and again noted that IHL binds everyone, states and NSAs alike. With regard to the ATT process, Ambassador Himanen noted that it will be important to focus the discussions and negotiations on those issues that are relevant to an ATT and that will enable the successful conclusion of the process in a legally binding, effective international treaty on conventional arms transfers.

Conclusion

The UNIDIR lunchtime seminar on the ATT initiative and how NSAs could or should be addressed was successful in attracting wide participation and evoking lively discussion. Over 70 governmental representatives as well as civil society participants attended the seminar and participated in its discussions.

The presentations made during the seminar addressed various issues related to NSAs, and presented examples from other processes, as well as policy suggestions for an ATT. Despite various views expressed, the common view seemed to be that addressing the question of NSAs explicitly in an ATT would prove politically and practically challenging. However, the importance of taking NSAs into account when considering issues related to controlling conventional arms transfers was not challenged, which is understandable given their prominent role and involvement in the majority of today's conflicts. The most prominent suggestion put forward in terms of how to address non-state actors through an ATT process was to ensure that an ATT contains effective and implementable end-user controls. In this, the primary responsibility lies with states as the main negotiators and objects of an ATT.

About the speakers

Valerie Yankey-Wayne is currently a PhD candidate at the University of Calgary, where she is also a Research Associate at the Armed Groups Project, a research group dedicated to analysing how various types of armed organizations operate and how they may better respect core human rights and humanitarian standards. Previously, Yankey-Wayne was a Researcher and a Policy Analyst at UNIDIR, conducting research on a wide variety of issues, including small arms and light weapons. Yankey-Wayne has published several articles on arms control, and continues to work closely with a range of civil society groups, governmental experts and regional organizations on these issues. She holds a Masters degree in International Relations from the University of Cambridge.

Nicolas Florquin holds the positions of Research Officer and Programme Officer for Africa at Geneva Call, a humanitarian organization dedicated to engaging armed non-state actors to comply with the norms of international humanitarian law and human rights law. He contributes to the organization's policy work, and participates actively in humanitarian engagement efforts targeting non-state actors in Africa. Prior to joining Geneva Call in 2006, Florquin worked as a researcher for the Small Arms Survey and as Arms Consultant for the UN Panel of Experts on Liberia. As part of his different appointments, Florquin has gained extensive experience on non-state actors and their impact on human security, notably in West and Central Africa. In 2005, he co-edited with Eric G. Berman the book *Armed and Aimless: Armed Groups, Guns and Human Security in the ECOWAS Region*. Florquin has a Masters of Public Administration in International Management from the Monterey Institute of International Studies.

Peter Herby is the Head of the Legal Division of the Mines-Arms Unit at the International Committee of the Red Cross. Prior to working there, Herby directed the Disarmament and Arms Control Programme of the Quaker United Nations office in Geneva. He holds a Masters degree in International Relations from the University of Cambridge as well as in Peace and Conflict Studies from the University of Bradford.

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Note

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The United Nations Institute for Disarmament Research (UNIDIR)—an autonomous institute within the United Nations—conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to the variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and governments. UNIDIR's activities are funded by contributions from governments and donor foundations. The Institute's web site can be found at:

www.unidir.org