

# The Arms Trade Treaty

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This article critically analyses the Arms Trade Treaty (ATT) in light of its object and purpose embedded in Article 1. It evaluates, in a past, present and future-orientated perspective, the successes and limitations of the ATT in establishing the highest common international standards governing conventional arms transfers to prevent and eradicate the illicit trade and diversion of conventional arms, for the purpose of contributing to peace, security and stability, reducing human suffering and promoting cooperation, transparency and responsible action. This chapter demonstrates that in its current form, the ATT has significant shortcomings that may hinder it from achieving its objectives. This chapter argues that there is scope for the ATT to develop its framework under rules of general international law and to realise its potential without having to resort to formal amendment.

## Table of Contents

I. Introduction .....	116
II. Rationale for a Global Arms Trade Treaty .....	119
1. Challenges of Regulating the Global Conventional Arms Trade .....	119
2. Towards the Arms Trade Treaty .....	121
III. The Arms Trade Treaty .....	123
1. Object and Purpose (Article 1) .....	123
1.1. Object of the ATT .....	124
1.2. Purpose of the ATT .....	125
2. Scope of the ATT (Articles 2, 3 and 4) .....	125
2.1. Weapons and Items Covered by the ATT (Articles 2.1, 3 and 4) .....	125
2.1.1. Conventional Arms (Article 2.1) .....	125
2.1.2. Ammunition/Munitions (Article 3) .....	128
2.1.3. Parts and Components (Article 4) .....	129
2.2. Transfers Covered by the ATT (Articles 2.2 and 2.3) .....	130
3. Transfer Prohibitions (Article 6) .....	131
3.1. UN Security Council Chapter VII Measures (Article 6.1) .....	132
3.2. Relevant International Obligations (Article 6.2) .....	133
3.3. Knowledge of Genocide, Crimes Against Humanity and War Crimes (Article 6.3) .....	134
3.3.1. Genocide, Crimes Against Humanity and War Crimes .....	135
3.3.2. Knowledge Requirement .....	136

4. Export and Export Assessment (Article 7) .....	138
4.1. Risk Assessment (Article 7.1) .....	139
4.1.1. Peace and Security (Article 7.1.a) .....	139
4.1.2. Violations or Offences (Article 7.1.b.) .....	140
4.2. Risk Mitigation Measures (Article 7.2) .....	142
4.3. Overriding Risk (Article 7.3) .....	143
4.4. The Special Case (Article 7.4) .....	144
5. Import, Transit, Transshipment and Brokering (Articles 8, 9, 10) .....	144
6. Preventing Diversion (Article 11) .....	145
7. Ensuring Implementation and Compliance .....	148
7.1. Implementation and Enforcement (Articles 5 and 14) .....	148
7.1.1. National Control System and National Control List (Articles 5) .....	148
7.1.2. National Enforcement (Article 14) .....	149
7.2. Reporting (Article 13) .....	150
IV. Organs of the Arms Trade Treaty .....	152
1. Conference of the States Parties (Article 17) .....	152
2. Secretariat (Article 18) .....	153
V. The Way Ahead .....	154
VI. Conclusion .....	159
Bibliography .....	163
Judicial decisions .....	169

## I. Introduction

The ATT<sup>1</sup> was adopted on 2 April 2013 by the United Nations General Assembly ('UNGA'), only days after the failure of the United Nations Final Conference on the ATT to reach consensus.<sup>2</sup> 154 states voted in favor and only 3 states, namely Iran, North Korea and Syria, opposed acceptance.<sup>3</sup> However, this overwhelming support was tempered by the abstention of 23 states, notably including some of the most important actors on both

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1 *Arms Trade Treaty*, opened for signature 3 June 2013, UNTS No 52373 (entered into force 24 December 2014).

2 UN General Assembly, *Resolution adopted by the General Assembly on 2 April 2013: The Arms Trade Treaty*, UN Doc A/RES/67/234 B (11 June 2013); Marlitt Brandes, "All's Well That Ends Well" or "Much Ado About Nothing?": A Commentary on the Arms Trade Treaty' (2013) 5(2) *Goettingen Journal of International Law* 399, 400; see *Charter of the United Nations*, opened for signature 26 June 1945, 1 UNTS XVI (entered into force 24 October 1945) art 18.3; Laurence Lustgarten, *Law and the Arms Trade: Weapons, Blood and Rules* (2020) 399.

3 As cited in Brandes (n 2) 406.

sides of the global arms trade, such as Russia, China and India.<sup>4</sup> Nevertheless, in the words of Ban Ki-Moon, former United Nations Secretary-General, it was ‘a victory for the world’s people’<sup>5</sup> as it represented the first time in world history that an international agreement regulating the conventional arms trade had been achieved. In fact, prior to the adoption of the ATT, there were stricter international rules and regulations on selling bananas and MP3 players.<sup>6</sup> The ATT entered into force on 24 December 2014, and at the time of writing, it has 110 States Parties and 31 Signatories, which are not yet states parties.<sup>7</sup>

Under United Nations (‘UN’) multilateral treaties, the ATT is categorised as a disarmament treaty, belonging in the second category of export control treaties.<sup>8</sup> These have a long-term goal of promoting peace, though, their main objective is to create common standards for regulating international trade of military-use weapons and technology.<sup>9</sup> As a novelty of its kind, the ATT represents a shift in how the international community defines and addresses common security challenges.<sup>10</sup> This shift is captured by its object and purpose in Article 1, which represents the essential goals of the treaty, plays an important role in guiding the behavior of states and sets the interpretative framework for the remaining articles of the treaty.<sup>11</sup> Pursuant to Article 1, the ATT seeks to regulate the international trade in conventional arms by establishing the highest common international standards, and to prevent and eradicate illicit trade and diversion of

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4 Lustgarten (n 2) 73 and 400; Brian Wood and Rasha Abdul-Rahim, ‘The Birth and the Heart of the Arms Trade Treaty’ (2015) 22 *SUR-International Journal on Human Rights* 15, 17.

5 Ban Ki-Moon, ‘United Nations Secretary-General, Statement on the adoption of the Arms Trade Treaty’, (Web page, 2 April 2013).

6 Susan O’Connor, ‘Up in Arms: A Humanitarian Analysis of the Arms Trade Treaty and Its New Zealand Application’ (2013) 11 *New Zealand Yearbook of International Law* 73, 78; Oxfam Australia, ‘Action on arms to safeguard millions’ (Web page, 26 November 2012); *Arms Trade Treaty* art 2.1.

7 Arms Trade Treaty, ‘Treaty Status’ (Web Page, undated).

8 Cindy Whang, ‘The Challenges of Enforcing International Military-Use Technology Export Control Regimes: An Analysis of the United Nations Arms Trade Treaty’ (2015) 33(1) *Wisconsin International Law Journal* 114, 117.

9 Ibid 118.

10 Ibid; Clare Da Silva and Brian Wood (eds), *Weapons and International Law: The Arms Trade Treaty* (2015) 23.

11 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31 and 31.2; Da Silva and Wood (n 10) 23.

conventional arms.<sup>12</sup> Conventional arms are understood to include all arms other than weapons of mass destruction.<sup>13</sup> In the context of the ATT, the term ‘conventional arms’ is used to refer to all arms that fall within the following categories: battle tanks, armored combat vehicles, large-calibre, artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.<sup>14</sup> The purpose of the ATT is to contribute to international and regional peace, security and stability; reduce human suffering; and promote cooperation, transparency and responsible action among the international community, thereby building confidence among states parties.<sup>15</sup>

The treaty has now been in force for six years, and yet global arms trading is still on the rise and continues to fuel human rights abuses.<sup>16</sup> This is influenced by the fact that some of the largest arms exporters, such as the United States (‘U.S.’) and Russia, have not ratified the treaty.<sup>17</sup> The U.S. signed the ATT in September 2013, yet the Trump administration communicated to the UN in 2019 that the U.S. does not intend to become a state party and thus, has no future legal obligations stemming from signature.<sup>18</sup> However, even several states parties appear to be in direct violation of legally binding obligations of the ATT, especially of those that lie at the heart of the treaty.<sup>19</sup> These are provisions that contain the moral and legal imperatives that led to the heartfelt campaign to regulate arms transfers; the life of the treaty is dependent on them functioning

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12 *Arms Trade Treaty* art 1.

13 Stuart Casey-Maslen et al, *The Arms Trade Treaty, A Commentary* (2016) N 0.02.

14 *Arms Trade Treaty* art 2.1.

15 *Ibid.*

16 Amnesty International, ‘Arms Control’ (Web Page, 14 August 2019).

17 *Ibid.*; The Russian foreign ministry stated that the ATT is a defective treaty and declared that Russia has no intention of signing it, see Julian Cooper, ‘Russian Arms Exports’ in Laurence Lustgarten (ed), *Law and the Arms Trade, Weapons, Blood and Rules* (2020) 293, 313; Pieter D. Wezeman, Alexandra Kuimova and Siemon T. Wezeman, *Trends in International Arms Transfers, 2020* (2021) 1.

18 Pablo Arrocha Olabuenaga, ‘Why the Arms Trade Treaty Matters – and Why It Matters That the US Is Walking Away’ (Web Page, 8 May 2019); Signatories are not legally bound to implement the ATT until they have ratified it, but they are still required to refrain from acts that would defeat the Treaty’s object and purpose, see *Vienna Convention on the Law of Treaties* art 18.

19 Amnesty International (n 16); ATT Monitor, *Dealing in Double Standards: How Arms Sales to Saudi Arabia Are Causing Human Suffering in Yemen* (2016) 7.

properly.<sup>20</sup> This implies that there are certain deficits in the ATT, which allow states parties to behave in this manner and keep others from joining.

The aim of this paper is to provide a critical overview and analysis of the ATT in light of its object and purpose enshrined in Article 1. To understand both the accomplishments and the deficiencies of the treaty, it is necessary to first examine its background and historical development, which is outlined in the first chapter. In the second chapter, core articles of the ATT are analysed, with a focus on those that speak more specifically to the obligations states parties are required to implement in order to achieve its object and purpose embedded in Article 1.<sup>21</sup> This chapter reveals the shortcomings of the ATT, including its loopholes, which provides the necessary anchor for exploring regulatory alternatives, and making recommendations for reform in the fourth chapter. The organs of the ATT are presented in the third chapter and analysed in the fourth, with regard to their role in developing the legal framework of the treaty, despite their limited mandate. This paper argues that in its current form, the ATT has significant shortcomings that may prevent it from achieving its object and purpose.

## II. Rationale for a Global Arms Trade Treaty

### 1. Challenges of Regulating the Global Conventional Arms Trade

Attempts to regulate arms transfers at a global level are not new.<sup>22</sup> Especially since the Cold War, several regional and international instruments have been agreed upon that regulate or affect conventional arms transfers.<sup>23</sup> However, these existing instruments were proving insufficient or inadequate in tackling the illicit trade in conventional arms, and ensuring responsible transfers because they vary widely in terms of scope, level of commitment and implementation.<sup>24</sup> Some are less comprehensive than others in terms of the transactions and categories of weapons they cover, some are legally

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<sup>20</sup> Casey-Maslen et al (n 13) N 6.02.

<sup>21</sup> Da Silva and Wood (n 10) 23.

<sup>22</sup> Sarah Parker, *Implications of States' Views on an Arms Trade Treaty* (2008) 2.

<sup>23</sup> For more examples see *ibid* 58–59.

<sup>24</sup> *Ibid* 9.

binding, but the majority are only politically binding, and some are less rigorously applied and enforced than others.<sup>25</sup>

Part of the problem as to why existing instruments have provided insufficient or inadequate lies in the nature of conventional arms: It is their ordinariness that makes the task of regulating their transfers appear, at a first glance, nigh on impossible.<sup>26</sup> There are three main aspects of conventional arms trade that help explain the challenges of its regulation. Firstly, the supply and demand for conventional arms, both legal and illegal, ebbs and flows as international crises emerge and/or are resolved.<sup>27</sup> Secondly, the international trade in conventional arms is a multi-billion-dollar business engaged in some part by virtually every country in the world.<sup>28</sup> Therefore, conventional arms are profitable.<sup>29</sup> Thirdly, the control of and trade in conventional arms are more complicated than that of other weapons systems: Unlike weapons of mass destruction, conventional arms do not primarily serve a deterrence function, but are tools that can be legitimately used by governments, militaries, police forces, and civilians.<sup>30</sup> They are dual-use, in that they can be obtained and used for legitimate purposes, as well as for committing violations of national and international laws.<sup>31</sup> Thus, any multilateral action on the trade in conventional arms as a whole must take the form of regulation rather than abolition or a ban, and discussions about the international arms trade are limited to identifying ways in which the trade and use can be controlled, overseen and made transparent.<sup>32</sup> Article 51 of the *United Nations Charter* ('UN Charter'), which recognises the inherent right of all states to individual or collective self-defense and consequently the right to manufacture, import, export, transfer, and retain conventional arms toward

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25 Ibid 10.

26 O'Connor (n 6) 78–79.

27 Rachel Stohl, 'Understanding the conventional arms trade' (2017) 1898(1) *American Institute of Physics Conference Proceedings* 030005–2.

28 Rachel Stohl, 'Putting the Arms Trade Treaty into Context: Perspectives on the Global Arms Trade, Existing Arms Trade Initiatives, and the Role of the United States' (2009) 103 *Proceedings of the American Society of International Law Annual Meeting* 333, 334.

29 Stohl (n 27) 030005–1.

30 Ibid 030005–2.

31 Tom Coppen, 'The Evolution of Arms Control Instruments and the Potential of the Arms Trade Treaty' (2016) 7(2) *Goettingen Journal of International Law* 353, 354.

32 Anna Stavrianakis, 'Legitimising liberal militarism: politics, law and war in the Arms Trade Treaty' (2016) 37(5) *Third World Quarterly* 840, 842; Stohl (n 28) 334.

that end, frames arms trade discussions.<sup>33</sup> Due to the fact that conventional arms serve legitimate purposes and are the source of a multi-billion dollar business, the role of the major arms producers and exporters cannot be understated. The U.S., Russia, Germany, France, China, and the United Kingdom ('UK') have been holding the lion's share of the global arms market, with the U.S. leading the way.<sup>34</sup> Their hesitance to enhance conventional arms trade controls is likely to have a significant influence on the will and capability of the entire international community to engage in stricter arms trade practices.<sup>35</sup>

## 2. Towards the Arms Trade Treaty

The roots of the ATT can be traced back to the late 1990 s and the beginnings of a civil society campaign supported by a group of Nobel Peace Prize Laureates.<sup>36</sup> In July 2006, 7 governments sponsored the first UN General Assembly Resolution 'Towards an Arms Trade Treaty', which recognised that 'the absence of common international standards on the import, export and transfer of conventional arms is a contributory factor to conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development'<sup>37</sup>. The Resolution was adopted by a large majority during the meeting of the First Committee in October 2006 and by an even larger majority in the UNGA in December 2006.<sup>38</sup> The U.S. was the only state to

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33 Stohl (n 28) 334.

34 Paul Holtom et al, *Trends in International Arms Transfers, 2012* (2013) 1; Stohl (n 27) 030005–7; Pieter D. Wezeman et al, *Trends in International Arms Transfers, 2019* (2020) 1; Wezeman, Kuimova and Wezeman (n 17) 1.

35 Stohl (n 27) 030005–7.

36 Da Silva and Wood (n 10) 13.

37 Mark Bromley, Neil Cooper and Paul Holtom, 'The UN Arms Trade Treaty: arms export controls, the human security agenda and the lessons of history' (2012) 88(5) *International Affairs* 1029, 1040; Parker (n 22) 5; UN General Assembly, *Draft Resolution – Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, UN Doc A/C.1/61/L.55 (12 October 2006); Peter Woolcott, *Arms Trade Treaty* (2014) 2.

38 Parker (n 22) 5; UN General Assembly (n 39); UN General Assembly, *Resolution adopted by the General Assembly on 6 December 2006: Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms*, UN Doc A/RES/61/89 (18 December 2006).

vote against, but foreshadowing the outcome of the process in 2013, important states such as Russia, China and India abstained.<sup>39</sup>

The road from 2006 to 2013, the adoption of the ATT, was not straightforward. States approached the negotiations from a broad range of perspectives.<sup>40</sup> One of the main dividing lines was between states that were interested in a human security instrument and those which would accept only a treaty based upon state security interests.<sup>41</sup> The support of the U.S., for instance, came at a high price: The U.S. demanded that the negotiations be held on the basis of consensus and even though it supported the inclusion of certain human security concerns in the treaty, it wanted state security interests to be paramount.<sup>42</sup> A second important dividing line was between states that viewed the ATT as an arms control instrument and those that saw it as an attempt to raise standards in arms export controls.<sup>43</sup> Both of these divisions lay at the heart of two issues during the negotiations: putting human security into prohibitions and criteria for arms transfers, and the scope of the items covered.<sup>44</sup> The wording of articles of the ATT reflect these issues.

The first UN Diplomatic Conference in July 2012 ended without a treaty being adopted.<sup>45</sup> Although it appeared that a compromise text had been agreed on, the U.S., supported by Russia, Cuba, Venezuela and DRP Korea, announced on the last day that further negotiations were necessary.<sup>46</sup> In December 2012, the UNGA decided to convene another diplomatic conference in March 2013, utilising the modalities of the July 2012 Conference.<sup>47</sup> The Final Conference produced a document which managed to gain widespread agreement, but consensus could not be achieved due to the objections of the delegations of Iran, North Korea and Syria.<sup>48</sup> However, within a week of the closing of the Final Conference, the treaty was approved by the UNGA Resolution,

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39 Lustgarten (n 2) 398; Parker (n 22) 5.

40 Da Silva and Wood (n 10) 13.

41 Bromley, Cooper and Holtom (n 37) 1040.

42 Ibid; Lustgarten (n 2) 399.

43 Bromley, Cooper and Holtom (n 37) 1042.

44 Ibid.

45 Lustgarten (n 2) 399.

46 Ibid.

47 Ibid.

48 Woolcott (n 39) 4.

where consensus is not required.<sup>49</sup> Therefore, in essence, the consensus requirement governing the negotiations had a profound impact upon the contents of the ATT text that was adopted.<sup>50</sup> With all negotiating parties practically given a veto, the treaty had to be designed with a view to accommodating the states least interested in a strong and effective agreement.<sup>51</sup> For the negotiations to result in something that could pass for diplomatic success, many states thought it was crucial that the U.S., Russia and China did not oppose the draft, and thus the treaty was written with their interests in mind.<sup>52</sup> Due to the restrictions stemming from the consensus rule, the ATT became a stronger text than one could have expected.<sup>53</sup> Had it been negotiated under the ordinary rules of the law on treaties, however, it could have become even more robust.<sup>54</sup>

### III. The Arms Trade Treaty

#### 1. Object and Purpose (Article 1)

The faithful interpretation and implementation of the ATT requires an understanding of its underlying aims and objectives.<sup>55</sup> Taken together, the preamble, its principles and the object and purpose in Article 1 create the overall framework for the interpretation of the ATT and illustrate the broad range of interests that the states were pursuing in its elaboration.<sup>56</sup>

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49 Stuart Casey-Maslen, Gilles Giacca and Tobias Vestner, *Academy Briefing No. 3, The Arms Trade Treaty (2013)* (2013) 6; Lustgarten (n 2) 399; *Charter of the United Nations* art 18.3.

50 Cecilia M. Bailliet, *Research Handbook on International Law and Peace, Research Handbooks in International Law* (2019) 272.

51 *Ibid.*

52 *Ibid* 274.

53 *Ibid* 272.

54 *Ibid*; *Vienna Convention on the Law of Treaties* art 9.

55 International Committee of the Red Cross, *Understanding the Arms Trade Treaty from A Humanitarian Perspective* (2016) 13.

56 A preamble forms part of a treaty for purposes of interpretation, see *Vienna Convention on the Law of Treaties* art 31.2; It is not typical for treaties to have a provision that purports explicitly to identify their object and purpose. Therefore, the normative effect of Article 1 is unclear, except insofar as it assists in the interpretation of other provisions in the treaty, see Casey-Maslen, Giacca and Vestner (n 49) 17; *Vienna Convention on the Law of Treaties* art 31 states that a 'treaty shall be interpreted in good faith in accordance with

## 1.1. Object of the ATT

The treaty contains two distinct, yet interconnected objectives: creating the highest international standards for the legal trade and preventing and eradicating the illicit trade in conventional arms.<sup>57</sup> While establishing standards can be seen as an output of the treaty negotiation, eradicating illicit trade in conventional arms is a long-term aim.<sup>58</sup>

Since it was understood during the negotiation process that some states would want to restrict arms transfers even in situations and to recipients not prohibited by the ATT, the twelfth preambular paragraph recognises that via national policies or laws, states have the right to place additional restrictions on transfers of weapons. In this sense, the ATT creates a ‘floor not a ceiling’<sup>59</sup>.

The ATT aims to prevent and eradicate the illicit trade and prevent diversion of conventional arms to the illicit market, or for unauthorised end use and end users.<sup>60</sup> The term ‘illicit’ is not defined in the ATT and there is no universally accepted or agreed definition of what constitutes ‘illicit trade’<sup>61</sup>. However, under the 1996 UN Disarmament Commission Guidelines on International Arms Transfers, recalled in the seventh preambular paragraph of the ATT, illicit arms-trafficking is understood to cover the international trade in conventional arms, which is in conflict with national law, treaty law, or customary international law.<sup>62</sup> Overall, the notion of illicit trade remains broad, and what can be considered ‘illicit’ in the context of the ATT, will largely depend upon the legal framework established by individual states.<sup>63</sup>

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the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ and uses the term eight times: arts 18, 19(c), 20(2), 31, 33, 41, 58(1) and 60, which shows that that the object and purpose plays is a fundamental component in a treaty; Casey-Maslen et al (n 13) N 1.03; Da Silva and Wood (n 10) 23.

57 Da Silva and Wood (n 10) 24.

58 Casey-Maslen et al (n 13) N 1.18.

59 Ibid N 0.41 and N 1.21.

60 *Arms Trade Treaty* preambular paragraph 3 and 8.

61 Casey-Maslen et al (n 13) N 1.26.

62 Ibid N 0.19 and 1.27; UN General Assembly, *Report of the Disarmament Commission*, 51<sup>st</sup> sess, Supp No 42, UN Doc A/51/42 (22 May 1996) 10.

63 Casey-Maslen et al (n 13) N 1.34.

## 1.2. Purpose of the ATT

The ATT's purpose is to contribute to international and regional peace, security, and stability; to reduce human suffering; and to promote co-operation, transparency, and responsible action by states parties in international trade in conventional arms, thereby building confidence among them.<sup>64</sup> The purposes of the ATT are interlinked and mutually reinforcing.<sup>65</sup> They refer to the longer-term goals that the treaty's drafters sought to achieve by creating international standards regulating the arms trade and preventing illicit trade.<sup>66</sup>

While Article 1 will be achieved through the collective implementation of all the obligations in the ATT, certain provisions speak more specifically to the obligations states parties are required to implement to realise or contribute to the achievement of the object and purpose of treaty.<sup>67</sup> These provisions, however, are not without problems, and are to be analysed next.

## 2. Scope of the ATT (Articles 2, 3 and 4)

### 2.1. Weapons and Items Covered by the ATT (Articles 2.1, 3 and 4)

#### 2.1.1. Conventional Arms (Article 2.1)

The categories of conventional arms covered by the ATT are directly relevant to many of the provisions of the treaty and serve as a point of reference for the scope of the items covered by Article 3 (ammunition/munitions) and Article 4 (parts and components).<sup>68</sup>

Predictably, the categories of weapons (and transactions) to be covered by the ATT were central questions throughout the deliberations, both before and during the actual treaty negotiations.<sup>69</sup> Debate centered on whether the treaty should apply to all conventional arms or whether the scope

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64 *Arms Trade Treaty* art 1.

65 See also *Arms Trade Treaty* preambular paragraph 6, which recognizes that peace and security, development and human rights are interlinked and mutually reinforcing; International Committee of the Red Cross (n 55) 14.

66 *Ibid*; Casey-Maslen et al (n 13) N 1.39.

67 Da Silva and Wood (n 10) 26.

68 *Ibid* 29.

69 Casey-Maslen et al (n 13) N 2.06.

should be more limited.<sup>70</sup> Most states wanted the treaty to cover all conventional arms, approaching the issue through an export control lens.<sup>71</sup> A number of states also supported developing an agreed list of weapons, similar to the control lists adopted under the *Wassenaar Arrangement* ('WA') and by the European Union ('EU'), or simply adopting an existing list, such as the 7 major conventional arms of the *UN Register of Conventional Arms* ('UNROCA').<sup>72</sup> Others, expressed concern that the UNROCA was not comprehensive and suggested it might be necessary to adopt a list containing categories broader than those in the UNROCA, especially containing small arms and light weapons ('SALW').<sup>73</sup> However, the states skeptical of the value of the ATT, including China and India, initially advocated that the scope should not go beyond the 7 categories.<sup>74</sup> Including SALW in the list of items covered was for most states, especially in regions most affected by their proliferation, the *raison d'être* for the treaty, without which they argued it would have little relevance.<sup>75</sup> As a result, during the UN Diplomatic Conference, China, India and other states in a minority agreed to the inclusion of SALW within the scope of the ATT, provided states were prepared to compromise in other areas of the treaty.<sup>76</sup> Therefore, the 8 categories of conventional arms in Article 2.1 ATT have a clear origin: they are the 7 found in the UNROCA, with the addition of SALW.<sup>77</sup>

The UNROCA was established in 1991 and reflecting the concerns of that era, is limited to heavy weaponry.<sup>78</sup> It also reflects the state of technology of a generation ago, even though the development of weapons has progressed

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70 Ibid.

71 Ibid N 2.08; Sarah Parker, *Analysis of States' Views on an Arms Trade Treaty* (2007) 5.

72 Casey-Maslen et al (n 13) N 2.08; Parker (n 83) 12; UN Register of Conventional Arms, 'Transparency in the global reported arms trade, Categories of major conventional arms' (Web page, undated).

73 As cited in Casey-Maslen et al (n 13) N 2.09.

74 Bromley, Cooper and Holtom (n 37) 1043; Da Silva and Wood (n 10) 30.

75 Da Silva and Wood (n 10) 32; Jo Adamson and Guy Pollard, 'Chapter 9, The Arms Trade Treaty: making a difference' in Larry MacFaul (ed), (2015) *Verification & Implementation, A biennial collection of analysis on international agreements for security and development, 2015* (2015) 143, 153; Casey-Maslen et al (n 13) N 2.15.

76 Bromley, Cooper and Holtom (n 37) 1043–1044; Da Silva and Wood (n 10) 32.

77 Lustgarten (n 2) 403.

78 Ibid; see Paul Holtom, 'Nothing to Report: The Lost Promise of the UN Register of Conventional Arms' (2010) 31(1) *Contemporary Security Policy* 61.

rapidly ever since.<sup>79</sup> This origin contributes significantly to major shortcomings of the list in the ATT, 2 of them regarding the limitation in nature and size.<sup>80</sup> Firstly, instead of including all ‘military’ vehicles, aircraft, and helicopters, as once proposed in a draft text in 2011, the ATT only covers ‘armored’, ‘combat’ and ‘attack’ versions of this equipment, which leads to various exclusions, such as training equipment, transport vehicles, unmanned aerial vehicles (‘UAV’) used as unarmed vehicles for the surveillance of target populations and the gathering of intelligence, and surveillance equipment in general.<sup>81</sup> Another shortcoming is that weapons technology is left out of the scope of the ATT entirely.<sup>82</sup> The inclusion of technology was once proposed in a draft text, but it was not considered a high-profile issue and the matter was eventually dropped.<sup>83</sup> As a result, all guidance systems for weapons covered by the scope of the ATT are now excluded.<sup>84</sup> Equally important, if a state imports technology that it then incorporates into equipment locally produced, or separately purchased in kit form for local assembly, the transfer, which provides the brain and the heart of the weaponry, also lies outside the scope of the ATT.<sup>85</sup> Additionally, technology for cyberwarfare, in which the technology is itself the weapon, and technology guiding autonomous weapons fall outside the treaty.<sup>86</sup> Secondly, regarding the category of SALW, an important and controversial issue concerns the line of demarcation between small arms and ammunition. The question arises as to how small a weapon must be before it ceases to count as a conventional armament.<sup>87</sup> This question of

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79 Lustgarten (n 2) 403.

80 Ibid; Da Silva and Wood (n 10) 36.

81 See Reaching Critical Will, ‘Chairman’s Draft Paper’ Documents from the 3rd PrepCom (PDF Document on Web Page, 14 July 2011); Ghazala Yasmin Jalil, ‘Arms Trade Treaty: A Critical Analysis’ (2016) 36(3) *Strategic Studies* 78, 88; Laura Louca, *Der Arms Trade Treaty und die Kontrolle von Dual-use-Gütern* (2018) 112; Lustgarten (n 2) 404–405; Simone Wisotzki, *Rüstungsexporte unter verschärfter Kontrolle? Eine Bewertung des internationalen Waffenhandelsvertrags* (2013) 17–18.

82 Lustgarten (n 2) 405; Jalil (n 96) 89; Wisotzki (n 81) 18.

83 Lustgarten (n 2) 405; Reaching Critical Will, ‘Elements of provision on Scope in an ATT’ (PDF Document on Web Page, 13 July 2012) 1.

84 Lustgarten (n 2) 405.

85 Ibid; Denise Garcia, ‘Global Norms on Arms: The Significance of the Arms Trade Treaty for Global Security in World Politics’ (2014) 5(4) *Global Policy* 425, 430.

86 Lustgarten (n 2) 405; Nathalie Weizmann, *Academy Briefing No. 8, Autonomous Weapon Systems under International Law* (2013) 6.

87 Lustgarten (n 2) 403.

classification is of practical importance because SALW and ammunition are treated differently in the ATT, with exports of ammunition subject to lesser controls.<sup>88</sup> The size issue arises because Article 5.3 of the ATT states that national definitions for SALW shall not cover less than the descriptions in the International Tracing Instrument ('ITI'). However, the ITI appears to exclude hand grenades and manually emplaced landmines.<sup>89</sup> Contrariwise, the 1997 Report of the UN Panel of Governmental Experts on Small Arms applies a broad definition of SALW based upon 'an assessment of weapons actually used in conflicts'<sup>90</sup>, in which it *inter alia* includes hand grenades.<sup>91</sup> It seems that an item unquestionably capable of causing death had to be of a certain minimum size before experts would classify it as 'small arms' rather than 'ammunition'<sup>92</sup>. Read together with Article 3 of the ATT regulating the export of ammunition/munitions, which limits the scope of ammunition/munitions covered by the treaty to those 'fired, launched or delivered by the conventional arms covered under Article 2 (1)', explosive devices laid by hand (emplaced) or thrown, such as grenades and manually emplaced landmines, are excluded.<sup>93</sup>

### 2.1.2. Ammunition/Munitions (Article 3)

A further shortcoming of Article 2.1 regards the failure to include ammunition within its scope and the discussions regarding its possible inclusion were perhaps the single most contentious issue during the negotiations.<sup>94</sup> The great majority of states wished to see ammunition/munitions included under the same terms as the classes of conventional arms listed in Article 2.1.<sup>95</sup> Others, notably the world's two largest conventional arms and ammunition manufacturers and exporters, the U.S. and Russia, would likely have preferred a treaty with no provisions on

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88 Ibid; see *Arms Trade Treaty* art 3.

89 Several classes of arms are entirely excluded or omitted by definition from the ITI, see Casey-Maslen et al (n 13) N 2.231.

90 See UN General Assembly, *General and Complete Disarmament: Small Arms*, UN Doc A/52/298 (27 August 1997) 11.

91 International Committee of the Red Cross (n 55) 20.

92 Laurence Lustgarten, 'The Arms Trade Treaty: Achievements, Failings, Future' (2015) 64(3) *International & Comparative Law Quarterly* 569, 581.

93 Casey-Maslen et al (n 13) N 3.24.

94 Lustgarten (n 2) 406.

95 Da Silva and Wood (n 10) 56.

ammunition/munitions at all.<sup>96</sup> Opposition against the inclusion of ammunition came most vocally from the U.S. and its position prevailed, though only in part: Given the decision very early in the negotiating process to proceed by consensus, some compromise was inevitable.<sup>97</sup> By the end of the negotiations, it was agreed that ammunition/munitions could only be included in the ATT if it were done in a partial way and not subjected to the same requirements as items in Article 2.1.<sup>98</sup> Therefore, it was agreed that ammunition would have its own dedicated provision in Article 3, according to which, each state party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2.1, and shall apply the provisions of Article 6 and Article 7 prior to authorising the *export* of such ammunition/munitions.

### 2.1.3. Parts and Components (Article 4)

Efforts to achieve an acceptable compromise on the inclusion of ‘parts and components’ reflected those on ammunition, with the provision being moved from Article 2.1 into a new stand-alone provision, specifically Article 4.<sup>99</sup> This provision requires each state party to ‘establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2(1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components’. The precise meaning of the qualification ‘where the export is in a form that provides the capability to assemble’ such arms is unclear and leaves room for interpretation.<sup>100</sup> Indeed, it constitutes an example of constructive ambiguity within the treaty designed to accommodate several contradictory views and allows for a range of possible interpretations. The responsibility of states under the international law of treaties to interpret and apply treaties in good faith<sup>101</sup> is of particular importance with regards to Article 4 to prevent a state

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96 Ibid.

97 Ibid; Lustgarten (n 2) 406.

98 Da Silva and Wood (n 10) 56; Lustgarten (n 2) 407.

99 Casey-Maslen et al (n 13) N 4.13.

100 Ibid N 4.16.

101 *Vienna Convention on the Law of Treaties* art 26; Casey-Maslen, Giacca and Vestner (n 49) 21.

party from circumventing its international legal obligations by sending several separate shipments of parts and components for a conventional armament falling under Article 2.1, as otherwise Article 4 could amount to a significant loophole in the treaty.<sup>102</sup>

## 2.2. Transfers Covered by the ATT (Articles 2.2 and 2.3)

Article 2.2 states that the activities of the international trade comprise export, import, transit, trans-shipment and brokering, collectively referred to as ‘transfer’. Regulating the international trade in conventional arms is one of the central goals of the ATT in Article 1, therefore defining what constitutes ‘international trade’ is key to the treaty’s implementation. In fact, Article 2.2 provides the only explicit definition in the entire agreement.<sup>103</sup> Curiously though, defining the term ‘international trade’ by listing the 5 activities that the concept includes, without providing their definitions.<sup>104</sup>

One of the central issues debated in the context of Article 2.2 of the treaty was whether transactions that do not involve financial considerations and/or the transfer of title should be included, namely, leases, loans or gifts.<sup>105</sup> Many states called for an explicit reference to such transactions, and such a reference did briefly appear in a draft text.<sup>106</sup> Others argued that the concept of export includes leases, loans and gifts by virtue of the fact that it involves the movement of items from a state’s territory, and that if their inclusion was made explicit, this could have the effect of narrowing the definition of export or transfer outside the treaty.<sup>107</sup> Ultimately states settled for constructive ambiguity in the text, mainly due to opposition from China, and as such, gifts, loans, leases are neither explicitly included, nor explicitly excluded.<sup>108</sup> States parties will have to determine in their

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102 Casey-Maslen et al (n 13) N 4.17; Casey-Maslen, Giacca and Vestner (n 49) 21.

103 Casey-Maslen et al (n 13) N 2.02.

104 See *ibid* N 2.233–2.261 for possible definitions; Da Silva and Wood (n 10) 36.

105 Casey-Maslen et al (n 13) N 2.21; Louca (n 97) 113.

106 See *Reaching Critical Will* (n 102) 15.

107 Casey-Maslen et al (n 13) N 2.21.

108 See ATT Working Group on Transparency and Reporting, *Reporting Authorized or Actual Exports and Imports of Conventional Arms under the ATT, Questions & Answers*, No ATT/CSP5.WGTR/2019/CHAIR/533/Conf.Rep.Rev1 (26 July 2019) 10; Brian Wood, *The Arms Trade Treaty. Prospects and Challenges as it “enters into force”* (2014) 5.

national definitions of the component elements of ‘transfer’ whether such transactions are covered and subsequent state practice will therefore influence the interpretation of Article 2.2.<sup>109</sup>

Article 2.3 excludes certain arms transfers from the application of the ATT, namely the international movement of conventional arms by, or on behalf of, a state party for its own use as long as the state retains ownership of the arms in question.<sup>110</sup> The rationale for such a provision is that states should not face the ‘burden’ of having to assess risks associated with the movement of weapons to their own forces overseas, since there is no change in control, and thus no ‘transfer’ within the meaning of the ATT takes place.<sup>111</sup> A big concern among negotiators was that such weapons subject to the exception may be left behind by the forces upon their departure and either sold or given to the host state, or abandoned.<sup>112</sup> Thus, a *de facto* transfer would take place and the departing state would not be under any obligation to apply the provisions of the treaty to the transfer.<sup>113</sup> Despite the concerns regarding the potentially ambiguous nature of Article 2.3, the phrase was not amended and consequently, the application of the treaty to weapons ‘left behind’ is implicit.<sup>114</sup> Moreover, the word ‘use’ implies that there is no qualification or limitation on the nature of the end user, only the end use.<sup>115</sup>

### 3. Transfer Prohibitions (Article 6)

Article 6 contains the absolute prohibitions that sit at the heart of the ATT and forbids a state party from authorising any transfer of conventional arms, ammunition/munitions and parts and components (Articles 2.1, 3 and 4) in 3 circumstances.<sup>116</sup>

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109 Casey-Maslen et al (n 13) N 2.21; *Arms Trade Treaty*, art 5.2.

110 Ibid N 2.03.

111 Ibid N 2.262.

112 Ibid N 2.26.

113 Ibid.

114 Ibid.

115 Ibid N 2.28.

116 Brandes (n 2) 409.

### 3.1. UN Security Council Chapter VII Measures (Article 6.1)

Any transfer of conventional arms and related items is prohibited under Article 6.1 where the transfer would violate a state party's obligation to comply with measures adopted by the UN Security Council ('UNSC') acting under Chapter VII of the *UN Charter*, in particular arms embargoes. The importance of Article 6.1 has been dismissed by some scholars on the grounds that it merely reiterates an already existing obligation.<sup>117</sup> However, this is a short-sighted view, particularly because one of the persistent criticisms of UN arms embargoes is their lack of effectiveness. Arms embargoes 'have suffered from uneven (or sometimes almost non-existent) implementation and are seen increasingly as being weak political positions that are not enforced'<sup>118</sup>. Since states parties are subject to the broader regulatory framework of the ATT, which requires them to designate competent national authorities and have an effective and transparent national control system to regulate the transfer of conventional arms and related items (Article 5 ATT), Article 6.1 has the potential to strengthen the implementation and enforcement of arms embargoes.<sup>119</sup> Such a national control system must include the capacity to take the necessary measures to effectively implement an arms embargo, through national legislation and enforcement.<sup>120</sup> Furthermore, states parties to the ATT are required, *inter alia*, to report on steps taken to implement the treaty; to take measures to regulate brokering and transit and trans-shipment; to facilitate international cooperation including information exchange; and to take enforcement measures.<sup>121</sup> Thus, the ATT has the potential to create a more uniform approach to the implementation and monitoring of UN arms embargoes.<sup>122</sup>

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117 Ibid 410; Silke Zwijzen, Machiko Kanetake and Cedric Ryngaert, 'State Responsibility for Arms Transfers: The Law of State Responsibility and the Arms Trade Treaty' (2020) *Ars Aequi* 151, 156.

118 Bonn International Center for Conversion, *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions: Results of the 'Bonn-Berlin Process'* (2001) 99–100.

119 Da Silva and Wood (n 10) 91.

120 Ibid 92.

121 *Arms Trade Treaty* arts 13, 10, 9, 15 and 14.

122 Da Silva and Wood (n 10) 92.

### 3.2. Relevant International Obligations (Article 6.2)

Article 6.2 prohibits the authorisation of any transfer that would violate ‘its relevant international obligations under international agreements to which it is a party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms’. Since the violation must relate to international agreements, specifically entered into by a state, this provision does not create any new substantive obligations and the obligations that a state party already has under other international agreements remain, regardless of whether or not they are considered ‘relevant’ to the ATT.<sup>123</sup> The significance of Article 6.2 is that it makes certain transfers of conventional arms that breach ‘relevant international obligations’, a breach of the ATT as well.<sup>124</sup> Interestingly, the provision excludes customary international law.<sup>125</sup> This gap may be at least partially closed in Article 6.3, where recipients engage or are likely to engage in war crimes, crimes against humanity or genocide or targeting civilian objects. However, Article 6.3 requires ‘knowledge’ rather than the strict liability standard in Article 6.2.<sup>126</sup>

In the context of Article 6.2, the question arises whether the ATT prohibits arms transfers to non-state actors (‘NSAs’). In fact, one of the main objections pressed by states which refused to sign the ATT was that it imposes no restrictions on transfers to NSAs.<sup>127</sup> Some states were seeking an absolute and explicit ban, whilst others preferred to keep their options open.<sup>128</sup> The failure of the ATT to eventually tackle this issue head on should not, however, lead to conclude that arms transfers to NSAs are unregulated by the ATT.<sup>129</sup> Firstly, there is no question that if an NSA is subject to a UN embargo, any transfer is forbidden.<sup>130</sup> Secondly, the prohibitions of Article 6.3 apply to NSAs in the same manner as they do to states, as these are directed at the uses to which the equipment is put, not the identity of the perpetrator.<sup>131</sup> The same goes for the application of

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123 Ibid 93.

124 Ibid.

125 Da Silva and Wood (n 10) 96; Lustgarten (n 2) 409.

126 Da Silva and Wood (n 10) 97.

127 Casey-Maslen et al (n 13) N 6.54; Lustgarten (n 2) 430.

128 Casey-Maslen et al (n 13) N 6.54; Paul Holtom, *Prohibiting arms transfers to non-state actors and the Arms Trade Treaty* (2012) 3–6.

129 Casey-Maslen et al (n 13) N 6.55.

130 Lustgarten (n 2) 430.

131 Ibid.

Article 7, as a matter of its structure.<sup>132</sup> A reading of Article 6.2 though could prevent any transfer to such a group, even if there were no risk of them being used to commit the crimes in Article 6.3. Therefore, the contentious question is whether the provisions of Article 6.2 can be said to extend to them.<sup>133</sup> The legal scholar Andrew Clapham has argued that armed NSAs are prohibited by the reference in Article 6.2 to international agreements, particularly those relating to the transfer of, or illicit trafficking in, conventional arms, since such an international agreement is the *UN Charter* and one of its fundamental principles is the prohibition on the use of force in Article 2.4 *UN Charter*.<sup>134</sup> However, the wording of Article 6.2 clearly signals that the drafters were concerned primarily with other international agreements restricting arms transfers, and not general provisions or constitutive instruments, such as the *UN Charter*.<sup>135</sup> Clapham's argumentation stretches the treaty language to breaking point to include the *UN Charter* within Article 6.2 and his argument does not consider the clear message emerging during the negotiations and from the statements recorded in the UNGA debates: A significant number of states did not believe that the treaty forbade transfers to NSAs, and this omission was, for many though not all, the main reason that they refused to sign it.<sup>136</sup> Having that said, the U.S. strongly opposed any ban on transfers to NSAs, consistent with its longtime position in various international negotiations.<sup>137</sup> This confluence of interpretation amongst states convincingly refutes any expansive interpretation of Article 6.2.<sup>138</sup>

### 3.3. Knowledge of Genocide, Crimes Against Humanity and War Crimes (Article 6.3)

The most controversial part of Article 6 is found in Article 6.3, which forbids the authorisation of transfers if a state party has 'knowledge at the time of

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<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Casey-Maslen et al (n 13) N 6.56; See *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgement) [1986] ICJ Rep 160, 166 and 167.*

<sup>135</sup> Lustgarten (n 2) 431.

<sup>136</sup> Ibid.

<sup>137</sup> Holtom (n 128) 6; Lustgarten (n 2) 431.

<sup>138</sup> Lustgarten (n 2) 431.

the authorization' that the conventional arms, ammunition/munitions and parts and components 'would be used in the commission of' one or more of the following crimes under international law: 'genocide, crimes against humanity, grave breaches of the Geneva Conventions on 1949, attacks directed against civilian objects or civilians protected as such' and 'other war crimes as defined by international agreements to which it is a party'. While this provision represents one of the ATT's most commendable achievements, its wording raises some questions of interpretation.

### 3.3.1. Genocide, Crimes Against Humanity and War Crimes

The ATT does not provide definitions for 'genocide' or 'crimes against humanity' and, unlike the case of 'war crimes', does not refer to definitions in other treaties. Article 6.3 refers to 3 types of violations of the laws of war: grave breaches of the 1949 Geneva Conventions; attacks directed against civilian objects or civilians protected as such; and other war crimes that are defined by international agreements to which a state party is a party.<sup>139</sup> War crimes are serious violations of international humanitarian law ('IHL') that occur during international armed conflicts or armed conflicts of a non-international character.<sup>140</sup> Article 6.3 makes no reference to the definition of war crimes in customary international law by which all states parties to the ATT are bound, which may have provided the provision with a more solid basis for uniform interpretation and application, given the limited applicability of the Geneva Conventions to non-international armed conflicts.<sup>141</sup> Additionally, the explicit reference to common Article 3 of the Geneva Conventions applicable in non-international armed conflicts was removed during the negotiations, although the vast majority of armed conflicts occurring in the world are not of an international character.<sup>142</sup> Although common Article 3 does not regulate the situation of non-international armed conflicts conclusively, it outlines the 'fundamental standard rules of protection that must be observed in all armed conflicts'<sup>143</sup>. What is also missing from Article 6.3 is

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139 Casey-Maslen et al (n 13) N 6.153.

140 Sarah Parker, *The Arms Trade Treaty, A Practical Guide to National Implementation* (2016) 60.

141 Brandes (n 2) 415; Da Silva and Wood (n 10) 102.

142 Brandes (n 2) 415.

143 Ibid.

a prohibition of transfers if the relevant state party has knowledge that the arms or items would be used to commit violations of international human rights law ('IHRL'), although many states had called for such a provision.<sup>144</sup> Though there is significant cross-over between crimes against humanity and gross and systematic abuses of human rights, meaning that many violations of IHRL will fall under Article 6.3, this remains an anomaly.<sup>145</sup> Given that the treaty is being touted as a 'powerful new tool' to 'prevent grave human rights abuses', the text of the ATT should make this clear.<sup>146</sup> The above claim and the purpose in Article 1 of reducing human suffering are undermined by the absence of a clause prohibiting arms transfers to human rights abusers.<sup>147</sup>

### 3.3.2. Knowledge Requirement

The major point of controversy regarding Article 6.3 is centered on the interpretation of the requirement of 'knowledge'. Article 6.3 sets out a knowledge requirement, yet fails to define what constitutes it. There is a question whether the requirement of 'knowledge' includes an objective standard of constructive knowledge, whereby the state party 'should have known', based upon credible publicly available information providing substantial grounds to believe that the arms would be used to commit the listed crimes, or whether it refers to a subjective standard of actual knowledge in the possession of the state party.<sup>148</sup>

'Knowledge' in Article 6.3 should be interpreted in light of the ATT's object and purpose, which includes the text of the treaty.<sup>149</sup> One object of the ATT is to establish the 'highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms'<sup>150</sup>. The ATT is preventative in the sense that it seeks to prevent a range of negative consequences set out in Articles 6 and 7.<sup>151</sup>

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144 Ibid; UN General Assembly, *Compilation of Views on the Elements of an Arms Trade Treaty: Background Document Prepared by the Secretariat*, UN Doc A/CONF.217/2 (10 May 2012) e.g. 9 (Australia), 23 (Costa Rica), 49 (Kenya), 55 (Malawi).

145 O'Connor (n 6) 86.

146 Ki-Moon (n 5).

147 O'Connor (n 6) 86.

148 International Committee of the Red Cross (n 55) 27.

149 Da Silva and Wood (n 10) 102; *Vienna Convention on the Law of Treaties* arts 31.1 and 31.2.

150 Da Silva and Wood (n 10) 102; *Arms Trade Treaty* art 1.

151 Da Silva and Wood (n 10) 103.

This suggests an interpretation which facilitates that object. States parties are required to establish and maintain a national control system to implement the treaty provisions (Article 5.2), which typically require applicants to disclose all relevant information when applying for permissions.<sup>152</sup> Information can also be requested from other states under Article 15 and nowadays, there is access to information through the internet.<sup>153</sup> It is therefore almost inconceivable that a state implementing the ATT as required will not have considered whether Article 6.3 might be implicated in an arms transfer authorisation and through that process, have actual knowledge or knowledge that can be presumed.<sup>154</sup> In other words, it would be contrary to the object and purpose of the ATT, and a breach of Article 6.3, if it did not include cases where the contracting party must have known that the arms would be used for the listed crimes. This would be the case where the circumstances are notorious and widely known of, or the state official had reasonable suspicions about the prohibited acts, but chose to turn a blind eye, or if there were a failure to conduct due diligence by checking readily available and credible information (e.g. information published by reliable sources).<sup>155</sup> The latter serves to emphasise the important role of Article 15 of the ATT and civil society; the more that relevant information is circulated by states parties and NGOs, the more difficult it will be for a state to argue lack of knowledge.<sup>156</sup> Moreover, virtually all states devote considerable resources to attaining foreign intelligence and the larger and wealthier ones, which includes almost all major exporters, have dedicated intelligence agencies for this purpose.<sup>157</sup> Therefore, the focus should be on what is 'reasonably foreseeable', rather than what was actually foreseen.<sup>158</sup> The goal is to place states under an obligation to inquire diligently about how the weapons, whose export they have approved, are likely to be used and consequently reinforcing and making explicit, the obligation to prevent the occurrence

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152 Ibid 102–103.

153 Ibid 102–103.

154 Ibid 103.

155 Ibid.

156 *Arms Trade Treaty* preambular paragraph 15 recognizes the voluntary and active role that civil society, including non-governmental organizations, and industry can play in raising awareness of the object and purpose of the ATT, and in supporting its implementation.

157 Lustgarten (n 2) 411.

158 Ibid.

of harms that international law generally imposes on all states.<sup>159</sup> A formulation such as ‘knows or has reasonable cause to believe’ is not too demanding and would have been preferable, since the ATT does not impose criminal sanctions, nor any form of direct civil liability.<sup>160</sup> In any case, Article 6.3 refers to knowledge that the weapons ‘would’ be used to commit the listed crimes, which indicates a lower burden of evidence to deny the transfer than knowledge that the weapons ‘will’ be used for such ends.<sup>161</sup> Hence, the level of knowledge required to prohibit a transfer under Article 6.3 is not one of absolute certainty.<sup>162</sup>

Regarding the temporal dimension of the knowledge requirement, Article 6.3 speaks of knowledge ‘at the time of authorization’, which is a serious shortcoming since the danger must be direct and immediate.<sup>163</sup> There is no explicit reference in Article 6.3 to the need for reassessment and revocation of export licenses, if information on international crimes is obtained after authorisation has been granted, but in relation to the less severe restrictions in Article 7.7, this issue is explicitly addressed; where an exporter ‘becomes aware of new relevant information it is encouraged to reassess the authorization’, though it may consult with the importing state before taking the decision. Due to the possibility of a time delay between an authorisation being granted and the arms or items being exported, which may be months or even years, it is not unreasonable to expect a state party to conduct a reassessment.<sup>164</sup> Strangely in Article 6, cases where the most serious concerns exist, strong enough to justify an outright ban, the issue is not addressed at all. This is clearly in contradiction with the objects and entire structure of the treaty and seems to have been a drafting oversight.<sup>165</sup>

#### 4. Export and Export Assessment (Article 7)

If an export of conventional arms, ammunition/munitions or parts and components has not been prohibited under Article 6 of the ATT, a state

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<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> International Committee of the Red Cross (n 55) 27–28.

<sup>162</sup> Ibid 28.

<sup>163</sup> Lustgarten (n 2) 412.

<sup>164</sup> Casey-Maslen et al (n 13) N 7.21.

<sup>165</sup> Lustgarten (n 2) 412.

party is required to carry out a further multi-step assessment under Article 7. Unlike the judgements under Article 6, those in Article 7 are expressed in terms of balance or overall ‘assessment’, which leaves room for decisions based upon political, economic and other factors, which may well be contrary, to the objects and purposes of the treaty.<sup>166</sup> Articles 6 and 7 are intended to stigmatise and prevent transfers that contribute to violations of international law.<sup>167</sup> Looking at Article 7 on its own, it can be interpreted as an attempt to correct the flaws in Article 6, as a ‘catchall provision’ designed to regulate situations that, while serious, are not so severe as to fall within the Article 6 prohibitions.<sup>168</sup> Another interpretation is that Article 7 is a clawing back of states that are not entirely committed to the ATT ideals.<sup>169</sup> Instead of establishing a comprehensive prohibition regime, issues that could not be resolved under Article 6 have been tucked away into the ‘too hard basket’ that is Article 7.<sup>170</sup>

#### 4.1. Risk Assessment (Article 7.1)

##### 4.1.1. Peace and Security (Article 7.1.a)

Before deciding whether to authorise any export of conventional arms, ammunition/munitions, or parts or components within the scope of the ATT, the exporting state party must assess the potential that the export concerned would contribute to or undermine peace and security (Article 7.1.a). The use of the word ‘would’ implies that there must be a high level of probability, therefore suspicion or vague possibility is insufficient.<sup>171</sup> To be able to make a substantially positive contribution, the arms or items themselves must be significant in the prevailing circumstances.<sup>172</sup> This might mean that a small shipment of arms or ammunition would be more difficult to justify as a contribution to peace and security, since its potential impact would be minimal or even non-existent. It also means that the nature of the arms being exported is a

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166 Ibid 414.

167 As cited in O’Connor (n 6) 87.

168 O’Connor (n 6) 87.

169 Ibid.

170 Ibid.

171 Casey-Maslen et al (n 13) N 7.38.

172 Ibid N 7.33.

relevant factor.<sup>173</sup> Furthermore, the *UN Charter* refers to international peace and security, while Article 7.1.a of the ATT only refers to peace and security concerns, which is a considerably broader concept, covering ‘the likely impact of the export for the proposed recipient state and its surrounding region, as well as the wider international community’<sup>174</sup>. This broad definition can also be reasonably interpreted from the preamble and principles, as well as the object and purpose of the treaty.

#### 4.1.2. Violations or Offences (Article 7.1.b.)

If, on balance, and despite any mitigation measures that can be undertaken in accordance with Article 7.2, it assesses that the export of arms or items would undermine peace and security, the request for authorisation must be denied.<sup>175</sup> If, however, the exporting state party determines that the proposed export of arms or items would contribute to peace and security, the exporting state party’s assessment must then take into account, according to Article 7.1.b, the potential that the arms or items could be used to commit or facilitate a serious violation of IHL or IHRL or, as set out in a treaty to which the exporting state is party, an act of terrorism or transnational organised crime.<sup>176</sup> In contrast to the previous sub-paragraph, on the contribution to, or undermining of, peace and security, it is necessary to assess the potential that the arms ‘could’ be used to commit or facilitate a violation or offence listed in sub-paragraph (b). Therefore, one does not need to show that they ‘would’ be so used, indicating that a lower probability is sufficient.<sup>177</sup>

According to the International Committee of the Red Cross (‘ICRC’), serious violations of IHL are war crimes and the two terms are interchangeable.<sup>178</sup> Serious violations of IHL can take place in international or non-international armed conflicts.<sup>179</sup> The scope of the notion of a serious

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173 Ibid.

174 *Charter of the United Nations* preamble and arts 1, 2, 11, 15, 18, 23, 24, 26, 33, 34, 37, 39, 42, 43, 47, 48, 51, 52, 54, 73, 76, 84, 99, and 106; Da Silva and Wood (n 10) 122.

175 Casey-Maslen et al (n 13) N 7.01.

176 Ibid N 7.02.

177 Ibid N 7.38.

178 International Committee of the Red Cross, *What are “serious violations of international humanitarian law”?* (2016).

179 Parker (173) 60.

violation of IHL in Article 7.1.b.i is broader than the scope of Article 6.3 because it also applies to serious violations of customary IHL, since there is no limitation to ‘war crimes as defined by international agreements’ to which the exporting state is a party.<sup>180</sup> In contrast to serious violations of IHL, there is less convergence on what constitutes a serious violation of IHRL.<sup>181</sup> Whether a violation of human rights is ‘serious’ under Article 7.1.b.ii needs to be determined on a case-by-case basis.<sup>182</sup> The exporting state, generally more developed than the importing state, will make this decision.<sup>183</sup>

As with Article 6, a potential problem arises in respect of NSA. It is not clear whether the phrase ‘a serious violation of international human rights law’ can cover the behavior of NSAs.<sup>184</sup> Given that there is a clear prohibition on transferring arms to NSAs where they would be used for the acts listed in Article 6.3, and that potential serious violations of IHL are covered by the previous clause related to a serious violation of IHL in Article 7.1.b.i, it would be odd if arms transfers would be scrutinised for potential to commit or facilitate a violation of IHRL by the government’s police and security forces, but not by the armed groups they were opposed by.<sup>185</sup> There is in fact a long-running doctrinal debate over whether human rights obligations extend to NSAs.<sup>186</sup> The resistance to include NSAs as potential bearers of human rights obligations and therefore potential human rights violators stems from a legal analysis that focuses upon the fact that human rights treaties are ratified by states and not by armed groups.<sup>187</sup> In addition, resistance can be traced to a political reluctance to allow a ‘recognition’ of armed groups by treating them as though they were states, and thus, subject to international human rights obligations.<sup>188</sup> The fact that such groups are undoubtedly said to be bound by IHL only adds to the controversy, for it highlights for some a need to keep IHL and

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180 Brandes (n 2) 417.

181 Da Silva and Wood (n 10) 125.

182 Amnesty International, *How To Apply Human Rights Standards To Arms Transfer Decisions* (2008) 3; Brandes (n 2) 419.

183 O’Connor (n 6) 88.

184 Casey-Maslen et al (n 13) N 7.70.

185 *Ibid.*

186 *Ibid.*

187 *Ibid* N 7.71.

188 *Ibid.*

human rights separate.<sup>189</sup> For present purposes, it can be assumed that NSAs are covered by this provision, *inter alia*, because Article 7.1.b.ii does not refer to human rights treaties, but rather to international human rights law.<sup>190</sup> Ironically, an importing state that does not want NSA operating on its territory to have conventional arms will utilise Article 7 to stop an export authorisation when providing information to assist the export assessment pursuant to Article 7.1 and Article 8.1.<sup>191</sup> There is nothing to stop the importing state from providing information that will jeopardise the NSA import attempt. Therefore, in some ways, the ATT may make it harder for NSAs to obtain weapons.<sup>192</sup>

#### 4.2. Risk Mitigation Measures (Article 7.2)

Pursuant to Article 7.2 of the ATT, the exporting state party must consider means to mitigate the risks identified in Article 7.1.a and 7.1.b. Numerous measures are theoretically available to it, though in practice, the options of an exporting state will often be constrained by its resources.<sup>193</sup> Certain measures entail co-operation between the exporting and importing state, which is reflected in the wording of Article 7.2 with reference to confidence-building measures and jointly developed or agreed programs. A measure already practiced by many states is the issuance of end-user certificates, which declare the final user and the end-use of imported arms and primarily serve to verify that the arms will not be further transferred to a third party without the exporting state's consent.<sup>194</sup> In addition, the requirement of risk mitigation measures, particularly with regard to IHL and IHRL, can also be seen as an undermining of the humanitarian concerns of the treaty, simply by its inclusion. Its existence is anomalous with the purpose of the ATT: IHL and IHRL abuses should 'automatically warrant denial of the transfer request'<sup>195</sup>. The fact that they do not weakens the ATT.<sup>196</sup>

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189 Ibid.

190 See *ibid* N 7.74 for a detailed discussion.

191 O'Connor (n 6) 89.

192 Ibid.

193 Casey-Maslen et al (n 13) N 7.88.

194 Brandes (n 2) 420.

195 Ray Acheson, *A tale of two treaties* (2013) 3; O'Connor (n 6) 88.

196 O'Connor (n 6) 88.

### 4.3. Overriding Risk (Article 7.3)

Article 7.3 requires the refusal of authorisation if the assessment of the exporting state concludes that despite any mitigation measures in Article 7.2 that can be taken, the risk of any of the negative consequences listed in Article 7.1.b ATT is ‘overriding’. The use of this term is contentious and has led to a lack of clarity as to the meaning of the provision.<sup>197</sup> Article 7.3 is central to the entire assessment and the controversy surrounding it, for it addresses the point of decision.<sup>198</sup>

The term ‘overriding risk’ is not defined in existing international law and is ambiguous.<sup>199</sup> It could be understood to mean that a national control authority must balance the predictable positive and negative consequences of exports of arms and items.<sup>200</sup> Following this reading, a state party could consider the contribution of the arms transfer to peace and security more important and then authorise the export, even if there was a very high risk that the arms would be used in violation of international law.<sup>201</sup> During the negotiations, persistent attempts were made by certain states to replace ‘overriding’ with ‘substantial’ or an adjective that has a similar meaning, to avoid balancing and create a clear red line defined by the negative consequences outlined in Article 7.1.<sup>202</sup> Having failed to achieve a change in the wording of the treaty text, a number of states parties have stated upon ratification that they will interpret the term ‘overriding’ as ‘substantial’ or ‘clear’, while others have stated their understanding that an ‘overriding risk’ would exist whenever any of the negative consequences listed in the provision are more likely to materialise than not, even after mitigation measures are considered.<sup>203</sup> In the view of the ICRC, such

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197 Casey-Maslen et al (n 13) N 7.02.

198 Ibid N 7.90.

199 Ibid N 7.91.

200 Ibid; Mika Hayashi, ‘Export Control in the Arms Trade Treaty: Can It Have an Impact on the Prevention of Serious Violations of International Humanitarian Law?’ in Dai Tamada and Philippe Achilleas (eds), *Theory and Practice of Export Control, Balancing International Security and International Economic Relations* (2017) 127, 130.

201 Brandes (n 2) 421.

202 Casey-Maslen et al (n 13) N 7.92.

203 International Committee of the Red Cross (n 55) 36; International Committee of the Red Cross, 2013 *Arms Trade Treaty* (2020) 3.

interpretations are consistent with the ATT's purpose of reducing human suffering and the obligation of states to ensure respect for IHL.<sup>204</sup>

#### 4.4. The Special Case (Article 7.4)

When making risk assessments under Article 7.1.a and Article 7.1.b, exporters must also 'take into account' the 'risk' (there is no qualifying adjective) whether the arms or items under consideration are being used (present continuous tense) to commit or facilitate serious acts of gender-based violence or serious acts of violence against children (Article 7.4).<sup>205</sup> Article 7.4 is a commendable advance of the ATT, as it represents the first time that a treaty links arms transfer decisions to the risk of gender-based violence.<sup>206</sup> What is less satisfactory is that exporters are only required to 'take account' of the possibility of such violence and there is no indication as to the weight to be given to that prospect.<sup>207</sup>

#### 5. Import, Transit, Transshipment and Brokering (Articles 8, 9, 10)

Once it became clear that the assessment in Article 7 would apply to exports only, it was necessary to include provisions governing other transfer-related activities in order to ensure the applicability of the ATT to all states parties, not just those engaged in export.<sup>208</sup> It was also evident that the object of the ATT in Article 1 would not be achieved by a treaty that regulated only the export of arms.<sup>209</sup>

Article 8 compliments Article 7 of the ATT by obliging importing states to provide appropriate and relevant information to the exporting state party for their export assessment and requires each importing state party to take measures that will allow it to regulate, 'where necessary', imports

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204 International Committee of the Red Cross (n 55) 37.

205 Da Silva and Wood (n 10) 131; Lustgarten (n 2) 418.

206 Ray Acheson, *Gender Based Violence and the Arms Trade Treaty* (2019) 4; International Committee of the Red Cross (n 55) 35.

207 Lustgarten (n 2) 418.

208 Casey-Maslen et al (n 13) N 8.02.

209 Ibid.

under its jurisdiction.<sup>210</sup> According to Article 9, each state party shall take ‘appropriate measures’ to regulate ‘where necessary and feasible’ the transit or trans-shipment of arms through its territory and under its jurisdiction. As suggested by the terms ‘where necessary’ in Articles 8 and 9, the ATT gives discretion to arms-importing and transit or trans-shipment states parties on whether or not to regulate arms importing or transit under their jurisdiction.<sup>211</sup> In contrast, there is no such qualifier in Article 10 that applies to brokering, which states parties are obliged to regulate.<sup>212</sup> Article 10 requires each state party to ‘take measures’ to regulate arms brokering taking place under its jurisdiction, but is not prescriptive or detailed in terms of identifying how states should regulate brokers and brokering activities.<sup>213</sup> Furthermore, Article 10 defines neither the term ‘broker’ nor ‘brokering’ and does not contemplate extraterritorial jurisdiction, which would have been relevant, since brokers are often located in and operating from one jurisdiction, while the transactions of the arms that they arrange take place in another.<sup>214</sup> In summary, Article 10 is less detailed and weaker than existing commitments in this area.<sup>215</sup>

## 6. Preventing Diversion (Article 11)

Unlike the transfers governed by Articles 6 and 7, diverted shipments of conventional arms are marked out by their illegality.<sup>216</sup> There was broad agreement among states that diversion should be addressed, considering an object of the ATT is to prevent and eradicate the illicit trade in conventional arms and prevent their diversion.<sup>217</sup> Diversion to the illicit market increases the uncontrolled availability of arms and their misuse, and is also of humanitarian concern where there is a risk that the

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<sup>210</sup> Brandes (n 2) 422.

<sup>211</sup> International Committee of the Red Cross (n 55) 41.

<sup>212</sup> *Ibid.*

<sup>213</sup> Casey-Maslen et al (n 13) N 10.39.

<sup>214</sup> *Ibid.*

<sup>215</sup> See for example *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 31 May 2001 (entered into force 3 July 2005) art 15; Casey-Maslen et al (n 13) N 10.37–10.38.

<sup>216</sup> Lustgarten (n 2) 419.

<sup>217</sup> *Ibid.* 421; *Arms Trade Treaty* art 1.

unauthorised recipients would use the conventional arms to commit serious violations of IHL or serious violations of IHRL.<sup>218</sup> However, the manner in which diversion is addressed in the ATT is rather odd; initially, it was included in the assessment in Article 7, but was removed therefrom when several references to it were gathered in one self-contained provision, which is Article 11.<sup>219</sup> This was the compromise between states that wanted very detailed provisions, and others which argued that diversion is not a sufficiently 'objective' concept and did not consider it acceptable to apply any diversion criteria to the export of ammunition.<sup>220</sup> Therefore, Article 11 addresses only the diversion of conventional arms covered under Article 2.1, not of ammunition/munitions or parts and components.

Article 11.1 requires all states parties involved in a transfer of conventional arms under Article 2.1 to 'take measures' to prevent diversion, although no specific measures are stated or suggested in the provision. Unlike the general obligation in paragraph 1, Article 11.2 pertains only to exporting states parties. It outlines how exporting states parties should 'seek to' prevent the diversion through their national control systems (established under Article 5.2) by assessing the risk of diversion prior to authorising an export and considering mitigation measures.<sup>221</sup> The wording of Article 11.2 clearly illustrates that it follows the same process as the assessment contained in Article 7. Contrary to Article 7, where exporting states parties must assess the 'potential' that the 'conventional arms or items' could be used for one of the outcomes described in Article 7.1.b, Article 11.2 requires the exporting state to assess the 'risk' of diversion of the 'export'.<sup>222</sup> The reference to the diversion of the 'export' rather than the diversion of the 'conventional arms' being exported arguably has ramifications for the nature or extent of the risk assessment the exporting state must conduct.<sup>223</sup> Put another way, it may limit the extent of the foresight an exporting state must have and the investigations it should conduct as part of its due diligence when assessing the risk.<sup>224</sup> The implication is that exporting states parties would only need to assess the risk of diversion

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218 International Committee of the Red Cross (n 55) 44.

219 Casey-Maslen et al (n 13) N 1.38; Lustgarten (n 2) 421.

220 Ibid.

221 Casey-Maslen et al (n 13) N 11.44.

222 Ibid.

223 Ibid N 11.45.

224 Ibid.

occurring while the conventional arms are in the process of being exported, meaning in the pre-shipment, in-transit, and point-of-delivery stages of the transfer, not post-delivery.<sup>225</sup> This interpretation is consistent with the list of other prevention measures suggested in Article 11.2, which all concern the pre-shipment stage of the transfer.<sup>226</sup> This is a completely different outcome from what was originally envisioned when a diversion criterion was first proposed, where the risk to be assessed related almost exclusively to whether the arms would be diverted post-delivery.<sup>227</sup>

Another difference to the export assessment is that Article 7.3 includes an obligation of not authorising an export if the exporting state party determines there is an 'overriding risk' of any of the negative consequences in Article 7.1, while Article 11.2 lists 'not authorizing the export' as a possible diversion prevention measures, but there is no explicit obligation to deny the export where a risk of diversion is detected.<sup>228</sup> In fact, the term 'overriding risk' and the corresponding obligation to deny the export were intentionally left out of Article 11.2 because it had proved to be such a contentious phrase during the negotiations on Article 7 and the drafters did not want to repeat the debate for Article 11.<sup>229</sup> As a consequence, there is no explicit threshold against which states parties are required to assess the risk of diversion.

In practice, states parties must consider the risk of diversion of an export during the assessment conducted in accordance with Article 7.<sup>230</sup> Taking the treaty as a whole, the aims of Articles 11 and 7 are interlinked in that they both attempt to prevent the diversion of weapons to end-users where there is a risk of their committing or facilitating the serious violations and offences listed in Article 7.<sup>231</sup> Additionally, the fact that the process for considering risk of diversion in Article 11.2 follows the same logic as the export assessment process under Article 7, suggests that the assessment of the risk of diversion is an element of the mandatory export assessment mechanism.<sup>232</sup> Therefore, the same threshold of 'overriding risk' would

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225 *Ibid.*

226 *Ibid.*

227 *Ibid* N 11.46.

228 *Ibid* N 11.48.

229 *Ibid* N 11.49.

230 Casey-Maslen et al (n 13) N 11.50.

231 Da Silva and Wood (n 10) 122; International Committee of the Red Cross (n 55) 36.

232 Casey-Maslen et al (n 13) N 11.50; Casey-Maslen, Giacca and Vestner (n 49) 34.

need to be applied when assessing the risk of diversion.<sup>233</sup> Accordingly, while the assessment required by Article 11.2 only refers to ‘conventional arms’ in Article 2.1 and not to ammunition or parts and components, it would seem impractical for a state party to exclude these items from its diversion risk assessment, although they would be subject to the risk assessment under Article 7.<sup>234</sup> Article 11.2 also requires exporting states parties to consider establishing mitigation measures, ‘such as confidence-building measures or jointly agreed programs by the exporting and importing States’. Notably, although the object of the ATT is to prevent diversion, the obligation in Article 11.2 is not to eliminate any identified risk of diversion altogether, but to mitigate it, which means to make it less severe or serious.<sup>235</sup>

## 7. Ensuring Implementation and Compliance

### 7.1. Implementation and Enforcement (Articles 5 and 14)

#### 7.1.1. National Control System and National Control List (Articles 5)

Article 5 sets out the obligation on each state party to implement the ATT at national level, by establishing and maintaining a national control system for the transfer of conventional arms, ammunition/munitions and parts and components.<sup>236</sup> However, the ATT does not articulate in detail the architecture or composition of the system for a state party’s national control regime, only that it must have one and that the system must contain a national control list stating which conventional arms, ammunition/munitions, and parts and components are to be regulated by that control regime.<sup>237</sup> Therefore, there is no ‘one size fits all’ solution for a national system to implement the ATT, and the reality is that its implementation requirements are not any more onerous than existing obligations under soft law instruments such as the WA, the PoA and UNROCA.<sup>238</sup> Collectively, under these instruments, states are required to

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<sup>233</sup> Casey-Maslen et al (n 13) N 11.50.

<sup>234</sup> Da Silva and Wood (n 10) 122; International Committee of the Red Cross (n 55) 36.

<sup>235</sup> Casey-Maslen et al (n 13) N 11.51.

<sup>236</sup> Ibid N 5.01.

<sup>237</sup> Ibid N 5.17.

<sup>238</sup> O’Connor (n 6) 90.

compile a national control list, regulate exports of most, if not all, conventional arms, ammunitions and munitions, and parts and components, and provide regular reports on national control measures.<sup>239</sup> The ATT has not expanded these existing implementation mechanisms, which is disappointing. As these instruments have proven to be incapable of combatting the humanitarian effects of arms transfers, the use of the same implementation mechanism in the ATT is redundant.<sup>240</sup>

### 7.1.2. National Enforcement (Article 14)

The enforcement of the ATT strongly resembles the enforcement mechanisms since the Cold War-era, where a prevalent concern for states implementing export control regimes was the possibility that an external export control standard will infringe on national sovereignty and national security, leaving enforcement standards to each state party.<sup>241</sup> The ATT emphasises that all countries have the right of self-defence and that it will not intervene in issues that are regarded as under domestic jurisdiction.<sup>242</sup> Thus, the ATT ‘establishes no administrative authority, policing body, or adjudicative forum. Nor does it require any specific form of enforcement – neither enactment of criminal penalties nor civil liability for violation’<sup>243</sup>. According to Article 14, entitled ‘enforcement’, all states parties are required to take ‘appropriate’ measures to enforce national laws and regulations that serve to implement the treaty.<sup>244</sup>

The ATT provides a dispute resolution system in Article 19, which could resolve disagreement pertaining to the interpretation or application of ATT standards and potentially improve treaty enforcement.<sup>245</sup> Article 19 operates under a notion of mutual consent, and negotiations, mediation,

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239 Ibid.

240 Ibid.

241 Whang (n 8) 36.

242 Ibid; *Arms Trade Treaty* principles 4 and 7.

243 Nina H. B. Joergensen, ‘State Responsibility for Aiding or Assisting International Crimes in the Context of the Arms Trade Treaty’ (2014) 108(4) *The American Journal of International Law* 722, 729; Lustgarten (n 2) 426; Laura Spano and Philip Alpers, *Reinvigorating the Narrative: The Broader Benefits of the Arms Trade Treaty* (2017) 26.

244 Such an enforcement is typically achieved by a range of legislative and administrative measures, policies, and programmes, including penal sanctions, see Casey-Maslen et al (n 13) N 14.16.

245 Whang (n 8) 137.

conciliation, judicial settlement, and arbitration are used as peaceful means to resolve disputes. Due to the cooperative efforts among states parties, no international entity has been listed as the venue for dispute settlement, although the International Court of Justice ('ICJ') has been acknowledged as a possible venue for ATT dispute settlement.<sup>246</sup> In essence, the enforcement of ATT standards and process of dispute settlement relies heavily upon self-policing, which once again, highlights the enforcement issue left unresolved by the ATT.<sup>247</sup>

## 7.2. Reporting (Article 13)

During the negotiations, states made it clear that Article 13 is intended to promote compliance and serve as a confidence-building measure in line with a central purpose of the treaty: to promote co-operation, transparency, and responsible action by states parties, 'thereby building confidence among them', as stated in Article 1.<sup>248</sup> Consequently, Article 13 imposes two mandatory reporting requirements for states parties: an initial and an annual report. Pursuant to Article 31.1, each state party must provide an initial report of measures it has taken to implement the treaty to the ATT Secretariat within the first year after the treaty's entry into force for it. Thereafter, they are to report to the Secretariat on new measures taken to implement the treaty on an *ad hoc* basis.<sup>249</sup> States parties are also obliged, in accordance with Article 13.3, to report annually by 31 May on detailing authorised or actual exports and imports of conventional arms covered under Article 2.1 of the ATT for the preceding calendar year, though commercially sensitive or national security information may be excluded.<sup>250</sup> Further, according to Article 13.2 states parties are encouraged to report on measures taken that have proven effective in addressing the diversion of transferred conventional arms on an *ad hoc* basis. In accordance with Article 13.3, reports on implementation and transfers are made available and distributed to states

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<sup>246</sup> Ibid; Casey-Maslen, Giacca and Vestner (n 49) 41; See *Statute of the International Court of Justice*, opened for signature 26 June 1945 (entered into force 24 October 1945) art 36.

<sup>247</sup> Whang (n 8) 139.

<sup>248</sup> Casey-Maslen et al (n 13) N 13.02.

<sup>249</sup> Ibid N 13.01.

<sup>250</sup> *Arms Trade Treaty* arts 13.1 and 13.3.

parties by the ATT Secretariat. It is not explicitly stated in Article 13.3 that annual reports will be made publicly available, though in practice they are, if the state party does not submit the report with the preference of it only being posted on the restricted area of the ATT website.<sup>251</sup>

An analysis conducted by Paul Holtom in 2019 suggests that the ATT can increase transparency in international arms transfers by increasing the number of states that report on imports and exports of conventional arms, although there are several worrying tendencies.<sup>252</sup> Holtom states that while the number of ATT states parties providing an annual report to the ATT Secretariat has increased year-on-year, the percentage of states parties that are fulfilling their annual report obligations is in decline.<sup>253</sup> Moreover, although still at a low level, the number of states parties choosing to limit access to their reports only to ATT states parties is increasing.<sup>254</sup> In addition, states parties that previously reported regularly, and with detailed information on their imports and exports of conventional arms, have started to aggregate their data and no longer provide information on exporting or importing states.<sup>255</sup> Therefore, it is not possible to determine if these states parties have record-keeping systems in place or whether their transfers are carried out in accordance with Articles 6, 7 and 11 of the ATT, as they do not indicate the states to which conventional arms are being exported to or imported from.<sup>256</sup> The ATT should not allow states parties to take advantage of the flexible approach to reporting contained in Article 13.3 to aggregate data and omit information from ATT annual reports that makes it impossible for other states parties or interested stakeholders to use them in assessing compliance with Articles 6, 7, and 11.<sup>257</sup> Holtom concludes that the ATT can still fulfil its purpose and increase transparency, but this requires states parties' willingness to implement the treaty's reporting obligations in good faith, and for NGOs to stay 'vigilant and highlight backsliding in reporting before obfuscation

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251 Arms Trade Treaty, 'Annual Reports' (Web page, 25 October 2021).

252 ATT Working Group on Transparency and Reporting, *Sixth Conference of States Parties, Co-Chairs' Draft Report to CSP6*, No ATT/CSP6.WGTR/2020/CHAIR/607/Conf.Rep (17 July 2020) 6; Paul Holtom, 'Can the Arms Trade Treaty Increase Transparency in International Arms Transfers?' (2019) 8 *History of Global Arms Transfer* 19, 35.

253 *Ibid.*

254 Holtom (n 252) 35.

255 *Ibid.*

256 *Ibid.*

257 *Ibid.* 36.

of information becomes a ‘norm’ in transparency in international transfers of conventional arms’,<sup>258</sup>

## IV. Organs of the Arms Trade Treaty

### 1. Conference of the States Parties (Article 17)

Article 17 of the ATT governs the Conference of States Parties (‘CSP’), which meets annually.<sup>259</sup> A range of tasks are assigned to the CSP under Article 17: review of the treaty’s implementation, including developments in the field of conventional arms; adopting recommendations on treaty implementation and operation, in particular the promotion of its universality; considering amendments to the treaty in accordance with Article 20 of the ATT; considering issues arising from implementation of the treaty; deciding on the tasks and budget of the Secretariat; considering the establishment of subsidiary bodies to improve the functioning of the ATT; and performing any other function consistent with the treaty.<sup>260</sup> The current subsidiary bodies of the ATT are the Bureau, the Management Committee, the Voluntary Trust Fund Selection Committee, and three Working Groups.<sup>261</sup> The Working Groups allow for focused work and information exchange on all aspects of treaty Implementation, Universalisation or Transparency and Reporting.<sup>262</sup> In addition, three Sub-working Groups of the Working Group on Effective Treaty Implementation (‘WGETI’) were established to focus upon specific areas of implementation, in particular on Article 5, Articles 6 and 7, and Article 11.<sup>263</sup> In 2019, the Article 5 Sub-Working Group was replaced by the Sub-Working Group on Article 9.<sup>264</sup> Over the years, both the Working Groups and the Sub-Working Groups have created a wide range of tools and guidelines that were welcomed and accepted by the

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<sup>258</sup> Ibid.

<sup>259</sup> Casey-Maslen et al (n 13) Rule 11.1.

<sup>260</sup> Casey-Maslen et al (n 13) N 17.02–17.03.

<sup>261</sup> Arms Trade Treaty, ‘Subsidiary bodies’ (Web page, undated); *Rules of Procedure, Arms Trade Treaty*, ATT/CSP1/CONF/1 (25 August 2015) Rule 42; *Arms Trade Treaty* art 17.4.

<sup>262</sup> Arms Trade Treaty (n 261).

<sup>263</sup> Arms Trade Treaty, ‘Working Group on Effective Treaty Implementation (WGETI)’ (Web Page, undated).

<sup>264</sup> Ibid.

CSPs as living documents of a voluntary nature to be reviewed and updated regularly.<sup>265</sup> Such documents include reference documents to be considered by states parties in the implementation of the core articles, in conducting risk assessments, in preventing and addressing diversion and voluntary guides.

As for decision making, the *Rules of Procedure* for CSPs underline the importance of consensus, obliging states to ‘make every effort to achieve consensus on matters of substance’<sup>266</sup>. If this is not possible, there is an obligatory suspension of proceedings for 24 hours and only if after such a grace period consensus remains unattainable, the CSP can take decisions by a majority of two-thirds.<sup>267</sup> The importance of consensus ensures a large share of control of individual states parties over future direction and implementation of the treaty. This way, it safeguards state sovereignty over ATT-related decisions and limits the flexibility of the treaty regime.<sup>268</sup> This conclusion is reinforced by the limited mandate of the Secretariat.<sup>269</sup>

## 2. Secretariat (Article 18)

The ATT has established a Secretariat to ‘assist States Parties in the effective implementation’ of the treaty.<sup>270</sup> However, the ATT restricts the Secretariat to an administrative and facilitating function, minimises its structure, and emphasises its subordination to states parties and the CSP, avoiding all references to any form of decision-making power for the Secretariat.<sup>271</sup> It is the states parties, through the CSP that are designated by the ATT to define the role of the Secretariat, which they have done at the first CSP, specifying the tasks of the Secretariat under its mandate of Article 18.3 ATT.<sup>272</sup> Pursuant to Article 18.3, the Secretariat undertakes the following responsibilities: receiving, making available, and distributing the reports in

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265 Arms Trade Treaty, ‘Tools and Guidelines’ (Web page, undated).

266 *Rules of Procedure* (n 261) Rule 33.1.

267 *Rules of Procedure* (n 261) Rule 33.1 and 33.2.

268 Coppen (n 31) 363.

269 *Ibid.*

270 *Arms Trade Treaty* art 18.1.

271 *Arms Trade Treaty* art 18.3 states that the Secretariat has a minimal structure; Coppen (n 31) 364.

272 See *Directive of the States Parties to the Secretariat of the Arms Trade Treaty*, ATT/CSP1/CONF/3 (25 August 2015); Coppen (n 31) 364.

accordance with Article 13; maintaining and making available to states parties the list of national points of contact in accordance with Article 5.4 and Article 5.6; facilitating the matching of offers of and requests for assistance for treaty implementation and promoting international co-operation on request pursuant to Articles 15 and 16; facilitating the work of the CSP, including making arrangements and providing the necessary services for meetings under the treaty as set out in Article 17; and lastly, performing other duties as decided by the CSPs. It also provides administrative and substantive support to the three established ATT Working Groups.<sup>273</sup> In addition, although not explicitly mentioned in Article 18.3, other provisions in the ATT call for action by the Secretariat.<sup>274</sup>

## V. The Way Ahead

Having explored the limits and deficiencies of the legal framework established by the ATT and the role of its organs, the question to be addressed now is whether the organs of the ATT have the capabilities, under international law, to develop the legal framework of the ATT despite their limited mandates.<sup>275</sup> This question arises because the ATT envisions the CSP playing a key role in the consideration and adoption of formal amendments to the treaty.<sup>276</sup> In reality though, this function will not affect the role of the CSP much, since the procedure for amendment is complicated and burdensome.<sup>277</sup> In accordance with Article 20.4, amendments to the treaty require the support of three-quarter votes and remain a purely political matter, since states parties that do not formally accept any particular amendment would not be bound by it.<sup>278</sup> However, Article 17.4 also attributes certain other functions to the CSP related to

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<sup>273</sup> ATT Secretariat, *Third Conference of States Parties, Report on the ATT Secretariat's Activities for the Period 2016/2017*, No ATT/CSP3/2017/SEC/154/Conf.SecRep (20 July 2017) 3, listed under 'mandatory responsibilities'.

<sup>274</sup> See Articles 11.6, 20.2 and 16.3; Casey-Maslen et al (n 13) N 18.11.

<sup>275</sup> Coppen (n 31) 367; Stefan Kadelbach, 'International Law Commission and role of subsequent practice as a means of interpretation under Articles 31 and 32 VCL' (2018) 46 *Questions of International Law-QIL, Milão, Zoom-in* 5, 5.

<sup>276</sup> Coppen (n 31) 367.

<sup>277</sup> *Ibid.*

<sup>278</sup> Lustgarten (n 2) 436.

implementation, interpretation and review of the treaty, which may make it possible for the CSP, based on general rules of treaty interpretation in the *Vienna Convention on the Law of Treaties* ('VCLT'), to develop the legal framework of the ATT without resorting to its formal amendment procedure.<sup>279</sup>

Articles 31 and 32 VCLT combine three main approaches to treaty interpretation; textual, subjective, and teleological.<sup>280</sup> The first two are more static than the teleological approach, as they emphasise the text itself and the text as a reflection of the intention of the drafters.<sup>281</sup> The teleological approach aims to interpret the terms of a treaty primarily in light of its object and purpose, which may 'go beyond, or even diverge from, the original intentions of the parties as expressed in the text' and therefore leaves room for the development of the law.<sup>282</sup> It can be used to fill gaps, make corrections, expand or supplement a text, as long as this is 'consistent with, or in furtherance of, the objects, principles and purposes in question'<sup>283</sup>. This may include looking at how the interpretation of the treaty's terms has evolved over time, particularly if they are abstract or undefined, as many of the ATT's terms are.<sup>284</sup> In the VCLT, the teleological approach to treaty interpretation is enshrined in Article 31.1, which states that a treaty must be interpreted 'in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'<sup>285</sup>. Article 31.3 VCLT embodies a dynamic element of treaty interpretation by stating that together with the context of the treaty text, the interpretation of a treaty should take into account any subsequent agreement between the parties regarding the application of the treaty or the application of its provisions, as well as any subsequent practice in the application of the treaty, which establishes the

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279 Coppen (n 31) 367–368.

280 Ibid.

281 Ibid; Francis G. Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18(2) *The International and Comparative Law Quarterly* 318, 319.

282 Coppen (n 31) 368; International Law Commission, 'Law of Treaties' (1964) II *Yearbook of the International Law Commission* 5, 54; Jacobs (n 281) 319.

283 As cited in Coppen (n 31) 368.

284 Coppen (n 31) 368; Ulf Linderfalk, *On The Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007) 77–78.

285 Coppen (n 31) 368.

agreement of the parties regarding its interpretation.<sup>286</sup> There is no hierarchy between the elements of Article 31; they form a singular, integral approach.<sup>287</sup> However, it is argued that when interpreting the ATT, a teleological, dynamic approach primarily based upon Article 31.3 VCLT should take precedence over the other approaches for three reasons. The first is related to the type of treaty that the ATT is.<sup>288</sup> Its nature and the modalities of its inception have led to the inclusion of numerous ambiguous and undefined terms within the treaty text.<sup>289</sup> Secondly, at the adoption of the ATT, 98 states supported a political declaration stating that the treaty enables its members ‘to make it stronger, and through its implementation, to adapt it to future developments’<sup>290</sup>. Hence, the ATT is widely viewed as a work in progress.<sup>291</sup> Thirdly, the ATT can be classified as a law-making treaty, rather than a contract treaty.<sup>292</sup> In contrast to the latter, which ‘contain specific obligations for each member, or group of members, in a *quid pro quo*, law-making treaties create general norms for the future conduct of the parties, containing obligations that are basically the same for all parties’<sup>293</sup>. The teleological method of interpretation is widely recognised as best suited for law-making treaties.<sup>294</sup> Article 1 states that the object of the ATT is the establishment of the highest possible common standards for arms transfers. This can only be achieved by the adaptation of its provisions and its development into a more precise and elaborated legal framework to guarantee the continued relevance of the ATT in response to military, political or technological changes.<sup>295</sup> The CSPs may play an important role in the creation of subsequent agreement and practice.

The terms subsequent agreement and subsequent practice are defined vaguely in the VCLT and the distinction between them is also rather unclear.<sup>296</sup> To determine whether the discussions and documents of ATT

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286 Ibid 368–369.

287 UN General Assembly, *Report of the International Law Commission*, 70<sup>th</sup> sess, Supp No 10, UN Doc A/73/10 (2018) 13.

288 Coppen (n 31) 369.

289 Ibid.

290 Ibid.

291 Ibid.

292 Ibid 370.

293 As cited in Coppen (n 31) 370.

294 Ibid.

295 Coppen (n 31) 370.

296 See *Vienna Convention on the Law of Treaties* art 31.3.a and 31.3.b.

CSPs can be considered subsequent agreement and subsequent practice in the sense of the VCLT, one must turn to the case-law of the ICJ and examine the comments by the International Law Commission ('ILC') to identify certain parameters.<sup>297</sup> This illustrates that there are no specific requirements for the form subsequent agreement and practice must take, and that organs such as the CSP, which are established by the treaty itself, may play a role in its subsequent interpretation, even if they lack international legal personality.<sup>298</sup> The Draft conclusion 11 of the 2018 ILC Report states that a decision adopted within the framework of the CSP embodies a subsequent agreement or subsequent practice under Article 31.3 VCLT, in so far as it 'expresses agreement in substance between the parties regarding the interpretation of the treaty, *regardless of the form and the procedure* by which the decision was adopted, *including adoption by consensus*'<sup>299</sup>. The legal effect of decisions by CSPs 'depends primarily on the treaty in question and any applicable rules of procedure'<sup>300</sup>. In 1952, the ICJ consulted documentation of a committee established by the 1906 General Act of Algeciras for the interpretation of the terms of the latter.<sup>301</sup> Though more recently, the ICJ rejected an interpretation of the Whaling Convention based on resolutions issued by the International Whaling Commission, in which the resolutions in question were not adopted by consensus.<sup>302</sup> In essence, what matters most appears to have less to do with the form of the subsequent agreement or practice, but more with the intention behind it and whether states parties agree that it should be a basis for interpretation or not.<sup>303</sup> It certainly appears that the ATT CSPs have the potential to meet this standard.<sup>304</sup> Article 17.4 mandates the CSP is to review the implementation of the ATT, consider recommendations, amendments, and, notably, 'issues arising from its interpretation' and gives the CSP full control over the size, mandate and activities of the ATT Secretariat. The CSP has also established various

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297 Coppen (n 31) 370.

298 Ibid; UN General Assembly (n 287) 14–15 and 49–50.

299 UN General Assembly (n 287) 15, emphasis added.

300 Ibid 84.

301 *Case Concerning Rights of Nations of The United States of America in Morocco (France v. United States of America) (Judgement)* [1952] ICJ Rep 176, 211; Coppen (n 31) 371.

302 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening) (Judgement)* [2014] ICJ Rep 226, 26; Coppen (n 31) 371–372.

303 Coppen (n 31) 372; UN General Assembly (n 287) 15.

304 Coppen (n 31) 372.

Working Groups and Sub-Working Groups for focused work on the ATT provisions. These have developed numerous documents, which have been accepted by the CSPs as documents of living nature to be reviewed and updated regularly. The current focus of the WGETI Sub-Working Group on Articles 6 and 7 is the unpacking the key concepts of Articles 6 and 7 and thereby discussing the interpretation of the language and standards in these articles.<sup>305</sup> Nevertheless, based upon the judgment of the ICJ in the Whaling-case, it is likely that CSP decisions would have to be taken by consensus to have interpretative value.<sup>306</sup> Therefore, it is doubtful that the CSP will be able to adopt formal amendments to the ATT, yet it does have potential to contribute to the development of the legal regime on arms transfers through the progressive interpretation of the terms of the ATT.<sup>307</sup> This does not mean that every declaration or document of a CSP meeting amounts to subsequent agreement.<sup>308</sup> Discussions at CSP meetings must reflect the intention of ATT states parties to interpret the treaty and this intention should be supported by state practice.<sup>309</sup> Developments could take years or decades.<sup>310</sup> In the case of the ATT, it is most likely that such practices will be stimulated, encouraged and documented by the Secretariat.<sup>311</sup>

The ATT Secretariat is not given any explicit law-making or interpretive mandate.<sup>312</sup> It also lacks international legal personality and the power to enforce compliance by recommending or enacting punitive measures against states.<sup>313</sup> This should, however, not lead to the conclusion that the Secretariat cannot contribute to the development of the treaty in other ways, for instance by carrying out supervisory tasks.<sup>314</sup> This is relevant for the ATT because non-compliance may be difficult to detect in the case of the ATT, but states will nevertheless demand certainty that others are

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305 ATT Working Group on Transparency and Reporting, *Multi-year work plan for the WGETI Sub-working Group on Articles 6&7 (prohibitions & Export and export assessment)* (March 2021).

306 *Ibid.*

307 *Ibid.* 374.

308 *Ibid.*

309 *Ibid.* 375.

310 *Ibid.* 374–375.

311 *Ibid.* 375.

312 *Ibid.*

313 *Ibid.*

314 *Ibid.* 376.

adhering to the rules of the treaty. The process for doing so is known as ‘supervision’<sup>315</sup>. Supervision ‘entails more than simply ensuring compliance with treaties. It also includes the stages of the process that help determine whether states have breached certain norms’<sup>316</sup>. There are four phases of a supervisory process: information gathering, review, assessment, and compliance management.<sup>317</sup> The Secretariat simply lacks the mandate to carry out capacities and/or mandates for assessing and enforcing ATT compliance, though this does not mean that it is not a supervisory organ, as supervision entails much more than assessment and enforcement.<sup>318</sup> As such, the Secretariat can contribute to the development of the ATT treaty regime, which starts with its information-gathering and transparency-related tasks.<sup>319</sup> Therefore, through supervising the implementation of the ATT, the Secretariat harbours the potential to contribute to the establishment of standard practices under the ATT and it is not required to have international legal personality, or to be part of an existing UN structure for this purpose.<sup>320</sup> Based on its current tasks and mandate, it can already play a role and disseminating information, best practices, assist in facilitating cooperation and capacity-building, as well as streamline reporting and interpretation of the treaty, thus furthering its harmonised implementation.<sup>321</sup> The CSP may also elect to expand the mandate and structure of the Secretariat over the years (Article 17.4.e and Article 18.3.d), further increasing its impact on international practice.<sup>322</sup>

## VI. Conclusion

The ATT establishes international standards governing conventional arms transfers to prevent and eradicate illicit trade and diversion of

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315 Ibid.

316 Ibid.

317 As cited in Coppen (n 31) 376.

318 Coppen (n 31) 378.

319 Ibid; Sibylle Bauer, Paul Beijer and Mark Bromley, *The Arms Trade Treaty: Challenges for the First Conference of States Parties* (2014) 6.

320 Coppen (n 31) 380.

321 Ibid.

322 ATT Secretariat, *Fifth Conference of States Parties, Final Report*, No ATT/CSP5/2019/SEC/536/Conf.FinRep.Rev1 (30 August 2019) 380–381.

conventional arms for the purpose of contributing to peace, security and stability, reducing human suffering and promoting cooperation, transparency and responsible action.<sup>323</sup> This paper has analysed the ATT in a past, present and future-oriented perspective to discover whether the ATT can indeed fulfil its object and purpose set out in Article 1.

What can be learned from history is that regulating the global conventional arms trade is not an easy endeavor, since there are many challenges that need to be overcome and taken into consideration. Against this background and negotiated under strict rules of consensus, the ATT had to be designed with a view to accommodating the states least interested in a strong and effective agreement.<sup>324</sup> Noteworthy is the fact that there was a considerable pushback against the human security framework and reassertion of the primacy of state security.<sup>325</sup> In essence, the price paid for consensus are several defects: inadequate provisions, ambiguous language or of loopholes in the scope of the treaty and the obligations it imposes.<sup>326</sup> This is a major issue because the fulfilling of the object and purpose of the ATT is especially dependent upon Articles 2, 6, 7 and 11 functioning properly. In this regard, there are also worrying tendencies in ATT reporting under Article 13, in which states parties are aggregating data and omitting information from ATT annual reports, which makes it no longer possible to assess whether their transfers are being undertaken in accordance with Articles 6, 7, and 11 of the ATT.<sup>327</sup> This is an issue for assessing compliance with these provisions, thus impeding the promotion of transparency and confidence building amongst states parties. Furthermore, since there is no international enforcement body with powers of authoritative interpretation, arms export control practices will continue to vary even though states parties have adhered to common and legally binding commitments in the field of conventional arms trade.<sup>328</sup> The challenge of enforcement will continue to exist, even as states ratify the treaty. In essence, it can be concluded that the ATT in its current

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<sup>323</sup> *Arms Trade Treaty* art 1.

<sup>324</sup> Bailliet (n 50) 272.

<sup>325</sup> Bromley, Cooper and Holtom (n 37) 1046.

<sup>326</sup> Lustgarten (n 2) 435.

<sup>327</sup> Holtom (n 252) 35.

<sup>328</sup> Lustgarten (n 2) 436; Maletta, Giovanna, 'Seeking a Responsible Arms Trade to Reduce Human Suffering in Yemen' (2021) 56(1) *International Spectator* 73, 85.

form has significant shortcomings that may prevent it from achieving its objectives.

Despite the many shortcomings, there are certain positive features of the ATT which stand out.

For one, it includes SALW fully within its scope, which was of central importance for certain states, which would not have ratified the treaty without it.<sup>329</sup> Moreover, the definition of ‘transfer’ in Article 2.2 is broad enough to capture almost all forms of passage of materiel from one state to another.<sup>330</sup> Although ammunition/munitions and parts and components are treated differently in the ATT than conventional arms, the compromise achieved is likely to ensure that the treaty covers virtually all exports, which is the central point of the transfer process.<sup>331</sup> In addition, the insertion of IHRL in Article 7 of the ATT facilitates the engagement of international and national human rights institutions in the assessment of states’ arms trade practices.<sup>332</sup> The requirement in Article 7.4 that a state party must take into account the risk of the arms or items ‘being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children’ represents the first time that a treaty recognises the link between arms transfer decisions to the risk of gender-based violence, and is a commendable achievement of the ATT.<sup>333</sup> So too is Article 6, although the wording is a product of compromise, it should overall be regarded as a significant achievement in defining global standards for when authorisations of the transfer of conventional arms and related items within the ATT are to be prohibited.<sup>334</sup> Finally, the creation and widespread acceptance of the treaty itself is perhaps the most important accomplishment of the whole process.<sup>335</sup> The regulation of arms transfers by a global legal instrument and acceptance by the majority of sovereign states is unprecedented, and now with the accession of China in 2020, the world’s fifth largest arms exporter and importer, the ATT’s

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329 Lustgarten (n 2) 434.

330 *Ibid.*

331 *Ibid.*

332 Zwijsen, Kanetake and Ryngaert (n 117) 160.

333 International Committee of the Red Cross (n 55) 35.

334 *Ibid.* 26.

335 Lustgarten (n 2) 434.

rules apply to a significantly greater volume of arms transfers and activities.<sup>336</sup>

This paper also pointed out that there is scope for the ATT to develop its framework under rules of general international law to realise its potential without having to resort to formal amendment. Both the CSP and the Secretariat can play an important role therein without transgressing the boundaries set by the treaty to their mandates.<sup>337</sup> As a result, the treaty regime could evolve to effectively carry out the task it was intended to, enshrined in Article 1. Since this process is based upon existing practices, although they may be stimulated by the organs of the ATT, the progressive development of the treaty will have a substantial state-driven aspect to it, which should satisfy state sovereignty concerns.<sup>338</sup> In addition, the requirement of consensus, which was newly stressed by the ICJ, should ensure that treaty development through subsequent agreement and practice will not bind states against their will.<sup>339</sup> Whilst the ATT may yet be inadequate to fulfill the promise of an effectively regulated and controlled international arms trade, it is undeniable that the ground has shifted because it now exists.<sup>340</sup> The ATT provides the foundation for a more comprehensive legal framework on conventional arms trade and international law provides the means to develop it; the realisation of its aim is now up to those involved.<sup>341</sup>

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336 Vestner, Tobias, 'The New Geopolitics of the Arms Trade Treaty' (2020) 50(10) *Arms Control Today* 14, 14.

337 Coppen (n 31) 381.

338 *Ibid* 382.

339 *Ibid*.

340 *Ibid*; Lustgarten (n 2) 434.

341 Coppen (n 31) 382.

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