

Controlling Small Arms and Light Weapons Proliferation: The Potential of the Arms Trade Treaty

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This article examines the potential of the Arms Trade Treaty (ATT) to strengthen international control over global small arms and light weapons (SALW) proliferation. Research was based primarily on existing scholarly work on SALW control, the ATT, and arms control generally, as well as on observations of the third and fourth sessions of the ATT Preparatory Committee. The first section of this article analyzes the value of the ATT to strengthen international SALW control, looking at the development of SALW control as a global security initiative, the existing system of SALW control, its weaknesses, and how the ATT could strengthen it. The second section examines the challenges and opportunities that face the ATT with respect to negotiations, implementation, monitoring and verification, and compliance. The article argues that the ATT, while not a perfect instrument of SALW control, presents significant opportunities to increase transparency and promote a “responsible arms trade,” thereby reducing the negative effects of SALW proliferation on human suffering, peace, security, and sustainable development. Moreover, the partnership that has developed between small- and medium-power states and civil society can help to address the challenges that the ATT faces from weak state capacities and control-averse states.

List of Acronyms and Abbreviations

ATT	Arms Trade Treaty
ATT Prep-Com	Prep-Com United Nations Arms Trade Treaty Preparatory Committee
CCM	Convention on Cluster Munitions
DDR	disarmament, demobilization, and reintegration
ECCOWAS	Economic Community of West African States
EU	European Union
Firearms Protocol	Protocol Against the Illicit Manufacture of, and Trafficking in Firearms, Their Parts and Components, and Ammunition

Inter-American Convention	Inter-American Convention Against the Illicit Manufacturing of, and Trafficking in Firearms, Ammunition, Explosives, and Other Related-Materials
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
Interpol	International Criminal Police Organization
MBT	Convention of the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
NGO	non-governmental organization
NISAT	Norwegian Initiative on Small Arms Transfers
OSCE	Organization for Security and Co-operation in Europe
PoA	Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects
SALW	small arms and light weapons
SIPRI	Stockholm International Peace Research Institute
The Monitor	Landmine and Cluster Munition Monitor
The Register	United Nations Register of Conventional Arms
Tracing Instrument	International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons
UN	United Nations
UNGA	United National General Assembly
UNODA	United Nations Office of Disarmament Affairs
UNSC	United Nations Security Council

Introduction

On 6 December 2006, the United Nations (UN) General Assembly (UNGA) passed Resolution 61/89, “Towards an Arms Trade Treaty [ATT],” in a majority vote of 139 states in favour, one against (the United States), and 24 abstentions (UNGA 2006). On 2 December 2009, by another majority vote and with the support of the United States, the UNGA adopted Resolution 64/48, whereby member states agreed “to convene a UN Conference on the Arms Trade Treaty” in 2012 to negotiate a “legally binding instrument on the highest possible common international standards for the transfer of conventional arms” (UNGA 2009, para. 4). One of the main reasons behind the call for the ATT is to strengthen international control over the global proliferation of small arms and light weapons (SALW) through regulation of or restraint over the legal SALW trade and to eliminate or prevent their illicit trade.¹ SALW kill between 500,000 and 750,000 people annually and are a “contributory factor to armed conflict, the displacement of people, organized crime and terrorism, thereby undermining peace, reconciliation,

safety, security, stability and sustainable social and economic development” (Geneva Declaration Secretariat 2011, 1–2).

This article analyzes the potential of the ATT to strengthen international control over global SALW proliferation. Part one examines the development of SALW control as a global security priority, the existing system of SALW control and its weaknesses, and the potential of the ATT to strengthen this system. It argues that the ATT is poised to become the key international instrument to control SALW proliferation. The ATT has great potential to increase transparency in arms transfers through legally binding reporting requirements and to promote a “responsible arms trade” through a normative legal framework of “transfer criteria,” which have been an important part of UN member states’ dialogue in the Arms Trade Treaty Preparatory Committee (ATT Prep-Com). Nevertheless, flaws with the ATT include its inability to address civilian ownership or reduce the millions of SALW already in circulation globally.

Part two considers the challenges and opportunities that the ATT faces in terms of negotiation, implementation, monitoring and verification, and compliance. The ATT is likely to face negotiation challenges from control-averse states, and implementation challenges from developing countries’ weak state capacities, and is unlikely to have a treaty mandate to develop monitoring, verification, and compliance systems. Despite these state-oriented difficulties, the partnerships that have developed between small- and medium-power states and transnational non-governmental organizations (NGOs) have the potential to be a dominant force in negotiations. Moreover, civil society has the capacity to assume monitoring and verification functions and respond to instances of non-compliance. This article concludes that the ATT has the potential to strengthen the international system of control over SALW proliferation, thereby reducing the frequency and severity in which these weapons are employed in war, armed violence, crime, terrorism, and repression.

Part I: The Value of the ATT to Strengthen International SALW Control

The development of SALW control as a global security initiative

The contemporary security discourse identifies the control of SALW proliferation as a global security initiative.² Historically, however, SALW were irrelevant to the international security discourse. The original Cold War “arms control” agenda of the 1960s looked to reduce the risks, severity, and costs of war between states through legally binding, verifiable treaties of agreed military constraints in the “numbers, types, deployment or use” of nuclear weapons and related military technologies (Krause 2011, 26). SALW were neglected since they were perceived to be inconsequential to the balance of military power between the two blocs of states led by the United States and the Soviet Union, respectively.³

The Cold War was dominated by a realist, or state-centric, security paradigm, which conceived of “the state as the subject of security and anarchy the eternal condition of international relations” (Krause and Williams 1996, 232). According to this view, states seek to increase their security *vis-à-vis* other states by strengthening their relative military power. The end of the Cold War led to a broadening and deepening of the security discourse. Types of security threats were broadened to include non-state actors; and the subject of security was deepened, most notably to define security in terms of the protection of civilians, or “human security” (ibid., 230).⁴ Thus it became popular in the post-Cold War arms control discourse to talk of “humanitarian arms control and disarmament” to reduce the risks to civilians of certain “inhumane” and “indiscriminate” weapons (Cooper and Mutimer 2011, 10; Krause 2011, 35). The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (MBT), signed in 1997, and the Convention on Cluster Munitions (CCM), signed in 2008, are examples of this new arms control agenda.

Recently, arms control has been reconceptualized as “controlling the means of violence,” implying a broader scope to address questions of “who can possess, use, develop and transfer the technologies of violence, under what circumstances, against whom, and for what ends” (ibid., 29). The objectives of this reconceptualization are as follows: “1. To reduce the likelihood that the instruments of armed violence are used against individuals, communities, or states; 2. To reduce the effects of armed violence should it be employed; and 3. To reduce the resources employed in the development, acquisition and deployment of the instruments of armed violence” (Cooper and Mutimer 2011, 11). As the threats to global security have changed, the arms control agenda has followed suit in an effort to contain the primary tools of destruction.

SALW control has thus become an issue of prominence in the contemporary security discourse (Garcia 2006, 29). In 1993, then Malian president Alpha Oumar Konaré requested that then UN secretary-general Boutros Boutros-Ghali send a UN mission to observe the effects of uncontrolled SALW proliferation in his country. At the time, scholars such as Edward Laurence (1992) were also beginning to focus on the security implications of the international arms trade, particularly the SALW trade. In 1995, Boutros-Ghali called for international attention to the need to control SALW proliferation and for the disarmament of these weapons, which “are actually killing people in the hundreds of thousands,” at the ground level (UNGA 1995). By the late 1990s, SALW control became one of the most important security priorities of a large number of states (Garcia 2006, 18–19).

The existing system of SALW control

The 1990s and 2000s produced a number of multilateral political and legal agreements on SALW control.⁵ The UN Register of Conventional Arms (henceforth the Register) was established in 1991 as a voluntary reporting system by states on conventional arms transfers. Its *raison d'être* was to build

confidence among states by increasing transparency in the international arms trade (Holtom 2010, 61). The Register's framework consisted of seven categories of conventional arms that omitted SALW.⁶ It has only recently created a standardized reporting form for SALW transfers (UNODA 2011). While it is a step toward a norm of transparency in arms transfers, the Register is weakened by its voluntary nature—it has experienced low state participation in regions of tension and a decrease in reporting in recent years (ibid., 82).

In 1998, the Economic Community of West African States (ECOWAS) declared the Moratorium on Importation, Exportation and Manufacture of Light Weapons in West Africa to stop the flow of SALW into West Africa, which were exacerbating armed conflicts in countries such as Sierra Leone and Liberia (ECOWAS 1998). In 2006, ECOWAS member states signed the Convention on Small Arms and Light Weapons, Their Ammunition and Other Related Materials, which, inter alia, banned SALW transfers into, from, and through the territories of states parties in order to “prevent and combat excessive and destabilising accumulation of [SALW] within ECOWAS” (ECOWAS Executive Secretariat 2006, Article 2.1, 3.1). Moreover, ECOWAS provides a humanitarian justification for the convention as it links SALW transfers to international humanitarian law (IHL) and international human rights law (IHRL) (ibid., Article 6; Garcia 2011, 122–23). ECOWAS set the stage for the Nairobi Declaration (2000) and Nairobi Protocol (2004) for the Great Lakes and Horn of Africa regions, and the Africa-wide Bamako Declaration (2000), which reinforced the positions of the majority of African states to strengthen SALW control (ibid., 116–17).

The European Union (EU) produced a Code of Conduct on Arms Exports in 1998, which came into force in December 2008. The Code of Conduct established uniform supply-side standards for arms transfers, recognizing the “special responsibility of arms exporting states” (Council of the European Union 1998, 1). The code establishes a number of normative principles to be applied on a case-by-case basis in transfer license decisions. Criterion two requires states to assess “the respect of human rights in the country of final destination,” and to “not issue an export licence if there is a clear risk that the proposed export might be used for internal repression” (ibid., 3–4). Also in 1998, the EU enacted the legally binding European Union Joint Action on Small Arms, which banned SALW transfers to non-state actors (Garcia 2011, 115). The EU has demonstrated significant leadership in SALW control, both in terms of norm creation and the fact that more rigorous EU control has dramatically reduced SALW proliferation to countries with poor human rights records (ibid., 141). In 2000, the Organization for Security and Co-operation in Europe (OSCE) adopted the “OSCE Document on Small Arms and Light Weapons” (supplemented by its 2003 *Handbook of Best Practices on Small Arms and Light Weapons*), a comprehensive system of SALW control, including regulations on manufacture, marking and record keeping, transfer control criteria, stockpile security, surplus weapons reduction, and transparency (OSCE 2000).

The Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (hereafter Inter-American Convention) entered into force in 1998. This legally binding agreement requires states parties to adopt measures “to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials,” including, *inter alia*, the creation of domestic legislation to criminalize illicit trafficking activities and systems for firearms marking and record keeping, transfer licensing, stockpile security, and information exchange (Garcia 2011, 113; OAS 1997). It has been ratified by a majority of states in the Americas, with the noteworthy exceptions of the United States and Canada (*ibid.*).

The Protocol Against the Illicit Manufacturing of, and Trafficking in Firearms, Their Parts and Components and Ammunition (henceforth Firearms Protocol) entered into force in 2005 as a supplement to the United Nations Convention Against Organized Crime. The Firearms Protocol was the first international legally binding instrument on SALW. The Firearms Protocol aggregates the measures taken by various regional agreements to create a common international framework “to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” (UNGA 2001b; Garcia 2011, 117).

The UN’s Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA) is the outcome document of the July 2001 UN Small Arms Conference. Edward Laurence and Rachel Stohl (2002, 5) have identified six areas in which the PoA has established the basis for policy-making on SALW control: regulating trade; marking and tracing; brokering; destruction and reduction of surplus stocks; stockpile security; and information exchange and transparency. The PoA recognizes the need for a multi-level approach to SALW control by calling on states to take action at the national, regional, and international levels (*ibid.*, 41–42; UNGA 2001a). The consensus nature of the document has served to frame the debate on SALW control at the international level through the establishment of norms in customary international law.⁷ Following the 2001 SALW Conference, the legally binding International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (henceforth Tracing Instrument) entered into force in 2005. The Tracing Instrument requires states parties to take more comprehensive steps in marking and record keeping; co-operate in tracing operations, information exchange, and technical assistance; create national points of contact; and co-operate with the International Criminal Police Organization (Interpol).

The UN Security Council (UNSC) is empowered to declare legally binding arms embargoes—the prohibition of arms transfers to a defined state(s). Twenty-seven arms embargoes have been declared since 1990. Embargoes are used to counter threats to global security, strengthen legitimate government authority, and achieve peaceful settlements to armed conflicts (Fruchart, Holtom, Wezeman 2007, v). However, the UNSC has a poor record

of sanctioning states that violate embargoes (Schroeder and Lamb 2006, 77). Disarmament, demobilization, and reintegration (DDR) is a strategy employed in UN peacekeeping operations to disarm ex-combatants and disband armed groups. There have been more than 60 DDR programs worldwide since the late 1980s (Krause 2011, 32). However, DDR has been criticized for being a highly political process, salient in determining post-conflict distributions of political and military power, often rewarding intransigence, and conceiving of a “Weberian monopoly of violence” as its model of state power (ibid., 32; Stavrianakis 2011, 195, 202).

Weaknesses of the existing international system of SALW control

Existing instruments of SALW control have focused on criminalizing illicit transfers, marking and record keeping, stockpile security and reductions, international co-operation and assistance, transparency and information exchange, and transfer controls. However, transparency and transfer controls remain relatively weak, as do linkages between normative doctrines, such as IHL and IHRL, and SALW control (see UNGA 2001a, II.2, II.11; Garcia 2011, 123; Laurence and Stohl 2002, viii). Apart from the regional systems established in Europe and Africa and UNSC arms embargoes, regulation of interstate SALW transfers is weak (Marsh 2002, 217). Moreover, significant areas of SALW control have been ignored at the international level. The intransigence of a few states in the 2001 Small Arms Conference, most notably the United States, prevented agreement on the regulation of civilian firearms and the ban of transfers to non-state actors in the PoA (Garcia 2006; UNGA 2001a).

The so-called “politically binding,” rather than legally binding, nature of several key instruments, including the Register and PoA, is another weakness of international SALW control since these documents are unable to compel compliance (Parker 2011, 32). However, legally binding treaties are evidently insufficient in ensuring compliance, as demonstrated by the occurrence of UNSC arms embargo violations (Schroeder and Lamb 2006, 77). Arguably, a greater problem is the weakness of monitoring, verification, and compliance systems. The PoA does not have a mandate for monitoring and verification. Instead, assessments of implementation are done through a combination of biennial meetings, five-year review conferences, and the work of NGOs and the UN PoA Implementation Support System, which provides information on states’ implementation efforts (UN 2012). The PoA Implementation Support System falls far short of the arms control standards set by the International Atomic Energy Agency and the Organisation for the Prohibition of Chemical Weapons, which have mandates for inspections of states’ nuclear and chemical facilities.

A final problem is the narrow framing of the international SALW control agenda as the control of “illicit” SALW through preventing SALW diversion, defined as the movement of SALW from legal control by states and state-sanctioned owners to illicit control by non-state-sanctioned owners.⁸ The distinction between licit and illicit SALW is often blurred. The current

framework does not sufficiently address the fact that SALW almost always originate in legal possession before being diverted to illicit possession, hence controlling illicit SALW requires control of legal SALW as well (see Garcia 2011, 49; Marsh 2002; Small Arms Survey 2002; Stavrianakis 2011). Similarly, the focal role of states in legal SALW regulation has limited the reach of international regulations in the critical areas of state-to-state transfers and civilian firearms possession. Lastly, the narrow association of illicit SALW with non-sanctioned non-state actors fails to address the illegitimate use of SALW by state actors. As Mike Bourne (2011, 216) rightly points out, the separation of legal and illicit SALW “bear[s] only limited and partial relationships to the potential use of weapons in violence,” and “de-emphasizes the violence that is often conducted with legally held and traded weapons.” Control-averse states have thus succeeded in having international SALW control instruments reaffirm their “legitimate rights” to use, produce, and transfer SALW.

The potential value of the ATT

The ATT could address a number of the weaknesses of the current international system of SALW control. The UNGA conceives of the ATT as a legally binding treaty that sets the highest possible international standards of regulation governing the transfer of conventional arms (UNGA 2006, 4). Thus, the ATT is poised to become the key international instrument covering SALW transfers. Most importantly, the ATT has the potential to expand the scope of the international SALW control agenda to include broad regulation of legal trade. The hope is that the ATT can increase transparency in the international arms trade through legally binding reporting requirements and promote a “responsible arms trade” through a strong normative legal framework of “transfer criteria,” whereby states parties would be required to apply thorough risk assessments when making arms transfer decisions (ATT Prep-Com 2011, V, VI).

The transfer criteria would likely be the ATT’s key substantive section. There is a wide range of normative possibilities for consideration. Possibilities include: the probability that a prospective arms transfer can be diverted to an unintended end-user; that transfers could be used to commit acts of aggression, armed violence, or repression, whether domestically or internationally; the end-user state’s compliance record with respect to the UN Charter, IHL, IHRL, UNSC arms embargoes, and international law in general; the end-user state’s participation and implementation of existing instruments of SALW control; the end-user state’s respect for democratic rights and norms; that the end-user state is not a site of armed conflict, terrorism, or organized crime; that the prospective arms transfer is proportionate to the end-user state’s legitimate internal and external security needs; that the transfer would not unduly divert scarce public funds from other needed areas, such as public health and education; and an absolute ban of arms transfers to non-state actors (ATT Prep-Com 2011, V; Council of the European Union 1998; Garcia 2011, 46, 68–71; Parker 2007, 10–11; and Wallacher and da Silva 2008, 3).

This is an ambitious list of transfer criteria for the ATT. Nevertheless, the core normative principle that needs to be satisfied in order to establish a responsible arms trade is that arms should not be transferred if there exists a clear risk that they would be used to facilitate human suffering, or to undermine peace, security, or sustainable social and economic development (*ibid.*, III, V; Garcia 2011, 37). The greatest challenge to building a norm of responsible arms trading is the need to reconcile state sovereignty with the arms trade. The ATT will have to reaffirm states' rights to acquire arms for self-defence and collective security, and to participate in peacekeeping operations (ATT Prep-Com 2011, II.2; UNGA 2009, 1). The ATT therefore needs to make clear distinctions between states' rights to acquire arms for legitimate purposes and illegitimate acquisitions that have no legal justification under the treaty's transfer criteria.

Despite its potential to increase transparency and promote a responsible arms trade, the ATT is not the perfect instrument for SALW control. First, SALW would likely be only one aspect within the scope of the ATT, which is to apply broadly to conventional arms (ATT Prep-Com 2011, IV). Therefore, it may be difficult for the ATT to cover all aspects of the SALW trade, including the trade in their parts, components, and ammunition, while simultaneously being expected to cover all aspects of the trade in other conventional weapons. Moreover, the ATT would not address key conditions enabling SALW proliferation. As it continues to be a state-centric process, it would not create international standards of control over domestic civilian possession, since those would sacrifice US support for the ATT process (Garcia 2011, 49). It also does not reduce existing stocks of SALW or limit future production (*ibid.*, 65), although associated market restrictions reduce the economic incentives to produce arms. The easy acquisition of SALW by civilians in countries with low standards of firearms regulations, and the millions of SALW already in global circulation, will continue to fuel proliferation. Nevertheless, introducing international regulation of the ammunition trade could make millions of illicitly held and irresponsibly used SALW superfluous, if their users are denied bullets. The ATT could save more lives as a mechanism of ammunition control than arms control. Setting high international standards for the ammunition trade should therefore be a key priority for the ATT (ATT Prep-Com 2011, IV; Parker 2007, 6).

Part II: The Challenges and Opportunities for the Arms Trade Treaty

Negotiation of the ATT

Keith Krause's (2002, 247–48) description of the 2001 UN Small Arms Conference could easily be applied to the current atmosphere of the ATT Prep-Com: "The last-minute intransigence of the United States (which almost blocked final consensus), the silent opposition of states such as China, the

activism of the European Union . . . and like-minded states, the persistent resistance of the Arab League to concrete measures, and the impassioned pleas of affected states—this time mainly in Africa.” Nevertheless, the Prep-Com has shown that most states envision the ATT as an instrument to strengthen SALW control (ATT Prep-Com 2011). In the debate on the scope of the ATT,⁹ a clear majority of states have supported the inclusion of SALW, with the notable exceptions of China, Egypt, Ethiopia, and Iran (see ArmsTreaty.org). The inclusion of ammunition and other munitions has received less support (*ibid.*).

Many developing countries in Africa, the Caribbean, Central and South America, and the Pacific face severe internal security threats from armed conflict and violent crime. They therefore perceive the ATT as a means of increasing security through controlling SALW proliferation, particularly with regard to non-state actors. Conversely, many states depend on foreign acquisitions of weapons and materials to supply their armed forces. For example, many states in the Middle East and North Africa, such as Algeria, Egypt, India, Iran, Iraq, Israel, Pakistan, Saudi Arabia, and Syria, consistently have military imports into the hundreds of millions of U.S. dollars annually (SIPRI 2011). These states, many of which—such as India and Pakistan—suffer from acute security dilemmas (Garcia 2011, 66), are likely to resist the ATT’s interference with their ability to acquire arms. At the same time, many of these states are also considered “high risk” according to potential ATT transfer criteria, which adds incentives to block successful negotiations. Not surprisingly, there has been consistent intransigence from a number of states in these regions, most notably from Algeria, Egypt, India, Iran, Pakistan, and Syria.

States also have commercial interests at stake in negotiations. Asid Efrat (2010, 122) observes a correlation between arms exporting states, particularly those with state-owned industries, and resistance to stronger SALW regulation. Russia, with a state-owned arms industry that exported over US\$60 billion worth of conventional arms between 2000 and 2010, has stated that the ATT should be limited to controlling the illicit conventional arms trade (SIPRI 2011). Furthermore, while EU states have been moral leaders in the ATT process, a number of them consistently rank within the top 10 global arms suppliers, including France, Germany, Italy, the Netherlands, Sweden, and the United Kingdom (*ibid.*). If states with growing arms industries such as Brazil, China, or India do not sign the ATT, then EU states’ arms industries would face significant commercial handicaps, since they would be held to higher standards than states outside the ATT.

The final danger is the consensus decision-making procedures that were agreed at the end of the fourth session of the ATT Prep-Com. Operational paragraph five of Resolution 64/48 states that “the United Nations Conference on the Arms Trade Treaty will be undertaken in an open and transparent manner, *on the basis of consensus*, to achieve a strong and robust treaty [emphasis added]” (UNGA 2009, 5). The interpretation of this paragraph was the most contentious point of the fourth session of the Prep-Com, dividing states into

two camps. The first group held that Resolution 64/48 means that all decisions at the ATT negotiation conference, whether on substantive or procedural matters, should be taken by a consensus of states. The second group claimed that in UN practice consensus is not synonymous with unanimity, but rather a process of reaching agreement without formal objections by states. These states generally believe that consensus was an objective to be worked toward, but that veto power should not be conceded to each state (Sears 2012b, 5). The Prep-Com finally agreed on rules of procedure on decision-making for the ATT negotiation conference whereby all substantive decisions are taken by consensus and that every effort is made to ensure that procedural decisions are taken by consensus. However, a mechanism for two-thirds majority voting of all states present and voting was included for when the president of the conference decides that all efforts toward consensus have been exhausted. The president also has the authority to rule on whether a matter is substantive or procedural (ATT Prep-Com 2012, VII). The danger that intransigent states will be able to block or substantially weaken a treaty through consensus decision-making on substantive matters thus remains a real threat to the negotiation of a mechanism to strengthen international SALW control.

On the other hand, the great number of small- and medium-power states and transnational NGOs that support the ATT have the potential to become the dominant force in the 2012 ATT negotiation conference. Matthew Bolton and Thomas Nash (2010, 178) argue that small- and medium-power states and civil society generally share an interest in establishing legal international norms to “tie great and regional powers down to stable and predictable international regulations,” while great and regional powers resist norms in order to maintain flexibility in their foreign policy. UN treaty negotiations in the post-Cold War world have thus seen the development of strategic partnerships between governments and transnational NGOs, also referred to as two-track diplomacy. Notably, such partnerships helped produce the MBT and CCM, despite formidable resistance from China, Russia, and the United States.

A significant body of literature has examined the successes of these state-civil society coalitions.¹⁰ Their success is attributed to the combination of their respective strengths: states possess financial resources and authoritative status to negotiate treaties, while civil society has the capability to frame a debate in moral terms and communicate its message to a wider audience (Bolton and Nash 2010; Price 1998, 638–39; and Rutherford 2000, 96, 102–03). These coalitions can place enormous political pressure on resistant governments, which may risk damaging domestic reputations and diplomatic relations if they are seen as being on the wrong side of a moral issue. Such pressure can be decisive in democratic societies. Moreover, if negotiations get bogged down by intransigent states, like the MBT and CCM cases demonstrate, it is possible to pursue negotiations as a process between like-minded states.

This sort of strategic partnership between small- and medium-power states and transnational NGOs has already emerged within the ATT process (Garcia 2011, 66–67). A number of state coalitions have supported common

positions for a strong ATT in the Prep-Com, including the African Group, Caribbean Community, EU, and Group of Like-Minded States led by Mexico (ATT Prep-Com 2011). They have been supported by various transnational NGOs, such as the Control Arms Campaign and the International Actions Network on Small Arms. These coalitions have been able to dominate SALW discussions in the Prep-Com because their numbers give them greater speaking time compared to control-averse states. The coalitions have framed the SALW debate in terms of the challenges to security and development caused by SALW proliferation and personal tragedies of victims of SALW violence (*ibid.*). Control-averse states have reserved their statements to states' sovereign rights to self-defence rather than confronting the moral issues of SALW proliferation.

It is possible that in the event of deadlock, negotiations could be organized outside the UN framework through the participation of like-minded states. However, this would not be an ideal solution to the problem of state intransigence since such negotiations would exchange the ATT's universality for its comprehensiveness. This potential scenario begs the question of whether the goal of greater SALW control is better served by a treaty of high, non-universal standards on the international arms trade or by less-stringent, universal standards. Certainly losing the support of major arms-exporting states such as China, Russia, and the United States is a problem that should be avoided, and an important reason to avoid the like-minded states negotiation model.

An apparent opportunity for ATT negotiations comes from a less expected front: the European arms industry. Representatives of this industry have explained that they have a commercial interest in a treaty that promotes predictability in arms transfer laws; common standards of competition between firms, whereby the lowest moral standard does not lead to competitive advantage; and corporate social responsibility, which is important to industry investors.¹¹ The industry's support, as key stakeholders in the international arms trade, may be a welcome development for the ATT. However, this support should be viewed critically. Commercial interest in the ATT by definition looks to make the arms trade easier and less costly for business, but SALW control generally favours making it more difficult and costly. For example, the European arms industry may perceive the ATT as a chance to lower their comparatively high regulatory standards. Thus, the industry may have very different objectives for the ATT than, for example, NGOs that see it as an opportunity to control SALW proliferation (Sears 2012a, 4).

Notably, there was debate in the Prep-Com over how the ATT should apply to non-state actors. The African Group called for an absolute ban on arms transfers to non-state actors. However, as the Swedish delegation pointed out, industry is also a non-state actor. The key is for the ATT to carefully define "non-state actors" and the treaty to be applied in a way that will make arms transfers to violent non-state actors that concern the African Group—insurgents, terrorists, and rebels, whether acting as individuals or

groups, seeking to undermine legally constituted government authority—illegal, while not placing overly burdensome restrictions on the normal activities of transnational firms. Yet, as the Nigerian delegation suggested, if these firms decide to associate themselves with violent non-state actors, their actions should be considered illegal under the ATT (*ibid.*).

Implementation of the ATT

Implementation of the ATT would occur primarily at the national level. First, national authorities may be required to apply ATT transfer criteria in case-by-case risk assessments (ATT Prep-Com 2011, V; Wallacher and da Silva 2008, 14). If national governments determine there to be substantial risk that a given transfer would violate these criteria, then the transfer would be illegal under the ATT. Second, states parties may be required to adopt or refine national legislation to be consistent with the ATT, such as criminalizing arms transfers without government authorization (ATT Prep-Com 2011, VI.3). Third, states parties may need to create or refine national agencies to monitor, keep records, and enforce laws on arms transfers (*ibid.*, VI. A). Fourth, states parties may be obligated to strengthen transit and transshipment security of conventional arms (Saferworld 2011, 11–12; Holtom and Bromley 2011b, 1). Finally, annual reporting of information on all arms transfers under a standardized framework would be a basic requirement of the ATT (ATT Prep-Com 2011, VI.B).¹² Reporting may also include information on national transfer control systems, law enforcement efforts, and other steps taken towards implementation (Holtom and Bromley 2011a, vii; Kirkham 2008, 8).

The biggest challenge for ATT implementation and for SALW control broadly is that effective national implementation requires a high level of state development. First, implementation requires sufficient human, technical, and financial resources, as well as low levels of corruption in state bureaucracies, such law enforcement and customs offices, as well as legislatures (*ibid.*, 4; Parker 2011, 15–17, 25). Second, states require effective control over their territorial jurisdiction, including borders, coastlines, and airspace (Lamb and Schroeder 2006, 70–72; Parker 2011, 19–21). These characteristics are mainly found in developed states. While developed states are capable of implementing the ATT to reduce the cascading effect of SALW diffusion from suppliers in developed states to markets in developing states, this would not eliminate the world’s SALW proliferation problems. SALW proliferation can be expected to continue between the world’s less developed countries, which already have saturated SALW markets and would be incapable of effectively implementing the SALW controls of the ATT.

Sarah Parker (*ibid.*, 15) has argued that “[f]or the most part, lack of capacity and resources is a challenge that can be addressed by international cooperation and assistance, if it is well coordinated.” The Prep-Com has identified weak state capacities as a key challenge to be addressed through international co-operation and assistance.¹³ However, it is unrealistic to think that the ATT can solve this problem simply through treaty provisions. The

MBT's Article VI on international co-operation and assistance uses weak language such as "each state party in a position to do so shall provide assistance" (Mine Ban Treaty 1997, 6.3–6.5). The fact that many states parties have failed to meet their initial demining and stockpile destruction deadlines and countless landmine victims still struggle without adequate assistance demonstrates that this is an insufficient strategy for solving state capacity problems (Landmine and Cluster Munition Monitor Editorial Board 2010, 1–2). What is required is a substantial bolstering of state bureaucracies and territorial control in the world's less developed countries. To accomplish this, the ATT would require much greater financial and technical commitments from developed states than was the case with the MBT. This seems unlikely (ATT Prep-Com 2011). The PoA's problem with implementation through co-operation is demonstrative of the challenges that await the ATT (Parker 2011, 16–17).

Monitoring and verification of the ATT

Monitoring is the collection of information on states parties' treaty implementation efforts, while verification is an analytic process of determining states parties' treaty compliance (Lewis and Findlay 2003, 2–4; Tulliu and Schmalberger 2001, 185–86). Monitoring and verification systems have three basic functions: to detect non-compliance, to deter non-compliance, and to build confidence through demonstrations of compliance (ibid.; Lewis and Findlay 2003, 2–4). The ATT has a number of monitoring and verification possibilities. The first is states parties' so-called "national technical means," or the unilateral collection of information on other states parties through available means, including intelligence agencies (ibid., 6, 20). National technical means would permit committed parties to track the compliance of less-committed parties. However, this may be damaging to a treaty that seeks to build confidence and increase co-operation.

The second possibility is the creation of an independent organization with a formal monitoring and verification mandate. Arguably the best examples of this type of monitoring and verification are the roles played by the International Atomic Energy Agency in relation to the Treaty on the Non-Proliferation of Nuclear Weapons and the Organisation for the Prohibition of Chemical Weapons with regard to the Chemical Weapons Convention. These bodies have permanent executives and secretariats that collect and analyze information submitted directly by states parties, and gathered through more intrusive means, including fact-finding missions, on-site inspections, requests for clarification of compliance, and advanced monitoring technologies (Rockwood 2007, 209; Tabassi 2007, 283–86). Unfortunately, the ATT is unlikely to establish such a body because of states' cautious attitudes towards monitoring and verification. The word "inspections" has, for example, been taboo in the Prep-Com (ATT Prep-Com 2011). The best that can realistically be hoped for is that negotiations will create an Implementation Support Unit that will collect and review reports submitted by states parties on their

implementation of the ATT (*ibid.*).

The third opportunity is for civil society to take on the tasks of monitoring and verification. The best example of this is the Landmine and Cluster Munition Monitor (hereafter the Monitor), the *de facto* monitoring organization for the MBT for over 11 years and the CCM for over three years. The Monitor systematically collects, organizes, and analyzes publicly available information on states' implementation and publishes high quality annual reports available to the public. The Monitor employs an international network of in-country researchers, managed by an editorial staff, to carry out its research (Landmine Monitor Editorial Board 2009, vi–vii; Meier and Tenner 2001, 213–15). High standards are demanded of researchers, who must verify and cross-check all information, rely on open-source materials, and do extensive footnoting. Researchers are encouraged to question the reliability of their sources and to act “in a professional and dispassionate manner” with “thorough, accurate and impartial” fact finding (Landmine and Cluster Munition Monitor 2011).

However, ATT compliance is substantially more difficult to monitor because of the high volume of conventional arms transfers, complicated transit routes, and numerous transaction parties in the international arms trade. Moreover, the smaller and the more numerous the items, the more difficult they are to monitor—indicating a challenge for monitoring SALW and ammunition transfers. Moreover, state implementation of transfer criteria, through risk assessments and subsequent authorizations, would produce a substantial verification challenge for civil society.

Fortunately there are examples of NGOs that have experience monitoring the international arms trade. The Stockholm International Peace Research Institute (SIPRI) maintains an annually updated database of publicly available information on international conventional arms transfers (excluding SALW) dating back to 1950 (SIPRI 2011). SIPRI's objectives for this program are to identify suppliers and recipients of major conventional arms, increase the transparency of the international arms trade, and identify destabilizing arms buildups (Holtom and Bromley 2011a, 27). Its database can be used to check the details of specific arms transfers, or the total imports and exports by country (*ibid.*). The Norwegian Initiative on Small Arms Transfers (NISAT) has a database that specifically monitors SALW transfers, their ammunition, and related-materials. NISAT's database uses primarily publicly available customs data on SALW exports and imports made available through the UN Commodity Trade Statistics Database. NISAT also cross-checks the import and export data to verify its consistency (*ibid.*, 28–29).

While the work of SIPRI, NISAT, and other NGOs provide reassuring examples that monitoring the international arms trade is possible, monitoring and verifying compliance with the ATT requires the development of a unique model. The primary function of such a civil society initiative should be to monitor and verify that national risk assessments and transfer authorizations and denials are carried out objectively, and that states' arms transfers are in accordance with the ATT's transfer criteria. Secondly, it should compare states

parties' national reports—if made public—with open source information on arms transfers to verify their accuracy. Thirdly, it could evaluate the strengths and deficiencies of states' transfer control systems (*ibid.*, 26). This sort of monitoring and verification would be most effectively pursued as in-depth, random investigations of states' ATT implementation, including, for example, assessments of states' actual arms transfers—authorizations, denials, and deliveries—against transfer criteria to verify that national transfer control systems comply with the ATT when making transfer decisions. Verifying that transfer denials are based on objective risk assessments rather than so-called “political abuse” could help gain the support of control-averse states. While annual evaluation of all states parties would likely be too ambitious of an agenda for a civil society initiative, random assessments of a number of states parties could still provide sufficient probability of detecting non-compliance, and therefore strengthen the deterrent from non-compliance and build confidence among states parties. A civil society initiative that focuses on these areas would also minimize its overlap with the work of existing NGOs, including SIPRI and NISAT, which measure international arms transfers irrespective of specific treaties such as the ATT.

Civil society monitoring and verification of the ATT has a number of advantages. First, NGOs have the freedom to determine their own mandate (Meier and Tenner 2001, 215–16). For example, the Monitor collects information on the activities of both states parties and non-parties, a liberty which no treaty mandate would provide (Woodward 2001, 106). Second, they can report their findings to the public, increasing accountability through greater transparency, while an official organization may be required to keep its information in confidence. Finally, they have the freedom to determine their information sources, while an official body may be forced to depend on information provided by states parties (Meier and Tenner 2001, 213–15). Conversely, civil society may not have access to confidential information or locations that may only be available to an official body, and may face greater budget constraints than an organization funded by states parties (*ibid.*, 217). Ideally, the ATT would have a two-track monitoring and verification system, with an official intergovernmental organization and a flexible NGO. In reality states are likely to oppose the creation of an official system. Thus, the NGO community should actively engage the topic of civil society monitoring and verification. A treaty without such a system would be significantly weakened, allowing states parties substantial freedom to interpret their obligations and implement a treaty as they see fit. The Monitor offers an instructive model for a future system: it should be established from within the ATT campaign, it should be based on an international network of in-country researchers, it should have leadership capable of managing the network from a central headquarters, it should make regular and reliable public reports of a consistent quality, and it should maintain close relationships with supportive states, which can be important sources of information, funding, and political support.¹⁴

Compliance with the ATT

Non-compliance refers to when a states party fails to meet, or is in open violation of, its treaty obligations (Tulliu and Schmalberger 2001, 185; Lewis and Findlay 2003, 33). Failure to address non-compliance can erode states parties' confidence in a treaty and encourage further non-compliance by weakening the deterrent of expected sanctions. Compliance systems, or a system of responses to non-compliance, exist in order to weaken or eliminate the incentives for treaty defection. Effective compliance systems should be able to assess the severity of non-compliance cases, distinguish between unintentional and deliberate non-compliance, have a range of appropriate responses, and be able to respond to a high frequency of cases (*ibid.*, 40).

A moderate compliance tool that has been suggested in the Prep-Com is to establish "consultation" and "clarification" procedures, or requests for information between states parties "regarding the implementation and operation of [the ATT]" (ATT Prep-Com 2011, I). Clarification procedures could be initiated by a state party if it believes that another state party has violated the ATT's transfer criteria. The latter party would then be required to provide information on its decision-making process for this transfer. A dispute settlement mechanism is another useful compliance tool that has been suggested in the Prep-Com (*ibid.*, J). The referral of cases to the International Court of Justice is one possible dispute settlement mechanism for the ATT (Kirkham 2008, 24–25). Meetings of states parties and treaty review conferences are an essential part of a compliance system. They provide forums for states parties to collectively address non-compliance cases with the states of concern (ATT Prep-Com 2011, G–H; Kirkham 2008, 17). In more extreme cases, sanctions can be considered (*ibid.*, 25). Case referrals to the UNSC carry the potential weight of an arms embargo, which is a fitting way to enforce a norm of responsible arms trading because it indicates that participation in the international arms trade is a privilege of responsible states rather than a right of all states.

Civil society provides an alternative in the likely event that the ATT does not elaborate a well-defined, robust compliance system (ATT Prep-Com 2011). Civil society has greater flexibility to be frank and forceful compared to states, which must balance goals of treaty compliance with the maintenance of good interstate relations. In the cases of the MBT and CCM, states parties have left the naming and shaming role to the International Campaign to Ban Landmines and the Cluster Munition Coalition, which use their speaking rights at meetings of states parties and review conferences to identify non-compliance, with the tacit or even direct encouragement of some states (Hansen 2011; Meier and Tenner 2001, 215–16). Similarly, the Monitor publishes the details of states parties' non-compliance in its annual reports, and identifies "non-adherence" by states that are not parties to the MBT and CCM.¹⁵ Responding to non-compliance could arguably be civil society's most important contribution to the ATT. As Jacqueline Hansen (2011) of the Monitor has said, "It is our job to hold [states] accountable . . . And we won't shy from making that a point."

Conclusion

UNGA Resolution 64/48 has set the agenda to negotiate the ATT aspiring to “the highest possible common international standards for the transfer of conventional arms” in July 2012. The ATT can strengthen the existing international system of SALW control by increasing transparency in the international arms trade through legally binding reporting requirements and, more importantly, by elaborating a strong normative legal framework of ATT transfer criteria to foster an international norm of a responsible arms trade. The key principle of a responsible arms trade is that arms should not be transferred if there is a clear risk that such weapons would be used to facilitate human suffering, undermine peace and security, or threaten sustainable social and economic development. While not tackling important areas of SALW control, such as civilian possession or disarmament, such a framework would nevertheless increase international control over SALW transfers, reducing the frequency and severity in which these weapons can be employed in war, armed violence, crime, terrorism, and repression. Moreover, the ATT that covers ammunition could have the potential to make hundreds of millions of illicit SALW superfluous by controlling the flow of bullets.

There are, however, serious challenges to realizing the ATT. The first comes from the potential of control-averse states to derail, stall, or weaken the ATT during negotiations, particularly in the event of consensus voting procedures. The strategic partnerships that have developed between small- and medium-power states and transnational NGOs will be key to overcoming this challenge. Thus far, these coalitions have been able to dominate the SALW debate in the Prep-Com, successfully framing it in moral terms, and exerting significant political pressure on democratically elected governments. In the event of failure, it remains possible that a group of like-minded states could negotiate the ATT outside of the UN.

The ATT also faces serious implementation challenges from developing countries’ weak state capacities. While the ATT could be implemented by developed countries to reduce or eliminate the cascading effect of future SALW diffusion to developing countries, SALW transfers are likely to continue between the world’s least developed countries. It will be difficult, but not impossible, for international co-operation and assistance to effectively address this state capacity problem.

It also seems unlikely that the ATT would elaborate well-defined, robust systems of monitoring, verification, and compliance. The absence of such systems would seriously weaken the ATT and its deterrent of detection and sanctions for non-compliance. Civil society has a critical role to play in monitoring, verification, and responding to non-compliance. The NGO community should immediately begin putting together a system based loosely on the Monitor and draw useful lessons from SIPRI’s and NISAT’s programs on monitoring conventional arms transfers. The ATT that covers SALW and has a group of like-minded states and transnational NGOs to enforce it offers real potential to strengthen the international system of SALW control.

Notes

1. SALW have been defined broadly in international law. The International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons defines “small arms” as weapons designed for individual use, such as revolvers, pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns. “Light weapons” are designed for use by two or three persons, such as heavy machine guns, hand-held and mounted grenade launchers, portable anti-aircraft and anti-tank guns and rocket systems, recoilless rifles, and mortars (UNGA 2005, II).
2. There is a long list of scholarly work that has identified uncontrolled SALW proliferation as a global security threat, and/or control of SALW proliferation as a global security initiative. See, for example, Atwood (2006), Bourne (2011), Bromley and Griffiths (2010), Cooper (2011), Cooper and Mutimer (2011), Garcia (2006), Efrat (2010), Garcia (2006; 2009; 2011), Hughes (2004), Kartchner (1996), Krause (1999; 2002; 2011), Schroeder and Lamb (2006), Laurence and Stohl (2002), Lock (1999), Marsh (2002), Rotfeld (2001), and Wallacher and da Silva (2008).
3. For a seminal study of the development of the initial Cold War arms control agenda, see Bull and Goold-Adams (1961). For discussion of SALW being outside the scope of the Cold War arms control agenda, see Bourne (2011, 216), Garcia (2011, 32–33), and Krause (2011, 26).
4. For explanations of the post-Cold War development of the human security agenda, see Cooper (2011, 140) and Garcia (2011, 12–13).
5. This article does not attempt to provide a comprehensive account of all existing instruments of SALW control. This has been done elsewhere (see, for instance, Garcia 2011).
6. The Register’s seven-category framework on conventional arms includes battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, and missiles and missile launchers. This framework reflected a focus on destabilizing buildups of larger conventional systems, mostly relevant to interstate rivalries.
7. For further discussion, see Garcia (2011, 118–19), Krause (2002, 249), and Laurence and Stohl (2002, ix).
8. The framing of the diversion problem focuses on the ways in which SALW move from legal to illicit possession (through such means as falsification of documentation, bribery of corrupt officials, redirection of flights, or simply the illegal production, purchasing, theft, looting, and smuggling of weapons) and the physical and market characteristics of SALW that facilitate their diversion (such as their size and weight, which makes them relatively easy to smuggle by land, air, or sea; their durability and low maintenance requirements, which give them long life cycles so that they often travel from armed conflict to conflict; and the enormous quantities already in illicit circulation). See, for example, Husbands (1996, 242–43), Joseph and Susiluoto (2002, 130–31), Marsh (2002, 223–24), Schroeder and Lamb (2006, 71–72), and Small Arms Survey (2002, 134–38).

9. The scope of an ATT refers to the types of weapons, materials, and technologies, and the types of international transactions and activities to be covered by a treaty. Suggested weapons, materials, and technologies have included tanks; military vehicles; artillery systems; military aircraft (manned or unmanned); military helicopters (manned or unmanned); naval vessels (surface and submarine vessels armed or equipped for military use); missiles and missile systems (guided or unguided); small arms; light weapons; ammunition; munitions; parts and components; technology and equipment; and dual-use goods (ATT Prep-Com 2011, IV. 1). Suggested international transactions and activities have included import; export; transfer; brokering; manufacture under foreign license; and technology transfer (*ibid.*, IV. 2). However, the definition of “transfer,” as it has been proposed, includes import and export, as well as a number of other items, such as re-export, temporary transfer, transshipment transit, transport, leases, loans, and gifts (ATT Prep-Com 2011, Annex A).

10. See, for instance, Bolton and Nash (2010), O’Dwyer (2006), Price (1998), Rutherford (2000), and Short (1999).

11. Representatives of the European arms industry spoke at a side event at the third session of the ATT Prep-Com and explained their commercial interests in the ATT (ATT Prep-Com 2011). In July 2011, 21 investors of Principles for Responsible Investment, representing US\$1.2 trillion in assets, called for a strong, legally binding, and comprehensive ATT (Principles for Responsible Investment, 2011).

12. A standardized reporting framework for the ATT may require information on, *inter alia*, suppliers and recipients, transit routes, the types and numbers of weapons, the years of order and delivery, and the value of transfers (Holtom and Bromley 2011a, vii).

13. Key areas that have been identified are co-operation in information exchange and law enforcement operations (with Interpol able to facilitate interstate co-operation), financial assistance and technical training, and an Implementation Support Unit to assist in the ATT’s implementation (ATT Prep-Com 2011, VI; Saferworld 2011, 11–12).

14. On 27 July 2011, I interviewed Jacqueline Hansen, Program Manager (Canada) for Landmine and Cluster Munition Monitor, to learn about how the Monitor monitors, verifies, and responds to non-compliance with the MBT and CCM. The objective of this interview was to draw lessons from the Monitor that could be applied in the creation of a similar civil society function with respect to the ATT.

15. As a result, beyond the gradual increase in the number of signatories to these treaties, non-parties—such as the United States, Russia, and China—have made real moves to demonstrate their adherence to treaty norms, declaring moratoriums on the use or transfer of landmines, halting production, destroying stockpiles, and providing assistance for demining activities and to landmine victims (Landmine Monitor Editorial Board 2009, 1–2).

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