



Control Arms campaigners demonstrate in favor of an Arms Trade Treaty in 2012. Control Arms/ Andrew Kelly

SAVING LIVES WITH COMMON SENSE

The Case for Continued US Support for the Arms Trade Treaty

On September 25, 2013 US Secretary of State John Kerry signed the Arms Trade Treaty. The Arms Trade Treaty is a common sense agreement that will have a positive impact on US security, civilians living in the midst of armed conflict or unstable environments, and poverty alleviation. By signing the Treaty, the Obama Administration took an important step toward a more secure world. Now is the time for the Senate to do its part and support this life-saving Treaty.

SUMMARY

By signing the Arms Trade Treaty on September 25, Secretary John Kerry took an important step toward a safer and more secure world. The Arms Trade Treaty (ATT) is the first-ever multilateral treaty on the global trade in conventional arms. It is a common sense agreement that establishes standards for the \$40 billion legal international weapons trade and seeks to reduce the illicit arms trade.

The Treaty offers great benefits to the safety of civilians globally and to US security. It sets clear rules that stigmatize irresponsible arms transfers and will help make it more difficult and expensive for rogue arms dealers to supply weapons to war criminals, human rights abusers, criminals, and potential terrorists.

The Arms Trade Treaty applies to the international trade in conventional arms—that is export, import, transit, transshipment, and brokering—and contains no provisions regulating domestic gun sales or use. The Treaty's life saving potential derives from its four central requirements.

First, the Treaty bans absolutely the transfer of arms when the exporter knows the weapons will be used for genocide and other atrocity crimes. The Treaty strictly forbids arms transfers for use in genocide, crimes against humanity, and war crimes.

Second, the Arms Trade Treaty gives governments a set of steps they must all take prior to transferring arms. Governments must assess the risk of an arms transfer fueling violations of international human rights or international humanitarian law, international organized crime, terrorism, and gender-based violence. If the exporting country finds that the risk of the weapons contributing to such acts is sufficiently high and cannot be mitigated, they may not transfer these arms.

Third, the Treaty requires all countries to develop national export and import control systems. While many countries have strong control systems in place, the US Department of State estimates that around 100 countries have either grossly inadequate or non-existent systems. Because national governments often do not effectively control arms flows, at least \$2.2 billion worth of arms and ammunition was illegally imported by countries under arms embargoes between 2000 and 2010. Implementing effective national systems is the surest way of preventing unscrupulous arms dealers from trading arms to war criminals and terrorists with impunity.

Finally, the Treaty requires governments to be transparent in their arms trade decisions. Without obligations requiring countries to be transparent, the shadowy and secretive global trade in arms and ammunition will continue unabated, fuelling corruption and hindering accountability. Furthermore, transparency is the key to enforcing the Arms Trade Treaty. There is no supranational body entrusted with enforcing the Treaty. Instead, the Treaty will be enforced at national level by national governments. Yet without public information detailing what measures are

taken and which transfers are authorized, governments will not be held to account for failing to implement the Treaty. The transparency provisions of the ATT will help other governments, national legislatures, and civil society understand what governments are doing and hold them accountable.

There is a strong case to be made for the US Senate giving its consent to ratification of the Arms Trade Treaty. In many ways, existing US law and policy on the arms trade mirror the Arms Trade Treaty. Leaders of both political parties agree that it is in the US national interest to prevent the harm that comes with the illicit and irresponsible arms trade and to further the establishment of a global order that allows for the legitimate transfer of arms. To this end, both Republican and Democratic administrations have pursued multilateral and bilateral efforts to: restrict arms transfers from fueling atrocities; apprehend and bring arms dealers to justice; add transparency to the arms trade; and enhance cooperation on export controls.

Yet measures agreed upon before the Arms Trade Treaty have proven inadequate. Without the clear, strong set of global rules found in the Arms Trade Treaty, governments and other actors will continue to transfer arms to end users that threaten peace, commit abuses, and undermine global efforts to achieve development goals and reduce poverty. Without clear requirements for countries to enact and enforce domestic laws governing arms flows, dealers will continue to find safe havens from which to base their operations and trade arms to war criminals with impunity. Without obligations on transparency, the shadowy and secretive global trade in arms and ammunition will continue unabated, fuelling corruption and hindering accountability.

The Arms Trade Treaty offers the United States and the world humanitarian, security, and development benefits. At the same time, the ATT respects the sovereign right of governments to defend themselves and their allies, and it will not infringe on the legitimate commercial trade of conventional weapons or domestic firearms rights. The Senate should welcome the Arms Trade Treaty and move forward with providing its advice and consent to ratification. President Obama demonstrated strong and conscientious leadership by supporting the Treaty through its development and by signing the agreement. It is now time for the Senate to do its part.

1 INTRODUCTION

On April 2, 2013, Member States of the United Nations adopted the Arms Trade Treaty (ATT) by an overwhelming majority vote of 154 to 3. The Treaty is the first of its kind and will, for the first time, regulate the \$40 billion global trade in conventional armaments.¹ US Secretary of State John Kerry signed the Treaty on September 25, 2013.

States adopted the ATT because they recognized that the global arms trade is out of control. Although the arms trade is a legitimate business, the illicit and irresponsible trade of arms and ammunition fuels armed conflict, human rights abuses, war crimes, acts of terror, and poverty.

The current crisis in Syria provides a deeply saddening case study of why the ATT is vital for saving lives and reducing the impact of armed conflict. Although the responsibility for the deaths of more than 100,000 people in the Syrian conflict lies at the feet of the belligerents, mass atrocities are all too often, directly or indirectly, supported by outside parties.² Governments and non-state actors continue to supply arms and ammunition to both sides of the conflict, despite the severe risks that the weapons will be used to violate international human rights and international humanitarian law.

The wars that ravaged West Africa in the 1990s and 2000s are another tragic example of the negative consequences of an unregulated arms trade, and they expose a different yet equally threatening side of the arms trade. Most arms exporters refused to transfer arms to countries that were under UN arms embargoes, such as Sierra Leone and Liberia.³ However, rogue arms dealers easily exploited weak or non-existent national control systems to send arms to West African conflict zones. One such situation was documented by a UN panel of experts in March 1999. According to the panel, a notorious Ukrainian arms dealer sent 68 tons of Ukrainian weapons to Burkina Faso using false end-user certificates, under a contract organized by a company registered in Gibraltar. Within days of their arrival in Burkina Faso, the weapons were carried to Liberia in an aircraft owned by the arms dealer. The aircraft was registered in the Cayman Islands and was operated by a company registered in Monaco. The weapons were then transferred from Liberia to Sierra Leone, which was at the time in the midst of an 11-year civil war during which massive acts of violence were perpetrated on the civilian population.⁴ The arms dealer at the center of this saga, Leonid Efimovich Minin, was arrested in Italy for trafficking arms. Italian officials found documents in his hotel room describing the transfer of nearly 14,000 Kalashnikov rifles and 9 million rounds of ammunition.⁵ Minin's arms-trafficking charges were dismissed and he was later released on the grounds that the prosecution lacked jurisdiction, since the arms transfers did not pass through Italy.⁶

Flagrant violations of arms embargoes can occur because the international legal regime governing the arms trade has so far been an inadequate patchwork system of national laws, regional initiatives, and country-specific embargoes. National laws governing the arms trade have ranged from

sophisticated to non-existent. Although the United States and some other countries have extensive systems of arms export and import controls, close to 100 countries have either grossly inadequate controls or no controls at all.⁷ Furthermore, regional efforts are often limited and are implemented unevenly; large areas of the world—including all of Asia and the Middle East—fall under no regional control initiatives. The current system enables unscrupulous arms dealers to bypass law enforcement efforts and transfer arms to actors that are, for good reasons, unable to receive arms on the legitimate arms market.

International arms embargoes are the United Nations' central tool for stopping arms flows to human rights abusers and war criminals. However, the existence of the embargoes alone is often not an effective tool for stopping irresponsible arms transfers. Because national governments often do not effectively control arms flows, at least \$2.2 billion worth of arms and ammunition was imported by countries under arms embargoes between 2000 and 2010.⁸ Even when an arms embargo has the capacity to stop new arms flows, embargoes often come too late to make a difference to the affected country. The international community rarely makes a concerted effort to stop arms flows until after the conflict has taken far too many lives and arms are already readily available.

Governments that developed the Treaty recognized that without a clear, strong set of rules to govern the arms trade, governments and other actors will continue to transfer conventional arms to end users that threaten peace, commit abuses, and undermine global efforts to achieve development goals and reduce poverty. Without clear requirements for countries to enact and enforce domestic laws on arms flows, arms dealers will continue to find safe havens from which to base their operations and trade arms to war criminals with impunity. Unless there are unambiguous and comprehensive legal obligations that apply evenly across the world, national and regional arms-control mechanisms will be easily circumvented. Without obligations on transparency, the shadowy and secretive global trade in arms and ammunition will continue unabated, fuelling corruption and hindering accountability.

The adoption of the ATT is an historic achievement. The modern initiative for an arms trade treaty was started by a group of NGOs and Nobel Laureates in the 1990s. The idea started to gain momentum and Oxfam joined with other NGOs including Amnesty International and the International Action Network on Small Arms in 2003 to launch the international Control Arms Campaign, calling on governments to develop a global arms trade treaty.

At the start of the Control Arms Campaign, only three states—Costa Rica, Cambodia, and Mali—publicly supported the idea of an arms trade treaty. Support gradually increased as countries affected by the unrestrained global arms trade listened to their populations and joined the effort. Major arms producers started to add their voices to the effort in 2006, and the United States reversed its previous position and voiced its public support for the idea of an arms trade treaty in 2009. Ten years after the Control Arms Campaign was launched, the Arms Trade Treaty was adopted and opened for signature.

2 THE TREATY'S PROVISIONS

The Arms Trade Treaty is an important step toward controlling the international arms trade. It bans the transfer of arms to end users when the exporter knows the weapons will be used to commit violations of human rights and international humanitarian law. Over time, it will stop unscrupulous arms dealers from operating with impunity. It will increase transparency and will enhance cooperation in law enforcement and export control.

The goals of the Treaty are ambitious, and their realization depends upon State Parties' rigorous implementation of its provisions. Below is an outline of what governments must do in order to implement the ATT.

SCOPE OF THE TREATY

The Arms Trade Treaty covers the international trade of conventional weapons. Each government must decide for itself what it will control, but the Treaty does specify what those items must be, at a minimum. Items explicitly named in the Treaty are:

- battle tanks;
- armored combat vehicles;
- large-caliber artillery systems;
- combat aircraft;
- attack helicopters;
- warships;
- missiles and missile launchers;
- small arms and light weapons;
- ammunition fired, launched, or delivered by the arms listed above; and
- parts and components.⁹

However the Treaty goes further, encouraging countries to “apply the provisions of this Treaty to the broadest range of conventional arms.”¹⁰

This reflects the widespread practice among arms-exporting states, including the United States, of controlling a comprehensive range of military equipment.

The Treaty applies to the export, import, transit, trans-shipment, and brokering of conventional arms. It does not address the internal trade, manufacture, or use of firearms. Rather, according to the Treaty, it is “the sovereign right of any State to regulate and control conventional arms exclusively within its territory, pursuant to its own legal or constitutional system.”¹¹

TRANSFER RESTRICTIONS

The centerpiece of the Arms Trade Treaty is its requirements in Articles 6 and 7 that countries refrain from exporting arms when the weapons will be used to undermine the Treaty's humanitarian goals. As a whole, these articles place a strong stigma on arms transfers that are likely to contribute to, or fuel, atrocities, violations of international human rights law and the laws of armed conflict, terrorism, or transnational organized crime. The Treaty does this by first prohibiting arms exports in certain circumstances, most notably when the exporter knows that the importer will use the weapons for genocide, crimes against humanity, and war crimes. Under no circumstance could a State Party to the Treaty transfer arms when it has the knowledge that the weapons will be used for these crimes.

Where these prohibitions do not apply, State Parties must conduct a comprehensive risk assessment and consider possible risk-mitigation measures before authorizing an export. The assessment explicitly requires State Parties to examine whether there is a risk of serious violations of international human rights or humanitarian law, or of contravening conventions relating to terrorism and organized crime. States are required to refuse authorization where this assessment concludes that even with mitigation measures, there remains an "overriding risk" that the arms will be used for one or more negative acts. States are also required in this section to take into account, before arms are transferred, the risk of the weapons being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children, as well as the risk of diversion from the legal to the illicit arms market.

NATIONAL CONTROL SYSTEMS

In addition to the transfer restrictions, the Arms Trade Treaty requires that all State Parties build and enforce a national system for controlling arms flowing into and out of their territory. First, the Treaty requires that State Parties establish a national control list that catalogues the items their nationals place in international commerce that are subject to controls. Second, the Treaty requires that each State Party designate competent national authorities to administer the system in a transparent way. Third, each State Party must take appropriate measures to regulate, where feasible, the transit and trans-shipment of arms, and to regulate arms brokers. Finally, the ATT encourages exporting countries to build into their control system appropriate measures to prevent the diversion of arms into the illicit market, such as examining parties involved in the export; requiring additional documentation, assurances and investigation; and law enforcement activities.

The system that all State Parties must adopt contains all the essential elements of a basic arms export and import control system. If a substantial majority of countries adopt such a system, rogue arms dealers will have a very difficult time finding safe havens in which to base

their operations. They will struggle to find transit countries that will allow illegal arms shipments to move through them, and they will eventually find their profits drying up.

Each State Party to the ATT is encouraged to control arms transfers coming into and out of their country beyond the Treaty's minimum requirements. The United States, for example, currently has a system in place that in some ways far exceeds the Arms Trade Treaty's requirements. Yet it does not make sense for countries that do not export weapons and only import a small number of weapons to control arms transfers at the same level as the United States does. Likewise, remote island-countries that do not serve as transit points for arms will not need to enact extensive controls on the transit and trans-shipment of arms. Thus, the Treaty enables countries to establish a system that serves its goals but does not put in place an expensive one-size-fits-all regime.

TRANSPARENCY: THE KEY TO ENFORCEMENT

The arms trade is one of the least transparent sectors of global commerce. Enforcing the Treaty will be very difficult without governments showing the world when, and to whom, they are transferring arms.

There is no supranational body entrusted with enforcing the Treaty. Instead, it will be enforced at national level by State Parties that are required to "take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty."¹² Yet without public information detailing what measures are taken and which transfers are authorized, State Parties will not be held accountable. For this reason, the Treaty requires each country to maintain records of exports and imports; to share that information with other states involved in a transaction; and to share information with the public.¹³

According to the ATT, each State Party "shall maintain national records, pursuant to its national laws and regulations, of its issuance of export authorizations or its actual exports of the conventional arms."¹⁴ There is no single format that the records must adhere to, but the Treaty encourages countries to include in those records the quantity, value, model/type, authorized transfers, conventional arms actually transferred, details of exporting state(s), importing state(s), transit and trans-shipment state(s), and end users. The Treaty requires each exporting country to make available information about export authorizations to the importing country and to the transit or trans-shipment countries when requested. The Treaty also encourages countries to cooperate and share information, according to their respective national laws, so that they can tackle the black market arms trade.

State Parties and civil society will monitor implementation of the ATT. The Treaty requires State Parties to submit annual reports to other State Parties on international transfers and national implementation activities and to make these reports publicly available, so that their

appropriateness can be assessed by other governments and citizens. Although some countries, like the United States, provide the public with information about most of their transfers, many countries keep this information secret. The Treaty's transparency provisions will enable its effective implementation and will bring citizens into the discussion of arms trade decisions.

IMPLEMENTATION AND COOPERATION

The Arms Trade Treaty requires that State Parties “cooperate with each other, consistent with their respective security interests and national laws, to effectively implement this Treaty.”¹⁵ Such cooperation will offer some of the Treaty's greatest benefits. It encourages countries to share “information regarding illicit activities and actors in order to prevent and eradicate diversion of conventional arms” and to “afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings in relation to violations of national measures established pursuant to this Treaty.”¹⁶

Mutual legal assistance is the formal means for obtaining information located in one country that will assist in the prosecution of suspected criminals in another country. Unless countries have signed bilateral agreements on mutual legal assistance, government investigators and prosecutors may find it difficult to obtain evidence from other countries. If countries take up the call in the ATT, the Treaty could help to maximize the use of existing agreements, as well as concluding new ones for legal assistance in investigations and prosecutions for illicit arms trafficking.

The ATT also provides a way for those that need help implementing its provisions to get assistance from those in a position to provide it.¹⁷ Such assistance may include: stockpile management; disarmament, demobilization, and reintegration programs; model legislation; and the sharing of best practices. States may provide such assistance directly to the country. For example, the United States does this through its Export Control and Related Border Security Program, administered by the State Department; the stockpile management program, administered through the Defense Department; and various US Agency for International Development programs. States may also contribute funds to a voluntary trust fund administered by the United Nations.

3 ATT RATIFICATION AND US INTERESTS

The goals of the Arms Trade Treaty conform to long-standing US policy and practice. Both Republican and Democratic administrations have pursued multilateral and bilateral efforts to prevent arms transfers from fueling atrocities; apprehend and bring arms dealers to justice; add transparency to the arms trade; and enhance cooperation on export controls. What has divided US policymakers is the issue of whether the United States should legally bind itself to global standards. Some policymakers and commentators argue that the ATT strikes the appropriate balance between meeting US humanitarian, development, and national security goals on the one hand, and the requirements of alliances and support for US industry, on the other.¹⁸ Although US officials routinely demand that other countries follow the standards outlined in the Treaty, there are other US policymakers and analysts who argue that the ATT gives up too much American freedom of action to justify the benefits.¹⁹

America seeks an international system that lets nations pursue their interests peacefully, especially when those interests diverge; a system where the universal rights of human beings are respected, and violations of those rights are opposed; a system where we hold ourselves to the same standards that we apply to other nations, with clear rights and responsibilities for all.

—President Barack Obama, Moscow, Russia, July 7, 2009²⁰

Countries choose to enter treaties when the benefits of the Treaty outweigh the limits it places on a country to pursue its agenda unencumbered. The goals of the ATT are in line with long-standing US policy, and senators supporting ratification must make the case for why this particular treaty will achieve benefits that outweigh any accompanying potential for the United States to be limited in acting as it chooses.

Ratification of the Arms Trade Treaty will benefit US humanitarian and national security interests. The global arms trade is a legitimate component of global security and commerce; yet the illicit and irresponsible trade in conventional weapons has numerous, severe deleterious effects. By providing arms to those who use them for heinous acts, the illicit and irresponsible arms trade fuels human rights abuses, war crimes, and terrorism. By providing belligerents with a steady flow of arms, it fuels and prolongs conflicts and contributes to the displacement of people. The United States has a strong interest in preventing the harm that comes with the illicit and irresponsible arms trade and in furthering the establishment of a global order that allows for legitimate arms transfers.

The Treaty is an important contribution to efforts to stem the illicit trade in conventional weapons, which fuels conflict, empowers violent extremists, and contributes to violations of human rights.

—Secretary of State John Kerry, June 3, 2013²¹

PREVENTING ATROCITIES

On April 4, 2011, President Obama released a presidential directive which stated that “preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States.”²² The Obama administration has taken a variety of steps to implement this directive, including efforts to restructure the US government’s internal approach to armed conflict and strengthen global accountability mechanisms. Each of the steps taken by the administration is important, yet no strategy to prevent mass atrocities is complete without effective control of the global arms trade.

Mass atrocities are organized crimes. Those who commit genocide and crimes against humanity depend on third parties, either states or private actors, for the goods and services that sustain large-scale violence against civilians.²³ When those who commit these crimes cannot be persuaded through sanctions or peace agreements to stop, the global community must take concerted efforts to prevent third parties from enabling atrocities. Such efforts must start with the clarification that it is never appropriate to supply arms to war criminals, perpetrators of genocide, and those who commit crimes against humanity.

The ATT advances this objective by setting a clear global rule: no country may, under any circumstances, transfer arms to parties when the exporter knows the weapons will be used to commit genocide, crimes against humanity, or war crimes.²⁴

Because this prohibition sets a very high standard, the Treaty contains provisions that require states to prevent precarious arms transfers before obtaining the requisite knowledge. The Treaty requires that countries withhold arms transfers if there is an “overriding risk” that the weapons will be used for serious violations of human rights law or international humanitarian law, and those risks cannot be mitigated.²⁵ Thus, even if an exporter does not “know” the weapons will be used for atrocities, State Parties to the ATT must not transfer arms if the risks of being used for serious violations of international human rights law or the laws of war are significantly high.

Governments are not the only supplier of arms used in these crimes. Private arms dealers have become experts at supplying arms to rogue regimes and armed actors by circumventing weak or unenforced national laws and UN arms embargoes. In order to make it more difficult for rogue arms dealers to transfer arms with impunity, the ATT requires countries to strengthen national laws and enforcement mechanisms. The provisions requiring all State Parties to regulate arms brokers, establish

competent national authorities, and prevent diversion into the illicit market will, over time, make it more difficult and expensive for rogue arms dealers to transfer arms to undesirable recipients.

FIGHTING CORRUPTION AND FOSTERING DEVELOPMENT

Fighting poverty and fostering development is “vital to US national security and is a strategic, economic, and moral imperative for the United States.”²⁶ In the 2013 State of the Union Address, President Obama set a goal of eradicating extreme poverty in the next two decades. This is an ambitious goal that must be met with actions that include aid, governance, the rule of law, trade, and security.

With as much as 80 percent of the world’s poor projected to live in countries with conflict or high instability by 2025,²⁷ a strategy to end extreme poverty must address the drivers of fragility and focus on the prevention of armed violence. It is thus in the interest of the United States to address the prevalence of armed violence fueled by the irresponsible arms trade and the waste involved in unaccountable arms flows.

By implementing poverty reduction, development, and security sector programs, governments can create the environment necessary to gain access to essential services and enable people to make the choices and decisions that affect their daily lives. Responsible transfers of military and security equipment can assist a state in establishing the military and policy functions that lead to the security and stability necessary for development. However, irresponsible transfers can do the opposite. Armed violence stalls development by preventing countries from providing employment, delivering essential services, and ensuring basic rights.

Between 1990 and 2006, sub-Saharan Africa lost an estimated \$284 billion as a result of armed conflict—on average \$18 billion per year.²⁸ This was nearly the same as the total amount of official development assistance that the region received during this time. It is thus no surprise that no low-income, fragile, or conflict-affected country has yet achieved a single UN Millennium Development Goal.²⁹

The notoriously secretive nature of the arms trade has allowed corruption to flourish. Corruption in the defense industry is estimated to cost \$20 billion per year.³⁰ The Trade Promotion Coordinating Committee of the Department of Commerce estimated that corruption in the arms trade accounted for approximately 50 percent of all corrupt transactions globally in the 1990s, despite the fact that the value of arms traded annually does not exceed one percent of global trade.³¹ Corruption and bribery lead to higher transactional costs and various hidden costs, leading arms exporters to increase the price of the goods in order to represent the true cost of doing business. Corrupt actors may think they are only taking funds from the arms exporter, but by causing the price of goods to rise, they steal funds from the treasuries of importing countries that would otherwise be used to provide basic services to their populations.

The Arms Trade Treaty will promote development by stopping many irresponsible arms transfers, requiring states to cooperate to stop the diversion of arms into the illicit market and shed light on the arms trade through reporting requirements.

PREVENTING TERRORISM

The primary threat to US national security since the fall of the Soviet Union has come not from strong nation-states but from weak states that fail to provide governance and economic opportunities for their citizens. Many security experts argue that these places breed terrorist threats, and the lack of governance allows for arms to proliferate and reach the hands of potential threats to the United States.³²

Preventing arms from reaching the hands of violent extremists who operate in these ungoverned spaces has long been a core US policy goal. Whether it comes in the form of prosecuting those that “materially support terrorism” in federal courts, sanctioning companies or countries, or unilateral or multilateral efforts to interdict arms or shut down networks, disruption of terrorist supply chains is many government officials’ goal.

On a daily basis, foreign states as well as criminal and terrorist groups seek arms, technology, and other materials to advance their technological capacity and weapons systems... posing threats to US allies, US troops overseas, and to Americans at home.

—US Department of Justice, October 28, 2008³³

The ATT requires State Parties to withhold an arms transfer if there is an “overriding risk” that the arms would be used to “commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party.” Although the United States has many laws banning the provision of arms and other forms of support to those who may commit terrorism, many other countries have no such laws and supply arms to those that would use them for heinous acts against civilian targets.

With the notable exception of the 1999 Convention Against the Financing of Terrorism,³⁴ international law on terrorism often focuses on criminalizing specific behaviors that constitute terrorist acts. There is a remarkable dearth of law covering the supply of material or assistance to terrorists. The ATT breaks this mold by placing a clear obligation on states to prevent arms from reaching the hands of terrorists. As such, it will assist the United States and other governments in pressuring countries to control the flow of arms to terrorists and refrain from transferring arms that could be used in terrorist acts.

The ATT also requires State Parties to control arms entering and leaving their country and to regulate arms brokers. As a consequence, dozens of countries will need to build national control systems essentially from scratch. The US government has an opportunity to help these countries build effective systems that will support US security and save lives.

PREVENTION OF VIOLENCE AGAINST WOMEN AND CHILDREN

War in the 21st century has become increasingly indiscriminate. In 2000, the United Nations Security Council expressed concern that “civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and increasingly are targeted by combatants and armed elements.” The Security Council recognized that “an understanding of the impact of armed conflict on women and girls, effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security.”³⁵ Since the Security Council passed this landmark resolution, successive US administrations have made it a priority to prevent international violence against women.

One of the most important ways that we must measure the value of our international community is by how effective we are in protecting and providing justice for the most vulnerable of our members. When women and girls are preyed upon and raped, the international community cannot be silent or inactive. It is our responsibility to be their advocates and their defenders.

—Secretary of State Condoleezza Rice, June 19, 2008³⁶

The Obama administration has described violence against women as a global epidemic³⁷ and has promulgated a National Action Plan on Women, Peace and Security.³⁸ Yet before the Arms Trade Treaty, neither the United States nor any other government was explicitly required to consider the impacts of arms transfers on violence against women or children prior to authorizing such transfers.

Under the Arms Trade Treaty, State Parties must now assess the risks the arms transfer poses to women and children and take into account, prior to authorizing an arms transfer, whether arms or ammunition will be “used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.”³⁹ Although the Treaty’s language will not by itself halt indiscriminate violence against women, it represents an important component of global efforts to fight the scourge of gender-based violence and sends the message to arms exporters that they must be part of the solution rather than part of the problem.

LIMITATIONS ON US FREEDOM OF ACTION

The benefits of the ATT are numerous and clearly fit within US foreign policy interests. But before the Senate can determine whether the Treaty is worth providing its consent to ratification, it must assess the extent to which the Treaty limits US freedom of action and whether it requires changes to US law or practice.

The Treaty, in establishing adequate minimal standards for the international community, will advance not only security in the world but also the United States foreign policy and national security interests. And it will do this without requiring us to change our laws, as our standards are already higher than those of the Treaty; it will accomplish this without damaging the competitiveness of US industry in the legitimate defense trade; and it will accomplish this without impinging in any way upon the domestic constitutional rights of US citizens.

—Assistant Secretary of State Thomas Countryman, June 17, 2013⁴⁰

The United States already has in place an extensive arms export and import control system. In most ways, this system goes far beyond the requirements of the Arms Trade Treaty. Because the standards in the ATT can be implemented within the existing legal framework of the Arms Export Control Act (AECA) of 1976, the US State Department argues that no implementing legislation would be required and no law would need to be changed.⁴¹

With the AECA, Congress delegated broad authority to the president to implement export and import controls. According to the AECA, prior to decision on issuing export licenses, government officials must consider “whether the export would:

- contribute to an arms race;
- aid in the development of weapons of mass destruction;
- support international terrorism;
- increase the possibility of outbreak or escalation of conflict;
- and prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”⁴²

Although the language of the AECA is not as detailed and prohibitive as Articles 6 and 7 of the ATT, the AECA sets broad parameters and delegates the setting of detailed criteria for arms transfers to the executive branch.⁴³ The Act’s language has been interpreted by successive administrations as requiring the United States to consider the risk of a potential arms transfer prior to authorization and to withhold the transfer if the risk is sufficiently high. This policy has been further spelled out in Presidential Decision Directive 34 of 1995⁴⁴ and has guided the policy of the past three administrations.

The reporting and record-keeping portions of the Arms Trade Treaty are also consistent with existing US law, and no legislative changes are

needed to implement these requirements. The United States reports extensively on its arms exports and keeps associated records. The most comprehensive reporting requirement is contained in Section 655 of the Foreign Assistance Act of 1961, which requires annual reporting of defense articles and services that were authorized and exported to each foreign country and international organization for the previous fiscal year under State Department export license or furnished under the Foreign Military Sales program administered jointly by the departments of Defense and State.⁴⁵ The AECA requires additional transparency in arms sales in the form of advance notice to Congress of proposed sales over a certain dollar threshold. The Department of Defense is also required to report on defense exports that occur under other programs, such as Excess Defense Articles and International Military Education and Training.⁴⁶

Although US reporting on imports of arms is more limited, the United States does report on arms imports to the United Nations Register on Conventional Arms.⁴⁷ Because the Treaty states that “the report submitted to the Secretariat may contain the same information submitted by the State Party to relevant United Nations frameworks, including the United Nations Register of Conventional Arms,”⁴⁸ the United States is already in compliance with this section.

Although no change in law will be required as a consequence of the United States becoming a State Party to the ATT, the Treaty will limit US freedom of action by requiring it to withhold certain transfers not otherwise prohibited by domestic law and by placing an international legal limitation on its ability to significantly lower existing export control law.

First, there is nothing in US law, existing treaty obligations, or executive branch rules that prohibits arms transfers when the exporter knows the weapons will be used for crimes against humanity.⁴⁹ Nor is there any law or policy document that requires the United States to withhold an arms transfer if the risks of serious violations of human rights or international humanitarian law are sufficiently high.

Administration officials will admit that there is no US law that exactly mirrors these obligations, and US officials do not read their customary international obligations as requiring the United States to withhold arms transfers for crimes against humanity or when the risks of human rights abuses or war crimes are significant. However, these officials point out, withholding such transfers has been long-standing US practice. It is often true that the United States refrains from arms transfers when the risk of human rights violations is significant, but this is not always the case. US history is replete with examples of unwise arms transfers that have fueled conflict and human rights abuses.⁵⁰ If ratified, the ATT will require the United States to stay true to its principles.

Second, the ATT will set a global minimum standard of export and import controls. Although the US system greatly exceeds the ATT standards, Congress and the president are free to lower US standards to levels below those set by the ATT. Ratifying the ATT will in no way prohibit

Congress from exercising its constitutional role of “regulating commerce with foreign Nations” or the president’s duty to protect the nation,⁵¹ but it will be a promise to the international community that Congress will not significantly lower US arms transfers laws and regulations while bound by the Treaty.⁵²

MYTHS ON THE EFFECT OF THE ARMS TRADE TREATY

The limitations imposed on the United States by the ATT are either modest or reflect existing US policy, practice, or values. Yet some opponents of the Treaty claim that the ATT would impinge on the rights guaranteed by the Bill of Rights or require changes to existing domestic firearms law. The president of the National Rifle Association went so far as to argue that the ATT is an attempt by the Obama administration to “end-run the Constitution.”⁵³ These arguments are completely false and are often rooted in a misreading (or lack of reading) of the text of the Treaty or a misunderstanding of the place treaties fit within the US constitutional structure.

First, the fear that the Treaty could undermine Second Amendment rights is misguided, because under the US governance structure, no treaty can override the Constitution. In *Geofroy v. Riggs*, the Supreme Court held that the power to make treaties does not extend “so far as to authorize what the Constitution forbids.”⁵⁴ The Supreme Court rarely gets more clear than it did in *Reid v. Covert* when it reasoned that “it would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights, ...[to permit] the United States to exercise power under an international agreement without observing constitutional prohibitions.”⁵⁵ Thus, a treaty that would in any way infringe on a right protected by the Bill of Rights could not withstand constitutional scrutiny. There is no way to bypass the Bill of Rights via a treaty.

Second, issues related to domestic control of firearms are outside the scope of the agreement. The ATT only applies to the export, import, transit, transshipment, and brokering of conventional arms within its scope.⁵⁶ Additionally, the preamble of the Treaty recognizes that it is the “sovereign right and responsibility of any State to regulate and control transfers of conventional arms that take place exclusively within its territory, pursuant to its own legal or constitutional systems.” The preamble also takes note of “the legitimate trade and use of certain conventional arms, inter alia, for recreational, cultural, historical, and sporting activities and lawful ownership where such ownership and use are permitted and protected by law.”

Some commentators and members of Congress often ignore the language of the Treaty’s preamble and argue incorrectly that even if there is no direct language in the Treaty covering domestic use, manufacture, or transfer of firearms, the requirements of the Treaty in Articles 5 and 12 could lead to a national gun registry.⁵⁷

Article 5 of the Treaty states that State Parties must “establish and maintain a national control system,” including a “national control list.” In this context, a national control list is a list of items that the federal government has determined require oversight and approval when imported and exported. This is not a new idea created by the ATT; rather, it is the cornerstone of US export and import control law, regulation, and practice.

An important part of this system involves determining which items should be subject to scrutiny and which can be freely traded. For this reason, national arms transfers control lists are created as a way to inform manufacturers, importers, and exporters when an import or export license is required and to alert law enforcement and customs officials when items must receive extensive oversight. The United States has maintained a national arms transfers control list, called the US Munitions List, for military technology ranging from pistols to fighter jets and warships, including most firearms, for almost 40 years.⁵⁸ Other items are controlled by the Commerce Department, under the Commerce Control List.⁵⁹ The argument that the ATT requirement to create a national arms transfers control list would lead to national gun registration ignores the fact that the United States has had a national control list for more than 40 years and this has had no impact on domestic gun rights.

Other commentators argue that the record-keeping requirements in Article 12 of the Treaty also require the development of an international gun registry.⁶⁰ Article 12 of the Treaty requires all exporters of conventional weapons to keep records. It encourages but does not require each State Party to maintain records of conventional arms that are transferred to its territory as the final destination. Article 12 also encourages but does not require the records to include, as appropriate: the quantity, value, model or type, authorized international transfers of conventional arms, conventional arms actually transferred, details of exporting state(s), importing state(s), transit and trans-shipment state(s), and end users.

Contrary to the claims of some Treaty opponents, Article 12 does not require the United States to do anything more than what it already does. The United States already maintains records of both the import and export of conventional weapons, including firearms. An individual gun owner, unless he or she is a licensed importer, licensed manufacturer, or licensed dealer, is already barred by US law from importing firearms.⁶¹ Those applying for a permit to import firearms must file with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, listing details about the importer, the exporter, the item, and the purpose of the import, including the final recipient if it is different from the importer. These records are kept by the Justice Department, should it ever be necessary to prosecute anyone for illegal arms importation. Similar records are kept by US Customs and Border Protection when it inspects shipments entering the country. Since neither set of records covers weapons once they enter the domestic stream of commerce, the requirement to keep these records cannot be considered anything close to a national gun registry.

COSTS AND BENEFITS OF RATIFICATION

The case for the US Senate providing its consent to ratification of the Arms Trade Treaty is strong. The ATT offers the United States and the world a host of humanitarian, security, and development benefits. At the same time, the ATT respects the sovereign right of governments to defend themselves and their allies and will not infringe on the legitimate commercial trade of conventional weapons or domestic firearms rights.

Yet because the ratification of a treaty requires two-thirds of the Senate to provide consent, the prospects of quick ratification of the ATT seem bleak. Achieving a vote of 67 votes in the US Senate on anything in the second decade of the 21st century is a difficult task.

The costs of signing but not ratifying the ATT are significant. As a signatory but not a State Party, the United States would not be able to participate as a full voting member at meetings of State Parties. It would not be able to engage fully in discussion or adoption of possible amendments to the Treaty, or in questions that may arise about implementation or interpretation of provisions. The United States would also be unable to influence the budget and staffing of the Arms Trade Treaty Secretariat. For these reasons, the United States must become a State Party to the Treaty through ratification if it is to ensure its implementation and that the future direction of the Treaty remains in line with US interests.

Conversely, if the United States clearly signals its consent to be bound by the Treaty, other countries currently sitting on the fence will have a difficult time arguing that it infringes upon sovereignty and limits commercial competitiveness. If the US government decides to ratify the Treaty, and clearly demonstrates in its words and deeds that the Treaty is in the US interest, many other countries will follow.

4 CONCLUSION

The agreement of the Arms Trade Treaty is an historic achievement. This momentous Treaty is the culmination of more than 10 years of diplomatic negotiations and campaigning by Oxfam and its partners in the global Control Arms Coalition. In 2013, governments finally joined together and agreed to a plan that, if implemented rigorously and universally, will put an end to the irresponsible arms trade that fuels so much suffering in the world.

The ATT is a common-sense agreement that will have a positive impact on US security; civilians living in the midst of armed conflict or unstable environments; and poverty alleviation. Because the Treaty offers so many benefits, and because the United States is already compliant with its provisions, the Senate should welcome the Treaty and move forward with providing its advice and consent to ratification. President Obama demonstrated strong and conscientious leadership by supporting the Treaty through its development and by authorizing Secretary of State John Kerry to sign the agreement. It is now time for the Senate to do its part.

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- ¹¹ Arms Trade Treaty, Preamble paragraph 5.
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⁶⁰ See: Cox, "UN Arms Treaty."

⁶¹ See: 18 *US Code* § 922 and 27 *Code of Federal Regulations* § 447.41.

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