

## CHAPTER 9

**The Arms Trade Treaty: making a difference**

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*This is a victory for the world's people. The ATT will make it more difficult for deadly weapons to be diverted into the illicit market and it will help to keep warlords, pirates, terrorists, criminals and their like from acquiring deadly arms. It will be a powerful new tool in our efforts to prevent grave human rights abuses or violations of international humanitarian law. And it will provide much-needed momentum for other global disarmament and non-proliferation efforts. I applaud States for their willingness to compromise on a number of complex issues, thus making it possible for us to have a balanced and robust treaty text.*

—Ban Ki-moon, 2 April 2013

On 2 April 2013, the United Nations General Assembly adopted the Arms Trade Treaty, with 154 votes in favour, three votes against—DPRK, Iran and Syria—and 23 abstentions. Twenty months later, on 24 December 2014, the treaty entered into force.<sup>1</sup> This is one of the shortest time periods to date for a treaty to take legal effect.

Upon the UK's ratification on 2 April 2014 the then British Foreign Secretary William Hague stated that 'This Treaty will help make the world safer, by placing human rights and international humanitarian law at the heart of decisions about the arms trade. For the first time, countries have agreed international rules governing everything from small arms to warships. If these rules are implemented globally and effectively, they have the power to stop arms from reaching terrorists and criminals, and fuelling conflict and instability around the world'.

Those words speak to the ground-breaking nature of the Arms Trade Treaty, but also to the challenges ahead to ensure that the treaty delivers its full potential: reducing conflict, saving lives and reducing human suffering.

This chapter examines what the Arms Trade Treaty is, the negotiations which led to its conclusion, and how the international community might work together to make a difference in the treaty's first years of operation.

In a difficult international context including ongoing conflicts in Iraq, Libya, Syria, Ukraine, the chapter argues against re-fighting old diplomatic battles over the meaning of text, instead focusing on achieving quick wins to demonstrate the relevance of the treaty and to cement the foundations of the new 'Arms Trade Treaty community'.

## What is the Arms Trade Treaty?

The Arms Trade Treaty or 'ATT' is like no other treaty on arms regulation. It was not born through an already-established practice and contains elements never before seen in treaty law, for example, 'principles'. It is full of constructive ambiguity which can either help or hinder its implementation, and has elements which need further development, such as on reporting and definitions. As a legally binding document, the text of the treaty must be read in its entirety and as a self-reinforcing whole. The Geneva Academy has produced a useful commentary on each section and articles of the ATT to help readers become more familiar with the text.<sup>2</sup> For the sake of brevity, it is worth highlighting here some key elements that form the building blocks of the agreement.<sup>3</sup>

The ATT is the first global, legally binding instrument to regulate the international trade in conventional arms. It establishes global rules to be enforced by national authorities. One of the key differences between the ATT and previous approaches to conventional arms is that it moves beyond the focus solely on *illicit* trade and requires states to assess the potential negative consequences of arms exported in *legitimate* transfers. The ATT is also more explicit about the potential link between arms transfers and the commission of gender-based violence, including sexual violence in conflict. Transparency is also at its heart, again moving away from voluntary political arrangements, such as the UN Register on Conventional Arms Transfers (UNROCA), toward obliging states parties to keep records, report on implementation measures and to report annually on any transfers and export control decisions made.

The ATT comprises 28 legally binding articles, which are framed by the preamble and principles. Most important of these articles is the object and purpose of the treaty laid out in Article 1. Unlike many other treaties the object and purpose of the ATT is divided into two parts.

The first part describes the 'object' of the treaty, to:

- Establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; and
- Prevent and eradicate the illicit trade in conventional arms and prevent their diversion.

The second part sets out its 'purpose':

- Contributing to international and regional peace, security and stability;
- Reducing human suffering;
- Promoting cooperation, transparency and responsible action by states parties in the international trade in conventional arms, thereby building confidence among states parties.

Thus, the reason and motive behind the ATT is the establishment of the highest possible common international standards for regulating the conventional arms trade and preventing illicit trade. This in turn will result in: contributing to international and regional peace, security and stability; reducing human suffering; and promoting cooperation, transparency, and responsible action by states parties—thereby building confidence between them.

To fulfil Article 1, the authors of the ATT recognised that international trade in conventional arms remains a national responsibility and therefore the only way an ATT could work would be to oblige states parties to take certain national steps in order to achieve the overall international objective. Importantly, the ATT tells states what they must do, but not how to do it.

Under the ATT, states parties are obliged to:

- Establish and operate a national control system that applies to the broadest range of conventional arms.
- Prohibit exports that will be used for genocide, crimes against humanity, or a broad range of war crimes.
- Undertake a mandatory risk assessment for arms exports—including ammunition/munitions, and parts and components—to be assessed on the basis of criteria including peace and security, human rights, international humanitarian law, terrorism and transnational organised crime.
- Refuse to authorise transfers if they pose an overriding risk of possible negative consequences.
- Take into account, in export licensing decisions, the risks of serious acts of gender based violence and violence against women and children.
- Regulate arms brokering.
- Maintain records and undertake regular reporting to the ATT secretariat, and through them to other states parties and the wider public (where agreed) on authorisations or exports of conventional weapons made.

In addition, states are encouraged to:

- Regulate imports, transit and transshipment of conventional arms where it is practicable and feasible.
- Cooperate with each other to prevent the diversion of weapons to illicit trafficking or use.

The ATT is not a panacea that will solve all the problems surrounding unregulated and illicit trade in conventional arms, but if properly implemented it has the capacity

to lead to a better regulated international trade, to choke supply to the illicit market and evolve over time to keep pace with new developments. In this respect it is important to note that the treaty contains a provision to make sure it is future-proofed and to ensure that the instrument keeps up to date with possible new types of weaponry.

## Why an Arms Trade Treaty? The long road to effective rules

The Arms Trade Treaty is not a new idea. Shortly after the end of the First World War several states<sup>4</sup> negotiated the 'Convention for the Control of the Trade in Arms and Ammunition'.<sup>5</sup> This was signed at Saint-Germain-en-Layne on 10 September 1919. Its main provisions set out a prohibition on:

the export of the following arms of war: artillery of all kinds, apparatus for the discharge of all kinds of projectiles or gas-diffusing, flame throwers, bombs, grenades, machine-guns and rifled small bore breech-loading weapons of all kinds, as well as the exploitation of the ammunition for use with such arms. The prohibition of exportation shall apply to all such arms and ammunitions, whether complete or in parts.

This prohibition on exports was to be confined to the whole of the continent of Africa (except Algeria, Libya and South Africa), Transcaucasia, Persia, Gwadar, the Arabian Peninsula, and parts of the Turkish Empire.

Despite its lofty ambitions prohibiting transfers of a wide array of weaponry, ammunition, parts and components, it never entered into force. Had it done so, the security landscape may look very different than it does today and there would have been no need for the Arms Trade Treaty of 2013. Instead, lacking such an instrument and fuelled by irresponsible trade, the proliferation of conventional weapons flourished. Today it is the main contributor to conflict and armed violence, gives non-state actors the means to commit terrorist atrocities and destroys livelihoods causing human suffering.

Following the conclusion of the Second World War, attention turned to the destructive power of the weapons of the atomic age, and for much of the second half of the twentieth century, international arms control focused on trying to eliminate these 'Weapons of Mass Destruction'.

In the 1970s, an increase in the trade of arms was stimulated in the wake of the Yom Kippur War as the US armed Israel and Russia armed Syria and Egypt. Other Middle East countries amassing considerable wealth following the Organization of the Petroleum Exporting Countries (OPEC) oil embargo in 1973 also began to purchase large amounts of conventional weaponry for self-defence. Following this, the UN General Assembly (UNGA) adopted by consensus the Final Document of the First

Special Session on Disarmament (SSOD<sub>1</sub>) in 1978.<sup>6</sup> This document called on all states to negotiate limiting the scale of the arms trade. However, this initiative faltered and no concrete progress was made. The only firm result was the creation of the UN Instrument on Reporting of Military Expenditures in 1980, which attempted to bring some transparency to an otherwise opaque world of arms transfers.<sup>7</sup> However, its success is questionable as it still lacks universal participation on a regular basis.

Given large imbalances of conventional forces between NATO and the Warsaw Pact nations, arms reductions appeared unlikely and international negotiations emphasised establishing national limits on holdings of large systems such as battle tanks, combat aircraft, warships and missiles. The result was the adoption of the Treaty on Conventional Armed Forces in Europe in 1990.<sup>8</sup> The invasion of Kuwait by Iraq in the same year gave a renewed urgency to combating the proliferation of conventional arms, and in particular more sophisticated weaponry. In the immediate aftermath of the multinational conflict that followed, the Five Permanent Members of the UN Security Council (P5) agreed to restrain their supply of weapons to third parties.<sup>9</sup> Through a statement issued in Paris in 1991, the P5 'noted with concern the dangers associated with the excessive build up of military capabilities, and confirmed they would not transfer conventional weapons that would undermine stability'.

By October 1991, the P5 had agreed to a set of 'Guidelines for Conventional Arms Transfers'.<sup>10</sup> These guidelines included some of the risk assessment provisions now featured in the current ATT, such as avoiding transfers that support or encourage terrorism or those prolonging or aggravating existing conflict. However, this collaborative momentum was short lived. By 1992, internal arguments among the P5 over exports of weapons to Taiwan and non-state actors led to a break down in cooperation.

Following the end of the Cold War, observers noted an explosion in the number and frequency of 'low intensity' conflicts, especially in Africa. It is instructive to look at the high proportion of UN Peacekeeping Operations established since 1988–56 out of a total of 69 since 1948—and how the UN was increasingly called on to intervene in intra-state as well as inter-state conflicts.<sup>11</sup> Those conflicts were often characterised by a reliance on small arms and light weapons, and other conventional weapons, which flooded into conflict zones through a mixture of legitimate and illicit routes. Similarly, in Latin America and the Caribbean, low economic growth stimulated domestic crime and armed violence. Gun crime took hold with vicious and bloody clashes between rival drug gangs and the police become commonplace; the easy availability of firearms exacerbated the problem.<sup>12</sup>

Former UN Secretary General Kofi Annan has described conventional weapons as 'weapons of daily destruction'. The statistics make for alarming reading. A 2001 study by the Small Arms Survey estimated that 500,000 civilians died annually as a

result of the misuse of conventional weapons—or one civilian every minute.<sup>13</sup> A 2007 Oxfam Briefing Paper estimated that conflict was costing Africa's economy some US\$18 billion a year, with \$300 billion lost between 1990 and 2007.<sup>14</sup>

Yet the international community was at first slow to adapt to the challenge. Writing in the 2002 edition of the *VERTIC Verification Yearbook*, Kate Joseph and Taina Susiluoto recalled a time when controlling the transfer and use of small arms and light weapons was thought to be 'not only impossible but also undesirable'.<sup>15</sup> Small arms and light weapons had many legitimate uses, for example in law enforcement, and were so widely available that it was considered naïve to seek to 'put the genie back into the bottle'.

The initial international response consisted of a series of self-standing regulations, projects and standards, which were mainly focused on transparency and against illicit trade and trafficking. They included the UN Register of Conventional Arms (1991);<sup>16</sup> UN Guidelines for International Arms Transfers (1996);<sup>17</sup> the UN Programme of Action to Prevent, Eradicate and Combat the Illicit Trade in Small Arms and Light Weapons (2001);<sup>18</sup> the UN Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition or Firearms (2001);<sup>19</sup> and the International Tracing Instrument (2005).<sup>20</sup> Regions and like-minded groupings also took matters into

### Box 1 Regional approaches to addressing arms trade

**Africa:** Bamako Declaration on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons 2000;<sup>21</sup> Nairobi Declaration 2000;<sup>22</sup> Southern African Development Community Council Decisions on the Prevention and Combating of Illicit Trafficking in Small Arms and Related Crimes 1999;<sup>23</sup> Organisation of the African Union Decision on the Proliferation, Circulation and Illicit Trafficking of Small Arms and Light Weapons, 1999;<sup>24</sup> the Economic Community of West African States Convention on Small Arms and Light Weapons, their Ammunition and Other Related Materials, 2006;<sup>25</sup> Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region.<sup>26</sup>

**Americas:** Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Material, Organisation of American States, 1997;<sup>27</sup> Inter-American Convention on Transparency in Conventional Weapons Acquisitions Organisation of American States, 1999;<sup>28</sup> Brasilia Declaration of the Latin American and Caribbean States, 2000.<sup>29</sup>

**Asia-Pacific:** Association of Southeast Asian Nations Regional Forum, 1993;<sup>30</sup> Colombo Declaration 2000;<sup>31</sup> Honiara Initiative, 1998;<sup>32</sup> and the Nadi Framework Model Weapons Control Bill (Pacific Island Forum), 2003.<sup>33</sup>

**Europe:** European Union Code of Conduct for Arms Transfers, 1988;<sup>34</sup> Organisation for Security and Co-operation in Europe Forum for Security Cooperation and Confidence and Security Building Measures, 1992;<sup>35</sup> Wassenaar Arrangement, 1996;<sup>36</sup> and European Union Programme for Preventing and Combating Illicit Trafficking in Conventional Arms, 1997.<sup>37</sup>

their own hands in an effort to address the issue and established a patchwork of declarations, protocols and conventions (see Box 1).

Each of these initiatives made a positive contribution to tackling the proliferation of conventional weapons. But in the first decade of the twenty-first century, calls were growing for a more comprehensive and legally binding approach to tackle the problems of patchwork regulation, legal loopholes, lack of transparency, and a growing globalisation of the arms trade.

A game changing moment occurred in 2000 when a group of NGOs proposed a 'Draft Framework Convention on International Arms Transfers', which called for a universal, legally binding agreement governing arms transfers.<sup>38</sup> This built on ideas first proposed in 1997 by a group of Nobel Laureates led by former Costa Rican President Oscar Arias.

In the first few years, the initiative found only a handful of state supporters. It was not until the Control Arms Campaign for an Arms Trade Treaty was launched in 2003, with support from Costa Rica, Cambodia and Mali that this idea started to gain traction. With the UN Programme of Action in its infancy many states were sceptical of the value a new treaty would bring over the recently agreed arrangement that was not thoroughly implemented. What the Control Arms Campaign needed was a major arms manufacturer and exporter to support them. It was the United Kingdom.

Despite its initial scepticism over the proposed ATT, the United Kingdom became champion and leader of the process, providing the necessary boost to start its journey from concept to reality. In late 2004, the scene was set for discussions to begin towards building a robust and effective ATT.

## How the Arms Trade Treaty was negotiated

The road from the 'Draft Framework Convention' to the adoption of the Arms Trade Treaty on 2 April 2013 was remarkable not just for the route taken, but also for those who made the journey together, and for the different drivers at the wheel in different stages.

### Phase one—supporters and plan

Now firmly backing an ATT, the UK Government set about creating a group of core supporters to construct a plan for the negotiations and start the momentum necessary for achieving a treaty.

The context and setting for the negotiations were important. For an Arms Trade Treaty to be most effective, it would need to contain the highest possible standards

and enjoy the participation of the broadest possible group of countries. In addition, it would need buy-in from countries with the greatest influence over the arms trade, including major arms exporters and importers.

In early 2005, various options to progress the ATT were discussed and discarded. The United Nations was the traditional setting for discussions on arms control and disarmament, but there were challenges. The UN Conference on Disarmament in Geneva had been in stalemate since 1998; the Convention on Certain Conventional Weapons was still negotiating Explosive Remnants of War and looking to negotiate a Protocol on Anti-Vehicle Mines; and the World Trade Organisation did not regulate arms.

Taking negotiations outside of the traditional architecture had provided results. Instruments on conventional arms, including the 1997 Anti Personnel Landmines Convention and the 2008 Cluster Munitions Convention had been negotiated outside the UN, initiated by a group of like-minded states. While negotiating these types of treaties had their attractions, as they were not bound by UN process, budget or rules of procedure (including the need to strive for consensus), they were not seen as inclusive enough for what the ATT was set to achieve as a number of relevant countries—China, India, Pakistan, Russia, the US—had remained outside those new instruments and had stood aside from the negotiations. Therefore, it was decided that, despite the hurdles, only a new process using all the negotiating tools available under the United Nations, could provide the necessary platform.

To initiate the process a resolution had to be put before the UNGA First Committee. However, the UK was wary of doing this on its own. It therefore sought a core group of like-minded countries to help 'co-author' the resolution and kick-start the process. The UK felt it would be beneficial to form a group that represented the entirety of the regions around the globe. Initially, 12 countries were approached to join the UK as co-authors. Ultimately, seven states were willing to support the UK and the ATT.<sup>39</sup> As co-authors, they put forward the first resolution in 2006 entitled 'Towards an arms trade treaty: establishing common international standards for the export, import and transfer of conventional arms'.<sup>40</sup>

The resolution in 2006 contained two important elements. First it sought UN member states views 'on the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms' and second, it created a Group of Governmental Experts (GGE) to examine the issue.

The GGE would not sit until 2008, due to UN budgetary programming requirements, but prior to that, states were busy submitting their views. For the first time in the UN's history more than 100 states answered the call to submit their views to the UN Secretary General on a specific issue. Civil society was instrumental in this and

campaigned hard to ensure that the UN heard from all of the ATT supporters that such a treaty was feasible and desperately needed.

In 2008, the GGE sat for a period of four weeks. GGEs in the UN system are usually composed of 15 experts, but given the enormity of interest in this process, the GGE was expanded to 28 members.<sup>41</sup> This activity marked the start of the process and it could have easily failed at that point if the group could not arrive at a consensus decision on the way forward. For it to succeed a good chairperson was required, preferably also one of the co-authors of the resolution. Having previously chaired the GGE on the UN Register on Conventional Arms, Argentinean diplomat Ambassador Roberto Garcia Moritan accepted this task and steered it to its conclusion. The consensus recommendation that ‘further consideration of efforts within the United Nations to address the international trade in arms is required on a step-by-step basis, in an open and transparent manner . . . on the basis of consensus . . .’ was enough to facilitate moving to phase two.

## Phase two—inclusivity

The resolution’s co-authors were quick to seize on the results of the GGE and put forward another resolution in 2008, which established the next step in the process.<sup>42</sup> This was the creation of an open-ended working group (OEWG) to ‘further consider those elements in the report of the Group of Governmental Experts where consensus could be developed for their inclusion in an eventual legally binding treaty . . .’. This process allowed all UN member states to take part in the discussions over six one-week sessions from 2009.

The first two sessions in 2009 showed that progress was not being made; many of the same arguments put forward in states’ responses to the UN Secretary General were being reiterated to a wider audience. However, all states had a chance to participate in this process and all views were heard. Again, Ambassador Roberto Garcia Moritan was crucial in the success of this group and the report adopted by consensus concluded in paragraph 23 that:

The Open-ended Working Group also recognized the need to address the problems relating to unregulated trade in conventional weapons and their diversion to the illicit market. Considering that such risks can fuel instability, international terrorism, and transnational organized crime, the Group supports that international action should be taken to address the problem.<sup>43</sup>

With this recognition agreed by consensus by all UN member states the time was now opportune for the co-authors to push forward with phase three.

### Phase three—preparation for negotiation

The most important resolution for the ATT was in 2009.<sup>44</sup> Building on the outcome of paragraph 23 of the OEWG report, the co-authors believed that they had legitimacy to establish a Diplomatic Conference in 2012, and change the remaining sessions of the OEWG into Preparatory Committees. The only remaining difficulty was the issue of consensus.

Up until that point, the United States had opposed the various ATT resolutions and been sceptical of the process and thus it was important to bring them on board. A change in the political landscape in the US enabled the country to support the ATT, but only if the co-authors could accept the Diplomatic Conference being governed by the rule of consensus on the adoption of any outcome. This was, however, highly controversial. Processes under the General Assembly rules were governed by majority vote. This would change that and create a new precedent that could be used for other issues. Such a change was not an easy sell to the rest of the supporters or civil society who associated consensus with stagnation, lack of progress, and lowest common denominator. Even the co-authors opinions were divided on this issue.

Nevertheless, buoyed on by the prospect of US support, the co-authors agreed to put forward the consensus rule for the final outcome for the conference and vote it through. By 153 in favour to 1 against (Zimbabwe), and 19 abstaining, the Diplomatic Conference was established, the Preparatory Committees set, and the end of the ATT process was in sight.

During 2010 and 2011, the Preparatory Committees took place. These four weeks of preparation had been intended to pull together the beginnings of a draft treaty, which could have been used as the basis for negotiations in the Diplomatic Conference. However, states were not prepared to negotiate at this early stage, preferring instead to reiterate their views on what an ATT could and should do. Differences of opinion were vast, and progress on areas of consensus was slow. At the end of this process, an ATT was no further forward and, despite having various options to put on the table, the chair decided to begin the 2012 Conference with no informal paper on which to launch negotiations.

### Phase four—the negotiation, part i

The first ATT negotiating conference in July 2012 did not get off to an auspicious start. Two days of the first week were lost at the opening as the chairman and delegates sought a solution to seating arrangements for Palestine and the Holy See. This was an unnecessary problem created by a dispute as to whether the conference was a 'UN Member State' Conference or an 'All States' Conference. A (unconventional) solution was found whereby Palestine and the Holy See sat at the front of the room before states

were seated in alphabetical order. With this, and after a break for 4 July celebrations, the conference began its substantive work.

Having lost three working days already, the chair appointed several facilitators to assist in the negotiations. Main Committees, formal and informal, were established, which allowed civil society to some and not to others. Civil society were also on some delegations which negated the need to close some meetings to them. In addition, by the end of the second week, the chair began holding late night informal meetings. Following the meetings from 10am to 1pm and then 3pm to 6pm, the chair began to hold meetings in the Indonesian Lounge in the UN Main Building in New York from 8pm till early morning. This lounge was not set up for meetings and an improvised cinema-like arrangement had to be put in place to allow the drafting of certain texts. However, this method of late nights, hot cramped rooms coupled with food and sleep deprivation was not favoured by many delegates and several began to lose faith in the chair.

The main substantive arguments during these negotiations focused on the following:

- *Scope of the treaty*: many advocated a broad approach so that the treaty covered *all* conventional arms but there were difficulties with definitions. No definitions of conventional arms existed in the international sphere except for UNROCA, which many, especially civil society, believed to be inadequate. However, it was certainly not possible to begin defining conventional arms at this late stage as that could have taken many months to conclude in itself. Others wanted non-lethal items, body armour or a difference between military and non-military weaponry to be included.
- *Small Arms and Light Weapons (SALW)*: these types of weapons were not covered by the seven categories of the UNROCA and it was essential for many that SALW were included. For such people, this was the *raison d'être* for the ATT. However, there were issues over domestic and personal use, how to treat weapons used for hunting and sports, and also constitutional rights. This campaign was very vocal particularly through the US National Rifle Association (NRA). They remained sceptical of the ATT believing that it affected the 2<sup>nd</sup> Amendment of the US constitution. Despite the ATT being about international transfers, they saw this as an opportunity to scaremonger in the US and gain political and financial support especially as gun related incidents and public backlash was on the increase domestically.
- *Ammunition*: without ammunition many saw the ATT as an empty vessel, but the US did not want it included. They believed that it was impossible to place import controls on ammunition or prevent its diversion to the illicit market as the quantities in question were too large to properly address. They also believed that record

keeping of ammunition would be very costly and time consuming for no practical benefit.

- *Transactions covered:* the ATT resolutions and process had highlighted three main elements to be covered in any future treaty: import, export and transit/transshipment. But the question about whether gifts, leases, or loans were covered remained unanswered.
- *Diversion to the illicit market:* this was key for many Latin American states, particularly Mexico. However, given the issues with ammunition, the volumes dealt with and the reluctance of some states to include it within the scope of the ATT, it was unclear how diversion would be tackled by the treaty. Two solutions were put forward: either include diversion as a core criteria for the risk assessment and not include ammunition in the scope of the instrument, or include ammunition in scope but do not apply the diversion criteria to it. This would only really be solved in the Final Conference.
- *Risk Assessment Criteria:* these provisions would list what factors should be considered by national authorities when assessing transfers, including human rights and international humanitarian law. There were many examples in existence for risk assessment (such as the EU Code of Conduct, ECOWAS guidelines, and national criteria), but the delegates could not agree on which factors should be included in an ATT criteria list. Despite intense efforts, agreement was not reached.
- *Defence Cooperation Agreements (DCAs):* several states, in particular India, did not want existing DCAs to be voided by an ATT and sought to create an exemption but this created a large loophole which many feared could completely undermine the prospects of a strong and robust ATT.
- *Entry Into Force:* some states wanted similar arrangements to those found in the Comprehensive Test Ban Treaty, with the largest exporters having to ratify before it could enter into force, others wanted just 20 states to trigger the entry.
- *Amendments:* a debate occurred on how to review the text of the treaty to ensure it remained relevant and implementable, for example, through reviewing whether the scope of the treaty remained adequate and whether certain articles were having the desired impact. This discussion was contentious with some arguing for a long implementation period before any review and others wanting regular Review Conferences.
- *Regional Organisations:* there was a question over whether the treaty could be open to regional organisations, such as the ECOWAS and the European Union, to join as states parties similar to some Climate Change Conventions. However, this was a sticking point for China, which is still subject to an EU arms embargo.

After a month of heated debate, Ambassador Moritan tried to pull the different strands together and attempted to chart a middle path with a paper he produced on 26 July.<sup>45</sup> However, the United States, supported by Russia, China, Cuba and others called for more time on the final day to consider this text. This caused outrage from many who had worked hard to secure the ATT during this conference and several declared that they could have adopted such an instrument. However, with consensus nowhere in sight, Ambassador Moritan's time was up and the conference ended without a result. On reflection this was no bad thing. The text of 26 July was far from perfect and did not fit together correctly. Had it been adopted at that time, it would have been a missed opportunity.

## The negotiation, part ii

At the UNGA First Committee of 2012, the co-authors submitted a new resolution, which established the Final Diplomatic Conference.<sup>46</sup> Many objected to the word 'Final' in the title feeling that the process could continue, but the co-authors and supporters were adamant that the ATT would be finalised at this conference. To ensure this happened, operational paragraph 7 was added to the text. This paragraph kept the agenda item for the ATT open during the 67<sup>th</sup> Session of the General Assembly and requested the chair to report to the GA as soon as possible after the end of the meeting. This paragraph allowed for the ATT to move to the GA and be adopted by vote, should consensus not be achievable by the end of the conference.

After a break of eight months and with a new Australian chair, Ambassador Peter Woolcott, the Final Conference was held from 12–29 March 2013. In preparation for this, Ambassador Woolcott travelled extensively. He was also helped through the resolution, which had cited that the 26 July 2012 text, to provide the basis for his consultations. This crucially meant that there was a solid foundation for negotiation in the Final Conference.

At the outset of the Final Conference, there were no procedural seating issues and delegations came prepared to negotiate. Many of the same arguments took place, but the delay had allowed states to 'tidy up' the text into clearer legal language and the chair quickly put forward a revised version. Working in the plenary sessions and consulting with various groups on the tricky issues, a text began to emerge and develop as the conference continued. On the penultimate day, the chair put forward a 'take it or leave it' text. It was a text that he believed could command consensus and was as robust as it could have been. The tricky issues identified above had been solved as follows:

- *Scope of the treaty*: the chapeau referred to 'all conventional arms within the following categories' and the categories were defined by relevant international instruments—

UNROCA and the Firearms Protocol. The view taken was that all conventional arms fell within these eight categories, most importantly including SALW. However, some have suggested that now only landmines and hand grenades fall outside the scope of the ATT and must be addressed when the time comes for amendment.

- *Ammunition*: using both English terms ‘ammunition/munitions’ meant that all forms of ammunition and artillery used in conventional arms were covered. To get around the earlier US problem, only Article 6 and 7 were applicable to ammunition and parts and components, meaning that diversion and record keeping were not applicable for these transfers.
- *Transactions covered*: the only definition in the ATT was ‘the activities of the international trade comprise import, export, transit, trans-shipment and brokering’. The question as to whether this covers gifts, leases, or loans remains a live debate, but it was this ambiguity that allowed certain states to accept the ATT and ultimately to join it.
- *Diversion to the illicit market*: a significant development over the 2012 text was the inclusion of a separate article on diversion compelling states to co-operate to prevent diversion of weapons. This also was reflective of the objective of the ATT and despite controversy over non-state actors, end use and end users; it was a welcome addition and an area for future implementation.
- *Risk Assessment Criteria*: this became a balancing act where the negative consequences of a transfer are weighed against the positive consequences. Violation of International Humanitarian Law, International Human Rights Law, offences under terrorism instruments, and offences of transnational crime, became the four key criteria on which to assess an arms transfer. Additionally, the risk of the arms being used for gender-based violence or diverted, while not at the heart of the risk assessment or part of the ‘balance’ to be made between positive and negative consequences of the transfer, are factors that need to be taken into account by the authorising state. The weight, accorded to these factors, remains a national decision.
- *Defence Cooperation Agreements*: given earlier legitimate concerns over the possible creation of a loophole in the ATT, this article was confined to those Defence Cooperation Agreements made only between ATT states parties and not third parties as originally drafted.
- *Entry Into Force*: given variances in views on this issue and the plethora of examples available, the chair unilaterally decided on the number 50.
- *Amendments*: based on the Tobacco Framework Convention, this procedure allowed for the initial implementation of the ATT before allowing the treaty text to be open for amendments. Even then, despite the rules governing decision-making for the

Conference of States Parties, the threshold for these amendment decisions was three quarters of states parties present and voting.

- *Regional organisations*: this issue remained a sticking point and in the end their participation as states parties was not accepted.

On the final day, the chairman's text was put forward for adoption, but was blocked by DPRK, Iran and Syria who cited references to the UN Security Council arms embargoes in Article 6 as unacceptable and therefore could not allow the adoption of the text.

A group of like minded countries, including the co-authors, the United States, Nigeria, and Mexico took the floor to table their proposal to submit a resolution to the General Assembly on Tuesday 2 April, to adopt the ATT as contained in the chair's paper. On the Tuesday, following a brief commentary of the final negotiations by Ambassador Woolcott, the General Assembly voted in favour and adopted the Arms Trade Treaty.

The three states that had opposed the adoption by consensus of the treaty text in the Diplomatic Conference were outvoted in the General Assembly and the treaty was opened for signature on 3 June 2013.

## Why did the ATT process work?

At the outset, the process was well thought out and calculated. Using the modalities of the UN in a systematic way from GGE to OEWG to Preparatory Committees to Diplomatic Conference, and using consensus in a manner that could be broken in the end, was the only way success could be achieved.

The campaign stage of the ATT, early engagement with industry and the crucial vocal support of civil society were instrumental in awareness raising in states and among the public which put pressure on individual governments through targeted campaigns. Outreach by the co-authors and in particular the UK was very efficient at winning over support. The reason for this was that a different, or tailored, message was conveyed to each different group; a message that was relevant to the group's interests and concerns. The global vision of the ATT differed depending on who the target audience was. For Africa, they hoped that the ATT would be the legally binding 'Small Arms Treaty', for Latin America it was about tackling diversion, armed violence and criminal gangs, and for Europe and the US, it was the creation of a responsible global trade and a levelling of the playing field in that trade ensuring that all major exporters were applying the same criteria in their arms exports.

The negotiating process itself was marked by the emergence of a number of coalitions and like-minded groups. The co-authors were made up of exporters and importers

from different continents, with the aim of working regionally as well internationally at the United Nations. Control Arms brought together a wide range of different civil society groups, including NGOs, parliamentarians, medical professionals, survivors of conflicts, and regional groupings. Industry added their own thoughts on practical implementation particularly on how to manage 'parts and components'. Some countries caucused on the basis of regional arrangements. Others clustered to advance specific issues such as gender-based violence and sustainable development. Leadership was shared among individuals and coalitions. Crucially, the UN political groupings were split and redundant. States were freer to engage with like-minded states and drive common agendas. The two chairs pushed UN member states towards consensus but expected delegates to engage in genuine negotiations and drafting. The final text contains echoes of speeches and written contributions from numerous delegations.

## How can the Arms Trade Treaty make a difference?

The ATT entered into force on 24 December 2014. At the time of writing, it has 130 signatory states and 72 states parties.

With many potential areas of activity, it will be important for the international community to prioritise, and not politicise, future work for the ATT. Based on the experience of negotiating the text, the following could serve as organising principles:

- Reaffirming the fundamental aims of the ATT should remain a guiding principle underpinning every action. These include saving lives, reducing conflict and human suffering, promoting human rights and IHL, supporting development and fighting terrorism.
- Examining and exploiting the ATT's relationship with other instruments. In this regard the Chatham Houses research paper on the 'ATT's Interaction with Other Related Agreements' has some interesting ideas that states parties should consider in order to develop the ATT's potential to improve global control capacities and maximise potential synergies with other instruments and forums.<sup>47</sup>
- Communication activities could be geared to showing the ATT in action, for example in countries undertaking export or import controls for the first time, or supplemental activities. Now more than ever the treaty needs a diverse group of champions to demonstrate that it belongs to all of those affected by the arms trade.
- The first year should focus on the practical business of setting up the secretariat and bringing states together for the first Conference of States Parties. By the time of publication, the first conference is due to have taken place where it is hoped a decision will be made on Rules of Procedure, the Secretariat (location and head),

and financial rules. Hopefully, the conference will also have achieved some quick wins, for example agreement on 'Reporting' and agreement to have a mechanism to continue work on certain issues, for example, end use/r certificates. But in any case, two observations can be made on the negotiating process in general. First, it is hoped that the conference, and any subsequent meetings, maintain the coherence of the treaty and do not risk fracturing it. The text of the Arms Trade Treaty was negotiated over six years. It is what the market will bear. Success should be measured by results on the ground. Second, negotiations in the development phase of the treaty showed that good progress can be made if priorities are discussed among a broad group of participants, and some delegations are asked to lead on specific issues.

- States parties and other stakeholders should seek to consolidate and enlarge the new ATT community. The goal of universality should guide outreach and communications to sceptics. This should apply to civil society participation as well as to states—the ATT negotiating process was enriched by the presence of diverse voices. Industry representatives were critical to ensuring that the practical implications of decisions were taken into account at the point of negotiation, not as an afterthought.
- The ATT community should think about how to measure the impact and success of the treaty over the long term. NGOs play a useful role in monitoring implementation. Figuring out how the treaty has affected conditions on the ground is a complex issue, as it is notoriously difficult to distinguish between causation or simple correlation. A good first step might be to seek to establish baseline information against which the international community can measure change. In this regard, the Baseline Assessment Survey, which allows states to publish what measures they have put in place to control the arms trade, whether or not they are states parties of the ATT, is a useful start and one that should be encouraged.<sup>48</sup> In addition, Control Arms and the ATT Monitor, will be crucial in monitoring future implementation and a useful tool in the analysis of what impact the ATT will have.

## Conclusion

Speaking on 28 March 2013, after three countries had blocked the adoption of the Arms Trade Treaty, the UK said, 'this is not failure, this is success deferred'. This statement was born out with the adoption of the ATT on 2 April 2013. But that event merely marked the end of the beginning. There is still some way to go. The international community is embarking on the painstaking business of building the new architecture that will transform the ATT from text to tools. The positive energy that drove negotiators

to be ambitious is still there. Technical and legal expertise is abundant. The availability of a UN Trust Fund should ensure that projects are funded that can make a real difference in the ATT's first year. The international context may be difficult but if properly managed the ATT could yet be a forum that brings countries together despite their other differences. That is certainly how the ATT was negotiated. It is how it should be implemented.

*The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of the UK government or of its agencies.*

## Endnotes

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