

Worth the Paper? The Arms Trade Treaty

Written by Glenn McDonald

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GLENN MCDONALD, APR 17 2013

Nearly 20 years in the making,[1] the road to an Arms Trade Treaty (ATT) was anything but smooth. Two diplomatic conferences at the UN, in July 2012 and March 2013, were unable to reach consensus agreement on a treaty text, but on 2 April 2013 the UN General Assembly voted to approve the text that was on the table at the end of the March conference. In light of earlier failures to negotiate antipersonnel land mine and cluster munitions treaties within the UN framework, many were surprised that the UN had met the ATT challenge. But was it worth it?

From the outset, a number of arms importing states, but also some major exporters, were suspicious of an initiative they believed was bound to hamper their ability to import conventional arms or to export them to whomever they wished. They consistently pushed to keep the Treaty as weak as possible, while many other countries, backed by most civil society groups, insisted on a strong and comprehensive instrument. These tensions are inevitably reflected in the final text and could influence future implementation. This paper will first examine some of the principal strengths and weaknesses of the ATT text, before considering its likely influence on international arms transfer practices.

Key features of the text

The ATT text that was on the table at the end of the July 2012 Conference had several serious weaknesses, including an escape clause that basically rendered the Treaty meaningless (Argentina, 2012, Art. 5(2)). The final ATT text closed the major loopholes and tightened the language overall (UNGA, 2013). Important weaknesses remain in the final text, yet these do not call the Treaty, as a whole, into question.

The ATT was always destined to live or die on the strength of its export licencing provisions. In the event, they are relatively strong. All States Parties are required to conduct a thorough assessment of the risk of misuse of arms before authorizing their export abroad (UNGA, 2013, Art. 7). References to peace and security, international humanitarian law, international human rights law, terrorism, and transnational organized crime lie at the heart of this assessment (Art. 7(1)), which is only slightly weakened by the fact that the trigger for a denial of export authorization is an 'overriding risk of ... negative consequences' (Art. 7(3)), rather than the lower threshold many states had wanted during the negotiations ('substantial risk').

The range of conventional arms the ATT covers is quite broad and includes small arms and light weapons, as well as all major conventional weapons systems (Art. 2(1)); yet there are several important gaps. Major conventional weapons systems are defined in accordance with the UN Register of Conventional Arms (Art. 5(3)), which focuses on offensive military systems ('combat aircraft'), rather than the full range of military equipment present in national arsenals, including transport, refueling, and command and control systems. Further, reflecting the sensitivity of the issue for some states, ammunition and parts and components have one foot inside and another outside of the Treaty. While the ATT's export licensing obligations (Arts. 6–7) do apply to these items, most of its other provisions, including those relating to import, transit/trans-shipment, brokering, and diversion, do not (Arts. 8–11). A further gap is the ATT's failure to cover munitions, such as grenades, that are not used with a supporting weapons platform (Art. 3). As for the language on parts and components, it could be read as covering only shipments that include all of the parts and components required for the complete assembly of a conventional arm (Art. 4). Equally seriously, the definition of 'trade' in Article 2(2) does not specify that gifts and loans fall within the scope of the Treaty—along with

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transfers of a commercial nature.

In a significant strengthening of the 26 July 2012 version, the final ATT text includes a relatively detailed provision on diversion, a key pathway to the illicit market for many small arms and light weapons (Art. 11). This provision, however, puts almost all responsibility for preventing diversion on the exporting state, playing down the contribution that importing states need to make in this area—for example, by not re-exporting arms without the authorization of the original exporter. Another problem in Article 11 is its liberal use of qualifying language (e.g., ‘where appropriate’, ‘pursuant to their national laws’). This, in fact, is characteristic of most of the provisions dealing with arms transfers outside those applicable to export. The ATT brokering provision, for example, subordinates the obligation to ‘take measures’ to the qualifying language ‘pursuant to its national laws’, suggesting that a State Party need not do anything more than what it is already doing ‘to regulate brokering’ (Art. 10).

The ATT requires States Parties to keep records of export authorizations or actual exports, and to report on national measures to implement the Treaty, as well as to submit annual reports on authorized or actual exports and imports (Arts. 12–13). Transparency is limited, however. These measures do not apply to ammunition or parts and components. Export/import reports for conventional arms may also exclude ‘commercially sensitive or national security information’ (Art. 13(3)). Implementation and export/import reports are to be distributed to other States Parties by the ATT Secretariat, but will not necessarily be made available to the public (Art. 13). Further, the ATT does little to advance the cause of weapons traceability. Its minimum ten year period for the retention of export records (Art. 12(4)) is half the 20 year minimum that, in principle, all UN member states accepted in the (politically binding) International Tracing Instrument (UNGA, 2005, para. 12). Nor does the ATT specify that export records contain sufficient information so as to allow for the unique identification of the conventional arm (Art. 12(3)), indispensable for tracing.

Treaty provisions governing entry into force and ATT implementation and development (so-called ‘final provisions’) were fortified in the final draft and should ensure that the ATT regime works reasonably well. The Treaty will enter into force 90 days after 50 states have opted to become States Parties (Art. 22). Significantly, the ATT can be amended—i.e. strengthened—by a three-quarters majority vote if all efforts to reach consensus are exhausted, although, in accordance with standard treaty practice, Treaty amendments will apply only to States Parties that explicitly accept the amendment (Art. 20). Consent is also required ‘to pursue settlement of any dispute ... with regard to the interpretation or application’ of the ATT (Art. 19). Most important, as mentioned earlier, the broad loophole found in Article 5(2) of the 26 July 2012 text (Argentina, 2012) was closed in the final version of the Treaty (UNGA, 2013, art. 26). While the second paragraph of Article 26 states that the ATT ‘shall not be cited as grounds for voiding defence cooperation agreements concluded between States Parties’ to the Treaty, it does not negate the principle, articulated in paragraph 1 of Article 26, that in implementing the ATT States Parties must disregard obligations arising under other international agreements that are inconsistent with their obligations under the ATT. In case of conflict, the ATT prevails.

A world remade?

Now that the ATT has been adopted, the crucial question is what influence it will have on arms transfer practices worldwide. Will it result in fewer shipments to problematic destinations or could the Treaty’s weaknesses, reviewed in the preceding section, be used as legal cover for irresponsible arms exports?

A state could, for example, seize on the term ‘overriding risk’ in Article 7(3) to justify an export intended to help a government end a civil war, notwithstanding the latter’s systematic violation of human rights norms. In the eyes of the exporting state, the contribution the shipment is intended to make to ‘peace and security’ (Art. 7(1)(a)) would ‘override’ the importing state’s lack of respect for human rights. The ATT’s provisions on scope offer further room for the evasion of core Treaty obligations. An exporting country could, for example, assert that the use of the word ‘trade’, rather than ‘transfer’, in Article 2(2) would allow it to ignore the Treaty when making a gift of weapons and ammunition to another state.

There are many other possibilities open to states determined to evade the application of the ATT. These include the

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Treaty's partial application to ammunition and parts and components, its narrow definition of conventional arms, and its relative failure to strengthen transfer control practices beyond export licensing (e.g. brokering). Whether or not these loopholes cause significant harm will depend on a series of factors underpinning broader ATT implementation. The first factor is the number of states that become Parties to the Treaty. The more the ATT approaches its stated goal of 'universal adherence' (preamble, para. 17), the greater the pressure on all states, Parties or not, to adhere to Treaty standards, especially in the area of export licensing.

Transparency will be the second determinant of the ATT's long-term health. Greater transparency over the arms trade, whether formally subject to ATT rules or not, will allow civil society to monitor compliance with Treaty provisions and spur strengthened compliance. The world will be watching the international arms trade as never before, using the ATT as a reference point. Research organizations, like the Small Arms Survey and the Stockholm International Peace Research Institute, will continue to track the authorized arms trade, matching exporters, importers, and the transfer of specific weapons. Current civil society transparency mechanisms, such as the Survey's Trade Transparency Barometer (see Lazarevic, 2012), will undoubtedly incorporate ATT reporting in their assessment of transparency, thus offering some incentive to make ATT reports publicly available. One can also expect research and advocacy groups to evaluate the transfer practices of ATT States Parties against Treaty obligations, as they have for the UN Programme of Action on Small Arms (see BtB with IANSA, 2006).

It also appears likely that states that see themselves as responsible exporters—the 'like-minded' group of countries that provided much of the impetus to the negotiations—not only ratify the ATT, but encourage other, similarly situated states to do the same in order to level the commercial playing field and demonstrate solidarity with the ATT's humanitarian goals. On the one hand, this is unlikely to lead to much change in the export policies and practices of these states since, by definition, they are already ATT compliant or very nearly so. In fact, during the negotiations most states, whether ATT friendly or not, sought a Treaty that would require little or no change to their existing laws and practices.

On the other hand, the fact that national export licensing decisions will now be conducted against the backdrop of binding international norms could well spur greater restraint by many countries, including those from the like-minded group. There is clearly room for such restraint. Research conducted by the Small Arms Survey at the time that the ATT initiative was first gaining traction at the UN revealed that a wide range of states, including many with relatively rigorous export control systems, had sent small arms and light weapons to destinations where serious human rights violations and/or armed conflict were occurring (Glatz and Lumpe, 2007).

At the end of the day, the ATT will make it more difficult for any country, whether State Party or not, to send conventional arms to countries that systematically violate international humanitarian law or international human rights law, or that divert arms to terrorists or organized criminal groups. Opportunities to evade the application of the ATT's core licensing rules exist. Fundamentally, nothing in the ATT takes export licensing decisions out of the hands of states; these remain the prerogative of national governments. Nevertheless, the mood has changed. The mere existence of UN standards for international arms transfers creates expectations for national conduct that have much greater moral and legal force than before. The ATT will not remake the world but—if the world pays attention to Treaty implementation—it should nudge it towards an era of greater security for all.

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[1] For an early history, see Bevan, McDonald, and Parker (2009, pp. 147–52).

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