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The Destruction of Mass Weapon Distribution: The United Nations Arms Trade Treaty & the Part America Must Play

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THE DESTRUCTION OF MASS WEAPON DISTRIBUTION:
THE UNITED NATIONS ARMS TRADE TREATY &
THE PART AMERICA MUST PLAY

Matthew Levitt[†]

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The Destruction of Mass Weapon Distribution

I. Introduction

A. United Nations Arms Trade Treaty

The United Nations has spent the better part of the last century attempting to foster diplomacy and understanding between the nations of the world. It has succeeded in bringing together nations that have been bitter enemies, nations that have refused to meet unilaterally with foes, and nations that want to change the world without picking up a weapon. Although sometimes it may be necessary to weaponize to defend one's ideals, what happens when those weapons are turned on the innocent, the undeserving, or the unprotected? What has happened is that at least a quarter of a million people have been killed annually in armed conflicts around the globe since 1989, with many of those deaths being facilitated by the trade in conventional arms.¹ Therefore, the United Nations sees fit to address this situation, as it remains largely problematic in many regions of the world.

The United Nations (U.N.) is currently working on drafting an Arms Trade Treaty (ATT) that will attempt to not only codify the large weapons that have been at issue in the past, but also the Small Arms and Light Weapons ("SA/LW") that have become the scourge of third-world countries and the deadliest of weaponry.²

The U.N. created an ATT Preparatory Committee that met most recently on July 11-15, 2011.³ Since 2009, the committee has been meeting "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. . ."⁴ The U.N. established July 2012 as the target date to pass the ATT, with ratification by signatory nations in the months following.⁵

B. United States Position on an ATT

United States Secretary of State, Hillary Rodham Clinton, has stated that the U.S. "is committed to actively pursuing a strong and robust treaty that contains the highest possible legally binding standards for the international transfer of

¹ *Killer Facts, The Impact of the Irresponsible Arms Trade on Lives, Rights and Livelihoods*, AMNESTY INT'L 4 (May 2010) (Index No. ACT 30/005/2010), http://controlarms.org/wordpress/wp-content/uploads/2011/03/killer_facts_en.pdf.

² U.N. Group of Governmental Experts on Arms Trade, Rep., transmitted by letter dated Aug. 8, 2008 from the Chairperson of the Group of Governmental Experts established pursuant to General Assembly resolution 61/89 (2006) concerning an Arms Trade Treaty addressed to the Secretary-General, ¶¶ 21, 23, U.N. Doc A/63/334, 63rd Sess. (Aug. 26, 2008) [hereinafter Report of GGE].

³ *U.N. Arms Trade Treaty Preparatory Committee: Meeting Dates*, UNITED NATIONS, <http://www.un.org/disarmament/convarms/ATTPrepCom/index.htm> (last visited Oct. 3, 2011).

⁴ Rep. of the Open-ended Working Group towards an Arms Trade Treaty, July 13-17, 2009, U.N. Doc. A/AC.277/2009/1, 2d. Sess. (July 20, 2009).

⁵ See generally UNITED NATIONS ARMS TRADE TREATY PREPARATORY COMMITTEE WEBSITE, <http://www.un.org/disarmament/convarms/ATTPrepCom/> (last visited Nov. 11, 2011).

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conventional weapons.”⁶ The U.S. for the first time in more than a decade is open to the possibility of supranational arms control, a large diplomatic step that will strengthen several areas of interest for the American government.

Secretary Clinton, however, also understands that this will not be an easy task, and a useless ATT will be no better than no treaty at all. Secretary Clinton stated that the U.S. will actively support the negotiations so long as “the Conference operates under the rule of consensus decision-making needed to ensure that all countries can be held to standards that will actually improve the global situation. . .”⁷ Therefore, it will be important for the United States to take an active role in the formation of this treaty, especially by participating over the next two years and garnering support in the international community.

The U.S. is seeking a treaty that will make concrete strides in the area of arms control and protect those who are the senseless victims of unsafe weapons trading. Ellen Tauscher, the U.S. Under Secretary for Arms Control and International Security stated, “What we are after is a means to have all nations do what the United States already does: examine each conventional weapons transfer before it is authorized to be certain that it will enhance. . .not undermine. . .security and stability.”⁸

C. The U.S. Must Take an Active Leadership Role in Developing the ATT

The U.S. has taken the first step to making the ATT a reality, namely, it has publicly expressed support for its passage. Now, in order to unmistakably back its public support, the U.S. must take the next step and actively participate in the stages of development and writing, as well as international lobbying and negotiations that will result in an effective treaty.

The U.S., however, need not look at the ATT as a moral project; rather, it will enhance several legitimate goals that the U.S. government would like to reach. Therefore, this paper proposes that the objectives of the U.S. will be furthered in a number of ways by its active participation in the negotiations and ratification of the U.N. Arms Trade Treaty. First, an ATT will quell terrorism and regional conflicts. Second, the ATT can ensure the safety of millions of citizens in various countries where arms trafficking has led to a rash of organized killings and genocidal-type deaths. And third, an ATT will allow the U.S. to strengthen alliances and potentially make new ones as the negotiations progress and diplomacy is furthered among participant nations.

It will not be a simple, straightforward path, however. The U.S. must be willing to negotiate with countries with which it typically does not have an open dialogue. This will be necessary as the U.S. has much at stake in the development of this treaty. For instance, the U.S. must protect legitimate weapons sales because it is vital to its economy, as evidenced by the fact that the U.S. is the

⁶ Press Release, Hillary Rodham Clinton, Sec’y, of State, U.S. Support for the Arms Trade Treaty (Oct. 14, 2009), available at <http://www.state.gov/secretary/rm/2009a/10/130573.htm>.

⁷ *Id.*

⁸ Ellen Tauscher, Under Sec’y for Arms Control & Int’l Sec., U.S. State Dep’t, Arms Trade Treaty Remarks at the Carnegie Endowment for International Peace (Feb. 18, 2010).

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leading arms exporter in the world, responsible for 30% of the world's arms exports from 2006 to 2010.⁹ At the same time, concessions may be necessary to ensure a respectable number of signatories. If the ATT is ratified by a only small percentage of nations, it will carry no more weight than past U.N. Arms Trafficking agreements.

By way of a roadmap, this article will, in Section II, give a background on the historical development of arms trade agreements previously employed. Section III will discuss the state of current global arms trade control. Next, Section IV will address what is being proposed for inclusion in the United Nations Arms Trade Treaty, as well as why those elements are crucial for the overall success and implementation of that treaty. Section V will propose several reasons why the United States will benefit from active participation in the ATT negotiations, along with pinpointing potential regional conflicts that would be impacted by the new treaty. And finally, a short conclusion in Section VI will emphasize how the U.S. government can go about implementing the treaty both at home and abroad.

II. Background

In order to understand why the Arms Trade Treaty is both desirable and pressing, it is necessary to give a timeline of the historical development of arms control at the international level. As discussed in the following section, history shows that now is the time to take action because the world is ready for a comprehensive arms trade treaty.

A. Historical Calls for Arms Control in the U.N.

After World War II, the Cold War brought attention to the problems that arise when arms stockpiling becomes commonplace. The arms race between the United States and the Soviet Union led to the First Special Session on Disarmament (SSODI) in 1978.¹⁰ However, the first SSODI was, essentially, an admission of the failure of the declared "Decade of Disarmament" that had begun in 1969, as the U.N. realized that disarmament was likely further away in 1978 than it was in 1969.¹¹

At the same time, there was worldwide growth in awareness about nuclear weapons.¹² This newfound fear of nuclear weapons, predicated on the destruction that took place in Hiroshima and Nagasaki, led to a movement for nuclear disarmament that took center stage as the U.S. and Soviet Union stockpiled these

⁹ 14 March 2011: *India world's largest arms importer according to new SIPRI data on international arms transfers*, STOCKHOLM INT'L PEACE RESEARCH INST., <http://www.sipri.org/media/press-releases/armstransfers> (last visited Nov. 11, 2011).

¹⁰ First Special Session of the General Assembly devoted to Disarmament, Final Document of SSOD-I: Resolutions and Decisions of the Tenth Special Session, ¶ 1-2, U.N. Doc. A/S - 10/4 (1978), available at <http://www.un.org/disarmament/HomePAge/SSOD.ssod4-documents.shtml>. Report of the First Special Session on Disarmament.

¹¹ *Id.* at ¶ 7.

¹² *Id.*

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weapons of mass destruction.¹³ But all of the activists had basically failed when it came to the arms race. They all focused on nuclear weapons and the devastation that a single bomb could inflict, while small arms and conventional weapons were brushed aside despite the fact that these weapons would go on to kill far more people than nuclear, chemical, and biological weapons combined over the next several decades.¹⁴

In response to the growing concern over all types of weapons, the U.N. adopted two instruments aimed at promoting transparency on military matters and conventional arms transfers: the 1980 U.N. Standardized Instrument for Reporting Military Expenditures and the 1991 U.N. Register of Conventional Arms.¹⁵ Additionally, in 1991, the U.N. Security Council adopted Guidelines for Conventional Arms Transfers.¹⁶

The 1991 Register of Conventional Arms (“the Register”) is viewed as the forerunner to the upcoming ATT.¹⁷ The Register covered seven categories of weapons: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, and missiles.¹⁸ However, despite initial optimism in the international community, the Register is generally viewed as a failure¹⁹ because although the international community had assented to transparency in arms transfers, there was no useful data harvesting mechanism and no way to follow the transfers in order to monitor a potentially destabilizing build-up of arms.²⁰

B. A Renewed Call for Arms Control

Over a decade into the 21st century, SA/LW have increasingly threatened security in several conflict regions around the world, as well as fueling terrorism all over. At the turn of the millennium, the U.N. once again began discussing what it could do to help stem the tide of weapons reaching the hands of groups who intended to violate basic principles of human rights. Therefore, “[r]ecognizing that the illicit trade in small arms and light weapons in all its aspects sustains conflicts, exacerbates violence, contributes to the displacement of civilians. . . and fuels crime and terrorism,” the U.N. embarked on several initiatives to aid the fight.²¹

¹³ *Id.*

¹⁴ Tauscher, *supra* note 8.

¹⁵ Report of GGE, *supra* note 2, ¶ 7.

¹⁶ *Id.*

¹⁷ See generally Cristiane Carneiro, *From the United Nations Arms Register to an Arms Trade Treaty – What Role for Delegation and Flexibility?*, 14 ILSA J. INT’L & COMP. L. 477 (2008).

¹⁸ *Id.* at 478.

¹⁹ *Id.* at 479.

²⁰ *Id.*

²¹ United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, July 9-20, 2001, *U.N. Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, ¶ 5, U.N. Doc. A/Conf.192/15 (July 20, 2001) [hereinafter *Conference on Illicit Trade*].

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The U.N. Register failed to cover the transfer of small arms, so it became apparent that this issue needed to be addressed on an international level.²² The first attempt was made in 2001, with the passing of the U.N. General Assembly's Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components, and Ammunition.²³ Additionally, the U.N. held the Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects, which led to a Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects in 2001.²⁴

This Programme of Action was an attempt by the U.N. to memorialize what the member nations believed was an effective method for registering, manufacturing, trading, and maintaining a safe market for SA/LW.²⁵ The Programme sought to create global norms, develop and implement agreed measures, emphasize particular regional problems, increase international cooperation and information sharing, and promote responsible action by States.²⁶ While this document has been marginally effective in creating the standards it aimed to promote, after a few years the U.N. membership began to desire more.

In December 2006, the U.N. General Assembly asked the Secretary-General to seek the views of member states in regards to an arms trade treaty as well as to put together a Governmental Group of Experts to assess the situation.²⁷ The General Assembly, in taking this step, recognized that arms control, disarmament, and non-proliferation are essential for the maintenance of international peace and security, each state has a right to take legitimate self-defense steps, and each country must respect international law, including human rights and humanitarian law.²⁸ Nevertheless, it also recognized the need for a balance between these goals and the safety of individuals around the globe.²⁹

C. Recent American Attitudes Toward Arms Control

In 2001, the U.S. was far from amenable when discussions turned towards arms control. John Bolton, then the U.S. Representative to the U.N. Illicit Trade in Small Arms and Light Weapons Conference, stated that the U.S. "does not support any course of action that constrains the legal trade and manufacture of small arms."³⁰ The consensus in the George W. Bush Administration was that any type of constraint would be bad for American business and might hamper national interests abroad, especially as wars in Afghanistan and Iraq ramped up.³¹

²² Carneiro, *supra* note 17, at 481.

²³ Conference on Illicit Trade, *supra* note 21, ¶ 20.

²⁴ *Id.* ¶ 1.

²⁵ *Id.* ¶ 9-14.

²⁶ *Id.* ¶ 22.

²⁷ G.A. Res. 61/89, ¶ 1, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Elizabeth Powers, *Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383, 416 (2008).

³¹ *Id.*

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However, U.S. policy changed courses in the latter half of Bush's presidency as alliances became harder to cultivate. Robert Loftis, then the American Ambassador to the Organization of American States, said in an April 2005 speech to the Organization of American States that the U.S. supports the 2001 U.N. Programme of Action on Illicit Trade of Small Arms and Light Weapons.³² He went on to state that the U.S. sees an arms trade treaty as facilitating the timely, reliable identification and tracing of illicit SA/LW, which will be a goal of the current administration as it strives to enact the proposed U.N. ATT.³³

Secretary Clinton is fully behind the ATT proposition being discussed by the preparatory committee. Secretary Clinton stated that the United States would actively support the negotiations as long as the ATT "will improve the global situation by denying arms to those who would abuse them."³⁴ To be sure, this is a good sign for those who support an Arms Trade Treaty because, even as the image of America as the last world superpower dwindles, America is still a powerful country whose opinion matters to many nations around the world.

III. Discussion

A. Status of Current Regional Arms Control

The majority of current arms control safeguards around the world are at the national or regional level. There are a number of agreements, such as the U.N. Register previously discussed, that are only politically binding because the country itself did not pass or ratify the law.³⁵ A legally binding instrument, which is the goal of the ATT, would become part of the law of a nation if that nation ratified it.³⁶ Once ratified and legally binding, breaking or subverting that law would have consequences.³⁷

Politically binding agreements in place now, such as the Wassenaar Arrangement and the U.N. Register, are voluntary.³⁸ This has led countries that already have national laws regulating arms trade to acquiesce to these agreements, meaning little actual progress has been made because countries where illicit trafficking exists without national laws are the real targets of an international arms trade treaty.³⁹ In other words, until countries without national laws to regulate the arms trade are willing to sign an arms trade treaty and adopt it as national law, true progress is minimal.

³² *Id.*

³³ *Id.* at 416-17.

³⁴ Clinton, *supra* note 6.

³⁵ Katherine Orlovsky, Note, *International Criminal Law: Towards New Solutions in the Fight Against Illegal Arms Brokers*, 29 HASTINGS INT'L & COMP. L. REV. 343, 369 (2008).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Jonathan T. Stoel, Note, *Codes of Conduct on Arms Transfers – The Movement Toward a Multilateral Approach*, 31 LAW & POL'Y INT'L BUS. 1285, 1288-89 (2000).

³⁹ *Id.* at 1289.

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As mentioned above, states and regional organizations have attempted to add layers to national laws to protect their citizens and foreign interests. The United States and European Union (EU) have regimes in which they “attempt to identify rogue states that act outside acceptable norms of behavior and bar the exportation of weapons to these states.”⁴⁰ This unilateral stance has created an international system that forbids the movements of weapons to Iran, Iraq, Libya and North Korea, via the Wassenaar Arrangement, but permits sales to any other country, with constraints coming only from the laws of the receiving nation.⁴¹

While this may seem like a positive step forward, the problem with this arrangement is its inherent leniency that allows for decisions based on several factors, not just who is on the other side of the transaction. In America, policy guidelines are supposed to use a balancing test between the possibility that the transfer “may exacerbate regional arms races or contribute to human rights abuses” and “the effect on the U.S. arms industry and the defense industrial base.”⁴² Unfortunately, capitalism generally prevails under the theory that we are aiding developing nations by giving them the means for self-defense, or at least to balance the weaponization of a region.⁴³

However, there have been some recent regional agreements that have seen success. The best example is the European Union (EU) Code of Conduct on Arms Exports.⁴⁴ The EU’s Code of Conduct sets out eight criteria for assessment of applications for the export of conventional arms. Those eight criteria are: (1) comportment with international obligations of EU member states (U.N. treaties, other international treaties, etc.); (2) the respect of human rights in the country of final destination; (3) the internal situation in the country of final destination; (4) preservation of regional peace, security and stability; (5) national security of the member states and of territories whose external relations are the responsibility of a member state; (6) behavior of the buyer country with regard to the international community, particularly attitudes to terrorism and alliances; (7) existence of a risk that the weapons may be diverted in the buying country; and (8) compatibility of the arms exports with the technical and economic capacity of the recipient country.⁴⁵ The EU Code of Conduct sets out these eight criteria along with a method of evaluating each criterion. Additionally, the EU Code established a notification and consultation mechanism for denials and insists on transparency throughout the entire procedure through the publication of the EU annual reports on arms exports.⁴⁶

⁴⁰ *Id.* at 1287.

⁴¹ *Id.* at 1287-88.

⁴² *Id.* at 1288.

⁴³ *Id.* at 1290.

⁴⁴ *The EU’s Support for a Legally Binding International Arms Trade Treaty*, COUNCIL OF THE EUROPEAN UNION, http://www.consilium.europa.eu/uedocs/cmsUpload/016_09_EN_low.pdf (last visited Oct. 15, 2010) [hereinafter EU’s Support for ATT].

⁴⁵ 1998 O.J. (L 75) 81.

⁴⁶ EU’s Support for ATT, *supra* note 44.

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The European Union also adopted a *Strategy to combat illicit trade and excessive accumulation of SA/LW and their ammunition*.⁴⁷ This document sets out a few guidelines, but is particularly noteworthy as it came out strongly in favor of international initiatives like the ATT. One of the strategic initiatives, in fact, was to encourage the EU to foster discussion in other regional groups and with U.N. member states throughout the world.⁴⁸

B. United Nations Renews Arms Control Effort

In December of 2006, the U.N. General Assembly adopted Resolution 61/89 entitled, "Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms."⁴⁹ Within this resolution, the General Assembly requested that the Secretary-General appoint a 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."⁵⁰ According to that Group of Governmental Experts (GGE), an ATT is necessary for several reasons. First of all, globalization changed the dynamics of the international arms trade.⁵¹ The types of weapon systems, equipment and components manufactured were being developed through joint ventures between states, allowing for faster development and increased production capabilities.⁵² Second, the GGE noted that, on certain occasions, U.N. Security Council arms embargoes were being violated because weapons were traded on illicit markets, re-exported through illegal brokering, and unsecure weapons storage and transportation allowed for re-direction far more easily than should have been the case.⁵³ Further, the GGE observed that "such weapons could be used for terrorist acts, organized crime and other criminal activities," all of which are now being targeted by the ATT.⁵⁴

C. The World Calls for an Arms Trade Treaty

In the first comprehensive collection of States' Views on an Arms Trade Treaty, the reasons for promoting such a broad initiative restricting arms trading became clear. There is growing support for a legally binding instrument negotiated on a non-discriminatory, transparent and multilateral basis, to establish common international standards for the import, export and transfer of conventional arms.⁵⁵ There are three global concerns that have continually surfaced in discus-

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

⁵⁰ Report of GGE, *supra* note 2, ¶ 1.

⁵¹ *Id.* ¶ 12.

⁵² *Id.*

⁵³ *Id.* ¶ 13.

⁵⁴ *Id.*

⁵⁵ G.A. Res. 63/240, U.N. Doc. A/RES/62/240 (Jan. 8, 2009).

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sions, and while they are not specific in nature, they have provided the basis for further discussion: the impact of the arms trade worldwide, the changing nature of the arms trade, and the inadequacy of existing arms transfer control mechanisms.⁵⁶

At this point, it is undisputed that the impact of the arms trade reaches nearly every corner of the world and “the absence of common international standards. . . is a contributory factor to conflict, the displacement of people, crime and terrorism,” that undermines peace, security and sustainable development.⁵⁷ Sarah Parker, who authored the U.N. study that categorized and analyzed states’ views on an ATT, wrote that in the context of civil conflict, illicit arms transfer can contribute to the beginning or continuing of conflict, meaning that it is an omnipresent danger in countries where strife is ready to strike at all times.⁵⁸ Parker also notes that irresponsible arms transfers have an impact on development, citing military expenditures that often divert financial, technological and human resources from development objectives.⁵⁹ Furthermore, underdeveloped and broken societies have compounded their own problems with misguided weapons purchases, which have created widespread corruption and have had a disparaging impact on economic growth and development.⁶⁰

Second, the changing nature of the arms trade has increased the concern over how weapons are controlled, as old safeguards are no longer effective. The sharing of information among nations has become far more widespread than it used to be and although weapons development is in the hands of a few firms, the increased cooperation leads to the necessity of adaptable regulation standards.⁶¹ Parker continues by observing that technology has allowed more delocalized sales and trade networks, making detection of illegal activities more difficult.⁶² Parker recommends that, by challenging illegal transfers on an international level, the ATT will more accurately address the issues raised by a globalized trade network.⁶³

Finally, the international community has expressed concern over the inadequacy of existing arms transfer control mechanisms. Current instruments such as the U.N. Register and the Programme against the Illicit Trade of Small Arms and Light Weapons have already been discussed, but these mechanisms are insufficient for dealing with an evolving market.⁶⁴ In the end, these documents must not be considered failures; rather they should be recognized as steps in the con-

⁵⁶ SARAH PARKER, IMPLICATIONS OF STATES’ VIEWS ON AN ARMS TRADE TREATY 7 (Jan. 2008) (report for the United Nations Institute for Disarmament Research) available at <http://www.unidir.org/pdf/ouvrages/pdf-1-92-9045-008-B-en.pdf>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 8.

⁶¹ *Id.* at 8-9.

⁶² *Id.* at 9.

⁶³ *Id.*

⁶⁴ *Id.*

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tinuing process, utilizing the past treaties as examples on what has worked and what can be improved upon.

D. The United States' Outlook

As a result of our capitalist democracy and the incentives it creates, the question raised in America during the Bush administration was, "what's in it for us?" At the time, as reflected by the statements made by John Bolton to the U.N. there was not much for the United States to gain, as it was already seen as the "benchmark" for arms trade regulation.⁶⁵ Moreover, America was and still is the world's largest exporter of SA/LW, so more stringent regulations might dampen the profit potential for many American companies in the industry.⁶⁶

However, in light of the September 11, 2001 terrorist attacks in the United States, the continued resistance in Afghanistan, and a war in Iraq, the United States fundamentally altered its position because it now might benefit from the ATT. The United States sees that the ATT could temper illegal arms trade in regions where terrorism and internal strife are continuous threats.⁶⁷

The United States must be active in the formation of this treaty in order to continue giving aid to states in need as well as continue to provide SA/LW for military preparedness. An ATT would successfully regulate the arms trade industry, while still allowing exporters to properly equip countries that cannot produce the means to defend themselves.⁶⁸ Regulation of the SA/LW industry is critical as recent history has demonstrated the devastating effects where regulation is non-existent and the transfer of these weapons is like selling any other commodity.⁶⁹ As Elizabeth Powers wrote, "The availability of SA/LW adds to the causes of conflict and generates a vicious circle in which greater insecurity further increases the demand for, and use of, these weapons."⁷⁰ The U.S. can see this as the case, so it now must take action to prevent further abuses while maintaining its own ability to sell weapons to allies who will use the weapons for proper purposes such as self-defense.

The final reason the U.S. would benefit from an ATT is because it will further the human rights goals the U.S. has set for itself and reflect these goals on an international level.⁷¹ Already, the U.S. has joined the Organization for Security and Cooperation in Europe (OSCE), which is committed to the principle that "each participating State will avoid [arms] transfers which would be likely to be used for the violation or suppression of human rights and fundamental freedoms."⁷² Additionally, the Wassenaar Arrangement, to which the U.S. was a

⁶⁵ Powers, *supra* note 30, at 416.

⁶⁶ *Id.* at 406.

⁶⁷ Tauscher, *supra* note 8.

⁶⁸ *Id.*

⁶⁹ Powers, *supra* note 30, at 415.

⁷⁰ *Id.*

⁷¹ *The U.S. Should Support an Effective Human Rights Rule in the Arms Trade Treaty*, AMNESTY INT'L 4 (July 1, 2010) (Index No. AMR 51/057/2010) [hereinafter AMNESTY INT'L].

⁷² *Id.*

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party, stated that “each Participating State will avoid issuing licenses for exports of SA/LW where it deems that there is a clear risk that the small arms in question might. . . be used for the purpose of repression; be used for violation or suppression of human rights and fundamental freedoms.”⁷³

For America, there is a delicate balance that the Arms Trade Treaty must strike. On one hand, the U.S. needs to protect the interests of businesses and their right to trade weapons to those in need, as well as protect those individuals in regions where these weapons could be used for improper purposes. That is precisely why the U.S. government sees the value in supporting an arms trade treaty.

E. Non-Governmental Organizations Call for Arms Control

There is no shortage of Non-Governmental Organizations (NGOs) actively campaigning for the ATT to become a reality. The main interest from these organizations stems from the desire for increased human rights awareness and the desire to see the rule of international law proliferate.⁷⁴

Control Arms, a coalition made up of over 25 different smaller NGOs, is a highly active campaigner in ATT discussions.⁷⁵ Control Arms heavily relies upon statistics to support a swift implementation of an ATT, the most alarming of which is that “[e]ach year, at least a third of a million people are killed directly with conventional weapons and many more are injured, abused, forcibly displaced and bereaved as a result of armed violence.”⁷⁶ It is apparent that the level of casualties must be curtailed, so the Control Arms campaign is exerting as much pressure on governments and regional organizations as possible to expedite negotiations by actively lobbying national governments and other NGOs to join the cause.

Much like Sarah Parker’s U.N. backed analysis of states’ views on an ATT, Control Arms shows empathy for more than just those that are killed or injured by arms. They are concerned for the development of entire nations, citing the fact that “even outside of wartime, governments arms purchases can exceed legitimate security needs, diverting substantial amounts of money away from health and education.”⁷⁷ For instance, Botswana, the Democratic Republic of Congo, Nigeria, Rwanda, Sudan and Uganda each doubled their military spending from 1985 to 2000 while their people continue to lack basic essentials such as clean water, food and housing.⁷⁸ Control Arms advocates for inhibiting the flow of

⁷³ *Id.*

⁷⁴ *Id.* at 9.

⁷⁵ See generally *About Control Arms*, CONTROL ARMS, <http://www.controlarms.org/about-control-arms> (last visited Nov. 11, 2011).

⁷⁶ *Updated - Facts & Figures*, AMNESTY INT’L, http://www.amnesty.at/uploads/tx_amnesty/act300172008en_02.pdf (last visited Nov. 11, 2011).

⁷⁷ *Id.*

⁷⁸ Edmund Cairns, et.al, *Arms Without Borders: Why a Globalized Trade needs Global Controls*, CONTROL ARMS Campaign of Amnesty Int’l 6 (Oct. 2006) (Index No. POL 34/006/2006) available at <http://www.amnesty.org/en/library/asset/POL34/006/2006/en/34ec3a8b-d403-11dd-8743-d305bea2b2c7/pol340062006en.pdf>.

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SA/LW because “while weapons do not cause these conflicts, the continuing supply and misuse of easily available arms and ammunition fuels their continuation, and makes them more deadly.”⁷⁹ As Control Arms bluntly notes, “[t]he human suffering caused by collapsing economies, devastated health and security infrastructures, disease and famine is horrifying.”⁸⁰

While NGOs do not necessarily call on a single country to completely drive the process, there is a sense that the U.S. is in the best position to ensure that certain elements are included in an ATT that will not only further the goals of the international human rights community, but also those of the U.S. as well.⁸¹ Amnesty International gives credit to the U.S. for maintaining human rights as a “central foundation of U.S. conventional arms export control law,” but it says that for an ATT to be useful, “a similarly robust standard” is necessary, especially one backed by the world’s largest exporter.⁸²

IV. Analysis

Not enough has been done in the international sphere. While there have been legitimate attempts to quell the illicit transfer of arms, they have been insufficient.⁸³ Previous attempts such as the Programme of Action have been voluntary, meaning the real culprits of discord and merchants of death have not been subjected to the terms. It is now time for the world to commit to a legally binding ATT that will foster national laws in accordance with international principles agreed to at the Arms Trade Treaty Convention in 2012.

A. A Legally Binding Arms Trade Treaty

By far, the most discussed issue in the preliminary stages of negotiations has been that the new treaty will be legally binding on the countries that ratify it, not simply politically binding as past agreements have been.⁸⁴ From the outset, the goal has been to write a “legally binding instrument negotiated on a non-discriminatory, transparent and multilateral basis, to establish common international standards for the import, export and transfer of conventional arms.”⁸⁵ The importance of a legally binding ATT with a broad, multilateral framework and clear, concise expectations cannot be overstated. These expectations and what transfers will fall within the grasp of the ATT must be made known internationally to minimize the number of illicit transfers. There must be no room to plead ignorance of the ATT.

⁷⁹ *Id.* at 25.

⁸⁰ *Id.*

⁸¹ AMNESTY INT’L, *supra* note 71, at 3.

⁸² *Id.*

⁸³ See background *supra* Part II.B.

⁸⁴ Orlovsky, *supra* note 35.

⁸⁵ G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

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B. The Scope of an Arms Trade Treaty

Two key issues are being contemplated for inclusion in the ATT though the details are not yet resolved. The first issue is what categories of weapons or items will be included on the list; the second issue is what types of activities and transactions will be included.⁸⁶

In regards to the first issue, a list of weapons must be included. The primary question is whether the list will be one that already exists, such as the list used by the U.N. Register of Conventional Arms, or if a new list will be created. The likely resolution is the use of an existing list with simply modifications as many of the lists include the obvious choices, leaving room for additions or subtractions.⁸⁷ However, one main concern raised by several countries is that this list should be unambiguous and to allow for easy updates so that new weapons can be incorporated.⁸⁸

Secondly, the scope of included activities and transactions must be determined. While a broad cross-section of activities and transactions is inherent in the goals of the ATT (“import, export and transfer”), most states desire something more definitive, expressing what each of those singular terms encompasses.⁸⁹ Other terms that have been suggested include: “brokering” (laws about who can broker and what can be brokered), “transit” (who is responsible for regulation – exporting country, transitional country, or importing country), “re-export” (guidelines for reselling arms and under what conditions this can be done), and “intangible transfers and licensed production” (trading of manufacturing knowledge or information).⁹⁰

C. Parameters for an Arms Trade Treaty

After the scope, the Group of Governmental Experts should discuss the parameters of arms transfers, specifically, what concerns the treaty should encompass when deciding whether to allow an arms transfer to a country.⁹¹ This will require a survey of the regional agreements and national laws in existence to develop a “best practice” idea to then be put in place on the international level.⁹² It will also require an ATT to take into account the current regional and international commitments, embargoes, and U.N. Charter and Security Council Resolutions so as not to create a situation where, by acting in accordance with the ATT, a country would violate duties owed in other circles.⁹³

The other major issue that must be considered when evaluating how far an ATT can reach is whether the exporter must evaluate the likely use of the weap-

⁸⁶ PARKER, *supra* note 56, at 12.

⁸⁷ *Id.* at 12-13.

⁸⁸ *Id.* at 13.

⁸⁹ *Id.* at 17.

⁹⁰ *Id.* at 18-21.

⁹¹ *Id.* at 21.

⁹² *Id.*

⁹³ *Id.* at 23-25.

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ons by the end user. The most obvious consideration is whether these weapons might end up in the hands of terrorist and organized crime groups. In that case, the exporter will be expected, if not required, to refrain from making an arms deal.⁹⁴ In the same vein, diversion during legitimate transport will have to be included as a subject, especially regarding who is responsible for shipments or when responsibility shifts (if it does as at all).⁹⁵ However, the GGE had not yet considered diversion, thus, it is an open issue. This concern has bled into a discussion on selling weapons to non-state actors and whether there should be a blanket ban on such transactions, though at this stage of an ATT, Parker believes this subject will be left to future treaties.⁹⁶

D. Country Considerations Based on Likely Use of Transferred Arms

In short, the use of transferred arms to commit human rights violations is the aspect where NGOs and the human rights movement hope an ATT would be most effective. The conclusion of an ATT will likely stem the flow of SA/LW, which, in the aggregate, do the most damage.⁹⁷

But how far can the treaty go? Several states suggested a method for assessing the level of risk when countries are being considered for a sale transfer of weapons, but there is no consensus.⁹⁸ The only sort of agreement that can be discerned at this point is to use the criteria established by the EU Code of Conduct on Arms Transfers, but its ability to be adapted to the world level may not prove so easy.⁹⁹ It will again be up to the U.N., much like with the earlier Register, to maintain a database that all countries will abide by. Finland suggested that the human rights bodies of the U.N., specifically The Human Rights Council, would be in charge of those determinations, but even that resolution might have issues depending on which country is a member of that committee at any given moment.¹⁰⁰

E. Country Considerations Based on Likely Impact of Arms Transfers

Many states went beyond the impact on individuals and human rights to express concern for the states where arms transfers may hinder broader sustainable development and regional stability. Both of these are complicated issues, mainly because an exporter of arms is not necessarily oblivious to either one. In regards to sustainable development, an ATT will likely address whether a country can export weapons to a country where purchasing of arms should not be at the top of the list on how they should spend money, but does the international community

⁹⁴ *Id.* at 25-26.

⁹⁵ *Id.* at 27.

⁹⁶ *Id.* at 29.

⁹⁷ Tauscher, *supra* note 8, ¶ 6, 9-11.

⁹⁸ PARKER, *supra* note 56, at 29.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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have the right to dictate such a judgment?¹⁰¹ Additionally, exporters do not take the monetary priorities of purchasing countries into account because their financial benefit is the same regardless of whether it is derived from a rich country or a poor one. Parker refrains from making a suggestion in her U.N. report because the topic is difficult to gauge based on the countries submitting views.¹⁰²

Again, a selling country would also likely have to make considerations based on regional stability; however, this is an inexact science because the country will not make decisions devoid of their own interest in regional power balances.¹⁰³ For instance, the United States may want to continue weaponizing the United Arab Emirates to have an ally in the Middle East with usable conventional weapons should Iran take action, or alternatively, the U.S. may continue selling aircraft and long-range weapons to South Korea in case North Korea takes military action. Parker writes that an ATT must have criteria for objectively assessing whether or not an arms transfer will have a destabilizing effect on a region.¹⁰⁴

The final consideration on impact of arms transfers is whether the exacerbation of an ongoing conflict will take place. Much like regional stability, exporters must consider the entire situation including neighbors of a country before they allow weapons systems to cross borders and potentially fuel arms races.¹⁰⁵

In the end, the considerations that the GGE must address require guidelines that are both specific enough to prevent misallocation of weapons and broad enough that they are adaptable as new situations arise. Although this is a difficult balance to strike, an effective treaty created with multilateral cooperation could save lives, ensure international human rights, and prevent further destabilization or exacerbation of regional conflicts.¹⁰⁶ The potential danger must be weighed against the legitimate defense needs, economic considerations of exporting countries, and the behavior of countries throughout transactions.¹⁰⁷

F. Range of Implementation Measures

As the U.N. General Assembly noted, “the political will of States to implement non-proliferation, arms control and disarmament obligations and commitments and to participate in the associated verification agreements. . . is crucial.”¹⁰⁸ Though it is helpful for a State to simply sign an international treaty, it is much more useful when the State ratifies it, incorporates it as a national law,

¹⁰¹ Note by the U.N. Secretary-General, *Verification in all its aspects, including the role of the United Nations in the field of verification*, 14, UN Doc. No. A/61/1028 (Aug. 15, 2007).

¹⁰² *Id.* at 32-33.

¹⁰³ *Id.* at 33.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 34.

¹⁰⁶ *Id.* at 32-34.

¹⁰⁷ *Id.* at 34-36.

¹⁰⁸ Panel of Government Experts, *Verification in all its aspects, including the role of the United Nations in the field of verification*, transmitted by letter July 30, 2007, from the Chairman of the Panel established pursuant to ¶ 3 of General Assembly resolution 59/60 (2004), ¶ 14, U.N. Doc. A/61/1028 (Aug. 15, 2007).

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and then follows through on that commitment “to share information, allocate resources, use available verification mechanisms and deal with cases of non-compliance.”¹⁰⁹

G. The Capacity to Implement an Arms Trade Treaty

In order for the ATT to take effect, it must be implemented, but this is not a simple task. The U.N. recognizes, and several states agree, that international cooperation and assistance will be vitally important.¹¹⁰ This means that countries must be responsive to one another, allowing the exchange of information, creation of border control procedures, and collaboration in educating, training, and offering legal assistance to other nations.¹¹¹ No country is likely in a better position to assist than the United States, which already has similar mechanisms in place with personnel capable of handling the new procedures.

Another place developing states will look for assistance with implementation is through the approval and publishing of detailed implementation guidelines as part of the ATT.¹¹² Approving states were apathetic as to whether this was in the form of a checklist or standard form to be submitted, they simply wanted a known set of guidelines so that implementation, application and problem resolution took place similarly in one country to the next, allowing for better understanding and more effective evaluation of pending transfers.¹¹³ In addition, a more controversial topic, but most likely one that would set this treaty apart from previous agreements is the desire for included recommendations for national legislation.¹¹⁴ For example, these recommendations include: suggestions for penal and administrative sanctions for non-compliance; licensing systems that require licenses for the export, import, and international transit of conventional arms; marking of all SA/LW so that international tracing requirements can be met; record-keeping for accurate compliance with external obligations; and establishing a national agency in each country to oversee all of these different aspects.¹¹⁵

H. Transparency and Accountability

One of the major problems with past international weapons transfer protocols was that they did not increase transparency in the area.¹¹⁶ Without transparency, accountability suffered and those agreements were viewed as unsuccessful.¹¹⁷ In fact, individual national desire for increased accountability has kept the ATT on

¹⁰⁹ *Id.*

¹¹⁰ PARKER, *supra* note 56, at 37.

¹¹¹ *Id.* at 37-38.

¹¹² *Id.* at 38-39.

¹¹³ *Id.*

¹¹⁴ *Id.* at 39.

¹¹⁵ *Id.* at 38-39.

¹¹⁶ Carneiro, *supra* note 17, at 490-491.

¹¹⁷ *Id.* at 493; *see also* Background *supra* Part II, B.

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the bargaining table for so long.¹¹⁸ Therefore, the most prevalent suggestion for an ATT is a method for sharing information, including whether transfers were denied or approved, information on authorized dealers, producers and carriers, technical information to prevent illicit arms manufacturing and movement, experience and expertise, and information on national regulations.¹¹⁹ Another possibility is the use of a mandatory reporting mechanism, as opposed to a voluntary one used by the U.N. Register.¹²⁰ While this may take the form of an international database maintained by the U.N., that question is up for debate and consideration by the GGE.

I. The Problem of Compliance Mechanisms

Arguably the most challenging issue that any legally binding treaty must address is compliance and enforcement. Many states will not appreciate being questioned about their level of commitment and might not be willing to accept such an intrusive verification mechanism.¹²¹ Parker suggests several possibilities for verification, including, allowing a secretariat or other state party to request clarification, a request-and-respond system that could lead to a fact-finding mission, and/or a requirement for interstate communication prior to a request for clarification with a provision for on-site inspection.¹²² However, all of these appear to have drawbacks, as some countries will target others to the point where they might withdraw or disavow the treaty. The best solution is the final one suggested by Parker's report: an international roster of trained auditors to carry out spot checks on states' submissions to a register.¹²³ This method will ensure that all countries are participating fairly without the added necessity of accusations and alienation.

The other compliance problem is enforcement. The enforcement problem has two prongs: first, who will do the compliance monitoring, and second, if a country is found to be in violation of the treaty, what penalties are available?

When it comes to a monitoring organization, the best suggestion is for a U.N. body to be created or have the responsibility be added to an existing organ. One country suggested that the Security Council essentially govern the entire process: have it be in charge of investigating, penalizing and enforcing the penalization, even though this will be a continued topic of debate throughout the treaty's development.¹²⁴

In regards to consequences for nations who violate the treaty, the most popular suggestion has been to institute either import-export embargoes or U.N. Security

¹¹⁸ *Id.*

¹¹⁹ PARKER, *supra* note 56, at 40-41.

¹²⁰ *Id.* at 41.

¹²¹ *Id.* at 47-48.

¹²² *Id.* at 48-49.

¹²³ *Id.*

¹²⁴ *Id.* at 48.

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Council sanctions.¹²⁵ However, either option appears to lack support in practice as studies have suggested that U.N. arms embargoes have done little to stem the flow of weapons to target countries with few countries effectively enforcing the embargoes or sanctions.¹²⁶ Other suggested consequences for violations are financial penalties for misconduct or a lack of oversight, or temporary restrictions and/or prohibitions on trading arms for gross failures.¹²⁷ The question is far from settled, but the U.S. could affect its resolution because their opinion is valuable as a major player in both arms exportation and U.N. enforcement mechanisms.

V. Proposal

The United States should support and actively work for the development of the United Nations Arms Trade Treaty. The ATT can be utilized to further several U.S. goals, including winning the global war on terror, preventing nations such as Iran and North Korea from building weapons stockpiles, strengthening current alliances and winning new allies in countries in need of regulatory aid, and making strides in the fight for human rights.

A. The War on Terror

The U.S. recognizes what is at stake in the negotiation of an effective, binding, high-standard ATT. Ellen Tauscher, Under Secretary of State for Arms Control and International Security stated:

The arms trade treaty negotiations will likely be long and difficult. Some participants will be tempted to take the easy road of seeking the lowest common denominator just to get a quick agreement from those states who would like to continue to support. . .directly or indirectly. . .terrorists, pirates and genocidal warlords for a quick profit or short-term advantage.¹²⁸

Tauscher's words articulate the first goal that America could potentially reap in an ATT: the world could see fewer terrorists equipped with the weapons that make them most dangerous. SA/LW that fuel insurgency would no longer be available as widely on the black market. In short, the advantages of a regulated world arms trade begin with the advantages the entire world can enjoy: safety and security.

Additionally, Tauscher commented, "For the [ATT] to be effective at thwarting irresponsible transfers, it must ensure that members effectively implement national laws that criminalize such transfers and allow for the monitoring of commerce."¹²⁹ America is in a spectacular position to affect the ATT despite their

¹²⁵ *Id.*

¹²⁶ Michael Brzoska, *Putting More Teeth in U.N. Arms Embargoes*, in SMART SANCTIONS: TARGETING ECONOMIC STATECRAFT 132 (David Cortright & George Lopez eds., 2002).

¹²⁷ PARKER, *supra* note 56, at 48.

¹²⁸ Tauscher, *supra* note 8.

¹²⁹ *Id.*

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image being tarnished by ongoing regional conflicts recently in the international community because the U.S. is still seen as a beacon of hope by many downtrodden people.

B. Prevention of Rogue States Obtaining Weapons

Iran and North Korea present a problem, but not one that is unique to world power politics of the 20th and 21st centuries. Those two countries pose a legitimate threat to neighboring countries when it comes to exacerbating regional conflict or even starting one because they have proven willing to engage in inflammatory discourse and, on a small-scale, actually take military or covert action. Therefore, the more widespread the international pressure, the more likely countries will abide by their commitments, and the more difficult it will become for rogue states to obtain weapons.¹³⁰

The U.S. may in fact be able to more closely monitor what exports and imports are going in and out of those countries. If the ATT develops an effective mechanism for monitoring, the world will better be able to see what types of armaments are being traded in the region, even tracing some of them to black markets and into the countries where they are not supposed to be.

C. Strategic Alliances

If the U.S. demonstrates its commitment to all stages of ATT development and negotiations, other countries, especially those dependent on America for trade or other aid, will more likely be party to the Treaty. Countries understand that if they take a risk by not signing the Treaty, the U.S. could limit trade and weapons exports to that country, thereby leaving them in a vulnerable position.¹³¹ Also, if the U.S. decides to limit aid to non-signatory countries, other allies may follow. The U.S. must understand and utilize its position and ability to control what might be viewed as a watershed effect. If the United States participates, their allies and their allies' allies will see the benefit in participation and ratification of an ATT, but if the United States allows the Treaty to simply continue without an active role, the entire process might be undermined.¹³²

The U.S. must take a hardline stance, but must also be willing to help those nations that may not be able to afford participation from the start. Tauscher noted that if a country does not have the resources to implement safeguards in their own country, then the international community will have to step up and make available the necessary resources.¹³³ There is no better way to lead than by example, so if the U.S. were to provide resources such as funding and training to back the new treaty and its implementation, while making clear that those who

¹³⁰ Tauscher, *supra* note 8.

¹³¹ David Kopel, Paul Gallant, Joanne D. Eisen, *The Arms Trade Treaty: Zimbabwe, The Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 144 PENN ST. L. REV. 891, 935-936 (2010).

¹³² Clinton, *supra* note 6.

¹³³ *Id.*

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participate will be rewarded and those who do not may face economic consequences, America may succeed in garnering significant support for an effective, legally binding ATT.

D. Human Rights

The U.S. maintains a pledge to aid human rights victims, thus participation in an ATT takes that pledge one step further by taking steps to prevent human rights crimes that victimize innocent people. Tauscher noted, “[t]he treaty is worth doing because it can have, unlike many things we do, a more immediate impact. Lessening the arms trade can lead to less killing and maiming.”¹³⁴

However, the biggest issue lies in getting the countries that speak about aiding human rights to actually follow through with their commitments.¹³⁵ Contemporary history shows that countries with little or no intent to comply with human rights initiatives are more than willing to sign any treaty, knowing that there is nothing in their home country that will require fulfillment of their promises.¹³⁶ This will be an incredibly difficult issue, but the U.S. must not be deterred. Instead, the U.S. must hope and understand that increased political pressure can bring about positive change elsewhere.

The United States must demand that the highest ethical standards are included in the treaty in order to garner support, and make a pledge to abide by them. By doing this, NGOs will support the treaty more fully, and those NGOs, despite not having political power, have been able to harness valuable voices through the arena of public opinion. Governments often find it hard to ignore their own people when they are calling for a new program or assistance, therefore, with the backing of NGOs, States will hear the call for an ATT and hopefully answer in the affirmative.

VI. Conclusion

The United States should fully support the writing and development of the Arms Trade Treaty, while garnering allies to ensure the eventual effectiveness. The U.S. can utilize this opportunity to further national goals such as the war on terror, specifically stemming the tide of illegal weapons into the hands of terrorists and militants who seek to injure Americans, their allies, and other peaceful nations. However, the U.S. will likely have to keep an open mind, monetary resources available, and political will to achieve the “strong and robust” treaty it desires.¹³⁷

It will be important for the White House and State Department to channel resources and open lines of communication to allies around the world to garner support for the ATT. The ATT can provide another avenue for pursuing international peace, fighting the war on terror, leading the battle for human rights, and

¹³⁴ *Id.*

¹³⁵ Kopel, *supra* note 131, at 909.

¹³⁶ *Id.*

¹³⁷ Clinton, *supra* note 6.

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strengthening alliances through diplomatic means while actual armed conflict winds down under the Obama administration. The wars in Iraq and Afghanistan have lasted longer than anyone might have guessed in 2001; therefore upping the ante in the diplomatic fight against terrorism could save more lives both within the army and civilian populations.

The ATT is an opportunity for the world to begin to control and diminish a problem that has caused great atrocities and continues to plague third world countries. If the U.S. is actively involved, other countries are likely to follow.