

USING THE ARMS TRADE TREATY TO ADDRESS PASTORALIST CONFLICT AND WILDLIFE CRIME IN KENYA'S MARGINALIZED REGIONS

USANDO O TRATADO DE COMÉRCIO DE ARMAS PARA ENFRENTAR O CONFLITO PASTORALISTA E O CRIMES SILVESTRES EM REGIÕES MARGINALIZADAS DO QUÊNIA

UTILIZANDO EL TRATADO DE COMERCIO DE ARMAS PARA TRATAR EL CONFLICTO PASTORALISTA Y EL CRIMEN DE VIDA SILVESTRE EN LAS REGIONES MARGINADAS DE KENYA

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RESUMO

Respostas militarizadas ao conflito em área pastoril e aos crimes contra a vida selvagem no Quênia - incluindo o colapso de populações de elefantes e rinocerontes - muitas vezes não atendem aos padrões de direitos humanos e prejudicam as capacidades locais de sustentabilidade, paz e meios de subsistência alternativos. A repressão do Estado encoraja a violência extrajudicial e introduz novas armas que muitas vezes entram ilicitamente no mercado. Este artigo descreve abordagens alternativas enraizadas nos direitos humanos, no Estado de Direito e na cooperação e assistência internacionais, incluindo o uso de instrumentos regionais que regulam o comércio de armas pequenas e leves (SALW, na sigla em inglês para *Small Arms and Light Weapons*), incluindo o Tratado de Comércio de Armas (ATT, na sigla em inglês para *Arms Trade Treaty*) de 2013. O artigo baseia-se no trabalho de campo no Quênia e na observação participante na defesa do ATT.

Palavras-chave: Conflito em área pastoral; Crimes contra a vida selvagem; Abigeato; Tratado de Comércio de Armas; Armas pequenas e leves.

ABSTRACT

Militarized responses to pastoralist conflict and wildlife crime in Kenya -including to the collapsing elephant and rhino populations - often fail to meet human rights standards and undermine local capacities for sustainability, peace and alternative livelihoods. Heavy-handed state suppression encourages extrajudicial violence and introduces new weapons that often enter the illicit market. This article outlines alternative approaches rooted in human rights, the rule of law and international cooperation and assistance, including the use of regional instruments regulating the trade in small arms and light weapons (SALW), including the 2013 Arms Trade Treaty (ATT). The article draws on fieldwork in Kenya and participant observation in advocacy on the ATT.

Keywords: Pastoralist Conflict; Wildlife Crime; Poaching; Arms Trade Treaty; SALW.

RESUMEN

Las respuestas militarizadas al conflicto pastoralista y los delitos contra la vida silvestre en Kenia, incluidos los colapsos de las poblaciones de elefantes y rinocerontes, a menudo no cumplen con los estándares de derechos humanos y socavan las capacidades locales de sostenibilidad, paz y medios de vida alternativos. La represión Estatal de mano dura alimenta la violencia extrajudicial e introduce nuevas armas que a menudo entran en el mercado ilícito. Este artículo describe enfoques alternativos arraigados en los Derechos Humanos, el Estado de Derecho y la cooperación y asistencia internacional, incluido el uso de instrumentos regionales que regulan el comercio de armas pequeñas y ligeras (SALW, por su sigla en inglés para *Small Arms and Light Weapons*), incluido el Tratado de Comercio de Armas (ATT, por su sigla en inglés para *Arms Trade Treaty*) de 2013. El artículo se basa en el trabajo de campo en Kenia y la observación participante en la incidencia sobre el ATT.

Palabras clave: Conflicto Pastoralista; Crimen de vida silvestre; Caza furtiva; Tratado de Comercio de Armas; SALW.

SUMMARY

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INTRODUCTION

In early 2017, some 10,000 pastoralists armed with automatic rifles raided farms, wildlife reserves and conservancies in Laikipia, Kenya, attacking wildlife, people and raiding livestock. The region was and is currently affected by severe drought, and tensions flared as political figures exploited ethnic divisions in campaigning for the 2017 elections.¹

Numerous researchers have found that militarized state interventions to address the kind of cattle rustling observed in Laikipia often exacerbate the situation, introducing new weapons (that enter the illicit market sector through theft or sale) and extrajudicial violence. Heavy-handed suppression is also expensive, diverting important resources away from sustainable development.² Militarized state responses to the collapsing populations of elephants and rhinos—such as shoot-to-kill policies—have often failed to meet human rights standards and

¹ Adam Cruise and Bibi van der Zee, "Armed herders invade Kenya's most important wildlife conservancy," *The Guardian*, February 2, 2017 <https://www.theguardian.com/environment/2017/feb/02/armed-herders-elephant-kenya-wildlife-laikipia>; Jennifer Bond and Kennedy Mkutu, "Behind the conflict in central Kenya that's costing lives and hitting tourism," *CNBCAfrica*, February 8, 2017, <http://www.cnbc africa.com/news/east-africa/2017/02/08/behind-the-conflict-in-central-kenya>

² Kennedy Agade Mkutu, *Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms*, Indiana University Press, 2008; James Bevan, "Crisis in Karamoja: Armed Violence and the Failure of Disarmament in Uganda's most deprived region." *Small Arms Survey Occasional Paper 21*, 2008, <http://www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP21-Karamoja.pdf>

have even been implicated in poaching.³ Indeed, such responses may undermine important efforts to engage and build local capacities for sustainability, peace, and alternative livelihoods.⁴

There are, however, alternatives to militarized responses to pastoralist conflict and wildlife crime, rooted in human rights, the rule of law and international cooperation and assistance. Excess availability of arms can fuel militarization, as parties to conflict escalate responses to the increasing danger posed by each other and deadly weapons become more widespread in ownership and uses. Over the last decade states and civil society have constructed transformative legal and normative frameworks to address the human suffering caused by an unregulated arms trade and unchecked proliferation of small arms and light weapons (SALW). These include the United Nations Programme of Action on SALW (PoA) and regional SALW instruments (including, in Africa, the Nairobi Protocol, Kinshasa Convention, ECOWAS Convention and SADC Protocol). Similarly, the previous African elephant poaching crisis in the 1980s—which was fueled by the influx of guns in Africa's Cold War proxy conflicts—was stopped not so much by militarized interventions but rather through international legal and normative change. For example, the ivory trade ban was instituted through the framework of an international treaty - the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). It

³ Matthew Bolton, "How to Use the Arms Trade Treaty to Address Wildlife Crime," Control Arms, September 2016, <https://controlarms.org/wp-content/uploads/2018/03/Wildlife-Crime-Paper-REVISED-Email.pdf>; Matthew Bolton, "Using the Arms Trade Treaty to Address Wildlife Poaching in East Africa: A Human Security Approach," Control Arms, 2015, <https://controlarms.org/wp-content/uploads/2018/03/BoltonPoaching-1.pdf>; "The Nexus between Poaching and Proliferation of Illicit Small Arms and Light Weapons Regional Report: Central African Republic, Democratic Republic of the Congo, Kenya, Uganda and Tanzania," RECSA, 2016.

⁴ Khristopher Carlson, Joanna Wright. and Hannah Donges, "In the Line of Fire: Elephant and Rhino Poaching in Africa," Small Arms Survey 2015, Small Arms Survey, pp. 27-28; Dilys Roe, et al., "The Elephant in the Room: Sustainable Use in the Illegal Wildlife Trade Debate," International Institute for Environment and Development, 2014; "Sustainable Natural Resource Management in Namibia: Successful Community-based Wildlife Conservation," Overseas Development Institute, 2011; Peter Gettleman, "Notorious Poacher Now Leads a Fight to Save Africa's Elephant," Sydney Morning Herald, December 31, 2012, <http://www.smh.com.au/world/notorious-poacher-now-leads-a-fight-to-save-africas-elephants-20121230-2c1ix.html> ; Community-based Natural Resource Management Lessons from the Field: IRNDNC's Experience in Namibia, IRDNC (Integrated Rural Development and Nature Conservation), 2011, <http://www.irdnc.org.na/pdf/IRDNC-Lessons-from-the-Field.pdf> ; Chris Ocowun, "Nebbi Chiefs Disarm Poachers." New Vision, August 22, 2010, <http://allafrica.com/stories/201008230873.html> ; John Kasaona, "How poachers become caretakers," TED, June 2010, https://www.ted.com/talks/john_kasaona_from_poachers_to_caretakers/transcript?language=en; "Planned grazing to reduce conflict," Northern Rangelands Trust, April 18, 2009.

was supported by a global awareness-raising campaign—by both States and NGOs—that in many societies transformed ivory from a symbol of luxury to one of disgust.⁵

Most recently, in 2013, the Arms Trade Treaty (ATT) established, for the first time, global regulations on the transfer of conventional weapons that can prevent arms getting into the hands of human rights abusers, terrorists, war criminals and organized criminal groups. Championed by African states, global civil society and faith leaders who called attention to the devastation of armed conflict on the continent, the treaty creates new opportunities to limit SALW proliferation in regions affected by pastoralist conflict, wildlife crime and armed cattle raiding. If it is universalized and rigorously implemented, States can use the ATT as a normative framework for assessing and mitigating the risks that arms transfers will exacerbate armed violence in pastoralist communities, including cattle raiding and wildlife crime, as well as counterproductive, militarized approaches to controlling pastoralist regions. ATT implementation could include supporting programs that limit the risks of diversion and misuse of SALW and associated ammunition, as well as international, regional and national cooperation and assistance for human security and sustainable development. While the majority of African states have signed the ATT, movement toward ratification has been slow outside West Africa. In particular, the level of accession in the East and Horn of Africa region—an area struggling with the human impact of pastoralist conflict—has been low.⁶ Kenya was particularly crucial in this diplomatic victory, as one of the eight “co-authors” (seen as custodians of the process) of the 2006 General Assembly Resolution that launched the treaty process. However, Kenya has not yet joined the ATT.⁷

This article draws on and summarizes the findings of two more detailed reports written for the ATT Academy,⁸ a 2016-2017 project that trained government and civil society personnel

⁵ Ronald Orenstein, *Ivory, Horn and Blood: Behind the Elephant and Rhinoceros Poaching Crisis*, Firefly Books, 2013 pp. 53-66.

⁶ Matthew Bolton, “The Arms Trade Treaty: A Pan-African Global Policy Victory,” ThinkAfricaPress, April 8, 2013 http://www.academia.edu/3241508/The_Arms_Trade_Treaty_A_Pan-African_Global_Policy_Victory.

⁷ For further details on ATT universalization and implementation in Africa, see “Achieving ATT Universalisation in Africa,” *Control Arms*, August 2016, <https://controlarms.org/wp-content/uploads/2018/03/Achieving-Arms-Free-Africa-FinalVersion-October-2016.pdf>. See also the ATT secretariat website <http://thearmstradetreaty.org/index.php/en>.

⁸ Matthew Bolton, “How to Use the Arms Trade Treaty to Address Wildlife Crime,” *Control Arms*, September 2016, <https://controlarms.org/wp-content/uploads/2018/03/Wildlife-Crime-Paper-REVISED-Email.pdf>; Matthew Bolton, “How to Use the Arms Trade Treaty to Address Pastoralist Conflict,” *Control Arms*, March 2017, <https://controlarms.org/wp-content/uploads/2018/03/Pastoralist-Conflict-Final.pdf>.

from East and the Horn of Africa on the treaty, implemented by Pace University and Control Arms with funding from the United Nations Trust Facility for Supporting Cooperation on Arms Cooperation (UNSCAR).⁹

1 ARMED VIOLENCE IN KENYA'S MARGINALIZED REGIONS

The East and Horn of Africa region is home to one of the largest concentrations of pastoralist communities—some 20 million people whose cultures and livelihoods have traditionally revolved around herding cattle, camels, sheep and/or goats.¹⁰ Nomadic and semi-nomadic life-ways are well-suited and adapted to the arid and semi-arid Great Rift Valley and surrounding savannahs. Seeking pasture and water through regular movement over wide areas, herders can avoid overgrazing and limit their impact on fragile ecosystems.¹¹ However, pastoralists in the East and Horn of Africa have been marginalized politically, economically, and socially. Colonial governments seized some of the best grazing land traditionally used by pastoralists, enclosing it for white settlement, government use, or for wildlife reserves. Pastoralist communities were often displaced into, or confined to, marginal areas. They were also subjected to neglect through systems of indirect rule, which armed and abetted proxies doing the state's bidding. Government interventions tended to be punitive and coercive, rather than offering investment in security and development. Such policies often continued into the postcolonial period.¹² Scarcity of water and pasture has been exacerbated by climate change and environmental degradation.¹³

⁹ Matthew Bolton "The Role of Education in Advancing Arms Trade Treaty Universalization and Implementation: Lessons Learned from ATT Academy East Africa 2016-2017," Control Arms, May 2017, <https://disarmament.blogs.pace.edu/files/2017/06/ATT-Academy-Lessons-learned-final-2bwkr5w.pdf>.

¹⁰ Kennedy Mkutu, "Pastoralism and conflict in the Horn of Africa," SaferWorld, 2001 <https://www.saferworld.org.uk/resources/publications/75-pastoralism-and-conflict-in-the-horn-of-africa>

¹¹ Robin S. Reid, *Savannahs of our Birth: People, Wildlife and Change in East Africa*, University of California Press, 2012.

¹² T.O. Ranger, "The Invention of Tradition in Colonial Africa," *The Invention of Tradition*, E. Hobsbawm and T. Ranger (Eds), Cambridge University Press, 1983, pp. 211-262; Mahmoud Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, 1996.

¹³ Essayas K. Ayana, et al., "Examining the relationship between environmental factors and conflict in pastoralist areas of East Africa," *Political Geography*, volumes 557-558, July 2016, pp. 601-611.

In December 2016, at a Control Arms NGO meeting in Nairobi, Kenya, participants stressed the importance of not reading pastoralist conflict through the lens of “culture” (i.e. pathologizing nomadic and semi-nomadic people as somehow inherently problematic). Pastoralist conflict is often misrepresented as a localized, outmoded and “primitive” practice of “cattle rustling.” Similarly, a 2016 Kenya Wildlife Service presentation to the ATT Academy noted that the participation of pastoralists in wildlife crime may be explained by their proximity to wildlife reserves and conservancies, which were often actually alienated from pastoralist communities. However, pastoralist conflict and wildlife crime is often a manifestation of broader conflicts in the region’s “peripheries” and overlaps with tensions over power, wildlife conservation, land and water.¹⁴ Cattle rustling and wildlife crime are also embedded in sophisticated organized criminal complexes and neo-patrimonial patronage systems. Arms trafficking connects patronage and stolen cattle or wildlife products through networks that extend throughout the region and even the world.¹⁵ The proliferation of SALW and ammunition, commercialization of cattle trafficking, the globalization of wildlife trafficking networks, private enclosure of pasture, and political polarization have increased the stakes of conflict in pastoralist communities.

2 USING THE ATT AS A FRAMEWORK FOR ADDRESSING ARMED VIOLENCE IN KENYA

While support for the ATT remains strong in Kenya’s diplomatic community, civil society and faith institutions, accession has been delayed by powerful countervailing forces. These include an executive branch skittish about global treaties following confrontations with the International Criminal Court and a security establishment that resents external scrutiny. However, the ATT offers opportunities to address the negative impact of the arms trade on pastoralist conflict and wildlife crime and also mitigate problems with militarized efforts to control them.

¹⁴ Khristopher Carlson, Joanna Wright, and Hannah Donges, “In the Line of Fire: Elephant and Rhino Poaching in Africa.” Small Arms Survey 2015, Small Arms Survey, p. 20.

¹⁵ Kennedy Agade Mkutu, *Guns and Governance in the Rift Valley: Pastoralist Conflict and Small Arms*, Indiana University Press, 2008; Andy Catley, Jeremy Lind, Ian Scoones, *Pastoralism and Development in Africa: Dynamic Change at the Margins*, Routledge/Earthscan, 2013.

The weapons used in pastoralist conflict in the East and Horn of Africa region are often circulating from one country to another. Assault rifles from Ugandan government stockpiles in Moroto, looted by Karamajong militias in 1979, spread to Kenya.¹⁶ Guns from the conflicts in Ethiopia, South Sudan, and Somalia have converged and circulated throughout the region.¹⁷ While militarizing borders may seem like an obvious solution to trafficking in the region, it can often contribute to arms proliferation, since security forces may “leak” weapons to local groups and fuel the demand for illicit meat. Nevertheless, more careful controls on the movements of arms into and through the East and Horn of Africa region could contribute to stemming diversion to unauthorized users and uses. Given that much of the supply of weapons involved in pastoralist conflict in East and the Horn of Africa has come from state sources, much more needs to be done to limit diversion of guns and ammunition to unauthorized users and uses.

The ATT requires states parties to assess and mitigate risks that a transfer of conventional arms, ammunition, or parts and components will be used to “commit or facilitate” transnational organized crime, terrorism, serious violations of international human rights and humanitarian law, “serious acts of gender-based violence or serious acts of violence against women and children” or “undermine peace and security” (Article 7). If such risks exist, exporting states parties are obligated to collaborate with importing states in risk mitigation measures (Article 7.2). If an “overriding risk” remains, then the exporter “shall not” authorize the transfer. States parties are also required to “take measures to prevent” diversion of arms to unauthorized users or uses (Article 11). The ATT also contains more stringent prohibitions of any transfers of arms if a state party “has knowledge” that they “would be used in the commission” of genocide, crimes against humanity or war crimes (Article 6.3).

Transparent reporting on transfers, aided by the ATT, could thus be very useful in addressing armed violence in pastoralist communities, by aiding research on movements of weapons most at risk of exacerbating the situation. One potential avenue of ATT-mandated cooperation and assistance would be a more careful identification and analysis of arms trafficking in the region, tracking how guns move and potential sources of “leakage” from state stockpiles. Sharing this information could enable states—both in the region and beyond—to target policy and programs to disrupt trafficking routes and prevent diversion of weapons to

¹⁶ Manasseh Wepundi, et al., “Lessons from the Frontiers: Civilian disarmament in Kenya and Uganda.” SaferWorld, 2011, <https://www.saferworld.org.uk/resources/publications/564-lessons-from-the-frontiers>

¹⁷ “Regional Report on the Nexus between Illicit SALW Proliferation and Cattle Rustling: Ethiopia, Kenya, Somalia, South Sudan and Uganda,” RECSA, 2016

militias, gangs and organized crime networks. For example, states could improve data gathering and sharing within the CITES-mandated Monitoring the Illegal Killing of Elephants (MIKE) program. MIKE enables states to record and report the types of weapons and ammunition used in poaching in an international database, but it is currently underutilized. Other potential sources of information include police and military data on illegal firearms, as well as regional institutions engaged in cooperation on countering SALW proliferation (such as the Regional Centre on Small Arms [RECSA] in East Africa), as well as conservation (such as the Lusaka Agreement Task Force).¹⁸ ATT anti-diversion measures should not only be directed at halting the illicit flow of weapons to cattle raiders and militias, but could also ensure that state security forces do not use the weapons they receive in ways that create insecurity, violate human rights or contribute to gender-based violence. The ATT can serve as a catalyst for improving export, import, brokering, transit and trans-shipment controls in smart ways. The information sharing, cooperation and assistance provisions contained within the ATT enable states to work together and engage in conversations about best practices.

Insecurity and poverty are key drivers of both pastoralist conflict and SALW proliferation. A lack of livelihood opportunities in the legitimate economy often provides incentives to engage in cattle raiding. Reducing both the supply of and demand for weapons used in pastoralist conflict thus requires peacebuilding as well as sustainable development efforts. For example, around Lake Nakuru National Park in Kenya, community groups have partnered with Kenya Wildlife Service to increase access to water, promoting sustainable rural livelihoods that reduce pressure on the park. The ATT encourages states parties to engage in “international cooperation,” information -sharing, and provision of “international assistance” (including through a newly established “voluntary trust fund”) (Articles 15 and 16). ATT states parties are also required to meet in annual Conferences of States Parties to review implementation. ATT-mandated measures could be used to build peace and development in regions where there is a nexus of pastoralist conflict, wildlife crime, and SALW proliferation. Membership in the ATT may also help with applications for development assistance, or peacebuilding and sustainable development programs that aim to address the root causes—marginalization, deprivation, persistent instability—of SALW proliferation.

¹⁸ For further similar recommendations, see Nikhil Acharya and Arthur Muhlen-Schulte, “The Final Round: Combating Armed Actors, Organized Crime and Wildlife Trafficking,” BICC Policy Brief, March 2016, <https://www.bicc.de/publications/publicationpage/publication/the-final-round-combating-armed-actors-organized-crime-and-wildlife-trafficking-648>.

Rather than seeing the ATT as a threat to Kenya's national security—as it is sometimes misunderstood by elements of Kenya's security establishment—the treaty offers avenues for building human security in communities suffering from armed violence. The ATT offers an approach to addressing armed violence and wildlife crime in pastoralist communities through rule of law, human rights, and international cooperation. As the Honorable David Musila, then Kenya's Assistant Minister for Defense, stated during the 2012 ATT negotiation conference:

Kenya continues to suffer negative effects of unregulated trade of ... SALW which is causing devastating impact on social, political and economic wellbeing of its people. ... We realize that an ATT will not solve all the problems of the world. However, a robust legally-binding treaty on international arms transfers that will leave an effect in reducing the flow of arms from the legal to the illicit trade will certainly be a very important step in reducing human suffering.¹⁹

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¹⁹ David Musila, "Statement by David Musila, MP, Assistant Minister for Defence of the Republic of Kenya during the United Nations Conference on Arms Trade Treaty (ATT)," July 5, 2012, http://reachingcriticalwill.org/images/documents/Disarmament-fora/att/negotiating-conference/statements/5July_Kenya.pdf.

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