THE ARMS TRADE TREATY: ACHIEVEMENTS, FAILINGS, FUTURE

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Abstract This article looks at the origins, purposes and conflicts of national interests and policies that were the primary influences in shaping the substance of the Arms Trade Treaty, which came into force at the end of 2014. It then proceeds to a more legally focussed analysis and, having identified several important issues which have had to remain undiscussed, concentrates on detailed examination and evaluation of the most important provisions of substance. These are firstly the scope of the Treaty—defining the equipment or materiel covered (Article 2). There follows analysis of the provisions which contain the obligations on exporting States, ranging from absolute prohibitions (Article 6) to 'export assessments' (Article 7), which in practice will be the most frequently applicable. The paper concludes by identifying several valuable provisions in the Treaty whilst also highlighting several significant weaknesses and omissions. It contends that evaluation of the Treaty's likely contribution to controlling the recognized evils of the arms trade is premature at this stage and, further, that efforts towards that end must focus on the practice and law of domestic administrative implementation, rather than international law.

Keywords: arms trade, arms trade treaty, export assessments, export prohibitions, small arms and light weapons (SALW).

I. INTRODUCTION

On 2 April 2013, an overwhelming majority of the UN General Assembly, 154 States voted to accept a Resolution approving the text of an Arms Trade Treaty.[1] Only three States—Iran, North Korea, and Syria—opposed acceptance.[2] This apparent overwhelming support was tempered by the abstention of 23 States,

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[1] The Resolution is A/67/L.58 (2013).

[2] The same three States blocked the adoption of the Treaty by consensus at the Final UN Conference on the Arms Trade Treaty which finished its deliberations the previous week.

[*ICLQ* vol 64, July 2015 pp 569–600] doi:10.1017/S0020589315000202

including some of the most important actors on the global stage.[3] Nonetheless it was an impressive moment: the first time in world history that a truly global agreement restricting the transfer of conventional weapons has been realized. Unlike so-called pariah weapons such as chemical and biological weapons (CBW) or cluster munitions which have been subject to widely agreed international restrictions,[4] or atomic weapons, whose unparalleled potential for global destruction is universally acknowledged and whose possession is limited to the Permanent Members of the UN Security Council and a few outriders,[5] conventional weapons are possessed by every State. That possession is intimately connected to the inherent right of self-defence, long recognized in international law and enshrined in Article 51 of the UN Charter. Moreover, commerce in them is extensive, lucrative, and energetically encouraged by the governments of States in which they are manufactured. Thus the mere fact of a formal agreement, even if accompanied occasionally by extravagant rhetoric, is more than worthy of note. So too is the extremely rapid movement towards making it operational; within 18 months, more than the requisite 50 States[6] had formally ratified, and it came into force on 24 December 2014.

It is certainly possible that even a limited treaty can set in motion a 'cascade effect' which eventually produces national or international norms. Yet once the undoubted normative significance of the mere existence of the Arms Trade Treaty (ATT) is acknowledged, the hard questions arise: What are its main purposes? How did it take the shape it did, and what are its strengths and weaknesses? And most important, what practical effect is it likely to produce?

The present article does not present a comprehensive analysis of these questions. Rather, it concentrates on the Treaty's core: what is covered—described in Article 2 as its 'scope'; and the obligations it imposes on State Parties which export weaponry. A range of issues, most notably the substantially weaker obligations imposed on importers; enforcement (or lack of it) including record-keeping and tracing; diversion; the controversy over transfers to non-State actors; and brokering, are not considered. The result inevitably is an incomplete discussion, but the fundamental issues can be treated in full depth.

A critical examination of the main Articles of the Treaty can only be undertaken in light of the reasons for its existence, ie, whether and how effectively it addresses those problems that led to its creation. The present analysis will start there, and then proceed to a close examination, textual but also contextual, of the core provisions. The question of likely impact can at

[3] See further section III.

[4] Bacteriological and Biological Weapons were addressed in Convention of 1972; the Chemical Weapons Convention was open for signature in 1992; the Cluster Munitions Convention (CCM) was signed in 2008; the USA has refused to sign, let alone ratify, the latter.

[5] And, of course, is supposed to be restricted by anti-proliferation agreements, notably the 1968 Nuclear Non-Proliferation Treaty. This is not the place to explore the role of the superpowers in assisting Israel and India to acquire nuclear weapons, let alone the story of Pakistan's acquisition.

[6] ATT art 22.

this point only receive speculative answers, but the critique should identify problems and omissions that will require further attention in future.

II. CONCERNS

Seven substantial, diverse, and in some instances overlapping concerns lay behind the movement for international regulation of the arms trade. Not all of these have been addressed by the Treaty.

A. The Problem of SALW

Since the end of the Cold War, numerous wars in the Global South,[7] and especially in Sub-Saharan Africa, have caused millions of deaths and vast economic and social devastation. The primary means of destruction are the so-called Small Arms and Light Weapons (SALW), which Kofi Annan, when UN Secretary General, aptly called 'the real weapons of mass destruction'.[8] The most widely used definition of SALW[9] includes most notably revolvers and self-loading pistols, rifles and assault rifles, sub-machine and light and heavy machine guns, various portable anti-tank and anti-aircraft guns, plus launchers for anti-tank and anti-aircraft missile systems, particularly so-called MANPADS (man-portable air defence systems).

The movement towards control of the traffic in SALW began in the UN in the 1990s, spurred initially by Secretary General Boutros Boutros-Ghali, who saw the need to extend post-Cold War disarmament efforts to what he termed 'micro disarmament'.[10] He and Annan, his successor, were as Africans perhaps more sensitive than their predecessors to the disasters of intra-State violence and the central role of SALW in producing it; and they could not fail to be aware that the guns, bombs, MANPADS, and ammunition were all manufactured in and initially imported from Northern sources. Therefore restricting transfers became the focus of regulation.[11] Northern NGOs, many of them devoted to development, lobbied in support for years, having seen the effects of SALW at first hand. They highlighted the fact that the overwhelming majority of those who have died in conflict zones are civilians, and that of these the

[7] The Cold War vocabulary of 'East' and 'West' has long ceased to describe real global political or economic divisions. I have therefore adopted the newer and somewhat more accurate terminology of Global North and South.

[8] In a speech delivered to the UN Millennium Summit in 2000, quoted in M Bourne, *Arming Conflict: The Proliferation of Small Arms* (Palgrave Macmillan 2007) 3.

[9] Contained in a Report of the Panel of Governmental Experts on Small Arms, A/52/298, presented to the UN General Assembly 27 August 1997.

[10] Quoted in R Stohl *et al., The Small Arms Trade* (Oneworld Publications 2007) 39.

[11] This is not to ignore the importance of 'leakages' from State arms holdings and illicit trafficking within the continent. See further T Jackson, 'From under Their Noses: Rebel Groups' Arms Acquisitions and the Importance of Leakages from State Stockpiles' (2010) 11 International Studies Perspectives 131.

majority are women and children. Thus the aim of reducing civilian deaths led inescapably to restrictions on transfer of weapons, and entwined with that aim are concerns about development and violence against women.

B. Use for Internal Repression

Weapons manufactured in Northern democracies have been used repeatedly in violent suppression of dissent in the domestic political orders of recipient States. Making profit and/or achieving diplomatic goals by assisting governments engaged in domestic repression and human rights abuses hardly squares with the promotion of good governance and human rights loudly proclaimed by Northern States over the last two decades, and those States have been under pressure from their own media and civil society organizations to bring their deeds into line with their words. Although most have domestic legislation that purports to restrict arms sales which may be used for human rights violations, these laws are often ignored.[12] Whether their policies or conduct will change significantly now that they have adhered to a treaty which all have supported and some have strongly advocated (though it contains weaker standards than those they are already supposed to comply with), is purely an empirical question, and one of great importance.

C. Promoting Violent Conflict

The arms trade is often accused of contributing to death and misery by encouraging and facilitating warfare. This is an empirical claim, not a normative one. Underlying it are a host of questions: does receipt of arms encourage aggression that leads to war, or discourage it by achieving or restoring military balance? Does it encourage diplomatic combativeness, but not armed conflict? Does the effect depend on volume, timing, the specific political circumstances, or a combination of some or all of these? Does the effect vary significantly depending upon whether the recipient is a State or a non-State actor (NSA)? How important is the character of the NSA, which could be anything from a politically sophisticated and well-guided revolutionary movement, to a militia or para-military group led by a 'warlord'? Several studies have addressed aspects of these questions, with results that have been quite inconclusive.[13] As the data they drew upon

[12] For description and analysis of the EU system, which is supposed to guide export licensing decisions of all Member States, see L Lustgarten, 'The European Union, the Member States and the Arms Trade: A Study in Law and Policy' (2013) 38 ELRev 521. For a valuable empirical analysis of its workings, see A Vranckx (ed), *Rhetoric or Restraint? Trade in Military Equipment under the EU Transfer Control System* (Academia Press 2010), a Report prepared for the EU Presidency. For a description of the US system, see M Schroeder and R Stohl, 'US Export Controls' in SIPRI Yearbook 2005 (OUP 2005) App 17A.

[13] See especially two articles by D Kinsella, 'Arms Transfer Dependence and Foreign Policy Conflict' (1998) 35 JPeaceRes 7 and 'Conflict in Context: Arms Transfers and Third World

related to the Cold War era, the questions, which are of great practical importance, deserve more contemporary research.

Whatever scholarship may reveal, supplier States have uniformly shared the view that in circumstances where a fresh infusion of arms is likely to encourage aggression or armed conflict, none should be supplied. As this is unwelcome to protagonists, whether governments or NSAs, contemplating or involved in armed conflict, the problem of getting round restrictions becomes fundamental: hence the importance of eliminating 'black market' arms sales. Issues around preventing covert illegal shipments, the regulation of arms brokers and other intermediaries and, most important, preventing diversion of weapons from the ostensible purchaser to other parties, then arise inescapably. Any serious attempt at addressing them must involve a range of practical measures and development of institutional capacities of enforcement. Mere statements of prohibition or restrictive criteria for decision, unaccompanied by effective means of implementation, are simply worthless.

D. Diversion

Preventing diversion is an important aim for exporting States for more self-interested reasons as well. One important reason is to ensure that embargoes imposed by the UN and/or individual States or entities like NATO or the EU are not evaded by sales to 'front' purchasers, as notoriously happened with purported UK sales to Jordan in the late 1980s that were actually to Saddam Hussein's Iraq. The aborted prosecution of one supplier, Matrix Churchill, produced a major scandal and led to the Scott Inquiry.[14]

Concern has also repeatedly been expressed that weapons inadequately safeguarded when in possession of their genuine purchasers could find their way into the hands of 'terrorists' or 'transnational organized crime' (TOC).[15] Whilst contentious political divisions among States has for decades prevented international agreement on a definition of terrorism,[16] the term may legitimately be applied to the militias who have committed repeated horrific violence against civilians, some of the worst of which have led to prosecutions before ad hoc Tribunals or the International Criminal Court. The application to TOC relates

Rivalries during the Cold War' (1994) 38 AJPS 557. The latter article, at 558, reports and summarizes several other studies covering the same period, and notes that they establish no clear conclusion about the relationship. G Sanjian, 'Promoting Stability or Instability? Arms Transfers and Regional Rivalries, 1950–1991' (1999) 43 International Studies Quarterly 641 similarly shows the impossibility of drawing firm general conclusions about impact.

[14] Sir Richard Scott, Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecution, HC 115 (1995–96). For analysis, see I Leigh and L Lustgarten, 'Five Volumes in Search of Accountability: The Scott Report' (1996) 59 MLR 695; A Tomkins, *The Constitution after Scott* (OUP 1998).

[15] The term used in ATT art 7. l(b)(iv), following the UN Convention on TOC adopted by General Assembly Resolution 55/25 of 15 November 2000.

[16] See generally B Saul, *Defining Terrorism in International Law* (OUP 2006). Recent diplomatic attempts in this direction have proven equally fruitless.

particularly to SALW, and hence heightens the importance of the treatment of ammunition, a controversy discussed below.[17]

E. Corruption

The arms trade has been tainted by deep and widespread corruption, so much so that it has even been argued that for some States corruption is the *purpose* of arms purchases: those in positions of great power authorize acquisition of equipment not genuinely needed for defence in order to profit from bribes, commissions, contracts for related services, and other lucrative opportunities. This view has been very cogently supported,[18] but even though it may not apply in all circumstances, the prevalence of corruption is beyond argument.[19] The result is not only a great drain on public resources, but may well result in acquisition of inferior equipment, or of weapons that the purchaser is simply incapable of using.[20] It is less commonly realized that arms trade corruption may also be deeply damaging to the governance of exporting countries, as governments refuse to comply with normal forms of legislative accountability and even manage successfully to close off the judicial system to those who seek to cast light on criminal activity undertaken with official knowledge, or even by public officials directly.[21]

F. Burdening Development

Although the connexion is by no means always present, concerns about corruption in purchasing States are often tightly linked to impoverishment of poor countries who purchase weapons well beyond their means.[22] Several African States in particular have spent billions of dollars which have

[17] See Section IVB.4.

[18] It was expounded most fully by the late Joe Roeber, a *Financial Times* journalist who later worked with Transparency International's anti-corruption projects. His argument appeared in compressed form as part of a more general analysis of corruption in the arms trade that appeared in the UK political journal Prospect: J Roeber, 'Hardwired for Corruption' Prospect Special Report No 113 (2005). His more detailed cases studies were unable to be published due to the threat of libel proceedings. See also his earlier work, J Roeber, *The Hidden Market: The Effects of Corruption in the International Arms Trade* (New Press 2001).

[19] The most comprehensive study is that of A Feinstein, *The Shadow World: Inside the Global Arms Trade* (Penguin 2012). A more analytically focused paper, which distils material from his work on South Africa, is A Feinstein, P Holden and B Pace, 'Corruption and the Arms Trade: Sins of Commission' SIPRI Yearbook 2011 (OUP 2011) ch 1.

[20] Most notoriously in the case of jet fighters bought at enormous cost by Saudi Arabia from the USA, which Saudi pilots proved incapable of controlling during the first Gulf War in 1991.

[21] See, in addition to the material cited in n 14, L Lustgarten, 'The Arms Trade and the Constitution: Beyond the Scott Report' (1998) 61 MLR 499 and *R (on Application of Cornerhouse Research) v Director of the Serious Fraud Office* [2008] UKHL 60.

[22] Most obviously, the connection is absent in the cases of Saudi Arabia and some of the Gulf States, where corruption in arms purchases has been rife, but which in terms of GDP per head of population are quite wealthy.

deprived their populations of funds that could have been used for desperately needed investment in education, health, or infrastructure. The criteria set down by the EU which are supposed to guide Member States taking arms export decisions—known as the Common Position—describe this effect as 'seriously hamper[ing] the sustainable development of the recipient country'.[23] Corruption in arms purchases as a factor in continuing impoverishment of poor nations has long been recognized as a major scandal. Yet attempts by Northern States, often former colonial rulers, to refuse to permit sales on this ground risk vituperative charges of 'neo-colonialism'. Hence any attempt to include a sustainable development criterion in any international agreement regulating the arms trade invites fierce controversy, as the negotiations over the ATT demonstrated.[24]

G. Facilitating Private Violence

Civilian gun violence is a major problem in many States, and the weapons used are almost always imported SALW. Several of the most severely affected States are in the Western Hemisphere, where the lure of the lucrative US drug market has led to murderous rivalry between heavily armed gangs of traffickers, who terrorize civilian populations and can at times overwhelm the local police and even military. No nation has been more severely affected than Mexico, which was one of the prime movers for an ATT; it was strongly supported for the same reason by CARICOM States such as Trinidad and Tobago. Ironically, the source of most of the weapons used is also the USA.

III. THE HISTORICAL BACKGROUND

The evolution of the Treaty, covering its political and diplomatic background over a period of 15 years, including the role of several Nobel laureates and civil society groups, has been well chronicled.[25] For present purposes it will be sufficient to offer a skeletal description of some key developments.

[23] Council Common Position 2008/944/CFSP, defining common rules governing control of exports of military equipment and technology, OJ L 335, 8 December 2008, art 2, para 8.2. See further Lustgarten (n 12).

[24] See section VII.

[25] See especially D Garcia, *Disarmament Diplomacy and Human Security* (Routledge 2011) ch 2, for a valuable general account. The important role of NGOs is described in a background paper for an EU-UNIDIR (United Nations Institute for Disarmament Research) project, D Mack and B Wood, 'Civil Society and the Drive towards an Arms Trade Treaty' (2010) <http://www.unidir.org/Search?keyword=d.+mack+and+b.+wood>. The views of nearly 100 States involved in the extensive discussions in the mid-2000s were collated and analysed in two reports for UNIDIR prepared by Sarah Parker, 'Analysis of States' Views on an Arms Trade Treaty' (October 2007) <http://www.unidir.org/programmes/process-and-practice/analysis-of-states-views-on-an-arms-trade-treaty> and 'Implications of States' Views on an Arms Trade Treaty' (January 2008) <http://www.unidir.org/Search?keyword=sarah+parker+implications>.

In December 2006, the UN General Assembly passed a Resolution in favour of an international arms trade treaty.[26] The USA was the sole State to vote against but—foreshadowing the outcome of the process in 2013—important States like Russia, China and India abstained. The Resolution directed the UN Secretary-General to establish a Committee of Government Experts to take the effort forward. This met in three sessions in 2008, and was chaired by Roberto Garcia Moritán, a lawyer and career diplomat from Argentina. He continued in this role through three Preparatory Committee sessions in 2009–2011. For the last, in July 2011 he produced a Paper which formed the basis of the negotiations involving all UN Member States[27] which took place in New York in July 2012.[28] These were undertaken on the basis that the result had to be agreed by consensus, ie unanimity. They went on for three weeks under Ambassador Moritán's leadership and it appeared that a compromise text had been agreed. However, on the last day the USA, supported by the strangest of bedfellows[29] announced that further negotiations were necessary. This was regarded at the time by many proponents as almost an act of sabotage, although there has been general agreement that the text eventually produced represents a considerable improvement. The US démarche was also entirely predictable, given that the Presidential elections were scheduled for November; the Obama Administration—which had to reverse its predecessor's stance in 2009 to agree to participate at all in the negotiations—was vulnerable politically on the issue and did not need to highlight a controversy which could only cost it votes.[30]

The second Negotiation Conference was convened in March 2013, this time under the Chairmanship of Peter Woolcott, the Australian Permanent

[26] UN GA 61/89, 6 December 2006.

[27] The first two days of the Conference were sidetracked by controversy over the presence of Palestinian representatives, who were eventually granted observer status. The Vatican, though not a UN member, did participate in the discussions but did not vote. The same was true of the European Union.

[28] The UN has published no official record of either Negotiation Conference, which consisted of both open and closed sessions. In its account of the positions taken by various States or regional groups, this article draws extensively from three sources. Most extensive, covering both 2012 and 2013 both with daily blogs and extreme comprehensive analysis, is the material available on the website of Reaching Critical Will, an NGO devoted to disarmament. A complete archive is available at <http://www.reachingcriticalwill.org/disarmament-fora/att>. A second important source is an account issued by the UN Department of Public Information 2 April 2013, GA/11354, summarizing statements made by scores of Member States in the run-up to the Assembly's approval of the Treaty.

[29] Russia, Cuba, Venezuela and DPR Korea.

[30] The politics of the United States' role requires special attention because of its pre-eminent global power and the fact that the USA is the world's largest arms exporter. The internal opposition is based on exaggerated claims about danger to the Second Amendment constitutional 'right to bear arms'. In fact the Treaty recognizes in three separate places 'the sovereign right of any State to regulate and control conventional arms exclusively within its territory, pursuant to its own legal or constitutional system' (Preamble, para 5); 'the legitimate trade and law ownership, and use of certain conventional arms' for diverse purposes (ibid, para 13) and reiterates in the statement of Principles 'Non-intervention in matters which are essentially with the domestic jurisdiction of any State in accordance with Article 2(7) of the UN Charter'.

Representative to the UN.[31] It also lasted three weeks, and produced a document which managed to gain widespread acquiescence, but could not achieve consensus. However, within a week of the closing of the Conference on 27 March, the Treaty had been approved by General Assembly Resolution, where consensus is not required. This is the document that has come into force.

Before undertaking an analysis of the specifics of the Treaty, some general observations are required in order to understand both how particular Articles took their final shape, and also the limitations of support for the Treaty. Although there were only three recorded opponents, the abstainers represent nearly half the world's population,[32] most of the Arab world including nearly all the oil-rich States,[33] and all of the Latin American States with left-wing governments.[34] Thus the claim that the Treaty expresses overwhelming international opinion is something of an illusion. Russia is the world's second largest arms exporter and China has rapidly emerged as a major one.[35] India is by far the world's leading importer, having displaced Saudi Arabia and the Gulf States which had topped that particular league table for years previously.[36] Thus key States on both sides of the trade in weapons remain unenthusiastic at best. There were also notable divisions between exporting and importing States—several of the latter being critical of the Treaty as reflecting excessively the views of the former[37]—but also significant differences in the importance various States and regional groups attached to the various contentious issues that emerged during the negotiations. Some States—the USA most publicly and explicitly—had 'redlines' which they would not allow to be crossed if they were to sign the Treaty.[38] Many others wanted the Treaty to go further in various ways, but were forced to accept more modest measures if the key States were to be kept on board.[39] No one, State or NGO, was fully satisfied with the compromises that emerged. Whether acceptance of half (or perhaps

[31] The reasons for the replacement of Robert Garcia Moritán were never made public.

[32] China, India, Indonesia, Russia and Egypt were the most populous of this group.

[33] In addition to Egypt and Yemen, Saudi Arabia, Oman, Bahrain, Kuwait, Qatar all abstained. Venezuela, was recorded as 'absent', but later stated it wished to abstain. Of the oil sheikdoms, only United Arab Emirates voted in support.

[34] Bolivia, Cuba, Ecuador, and Nicaragua, in addition to Venezuela.

[35] As reported in the *Financial Times China*, 18 March 2013, using data from SIPRI, China is now the world's fifth largest arms exporter <http://www.ft.com/cms/s/0/c7215936-8f64-11e2-a39b-00144feabdc0.html#axzz2Unn9tRyi>.

[36] India imported more than double the value of weapons purchased by the second-ranking State (Pakistan) in the period 2009–12. See the SIPRI Database <http://armstrade.sipri.org/armstrade/html/export_toplist.php>.

[37] India was perhaps the most vocal in expressing this view, but it had considerable support among the abstaining States.

[38] US Department of State, 'Elements of an Arms Trade Treaty', Fact Sheet issued 4 June 2010, [hereafter called 'USA redlines'] which included a bullet point listing of key US objectives, policies and the 'redlines'. As the only Superpower and also the world's largest arms exporter, the USA is powerful enough to ensure that its 'redlines' were respected. Other States were forced to compromise.

[39] This is true particularly of the controversy over the treatment of ammunition; see section IVB.4.

https://doi.org/10.1017/S0020589315000202 Published online by Cambridge University Press

even a lesser portion) a loaf was the mark of good judgement or an abandonment of principle is something that can only be properly assessed when the Treaty has had a reasonable time to make its mark.

IV. THE SUBSTANCE OF THE TREATY

Before discussion of scope and exporters' obligations can be presented, an essential preliminary question must first be discussed.

A. What Is the Arms 'Trade'?

The ATT does not regulate the arms 'trade' as such: it governs arms 'transfers'. This is one of the few terms specifically defined within the text, and includes 'export, import, transit, trans-shipment, and brokering', all brought within the portmanteau category of 'transfer'.[40] Obviously this covers much more than the sale of weapons from A to B, and there are some important questions surrounding its exact extent.

There are two explicit exclusions. One is that weapons moved internationally by a State Party which retains ownership of them are outside the scope of the Treaty.[41] This would exempt transport of weapons by a State to its armies[42] stationed or actively engaged in military activities outside its borders; the same would be true of States whose forces were engaged in UN peacekeeping operations. More important was an issue that occasioned considerable concern as diplomatic discussions proceeded, namely whether a 'transfer' had to be of a commercial nature in order to be included. The bare language certainly does not command this interpretation, which could create a significant loophole since some countries, notably the USA but others as well, give weapons as gifts to allies, particularly if they are surplus to present requirements.[43] However, in its 'Redlines' document, the US State Department was quite clear that the scope of an ATT should be extremely comprehensive,

[40] ATT art 2.2. 'Transit' means the export of equipment from one country through the territory of one or more intermediary country to reach the ultimate recipient country. 'Trans-shipment' is the physical process of unloading the goods at the initial destination then reloading them, usually via another form of transport [eg from ship to lorries] for trafficking to the final recipient.

[41] ATT art 2.3.

[42] There is no loophole here allowing a State to lend equipment to an ally whilst retaining ownership; art 2.3. requires that the movement of arms be for 'its', ie, the State's, own use.

[43] Particularly during the Cold War, the USA operated several programmes involving non-commercial sales to 'deserving' countries; until the 1980s this was the predominant method of its arms transfers. This approach now operates particularly as part of 'counter-terrorism' policy; particularly important at present is the so-called 'section 1206 authority' for training and equipping foreign military forces for this purpose. For details, see NM Serafino, 'Security Assistance Reform: "Section 1206" Background and Issues for Congress' (Congressional Research Service 2014). The UK acts similarly, albeit on a smaller scale. Annual Reports of the UK House of Commons Committees on Arms Export Controls, cited throughout this article, contain a section on 'Gifted Equipment' detailing which nations have received what largesse from the UK during the previous year. On 9 September 2014, the UK announced that it was

including 'international transfers, export, import, transit, transhipment or brokering of conventional arms, whether the transfers are State-to-State, State-to-private end-user, commercial sales, leases, or loans/gifts'.[44] This reading of 'transfer' accords with the widely shared objectives of the Treaty by supporting the broadest reasonable interpretation. In fact the US approach is widely shared, although China has rejected it.[45]

B. Scope

What then of the 'conventional arms' element of the Arms Trade Treaty? Put another way, what weapons and equipment, or *materiel*, are subject to the range of regulations within it? Here the result is disappointing, as early in the evolution of the Treaty its scope was significantly narrowed.

The Chairman's Draft of 14 July 2011 was broad-ranging in this respect. It sought to include all 'conventional arms', which were defined as everything within the following categories:

a. Tanks
b. Military Vehicles
c. Artillery Systems
d. Military Aircraft (armed or unarmed)
e. Military Helicopters (armed or unarmed)
f. Naval Vessels (surface and submarine vessels armed or equipped for military use)
g. Missiles and Missile Systems (guided or unguided)
h. Small Arms
i. Light Weapons
j. Ammunition for use with weapons defined in subparagraphs (a)–(i)
k. Parts or Components specially and exclusively designed for any of the categories in subparagraphs (a)–(j)
l. Technology and Equipment specially and exclusively designed and used to develop, manufacture or maintain any of the categories in subparagraphs (a)–(k).

In its final form of April 2013 the list is both shorter and narrower:

> This Treaty shall apply to all conventional arms within the following categories:[46]
> a. Battle tanks;
> b. Armoured combat vehicles;

'gifting' the Iraqi and Kurdish Regional governments £1.6 million of machine guns and ammunition to assist their fight against the Islamic State.

[44] See (n 40).

[45] See the analysis of the German government, produced by the Federal Foreign Office, 'Memorandum of the Federal Government on the Arms Trade Treaty', unofficial translation of 1 March 2014, at 6.

[46] The July 2012 text included the phrase 'at a minimum' at this precise point. This caused confusion and controversy, and was omitted from the final document.

c. Large-calibre Artillery systems;
d. Combat aircraft;
e. Attack helicopters;
f. Warships;
g. Missiles and missile launchers; and
h. Small Arms and Light Weapons.

The truncation of this list occurred during the July 2012 session; what emerged then is identical to ATT Article 2.1. As we have seen, the inclusion of SALW[47] was of fundamental importance to many African and CARICOM States, and it is doubtful that they would have signed the Treaty had SALW not come within its scope.

The eight categories in the final version have a clear origin: they are the seven found in the UN Register of Conventional Arms (UNROCA), with the addition of SALW.[48] The Register was established in 1991 and, reflecting the concerns of that era, is limited to heavy weaponry.[49] It also reflects the state of technology of a generation ago, even though weapons development has since progressed rapidly. This provenance contributes significantly to the major shortcomings of the list. Three may be identified, in order of rising importance:

1. Size

The most important and controversial issue here concerns hand grenades and mines (of any kind, though especially landmines.) The Nairobi Protocol, signed by 11 East and Central African States in 2004,[50] contains a comprehensive definition of 'small arms' which includes a sub-category of 'firearms' covering both grenades and mines. This is the definition used by NGOs in their teaching and campaigning.[51] However the UN definition, drawn from the 1997 Experts' Report,[52] is narrower in a crucial respect. The latter breaks down the 'weapons addressed' therein into three categories: small arms, light weapons and ammunition. It is only in the category of

[47] Category h of the final [2013] text, a combination of Categories h and i of the Chairman's Draft of 2011.

[48] In the Working Group discussions in the years preceding the 2012 Conference they become known as '7 + 1'.

[49] The UNROCA list may be found at <http://www.un-register.org/Background/Index.aspx>. As was pointed out in a valuable pamphlet produced by SAFERWORLD, the list was not compiled primarily for purposes of arms control. The aim was to increase public knowledge of the transfers of the sort of heavy weaponry that had been used in the First Gulf War, in hope of preventing secret and therefore destabilizing regional build-ups. See SAFERWORLD, 'The Arms Trade Treaty and Military Equipment' (2009) and also P Holtom, 'Nothing to Report: The Lost Promise of the UN Register of Conventional Arms' (2010) 31 Contemporary Security Policy 61.

[50] Nairobi Protocol for the Prevention, Control, and Reduction of SALW in the Great Lakes Region and the Horn of Africa (2004) art 1.

[51] eg in the SAFERWORLD Module designed for teaching diplomats, NGO workers and others about SALW: see <http://www.saferworld.org.uk/resources/view-resource/713-small-arms-and-light-weapons-control>.

[52] See (n 9).

ammunition that anti-tank and anti-personnel grenades, and landmines, appear.[53] It seems that an item unquestionably capable of causing death nonetheless had to be of a certain minimum size before the Experts would classify it as 'small arms' rather than 'ammunition'. The question of classification is of extreme practical importance because, as will be seen, SALW and ammunition are treated differently in the ATT;[54] thus exports of grenades and landmines are subject to lesser controls. The key point for the present analysis is that both interpretations of 'small' arms are more than plausible, and it would not be a clear violation of either letter or spirit of the Treaty for a State Party to adopt the narrower one in its implementation. Nor, since the Treaty does not create an authoritative organ of interpretation, is there any practical way to resolve the dispute. A less important example of the size exclusion is that boats such as those used by Special Forces for deployment would not be large enough to count as warships (Category F).[55] Weapons experts could doubtless cite other examples of light, mobile equipment that remains outside Article 2.1

2. *Purpose*

In place of all 'military' vehicles, helicopters, and aircraft, as Chairman Moritán had proposed, the Treaty covers only 'armoured', 'combat', and 'attack' versions of this equipment. The most obvious result is to exclude anything used for training. Since helicopters bought as training equipment can without great difficulty be refitted to engage in combat, this is a significant loophole, since helicopter gunships have featured prominently in attacks on civilians in conflicts like the drive for independence in East Timor. Excluding vehicles that are not 'armoured' allows transfers of transport vehicles, readily used to move troops to a battle area or to centres of political opposition where issues of human rights abuses readily arise, to remain unregulated and undocumented. And although drones and other planes capable of releasing bombs would count as 'combat' aircraft—the weapons would be used to attack human or physical targets—their increasingly common use as unarmed vehicles for the surveillance of target populations and the gathering of intelligence of all kinds, would fall outside the Treaty. This is a particularly acute example of the most serious weakness of the purpose limitation: it completely excludes whole classes of equipment whose impact, particularly on internal dissent, advances the repression and violence caused by actual weaponry. This is seen most clearly in relation to surveillance equipment.

[53] (Note 9), para 26(c)iv and v. 'Landmines' would appear to exclude naval mines, though that has not been an issue of much concern.

[54] See section IVB.4.

[55] Anything with a standard displacement of less than 500 metric tons is outside the definition of 'warship' in the UN Register.

https://doi.org/10.1017/S0020589315000202 Published online by Cambridge University Press

3. Omission of technology and equipment

The problem of the use by dictatorial regimes of various forms of sophisticated technology to track individuals and intercept communications came to the fore in relation to their use by governments like Tunisia, Egypt and Libya in relation to opposition movements during the 'Arab Spring'. The UK Committees on Arms Export Controls (CAEC), the parliamentary body which oversees UK arms exports, issued successive annual Reports which criticized the granting of UK export licences for surveillance equipment to Arab regimes.[56] Its Chairman, Conservative MP (and former Defence Minister) Sir John Stanley subsequently went further, arguing in interview that the UK Government must review the range of equipment requiring export licences, which have not been required for new technology that was not 'arms' in the strict sense. He was particularly concerned about their use by repressive regimes.[57] Shortly thereafter, the Wassenaar Arrangement, a group of 41 nations[58] founded in 1994 to control arms proliferation by establishing a list of recommended equipment that should require export approval by national authorities, held its annual meeting and added intrusion software and IP network surveillance systems to its list of regulated equipment.[59]

The CAEC and Wassenaar could speak and act in this manner because, unlike the ATT, their remit is not limited to a specified category of 'conventional arms'. Surveillance equipment, because it has both civilian and military uses, is classified as 'dual-use goods'. This makes possible, with varying degrees of difficulty, the conversion of originally, or ostensibly, civilian equipment to military use. UK readers may recall the so-called 'Arms to Iraq' scandal of the 1990s, which grew out of exports of dual-use machine tools to the Saddam regime, which quite effectively adapted them for military purposes.[60] Yet dual-use goods and technology have always been outside the intended scope of all proposed global regulation: a self-imposed limitation that has curtailed at the outset its ability to protect people and advance human security.

[56] The CAEC is a unique body in the UK Parliament, comprised of MPs drawn from four other related Standing Committees—Defence, Foreign Affairs, International Development and Business Innovation and Skills [ie Trade]—which monitors and reports on UK arms export policy and administration. The Report which most fully discussed the issue, HC 419, published 13 July 2012, is found at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmquad/419/41902.htm>. The subsequent Report, HC 205, published 17 July 2013, is most conveniently accessed at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmquad/205/205.pdf>.

[57] 'Trade in Spy Systems Must Be Reviewed Says Committee Chair', *Guardian* (London), 19 November 2013.

[58] The membership, reflecting its origins in the 1990s, is very US- and Euro-centric. South Africa has joined, but newer arms exporting States, most notably China but also Brazil, have not.

[59] For details, see the summary produced by the Stanford Law School Center for Internet and Society (15 January 2014) <http://cyberlaw.stanford.edu/publications/changes-export-control-arrangement-apply-computer-exploits-and-more>. It should be noted that the UK, like all EU Member States, regulates the export of dual-use goods pursuant to Reg 428/2009, [2009] OJ L 134/1 (Dual-Use Regulation). The categories of controlled *materiel* are periodically updated, mostly recently in 2012.

[60] See the material cited in (n 14).

The limitation of the ATT to specified categories of 'conventional arms' plainly fails to cover surveillance equipment. At present this is perhaps its most serious omission of scope, but looking towards the future, greater ones can be identified. Technology *per se* is outside the Treaty entirely. As has been seen, Chairman Moritán was at least partly aware of the problem, and included some technology in his list of matters to come within its scope. However, that proposal was quashed at a very early stage, and Category L vanished from all subsequent drafts. There was some support for its reinstatement in the March 2013 negotiations, notably from the CARICOM States, but it was not a high-profile issue, no other significant States or groups took it up, and the matter was dropped.

In the result all guidance systems for weapons unquestionably coming under the ATT, eg submarines and combat aircraft, are now excluded. And on the near horizon, if not indeed already with us, technology for cyberwarfare—in which the technology is itself the weapon—and—on a further horizon—autonomous weapons (AW), fall wholly outside it as well. Inevitably with any Treaty, or indeed any form of legal regulation, there is always the likelihood that technological change will make some of its categories outmoded. However, technological development moves particularly rapidly in the military field, and since amendments cannot be proposed until at the earliest six years after the Treaty comes into force,[61] there is the likelihood—it is more than possibility—that possession of internationally uncontrolled items may proliferate in this decade. The one practical restriction is that much of the cyber and AW technology is classified as highly secret by governments which possess them, so no 'transfers' will take place for reasons of strict national self-interest. But this point does not apply to surveillance equipment, and the need to go beyond the current definition of 'conventional arms' is inescapable if the Treaty's stated concerns about human rights[62] are to be given practical effect.

4. The Ammunition Controversy

The matters canvassed in the preceding analysis were not however the focus of controversy over scope. Perhaps the single most contentious issue in the entire negotiations was whether ammunition would come within the definition of scope in Article 2.[63] Its appearance in the Chairman's July 2011 Paper was as close as it came to inclusion. Yet the overwhelming number of States participating in both Conferences were strongly, in many cases fervently, in favour. On the opening day of the March 2013 meeting, Mexico delivered a

[61] ATT art 20.1.

[62] Stated repeatedly: in the Preamble and the Principles in the chapeau, and in art 7.1.ii.

[63] The treatment of parts and components of conventional arms was debated and determined alongside ammunition; the latter however was the focus of the bitter controversy. Therefore all discussion of the former in this article applies equally to parts and components.

https://doi.org/10.1017/S0020589315000202 Published online by Cambridge University Press

Joint Statement on behalf of 108 States which, in advocating strengthening the Treaty in four key aspects, identified the addition of ammunition as one of them. During the second day, which focussed on issues of scope, Ghana spoke for 69 States—including all the African States which had suffered most from low-technology but high-lethality violence—in a Joint Statement reiterating the necessity for its inclusion. A clear majority of participating States—the CARICOM States, most of Latin America and most members of the EU,[64] consistently took this position. However, they encountered unmoving opposition from Russia, China, India, and Malaysia, but most vocally from the USA, supported by one or two of its allies.[65] Its stance was the target of the greatest anger by proponents of a stronger Treaty but in public relations terms, criticism of the other opponents was deflected as they took shelter under the US umbrella. As so often happens in major international negotiations, the US position prevailed, though only in part. Given the decision very early in the negotiating process to proceed by consensus, some compromise was inevitable.

At first blush, exclusion of ammunition whilst including the weapons that fire it seems absurd. Guns do not kill; bullets do.[66] The United States' stance, though obviously adopted with one eye to domestic politics, was not however wholly irrational. The number of guns in *civilian* ownership in the United States is approximately equivalent to the total population: slightly greater than 300,000,000.[67] The result is that domestic manufacturers cannot supply an apparently insatiable demand for ammunition, so that in 2012 the USA imported approximately two and one quarter *billion* cartridges and shotgun shells.[68] If domestic sources had been sufficient, this would not be an issue for the ATT but as it is, the Treaty's requirements of record-keeping—and proposals for provisions on marking and tracing[69] that were not accepted for inclusion—would have been a significant burden on the government of the world's largest importer.[70] Moreover to comply conscientiously with keeping

[64] As well as the EU itself, which had separate representation and participated fully.

[65] And also Syria and the Sudan, not the most sought-after supporters.

[66] A Ghanaian diplomat described the treatment of ammunition as including the football player but not the ball.

[67] This figure does not include any hardware held by the armed forces or police. Its source is a Report prepared by the Congressional Research Service, 'Gun Control Legislation' (14 November 2012) 8.

[68] These figures, drawn from US Department of Commerce data, appeared in an online commentary from a conservative political website: M Bastasch, 'Foreign Ammo Imports doubled in 2013 to meet exploding US demand', *The Daily Caller*, 8 May 2013. Though the publishers are a political group opposed to gun control, the article was not concerned with public policy, but rather with the scarcity of ammunition for United States gun owners.

[69] 'Marking' requires manufacturers of weapons to imprint their name, country and an identifying numeric code on each weapon. The purpose is to facilitate 'tracing'—discovering the route by which weapons found in conflict zones arrived there, which often means following a trail of diversion from the nominal initial purchaser.

[70] The weight of the burden can be exaggerated. The record-keeping requirements of art 12 are more demanding with respect to exports—'Each State Party shall maintain national records … of its

records of all ammunition imports would necessitate vastly expanding requirements of registration and reporting for thousands of importers and dealers throughout the USA—raising precisely the kind of domestic political storm that the Obama Administration, having moved some way from its predecessor's intense hostility to the whole enterprise, was determined to avoid. Hence its list of 'Key Redlines' stated bluntly 'There will be no requirement for reporting on or marking and tracing of ammunition or explosives.'[71]

A related issue is that diversion, always a significant problem in relation to arms transactions, is even harder to control with respect to ammunition than to SALW, the smallest category of weaponry included. Insofar as United States importers can, under state or federal law, resell items they have received, they are no longer the end user and therefore the resale becomes, under the general understanding of the term, a form of diversion.[72] The Treaty's provision on controlling diversion[73] would therefore mandate government tracking of the final destination of all imported ammunition—again, a measure guaranteed to cause enormous political furore.[74] Some sort of compromise was essential if the USA was not to walk away from the Treaty entirely,[75] and the result is somewhat better than might have been expected.

(a) Resolving the Controversy: the treatment of ammunition[76]

Ammunition has its dedicated provision, Article 3, which enjoins each State Party to regulate its export by means of a national control system and—vitally—to 'apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions'. This means that the central elements of the Treaty, laying down rules and criteria for the authorization of the export of conventional arms, apply to ammunition *to precisely the same extent*. So does Article 5.5, part of the requirement of 'General Implementation', which mandates establishing 'an effective and transparent national control system' to

issuance of export authorizations or its actual exports' (art 12.1) whereas State Party importers are only 'encouraged' to keep records on conventional arms transferred to its territory or trans-shipped across it (art 12.2) emphasis added. This appears to give great leeway with respect to both the enactment and specific measures of compliance.

[71] See (n 40).

[72] The Treaty does not contain a definitional section, so the commonly accepted meaning of the term must apply. Diversion is understood to mean that the initial purchaser does not have permanent possession of the item, which is transferred to a third party.

[73] ATT art 11.

[74] The United States negotiators laid particular emphasis on the practical difficulties of monitoring the end use of ammunition exports. See the remarks reported at <http://www.armscontrol.org/act/2012_05/Hurdles_for_Arms_Trade_Treaty_Underscored>.

[75] There has never been any serious likelihood that the constitutional requirement that two-thirds of the Senate would approval ratification of the Treaty; the major question has always been whether the US would even sign it. This it did in September 2013.

[76] Parts and components of weaponry are treated identically to ammunition throughout the Treaty, though initially mentioned separately in art 4. Therefore everything stated herein about ammunition applies across the board to parts and components, which will not be mentioned further.

https://doi.org/10.1017/S0020589315000202 Published online by Cambridge University Press

encompass equally the transfer of conventional arms and of ammunition. The compromise—clearly designed to satisfy the USA—is that the Articles 8–15 concerning imports, brokering, diversion and record-keeping, apply only to 'conventional arms' but exclude ammunition. The majority of participating States were left disappointed, but the key issue is to judge the practical importance of these exclusions.

As will be seen, Articles 6 and 7 are core provisions of the Treaty, imposing absolute prohibitions on certain exports, and the obligation to make certain judgements in other circumstances where the equipment will be put to unacceptable uses. Ammunition is unquestionably encompassed within them. The exclusions apply most importantly to *imports*,[77] and their effect is tempered by the possibility of voluntary cooperation and the fact that the Treaty provisions are only a baseline. This is made clear in the Preamble: '*Emphasizing* that nothing in this Treaty prevents States from maintaining and adopting additional effective measures to further the object and purpose of this Treaty'[78]—which allows exporters to apply their own, more rigorous, rules. Many do: the EU Common Position, for example, applies to equipment appearing on its Military List, which specifically includes ammunition along with arms.[79] Those States genuinely concerned about effective Treaty implementation may, for example, provide importers with information about license they have approved, and maintain and share records of all exports, including those of ammunition. Assistance of this kind would not threaten important interests, for ammunition is not a high-value item and its production is not of significant economic importance.

V. ARTICLE 2: A BRIEF EVALUATION

The treatment of ammunition certainly falls short of what the majority of States wanted. It introduces potential loopholes, and handicaps fully effective controls on the traffic. However, the most important substantive duties created by the Treaty do apply to it; and it may be that less has been sacrificed than has been feared. The refusal to include training and transport equipment such as helicopters that are readily used for military or repressive purposes is a serious defect. So too is the failure to include surveillance equipment and weapons technology within the scope of the Treaty. The former are increasingly a part of the arsenal of police and 'security' agencies of repressive States, used to track and find dissenters so as to disrupt their

[77] Ammunition is also excluded from the rather weak provision on brokering, found in art 10, which adjures States Party to regulate brokering but leaves specific measures entirely to their discretion. The importance of this exclusion is unclear, since the weapons that fire the ammunition remain fully covered. (The same is true of art 9 on transit and trans-shipment). This merely illustrates the strange compromise that the Treaty negotiations produced.

[78] Preamble, para 12, original italics.

[79] Common Military List of the European Union, [2011] OJ C86, ML 3.

activities and immobilize their effectiveness. The latter, increasingly sophisticated and complex, provides the basis of weapons present and future that are likely to be used in ways and for purposes that the Treaty seeks to prevent.

VI. THE SUBSTANTIVE OBLIGATIONS IMPOSED ON STATES

The crux of the Treaty is found in the obligations it imposes on exporting States. These are subject to a sharp division: those that are peremptory, expressed as prohibitions, in Article 6, and those which require judgement or 'assessment', leaving great scope for political and/or administrative discretion, found in Article 7. These will be explored in sequence. It is worth reiterating that both apply as fully to ammunition and components, as to 'conventional arms'.

A. Prohibitions

There are three of these in Article 6. The first forbids authorization of transfers that would violate measures adopted by the UN Security Council acting under Chapter VII, 'in particular arms embargoes' (Article 6.1.). The latter have of course been adopted with increasing frequency over the past two decades, usually though not always unanimously. The new provision would forbid transfers by any State even though it voted against or (if one of the P5) abstained in the vote. Whether the result will affect the likelihood of any of the P5 vetoing a proposed embargo is academic at present: it would require that Russia and China, in particular, sign the Treaty, which they have given no indication of doing, at least in the near future. Should that change, however, the issue will inevitably arise.

Secondly, Article 6.2 bars authorization of any transfer that would violate 'its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms'. Beneath this rather anodyne phrasing lies an interpretive complexity: the violation must relate to international *agreements*, specifically entered into by a State. This would exclude customary international law, including peremptory norms. That lacuna is at least in part closed later in Article 6, in a manner discussed below.[80] It would also exclude, plainly, international instruments which a State has chosen not to sign or otherwise adhere to. The instrument most relevant to arms transfers is the Firearms Protocol, a supplement to the UN Convention against Transnational Organised Crime.[81] This is primarily concerned with preventing criminals

[80] See further below in this section, discussing prohibitions relating to genocide and crimes and against humanity. These are now regarded as part of customary international law, as their inclusion among the offences in the Rome Statute on the ICC indicates.

[81] The text may be found at <https://treaties.un.org/doc/source/RecentTexts/18-12_c_E.pdf>.

https://doi.org/10.1017/S0020589315000202 Published online by Cambridge University Press

from obtaining weapons illegally and, as its title suggests, its scope is limited to firearms. Moreover some of the major firearms manufacturing States—notably the USA, Russia, France, and Ukraine—have refused to sign at all. And of those which have, China, India, and the great majority of the EU States, including Germany and the UK, have never ratified it.[82] Thus one of the few apparently relevant global instruments, itself of quite limited scope, will not ground an obligation to prohibit transfers under the ATT for most key States. However, this paragraph clearly comprehends regional agreements, such as the Nairobi Protocol quoted earlier; similar agreements exist in other regions.[83] Moreover, it remains for each State to determine what it considers 'relevant', so that UN instruments relating to controls on SALWs which are not, strictly speaking, 'agreements'[84] could be used to guide domestic law or policy. So too could human rights obligations or those under the Rome Statute.[85]

Third and most controversially, Article 6.3 forbids transfers by a State Party

> if it *1) has knowledge 2) at the time of the authorization* that the arms or item would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party (emphasis and numbering added)

There are several issues within this, and notwithstanding the critique to be presented, it is unquestionably true that the present form of Article 6.3 is a distinct improvement over its equivalent (Article 3.3) in the 2012 version.[86]

The least satisfactory element is that found in the italicized language: the requirement of contemporaneous knowledge that the equipment would be used for the specified purposes. The commentary to the ILC's Articles on

[82] The list of signatories and adherents to the Protocol may be found at <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-firearmsprotocol.html>. This overwhelming lack of adherence makes it appropriate to describe the ATT as the first truly global attempt at conventional arms trade control, but the Protocol has served as a useful stepping stone.

[83] eg the Kinshasa Protocol on SALW, agreed by 11 States of central Africa and opened for signature in November 2010 but not yet in force, closely tracks the text of the Nairobi Protocol. A more limited instrument exists for the Western Hemisphere: 33 States have signed the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, which came into force in 1998. As the title suggests, it does not cover SALW, but does cover ammunition, [and, surprisingly, the USA is a Party]. The text of these instruments may be found on the website of the UN Office for Disarmament Affairs, <http://www.un.org/disarmament/HomePage/treaty/treaties.shtml>.

[84] Two are mentioned explicitly in the Preamble, para 8: the UN Programme of Action against 'illicit' trade in SALW, adopted in 2001, and the International Instrument adopted by the General Assembly 8 December 2005 to facilitate tracing illicit SALW.

[85] See the statements cited in Geneva Academy of International Humanitarian Law and Human Rights, Academy Briefing No 3 (May 2013) 24.

[86] The sole prohibited transfers under art 3.3 were those 'for the purpose of facilitating' enumerated major violations. This would have in effect required that the supplier of equipment be an active accomplice, and would have had made the ban virtually inapplicable.

State Responsibility[87] discusses the complexities of attribution and concludes —inevitably but not very helpfully—that whether attribution is 'subjective' or 'objective' must depend on the particular circumstances. In criminal law, the knowledge or *scienter* issue is always informed by the realization that a purely subjective test would permit ignorance, wilful or inadvertent, to be the escape route from liability.[88] The problem is often addressed by a formulation such as D 'knows or ought to have known' or 'knows or has reasonable cause to believe'.[89] This introduces an element of objective or external judgement, but is not an excessively demanding standard. Given that the Treaty does not impose any penalties, let alone criminal sanctions, an objective standard, rather than one based on intent or requiring demonstration of actual knowledge, would have been more appropriate. In this context there is no question of liability for negligence: the goal is to put States under a duty to inquire diligently about what uses weapons made on their soil are likely to be put.

A formulation such as 'knows or has reasonable cause to believe' is not excessively rigorous and would have been preferable.[90] Virtually all States devote considerable resources to obtaining foreign intelligence, if only from open source material, and the larger and wealthier ones, which includes almost all significant exporters, have dedicated agencies for this purpose. It would have been more than reasonable to impose upon them some responsibility to be aware of violent conflict in States or areas to which approval of a sale of is requested, and to insist that they take some steps to satisfy themselves that the transfer would not contribute to grave evils. An additional serious shortcoming is that the danger has to be direct and immediate: 'at the time of the authorization the arms or items *would* be used'. This literally means that so long as the recipient is not clearly about to commit some great atrocity, the prohibition can be avoided, even if the recipient's intention is clear and the capacity is being built up. This point seems to have got lost in the more intense debate at both Conference sessions about the

[87] International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentary, <http://legal.un.org/ilc/texts/9_6.htm>; Commentary to Article 2, 34–5.

[88] The Rome Statute on the ICC does not avoid this problem. Its treatment of the 'mental element' in art 30.3 defines knowledge as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'. 'Awareness' implies a subjective test. The decision of Pre-Trial Chamber I in the *Lubanga Case*, 29 January 2007, merely adds to the complexity and confusion.

[89] To take, of many possible examples, a regional, European one: Directive 2003/6/EC on insider dealing and market manipulation (market abuse), OJ L 96/16, 12 April 2003, art 4, requires that Member States enact legislation incorporating this standard.

[90] A more rigorous formulation would be 'that there is a reasonable likelihood' that the weapons would be used for the various unlawful purposes. Both would embody an objective test, but 'likelihood' rather than 'cause to believe' would compel officials deciding whether to impose a ban to scrutinize more intensively the situation(s) in which the purchaser would find the equipment useful in the short or medium term.

degree of awareness to be required,[91] but it is a major hole in what should be the heart of the Treaty. The ban should have been expressed in terms of looking to the future, and to require judgement to the standard of insisting that such use be highly improbable.

Such judgement would be based on information available at the time of authorization. There is no mention of a Party's obligation when information indicating possible misuse is obtained thereafter. At present, it is common practice for export authorizations to be suspended or revoked in light of developments. Thus EU Ministers meet in response to various crises to decide whether they merit revocation of licences by Member States; and to take one national example, from January 2012 until mid-2014 the UK suspended 209 licences for export to 17 countries, and revoked 109 licences to three more, all in response to changed circumstances relating to internal repression.[92] In relation to the less severe restrictions in Article 7 governing 'assessments' (discussed below), this issue is specifically addressed. Where an exporter 'becomes aware of new relevant information it is encouraged to reassess the authorization', though it may consult with the importing State before taking the decision.[93] Strangely, in Article 6 cases where the most serious concerns exist—strong enough to justify an outright ban—the point is not addressed at all. There is no apparent reason of policy to explain the omission, which is clearly at odds with the objects and entire structure of the Treaty. This can most sensibly be regarded as a drafting oversight, perhaps based on the assumption that regular practice made it unnecessary; one can only hope it is not exploited.

The evils singled out in Article 6.3 for particular avoidance are reasonably well defined and understood. Genocide is addressed in the Convention of 1948.[94] 'Crimes against humanity', first given legal expression at the Nuremburg Trials, has been part of the jurisdiction of several *ad hoc* International Criminal Tribunals,[95] and is defined in great detail in the Rome Statute of the International Criminal Court.[96] Its inclusion ensures that severe brutality against a State's own citizens comes within the prohibited sphere. 'Grave breaches' of the 1949 Geneva Conventions are defined at several points within those Conventions.[97] Particularly valuable is the specific mention of attacks directed against protected civilians and civilian objects.

[91] The discussion was cast in terms of knowledge *versus* intent, and the present language is an advance on the 'for the purpose of' formulation that appeared in the first draft (see n 91 above), but with the focus on this issue the ambiguities of simple 'knowledge' were not considered.

[92] House of Commons [UK], Committees on Armed Export Controls, First Report, 'Scrutiny of Arms Exports and Arms Controls (2014) para 167, available at <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmquad/186/18605.htm#note3>.

[93] ATT art 7.7.

[94] Convention on the Prevention and Punishment of the Crime of Genocide 1948.

[95] eg the International Criminal Tribunal for the Former Yugoslavia (ICTY).

[96] ICC Statute, art 7(1).

[97] These are itemized on the ICRC website: <www.icrc.org/eng/resources/documents/misc/5zmgf9.htm>.

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Whilst Common Article 3 of the 1949 Conventions does offer some protections to civilians in cases of non-international armed conflicts, these are supplemented considerably by Additional Protocol II of 1977. Thus the Treaty absolutely prohibits all transfers, to governments or non-State actors, which have attacked civilians or civilian objects (eg schools, refugee camps) in civil wars or other internal conflicts. This is a major advance for international law. And the expanded definitions of what are considered protected civilians and civilian objects in international armed conflicts, found in Additional Protocol I, are now reinforced and enforced via the ATT, in that exporters are banned from transferring weapons to States which do not respect them. Yet since the contours and content of those definitions have proven extraordinarily controversial, States which reject the ICRC's interpretation of those who may legitimately be targeted (and therefore should not be regarded as 'civilians' for this purpose) will presumably also construe their Treaty obligations accordingly.[98]

Finally, the 'sweeper up' category of other war crimes is a clear allusion to Article 8 of the ICC Statute, which contains an exhaustive definition of war crimes. However, a State implementing the ATT need only take account of war crimes defined in 'international instruments to which it is a party', which means that the very large number of important States which have either not signed or ratified the Rome Statute—a list which includes, China, Egypt, India, Israel, Pakistan, Russia, the USA and virtually every Arab State—need not do so. A fortiori this would apply to Article 8 *bis*, the newly added crime of aggression which has even fewer adherents.

B. Export Assessment under Article 7

The prohibitions are welcome, but much more frequent will be decisions where the actions engaged in by the prospective purchaser are less obviously repugnant. The Treaty commands a two-stage process of decision for approval of exports. The first is determination of whether any of the Article 6 prohibitions apply. If they do not, a more complex and rather malleable set of factors set out in Article 7 are to be applied. Unlike the judgements under Article 6, these are expressed in terms of balance or overall 'assessment'.[99] This leaves wide latitude for decisions based on political, economic and other factors that are irrelevant, and may well be contrary, to the objects and purposes of the Treaty.

Even before these factors are considered, exporters are enjoined to apply them in 'an objective and non-discriminatory manner'. This phrase appears

[98] The United States and Israel, in particular, have not signed the 1977 Additional Protocols, and have stated that they reject the ICRC interpretation of civilian status and do not regard the Additional Protocols as an accurate statement of customary international law. Their understanding of civilian status is much narrower. (Other non-signatories include India, Pakistan and Sri Lanka.)

[99] The main provisions of art 7.1 are reproduced in (n 111).

no less than three times in the Treaty,[100] which emphasizes both its importance and its contentiousness. Many of the States which were severely critical of the Treaty were most scathing about its failure to curb the ability of exporters to apply its restrictions selectively—to favour their friends, allies or good customers by applying criteria sufficiently 'open textured' to allow biased decisions whilst ostensibly applying it in good faith. This aspect above all—aggravated by the absence of a definitional Article or the creation of an interpretative organ under the Treaty—was cited by States like India in their stern critique of what they termed 'an exporter's Treaty'.[101]

This is a fundamental issue, and one that may be impossible to resolve. An analogous instance is the working of the EU Common Position on arms exports, which goes considerably beyond the ATT—it contains a greater number of Criteria and requires a higher level of confidence that they have been satisfied before exports are supposed to be approved. Nonetheless the actual application has been criticized in a comprehensive empirical study prepared for the European Commission, which found that large, economically lucrative deals had been approved even as lesser-value sales were rejected under the Criteria, and also revealed significant variations in assessments of particular risks.[102] The United States system of export controls is even more open-ended in this respect, as it permits Presidential 'waiver' when a proposed sale would fall foul of the statutory standards. This has permitted repeated sales to Egypt, Israel, Saudi Arabia and other States which, in terms of those standards, should not be eligible.[103] Importing States are quite right to fear they might be denied access to certain equipment on a given ground, eg human rights, when transfers to other States with equally bad records are approved. From this viewpoint, it is noteworthy that the EU Common Position, drafted from the perspective of exporting States, fails to mention any principle of non-discrimination.

Without a central administrative enforcement authority or a tribunal to review decisions, elimination of discrimination—political, economic, ethnic or other grounds—is not a serious possibility. There was never any chance, in a

[100] In the list of Principles in the Chapeau; in art 5.1, entitled 'General Implementation' where it is the first listed requirement, and in the beginning of art 7.

[101] See the statements of participating States in the General Assembly when the Treaty was approved on 2 April 2013, cited in (n 30). Approximately a dozen States expressed this position in various ways.

[102] Vranckx (n 12). An earlier study, M Bromley and M Brozska, 'Towards a Common, Restrictive EU Arms Export Policy?' (2008) 13 EFARev 333, found significant variations between EU Member States, under the broadly similar EU Criteria then in force.

[103] An example involving severe human rights violations occurred in 2012. The Child Soldiers Prevention Act of 2008 prohibits the sale of arms to States that victimize children in this way. However, if the President determines that it is in US 'national interest' to continue to equip those States, Section 404(a) of that Act allows him to 'waive' the ban by issuing a 'Presidential Determination'. President Obama issued such an Order with respect to Libya, South Sudan, and Yemen on 28 September 2012, which took the form of a Memorandum for the Secretary of State to submit to Congress. Accessible at <https://www.whitehouse.gov/the-press-office/2012/09/28/presidential-memorandum-presidential-determination-respect-child-soldier>.

Treaty already breaking new ground, that States would agree to the limitations of sovereignty required to establish institutions of that kind. Indeed the last of the US 'Redlines' was that '[t]here will be no mandate for an international body to enforce an ATT',[104] and in this respect the USA was merely being more open and blunt in stating a widely shared view. Only publicity and widespread campaigning against particular sales can stop exporters ignoring the Treaty's standards; though these are weaker than already exist in Europe and the USA, invocation of the ATT will serve as another arrow in campaigners' quiver. However—this, of course, is a more general point—in those exporting States currently lacking equivalent rules, demands for consistent application of ATT standards can serve as a rallying point.

1. The assessment

What exporters are supposed to do without discrimination is 'assess the potential' that the weaponry 'would contribute to or undermine international peace and security' (Article 7.1(a)), or 'could be used to commit or facilitate' any of the four enumerated things (Article 7.1(b)).[105] The language of 'potential' alerts one to the reality that the decision is one of prediction, of judgement about likely effect. It will be convenient to consider the sub-sections separately.

a) Article 7.1(a)

The maintenance of international peace and security (IPS) is the first of the Purposes listed in Article 1 of the Charter of the United Nations. It goes on to state that this is to be done by 'tak[ing] collective measures for the prevention and removal of threats to peace, and for suppression of acts of aggression'. The manifest failure of the UN machinery to achieve IPS, or to develop the means and the stature to exert important influence in this direction independently of the P5 and above all of the USA, has ensured that States continue to look to their

[104] See (n 40).

[105] The key provisions of art 7.1 read, in relevant part, as follows:

> If the export is not prohibited under Article 6, [exporting States] prior to authorization of the export of [conventional arms or ammunition] shall, in an objective and non-discriminatory manner, taking into account relevant factors … assess the potential that the [equipment]
>
> (a) would contribute to or undermine peace and security;
> (b) could be used to [commit or facilitate the following acts]:
> (i) a serious violation of international humanitarian law;
> (ii) a serious violation of international human rights law;
> (iii) an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
> (iv) an act constituting an offence under international conventions or protocols relating to [TOC] to which the exporting State is a Party.

own arsenals and alliances for protection. The notion that a 'balance of terror' kept the peace between the USA and USSR during the Cold War stimulated the idea that if hostile States could be equally well armed, actual warfare might not break out. Thus arms sales have repeatedly been justified by the argument that they are necessary to enable one's ally to match the capabilities of its potential enemy, thus deterring aggression. Examples are too numerous to require exhaustive mention.[106] Empirically, as suggested earlier there is little evidence either to establish or refute the proposition that equality of armament prevents war. But in the mouths of arms sellers it is so obviously self-interested that it should instinctively be discounted. This point merits strong emphasis, because whether the transfer of arms 'would contribute to or undermine peace and security (P&S)' is the first criterion that Article 7 directs exporters to apply. The idea that supplying arms would *contribute* to P&S is so obviously a convenient get-out for any State seeking political influence or economic gain that its inclusion in the Treaty, without significant debate,[107] is simply bizarre. The only slight mitigation is that 'would' suggests something more definite, or with higher likelihood, than 'could' (the verb used in the remainder of Article 7.1), so a higher threshold has been set for any State wishing to invoke this justification. However, and even giving due recognition to the 'inherent right of self-defence' enjoyed by all States, along with the right to arm themselves for that purpose,[108] the width of this potential loophole makes this a dangerous provision which should have been resisted. Half of it should in any case be unnecessary: if an exporter believes a transfer would *undermine* P&S, approval would never be justified, if even lip service is to be given to the responsibilities of UN membership. Indeed there is a strong argument that this possible consequence should have been included among the prohibitions found in Article 6.

b) Article 7.1(b)

The four consequences to be assessed under Article 7.1(b) have been set out above. The two that stir the greatest controversy are the potential that the weapons 'could be used' to commit or facilitate a 'serious violation' of international humanitarian law (IHL) or of international human rights law (IHRL). The reference to IHRL[109] is particularly welcome in light of the use of imported weapons for repression of dissent by authoritarian governments.

[106] Israel (in relation to Arab States), Saudi Arabia (v Iran), Pakistan (v India), India (v China) are but a few, which refer to US arms sales. In most cases Russia and other arms suppliers have offered precisely the same justification for sales to other side.

[107] It appeared in art 4.1 of the 2012 Draft and remained throughout, with no reported attempt by any State to remove or alter it.

[108] Recognized in art 51 of the Charter, cited in Principle 1 of the Treaty; Principle 8 recognizes the right to acquire conventional arms for that purpose and for peacekeeping operations.

[109] Which at a minimum must include the International Covenant on Civil and Political Rights, 1966 and the Torture Convention, 1984. More controversial applications might include the

Taken seriously it would bar sales to virtually every Arab State. Inclusion of IHL is also a potential flashpoint, calling into serious question sales to Israel in light of its response to Hamas rockets in July 2014.[110] These highly contentious examples show both the radical implications of requiring exporters to assess these issues, and also the political difficulty, and perhaps unreality, of expecting rigorous application.

c) The 'balancing' process

Having considered these possible 'risks', the exporter should then consider whether there are 'measures' that could 'mitigate' them, 'such as confidence-building measures' or joint programmes agreed with the importing State.[111] This was not a controversial paragraph, and received little discussion in either Session. Example of risk mitigation measures that have been suggested[112] include insisting that end-user certificates require that re-export is forbidden without approval of the exporting State's authorities; capacity-building measures could include demonstrable improvements in physical security and management of stockpiles of the imported weaponry. It seems sensible to allow exporters to take into account of genuine efforts by the importer to curb some of the abuses the Treaty is designed to address, though confidence-building measures may well take considerable time to produce demonstrable results. But what should *not* be counted as an acceptable measure of 'confidence building' is a generalized improvement in diplomatic relations. An example of the dangers is the case of Gaddafi's Libya, which after genuinely renouncing attempts to build up a nuclear weapons capability in 2004, was able to purchase large amounts of conventional weapons from a range of European States. Whilst Libya may have become less aggressive towards some of its neighbours, the regime continued to torture and supress internal political opposition, and it was only by ignoring the existing EU Criteria and invoking the value of better relations could Member States approve arms sales.[113]

Having assessed the potential for evil effects and considered 'available mitigating measures', the fundamental decision must be taken: Article 7.3

Conventions on the Elimination of all Forms of Racial Discrimination, 1966, and of Discrimination against Women, 1979.

[110] The UN High Commissioner for Human Rights, Navi Pillay, a former South African Supreme Court Judge, stated in a Council Debate of 23 July 2014 that in its failure to protect Gaza civilians, the Israel response to Hamas 'indiscriminate attacks' may have violated IHL in a manner that could amount to war crimes: <http://www.bbc.co.uk/news/world-middle-east-28437626>. The Gaza civilian death toll increased greatly in the ensuing weeks.

[111] Art. 7.2, which reads as follows: 'The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1 (see n 111), such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.'

[112] Both suggestions are offered in the Geneva Academy Briefing; see (n 87) 29.

[113] For details, see Lustgarten (n 12) 534–5.

https://doi.org/10.1017/S0020589315000202 Published online by Cambridge University Press

commands that if the exporting State 'determines that there is an *overriding risk* of any of [those] negative consequences, it *shall not* authorise the export' (emphases added).[114] The essential language is 'overriding risk', and it was perhaps the most intensely debated phrase throughout the entire negotiations.

The crux of the debate was over the degree of *probability* required before a transfer should be prohibited. It was not, or at any right should not have been understood to be, about the *gravity* of result: that is addressed in Article 7.1, especially a 'serious' breach of IHL or IHRL. If the likelihood—'could' is the word used—is not sufficiently reduced by various possible mitigating measures, then the transfer should be forbidden. An 'overriding risk'[115] that this will occur would mean that, even with mitigation, there is a very high likelihood that one of the evil effects will ensue. Most States considered this threshold to be too high. Over two days numerous States[116] argued for an alteration to 'significant' risk. They were opposed strenuously by the USA, which received very little vocal support.[117] Russia and China were conspicuously silent. In the end the Americans, who apparently dug in their heels, once again prevailed. This sends entirely the wrong message to States now embarking on establishing domestic standards for export controls. 'Overriding risk' makes it far too easy for a State to approve a transfer whilst claiming compliance with the Treaty because the risk of some evil, though undeniably present, is not of the great magnitude required.

VII. THE SPECIAL CASE

Having established requirements and conditions for forbidding transfers in Articles 6 and 7.1–7.3, the Treaty then adds a paragraph highlighting an issue of particular concern. This requires exporters, when making their assessment under the preceding paragraphs, to 'take into account' the 'risk'—there is no qualifying adjective—of the weapons 'being used to commit or facilitate serious acts of gender-based violence (GBV) or serious acts of violence against women and children'. This provision, Article 7.4, is very welcome, since whilst women and children are in all but the rarest instances non-combatants,[118] their inability to protect themselves has made them the overwhelming majority of forcibly displaced persons and refugees from conflict zones.[119] There was an

[114] The full text of art 7.3 reads as follows: 'If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1 [ie, art 7.1], the exporting State Party shall not authorize [sic] the export'.

[115] The French text uses '*preponderant*'.

[116] These included some significant exporters like Germany and UK, and the EU itself.

[117] The Philippines followed in the US wake, on this as on most issues.

[118] The exception is that case of child soldiers, coerced into fighting for various paramilitary bodies. This practice of forced conscription, a severe human rights violation, should itself be regarded as violence against children.

[119] They amount to about 70 per cent of all those the UNHCR regards as 'persons of concern'. This figure may be calculated from a recent Report: UNHCR, *Global Trends 2011* (2012) 3.

extended debate about whether the phrase 'violence against women and children' or 'GBV' should be used. Fortunately both were included, which should remove any doubts, both that sexual violence is covered, and that it encompasses attacks on persons of either gender.

What is less satisfactory is that exporters are only required to 'take account' of the possibility of this kind of violence. There is no guidance as to the weight to be given to that prospect. It clearly means something stronger than the wording of the July 2012 text, which would only have required exporters to 'consider taking feasible measures' to avoid that possible use.[120] This upgrade should reinforce the importance of the consideration of serious violations of IHRL already required by Article 7.1.(a)—it would require prohibiting the export of weapons where there existed a reasonable possibility soldiers equipped with them might commit GBV. That at any rate is a defensible, if optimistic, reading of the effect of paragraph 4.

Numerous States attempted to include other considerations in paragraph 4. The July 2012 version also addressed 'corrupt practices' and 'adversely impacting the development of the importing State'—references to the corruption and sustainable development issues discussed earlier. These too would have been subject only to the weaker duty to consider taking feasible measures. Yet even that proved too much for other States. Sustainable development in particular aroused intense opposition.[121] Although Costa Rica on behalf of 41 States delivered a joint statement calling for strong development criteria, that was forcefully opposed by several 'big hitters', most notably all four BRIC States. Opponents claimed that refusal of export authorization on grounds that the expenditure would involve a greater cost than the purchaser's economic condition and development needs could sustain, is a form of contemporary 'neo-colonialism'.

This contention is not truly sustainable. For one thing, whilst it achieved strong support from EU Member States, the majority of States supporting the Costa Rican initiative were of the Global South: several ECOWAS members, several East Africa States, Bangladesh, and some smaller Latin American and Pacific Island States. And for those European States, the proposal embodied the very opposite of colonialism, neo- or otherwise, for acceptance would have involved no possible economic or political gains, and very possibly short-term losses of both kinds. The 'interference' in States' sovereignty that opponents so severely attacked would have been felt only by authoritarian regimes determined to shore up their rule by force. However, the extensive opposition forced the proposal off the table; and the proposed inclusion of corruption, which had even less vocal support, quietly followed it.

[120] The former art 4.6.

[121] For an illustration of how a sustainable development criterion might be implemented, see Oxfam, *Practical Guide: Applying Sustainable Development of Arms-Transfer Decisions* (Oxfam International Technical Brief April 2009).

VIII. CONCLUSION

The Arms Trade Treaty was the product of diplomatic negotiation, the first effort at agreeing legal restrictions on the transfer of conventional arms in the post-1945 era.[122] Its achievements and failings, as detailed in this article, are the result of the compromises inevitable in normal multilateral negotiations which require unanimous approval to achieve a result. It would certainly have been possible to have produced a much stronger Treaty which would have commanded a clear majority in the UN General Assembly. Such a document, however, would probably have lost the support of many of the more active proponents among European States and also the USA,[123] as well as triggering outright opposition from many of the abstainers, for the consensus principle exerts strong force in international law and relations, particularly among smaller and relatively weak States.[124] What emerged would have had much reduced moral force, and even less practical value.

The price paid for consensus is sacrifice of the best, or dilution of the desirable. In this instance there are six major defects, consisting either of inadequate provisions or of major gaps in the scope of the Treaty and the obligations it imposes:

1) Excessive narrowness of scope.[125] Surveillance equipment and military technology generally, remain entirely outside the Treaty, as do grenades and landmines. The regulation of trade in ammunition and components remains incomplete; the actual size of that loophole remains to be seen.
2) The circumstances required before an outright ban is imposed are too narrow. In particular, a transfer that has reasonable potential for undermining international peace and security, or of being used to commit or facilitate serious human rights violations, should have been added to the three that are currently found in Article 6.

   The assessment process in those cases not covered by the outright ban—and these will be the great majority—is weak in several respects.[126] The three main defects are

[122] For an account of earlier attempts, see M Bromley, N Cooper and P Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History' (2012) 88 IA 1029, 1031–4. Professor Cooper is preparing a more extensive historical study of arms trade regulation. For a study of League of Nations efforts, see DR Stone, 'Imperialism and Sovereignty: the League of Nations' Drive to Control the Global Arms Trade' (2000) 35 JContempHist 218

[123] Which insisted on 'consensus decision making to allow us to protect US equities' consensus as one of its 'redlines'.

[124] At least ten States referred to the abandonment of consensus as a strong objection in their General Assembly statements on 2 April 2013. China gave particular emphasis to this, decrying the abandonment of universality as a principle of multilateral treaty making.

[125] Art 2. The omission of dual-use goods is also of great practical importance, but since their inclusion was never even a remote possibility, it would be unfair to criticize the Treaty on this ground.

[126] Art 7.

3) the excessively high threshold for the 'risk' that must be avoided;
4) the 'knowledge' that is required before a transfer should be disapproved, and
5) the absence among the factors that must be taken into account of reasonable suspicion that the sale involved corruption, or that it would significantly distort or hamper sustainable development of the recipient State's economy.
6) Finally, the Treaty gives excessive latitude to exporters to allow them to 'pick and choose' among potential recipients on grounds of economic self-interest or double standards based on political advantage. Purely as a technical legal matter this is very difficult to correct, for it is hard to reformulate the factors set out in Article 7.1 to ensure consistency. In terms of *realpolitik* the problem is even greater: creation of an international enforcement body with powers of authoritative interpretation was and is simply unacceptable to key States, and perhaps most States, as an incursion on their sovereignty.[127] And in addition to principle, so long as powerful States, the USA above all, see arms sales and gifts as a tool of foreign policy, this block will remain. This may be the most intractable problem of all.

One can only hope that the amendment process—which permits alteration of the Treaty if, after attempts at achieving consensus 'have been exhausted', three-quarters of the States present and voting at a Conference of State Parties agree[128] will address at least some of these defects effectively when it becomes operational six years after the Treaty comes into force. This remains a purely political matter, and State Parties who do not formally accept any particular amendment would not be bound by it.[129]

The ATT imposes binding obligations in international law upon those who ratify it, and lesser ones on those who merely sign it[130]. Yet international law is not the level at which an effective Treaty will have its greatest impact. The baton has now been passed from international lawyers and diplomats to administrative lawyers and public officials. What matters most is how its provisions are translated into domestic policy and administrative law and practice. That depends in part on a range of institutional and technical matters

[127] A prominent example of this is that ever since the establishment of the European Economic Community in 1957, and throughout the history of ever-expanding Community and now Union competence, Member States have insisted on retaining exclusive competence in matters they 'consider necessary for the protection of the essential interests of [their] security which are connected with the production of or trade in arms, munitions and war material'. This provision has, almost uniquely, remained unaltered since 1957, and is now found in art 346 of the Treaty on the Functioning of the European Union. [128] Art 20.3. [129] Art 20.4.

[130] Those who sign but do not ratify, like the United States, nonetheless put themselves under an obligation of good faith not to act so as to frustrate the objects of the Treaty: see Vienna Convention on the Law of Treaties 1969, art 18.

common to all implementation of international agreements, such as the general quality of the national civil service, including the legal support and advice it can draw upon. However, factors particular to ATT implementation will enhance the difficulties. These concern the calibre and training of the customs authorities and the police, especially with respect to techniques of detection of contraband, their understanding of some of the aspects unique to arms sales such as end-user certificates—and above all, their immunity from corruption. International cooperation measures, including training and other aspects of so-called capacity building,[131] will certainly be of value. These are specifically encouraged by the Treaty, with anti-corruption measures singled out for special attention.[132] Yet it would require an inordinate degree of optimism to believe that corruption at this level will end anytime soon, especially because low-level enforcement officials in countries of the South are generally very poorly paid, and those profiting from illegal weapons shipments can offer comparatively vast sums.

Having leapt the first barrier and agreed a set of norms, the next and in some respects higher hurdle is that of national implementation. This will require international assistance in the form of expertise and finance for training and monitoring, which can only be provided by the wealthier, mostly exporting, States. The really hard work comes now, and must take place within the public administrations of poor States with limited governmental capacity; this is of much lower visibility but without it the Treaty would remain largely a paper exercise.

[131] Described in the Treaty as 'confidence-building measures or jointly developed and agreed programmes by the exporting and importing States': art. 7.3. A particularly critical one is destruction and disposal of surplus weaponry after the end of internal conflicts. A detailed set of practical suggestions for international assistance in implementation is presented in M Bromley and P Holtom, 'Arms Trade Treaty Assistance: Identifying a Role for the European Union', EU Non-Proliferation Consortium Discussion Paper, (SIPRI, February 2014)

[132] ATT art 15, concerning 'International Cooperation'. Art 15.6 refers to prevention of transfers 'becoming subject to corrupt practices'.