

**DRAFT**

## **SHOULD THE UNITED STATES UNSIGN THE ARMS TRADE TREATY?**

Jeff Moran

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*Comment: This was published as a draft paper intended for wide review and comment. The original version was published on 25 July 2013 and has been updated to reflect events. The thrust of the article is to argue that if the Arms Trade Treaty (ATT) is a gateway for transnational small arms control and disarmament, and small arms related problems have less to do with inadequate international transfer controls and more to do with controlling small arms already within State territories, perhaps the US should not have signed the ATT after all, and that a strong case can be made for unsigning it, eventually. Feedback would be much appreciated and will help shape ongoing work to develop and explore this area of legal research, please see author contact information in the Notice section of this paper.*

SHOULD THE UNITED STATES UNSIGN THE ARMS TRADE TREATY?

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## SHOULD THE UNITED STATES UNSIGN THE ARMS TRADE TREATY?

### Introduction

On September 23, 2013 American Secretary of State John Kerry signed the Arms Trade Treaty. Just a few months prior to this, on June 20, Ambassador Roberto Moritán (Argentina), the former President of the 2012 UN Arms Trade Treaty (ATT) Conference and Chairman of the pre-negotiations process, spoke as part of a public briefing on the ATT at the United Nations in Geneva titled “The Arms Trade Treaty: Past, Present, Future.”<sup>1</sup> This was an important briefing that set the tone for the future with respect to the ATT.

Amb. Moritán explained the ATT should not be seen as a static treaty, like others within the traditional arms control and disarmament field. Instead, he explained that the ATT is best understood as an ongoing process and a framework...dynamic and expandable with amendments and additional protocols perhaps. Additional protocols were understood to mean distinct treaties negotiated in addition to the ATT. An example of a disarmament treaty with additional protocols of would be the 1980 Convention on Certain Conventional Weapons.<sup>2</sup>

Expanding on this theme, Amb. Moritán stated the current “scope,” “parameters,” and “criteria” within the existing treaty “need additional negotiation.” In particular, he said the scope of the treaty should be expanded over time in light of technological developments, and cited scientific achievements in robotics as one reason for this. He concluded by stating

***“the ATT has to lead to negotiations in conventional weapons. Negotiations of conventional weapons cannot continue to be a taboo in the United Nations.”***

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### The ATT and the Future of Small Arms Control

If the ATT is to become a broader framework for ongoing negotiations on conventional arms control and disarmament, it is only a matter of time before the volume of the UN small arms control discussion turns up. This was hinted at during presentation that followed Amb. Moritán given Sarah Parker of the Small Arms Survey, the UN's go-to resource for small arms control research and policy development.<sup>3</sup>

Ms. Parker presented a PowerPoint version of a report she published earlier this month called: "The Arms Trade Treaty: A Step Forward in Small Arms Control?"<sup>4</sup> She explained in her report that while "the ATT has contributed several missing pieces to the framework of controls governing the international transfer of small arms," it nonetheless has "provisions that are, in many cases, weaker than existing commitments on small arms transfers agreed more than a decade ago." She also confirmed to those present that deliverables from a separate UN project to write and promulgate International Small Arms Control Standards (ISACS) would be "of value" in future discussions to amend the ATT but did not elaborate.

Three take-aways from the briefing with respect to small arms: the ATT needs more work with respect to controlling and documenting international small arms transfers at the very least, and the UN ISACS are likely to be valuable tools for transforming the ATT into a more robust binding instrument of small arms control going forward.

But normative developments within the ATT and broader small arms process framework will not likely be limited to controlling and documenting international small arms transfers. Given the history of the ATT negotiations and the small arms process, restrictions on transfers of small arms to "non-state actors" or "private actors" (diplomatic homonyms that often mean rebel groups, private corporations, or individuals) will probably reappear on the UN agenda through implementation and expansion of the ATT and other aspects of the global small arms control framework. So might global restrictions in the form of national controls on civilian access or even outright prohibitions on civilian possession of certain types of small arms.

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### The Link to Transnational Gun Control

In this direction, a coalition of UN agencies and contracted small arms control advocates have been quietly developing a series International Small Arms Control Standards (ISACS) since 2008.<sup>5</sup> Some ISACS were released last year, but Patrick McCarthy, the project's coordinator, reports the remaining ones will be released this year.<sup>6</sup> Privately, diplomats estimate that many states hope a critical mass of these standards will become the basis for future negotiations to amend the ATT. It is understood that this would be an example of UN inter-agency transnational smalls policy making which could be fed into the ATT framework six years after the instrument enters into force, and during meetings of States Parties every third year thereafter. Decisions on amendments will not be made by consensus, but through a three-fourths majority vote of States Parties in the room.<sup>7</sup>

Two ISACS are thought to be of particular interest to those seeking to amend the ATT. The first is ISACS number 03.20, "National Controls Over The International Transfer Of Small Arms And Light Weapons."<sup>8</sup> Among other things, 03.20 has a provision that prohibits international transfers to private actors without "end-user certification." The second is ISACS number 03.30, "National Controls Over the Access of Civilians to Small Arms and Light Weapons."<sup>9</sup> Among other things, 03.30 requires national registration of firearms and owners, prohibitions on civilian possession of certain weapons Americans can already legally and legitimately possess with appropriate federal transfer application, even has language advocating for national home inspections of private gun collections for safety compliance.<sup>10</sup> This second standard was written by Dr. Ed Laurance,<sup>11</sup> who is a former strategic planner for IANSA. IANSA stands for the International Action Network on Small Arms, which, according to page three of its foundation document, is committed to "reducing the availability of weapons to civilians in all societies."<sup>12</sup>

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### The Basis for American Stakeholder Concern

Setting aside arguments that the ATT undermines independent, constitutional, and democratic sovereignty by promoting supranational global governance, the main concern of American non-profit and charitable groups representing industry, collector, sporting, and pro-gun civil rights/human rights groups is that the formula of ATT + ISACS equals transnational gun control policy making. The outputs of this project are seen as troublesome in that they will initially conflict with but may become persuasive if not controlling within in domestic judicial and regulatory contexts over time, even if the ISACS are rejected formally as ATT amendments by the United States. This concern is validated by the way the ISACS project itself has been executed. In short, the methodology has created a crisis of confidence that may precipitate disruptive political blow-back.

For example, the Small Arms and Ammunition Manufacturing Institute (SAAMI), a long-time bona fide international standards setting body itself, publicly condemned the ISACS project and withdrew from it in March 2012 after working in good faith. According to SAAMI's nine-page public statement, the ISACS project does not follow accepted practices in international standards development. The report provided detailed examples of five "breaches in standard-setting protocols."<sup>13</sup>

Independent research<sup>14</sup> by this author suggests that the ISACS project may become better known as case example of troubled transnational lawmaking within UN inter-agency settings. Interviews and project document analysis reveal that the ISACS project does appear to have operated at variance with two principles of international standards development as set forth by the International Organization of Standardization (ISO).<sup>15</sup> These two principles require 1) global multi-stakeholder engagement and 2) decision making by consensus. What the ISACS project appears to have done is exclude entire segments of civil society in some developed countries because they have happen to have more favorable assumptions about the value of small arms in civil society. A key lesson for this is that normative ambitions in UN project settings can and do compromise accepted principles of international standards development and undermine confidence among stakeholders, and that this will drive predictable political consequences with potentially wide-ranging implications.

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### The Future UN Small Arms Control and Disarmament Agenda

If the ATT negotiations to date and the 112 signatories to the 2006 Geneva Declaration<sup>16</sup> offer any indicators, most if not a three-quarters majority of UN member states would endorse today “private actors,” “end-user certification,” and “civilian access” appearing on the UN’s small arms control and disarmament agenda with respect to the ATT. This would of course include the “two pillars” of gun control sought by international activists around the world: 1) national registration of all firearms, and 2) national licensing of all owners.<sup>17</sup> In fact, Ms. Parker, along with her colleague Markus Wilson, even suggest in their UN small arms [transnational legal] process guide for diplomats<sup>18</sup> that prohibitions on transfers to private or non-state actors and on civilian possession would have already become established international norms by now were it not for the singular opposition of the United States during the 2001 UN Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA).<sup>19</sup>

Of course, there are admirable elements of the ATT like the aspiration to establish badly needed export controls with respect to conventional weapons in States currently lacking them. Other admirable elements include injecting appropriate humanitarian criteria into exporting State decision making where such criteria are missing or weak. But an ATT is not necessary for states to enact these sorts of national rules on their own if they really are priorities. Moreover, as approved by the UN General Assembly on April 3<sup>rd</sup> this year, the ATT clearly seems off target with its focus on global governance when the actual problems associated with small arms in civil society are isolated to local governance deficiencies in a relatively small number of seriously affected states. Even Sarah Parker has finally admitted in the conclusion of her aforementioned report:

***"Small arms related problems have less to do with inadequate international transfer controls and more to do with controlling small arms already within [state] territories."***

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Ms. Parker's remark is supported by solid research making the stronger point that, in fact, for most countries around the globe, particularly for most developing or fragile states, a combination of deficient domestic regulation of legal firearms possession with theft, and loss or corrupt sale from official inventories is a more serious problem than illicit trafficking across borders.<sup>20</sup> Though the timing of Ms. Parker's acknowledgement after the conclusion of the 2013 ATT negotiations may raise ethical questions to some, her acknowledgement should be nonetheless welcomed in the spirit of it being better late than never.

This all being said, can one seriously deny at this point that the ATT as approved by the UN General Assembly is also a giant milestone towards global governance in the sphere of national small arms controls and civil disarmament, toward “reducing the availability of weapons to civilians in all societies?” The truth is that a legally binding ATT, among other things, can and most likely will be revised and expanded to substantially achieve all that the politically-binding PoA was hoped to achieve but hasn’t, and then some.

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### Conclusion and Next Steps?

At bottom, if the United States already is the "gold standard" in terms of export controls, already applies humanitarian criteria in international weapons transfers, and a majority of states currently do not, why again was it so imperative the US sign the ATT? Why, especially given the transnational implications and the evidence about the UN's ISACS project.

Sarah Parker herself clearly suggests that if we are truly concerned about the adverse impact of small arms in states most afflicted by them, it makes much more sense to focus on building capacity for good local governance than by striving for more global governance through an open ended gateway treaty for controversial transnational civilian gun control. It would seem that the true humanitarian priority should be focused on root causes of armed violence in especially afflicted developing or fragile states, namely, the lack of rule of law, weak if not incompetent local governance, corruption, and deficient controls over government stocks of small arms and light weapons.

Some key diplomats suggest the US signature was necessary to create a symbolic demonstration of communitarian international engagement, and that this would help encourage other key abstaining states (e.g. Russia, China, India, etc) to do the same. This might still be conventional thinking, but it hasn't had the intended effect. What's more, if the terms for signing and ratifying the ATT include a balloon payment 6 years after entry into force leading to a roll-back of American industry, collector, sporting, hunting, and civil arms rights and privileges, perhaps the US really ought not to have signed the treaty. Perhaps the next President of the United States would be wiser to unsign the treaty as was done for the Rome Statute of the International Criminal Court.<sup>21</sup>



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#### Notices

**Acknowledgements:** Many individuals must be thanked for their contributions to this draft paper. This paper would not have been possible without their candor and patience. Because of the sensitivity and the in-progress nature of the topic, and the relatively small size of the world that is the small arms control, some individuals consulted requested their inputs be on a not-for-attribution basis. This was to minimize any adverse impacts on their personal and professional lives.

**Author:** Jeff Moran is a consultant and project executive with TSM Worldwide LLC. He wrote this when engaged in international legal and corporate sustainability work based in Geneva, Switzerland. For more information about TSM Worldwide LLC and Jeff Moran, please visit the company [website](#). Please send any feedback or questions to: [info@tsmworldwide.com](mailto:info@tsmworldwide.com)

**Disclosure:** This draft paper evolved from academic and business research. The views are the author's alone. This draft paper was not intended as legal counsel. It was written independently without any special remuneration from any individual or organization. TSM Worldwide LLC did provide leave time off and computing and storage resources toward the completion of the author's ongoing research.

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#### End Notes

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<sup>1</sup> The author attended this public meeting. The agenda for this program is here: [http://tsmworldwide.com/wp-content/uploads/2013/06/Agenda\\_June20\\_Geneva.pdf](http://tsmworldwide.com/wp-content/uploads/2013/06/Agenda_June20_Geneva.pdf). The final and preceding drafts of the Arms Trade Treaty are available here: <http://tsmworldwide.com/?p=1434>. An audio file for the first part of the June 20 briefing is available here: [http://tsmworldwide.com/?attachment\\_id=1807](http://tsmworldwide.com/?attachment_id=1807)

<sup>2</sup> See [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument)

<sup>3</sup> The Small Arms Survey, [www.smallarmssurvey.org](http://www.smallarmssurvey.org), was founded by Dr. Keith Kraus in 2001 as a NGO research center. Dr. Krause's contact information and CV are here: [http://tsmworldwide.com/wp-content/uploads/2013/07/CV-Krause\\_2012.pdf](http://tsmworldwide.com/wp-content/uploads/2013/07/CV-Krause_2012.pdf). There are approximately 40 individuals listed as staff or consultants on the Small Arms Survey's website: <http://tsmworldwide.com/wp-content/uploads/2013/07/Small-Arms-Survey-Staff.pdf>. Ms. Sarah Parker is one of five Senior Researchers on staff.

<sup>4</sup> See <http://tsmworldwide.com/wp-content/uploads/2013/06/SAS-Research-Note-30.pdf>

<sup>5</sup> See <http://smallarmsstandards.org/>

<sup>6</sup> This author interviewed Patrick McCarthy two times in May – June 2013.

<sup>7</sup> Amendments are specifically addressed in Article 20 of the ATT text. Amendments are not automatically binding on all signatories to the ATT, a State must sign and ratify amendments to be bound by them.

<sup>8</sup> See draft ISACS here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.20.pdf>

<sup>9</sup> See draft ISACS here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.3.pdf>

<sup>10</sup> For a detailed summary of this some of the problematic aspects of this ISACS see: [http://tsmworldwide.com/selected\\_isacs/](http://tsmworldwide.com/selected_isacs/)

<sup>11</sup> For professional biographic information see: <http://tsmworldwide.com/wp-content/uploads/2013/06/Edward-J.pdf>

<sup>12</sup> Foundation document here: [http://tsmworldwide.com/wp-content/uploads/2013/06/IANSA\\_Founding\\_Document.pdf](http://tsmworldwide.com/wp-content/uploads/2013/06/IANSA_Founding_Document.pdf)

<sup>13</sup> See <http://tsmworldwide.com/wp-content/uploads/2013/07/SAAMIMinorityReportISACSFinal.pdf>

<sup>14</sup> See draft paper on the ISACS project here: <http://tsmworldwide.com/draft-paper-released-for-review-comment/>

<sup>15</sup> The principles are here: [http://www.iso.org/iso/home/standards\\_development.htm](http://www.iso.org/iso/home/standards_development.htm)

<sup>16</sup> The Geneva Declaration is an affinity group of 112 states that have signed pledges to advocate for global small arms controls. For more information: <http://tsmworldwide.com/wp-content/uploads/2013/06/GD-Declaration-091020-EN.pdf>

<sup>17</sup> See comments of Phil Alpers of FirearmsPolicy.org, an Australian research group working in partnership with the Small Arms Survey. His views on the “two pillars of gun control” were discussed with the Huffington Post in December 2012. [http://tsmworldwide.com/wp-content/uploads/2013/07/HuffingPost\\_AmericanOutlierOnRegistrationOfGuns+Owners.pdf](http://tsmworldwide.com/wp-content/uploads/2013/07/HuffingPost_AmericanOutlierOnRegistrationOfGuns+Owners.pdf)

<sup>18</sup> See the guide here: <http://tsmworldwide.com/wp-content/uploads/2013/06/SAS-HB2-Diplomats-Guide.pdf>

<sup>19</sup> The PoA is a politically binding as opposed to a legally binding instrument. See the website for the PoA here: <http://www.poa-iss.org/poa/poa.aspx>

<sup>20</sup> A possible reason for the timing of her remarks might be due to her having been an advisor to the Australian ATT delegation, and the 2013 Final ATT Conference being led by the Australian Ambassador Peter Woolcott, who is posted in Geneva, where Ms. Parker works at the Small Arms Survey. President Bill Clinton signed the Rome Statue establishing the International Criminal Court on his last day in office in January 2001.

<sup>21</sup> President Bill Clinton signed the Rome Statue establishing the International Criminal Court on his last day in office in January 2001. His successor, President George Bush, effectively unsigned the treaty months shortly before the treaty came into force in July 2002. This was accomplished by delivering a note to the UN Secretary General signed by then US Ambassador to the United Nations John Bolton.