

UP IN ARMS: A HUMANITARIAN ANALYSIS OF THE ARMS TRADE TREATY AND ITS NEW ZEALAND APPLICATION

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I. INTRODUCTION

On 2 April 2013 the Arms Trade Treaty (ATT) was adopted by the United Nations General Assembly (UNGA).¹ The ATT is intended to increase global security by reducing armed conflict and restricting access to weapons for human rights abusers and perpetrators of certain crimes. This is to be achieved through the regulation of the international trade in conventional weapons.

Conventional weapons are generally understood to be all arms except chemical, nuclear and biological weapons. However there is no singular definition of the term. In the context of the ATT, “conventional weapons” is used to refer to all arms that fall within the following categories: battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons.²

This paper looks at the ATT from two angles. The ATT has been advertised as a humanitarian approach to arms control. The first part of this paper addresses this proposition and considers why an arms trade treaty is necessary by looking at the humanitarian implications of the international arms trade. The paper then moves on to set out the ATT negotiation process, before analysing how the humanitarian aspirations that motivated the Treaty discussions have been translated into the current instrument.

The second part of this paper places the ATT in the context of New Zealand. New Zealand's contributions to the arms trade are examined, as is the current arms trade legal framework. Finally, the paper looks at how New Zealand can give effective implementation to the ATT.

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1 *The Arms Trade Treaty* GA Res 68/31, A/Res/68/31 (2013) [ATT].

2 At art 2(1); the categories are further defined in *Transparency in armaments* GA/Res/46/36L, A/Res/46/36 (1991) at Annex and *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons* GA Decision 60/519, A/60/49 (2005) at art 4(a) and (b) [ITI].

II. A HUMANITARIAN APPROACH TO ARMS CONTROL

A. A Humanitarian Framework

The ATT has been presented as a humanitarian instrument designed to reduce human suffering. However little explanation has been given as to what, exactly, is meant by “humanitarian.”

Legal humanitarianism developed in the field of disarmament law. It seeks to protect civilians from the harm caused by armed conflict.³ As such, it has shifted international focus from questions of state security to questions of human security. Bonnie Docherty sets out the three characteristics of humanitarian disarmament treaties: first, the instruments create “absolute bans on the use, production, transfer, and stockpile of specific weapons”; secondly, the above prohibition is supplemented by remedial obligations to “reduce the effect of past use”; thirdly, cooperative implementation is required amongst states in order to fulfil the humanitarian potential of the treaty.⁴ This paper is not suggesting that Docherty has provided a definitive statement of humanitarianism. Rather, it is a working definition of a developing area of law and provides a useful framework against which the humanitarian claims of the ATT may be assessed.

At first glance it is clear the ATT does not fit snugly within this framework; it only satisfies the third characteristic, that of cooperative implementation. The first characteristic is partially fulfilled, as art 6 of the ATT puts in place absolute bans on the transfer of conventional weapons in specific circumstances. The second is not touched upon at all. This is not surprising. After all, the ATT is not outlawing certain weapons. Instead, it is regulating the movement of these weapons between states.

Although the ATT is not a security instrument,⁵ it might be considered a hybrid disarmament treaty. Docherty defines these instruments as ones which:⁶

... place restrictions on weapons, but their underlying purpose combines concerns for protecting security and minimizing the suffering of individuals. ... Hybrid disarmament instruments regulate and occasionally prohibit the use of specific weapons. They also include provisions that are primarily humanitarian in nature.

However, the ATT does not quite fit within this framework either. Hybrid instruments straddle humanitarian and security concerns and the ATT does not profess to have definite security objectives beyond the somewhat standard purpose of “contributing to international and regional peace, security and stability”.⁷

3 Bonnie Docherty “Ending Civilian Suffering: The Purpose, Provisions, and Promise of Humanitarian Disarmament” (2013) 15 *Austrian Review of International and European Law* 7 at 7.

4 At 7-8.

5 At 12: Docherty defines security instruments as those which “focus on the elimination of certain weapons of war.” Although humanitarian benefits may be provided, these are incidental to security concerns.

6 At 13.

7 ATT, above n 1, art 1.

A closer reading of the ATT reveals that it is humanitarian in nature. Although humanitarian treaties developed through disarmament efforts, they are not restricted to this field. The ATT is not purporting to be a disarmament instrument; as such it demonstrates that humanitarianism is a developing concept and has, over the last 12 months, moved beyond a set of fixed criteria. The Treaty is the result of a discussion that simultaneously acknowledges the importance of conventional weapons to state security and the human suffering these weapons cause. By recognising these competing interests, the ATT has broadened the application of Docherty's humanitarian framework to include arms control.

Docherty's framework is not lost in the ATT. As already noted, both the first and third characteristics are at least partially fulfilled. It is in relation to the second characteristic that the ATT departs from the traditional remedial requirements. Given the nature of the Treaty, looking to regulate the future rather than attempting to remedy the past, arts 6 and 7 needed to be proactive rather than reactive. Without this forward looking function, the ATT could not have been given practical effect. As it is, these two articles work together to prevent the future transfer of weapons to those perpetuating international human rights law (IHRL) and international humanitarian law (IHL) violations.

Docherty argues humanitarian treaties are primarily distinguishable from non-humanitarian instruments through the interests which "shape their underlying purposes and textual provisions."⁸ Humanitarian objectives lie at the heart of the ATT. The preamble is explicitly concerned with the effect that conventional weapons have on international peace, security and stability, human rights, social and economic development, and civilians. The operational provisions of the text give effect to measures put in place to address these concerns. The total effect is that the ATT has one express purpose: reducing human suffering.⁹ The ATT indisputably espouses a humanitarian approach to arms control.

B. The Humanitarian Cost of the International Arms Trade

The area of arms control has long been ripe for a humanitarian lens. Global attention has traditionally focused on the so-called weapons of mass destruction – nuclear, chemical and biological – and not on conventional weapons. Yet conventional weapons have the capacity to inflict just as much, if not more, harm to human security, human rights and human development than weapons of mass destruction.

Early weapons developers expected weapons technology to increase global security; the opposite has in fact been true. Alfred Nobel, creator of dynamite, argued:¹⁰

8 Docherty, above n 3, at 10.

9 International Committee of the Red Cross (ICRC) "Protecting Civilians and Humanitarian Action Through the Arms Trade Treaty" (International Committee of the Red Cross, Geneva, 2013) at 2.

10 Alexander Gillespie *A History of the Laws of War: The Customs and Laws of War with Regards to Arms Control* (Hart Publishing, Oxford, 2011) vol 3 at 23.

My factories may make an end to war sooner than your Congresses because the day that two armies have the capacity to annihilate each other within a few seconds, it is likely that all civilised nations will turn their backs on warfare.

History demonstrates that this has quite simply not been the case. Nobel was speaking in 1896; since then the world has endured two world wars and almost five decades of cold war. Although it has now been 69 years since the major world powers were at war with each other, armed conflicts have occurred regularly between states, and between states and non-state actors (NSA). History also shows that global weapons saturation has rendered IHL civilian protections largely meaningless in many of these conflicts.¹¹ Simultaneously, international human rights are often abused.

The most obvious humanitarian cost exacted by conventional weapons is human life. Debbie Hillier and Brian Wood elucidate this point in simple terms: in the time it takes to read one A4 page, “one more person will most likely be killed somewhere in the world and at least two more will have been seriously injured by the use of arms.”¹² These casualties are not limited to conflict zones as gun violence is prolific in countries such as the United States and Brazil.¹³ Loss of human life is an ordinary impact of conventional weapons transfers. After all, “arms, by definition, are sought for the purpose of killing, injuring and constraining.”¹⁴ They are “the only legal product that is explicitly designed to have a negative impact on human health.”¹⁵ Arms are used by defence forces, law enforcement officers, individuals and NSA for protection and for criminal purposes. As unregulated weapons move across borders, civil conflict is fuelled, regions are destabilised and terrorist and criminal networks are empowered.¹⁶ The possession of arms places security forces and armed groups in a position of extreme authority over vulnerable populations, undermining mental and physical dignity. Instances of torture, arbitrary arrest and disappearances, sexual violence and the silencing of opposition voices are often exacerbated by the possession of arms.¹⁷

But the human suffering caused by conventional weapons extends beyond the almost expected impacts of arms possession. Civil, political, economic, social and cultural rights are all threatened by the trade in

11 Jack M Beard “Law and War in the Virtual Era” (2009) 103 AJIL 409 at 409.

12 Debbie Hillier and Brian Wood *Shattered Lives: The Case for Tough International Arms Control* (Amnesty International and Oxfam International, London, 2003) at 24.

13 At 24-25.

14 Annyssa Bellal “Regulating international arms transfers from a human rights perspective” in Stuart Casey-Maslen (ed) *Weapons Under International Human Rights Law* (forthcoming).

15 International Committee of the Red Cross “ICRC position on goals and objectives of an Arms Trade Treaty: ICRC statement on goals and objectives of an arms trade treaty, opened working group towards an Arms Trade Treaty” (New York, 13 July 2009).

16 United Nations Department of Public Information *Secretary-General, in Remarks to Conference on Arms Trade Treaty Calls Absence of Global Instrument Dealing With Conventional Weapons ‘A Disgrace’* SG/SM/14394 (2012).

17 Hillier and Wood, above n 12, at 27-31.

conventional weapons. Forced migration, displacement and the undermining of socio-economic development are common side effects of armed conflicts.¹⁸ Education is disrupted and health care often becomes unobtainable. Taking Africa as an example, the impact of the global arms trade on development becomes clear. Between 1990 and 2007, 23 African states lost approximately USD 300 billion to armed conflict.¹⁹ This figure takes into account not only the military expenditure, medical and displacement costs and infrastructure destruction – the direct costs of armed conflict – but also the indirect costs. These include the halting of economic opportunities, inflation, national debt, unemployment, trauma and lack of public services. Not included in this calculation is the cost of armed violence occurring outside of conflicts. As a result, the actual economic and human rights cost to African nations is likely to be much higher. Conventional weapons have played a huge role in African conflicts, exacting a heavy economic and humanitarian toll.²⁰

The International Committee of the Red Cross (ICRC), in 1999, conducted a study into the effects of arms availability on civilians in armed conflict.²¹ The ICRC study highlighted that lethal weapons had begun to move into the hands of non-state forces with increasing regularity. This in turn led to a situation where a large number of combatants exist unconstrained by IHL.²² As a result, these weapons are being used against the very people who IHL has been designed to protect. As NSA disregard the principles of IHL and IHRL, it becomes increasingly difficult to promote respect for and to sustain these two bodies of law. Efforts made by states party to the 1949 Geneva Conventions to adhere to IHL are undermined by unregulated access to conventional weapons.²³

The legal and illicit arms trades have combined to form an environment where it is common for the presence of weapons to exacerbate human suffering. Although the proliferation of weapons is a by-product of state security concerns, states have been unable to successfully regulate arms transfers. Previous attempts to regulate the weapons trade have not been

18 Robert Muggah and Eric Berman *Humanitarianism Under Threat: The Humanitarian Impacts of Small Arms and Light Weapons* (Small Arms Survey, Geneva, 2001) at viii.

19 Debbie Hillier *Africa's Missing Billions: International arms flow and the cost of conflict* (Iansa, Oxfam and Saferworld, October 2007) at 3.

20 At 18-19.

21 International Committee of the Red Cross *Arms Availability and the Situation of Civilians in Armed Conflict* (Geneva, 1999) at 1 [ICRC].

22 At 1.

23 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 UNTS 31 (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 75 UNTS 85 (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War 75 UNTS 135 (opened for signature 12 August 1949, entered into force 21 October 1950); Geneva Convention relative to the Treatment of Prisoners of War 75 UNTS 287 (opened for signature 12 August 1949, entered into force 21 October 1950); ICRC, above n 15.

sufficient to deal with the extent of the problem. It is hoped that by reframing the issue in humanitarian terms, the ATT will provide a positive and effective development in the field of arms control.

C. Road to the Arms Trade Treaty

Given the impact conventional weapons have on human lives, it is somewhat surprising that before the ATT there were no adequate international standards regulating the trade. Oxfam International states the position prior to April 2013 succinctly; “we have the most cumbersome rules on selling bananas and MP3 players, but no solid, internationally-binding rules on arms trade.”²⁴

This deficiency was not for lack of trying. States, non-governmental organisations and civil society have become increasingly aware of the harm being caused by the use of conventional weapons. This awareness has fuelled “growing international sentiment that the multibillion-dollar weapons trade needs to be held to a moral standard.”²⁵ International lawyers, non-governmental organisations and state officials have been working towards arms control for some time. Organisations such as Stockholm International Peace Research Institute, the Norwegian Initiative on Small Arms Transfers (NISAT) and the ICRC have collaborated with these actors to provide accurate information. At a national level, states have actively regulated the production and transfer of conventional weapons through domestic legislation. National law sits alongside regional instruments which regulate arms transfers. However, many of these instruments did not come with accompanying enforcement mechanisms.²⁶ Additionally, the majority concentrate on small arms and light weapons, and are inadequate to address the wider problems caused by the global arms trade in conventional weapons.

Part of the problem lies in the nature of conventional weapons. Rachel Stohl and Suzette Grillot claim the movement of these weapons is much more difficult to regulate than that of specific weapons such as landmines or cluster munitions.²⁷ The legitimate uses of conventional weapons by states, NSA and civilians inhibited attempts to rectify the problem.

The argument made by Stohl and Grillot loses traction when the “dual use” issues associated with the Chemical Weapons Convention and the Biological Weapons Convention are considered.²⁸ Implementation of both

24 Oxfam International “Why we need a global Arms Trade Treaty” <www.oxfam.org>.

25 Neil MacFarquat “UN Treaty is First Aimed at Regulating Global Arms Sales” *The New York Times* (online ed, United States, 2 April 2013).

26 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 at 1035.

27 Rachel Stohl and Suzette Grillot *The International Arms Trade* (Polity Press, Cambridge, 2009) at 186.

28 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1974 UNTS 45 (opened for signature 13 January 1993, entered into force 29 April 1997); Convention on the Prohibition of the Development,

instruments has had to take into account the everyday use of products which can also be used to produce weapons of mass destruction. Be that as it may, as Jan Egeland highlights:²⁹

We are not talking about arms which are prohibited, but about ordinary weapons which everyone agrees are needed by the public authorities to defend themselves and maintain order. It is thus not a question of mobilizing against an indiscriminate, particularly cruel weapon of limited military value, as was the case with anti-personnel landmines. We are getting into a much more sensitive area when it comes to the issue of small arms [and other conventional weapons] because of the way it relates to State security and national sovereignty. Nor are the economic stakes inconsiderable.

It is the ordinariness of conventional weapons that makes the task of regulating transfers appear, at first glance, nigh on impossible.

The ATT has been a long time coming. Although it might seem as though the discussion and negotiation process began in 2006, the reality is that international lawyers and diplomats have been working towards regulating conventional weapons since at least the 1980s.³⁰ Disarmament talks then began in earnest in the aftermath of the Cold War, and while conversations around nuclear, biological and chemical weapons dominated the disarmament discourse, conventional weapons were also considered. This is clearly reflected in a series of UNGA resolutions and the adoption of various international standards.

The first of these resolutions is dated 6 December 1991 and was concerned with transparency in armaments.³¹ The UNGA formally recognised the impact excessive arms had on peace and security throughout the globe and sought to increase the transparency with which arms could legally be transferred through the creation of the United Nations Register of Conventional Arms (UNROCA).³² The Assembly also determined to “prevent the excessive and destabilizing accumulation of arms, including conventional weapons”.³³ At the same time, the inherent right of each state to collective or individual self-defence was reaffirmed and a corresponding right to acquire arms was acknowledged.³⁴ It was at this point conventional weapons were defined, establishing the internationally recognised parameters of the global conventional arms trade.³⁵

Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction 1015 UNTS 163 (opened for signature 10 April 1972, entered into force 26 March 1975).

29 Jan Egeland “Arms availability and violations of international humanitarian law” (1999) 835 *International Review of the Red Cross* (online ed) <www.icrc.org>.

30 See: *Reduction of Military Budgets* GA Res 35/142 (1980).

31 *Transparency in Armaments*, above n 2.

32 At [1], [7] and Annex.

33 At [2].

34 At [3].

35 At Annex.

Between 1991 and 2006, a number of standards and instruments were created to regulate the transfer of arms, both regional and international.³⁶ These instruments were aimed at small arms and light weapons rather than all conventional weapons. Although the international community was focusing in the right direction, this focus was realised in a manner that was geographically fragmented and restricted in scope. These two deficiencies combined to undermine the effectiveness of the instruments and as a result, whether taken together or separately, they were insufficient to deal with the problem.

The real impetus towards universal regulation of the global arms trade began in 2006. It then took seven years to negotiate the ATT text. The process was initiated by seven states who presented the UNGA with a draft resolution.³⁷ This resolution, entitled “Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional weapons”, became the basis for investigating methods of regulating the trade of conventional weapons. The resolution recognised:³⁸

that the absence of common international standards on the import, export and transfer of conventional weapons is a contributory factor to conflict, the displacement of people, crime and terrorism, thereby undermining peace, reconciliation, safety, security, stability and sustainable development.

Adopted by the UNGA on 12 October 2006, the resolution set up a group of governmental experts (GGE) charged with examining if creating an arms trade treaty was indeed possible.³⁹ UN Member States were invited to contribute to this investigation. More than 100 did so.⁴⁰ The Final Report of the GGE was delivered in 2008 and confirmed that it was possible for such a treaty to be made. However it noted that the “question of feasibility had both political and technical dimensions and that it impacted the security concerns of all States.”⁴¹ An arms trade treaty would only be possible if collective objectives could be agreed upon and the instrument could be practically applied, kept free from political abuse and was universal. Additionally, state sovereignty had to be reflected in the treaty text; as such only international movements of weapons could be included.⁴² The GGE raised a number of themes any potential treaty would have to address alongside existing IHL and IHRL concerns. These themes were:⁴³

36 For a list of these instruments see: Denise Garcia *Small Arms and Security: New emerging international norms* (Routledge, London and New York, 2006) at 53.

37 Reaching Critical Will “Arms Trade Treaty” <www.reachingcriticalwill.org>. The seven states were Argentina, Australia, Costa Rica, Finland, Kenya, Japan and the United Kingdom.

38 *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional weapons* GA Res 61/89, A/Res/61/89 (2006) at 1.

39 At [2].

40 *Report of the Group of Governmental Experts to examine 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* A/63/334 (2008) at 4.

41 At 13.

42 At 14.

43 At 15.

terrorism, organized crime and other criminal activities; maintaining regional stability; promoting socio-economic development; unlawful transfers to non-State actors, unauthorized re-export, unlicensed production, illicit brokering; right to manufacture and import; end use/end-user assurances; diversion; and compliance with Security Council arms embargoes and other existing international law obligations as a necessary condition for transfers.

The GGE went on to recommend that “further consideration of efforts within the United Nations to address the international trade in conventional weapons is required on a step-by-step basis in an open and transparent manner”.⁴⁴ The seven original sponsoring states responded to this recommendation with a draft resolution which established an Open-Ended Working Group (OEWG). This draft was also adopted by the UNGA.⁴⁵ The recommendation was carried out by the UNGA and an OEWG established. This Group was to hold six one week sessions between 2009 and 2011;⁴⁶ however, from 2010 these sessions were transformed into preparatory committees for the then upcoming UN Conference on the Arms Trade Treaty (UN ATT Conference).⁴⁷ This Conference was to sit for four consecutive weeks in 2012 in order to “elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms.”⁴⁸

The UN ATT Conference was held in New York in July 2012. It was not a success. Although a comprehensive draft treaty had been presented to delegations on 26 July 2012, the Conference ended on 27 July 2012 without that text being adopted.⁴⁹ Both Russia and the United States called for more time to assess the draft text, “scupper[ing] chances of an agreement”.⁵⁰ The United States had insisted that resolution 64/48, which provided for the UN ATT Conference, include a requirement that all negotiations occur “on the basis of consensus.”⁵¹ This prompted concern right from the start that the Conference could not be anything but unsuccessful as participating states were not all in agreement that an arms trade treaty was necessary or, if it was necessary, what it should focus on.⁵² It is also at odds with the humanitarian approach which saw the ATT develop out of concern with the impact of arms transfers on the ground. Consensus is a relic of the traditional disarmament

44 At 16.

45 *Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional weapons* GA Res 63/240, A/Res/63/240 (2009).

46 Stuart Casey-Maslen and Sarah Parker *Academy Briefing No 2: The Draft Arms Trade Treaty* (Geneva Academy, Geneva, October 2012) at 7.

47 *The arms trade treaty* GA Res 64/48, A/Res/64/48 (2009) at [4]-[8].

48 At [4].

49 Casey-Maslen, Gilles Giacca and Tobias Vestner *Academy Briefing No 3: The Arms Trade Treaty (2013)* (Geneva Academy, Geneva, June 2013) at 5; United Nations Conference on the Arms Trade Treaty *The draft of the Arms Trade Treaty A/Conf.217/CRP.1* (2012).

50 Casey-Maslen and Parker, above n 46, at 7.

51 At 7; *The arms trade treaty*, above n 47, at [5].

52 Casey-Maslen and Parker, above n 46, at 8.

model and gives each participating state a veto.⁵³ It creates the very real danger that any resulting instrument will be a “lowest common denominator agreement.”⁵⁴

On 24 December 2012 the UNGA adopted resolution 67/234. The Assembly had decided to convene another conference to “finalize the elaboration of the Arms Trade Treaty.”⁵⁵ This conference took place between 18 and 28 March 2013 (Final Conference). Again a draft treaty text was circulated and again this was unsuccessful.⁵⁶ During discussions it had become clear that the Democratic People’s Republic of Korea, Iran and Syria were determined to block the treaty.⁵⁷ However, this time the “on the basis of consensus” requirement was circumnavigated by putting the draft treaty text to the UNGA. On 2 April 2013 the Assembly adopted the draft treaty text with 154 votes in favour, three against and 23 abstentions.⁵⁸

D. Humanitarianism and the Arms Trade Treaty

The ATT has been hailed as a “landmark” treaty, which:⁵⁹

... will foster peace and security by putting a stop to destabilising arms flows to conflict regions. It will prevent human rights abusers and violators of the law of war from being supplied with arms. And it will help keep warlords, pirates, and gangs from acquiring these deadly tools.

There is no denying that the signing of the Treaty marks a significant step towards increasing global human security. Its explicitly humanitarian approach to arms control reflects an international paradigm shift that has been present in disarmament discourse for some time. Just whether it will reach the expansive achievements predicted by the United Nations Office for Disarmament Affairs (UNODA) is another matter altogether.

Humanitarian concerns are clearly placed throughout the Treaty text. Article 1 stresses that this is an international instrument intended to “establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms.” At the same time the Treaty aims to “prevent and eradicate the illicit trade in conventional arms and prevent their diversion.”⁶⁰

Broadly speaking, the ATT will achieve these objectives in three ways. First, the Treaty sets up international standards that must be integrated into domestic measures which control the import and export of all conventional weapons. Secondly, the international arms trade will become increasingly

53 Ray Acheson “Consensus, political will, and nuclear disarmament” (speech to Nuclear disarmament: its future in the CD Conference, New York, 11 October 2012).

54 Acheson, above n 53.

55 *The arms trade treaty* A/C.1/67L.11 (2012) at [2].

56 Casey-Maslen, Giacca and Vestner, above n 49, at 5.

57 At 6.

58 United Nations Office for Disarmament Affairs “The Arms Trade Treaty” <www.un.org> [UNODA].

59 UNODA, above n 58.

60 ATT, above n 1, at art 1. Conventional weapons are defined in art 2.

transparent, as states are required to provide the Secretariat established by the ATT with a report on the steps taken to implement the Treaty and on any international transfers made. Thirdly, the ATT “creates an environment of accountability” as states are responsible for ensuring compliance with the new global standards through the creation of domestic control lists and systems.⁶¹

1. The Preamble and Treaty Principles

The preamble and principles of the ATT clearly signpost the fact that the instrument is intended to be of a humanitarian nature. They work together to create the parameters within which the ATT will operate. As a result the Treaty’s humanitarian aspirations are mixed in with practical restatements of relevant international law.

Turning first to the preamble, it is clear that there are competing global interests at play. The Charter of the United Nations (UN) obligation to promote and maintain international peace and security is recalled⁶² as is the harm that unregulated and illicit trade has on civilians. The suffering endured by women, children, and the victims of armed conflict and armed violence is explicitly mentioned. At the same time, the relevancy of the legitimate weapons trade and the corresponding political, socio-economic and commercial benefits are recognised. The Treaty drafters have immediately signalled that successfully negotiating between the costs and the benefits of the conventional weapons trade was a complicated task.

The preamble also makes clear that civil society contributed significantly in moving arms control discourse to a point where it was possible to, finally, negotiate a comprehensive arms control instrument. This recognition occurs alongside acknowledgment of previous efforts to regulate arms, and confirms that these instruments remain significant in reducing the human suffering caused by all weapons. A final point worth taking from the preamble is that this Treaty is not intended to stipulate the maximum states may do when regulating arms. Instead, the ATT “creates a ‘floor not ceiling’ with respect to national policies and laws”,⁶³ and can, and should, be built upon by domestic legislatures.

The principles of the ATT are straightforward and are along similar lines to the preambular paragraphs. They cover expected elements such as a state’s inherent right to self-defence, the need for peaceful dispute settlement, the respect of political independence and territorial integrity, and the principle of non-intervention in domestic jurisdictions. An interesting addition to the basic principles is the specific references to IHL and IHRL. These highlight the fact that the major underlying concerns which have shaped the Treaty are humanitarian in nature and that the ATT is a humanitarian document.

61 Rachel Stohl “Arms Twisting: Why won’t Obama sign his own weapons treaty next week?” *Foreign Policy* (online ed, United States, 30 May 2013).

62 Charter of the United Nations, art 26. This article calls for “the least diversion for armaments of the world’s human and economic resources.”

63 Casey-Maslen, Giacca and Vestner, above n 49, at 12.

2. Core Provisions

The heart of the Treaty is contained in arts 2, 6 and 7. These three articles cover the scope of the Treaty, absolute prohibitions on arms transfers in certain circumstances and export criteria. While there can be no doubt that the adoption of the ATT signals a paradigm shift in international peace and security efforts, the articles which have achieved this shift are not without problems.

The humanitarian angle taken by the ATT has resulted in a treaty that has been criticised for being overly idealistic. This idealism has been picked up in commentary and the text has been romanticised. Rachel Stohl, for example, contributes to this, writing:⁶⁴

At its core, the Arms Trade Treaty is about reducing human suffering and providing economic and democratic opportunities to people worldwide. It is about protecting society's most vulnerable, and it is about accountability and justice. The Arms Trade Treaty tells dictators, human rights abusers, and war criminals that they will no longer have access to the tools of terror that allow them to kill, maim, and wreak havoc in their countries with impunity.

It is doubtful that the ATT will achieve the lofty heights predicted by Stohl. The inherent loopholes and weaknesses presented by the Treaty are evident right from the start. The fact that these are apparent prior to implementation is concerning and they may impact upon the Treaty's effectiveness.

(a) *The Scope of the ATT*

Turning first to the scope of the Treaty, art 2 sets out eight categories of conventional weapons which will be regulated. These categories were a central concern at the negotiating stage as the original UNGA resolution mandating the Treaty referred only to "the transfer of conventional weapons."⁶⁵ Generally this term is thought to refer to everything but chemical, nuclear and biological weapons, although there is no single definition. Under the ATT it will cover the following categories: battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. Article 2 is supplemented by arts 3 and 4 which expand the scope of the Treaty to include ammunition, munitions and weapon parts and components. These three articles combine to make the ATT the most comprehensive arms control treaty in existence.

Although the art 2 categories appear broad, there are a number of problems with the scope which emerge upon closer inspection. First, the Treaty does not go far enough. The definitions of the included weapons are set at the time the Treaty enters into force. This reflects contemporary military technology, begging the question: does the Treaty have the capacity to regulate future weapons or will it be out of date as soon as it comes into force? Tilman Brück and Paul Holtam point out that the international arms trade can only be

64 Stohl, above n 61.

65 *The arms trade treaty*, above n 47, at [4].

monitored if regulators are looking in the right direction.⁶⁶ Over the last 20 years, the arms trade has developed rapidly and significantly. It will continue to do so in the future; the ATT, which is not future-proofed, will not be able to regulate new forms of conventional weapons.

The second problem lies in art 3. On one hand, the inclusion of ammunition and munitions in the Treaty text should be considered a success. Article 3 was a highly contentious issue during negotiations. A number of states, including the United States and Russia, strongly objected to its inclusion. Other participating states argued that the effectiveness of the Treaty would be irrevocably undermined if ammunition and munitions were not included.⁶⁷ Although the latter view prevailed, it was compromised. The Treaty will only apply to ammunition and munitions that are “fired, launched or delivered” by conventional weapons.⁶⁸ The scope is restricted by delivery method. Weapons which are not “fired, launched or delivered” are not included. This creates a peculiar anomaly whereby “bombs, shells, missiles, or bullets” are covered, but “manually positioned landmines or grenades thrown by a person” are not.⁶⁹ The New Zealand Delegation to the Final Conference highlighted the incongruity of this point. In a statement to the Conference President, New Zealand made its position clear: “we regret the introduction of the language ‘fired, launched or delivered’ by the conventional arms ...’ We can see a strong disadvantage – and no apparent advantage – to introducing [this] text.”⁷⁰

Ammunition and munitions, regardless of delivery method, have the capacity to cause incredible destruction on the ground, and it is this impact with which the Treaty is concerned. Notwithstanding this, the restriction remains in place.

(b) Prohibitions Under the Arms Trade Treaty

Article 6 deals with the prohibitions that sit at the heart of the ATT. This article prohibits a state from authorising an arms transfer in three situations. These are: if the arms transfer would violate any measure adopted by the United Nations Security Council (UNSC) under its Chapter VII powers; where a state is prevented from transferring arms due to existing international obligations; and:⁷¹

if [the exporting state] has knowledge at the time of authorisation that the arms or items would be used in the commission of crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

66 Tilman Brück and Paul Holtam “Will the arms trade treaty be stuck in the past” (March 2013) Stockholm International Peace Research Institute <www.sipri.org>.

67 Casey-Maslen, Giacca and Vestner, above n 49, at 21.

68 ATT, above n 1, art 4.

69 Casey-Maslen, Giacca and Vestner, above n 49, at 21.

70 Dell Higgle, Ambassador for Disarmament “President’s Non-Paper of 22 March 2013 Final United Nations Conference on the Arms Trade Treaty 18-28 March 2013” (New York, 25 March 2013) at 2.

71 ATT, above n 1, art 6(3).

The scope of art 6(3) has been left deliberately wide in order to hold each ratifying state to the highest standard possible. This has the presumably unintended effect of creating a situation where state parties agree to be held to differing standards. An ATT state party which is also party to the Statute of the International Criminal Court (Rome Statute), for example, will have to take into account more factors than states which have not ratified these agreements.⁷² Although on one hand this may be seen as discriminatory, it is in fact keeping the integrity of the ATT alive. The article provides a baseline below which a state may not sink. Article 6(3) recognises that states exercise their sovereignty when becoming party to international agreements and requires each state to honour previous commitments.

Again, art 6 is not without problems. The first is that art 6(3) sets out a knowledge requirement, yet fails to define what constitutes “knowledge.” The lack of definition means art 6 is open to misuse and abuse. It has been suggested that the Rome Statute and the accompanying Elements of Crimes (EoC) document may provide assistance in interpreting this term.⁷³ Article 30(3) of the Rome Statute defines knowledge as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” The EoC expands on this definition, stating that knowledge may be inferred from relevant facts and circumstances.⁷⁴ Otto Triffterer’s Commentary on the Rome Statute takes the concept one step further. It points out that if a person refuses information in order to avoid gaining knowledge, then this is wilful blindness and is tantamount to actual knowledge.⁷⁵ As the ATT does not define any standard of knowledge, states will be able to impose their own knowledge requirements. This may well lead to inconsistent implementation of art 6.

The second flaw in art 6 is that arms transfers which will violate IHRL are not prohibited. Although 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 art 6, this remains an anomaly. Given that the Treaty is being touted as an instrument that “will prevent human rights abusers ... from being supplied with arms”, the text should make this clear.⁷⁶ The above claim, made by the UNODA, is undermined by the absence of a clause prohibiting arms transfers to human rights abusers. On this point the ATT has failed before it has even really begun.

72 Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1988, entered into force 1 July 2002).

73 Casey-Maslen, Giacca and Vestner, above n 49, at 24; *International Criminal Court Elements of Crimes* (2011) [EoC].

74 EoC, above n 73, at 1.

75 Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2nd ed, Hart Publishing, Oxford, 2008) at 861.

76 UNODA, above n 58.

(c) Export and Export Assessment

Under art 7, before an arms transfer may be authorised, the exporting state must assess the importing state against certain criteria. These are: whether the arms transfer has the potential to undermine international peace or security; if the arms might be used to commit or facilitate serious violations of IHL, IHRL and offences under international agreements relating to terrorism and transnational organised crime; if the weapons may potentially be used to facilitate or commit serious gender-based crimes and acts of violence against women and children; and whether there are any factors that may mitigate the risk of any of the above occurring.⁷⁷ If the exporting state deems there is an “overriding risk of any of the negative consequences” above, then the export cannot be authorised.⁷⁸ If new information becomes available, then the decision to decline the export may be reconsidered.⁷⁹ The importing state is required to provide the exporter with sufficient information to allow the art 7 assessment to take place.⁸⁰ Interestingly, art 7 only relates to exports and not to other activities included in the term “transfer”; as such, import, transit, transshipment and brokering are not covered by this provision. Even though the scope of ‘export’ is not clearly delineated under *pacta sunt servanda* a state cannot circumvent the art 7 assessment by listing conventional arms transfers as gifts.⁸¹

The role of art 7 is open to interpretation. Taken together arts 6 and 7 are intended to stigmatise and prevent arms transfers contributing to international law violations.⁸² Looking at art 7 on its own, it can be understood as, on one view, an attempt to negate the flaws in art 6. It is a catchall provision designed to regulate situations which, although concerning, are not so severe as to fall within the art 6 prohibitions. An alternative understanding is that art 7 is a clawing back of states not fully committed to the ATT ideals. Instead of creating a comprehensive prohibition regime, issues that could not be resolved under art 6 have been tucked away into the ‘too hard basket’ that is art 7.

However art 7 is interpreted, it is far from perfect. A major flaw is that although IHRL must be taken into account under the export assessment, a transfer may still go ahead even if there is a risk it will contribute to human rights violations, as long as it is not “overriding.”⁸³ This means that human rights violators will have continued access to weapons as long as the exporting state takes the position that the transfer will protect international peace and security. The Treaty has been criticised on this basis alone, as it is “enough to

77 ATT, above n 1, arts 7(1) and (2).

78 Article 7(3). New Zealand has stated that “overriding risk” will be interpreted as “substantial risk”: Dell Higgin, Ambassador for Disarmament “Scope, Prohibitions and Criteria Statement to Final United Nations Conference on the Arms Trade Treaty 18-28 March 2013” (New York, 19 March 2013).

79 ATT, above n 1, art 7(7).

80 Article 8(1).

81 Casey-Maslen, Giacca and Vestner, above n 49, at 26.

82 Scott Stedjan “The Arms Trade Treaty: An Introductory Note” (2013) 52(4) ILM 985 at 986.

83 ATT, above n 1, art 7(3). Overriding is not defined in the ATT.

render the treaty worse than useless”.⁸⁴ States may continue to export on the basis of economic and political interests; arts 7(1) and 7(4) provide legal cover to those who will authorise irresponsible transfers as IHL and IHRL violations are pitted against the potential contribution weapons have to international peace and security.⁸⁵ Article 7(3) adds to this protection. The requirement that risk mitigating factors be included in art 7 was made mandatory after Russia, China and Syria expressed concern that IHL and IHRL abuses could be “politically manipulated”.⁸⁶ What this requirement does is undermine the humanitarian concerns of the Treaty by the simple fact of its inclusion. Its existence is anomalous with the purpose of the Treaty: IHL and IHRL abuses should “automatically warrant denial of the transfer request.”⁸⁷ The fact that they do not weakens the ATT.

Article 7 is vague in terms of what constitutes serious violations of IHL and IHRL. The exporting state – generally more developed than the importing state – will make this decision. Simply put, the countries producing and exporting greater quantities of conventional weapons retain control of how and where these weapons move. It is naïve to think that political considerations will not enter into export assessments and decisions. The ATT will not prevent states from making politically savvy arms transfers; even under the new rules political allegiances and diplomatic rows will continue to influence the movement of arms around the globe.⁸⁸ Iran, explaining why it does not support the ATT, pointed to the fact that the exporting state has the right to objectively and subjectively assess the importing states security needs and curtail their access to weapons.⁸⁹ This makes the ATT “highly abusable and susceptible to politicization, manipulation and discrimination.”⁹⁰ Despite this objection, participating exporting states will still be required to apply art 7 if transferring arms to Iran. The obligation to do so is in respect of all conventional arms transfers, regardless of the recipient’s status under the ATT.

A potential problem arises in respect of NSA. The Treaty does not make specific reference to these groups, perhaps because there is no internationally agreed definition of the term.⁹¹ The absence of a specific prohibition of arms transfers to NSA under art 6 was cited by a number of states as justification

84 Ray Acheson “The ATT is needed for saving lives, not profits” (2012) 5(17) *Arms Trade Treaty Monitor* 1 at 1.

85 Ray Acheson “A tale of two treaties” (2013) 6(9) *Arms Trade Treaty Monitor* 1 at 2-3.

86 At 3.

87 At 3.

88 Casey-Maslen, Giacca and Vestner, above n 49, at 15.

89 Golamhossein Dehghani, Deputy Permanent Representative of the Islamic Republic of the Iran to the United Nations “Explanation of vote” (United Nations General Assembly, New York, 2 April 2013) at [8].

90 At [8].

91 Paul Holtom “Prohibiting Arms Transfers to Non-State Actors and the Arms Trade Treaty” (United Nations Institute for Disarmament Research, Geneva, 2012) at 9.

for abstention from the UNGA vote.⁹² However, NSA are still covered by the ATT. Article 7 does not preclude the application of the assessment criteria to arms transfers to NSA. Somewhat ironically, there is the danger that an importing state which does not want NSA to have conventional weapons will utilise art 7 to stop an export authorisation. Article 7(1) allows the importing state to provide information in order to assist the export assessment. There is nothing to stop that state from providing information that will undermine the NSA import attempt. In some ways then, the ATT may make it harder for NSA to access weapons.

3. Further Issues with the Arms Trade Treaty

The ATT suffers from problems that extend beyond the core provisions. There are three main issues: implementation, state responsibility and the relationship of the ATT with existing international agreements.

(a) Implementation

Turning first to implementation, it is significant that the ATT does not ask anything more of state parties than is required by existing arms agreements. In the area of implementation, the Treaty does nothing to develop arms control regimes.

The Treaty will be implemented through national control systems. What each system will look like may be determined by the individual state although the ATT does provide some parameters. Participants are required to create a national control list,⁹³ keep records on all export authorisations and transshipments, and provide the Secretariat, established under art 18, with a report on the measures taken to ensure treaty compliance.⁹⁴ A competent authority, which will be responsible for ensuring compliance with arts 6 and 7, must be designated.⁹⁵ States must also put in place systems to address arms diversion.⁹⁶ The Secretariat will hold a conference within one year of the ATT entering into force in order to review national treaty implementation, and to consider any amendments that may be required.⁹⁷

The reality is that the implementation requirements of the ATT are not any more onerous than existing obligations under soft law instruments such as the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (WA), the United Nations Programme of Action Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its

92 Geneva Academy of International Humanitarian Law and Human Rights and Oxford Marin School Programme on Human Rights “We have an Arms Trade Treaty! But the hard work starts now” (2 April 2013) Arms Trade Treaty legal blog <www.armstradetreaty.blogspot.ch>.

93 This list need not be made publicly available: ATT, above n 1, art 5(4).

94 Articles 5, 12 and 13.

95 Article 5(5).

96 Article 11.

97 Article 17.

Aspects (PoA)⁹⁸ and UNROCA.⁹⁹ Collectively, under these instruments states are required to compile a national control list, regulate exports of most, if not all, conventional weapons, ammunitions and munitions, and components and parts, and provide regular reports on domestic control measures. The ATT has not expanded these implementation mechanisms. This is disappointing. As the existing instruments have proven incapable of combatting the humanitarian effects of arms transfers, the utilisation of the same implementation provisions in the ATT is redundant. They have already been found to be wanting; the failure to advance the implementation provisions makes it doubtful that the Treaty will achieve the art 1 humanitarian objectives.

A particular failing of the ATT is the lack of specific enforcement mechanisms. Instead, each state party must enforce any domestic measures which give effect to the Treaty.¹⁰⁰ This is not necessarily fatal as the Draft Articles on Responsibility of States for Internationally Wrongful Acts will cover treaty violations.¹⁰¹ However, if the ATT is to be taken seriously and achieve its ambitions, a specific enforcement provision or mechanism would be beneficial. This benefit is clearly reflected in other international initiatives, such as the Comprehensive Nuclear-Test-Ban Treaty (CTBT).¹⁰² Although this treaty is not yet in force, compliance is high. Article 2 provides for the Comprehensive Nuclear-Test-Ban Organization which works to ensure the CTBT is implemented through a verification regime. The regime has created a global alarm system which can detect any nuclear explosion on earth. Already in operation, the alarm system allows a prompt response to nuclear detonations even though the CTBT has yet to take effect.¹⁰³

The weaknesses inherent in the implementation provisions threaten the success of the ATT. This is not to say it is doomed to fail; there is the potential that civil society will step up and regulate compliance with the ATT as has occurred with the Ottawa Treaty and the Convention on Cluster Munitions.¹⁰⁴ At the very least the signing of the ATT has firmly planted humanitarian ideals in the arena of arms control. It shows that states are beginning to think normatively around conventional weapons transfers.

98 *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects* A/Conf.192/15 (2001).

99 Sarah Parker *The Arms Trade Treaty: A Step Forward in Small Arms Control?* (Small Arms Survey, Geneva, 2013) at 2.

100 ATT, above n 1, art 14.

101 International Law Commission *Draft Articles on Responsibility of States for Internationally Wrongful Acts* Supplement No 10 (A/56/10) (November 2010).

102 Comprehensive Nuclear-Test-Ban Treaty 480 UNTS 43 (opened for signature 24 September 1996, not yet in force).

103 Comprehensive Nuclear-Test-Ban Treaty Organization "Overview of the Verification Regime" <www.ctbto.org>.

104 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 2056 UNTS 211 (opened for signature 3 December 1997, entered into force 1 March 1999) [Ottawa Treaty]; Convention on Cluster Munitions 2688 UNTS (opened for signature 3 December 2008, entered into force 1 August

(b) State Responsibility and Existing International Obligations

The ATT places all responsibility on the exporting state, leaving the importing state free to receive weapons regardless of how they will be used. The importing state is already subject to obligations under IHL and IHRL, but these do not prohibit the acquisition of conventional arms. The placement of responsibility may lead to situations where the importing state simply looks to non-ATT member states for weapons supply. This in turn may result in instances of non-international armed conflict where only one party has legal access to weapons. The recent events in Syria demonstrate how this might operate in practice. Iran, a vocal opponent of the ATT, has long been supplying the Syrian government with weapons.¹⁰⁵ The United States, a Treaty co-sponsor, has pledged weapons to Syrian opposition forces.¹⁰⁶ This is a promise that cannot be fulfilled under the ATT unless the United States determines that the contribution to international peace and security these arms *could* make overrides Syrian human rights abuses. Consequently, the Syrian government forces will continue to have easy access to arms, while the opposition forces may struggle to maintain their supplies. The United States may, *if* the ATT is ratified, continue to supply weapons until the ATT enters into force. Once the Treaty enters into force, the supply of arms to the rebels may continue where there is not a serious risk of IHRL and IHL violations. However, Amnesty International alleges that all parties to the ongoing Syrian conflict have violated international law.¹⁰⁷ In the face of such evidence, the integrity of the Treaty will be seriously undermined if a key negotiating state, indeed a co-sponsor of the text, and one of the world's largest arms manufacturers and exporters, continues to arm the rebels until the ATT becomes legally binding.

A final point is that the ATT is not intended to prejudice other international obligations, existing or future, as long as they are consistent with its objectives and purposes. That being said, art 26(2) specifically precludes the ATT as grounds for voiding existing defence cooperation agreements. Although this is not a major loophole, ATT states may face financial penalties if the only justification for defaulting on an existing agreement is that the arms transfer will violate arts 6 or 7.¹⁰⁸ This has the potential to place states party to the Treaty in a very awkward position.

2010). The Landmine and Cluster Munitions Monitor is a civil society initiative which has become the de facto monitoring body for the two aforementioned treaties: Landmines and Cluster Munitions Monitor "About us" <www.the-monitor.org>.

105 Mohammad Khazaei, Permanent Representative of the Islamic Republic of Iran to the United Nations "Statement to the Final United Nations Conference on the Arms Trade Treaty 18-28 March 2013" (New York, 28 March 2013).

106 Rosemary DiCarlo, US Deputy Permanent Representative to the United Nations "Statement to the UN General Assembly Meeting on the Arms Trade Treaty" (New York, 2 April 2013). This is, of course, no guarantee that the United States will *ratify* the ATT.

107 See, for example, Amnesty International *Squeezing the life out of Yarmouk: War crimes against besieged civilians* (March 2014).

108 Casey-Maslen, Giacca and Vestner, above n 49, at 44.

Although the ATT may not fit perfectly within Docherty's humanitarian framework, it is nonetheless a humanitarian instrument. The arms trade causes severe and varied human suffering throughout the globe and the ATT has been created to combat this. The humanitarian impulses in the Treaty are plain; however it is also plain that it is not as strong as it could be. Despite its apparent flaws, the ATT does show that international understanding of the importance of humanitarian ideals is continually developing. The underlying concerns that have shaped the form and purpose of the ATT attest to this.

III. NEW ZEALAND AND THE ARMS TRADE TREATY

New Zealand is a long-time champion of disarmament and of humanitarianism. Throughout the negotiation process, the state was a strong supporter of the ATT¹⁰⁹ and it was one of the first countries to sign it.¹¹⁰ Its humanitarian elements complement New Zealand's overall approach to arms control, which stresses that "the human, and humanitarian, dimension of security processes must be paramount."¹¹¹

New Zealand officials were actively involved in drafting the ATT and facilitating disarmament is something the country takes a strong position on in the UN. The Government is currently vying to obtain a seat on the UNSC. If it is to have any chance at all of obtaining this seat, New Zealand must show it is serious about securing international peace and security. The Government has advertised itself as a "committed multilateralist" and "a leader on arms control issues."¹¹² As such, it is imperative that New Zealand take the appropriate steps to implement the ATT regime as soon as practically possible. The Ministry of Foreign Affairs and Trade (MFAT) has yet to indicate whether substantive, or indeed any, legislative change will be needed before the Treaty can be ratified.

This section of the paper sets out New Zealand's involvement in the global arms trade. It then moves on to analyse the current New Zealand legal framework which governs arms exports and imports, and discusses what changes must be made in order to implement the ATT.

A. New Zealand and the Arms Trade

New Zealand, although not a prolific arms trader, is involved in the global arms trade. This involvement is primarily through the New Zealand Defence Force (NZDF). However New Zealand's involvement with the global arms trade pre-dates this institution. A well-known example of early arms trade

109 Dell Higgle, Ambassador for Disarmament "General Statement to the 67th Session of the United Nations General Assembly First Committee", (9 October 2012).

110 Kieran Campbell "New Zealand Leads the way in landmark UN Arms Treaty" *The New Zealand Herald* (online ed, Auckland, 3 June 2013).

111 Dell Higgle, above n 109.

112 Ministry of Foreign Affairs and Trade "New Zealand: Candidate for the United Nations Security Council 2015-2016" <www.nzunsc.govt.nz> at 12.

participation occurred in 1820 when Māori chief Hongi Hika sailed to the United Kingdom. He purchased 300 muskets and gunpowder in order to prevail in battle over other Māori tribes.¹¹³ At the same time, on a more local scale, weapons were traded by whalers and colonisers for “women, food and curios such as preserved human heads”.¹¹⁴ Since then New Zealanders have taken a more civilised approach to modern arms trade.

Information on the New Zealand arms trade is not readily accessible. However, by piecing together information reported by UNROCA and NISAT, a picture of New Zealand’s arms imports and exports can be built.

New Zealand is a long-time UNROCA participant. The Government submitted annual reports detailing conventional weapons imports and exports to the UN from 1996 to 2009. Reports made by other states up until 2012 include data on New Zealand’s activities. Between 1992 and 2012 New Zealand exported 21 armoured combat vehicles to the United Kingdom, two combat aircraft (one to China and another to the United States) and two warships (one to Australia and the other to Spain). During the same period, New Zealand imported 104 armoured combat vehicles (72 of which came from Canada), nine combat aircraft from Italy, four attack helicopters from the United States and five warships from Australia.¹¹⁵

New Zealand Customs reported that small arms and ammunition exports from New Zealand in 2011 were valued at approximately USD 3.5 million. Consequently, New Zealand is a ‘minor’ exporter of small arms, ammunitions, parts and accessories. The annual value of New Zealand small arms and ammunition imports in 2011 was approximately USD 3.8 million.¹¹⁶ Weapons trading is not a large scale industry in New Zealand and there are relatively few arms in the country.¹¹⁷

1. Conventional Weapons Possession in New Zealand

Most conventional weapons in New Zealand are owned by the NZDF, which is made up of three branches: the New Zealand Army, the Royal New Zealand Navy and the Royal New Zealand Air Force. Currently, the NZDF is undergoing a weapons update and replacement programme. By 2015 the Ministry of Defence plans to have introduced a number of new (to New Zealand) conventional weapons. Aircraft, frigates, land vehicles and weapons will all be updated.¹¹⁸ New Zealand is set to import a large number of conventional weapons in order to facilitate these replacements. These

113 Gillespie, above n 10, at 17.

114 At 17.

115 United Nations Register of Conventional Arms “The Global Reported Arms Trade” (2013) <www.un-register.org>.

116 The value for exports was USD 3,556,664 and the value for imports was USD 3,807,603: GunPolicy “New Zealand – Gun Facts, Figures and the Law (2013) <www.gunpolicy.org>. See generally: Researcher’s Database <www.nisat.prio.org>.

117 George Hampton *Implementation of the International Tracing Instrument and Programme of Action* (Ministry of Foreign Affairs and Trade, February 2010) at 9.

118 Ministry of Defence *Defence White Paper 2010* (November 2010) at [5.18]-[5.19].

will range from “less-lethal to lethal means” as “selected weapon systems, ancillary equipment and specialist munitions within the NZDF weapon fleet” are updated.¹¹⁹

Given that international academic interest has focused primarily on the availability of small arms and light weapons, rather than all conventional weapons, it may be pertinent to highlight the number of firearms in New Zealand. The NZDF owns approximately 41,737 weapons while the New Zealand Police, although not routinely armed, have between 1,800 and 2,000 firearms. Civilian firearms far outweigh those owned by governmental institutions. There are between 925,000 and 1,200,000 civilian firearms – a more accurate number is not possible under the current legal framework. It is not considered necessary to create a comprehensive register of firearms, as the New Zealand Government has yet to decide whether to accede to the 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 (Firearms Protocol).¹²⁰ These figures place New Zealand at number 22 out of 178 countries when comparing the rates of privately owned firearms.¹²¹

2. New Zealand and the Illicit Weapons Trade

New Zealand has the largest stockpiles of small arms per capita in the Pacific.¹²² These are thought to be mostly legally obtained and owned guns. There have been suggestions that New Zealand has been subjected to systematic gun smuggling but these rumours have not been substantiated. In fact, the lack of evidence regarding an illicit weapons supply trade through New Zealand is one of the reasons the Firearms Protocol has not yet been acceded to.¹²³

Domestic laws which relate to conventional weapons imports and exports are considered adequate. Small arms and light weapons owned by the NZDF are all marked with either a manufacturer’s serial number or a control number. Some have both. These numbers are then entered into a Logistics Management System, their location recorded and an individual is assigned responsibility for the weapons. Access is strictly regulated and all armouries or containers are secured according to international standards.¹²⁴ The NZDF does not stockpile weapons that are obsolete or surplus. Instead, a small

119 NZ Army “Weapon Replacement and Upgrade Programme (ISWRUP)” (1 March 2013) <www.army.mil.nz>.

120 *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* GA Res 55/255, A/Res/55/255 (2001); Arms Amendment Bill (No 3) (248-1) at 2 [Law and Order Committee].

121 GunPolicy, above n 116.

122 Philip Ayers and Conor Twyford *Small Arms in the Pacific: Occasional Paper No 8* (Small Arms Survey, March 2003) at 18.

123 Law and Order Committee, above n 120, at 4.

124 Ministry of Foreign Affairs and Trade *New Zealand Response to the United Nations Security Council Counter-Terrorism Committee* (April 2004).

number of these weapons are retained for training purposes and for museum displays. The rest are destroyed.¹²⁵ All of the NZDF's firearms are imported and subject to end user certification. The disposal of surplus weapons is done in accordance with the end user certifications and with domestic controls.¹²⁶

New Zealand routinely destroys civilian firearms that are surrendered, seized or forfeited.¹²⁷ This occurs under s 70 of the Arms Act.¹²⁸ The police are authorised to destroy weapons with a court order issued in accordance with s 69 of the Arms Act 1983. Authority may also be granted by the Area Controller, or destruction may occur if a weapon is handed to the police following the revocation or surrender of a firearms licence,¹²⁹ or if the weapon is seized or detained under the Act.¹³⁰ The New Zealand Police have also destroyed surplus stock of up to 75 rifles as weapons were upgraded and replaced.¹³¹

Despite the lack of evidence of an illicit arms trade passing through New Zealand, the country has been recently associated with a well-publicised illegal arms transfer. Although the weapons in question never came near New Zealand, the case highlighted gaps in New Zealand law as well as in the international arms control system. On 11 December 2009 35 tonnes of conventional weapons left North Korea for Iran, violating a United Nations arms embargo.¹³² These arms, including explosives and anti-aircraft missiles, were intercepted in Thailand and seized by authorities.¹³³ The plane chartered to transfer the cache of weapons was leased by a shell company registered in New Zealand on 22 July 2009 and the only person charged in relation to this case was linked to this company.¹³⁴ The case shows that although the global illicit arms trade may not pass directly through New Zealand, the country is not entirely free from it either.

3. New Zealand and Weapons Development and Manufacturing

In 2007, New Zealand was recorded as a medium producer of small arms, light weapons and ammunition.¹³⁵ When this information was published, there were two manufacturers producing landmines and ammunition in New Zealand; however there was no data available on whether pistols, rifles, sub-machine guns and light weapons were being produced as

125 Hampton, above n 117, at 11.

126 At 11.

127 At 10-11.

128 See also: Neville Matthews *Firearms Manual* (New Zealand Police, Wellington, 2002) at [18.2].

129 Arms Act 1983, s 28.

130 Section 41.

131 Hampton, above n 117, at 11.

132 Oxfam International *Brokers without Borders* (Oxfam, 18 October 2010) at 1.

133 Andrew Koubaridis "Probe into huge arms seizure" *The New Zealand Herald* (online ed, Auckland, 9 January 2010).

134 Oxfam International, above n 132, at 1-2 and 11-13.

135 Mike Bourne *Arming Conflict: The Proliferation of Small Arms* (Palgrave MacMillian, Hampshire, 2007) at 63.

well.¹³⁶ MFAT has confirmed that there is a small arms and light weapons manufacturing industry in New Zealand.¹³⁷ However, the Ministry notes that this industry is small and tends to produce custom weapons of up to 50 calibre. There is no large-scale commercial production of small arms and light weapons.¹³⁸ Firearms manufacturers must have dealers licences issued by the New Zealand Police and illegal weapons manufacturing is an offence under the Arms Act 1983.¹³⁹

A number of companies located in New Zealand are engaged in the defence industry. A prominent defence company in New Zealand is the Defence Technology Agency (DTA). The DTA is owned by the NZDF and provides it, the Ministry of Defence and other defence organisations outside New Zealand with research, science and technology support in four core areas. These are network systems, applied vehicle systems, sensor systems and human systems.¹⁴⁰ The DTA is part of The Technical Cooperation Programme (TTCP) which New Zealand joined in 1969.¹⁴¹ Accordingly, weapons technology development in New Zealand is closely aligned with international defence efforts.

Although a small player in the international arms trade, there are conventional weapons imported and exported from New Zealand. There is a dearth of evidence that suggests illicitly traded weapons pass through New Zealand, but the North Korea case in 2009 shows that the state must continue to be vigilant in order to ensure such a trade is not established in the future.

B. Current New Zealand Legal Framework

New Zealand has a fairly comprehensive arms export and import control system. According to MFAT, domestic legislation upholds international export control best practice.¹⁴² MFAT oversees this body of legislation and, at first glance, it appears the above claim is not exaggerated.

1. New Zealand's Export Framework

The MFAT Export Controls Office regulates the export of conventional arms from New Zealand. Conventional weapons are included on the New Zealand Strategic Goods List (NZSGL);¹⁴³ controlled items include arms, military equipment and dual-use goods and technology. Included in this list are all the items set out in arts 2, 3 and 4 of the ATT. In fact, the list is more comprehensive than necessitated by the ATT as chemicals, nuclear

136 At 61. As New Zealand is a party to the Ottawa Treaty these landmines are presumably not anti-personnel mines.

137 Hampton, above n 117, at 1.

138 At 3.

139 Arms Act 1983, s 5.

140 See Defence Technology Agency <www.dta.mil.nz>.

141 The Technical Cooperation Programme "TTCP overview" <www.acq.osd.mil>.

142 Ministry of Foreign Affairs and Trade "Export Controls: Legislation" <www.mfat.govt.nz>.

143 Ministry of Foreign Affairs and Trade *New Zealand Strategic Goods List* (March 2013).

materials and micro-organisms are also included. NZSGL items, under the Customs Export Prohibition Order 2011, may not be exported without the consent of the Secretary of Foreign Affairs and Trade.¹⁴⁴ In order to give this prohibition practical effect the Secretary's authority is delegated to an Export Controls Officer in MFAT's International Security and Disarmament Division (ISDD).¹⁴⁵

The ATT can be implemented without altering this process. Article 5 requires states party to the ATT to create a national control system, with a national control list, that is under the control of a competent authority. This is already in place. In fact, the Secretary of Foreign Affairs and Trade may be by-passed altogether under the ATT as MFAT already has an appropriate authority dealing with export issues within the ISDD.

MFAT does not implement domestic arms export controls in isolation; instead, New Zealand participates in four informal non-proliferation arrangements.¹⁴⁶ These arrangements foster responsible trading in strategic goods. Of the four, only the Wassenaar Arrangement (WA) is relevant to this discussion.¹⁴⁷ It covers much of the same ground as the ATT.

The WA was established to contribute to both regional and international stability and security by increasing both transparency and responsibility in the export of conventional weapons. Forty-one participating states are committed to ensuring transfers of conventional weapons, and dual-use goods and technologies do not undermine these goals. States are required to put in place national policies which support the objective of the Arrangement¹⁴⁸ and agree to maintain national controls on certain, listed items, report transfers and export denials to non-WA member states, follow the WA's Best Practices, Guidelines or Elements and exchange sensitive information on dual-use goods and technologies.¹⁴⁹ There are two control lists: the Munitions List and the List of Dual-Use Goods and Technologies. Together, these lists go beyond the scope of the ATT and have been given effect through the NZLSG.

MFAT utilises a number of export criteria when determining if an arms export may take place. These reflect the Government's desire to make responsible decisions regarding the export of strategic goods and are principally derived from the WA regime.¹⁵⁰ These criteria can be split into three sections: basic decisions; regional security judgments; and other relevant assessments.¹⁵¹

144 Customs Export Prohibition Order 2011, regs 6 and 7 and Schedule. The Order is given effect through the Customs and Excise Act 1996.

145 Ministry of Foreign Affairs and Trade "Export Controls: Procedures and Requirements" <www.mfat.govt.nz> [MFAT].

146 Ministry of Foreign Affairs and Trade "Export Controls: International Regimes" <www.mfat.govt.nz>.

147 The other arrangements are: the Missile Technology Control Regime, the Nuclear Suppliers Group and the Australia Group. They fall outside the scope of the ATT.

148 Wassenaar Arrangement "Introduction" <www.wassenaar.org> [WA].

149 WA, above n 148, at "Overview."

150 MFAT, above n 145.

151 MFAT, above n 145.

The export criteria combine to cover a substantial range of issues. The basic criteria are concerned with compliance with international obligations such as UNSC sanctions, whether other states would allow particular exports to go ahead, if the importing state develops weapons of mass destruction and if that state is the final destination of the shipment.

The regional security assessment criteria build on this framework. They delve deeper into questions of international peace and security. Each potential import is assessed against the following criteria: the impact of the weapons shipment on particular regions; the legitimacy of the importing state; and whether the items are to be transferred into arenas of conflict. If the importing state is involved in a conflict, then who is fighting, how the transfer might contribute to the conflict and how it will be interpreted within the international community must also be considered.

The final set of criteria deal directly with humanitarian issues. The Export Controls Officer is required to directly assess the IHL and IHRL records of the importing state. The Officer must inquire if there is a risk that the goods will be used to commit human rights abuses. Additionally, end-user certification, import authorisation and delivery verification certificates may be required.¹⁵²

New Zealand takes these criteria seriously and has previously denied exports due to humanitarian concerns. In 2005 MFAT declined to issue Osmar International with an export licence on the grounds that the export had the potential to contribute to the conflict in Israel.¹⁵³

2. Other Relevant International Obligations

Sitting alongside the New Zealand domestic legal framework are a number of international agreements. Although these do not impact on the export of conventional weapons, they are aimed at promoting transparency in the transfer of these arms around the world. It is these instruments that constructed the international legal arms landscape prior to the creation of the ATT.

The normative framework on arms control was guided primarily by three instruments which relate to small arms and light weapons: the Firearms Protocol, the PoA, and the International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons (ITI).¹⁵⁴ These instruments cover a range of activities such as weapons manufacture, stockpiling, marking, tracing, criminalisation and record keeping.¹⁵⁵ They do not, however, regulate arms transfers. The ATT will fill this gap; in doing so, it has ventured into a new, although limited, facet of arms control.

152 Hampton, above n 117, at 9.

153 Helen Tunnah "Questions over military details sent to Israel" *The New Zealand Herald* (online ed, Auckland, 25 February 2005).

154 ITI, above n 2.

155 Parker, above n 99, at 2.

These instruments have been supplemented by UNROCA. The Register aims to create transparency and predictability in the movement of arms, in order to allow international peace, security and cooperation to flourish.¹⁵⁶ States are required to provide UNROCA with an annual report, thereby stating their intentions around conventional weapons acquisition and activities, capabilities and compliance with national, regional and international legal obligations.¹⁵⁷

New Zealand “generally complies” with the ITI and “substantially complies” with the PoA.¹⁵⁸ Compliance is hindered by the fact New Zealand legislation does not require registration of most firearms. This has also prevented ratification of the Firearms Protocol. For a state that is committed to arms control, this position is troublesome. Although in the current political climate the lack of an arms register is not problematic, it will become significant if the state enters a period of instability.

The ATT does not purport to replace the ITI, the PoA or the Firearms Protocol. Because the ATT is only concerned with arms transfers,¹⁵⁹ the other instruments remain relevant and compliance with them must continue. The ATT must be utilised alongside these instruments to create a strong, lasting commitment to arms control. The New Zealand Government cannot cite compliance with the ATT as justification for continued failure to ratify the Firearms Protocol or to reach complete compliance with the PoA.

It is apparent that New Zealand already has a comprehensive and tightly controlled export regime in place which substantially complies with international standards and obligations. As such, the State is in a healthy position to implement the ATT. There will, however, have to be some adjustments to domestic legislation in order for this to happen.

C. New Zealand and the Implementation of the Arms Trade Treaty

It is imperative that New Zealand ratify the ATT as quickly as possible. The need to do so stems from two directions. The first is that the state promotes itself as a champion of humanitarianism and disarmament. In order to cement its reputation in these areas, the Government must ratify the ATT as it is a key development in both humanitarianism and in disarmament. The second reason is that unless implementation takes place quickly, there is the danger that it will not occur at all. History has taught us this; the 2001 Firearms Protocol provides an apt example. Although legislation to implement the Protocol was initially introduced in 2005, this was rejected

156 *Transparency in armaments*, above n 2, at [7]; United Nations Office for Disarmament Affairs “UN Register of Conventional Arms” <www.un.org>.

157 Paul Holtom, Lucie Béraud-Sudreau and Henning Weber “Reporting to the United Nations Register of Conventional Arms” (Stockholm International Peace Research Institute, Stockholm, 2011) at 1.

158 Hampton, above n 117, at 2; Ministry of Foreign Affairs and Trade “Disarmament” <www.mfat.govt.nz>.

159 Transfer includes “export, import, transit, trans-shipment and brokering”: ATT, above n 1, art 2(2).

at the select committee stage in 2012 and it appears efforts to accede have now stalled.¹⁶⁰ With the 2014 election approaching, there is the risk that the ATT will suffer the same fate if ratification is delayed. Under the Key government, New Zealand has played an active role in the negotiation of the ATT; the incoming government may not have the same priorities and Treaty ratification may be delayed indefinitely in order to give preference to other matters. The importance of the ATT, as the first international instrument regulating conventional weapons transfers, means that it is imperative it does not suffer the same fate as the Firearms Protocol.

As the ATT does not operate at a purely international level, domestic legislation will have to give effect to the Treaty obligations.¹⁶¹ This can occur in two ways. Existing legislation may be amended to bring the Treaty into force in New Zealand. Alternatively a single piece of legislation could be drafted, giving effect solely to the ATT. The latter option would have the advantage of increasing accessibility to the new rules governing arms transfers, rather than burying them in the NZSGL, the Custom and Excise Act (CEA) and customs export prohibition orders. However both alternatives present viable options.

1. Implementing the Core Arms Trade Treaty Provisions

Regardless of how the ATT is given effect, the current New Zealand legal framework has placed the state in an excellent position to implement the Treaty quickly.

The requisite information is already collected and available under existing international treaties and agreements. Reports are provided to UNROCA on conventional weapons exports. The possession and movement of small arms and light weapons are recorded and reported pursuant to the PoA as far as possible. The PoA Secretariat is also advised of any developments in the New Zealand legal landscape. It will be a simple matter to collate the information provided to these bodies and to supplement it where necessary with exports authorisation information, thereby complying with arts 12 and 13. Establishing a competent national authority and contact point under art 5 is also easily done. The simplest way of doing so is to again utilise existing structures with the ISDD overseeing the ATT and providing the national point of contact.¹⁶²

Article 14 obliges states to set up a national enforcement system. Once more, the existing system can be expanded to include ATT obligations. Under the CEA it is an offence to knowingly import or export prohibited goods.¹⁶³ The offence is punishable by a fine not exceeding \$5,000 or, if the offence is committed by a body corporate, a fine not exceeding \$50,000.¹⁶⁴ As the ATT

¹⁶⁰ Law and Order Committee, above n 120.

¹⁶¹ Law Commission *A New Zealand Guide to International Law and its Sources* (Wellington, May 1996) at [47].

¹⁶² Hampton, above n 117, at 5.

¹⁶³ Custom and Excise Act, s 209.

¹⁶⁴ Section 209(2).

deals with arms transfers which have serious humanitarian implications, the penalties under the CEA should be increased to reflect this. Doing so will be a relatively simple task.

The scope of the ATT sets out a minimum of conventional weapons, parts and components, and ammunitions and munitions that must be covered by national control lists. If New Zealand were to take the NZSGL as the basis for its national ATT control list, which extends beyond the ATT requirements, this would be a firm statement that New Zealand supports a robust interpretation and implementation of the Treaty.

Some adaptation of the criteria currently used by Export Controls Officer to determine if an export may be authorised is required before the ATT can be implemented. In relation to art 6, the criteria must be amended to explicitly restate the ATT prohibitions so as to leave no room for error. It would be helpful to include a definition of “knowledge” so that these prohibitions can be consistently applied.

Implementation of art 7 will also require some adjustments, though this too may be done through the amendment of the Customs and Excise Act 1996. The current criteria will be useful in determining if a transfer will contribute to or undermine international peace and security. IHL and IHRL concerns are already addressed through MFAT’s export criteria; in fact MFAT arguably employs higher standards than those set out in the ATT. Articles 7(1)(b)(i) and (ii) refer to the commission or facilitation of serious violations of IHL and IHRL; MFAT looks beyond this by requiring the Exporting Officer to consider the IHL and IHRL records of the receiving state. Past and present IHL and IHRL violations will be assessed.

Definitions of what constitutes serious IHL and IHRL violations are necessary. The ICRC has defined “serious violations” of IHL as “war crimes” or crimes which “endanger protected persons ... or objects.”¹⁶⁵ More specifically, serious violations are actions contravening arts 50, 51, 130 and 147 of the 1949 Geneva Conventions I, II, III and IV respectively, grave breaches as set out in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts (Protocol 1),¹⁶⁶ crimes included in art 8 of the Rome Statute and other war crimes found in customary international law. Serious violations of IHRL are less easily defined. Annyssa Bellal suggests that these occur, in the context of the ATT, when the following are violated: the rights to life, freedom from torture and other cruel, inhuman and degrading treatment, liberty and security, freedom from slavery, freedom of thought, conscience and religion, recognition before the law as a person, to protest and to health, education, housing and food.¹⁶⁷

165 International Committee of the Red Cross “What are ‘serious violations of international humanitarian law’?: Explanatory note” <www.icrc.org>.

166 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Armed Conflicts (Protocol 1) 1125 UNTS 3 (opened for signature 12 December 1977, entered into force 7 December 1979).

167 Bellal, above n 14, at 18-19.

Regardless of how the ATT is implemented, the art 7 requirements should not be set out as an exhaustive list. Instead, the drafting body should stipulate that serious violations of IHRL and IHL *must* be taken into account, whilst other violations *may* be taken into account. This will give the ATT maximum effect and demonstrate New Zealand's commitment to humanitarian ideals.

2. Transit and Transshipment and Diversion

An area where New Zealand may face practical difficulties is implementing the transit and transshipment requirements under art 9 and combating diversion under art 11.

Article 9 reflects the fact that states incur responsibility when arms cross through their jurisdictions, even if they are not unloaded or do not touch that state's soil. However, the ATT only imposes an obligation in respect of transit as far as it is "feasible" to address the issue. This is a major flaw in the ATT. Allowing states to evade responsibility on the basis that it is not "feasible" has given rise to a weak provision.

It is clear that the issue of transit and transshipment is complex. New Zealand will struggle to give effect to art 9. Although there are already transit and transshipment regulations in place, it may not be practically possible to extend these.¹⁶⁸ New Zealand has the fifth largest Exclusive Economic Zone in the world;¹⁶⁹ as the ATT comes into force the Government must ensure that this Zone does not become a transit point for the illicit movement of conventional weapons.¹⁷⁰ This will not be an easy task and will likely require international cooperation amongst Pacific states. New Zealand has stated that it intends to draft and disseminate model legislation to assist states in the Pacific region implement the ATT;¹⁷¹ as part of this process, MFAT should initiate discussions on how transit and transshipment problems can be managed collectively.

Diversion is another area of the Treaty which may prove difficult to implement in practice. The obligation under art 11 highlights the responsibilities of importing states, as they are more powerfully placed to combat diversion.¹⁷² This does not relieve exporting states of responsibility and they too must remain vigilant. In theory, the New Zealand Government has already taken steps to prevent diversion from occurring. The Export Controls Office highlights a number of indicators that exporters must be aware of in order to avoid the diversion of their goods.¹⁷³ Goods which are

168 Goods transhipped through New Zealand may not be loaded onto the subsequent mode of transportation prior to receiving New Zealand Customs authorisation; goods transiting through New Zealand via ship or aircraft are subject to an electronic onward report which must be supplied to Customs: Hampton, above n 117, at 8-9.

169 Ministry for the Environment *Improving Regulation of Environmental Effects in New Zealand's Exclusive Economic Zone: Discussion paper* (August 2007) at [1.1].

170 Ministry of Defence, above n 118, at [3.66].

171 European Non-Proliferation Consortium *Implementing the arms trade treaty: next steps Seminar Report* (Geneva, June 2013) at 10.

172 Casey-Maslen, Giacca and Vestner, above n 49, at 33.

173 Ministry of Foreign Affairs and Trade "Export Controls: Diversionary Activities" <www.mfat.govt.nz>.

illegally exported or diverted may be seized under the CEA. At the same time, New Zealand's international export regimes will make it difficult for goods to be re-exported or diverted through the importing state. However, it will be up to the importing state to ensure that goods are not diverted in contravention of the ATT.

In order to prevent military stockpiles from being diverted or illegally transferred, it has been suggested that states ensure there is strict supervision of bodies which hold weapons and that the accessibility of these items is limited.¹⁷⁴ Again, New Zealand already has systems in place that achieve these goals including the secure storage of Police and NZDF weapons.¹⁷⁵

3. Weapons Imports Under the Arms Trade Treaty

As New Zealand imports the majority of its conventional arms, the Government must ensure that another state has no grounds to withhold authorisation under arts 6 and 7 of the ATT. It is unlikely that there will be any problems under the art 6 prohibitions. The stated policy is for the NZDF to respect IHL. There are no UNSC measures in place against New Zealand and the state is not involved in transferring or trafficking arms illicitly. Genocide, crimes against humanity, grave breaches of the Geneva Conventions, attacks against civilians or civilian objects and other war crimes simply do not occur here. The art 6 prohibitions will not interfere with arms transfers to New Zealand.

Turning to art 7, it is very unlikely that an export assessment will stop a transfer to New Zealand. Again, human rights abuses and IHL violations are not occurring in New Zealand. In 2010 NISAT listed New Zealand as a level 1 on the Political Terror Scale. Level 1 means that New Zealand has a "secure rule of law, people are not imprisoned for their views, and torture is rare or exceptional."¹⁷⁶ Nor is terrorism a problem, and there is nothing to suggest that an arms transfer will contribute to or facilitate a transnational organised crime. Although the state does not import a significant amount of arms, should the ATT enter into force prior to completion of the NZDF weapons upgrade and replacement programme New Zealand is very unlikely to run into issues under art 7.

Given the robust export framework that is already in place, New Zealand can implement the Treaty without making legislative amendments. The core articles can be given immediate effect through existing mechanisms and, in fact, doing so is a practical option. Within the first year of the Treaty entering into force, a conference of state parties must be held.¹⁷⁷ This conference will determine the future of the ATT and, with the number of ratifying states

174 Casey-Maslen, Giacca and Vestner, above n 49, at 34.

175 Hampton, above n 117, at 11.

176 NISAT "Country profile for New Zealand" <www.balder.prio.no>. 2010 is the most recent year listed.

177 ATT, above n 1, art 17.

currently standing at 31,¹⁷⁸ it is likely to be next year. Utilising the existing legal structure would be a pragmatic choice as it will guarantee New Zealand a voice under art 17. That being said, the current legislative framework will not allow New Zealand to take a maximum approach to the optional articles. This is a problem. As a strong ATT supporter and a state committed to increasing human security around the globe, the New Zealand Government should not use the language of the Treaty to undermine the integrity of the instrument. Taking the time to draft and enact legislation specific to the ATT will provide New Zealand with a comprehensive ATT framework. However, in an election year the legislative amendments needed to give maximum effect to the ATT are unlikely to go through in time to allow New Zealand to participate at the upcoming conference.

New Zealand is facing a difficult choice. On balance, the pragmatic approach is the right option. New Zealand should ratify the ATT as soon as possible. While the optional articles can be given effect after ratification, the chance to influence the future of the Treaty, once lost, can never be regained.

IV. CONCLUSION

The product of seven years of discussions and negotiations, the ATT is intended to cultivate international peace, security and stability whilst simultaneously reducing the impacts of the global arms trade on human populations. The ATT takes a distinctly humanitarian approach to regulating arms transfers, and the underlying concern of human security is evident throughout the text. The Treaty does not fit within a traditional humanitarian disarmament framework; instead it has expanded these frameworks by espousing a proactive rather than reactive approach to arms control.

This is done primarily through arts 6 and 7; however it is clear that there are problems associated with both of these articles which threaten to undermine their effectiveness. Coupled with the Treaty's weak implementation and enforcement mechanisms, these flaws have resulted in a treaty that will not have the intended impact. That being said, the ATT is still worth ratifying as it provides much needed regulation of the international arms trade. Further, its adoption marks a paradigm shift in the field of arms control. The shift in international discourse, from questions of state security to questions of human security, is now firmly cemented in international law.

New Zealand is a proponent of arms control and a strong supporter of humanitarian discourse and methods. There is a small scale arms industry in New Zealand and conventional weapons are both imported and exported by the State. Arms transfers are already scrutinised through a comprehensive export control regime that is based on international best practice and substantially complies with existing international obligations. It is imperative that New Zealand ratify the ATT as soon as possible. The Government is

178 UNODA, above n 58.

currently campaigning for a seat on the UNSC; failure to implement a treaty that New Zealand has given much public support to will undermine these efforts. Implementing the ATT will reinforce New Zealand's position as a leader in humanitarian arms control.

