

# The Arms Trade Treaty: Challenges Ahead

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## **I. Introduction**

The modern history of multilateral efforts to agree on controls for conventional arms transfers stretches back to the late nineteenth century. The General Act for the Repression of the African Slave Trade of 1890 represents one of the first multilateral agreements of the modern era to regulate arms transfers to colonial territories. There were two efforts to conclude a Convention on the international trade in arms after the First World War, with neither coming into force - Convention for the Control of the Trade in Arms and Ammunition (1919) and the League of Nations Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War (1925).

It took more than 70 years after these failed attempts for the next significant proposal for a multilateral agreement for controlling the international arms trade to be voiced. In 1997, a group of Nobel Peace Laureates released an International Code of Conduct on Arms Transfers. This was shortly followed by a proposal from civil society – the Draft Framework Convention on International Arms Transfers (2001). The Draft Framework Convention called for a universal, legally binding agreement governing international arms transfers, with both proposals calling for governments to ensure that they are fulfilling their obligations under international human rights and humanitarian law when permitting international arms transfers. These proposals were further developed by civil society organisations that found a group of like-minded states willing to promote the initiative for an Arms Trade Treaty (ATT) within a UN framework.

In 2006, the United Nations (UN) General Assembly voted overwhelmingly in favour of resolution 61/89 that (a) called upon member states to provide their views on the ‘the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms’ and (b) for a Group of Governmental Experts (GGE) to be convened to examine the issue. Based on the response to resolution 61/89, in 2008 the UN General Assembly adopted resolution 63/240, which called for an Open-Ended Working Group (OEWG) to be convened, which would unlike the GGE would be open for all UN member states and also for inter-governmental organisations, observer states and certain civil society organisations. In 2009 the UN General Assembly ‘convene the United Nations Conference on the Arms Trade Treaty to sit for four consecutive weeks in 2012 to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms’. The resolution also called for four weeks of

Preparatory Committees (PrepComm) to be convened before the 2012 conference. The first three weeks of PrepComms took place in July 2010 and February/March 2011, with the fourth and final week of PrepComm activity due to take place in July 2011.

While civil society organisations calling for an ATT have provided a plethora of suggestions for the content, obligations and institutional arrangements for an ATT, the states that have been the strongest supporters of the ATT initiative have kept their proposals in this regard intentionally vague. This vagueness has arguably helped proponents to demonstrate that they do seek frank, open, non-judgemental, multilateral discussions. A clearer picture of what these states think an ATT should look like has emerged following the PrepComms, but there are still many issues that have not been publicly elaborated.

This short paper begins with a brief overview of the involvement of EU member states and institutions in the ATT process. The main focus is upon challenges relating to reconciling (a) disarmament and arms control and export control approaches; (b) civil society and government aims; and (c) importer and exporter interests.

## **II. EU member state and institution activities relating to an ATT**

In September 2004, the UK became the first permanent member of the UN Security Council and the EU to back the ATT initiative. In October 2005, the Council of the European Union (EU) issued a statement of support in October 2005. All EU member states voted in support of the UN General Assembly resolution 61/89 and all EU member states submitted their views on the 'feasibility, scope and draft parameters' for an ATT. All EU member states cosponsored resolution 63/240 and several EU member states played active roles in the GGE and OEWG.

EU institutions and member states have sought to raise awareness of the ATT and provide inter-sessional meetings to discuss the ATT in the following outreach activities: (a) an ATT awareness-raising session during conventional arms export control seminars in the EU Neighbourhood; (b) ATT awareness raising seminars in different regions of the world as part of the UNIDIR managed project 'Promoting Discussion on an Arms Trade Treaty' (February 2009-August 2010); and (c) Inter-sessional discussions on the political and technical aspects of an ATT as part of the UNIDIR managed project 'Supporting the Arms Trade Treaty Negotiations through Regional Discussions and Expertise Sharing' (August 2010-)

The sense that the EU member states and institutions are pro-ATT is clearly conveyed by these actions and activities. Further, during the PrepComm meetings the state holding the rotating presidency of the EU has put forward statements agreed between EU member states. However, while it is clear that there are efforts to reach agreement to move the ATT process forward, it is also clear that there are a number of areas in which national interests continue

to take precedence. One of the clearest examples of this is where states have either particular issues that they desire to see included in the ATT but which are not regarded in the same manner by other EU member states, or more commonly particular issues that an EU member state does not want to be subject to an ATT.

### **III. Challenges ahead**

There are a large number of challenges ahead for the successful negotiation and eventual entry into force of a robust and effective ATT. There are potential challenges every step of the way from reaching agreement on the scope of items to be covered by an ATT to the number of states required to ratify before entry into force. Therefore, this paper takes a step back from the challenges posed by each element of a potential ATT to look at three underlying challenges - but also opportunities - that have become visible during the process towards the negotiation of an ATT in 2012:

#### *Reconcile disarmament and arms control and export control approaches*

For many reasons the ATT and the process towards its negotiation are novel. One of the most interesting aspects about the current efforts to negotiate an ATT is that it straddles a divide between two worlds - that of arms control agreements and export control regimes.

Disarmament and arms control agreements place restrictions upon the development, production, stockpiling, proliferation, and use of different types of weapons, especially weapons of mass destruction. They are often driven by efforts to eradicate a certain type of weapon or at the very least contribute to processes of disarmament and confidence-building. One of their central aims is to have universal state participation in these processes. Examples include the Nuclear Non-Proliferation treaty, the Biological Weapons Convention, the Chemical Weapons Convention, the Anti-Personnel Land Mines Convention and the Cluster Munitions Convention

Export control regimes are inter-governmental institutional arrangements that states use to organize and in some cases harmonize their systems for controlling exports and transfers of sensitive goods. Membership of these bodies is dependent upon states' adopting relevant standards in the structure and implementation of their export control systems and is inherently exclusive. Their members have agreed on general principles regarding export controls, share a common list of items to be subject to export controls and provide for systems of information exchange and consultation. Examples include the Wassenaar Arrangement, the Nuclear Suppliers Group and the Missile Technology Control Regime. One could also call the arrangements between EU member states that have evolved under the EU Code of Conduct and Common Position an 'export control regime'.

In terms of the way it is being negotiated - the forums that are being used and the underlying philosophy that is guiding the negotiating process - the

ATT looks and feels a lot like an arms control agreement. First, the preamble and many of the proposed chapter headings that have been presented in the draft text of the PrepComm chair's papers include elements that appear to be lifted from existing disarmament and arms control agreements. Second, the process is open to all UN member states and as with other UN instruments aims for universal participation. Third, the background of many of the diplomats involved in negotiating an ATT is in the field of arms control agreements and this is the experience from which they are drawing during the negotiating process.

In terms of what many of its proponents would like an ATT to achieve - the obligations they would like it to place upon state parties as well as the overall purpose they would like it to have - the ATT looks and feels a lot more like an export control regime. First, the scope and criteria in the chair's draft text is to a considerable extent derived from existing export control regimes, including the EU Common Position. Second, as the negotiations move towards their latter stages there is an increasing attempt to bring in officials that have more direct experience of how export controls and export control regimes function.

The way that an ATT seems to fall between these two worlds makes the ATT a uniquely complex and challenging instrument to negotiate. Resolving this tension would involve finding the best and most appropriate elements from each approach. For proponents of an ATT, the process entails moving beyond the two approaches of disarmament and arms control and export control regimes into a new paradigm.

Resolving the tensions between these two approaches is not insurmountable and there is evidence in existing UN instruments of efforts to improve transfer controls and build-confidence between states (e.g. Programme of Action on SALW, national legislation exchange and UN Security Council Resolution 1540). At the same time, it would be useful to reflect upon the lessons learned from these when considering what the ATT should look like, what it should be for and what it is unlikely to be able to help states do.

I would argue that a number of EU member states - as well as the external action service who are participating in the ATT negotiations - have managed to reconcile these two worlds to some degree; their disarmament and arms control ambassadors from New York or Geneva have taken the lead because of familiarity with UN processes, but when it comes to suggestions for content a number of EU member states have drawn upon export control and export control regime experience (although this is not universal). This is understandable because a number of EU member states are major arms exporters and the rationale for an ATT for a number of EU member states has been promoted on the grounds of forging a 'level playing field' for arms exporters as well as preventing conflict and violations of international humanitarian and human rights law.

*Reconcile civil society and government aims*

The proposal for an ATT has strong roots in civil society, in particular in organisations based in Europe. European civil society organisations have played a leading role in the Control Arms campaign for the promotion of an ATT. The campaign has sought harmonization of the criteria, standards, interpretations and implementation of national arms transfer controls as a means of preventing ‘irresponsible’ transfers. The fact that a date has been set for a conference to negotiate an ATT in 2012 is a remarkable achievement considering the traditionally sensitive nature of arms transfers for states. Civil society organisations have scored a remarkable accomplishment in getting so far so quickly. However, setting a date for a negotiation is not the same as securing an ATT containing the key elements sought by civil society campaigners.

As was the case with NGO-led campaigns for the convention on anti-personnel mines and cluster munitions, as well as work on SALW and armed violence reduction, the Control Arms campaign has persuaded a number of states to promote, and lobby other states to support, the ATT initiative. The response from EU member states has been particularly positive in this regard. EU member states and EU institutions have provided material support for civil society campaigns, involved civil society organisations in EU and national outreach activities and several EU member states have included representatives of civil society organisations in their delegations. It would appear, therefore, that European civil society organisations and governments are working closely together in pushing for a shared goal of a legally-binding agreement to provide common standards for controlling conventional arms transfers.

European civil society organisations and EU member states and institutions have already demonstrated that they can work together to enhance and harmonise controls on conventional arms exports between states, as civil society organisations have played a role in the development of the EU Code of Conduct and Common Position. One could argue that the experiences gained by European civil society organisations during this process has helped them also in terms of forging good working relationships with EU member state governments and institutions and also in terms of realising what is achievable in this sphere.

However, by focusing upon the European Union and those civil society organisations involved in the Control Arms campaign, one does not see the whole picture. Unlike the conventions on anti-personnel mines and cluster munitions, and the EU Common Position, the ATT is being negotiated between all UN states. The ATT process is not just about persuading a group of like-minded states to sign a legally-binding agreement, but also about persuading states that are sceptical about the ATT initiative to at the very least permit negotiations to be concluded. States that are sceptical about the purpose or potential impact of an ATT have been provided with an opportunity to help draft or derail the ATT. Further, sceptical states are particularly concerned

about a number of the issues that civil society organisations are raising in relation to the ATT and in particular elements that they might perceive as potentially impacting upon what they consider to be their 'sovereign rights'.

It has also become evident from the PrepComm meetings that a number of the states that are regarded as pro-ATT have opposed proposals that many civil society organisations regard as key elements for an ATT that will have a meaningful impact on their goals relating to reducing armed violence, human rights violations etc. I also presume that more issues will be presented as problematic during the upcoming PrepComm and that during the 2012 conference many key elements for civil society organisations will be removed from the final treaty text.

It is also worth noting that those civil society organisations campaigning for an ATT within the Control Arms network are not the only civil society organisations in Europe campaigning on issues relating to arms transfers. In Europe there are also civil society organisations campaigning for more restrictive export controls, which utilise different approaches for influencing government and industry than those used by the Control Arms network, and which are also sceptical about the potential impact of an ATT on 'irresponsible' arms transfers. To some extent they refer to the fact that despite the development of the EU Code of Conduct and Common Position EU member states continue to export arms and military equipment to end-users that these civil society organisations believe should not be considered eligible under the Common Position.

To some extent, the Control Arms network and a large number of pro-ATT states have reconciled their aims for an ATT. However, it remains to be seen if the pro-ATT states will deliver an ATT that meets the expectations of civil society organisations. To achieve this requires either a lowering of expectations on the part of civil society organisations or reconciling the aims of sceptical states and civil society. One would expect that the former is the only means for reconciling civil society and government aims.

#### *Reconcile importer and exporter interests*

Many of those involved in the ATT process have noted that the discussions in the July 2010 and February/March 2011 PrepComms have not produced the usual global divisions that one expects to see in disarmament and arms control negotiations - the discussions have not pitted the Global South against the Global North. Rather, the coalition of pro-ATT states cuts across North-South divide. The ATT initiative has attracted considerable support among states in sub-Saharan Africa and Latin America.

However, there has been a group of states from the South that have sought to emphasize 'importer rights' and 'exporter responsibilities' in a way that has opened up some divisions along the North v South axis. For example, there are states in the Global South that are concerned that an ATT will amount to an export control regime writ global, which will limit their ability to purchase weapons and maybe even 'civilian' technologies from abroad. This can be

clearly seen in the opposition by some states to the inclusion of controls on transfers of technology in the scope of an ATT. These states promote the idea that one should interpret article 51 of the UN Charter as enshrining a right to import arms and a consequent responsibility for exporters to provide said arms. This formulation has been strongly rejected by states that are major arms exporters and stress that it is the right of the supplier to decide whether or not to supply arms.

Nevertheless, there has been little serious effort to elaborate the rights, or rather the benefits, for a state that does not export conventional arms. It is difficult to identify incentives for states that are not seeking a 'level-playing field' for their arms exports in the PrepComm chair's draft text. The fact that some of the issues put forward by states in the Global South to be included in the ATT have not been acknowledged has lent further weight to concerns that the ATT is another export control regime. For example, the desire of states from the Global South to include a prohibition on transfers to non-state armed groups has not been accepted into the chair's draft paper to date.

By the same token, there has been little discussion of the responsibilities for states that are importing arms or serve as transit or transshipment points. The responsibilities for exporters have been elaborated and can be seen in the draft paper of the chair. This makes sense because thinking on the responsibilities of exporters is far more developed, largely because major arms producing states in North America and Europe have been working on improving their export controls for many years. The only 'importer regime' that could potentially be mined for ideas for importer responsibilities is the ECOWAS Convention. This outlines a range of obligations for states in West Africa with regards to imports of SALW and ammunition and related parts and components. However, the ECOWAS Convention is limited to transfers of SALW and only covers a small group of states faced with a particular regional problem. It is hard to imagine that the text of an ATT will contain the same obligations for importers as contained in the ECOWAS Convention.

Therefore, I think that one challenge that has to be overcome is the division of states into exporters and importers. This fails to address the fact that any state that possesses weapons is a potential exporter of second-hand equipment, irrespective of whether they have arms production capabilities or not. It also ignores the fact that many of the world's largest arms exporters also import significant quantities of arms. Further, this approach fails to take into account the important role that states that serve as transit and transshipment hubs can play in preventing cases of diversion and the responsibility of all states to have effective controls on arms brokering. Therefore, the ATT represents an opportunity to consider the responsibilities for all states with regard to different types of arms transfers.

One could argue that the principles and practices developed under the EU Code of Conduct and Common Position demonstrate ways in which a diverse range of states - those with and without significant arms production capabilities - can agree to common standards for controlling arms exports and

arms brokering. Although the EU Common Position calls for states to assess transit and transshipment licence applications against the Common Position's 8 criteria, it does not provide a requirement for states to have licensing for transit and transshipment. Further, the EU Common Position makes no reference to import controls. EU member states have different practices with regards to controls on transit and transshipment and imports and there has been no process for harmonising these in the same way that efforts have been undertaken for export and brokering controls. This is therefore an area in which an ATT could have implications for EU member states and where it will be interesting to see if those states labelled as 'exporters' are willing to make changes to their systems for controlling imports and transit and transshipment in the same way that they expect 'importers' to establish export controls.