

Firing Blanks?

The Arms Trade Treaty

Roderic Alley

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The Arms Trade Treaty

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Deadly weaponry continues to find its way into irresponsible hands. Unscrupulous arms brokers defy UN arms embargoes. Ruthless leaders turn their arsenals on their own citizens. Ammunition depots are poorly guarded. State-owned weapons go missing. Civilian airplanes end up in the crosshairs. End-use certificates are not standardized and can be easily forged. Pirates wield grenade launchers and machine guns against merchant ships. Drug-traffickers outgun police forces. Just as with other commodities, the trade in arms should comply with vigorous, internationally agreed standards. All actors involved in the arms trade must be held accountable.

United Nations Secretary General Ban Ki Moon 25 September 2014.ⁱ

Introduction

The Arms Trade Treaty (ATT) was adopted by vote at the United Nations (UN) General Assembly in April 2013 and opened for signatures two months later. It was approved by 154 states (later revised to 156), three against (Iran, Syria and North Korea), its 23 abstentions including some of the world's key arms exporters and manufacturers (China, Russia, India) and leading arms buyers (Egypt, India, Saudi Arabia and Indonesia). The treaty formally enters into force on December 24 2014 having received its requisite fiftieth ratification (including Australia and New Zealand) three months earlier. The United States reversed the previous Bush Administration's opposition and signed the ATT in September 2013.

In brief, the ATT introduces specific, legally binding measures to regulate international trade, transit and brokering of conventional arms, including small arms and light weapons (SALW). Before authorising transfers, states parties must subject them to criteria established under a mandatory national control system. The treaty prohibits transfers where a UN authorised arms embargo is in place, where there is violation of international agreements relating to the transfer or illicit trafficking of

conventional arms, or where risks of genocide, crimes against humanity or war crimes are known to exist. Where such prohibitions do not apply, an assessment is required as to whether a transfer risks undermining peace and security, potential violation of human rights, mounting of terrorist attacks, or conduct of organised crime. States parties are required to report annually to the UN on international exports and imports of conventional arms, and on the national laws and administrative procedures adopted for ATT implementation.

From this three initial points deserve note. First the ATT is not, nor was ever intended as a disarmament treaty. Its prime function is regulatory of what already exists, not a programme requiring reductions in the global stock of conventional weaponry annually killing hundreds of thousands and costing a conservative US\$70 billion a year and rising. Properly implemented however, the ATT offers scope to reduce those figures, its preamble recognising UN Charter Article 26 urging the least diversion of global human and economic resources into armaments.

Second, the weaponry coverage entailed is relatively restricted. The key Article 2 (1) application includes all conventional arms falling within the seven categories provided by the UN Register of Conventional Arms, a voluntary international arms transfer reporting system. They include battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, and missiles and missile launchers. After considerable dispute involving objections by China and other states an eighth, equally important category of SALW was added. For many developing countries struggling with inadequate border protections against small arms transfers, this addition was critical.

Not covered are surface to air missiles and unarmed unmanned aerial vehicles (drones) equipped for military purposes and capable of weaponisation by a purchaser. Arms transferred under defence cooperation agreements are not voided by the ATT, though any relevant obligations must remain consistent with the treaty (Article 26). Arms supplied as gifts, leases, loans or barter are not included, nor are offshore licensed production agreements permitting local manufacture or reassembly of weapons covered by the treaty. Transfers to non-state actors are not explicitly identified, but required national control systems must assess them regardless of whether the receiving agent is a state or non-state actor.

While a necessary framework for the ATT, the UN Register's existing seven categories plus SALW could prove inadequate into a future of rapidly evolving conventional arms technology.ⁱⁱ This includes the digital and robotics applications beginning to reshape the arms industry. Neither weapons transfers of modular design nor unmanned ground vehicles are covered by the existing Register.

Third, the political dimensions of the treaty are significant. Governments are under fuller notice over the consequences of their arms exports. The scope for public challenge of that previously authorised as a legitimate transfer is now widened. Facing greater scrutiny will be suspect arms importing through perversion of end

user certification, illegal transfers to rights violating non-state entities, or corrupt sales to armed vigilante formations. Necessarily closer scrutiny of the often opaque global arms trade places heavier organisational and information demands on civil society formations monitoring these activities.

ATT monitoring and investigative procedures will also require sustained funding and expertise. Whether on the demand or supply side of the arms transfer equation, current monitoring of the conventional arms trade is far from watertight. While a single, universal conventional arms transfer control system is unlikely in the foreseeable future, what exists can gain normative strength once the ATT is in force. That will require a commitment of appropriate resources, technical expertise and political focus.

This paper assesses key provisions of the ATT by first back-grounding its origins and contested formulation before assessing its transfer, prohibition and national control provisions. Throughout, an assessment is provided of the treaty's legal effectiveness compared to existing, complementary instruments.ⁱⁱⁱ The final pages discuss challenges facing ATT implementation and compliance and that are substantial for states of modest means including those in Oceania.

Background to the ATT

The ATT is culmination of numerous dedicated initiatives conducted over recent decades. In 1997, Costa Rican President and Nobel Peace Prize laureate Oscar Arias led other notables in summoning international community support for ethical standards and transparency in the arms trade. This was to better protect human rights and promote government accountability. In 1998, the European Union (EU) concluded its Code of Conduct on Arms Exports, an indicative political measure designed to block member-state arms exports to locations provoking or prolonging armed conflict, risking human rights repression or fomenting state aggression. By 2001, concerns over untrammelled SALW exports saw adoption of non-binding action guidelines agreed at a UN conference on the illicit arms trade, this termed the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects (POA). The term 'all aspects' provided an opportunity to consider the illegal trade in SALW. In December 2006, a group of states led by the United Kingdom began investigating the feasibility of an arms trade treaty with common international standards for the export, import, and transfer of conventional arms. The UN General Assembly then requested the UN Secretary General to canvass member states over the feasibility, scope and draft parameters of a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms.^{iv}

Following reports by a Group of Government Experts (2008), and a UN Open-Ended Working Group of government representatives (2009), differences over a future treaty were narrowed to four main headings. They included goals and objectives (treaty

application at its broadest level); feasibility (requirements for a universal, objective, non-discriminatory and clearly defined instrument); scope (intended weapons coverage and range of transactions, transfers and sales); and, importantly, parameters (principles and criteria providing presumptions of denial of transfer and operational mechanisms). In 2009, the UN General Assembly resolved to establish a negotiating conference in 2012 for purposes of drafting a legally binding arms trade treaty. It mandated negotiations be conducted on a basis of consensus.

None of this occurred in a vacuum. Mounting concerns over the human costs of unregulated arms transfers were vindicated by their lethal impacts in sub-Saharan, South Asian and Balkan conflicts; their employment in rampages of sexual violence and indiscriminate civilian slaughter; and their currency as recruitment and reward in internal conflicts. International non-governmental organisations including OXFAM, Amnesty International and the International Committee of the Red Cross sharpened their public advocacy for legal restrictions deemed essential for fulfilment of international human rights and humanitarian law obligations. The buttressing impact of customary international law was also increasingly evident. This occurred in the aftermath of conflict throughout the former Yugoslavia, the 1998 Rome Statute's Article 8 listing of war crimes, subsequent establishment of the International Criminal Court,^v and the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts commended to governments by a 2001 UN General Assembly resolution.^{vi}

Controversies exposed ... but only part resolved

As the ATT formulation assumed shape differences began to sharpen. Typically during UN treaty making what is outwardly procedural – as over the consensus principle – can mask sharp political contention. Some of it is driven by domestic electoral considerations, seen when the United States pushed the July 2012 conference into postponement claiming lack of time. Here failure to reach consensus over a final treaty text pushed deliberations well beyond the Obama Administration's looming presidential election November deadline. Meanwhile suspicions did not abate that the consensus rule might be used to either weaken the text or veto treaty negotiations.

Over treaty content, dispute surfaced over what constituted an irresponsible transfer and means of treaty implementation. There were accusations that the planned instrument was too heavily weighted against the interests of arms importing states, and over the national standards required to assess risks of particular arms transfers. For example, would an assessment have to determine that there was an 'overriding' as distinct from a 'substantial' risk that exported weapons would be used to commit or 'facilitate' serious violations of international humanitarian or human rights law? A more glaring textual difficulty identified – even to the point of ridicule – involved a draft Article stating 'implementation of this Treaty shall not prejudice obligations undertaken with regard to other instruments'. This would have allowed a state party

to ignore any ATT obligations, flatly deciding that a contract to sell or transfer arms simply overrode the treaty's requirements. While this wording was abandoned other concerns persisted, including the adequacy of provisions over ammunition and arms brokering where administrative regulation, not legal sanction, became the watchword. The question of application to entities other than states went unresolved, support coming from the EU and the Economic Community of West African States (ECOWAS), but strong resistance registered by China among others.

Over ammunition, there was disappointment at its exclusion from the stated scope of the treaty beyond an implied inclusion under national control measure requirements. The United States led demands for exclusion from scope, its representatives never explaining why international controls would require changes to existing American recording or reporting of transfers. Here the United States has legislated to control exports of ammunition and ordnance under its Munitions List (Category 3), a sole exception allowing civilian use of non-combat shotgun ammunition. Exclusion from scope pertained more to American objections about ammunition movements being recorded or reported, not that they would be subject to national risk assessment. Objections that supervision of ammunition transfers would prove cumbersome and expensive had some traction. Yet numerous states have publicly reported licensed transfers without difficulty and without jeopardising national security or commercial confidentiality.^{vii}

Subject to further contention was discretion in the national control of arms brokering. This issue is critical given the volume of conventional weaponry transferred through intermediaries and arms brokers often closely linked to defence contractors, governments and intelligence agencies. Not defined under international law or the ATT, brokering is generally construed as the negotiation of an arms deal by an agent or intermediary typically requiring remuneration for such services. The 2007 UN Group of Governmental Experts on illicit brokering in SALW identified it as facilitating contact between potential buyers and sellers, location of future transaction opportunities, documentation management, and arrangement of necessary payments.^{viii} Such 'one-stop shop' functions offer convenience and secrecy.

In the event, good faith assumptions were deemed sufficient to infer that a state party cannot employ brokering arrangements to circumvent prohibitions on transfer or, likewise, conceal them as 'gifts'. For the treaty, state party regulation of brokering pursuant to national laws (Article 10) *may* include registration or brokering authorisations. This is weaker than the non-binding POA's language (*should*, not *may*) as well as POA Section II.14 suggesting penalties over illicit brokering conducted within national jurisdictions. (Stronger controls beyond regulation also exist in the Firearms Protocol's Article 15, including licensing and registration of brokering, and disclosure of any relevant arms transfer documentation.) More significantly, and for a majority of states the ATT Article 10 'pursuant to national law' requirement will tread water given the lack of such legislation rendering such activity illicit. An opportunity was lost during the ATT's formulation to utilise salient knowledge identifying necessary components of a national brokering control system,

determining such modalities now left to slower, more variable states party processes.^{ix}

The Final Agreement: Humanitarian Principles Confront Consensus

The ATT's adoption in April 2013, soon opened for signature, occurred despite what some but not others considered a necessary but regrettable breach of the consensus rule. This followed adoption of a procedural provision, approved under UN General Assembly Resolution (67/234), permitting transmission of any finalised negotiated text for approval by the General Assembly. Opinion among conference delegates was sharply divided over whether breaking the consensus rule represented a dangerous precedent, or whether it was justified here to break a logjam caused by states bent upon the treaty's derailment regardless of content. Regret was diluted by Syria's war of attrition and humanitarian toll, negating any residual authority the Assad regime's negative vote may have possessed. United States delegation head Thomas Countryman, while supporting the consensus approach in principle even indicated that, on this occasion at least, he was happy to vote in opposition to Syria, North Korea and Iran.^x Contention over consensus aside, the procedure followed helped concentrate minds on the content of the planned instrument and negotiation of differences.

Here humanitarian protection as a non-negotiable value won the day, its prominence within an arms control treaty unthinkable a decade earlier. Hence among the Preamble's lengthy Principles was recognition 'that civilians, particularly women and children, account for the vast majority of those affected by armed conflict and armed violence', victims of such conflict requiring 'adequate care, rehabilitation and social and economic inclusion.' The Preamble further referred to respecting and ensuring respect for international humanitarian law and human rights as key principles, something not commonly found outside instruments establishing obligations for those purposes. Acknowledged was recognition that the ATT's standards for arms transfers flow from these obligations.

Elsewhere the Preamble identified the core objective of preventing and eradicating the illicit trade in conventional arms and preventing their diversion; the role of regional organisations, industry, and civil society formations in facilitating effective treaty implementation; reference to complementary instruments; and the overall normative framework provided by the Charter of the United Nations. Separate consideration is now accorded two key ATT components: Transfers and National Controls.

Arms Transfers

Central to the ATT are its prohibitions on transfers of categorised weaponry. Whatever its aims and modalities, the ATT will operate within an international security environment of upward momentum in official, state to state conventional

arms transfers. That is depicted by Figure One, Table One indicating the scale of transfers to the Middle East since 2006.

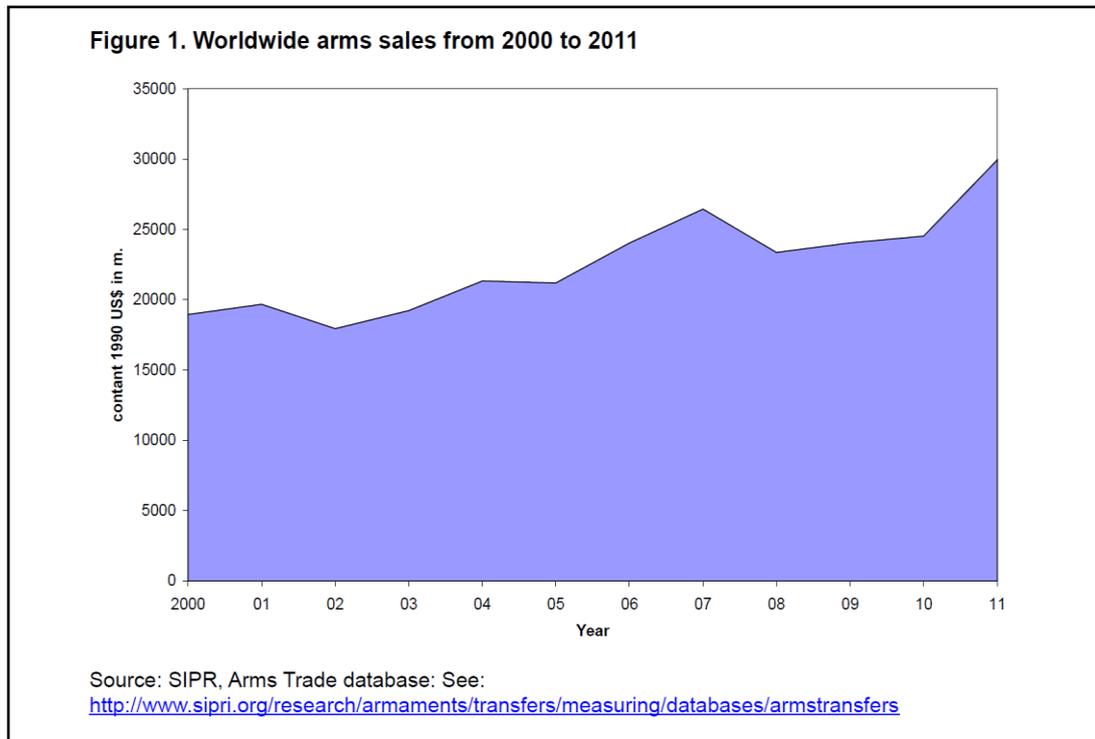


Table One. European Union Arms Exports to Arab Spring States 2006-10

Arab Spring States	EU Arms exports 2006-10 (Euros)
Algeria	1,551,094,239
Bahrain	188,258,586
Egypt	1,098,091,282
Libya	1,056,207,535
Syria	9,060,772
Tunisia	138,001,753
Yemen	213,653,621
All states	4,254,367,888

Source: Mark Bromley (2012). 'The Review of the Common Position on Arms Exports: Prospects for Strengthened Controls', *EU Non-Proliferation Consortium Non-Proliferation Papers* 7 at 10, Table 2.

Compared to the 2004-2008 period, a 14 per cent increase in the volume of total global arms transfers occurred between 2009 and 2013. Between both periods, arms imports to states in Africa increased by 53 per cent. This has widened the scope for illicit diversion and on-selling to those openly, often egregiously perpetrating international humanitarian and human rights law violations.^{xi} And future buyers unwilling to accept more stringent rules may simply turn to sellers remaining outside the ATT – Russia, China or India for example.

Transfers initially conceived and conducted between governments on legitimate security grounds have seen end user certificate regulation distorted or falsified under conditions of social and security convulsion. On this, a 2011 report by the United Kingdom House of Commons Committee on Arms Export Controls, Libya and Bahrain in mind, concluded: 'the present Government and its predecessor misjudged the risk that arms approved for export to certain countries in North Africa and the Middle East might be used for internal repression.' It recommended reconciling conflicts of interest between the promotion of arms exports and an upholding of human rights.^{xii} Seeing that recommendation gain global support is difficult given the variation with which states interpret existing export regime obligations.^{xiii}

Any impact exerted by the ATT on the total global arms trade is likely to be modest. Given their immense scale, the illicit leakage of no more than one per cent of legitimate transfers stands to wreak unsustainable harm. Without denying its long term potential as 'an effective element of global governance' grounded on a normative consensus shaping state practice, Cooper sees it functioning into the immediate future as a mechanism legitimising commercial sales, particularly North/North transfers.^{xiv} Head of the US delegation to the ATT conference, Thomas Countryman, believed the agreement's raising conventional arms transfer regulations closer to United States standards 'levels the playing field and gives American manufacturers a better competitive position in the World.'^{xv} In similar vein the British Foreign and Commonwealth Office's Arms Export Policy Department, acknowledging the ATT's recognition of legitimate state interests in producing, exporting, and importing weapons, saw these aims furthered by an introduction of common standards.^{xvi}

What Article 6 more broadly considers 'illicit' is undefined, while scope for discretion is also evident in subsequent Article 7. Here a national risk assessment review of applications for exports of the eight categories listed must consider potential 'negative consequences' for peace, security and human rights. Denial is permitted when an assessment determines existence of an 'overriding risk' of the exported weapons being used to commit or 'facilitate' serious violations of international humanitarian or human rights law. (In an explanation of vote, New Zealand with wide support stated that the concept of 'overriding' risk would be interpreted as 'substantial' risk'.^{xvii}). Denial extends to offences covered under international conventions or protocols relating to terrorism or international organised crime, or weapons used to commit or facilitate serious acts of gender-based violence or violence against women and children (Article 7.4).

Article 8 provisions regarding arms importing permit discretion, subsection (2) requiring states to take measures to regulate imports only 'where necessary' or, under Article 9, to regulate transit 'where necessary and feasible'. (Such qualifiers are absent in the already operative, legally binding Firearms Protocol.) Under ATT Article 8 (1) engaged state entities are to provide information helpful to an exporter in conducting a national risk assessment, including documentation on end uses or end users. Unspecified is the kind of information required, but indicative guidelines for a

state party undertaking this obligation in good faith are readily available.^{xviii} They include types and quantity of weapons for export; reasonably grounded assessments as to their foreseeable uses; the political and security situation within a final destination and its adjacent neighbourhood; the intended end user; entities involved in the export; and intended route of the transfer including any trans-shipment considerations. There is due acknowledgement that workability will require appropriate cooperation between the parties concerned. That is supplemented through Article 14 and 15 provisions, where appropriate enforcement of national laws and regulations for ATT compliance mandates cooperation with other state parties for that purpose.

For prohibitions, application occurs where there is 'knowledge' that the items concerned will be used in the commission of genocide, crimes against humanity, grave breaches under the 1949 Geneva Conventions or other war crimes. This Article's reference to war crimes 'defined by other agreements' (Article 6.2) covers not just 'grave breaches' of the Geneva Conventions but acts criminalised under the Statute of the International Criminal Court. In a joint declaration following adoption of the treaty 98 governments, led by Mexico, stated that Article 6.2 also incorporates human rights treaties to which a State Party to the ATT is also a party.^{xix}

Unresolved is whether these provisions are adequate to meet the customary law standards required for war crimes committed during internal conflict. That is conveyed by United Nations Security Council Resolution 1894 (2009) which, while recognising the primary responsibility of states to respect and ensure the rights of their citizens and others within their territory of protections under international law, has affirmed that an obligation extends to *all* parties engaged in an armed conflict. Entailed is strict compliance with applicable obligations under international humanitarian, human rights and refugee law. Here customary international law has been solidified through jurisprudence on internal conflict asserting 'the protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.'^{xx}

Could the ATT have prescribed more ambitiously to proscribe the transfer of illicit conventional weaponry into internal armed conflicts? A solid majority to do so existed in 2013, doubtless influenced by the scale of humanitarian violations occurring in the Syrian conflict. Pragmatism prevailed however with recognition that the five permanent members of the UN Security Council are among the six top global arms suppliers. Their power of veto in the Security Council facilitates unilateral judgements, informed by not unbiased national intelligence estimates about the security and political conditions obtaining in prospective arms receiving locations. Unilaterally determined calculations of national interest, moreover, disproportionately advantage major arms exporters through Article 7.7. This allows reassessment of an existing transfer authorisation in the light of 'new relevant

information’, an exporter no more than ‘encouraged’ to reassess following consultations with an importing state. That could see an exporter lifting previous restrictions following a regime change favoured by an exporter.

In part, concerns expressed by some states over the ATT’s failure to confront weapons transfers to non-state actors reliably identified as known violators have been met by UN Chapter Seven invoked arms embargoes specifically listing non-state actors as banned recipients. As of December 2013, they included sub-state actors in the Central African Republic (since 2013); Democratic Republic of the Congo (2005); Iraq (2004); Lebanon (2006); Liberia (2009); al Qaeda and associated identities and individuals (2002); Somalia (2007); and the Taliban (2002).^{xxi}

Seemingly arcane, debate during the formulation of Article 8.1 over distinctions between ‘end use’ and ‘end user’ was intense. With both terms employed in the text, differences could persist over what constitutes a responsible end user entity? (This issue has previously surfaced in exchanges between Wassenaar Arrangement^{xxii} participants, and among those seeking agreed common standards in the EU’s Code of Conduct on arms transfers). During the ATT’s formulation, some sought a prohibition to any unauthorised end use, others wanting the language of end user utilised to better categorise particular non-state actors considered unauthorised receivers. United States officials, prompted by the ever vigilant National Rifle Association, voiced concerns that the term ‘unauthorised user’ might result in a domestic gun ‘user’ requiring formal authorisation. Both terms are employed in the Preamble where, during the March 2013 diplomatic conference, the phrase ‘including in the commission of terrorist acts’ was added.

Of equal importance are questions about the robustness of ATT provisions on end user certification and legal enforcement measures. Article 7 requires all export authorisations be detailed and issued prior to export, such information being available on request to importing, transit or trans-shipment states parties. For SALW weaponry, states parties are to ensure ‘national definitions shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty.’ While utilisation of the reasonably comprehensive SALW definition found in Article 4 of the 2005 International Tracing Instrument is possible, states parties need a UN document of standing listing all relevant SALW weapons descriptions and applications in existing instruments relevant to ATT implementation. That would include materials drawn from the Organisation of Security Cooperation in Europe (OSCE) Handbook of Best Practice on Small Arms and Light Weapons (2003).^{xxiii}

National Controls

Under Articles 3, 4 and 5.2 parties are required to establish and maintain effective national control systems for the export, import, transit, trans-shipment, and brokering activities of categories of weapons covered by the treaty. This includes exports of

ammunition, and parts and components used for assembling arms covered under the treaty. Made available to other states via the planned treaty secretariat are national control lists (Article 5.4), and designation of national authorities for maintaining the national control systems (Article 5.5). Article 12 requires maintenance of national records for each export authorisation or delivery of conventional arms for at least ten years. Article 13 requires provision of annual reports to the planned treaty Secretariat, export and import authorisations also circulated to ATT states parties.

Yet prescribing these modalities faced the dilemma of some national control mechanisms regulating bilateral conventional weapons transfers being stronger than those offered under the ATT. But ranging from sound to poor to non-existent, the national control picture resembles, in totality, a patchwork unable to provide the comprehensive standards needed to meet ATT objectives. As indicated, many states simply have no such national systems. Evident is a twofold challenge of securing an international regime of national controls sufficient to prevent illicit transfers, this ineffectual without companion national measures curbing their domestic propagation. Some accord the latter even greater priority maintaining that weak domestic regulation, aggravated by stockpile theft, loss or corrupt sale within developing country recipients is of greater concern than illicit arms trafficking across borders.^{xxiv} That does not apply consistently, but where it is deficient then it is seriously so, sub-Saharan African locations a telling example.

Serious internal disintegration of central state institutions, collapse in the rule of law, and unbridled use of force to loot state assets for private gain, add to essential but difficult tasks of establishing effective national controls for states within, or recently emerging from conflict. Ending the abuse of arms to perpetrate impunity by the armed forces or the police requires appropriate stockpile control, weapons inventory management, sanctions for theft or loss of weapons, and accountability for weapons movement. These provisions are stipulated in the POA (Section II, sub. 17), ample guidelines available for relevant staff training in international humanitarian and human rights law.

Article 16 of the ATT outlines scope for assistance in national control development. Possibilities identified include legal, legislative, technical, and material measures to foster stockpile management, demobilisation and reintegration, and model legislation. States parties are encouraged to contribute to the voluntary trust fund established to further these objectives once the treaty is in force. Breadth is accorded potential institutional modalities delivering assistance, including UN, regional, sub-regional, non-governmental and bilateral mechanisms. A requirement that such assistance is provided on request underlines the need for governments to take the lead in establishing national controls.

Similar inducement is evident in Article 11 (5) where 'to better comprehend and prevent' transfers parties are 'encouraged to share relevant information' over 'illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations

used by organized groups engaged in diversion.’ Article 12 gives guidelines for record keeping, while Article 13 acknowledges the need to strengthen existing control methodologies. Here states parties are required to report to the planned Secretariat ‘any new measures undertaken in order to implement this Treaty, when appropriate.’ That objective faces numerous challenges of inadequate information sharing between supplier governments about known illicit transfers and problematic intermediaries.

Readily identifiable are national supports required to implement national controls. They include reliable sources of intelligence and its objective analysis; unhindered Red Cross monitoring capacities; news media enquires not subject to harassment from any quarter; integration of national control mechanisms within programmes of post-conflict demobilisation; and professionally based recruitment, staffing and training of police, armed forces and customs personnel. As a state-based instrument the ATT could not directly acknowledge a role for non-state actor participation in national control functions, but this possibility cannot go ignored. It is already occurring with the Geneva Call Deed of Commitment process committing non-state actors to respect international humanitarian and human rights law, specifically through deeds of commitment on anti-personnel mines, gender, and children’s issues in conflict settings.^{xxv} Nothing in the ATT precludes states parties from utilising similar forms of enlistment. Full implementation of previously cited Article 7 (4) (serious acts of gender-based violence or violence against women) will require state/non-state cooperation in several locations.

The ATT envisages regional collaboration networks assisting national control systems. In Africa, more than three quarters of states have existing ATT relevant obligations, including those under sub-regional instruments. They include the 2006 ECOWAS and 2010 Kinshasa Conventions designed to prevent the destabilising accumulations of SALW and ammunition, and the 2005 Nairobi Protocol on Small Arms and Light Weapons. They comprise commitments to establish national control systems, respect for international humanitarian law, and adherence to UN arms embargoes.^{xxvi} Areas of greatest need include the Great Lakes, Democratic Republic of the Congo, the Horn of Africa, and West and Central Africa. Despite opposition from North African states, the African Union agreed in 2011 on a common ATT position but indicated implementation was primarily a matter of individual state responsibility.^{xxvii} Initiatives designed to scope African national implementation have been primarily exogenous in origin.

Elsewhere regional mechanisms attempting to foster national controls have had stronger declaratory intent than proven institutionalised cooperation. Lacking have been multilaterally derived standards promoting responsibility and transparency in international ammunition transfers. Rarely are they subject to licensing provisions informed by obligatory standards deriving from international humanitarian and human rights law. This has been evident in the Caribbean, where illicit small arms and ammunition transfers have contributed to some of the highest homicide rates per head of population in the world. The Caribbean Community (CARICOM) has an Implementing Agency for Crime and Security (IMPACS) which has supported POA

initiatives that include trans-border customs cooperation, information sharing, and ballistics identification. With the exception of some training programmes in Trinidad and Tobago, national stockpile management regulation is either weak or deficient, likewise arms brokering. Readily available to these governments is the Organisation of American States best practice Model Regulations for SALW brokering, while EU and OSCE principles provide relevant complementarities.

The gap between intention and control implementation is explicable in some locations by a nexus linking illicit arms transfers to racketeering networks pursuing people trafficking, narcotics dealing, resource depredation and money laundering.^{xxviii} Its existence is acknowledged by previously cited ATT Article 11 (5) requirements for information sharing over arms diversion for illicit purposes. That achievement will prove difficult: ring fencing national control systems, however well constructed, remains problematic in regions where porous borders are exploited to magnify insecurity. Such settings lack regional institutional cooperation over arms transfers of any sort, as is evident in South and Central Asia and the Middle East. Across the north and Southeast Asian littorals, declaratory homage is paid to cooperation, actual results less forthcoming. Southeast Asia has been a prime location for trafficked SALW, many weapons accumulated from its previous conflict locations. States here have been fully supportive of the ATT, while the Association of Southeast Asian Nations (ASEAN) 1997 Declaration on Transnational Crime stressed the need for continuing cooperation to control illicit arms transfers. But the region's lack of agreed standards has left wide variation in national gun control measures. Unless they are tightened, ASEAN states are unlikely to forge the regional standards needed to properly complement future ATT participation.

Treaty Implementation

The preceding discussion has identified several issues confronting eventual ATT implementation so what more is usefully added? It is apparent that key future requirements are related, and involve a distinction between development of the instrument as an organic entity unto itself, and what is required of states to fulfil their treaty obligations.

To the first and as aptly put by Norwegian representative Langeland to the UN in October 2013, the treaty upon entry into force should 'be a dynamic and living instrument open for improvements and changes in the future.'^{xxix} In part that will require an effective treaty Secretariat where ATT Article 18 offers guidelines. They include requirements of professional staffing, establishment and maintenance of national contact points, state party conference and service arrangements and, critically, facilitating 'the matching of offers of and requests for assistance for Treaty implementation and (to) promote international cooperation as requested' (Article 18 3 d).

The last mentioned constitutes both a necessity and a dilemma, namely conducting essential chores of resource mobilisation from often reluctant governments, but dangers that this may overwhelm equally important Secretariat functions. They include building the professional expertise found helpful when advising governments on 'flexible' interpretations of key Articles 6 and 7 dealing with prohibitions and export and export assessments respectively. Close monitoring of state practice shaping customary law for Article 6 stipulations denying 'illicit trafficking' is an example, and building criteria needed to employ 'knowledge' at times of authorisation of arms transfer another. Article 7 language regarding 'serious' international humanitarian law violations as grounds for denial of transfer will require cooperation with, and promotion of relevant International Committee of Red Cross guidelines.^{xxx} Aggregating and promoting durable benchmarks about what constitutes a serious human rights violation under Article 7 will test Secretariat expertise.

Although they cannot join the treaty, regional and sub-regional intergovernmental bodies can build and maintain mutually advantageous, cooperative relations with the planned Secretariat. Complicated but necessary will be its role in relation to non-state actors. That will entail collection and analysis of reliable, independently sourced information about the extent of non-state entity treaty violations. Without conferring legitimacy on non-state entities, the Secretariat could record and transmit as requested information regarding their compliance with ATT provisions. This is information the Secretariat cannot ignore, subsequent responses decided by states parties or the UN Security Council. The admissibility of information from proceedings taken under the Rome Statute would be covered by the 2004 Negotiated Relationship between the International Criminal Court and the UN.^{xxxi}

The handling of any proposed treaty amendments or additional protocols is conveyed by Article 20, something not possible until the treaty has been in force for six years (2020), a further six months notice required. Subsequent approval of changes will require 'every effort' by states parties to achieve consensus; should that not emerge, then passage by a three quarters majority is stipulated. A Conference of States Parties is scheduled (Article 17.1) to occur no later than a year following the treaty's entry into force and thereafter as decided by parties. There is no provision for a treaty review cycle, normally five years, though states parties can convene Extraordinary meetings provided those calls gain at least two-thirds membership support. As well as consolidating good faith obligations, a regular review process can attract support of states initially abstaining from treaty signature. Article 17 lists for future ATT review of implementation developments in the field of conventional arms; possible amendments in accordance with Article 20; issues arising from treaty interpretation; possible establishment of subsidiary bodies; and performance of other functions consistent with the treaty. Into the future, subsidiary bodies could include inspection mechanisms though doing so would face opposition.

While regular treaty reviews would maintain attention over illicit arms transfers, an opposing argument cannot go discounted. Into the next decade, the ATT will provide

states parties more than enough with which to contend, over and beyond the additional time and resources devoted to international conferencing preparation and participation. This reasoning appeals to small developing states finding existing UN conference cycles onerous.

The ATT stands to gain support from relevant UN Security Council determinations, an example being resolution 1894 of November 2009. In calling for the widest possible dissemination of international humanitarian law, it urged all states to provide relevant training for public officials, members of the armed forces and armed groups, personnel attached to armed forces, civilian and law enforcement personnel, and members of the judicial and legal professions. More recently, UN Security Council resolution 2017 of September 2013 addressed the SALW issue as a threat to international peace and security. Politically, and even if UN Security Council Chapter VII conflict reduction initiatives are vetoed, major arms traders face increasingly adverse global publicity once convincing evidence of ATT violation is publicised. Here added bracing is needed by a long overdue incorporation of SALW as an eighth category under the UN Register on Conventional Arms, that Register's overall processes needing stronger promotion, funding, regional support, and data management.^{xxxii}

At the state level, the treaty offers an essential checklist of required domestic measures and where international assistance could be needed to fulfil relevant obligations. To summarise, that includes: national control systems for all transferred covered under the eight conventional arms categories (Articles 3, 4, and 5.2); national control lists (Article 5.3), and their availability to other states parties (Article 5.5); designation of relevant national authorities for these systems (Article 5.5); designation of at least one national contact point responsible for information exchange related to ATT implementation (Article 5.6); prohibitions (Article 6); national risk assessment applications (Article 7); measures to control arms imports and, when importing, information provision to an exporter conducting national export assessment, including end use or end user documentation (both in Article 8); necessary measures to regulate transit and trans-shipment (Article 9); national brokering regulation (Article 10); mitigation measures and cooperation and information sharing to prevent diversion of conventional arms to illicit markets or unauthorised end users (Article 11); national record keeping (Article 12); annual reporting to the Secretariat on export and import authorisations or arms deliveries to states parties (Article 13); relevant national legal and regulatory enforcement (Article 14); and cooperation with states parties for effective ATT implementation (Article 15).

That list is demanding but ATT ratification need not prove unduly daunting. Readily available online are legislative and regulatory templates.^{xxxiii} Some experts see value in employing the matrix employed to implement UN Security Council Resolution 1540 (2004), requiring states to establish laws prohibiting diversion to non-state entities of nuclear, chemical, or biological weapons and their means of delivery.^{xxxiv} Utilising existing monitoring modalities employed for dual-use goods and technologies is another possibility. Often these procedures and agencies are

adaptable for invigilation of SALW transfers, although here poorer states will require external technical assistance.^{xxxv}

State ratification and ATT implementation stands to gain from existing, related intergovernmental cooperation. Parliamentarians acting in global cooperation can foster state ratification.^{xxxvi} Asia-Pacific parliamentarians have sought this objective through the July 2014 Siem Reap Plan of Action.^{xxxvii} That was previously exemplified by the October 2013 joint Committee session on the ATT held by the consultative Pan African Parliament.^{xxxviii} In the Western Balkans, representational functions have been fostered by the South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms (SEESAC). Established in 2002 and subsequently expanded, it liaises with governments and civil society to provide technical assistance and raise funds for specific SALW control projects. Directly assisted by the United Nations Development Programme and, for governments, incentivised by prospects of EU membership, SEESAC activities have extended beyond SALW control to embrace gender equality in security sector reform and disaster risk reduction.

In the Islands Pacific, Australian development assistance has been utilised to enhance non-governmental, state level and regional cooperation prior to, and since the ATT's formulation. Tangible outcomes included the 2011 Pacific Islands Forum agreed position stating leader support for an ATT that 'would help deter and prevent illicit trafficking and proliferation of arms, including small arms and light weapons ... and strong support for the development of a common Forum position on an ATT.'^{xxxix}

Preparations saw high level workshop activity that organised ATT diplomatic conference preparation and attendance, and drafting regional guidelines for POA implementation. The New Zealand government organised the drafting and dissemination of model implementation legislation for Pacific states.^{xl} That was preceded by non-governmental and civil society activity fostering linkages beyond the state level, supplying advice and information to international officials, and facilitating conference participation.

This activity is significant for monitoring ATT implementation, particularly flows of SALW into and between states. At a public level, advocacy will insist that ATT international cooperation objectives requiring consistency with states 'security interests' (Article 15) also embrace humanitarian considerations; that reporting and information sharing obligations ensure full, not partial transparency; and that what is 'illicit' for treaty purposes is consistently interpreted, as a bare minimum, all treaty Article 6 prohibitions. Civil society organisations will likely insist that states parties apply the broadest possible criteria to compilation of national control lists. Bolton and Zwijnenburg sum up with pertinence, seeing the ultimate strength of the ATT deriving not from literal meanings of its text, but through its application and monitoring by civil society and concerned states. Monitoring mechanisms, they add, should anticipate potential circumvention strategies holding to account those states, manufacturers or armed groups seeking to exploit loopholes.^{xli}

Conclusions

The ATT's most significant achievement has been to stake out higher ground for advancing humanitarian and human rights protections in armed conflict. The link connecting initial transfers of conventional arms to their subsequent utilisation has been shortened - whether that is facilitating crimes of sexual violence, employing child soldiers, or waging indiscriminate attacks against civilian locations of no military utility. Approved transfers of conventional arms lose legitimacy once unambiguously linked to serious humanitarian law violations - culpable offences incurring legal consequences. Accordingly the gap differentiating 'legitimate' conventional arms transfers to 'responsible' users, from negligent trade to those of known unreliability has narrowed. It is a shrinkage highlighted by vulnerability to regime collapse, notably in the Middle East. However should regimes begin to resolve long standing internal differences, institute effective small arms stockpile management, and instil command responsibility through security sector reform, then clearer air will emerge to facilitate legitimate transfers.

This paper concludes that the ATT provisions on arms brokering are inadequate. What begins as a 'white' transfer may through brokering enter the realm of 'grey', and thence to outright 'black'. Previously discussed ATT Article 11 provisions on diversion are constructive, but uneasily straddle differences between states (eg Canada and the US) treating it as unwarranted diversion *between* seller A and receiver B, and those (eg Mexico) interpreting it as dispersion *beyond* end point reception. The ATT does not have an end use monitoring mechanism allowing exporting states to check where the arms they have transferred are finally sent, or how they are used. This paper has argued that even a slight diversion of the high volume of legitimate transfers harbours serious risk of ATT violation.

When reviewing the controversies that marked the ATT's formulation, compromises reached for their resolution will influence the quality of future implementation. No one size fitting all, we have seen that the ATT's language contains numerous 'as appropriate' or 'as feasible' qualifiers regarding national discretion. The test will be whether flexibility designed to foster workability comes at a cost of consistent treaty interpretation and application. EU members with different allies and arms sales destinations have encountered difficulties in forging a common position on ATT interpretation.

Differences identified reflect a deeper, longer running cleavage. This involves the contested ground of core security, and how humanitarian as distinct from sovereign territorial imperatives might assume appropriate salience. Hopes of balancing such imperatives by treaty means do not diminish their scope for polarisation. Contest here has a raw immediacy, courtesy live television's coverage of conflict's civilian toll in the Middle East. Weapons supplied in good faith to Syrian rebel forces, but ending up in the hands of the Islamic State have shocked publics. That has imparted urgency to ATT ratification and implementation.

Certainly the ATT has thrown into sharper relief the primary importance of state responsibility for effective implementation. That begs questions the treaty could not realistically confront: fragile, incompetent or corrupt state agency functions; malfunctioning rule of law and widespread impunity of state operatives; collusion of state and non-state entities manipulating domestic arms transfers for predation; completely absent or seriously defective record keeping; the use of arms to perpetrate gross, unreported and unprosecuted human rights violations; and the agility, local knowledge and resourcefulness of international arms brokers and traders exploiting licence and end use loopholes to advantage. Nor has controversy over consensus procedure abated: contest over its application, not decision by vote, could inflame Rules of Procedure discussions in future meetings of states parties.

Despite these concerns the ATT has sown seeds for future amelioration, most conspicuously through space provided for enhanced international cooperation permitting states to institutionalise national control mechanisms. There is also breadth in the encouragement given to information sharing and exchange, an indirect acknowledgment of an ATT need to confront ongoing challenges through modification. List sharing between states will open opportunities to expand beyond the seven plus one conventional weapons categorisation offered by the treaty, hopefully to embrace the difficult, but increasingly critical issues of exported licensed production and technology transfers. These developments will not stand still, their expansion widening scope for possible ATT circumvention.

Failure to confront change will see the treaty a worthy but secondary instrument determining state practice. State peer pressure urging movement towards norms of appropriateness outlawing nefarious arms transfers will prove important. Assistance is required for smaller states to foster and implement national measures, and to ease burdens of treaty compliance reporting. Assistance is also required to strengthen existing, complementary arms transfer control mechanisms. Currently they leave gaps for those willing to hunt them out for bad faith purposes of deliberate evasion. A circle of control has not yet been joined, but the ATT has given existing legal regimes greater scope to move closer towards that goal. That includes contributions from regional systems, and their need to move beyond undue reliance on international institutional or external bilateral funding, and towards greater ownership of indigenous capacity and expertise. This point embodies an overall conclusion: the ATT's legal structure will require not just cooperation across its designated, contrasting levels of responsibility, but enduring state commitment for durable implementation.

End Notes

ⁱ Remarks delivered by Angela Kane, 25 September, on behalf of the Secretary General to the 2014 Treaty Event, annually devoted to multilateral treaty advancement at the margins of the UN General Assembly New York.

ⁱⁱ That includes the development of non-lethal weapons designed to incapacitate rather than kill, and widening use of unmanned combat vehicles. Related issues include 'civilianisation' of military tasks and rapid rise of private military and security companies purchasing conventional weapons. For informed comment, see Matthew Bolton and Wim Zwijnenburg (2013). 'Futureproofing

is Never Complete: Ensuring the Arms Trade Treaty Keeps Pace with New Weapons Technology', ICRAC Working Paper 1; Tilman Brück and Paul Holtom (2013). 'Will the arms trade treaty be stuck in the past?' SIPRI www.sipri.org/media/newsletter/essay/brueck_holtom_March13.

ⁱⁱⁱ They include the soft law guidelines of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (POA); the UN Register of Conventional Weapons; the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons; the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (Firearms Protocol), supplementing the United Nations Convention against Transnational Organized Crime; the Convention on Prohibitions or Prohibitions on the Use of Certain Conventional Weapons Which May be Deemed Excessively Injurious or to Have Indiscriminate Effects and as amended by protocol (CCW or Inhumane Weapons Convention); and the quasi regulatory, confidence building Wassenaar Arrangement, where 41 states including the US, most EU members and Russia provide guidelines and exchange information on arms transfers covered under the previously cited UN Register categories.

^{iv} UNGA Res 61/89 (6 December 2006) passed by 153 votes in favour, one opposed (the USA) and 24 abstentions.

^v See Article 25 3 (c) of the Rome Statute regarding state responsibility to exercise criminal jurisdiction over those responsible for international crimes or facilitating their commission, and which could include deliberate acts to supply arms knowing they would be used for unlawful acts such as crimes against humanity and genocide.

^{vi} This reiterated the principle that every internationally wrongful act by a state necessarily entails an international responsibility by that entity (Article 1), as would aid or assistance in the commission of an internationally wrongful act, with knowledge of its circumstances, and the act being internationally wrongful if committed by the commissioning state (Article 16). UNGA Res. 56/83 (12 December 2001).

^{vii} Holger Anders (2012). 'Ammunition Controls, the ATT, and Africa', GRIP Report Brussels at 20.

^{viii} Report of the Group of Governmental Experts established by UNGA Res 60/81 to consider steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons UN A/62/163 (30 August 2007).

^{ix} See for example Kloe Tricot O'Farrell (2013). 'Arms Brokering Controls. How they are Implemented in the EU', GRIP Report Brussels at 2.

^x On the record briefing of Thomas Countryman US Department of State 28 March 2013, States News Service at: (<http://www.highbeam.com/doc/1G1-324071611.html>).

^{xi} Simeon Wezeman and Pieter Wezeman (2014), 'Trends in International Arms Transfers 2013. SIPRI Fact Sheet.

^{xii} Quarterly Reports July-December 2010 and January-September 2011, Government's Review of arms exports to the Middle East and North Africa and wider arms control issues, HC 419, Cm. 8441 2012, p. 3.

^{xiii} Neil Cooper (2012). 'The Arms Trade Treaty in the Context of Post-Cold War Conventional Arms Trade Regulation'. Paper incorporated in research project on history of arms trade regulation. Trust for Research and Education on the Arms Trade and the British Academy, at: (www.caat.org.uk/issues/att-neil-cooper.pdf).

^{xiv} Ibid at 12-13.

^{xv} On the record briefing of Thomas Countryman, op.cit., 28 March 2013.

^{xvi} Publicly released letter of Arms Export Policy UKFCO April 2013, at:(www.caat.org.uk/issues/2013).

^{xvii} UN Document DPI GA/11354, (2 April 2013). Assuming parallel relevance has been European Court of Human Rights jurisprudence with requirements that states assess a 'real' risk' when determining that they have 'substantial grounds' to conclude a person would face torture or inhumane or degrading treatment if deported.

^{xviii} Transfers of SALW guidelines are provided by the POA Section II para. 11.

^{xix} S. Casey-Maslen (2013). 'The Arms Trade Treaty 2013', Geneva Academy Briefing 3 at 24.

^{xx} Judgement of ICTY Appeals Chamber on the merits in the *Tadić* case, 2 October 1995 at 127.

^{xxi} Stockholm International Peace Research Institute, 'Arms Embargoes Database', undated but accessed 18 May 2013, at: (www.sipri.org/databases/embargoes).

^{xxii} Refer supra note iv for details of this Arrangement.

^{xxiii} OSCE (2003). *Handbook of Best Practice on Small Arms and Light Weapons*, 5/03.

^{xxiv} Owen Greene and Nicholas Marsh (2011). *Small Arms, Crime and Conflict: Global governance and the threat of armed violence*, London: Routledge Studies in Peace and Conflict Resolution, p. 90.

^{xxv} Geneva Call. *Deeds of Commitment on Banning Anti-Personnel Mines; Prohibiting Sexual Violence and Gender Discrimination; Child Protection* at: (www.genevacall.org/resources/documents).

^{xxvi} Guy Lamb (2012). 'African States and the ATT Negotiations', *Arms Control Today*, 42.

^{xxvii} *African Union Common Position on the Arms Trade Treaty*, 2011 at 39. As elaborated by a meeting of experts of Member States held in Lomé, Togo, in September 2011, and subsequently supported by the Assembly of the Union, at its 20th Ordinary Session, Addis Ababa January 2013.

^{xxviii} See for example World Bank (2011). *World Development Report 2011: Security, Conflict and Development*. Washington, DC: World Bank.

^{xxix} Knut Langeland government of Norway statement. General Debate on all disarmament and international security agenda items 89-107, UNGA First Committee, 14 October 2013.

^{xxx} See for example ICRC (2012). *Arms Transfer Decisions. Applying international humanitarian law. Practical Guide*; ICRC (2007) *What are "serious violations of international humanitarian law"? Explanatory Note*, at: (www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf).

^{xxxi} Section 5 (a) (i) of this agreement regarding transmission to the Court of information received by the Secretary General of the UN as depositary of agreements relating to the exercise by the Court of its jurisdiction. ICC-ASP/3/Res.1 2004. See also Rome Statute 87 (6) permitting the Court to ask any intergovernmental organisation to provide information or documents relevant to its jurisdiction.

^{xxxii} Report of Group of Government Experts on the operation of the UN Register of Conventional Arms, A/68/140 56-61, 15 July 2013.

^{xxxiii} See for example Saferworld (2011). *An Implementation Framework for the Arms Trade Treaty*; OXFAM, CITS and Saferworld . Saferworld (2011). *National Implementation of the Proposed Arms Trade Treaty: A Practical Guide*. On end user controls, see United Nations Office for Disarmament Affairs (2011) *Development of A Framework for Improving End-Use and End-User Controls Systems*, Occasional Paper 21.

^{xxxiv} Paul Holtom and Mark Bromley (2013). 'Next Steps for the Arms Trade Treaty: Securing Into Force', *Arms Control Today*, 43, at. 2.

^{xxxv} Ibid.

^{xxxvi} See for example Parliamentarians for Global Action (2014) *PGA Parliamentary Handbook Promoting Signature, Ratification and Implementation of the Arms Trade Treaty*.

^{xxxvii} Siem Reap Plan of Action, 16 July 2014, Parliamentarians for Global Action at: (<http://controlarms.org/en/news/parliamentarians-adopt-siem-reap-plan-of-action/>).

^{xxxviii} Parliamentarians for Global Action <www.pgaction.org/activity/2013/pga-pan-african-parliament-joint-committee-session-on-the-arms-trade-treaty.html>.

^{xxxix} *Pacific Islands Forum Communiqué*, Auckland September 7-8, 2011.

^{xl} *Model Law to Assist Pacific States to Implement the Arms Trade Treaty*. New Zealand Ministry of Foreign Affairs and Trade in cooperation with the Small Arms Survey 2014.

^{xli} Bolton and Zwijnenburg, *supra* note ii at 3.