

Executive Summary Background

No. 2309
August 24, 2009



Published by The Heritage Foundation

The U.N.'s Arms Trade Treaty: A Dangerous Multilateral Mistake in the Making

Ted R. Bromund, Ph.D., and Steven Groves

On October 31, 2008, the U.N. General Assembly voted 145 to 2 with 18 abstentions for a resolution entitled “Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms.” The two nations voting against the resolution were the United States and Zimbabwe. The October resolution envisions a “legally binding treaty” that creates “common international standards” for “the import, export and transfer of conventional arms,” including small arms and light weapons.

The U.S. should continue to oppose any treaty based on the October resolution. Although putatively intended as an arms control measure that would reduce conflicts and limit the ability of terrorists and organized crime to obtain weapons, the treaty contemplated by the resolution would in reality be a license to almost all states, no matter how irresponsible, to buy and sell arms. The projected treaty would endanger U.S. arms export control policy, clash with the Constitution, offer a dangerous justification for dictatorial rule, and make it illegal under international law for the U.S. to support freedom fighters abroad.

The “growing global consensus” rhetoric that the treaty’s backers use to characterize its goals makes it unwise for the U.S. to ignore the campaign for the treaty. If the U.S. ignores it, the treaty will be drafted and adopted based on the October resolution. The treaty will then be established as another destructive precedent in multilateral arms control and a “norm”

for sympathetic lawyers and judges in the U.S. to draw upon and thereby subvert U.S. sovereignty.

The U.S. should act now to clearly establish its opposition to the projected treaty and should work to bring other, more creditable states to its side.

What the U.S. Should Do. The United States needs to take a measured approach to the upcoming negotiations of the proposed arms trade treaty. While the U.S. should continue to participate in the New York–based working group, it should not allow this participation to be mistaken for acquiescence in or agreement with the discussions or any resulting treaty.

The U.S. should judge the acceptability of any treaty that emerges by the following tests and should refuse to sign any treaty that does not meet all of them:

- Does the treaty recognize the legitimacy of nationally declared arms embargoes and, more broadly, avoid enshrining lowest-common-denominator standards?
- Does the treaty contain an agreed definition of terrorism that differentiates between terrorism

This paper, in its entirety, can be found at:
www.heritage.org/Research/InternationalOrganizations/bg2309.cfm

Produced by The Margaret Thatcher Center for Freedom

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

and armed rebellion against tyrannical and oppressive regimes that do not respect the inherent right of self-government?

- Does the treaty clearly and unconditionally respect the rights of the private citizens of member states to keep and bear arms?
- Does the treaty avoid establishing a right to buy and instead leave this question as a matter for customary international law?
- Is membership in any monitoring body established by the treaty restricted to law-abiding states that have a strong and consistent record of controlling the transfer and sale of arms to terrorists and repressive regimes?
- Do the terms of the treaty expressly state that it is not self-executing?
- Do the terms of the treaty expressly exclude rights of individuals and private entities to sue to enforce the treaty, to assert rights under the treaty, or to use its provisions as a defense against prosecution?

The U.S. can and should seek to advance the control of the international import, export, and transfer of conventional weapons through means that are less dramatic but more effective than the projected U.N. treaty. To this end, the U.S. should:

- Seek to use the largely inactive framework of the U.N. disarmament organization in Geneva as a good-offices organization in times of regional crisis to bring regional states together and to negotiate small, geographically limited treaties to address particular issues.
- Seek to secure adoption of a U.N. Security Council resolution requiring all U.N. member states to have strong laws against internal diversions from government stockpiles to terrorists. The U.S. already has such laws and could work with other responsible states to supply technical and expert assistance to states that are genuinely interested in reducing potential terrorists' access to arms.

- Work through suppliers groups—such as the member states of the Wassenaar Arrangement, the existing multilateral forum for export controls on conventional weapons and dual-use goods and technologies—to build up a body of knowledge and practice for use by all states that desire to improve their export and transit controls.
- Draw on the Proliferation Security Initiative model to promote expanded international monitoring of the sale, purchase, and transfer of conventional arms.

Conclusion. The purported goal of the U.N. arms trade treaty is to keep guns out of the hands of terrorists and organized criminals and to reduce conflict. These are worthy endeavors and should have the support of the United States and its democratic allies around the world.

However, a treaty based on the October 2008 arms trade resolution will not achieve these ends. Instead, it will further enable dictators and unscrupulous suppliers—including some European suppliers—to buy and sell arms. It will also provide a justification under international law for dictatorships to oppress their people.

Any U.N. treaty based on the October resolution that seeks to control the import, export, and transfer of conventional weapons will fail and, in failing, exacerbate the existing evils. If all U.N. member states were serious about its aims, no new treaty would be necessary. The unwillingness of the treaty's supporters to face this reality is the best evidence that the treaty is based on destructive illusions and will be a dangerous failure in practice.

—*Ted R. Bromund, Ph.D., is Senior Research Fellow and Steven Groves is Bernard and Barbara Lomas Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.*

Background

No. 2309
August 24, 2009



Published by The Heritage Foundation

The U.N.'s Arms Trade Treaty: A Dangerous Multilateral Mistake in the Making

Ted R. Bromund, Ph.D., and Steven Groves

On October 31, 2008, the U.N. General Assembly voted 145 to 2 with 18 abstentions for a resolution entitled “Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms.”¹ The two nations voting against the resolution were the United States and Zimbabwe. The October resolution envisions a “legally binding treaty” that creates “common international standards” for “the import, export and transfer of conventional arms,” including small arms and light weapons.

The U.S. should continue to oppose any treaty based on the October resolution. Although putatively intended as an arms control measure that would reduce conflicts and limit the ability of terrorists and organized crime to obtain weapons, the treaty contemplated by the resolution would in reality be a license to almost all states, no matter how irresponsible, to buy and sell arms. The projected treaty would endanger U.S. arms export control policy, clash with the Constitution, offer a dangerous justification for dictatorial rule, and make it illegal under international law for the U.S. to support freedom fighters abroad.

The “growing global consensus” rhetoric that the treaty’s backers use to characterize its goals makes it unwise for the U.S. to ignore the campaign for the treaty. If the U.S. ignores it, the treaty will be drafted and adopted based on the October resolution. The treaty will then be established as another destructive precedent in multilateral arms control and a “norm”

Talking Points

- Treating arms control as a human rights issue will result in a rushed and unenforceable treaty, which will further endanger international peace and security.
- The projected U.N. arms trade treaty would create a “right to buy” that would further enable dictators to buy arms and inhibit U.S. enforcement of U.S. arms embargoes.
- Because most U.N. members are not democracies, the monitoring and enforcement of any universal treaty will inevitably be perverted by the same states that currently arm terrorist groups and repressive regimes.
- The U.S. should not accept a U.N. arms trade treaty that does not acknowledge the individual’s right to keep and bear arms and the right of armed rebellion against tyranny.
- The U.S. can and should take constructive measures to control the international trade in conventional weapons, but signing the projected U.N. arms trade treaty is definitely not one of them.

This paper, in its entirety, can be found at:
www.heritage.org/Research/InternationalOrganizations/bg2309.cfm

Produced by The Margaret Thatcher Center for Freedom

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

for sympathetic lawyers and judges in the U.S. to draw upon and thereby subvert U.S. sovereignty.

The U.S. should act now to clearly establish its opposition to the projected treaty and should work to bring other, more creditable states to its side.

Background

The October 2008 vote followed a U.N. General Assembly vote in December 2006 to create the U.N. Group of Governmental Experts to explore a possible treaty on the global arms trade and six years of agitation by the Control Arms campaign, which is run jointly by Amnesty International, the International Action Network on Small Arms, and Oxfam International.² More broadly, it is the culmination of a post-Cold War crusade against the global trade in small arms.

After several years of academic conferences and campaigns by nongovernmental organizations (NGOs), U.N. Secretary-General Boutros Boutros-Ghali brought the movement to the U.N. in 1995 when he encouraged states to focus on “the weapons that are actually killing people in the hundreds of thousands.”³ Kofi Annan, the next U.N. Secretary-General, reinforced the campaign in 2000 by calling for a worldwide effort to prevent war by reducing the “illicit transfers of weapons, money, or natural resources” that he argued help to fuel conflicts.⁴

The Campaign’s Five Flawed Premises

The campaign was founded on five flawed premises that continue to be influential today.

First, the campaigners argue, as Boutros-Ghali implied, that small arms are responsible for most of the deaths in the contemporary world’s wars. With

the end of the Cold War, the campaigners came to believe that the time had come to turn the focus of arms control away from weapons of mass destruction to small arms, which previously had seemed less important.

This argument is based on the misconception that the world’s states are as seriously interested in controlling small arms as the superpowers were in controlling nuclear weapons during the Cold War. This argument is based ultimately on the belief that the end of the Cold War, by eliminating the antagonism between the West and the Communist bloc, has brought an opportunity for universal cooperation. This belief is regrettably incorrect. The divide between East and West, while obviously fundamental, was not the only source of conflict in the world, and the collapse of Communism has done nothing to end many other political, ethnic, religious, social, and cultural clashes.

Second, as Annan implied, the campaign is based on the argument that the small-arms trade is responsible for fuelling and even causing wars. Because of the dominant role of Western NGOs in the campaign against the arms trade, the greater transparency of Western governments, and the broad tendency of the NGO community to blame the West for the ills of the rest of the world, this argument tends to focus on the West’s supposed responsibility for this trade while minimizing or ignoring the far greater responsibility of non-Western states.

More broadly, the argument expresses the venerable liberal misconception that weapons cause wars. This naïve assertion was a feature, for example, of the campaign against the “merchants of death” who were supposedly responsible for the First World

1. U.N. General Assembly, “Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms,” U.N. Document A/C.1/63/L.39*, October 17, 2008.
2. U.N. General Assembly, “Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms,” U.N. Document A/63/334, August 26, 2008, and Control Arms, “Campaigning to Control the Arms Trade,” 2008, at <http://www.controlarms.org/en/about-us> (May 7, 2009).
3. U.N. Secretary-General, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, U.N. Document A/50/60-S/1995/1, January 3, 1995, Section III.D, at <http://www.un.org/Docs/SG/agsupp.html> (May 7, 2009).
4. Kofi A. Annan, “We the Peoples”: *The Role of the United Nations in the 21st Century*, United Nations, April 3, 2000, p. 3, at <http://www.un.org/millennium/sg/report> (May 7, 2009).

War. In reality, wars and the hatreds that drive them create the demand for and supply of weapons.

The October resolution rests in part on the logically flawed assumption that arms themselves are evil and the cause of what is wrong. However, arms, as such, have no moral content. What matters are the purposes for which the arms are acquired and used. Efforts to control the arms will have no effect on the purposes.

Third, the campaign relies for justification on the claim that, as U.K. Ambassador for Arms Control and Disarmament John Duncan states, “many of the irresponsible activities [of the exporters] are not even illegal.” Thus, the argument goes, the U.N. needs to advance a treaty to “put pressure on business to behave responsibly.”⁵

This is a remarkable claim for several reasons. U.N. Security Council Resolution 1373, passed unanimously on September 28, 2001, in the wake of 9/11, already requires all U.N. members to take wide-ranging actions against terrorism, including “eliminating the supply of weapons to terrorists.” By definition, assisting organized crime is against the law. Therefore, in some cases, the proposed treaty seeks to ban the supply of arms in cases where the supply is already illegal.

Furthermore, all U.N. member states already claim to have export and import controls on arms. For instance, Iran states in its official submission on the projected treaty that it “has enforced and continues to enforce effective measures to prevent and curb the illicit trafficking and transfer of such weapons.”⁶ In Iran’s case, this is an obvious falsehood, but it points out again that the problem is not an absence of law, but an absence of enforcement.

Finally, there is no need for a treaty to “put pressure on business.” If a state believes, for whatever reason, that arms should not be exported to a par-

ticular country or area, it should declare an arms embargo. The argument that states can stop arms exports only by exerting pressure on businesses through the U.N. is a confession of their governments’ unwillingness to act.

Fourth, the campaign has rapidly moved away from the realm of arms control into the realm of human rights and development. Harold Koh, former dean of the Yale Law School, and other activists have heralded this as an advance because it gives them a way to make the issue appealing to everyone in the West. This, in turn, has enabled them to move faster than arms control negotiations normally proceed.⁷

Yet this is also a dangerous retreat from reality. Arms control negotiations move slowly because vital national interests are at stake, and it is therefore important not to make mistakes. Small arms may be small, but they are arms nonetheless. Failing to treat negotiations for their control with the care accorded to negotiations for the control of larger weapons systems is a recipe for a rushed and flawed negotiations process.

The small-arms control process has proceeded with a speed dictated by a politically driven desire to achieve rapid success and with a corresponding failure to devote serious attention to a complex issue that involves virtually every state in the world. Recasting arms control as a human rights issue has made negotiating a treaty easier by making it less serious. That is a problem, not a virtue.

Fifth, at times, the campaigners appear to believe that they know what they are talking about. In the most literal sense, this is untrue.

While the U.S. and some states regularly publish information on their exports of conventional arms, most states do not. Thus, the publicly available data are extremely unreliable—especially the data for dic-

5. John Duncan, response to article by Ted R. Bromund, “We Don’t Need Treaties, We Need to Tackle the Dictators,” *Yorkshire Post*, January 12, 2009, at <http://www.yorkshirepost.co.uk/opinion/Ted-Bromund-We-don39t-need.4864984.jp> (May 8, 2009).
6. U.N. General Assembly, “Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms—Replies Received from Member States,” U.N. Document A/62/278/Add.2, October 19, 2007, p. 4.
7. Harold Hongju Koh, “Lecture: A World Drowning in Guns,” *Fordham Law Review*, Vol. 71, No. 6 (May 2003), pp. 2345 and 2347, at <http://law2.fordham.edu/publications/articles/500flspub11111.pdf> (July 22, 2009).

tatorial suppliers such as Russia and China and most of the world's importers. Furthermore, there are absolutely no regularly published, official statistics on, for example, Iran's supply of weapons to Hezbollah or Hamas. Campaigners rely on statistics published by Western governments, which minimize the responsibility of non-Western regimes, and on information provided by organizations such as the Stockholm International Peace Research Institute (SIPRI).

SIPRI itself admits that “[t]he only means of making assessments of the financial value of the arms trade is to rely on official data provided by governments and industry bodies. There are significant limitations on using official national data in this way.”⁸ This is correct. Even SIPRI's data for U.S. exports are badly flawed and incomplete. For instance, SIPRI reports that the U.S. sold no conventional arms to Slovakia in 2006 or 2007,⁹ but the U.S. reported \$10.57 million in sales for fiscal year (FY) 2007.¹⁰ The data for other nations are of even lower quality.

This is not a minor technical problem, but a fundamental barrier to negotiating a serious treaty because it affects even the most important conventional weapons. For example, the precise destination of the 33 T-72 tanks seized by pirates off Somalia in September 2008 remains publicly unknown.

If the world cannot determine where major weapons systems are headed, it has no chance of

policing small arms.¹¹ If the treaty were to cover—as Control Arms demands—“small arms and light weapons, heavy weapons, military support equipment, components and parts, technology for making arms and ‘dual use’ items which have both civil and military applications,” it would become even more impossibly broad because it would include almost every conceivable industrial item.¹²

The low quality of the data is particularly troubling given that the world's dictatorships and terrorist groups rely on receiving arms from states that regularly conceal their trade. One analyst has summed up the situation by noting that China, in particular, is “the country of choice when you want to buy cheap and simple weapons, such as Kalashnikovs, rocket-propelled grenades and artillery shells.”¹³

For example, in April 2008, a Chinese vessel making a delivery from Beijing sought to land more than 77 tons of small arms in South Africa for shipment to Zimbabwe. A Chinese spokeswoman defended the extensive arms trade between China and Zimbabwe as “normal” and “prudent and responsible.”¹⁴ The shipment became known only because dockworkers in Durban, South Africa, refused to unload the cargo.¹⁵ It appears that the cargo was eventually delivered by way of Angola.¹⁶

For its part, Russia's arms sales hit a post-Soviet high in 2008, with major customers including China, Algeria, Venezuela, and Iran.¹⁷ In 2006, the

8. Stockholm International Peace Research Institute, “Financial Value of the Global Arms Trade,” 2009, at http://www.sipri.org/research/armaments/transfers/researchissues/measuring_atrans/financial_values (June 17, 2009).
9. Stockholm International Peace Research Institute, Arms Transfers Database, at http://armstrade.sipri.org/arms_trade/values.php (June 17, 2009).
10. U.S. Defense Security Cooperation Agency, *Historic Facts Book*, September 30, 2007, p. 20, at <http://www.dsca.mil/programs/biz-ops/factsbook/FactsBook07.pdf> (June 17, 2009).
11. “The Mystery Tanks,” *The Economist*, October 9, 2008, at http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=12381465 (May 8, 2009).
12. Control Arms, “Frequently Asked Questions on the Arms Trade and the Arms Trade Treaty,” April 2008, p. 1, at <http://www.controlarms.org/en/documents%20and%20files/frequently-asked-questions-on-the-arms-trade-and> (June 17, 2009).
13. Tim Luard, “Buyers Line Up for China's Arms,” BBC News, June 16, 2006, at <http://news.bbc.co.uk/2/hi/asia-pacific/5086416.stm> (May 8, 2009).
14. Press release, “FM: China's Arms Trade with Zimbabwe ‘Normal’, ‘Irrelevant’ to African Country's Domestic Situation,” Embassy of the People's Republic of China in the Republic of South Africa, April 22, 2008, at <http://www.chinese-embassy.org.za/eng/zxxx/t427905.htm> (June 17, 2009).
15. David Beresford, “Chinese Ship Carries Arms Cargo to Mugabe Regime,” *Guardian*, April 18, 2008, at <http://www.guardian.co.uk/world/2008/apr/18/china.armstrade> (June 17, 2009).

International Herald Tribune described Russian sales as “seemingly immune to ethical debates that affect the industry elsewhere.”¹⁸

The claim is sometimes made that Chinese shipments are a minor part of the international arms trade and of negligible importance compared to larger U.S. sales.¹⁹ However, unless states such as Saudi Arabia are included in the definition, the U.S. is an extremely minor supplier to the developing world. In 2007, the top five purchasers in Africa received only \$16 million in deliveries from the U.S. To Africa as a whole, the U.S. made less than \$25 million in deliveries in FY 2007. This is insignificant compared to the \$280 million in arms sales to Canada and the \$1 billion in sales to South Korea.²⁰

These sales are a matter of public knowledge. The fact that much of the arms trade is not public does not stop the Control Arms campaign from claiming that “political action by the world’s governments” is “imperative.”²¹ Indeed, Control Arms at times uses its own admitted ignorance as a further reason to proceed rapidly, arguing that one purpose of the arms trade treaty is to bring the arms trade out into the open.²² Control Arms does not appear to have realized that the states responsible for concealing their trade and selling to the world’s worst regimes are the same ones that will be responsible for negotiating and enforcing the arms trade treaty.

Treaty-Making Process Is Under Way

This desire to move quickly is evident in the actions of the U.N. The passage of the October resolution has resulted in the creation of a working group that will meet twice a year through 2011.²³ This group is charged with the eventual creation of a legally binding treaty to create common standards for the international import, export, and transfer of arms. The subject will be considered again at the 64th session of the General Assembly in 2009.

Thus, the treaty-making process is already well under way and has acquired considerable momentum. Its course so far is strongly reminiscent of the campaigns that led to the treaties banning anti-personnel land mines and creating the International Criminal Court (ICC), in which an NGO-driven process led to a humiliating U.S. defeat in the vote on the Rome Statute in 1998.²⁴ It is a dangerous sign that the U.S., unlike many other U.N. member states, failed to make a submission to the Group of Governmental Experts. The U.S. was ably represented on this group, but its failure to make a submission implies inattention at best and divided counsels at worst.

Neither deficiency can be allowed to persist. The U.S. has taken a beating in the world press and in the court of public opinion by being paired with Zimbabwe as the only two states opposed to the U.N. resolution.²⁵ Few commentators and none of the treaty’s advocates noted the significance of the Chinese and Russian abstentions.

16. Christof Maletsky, “Zimbabwe: ‘Ship of Shame’ Cargo Delivered to Country,” *The Namibian*, May 20, 2008, at <http://allafrica.com/stories/200805200270.html> (June 22, 2009).

17. Associated Press, “Official: Russian Arms Sales to Set New Record,” *Boston.com*, August 5, 2008, at http://www.boston.com/news/world/europe/articles/2008/08/05/official_russian_arms_sales_to_set_new_record/ (June 18, 2009).

18. Oliver Bullough, “Russian Arms Sales: A Rising Worry,” *International Herald Tribune*, June 21, 2006, at <http://www.nytimes.com/2006/06/21/business/worldbusiness/21iht-rusarms.2019059.html> (June 18, 2009).

19. Luard, “Buyers Line Up for China’s Arms.”

20. U.S. Defense Security Cooperation Agency, *Historic Facts Book*, p. 20, and Richard F. Grimmett, “U.S. Arms Sales: Agreements with and Deliveries to Major Clients, 2000–2007,” *Congressional Research Service Report to Congress*, November 26, 2008, at <http://www.fas.org/sgp/crs/weapons/RL34768.pdf> (June 17, 2009).

21. Control Arms, “A Deadly Trade,” 2008, at <http://www.controlarms.org/en/the-arms-trade> (June 17, 2009).

22. Control Arms, “Frequently Asked Questions on the Arms Trade and the Arms Trade Treaty,” p. 3.

23. For the latest schedule, see U.N. Office for Disarmament Affairs, “Towards an Arms Trade Treaty,” 2009, at <http://www.un.org/disarmament/convarms/ArmsTradeTreaty/html/ATTMeetings2009-11.shtml> (June 17, 2009).

24. David Davenport, “The New Diplomacy,” *Policy Review*, No. 116 (December 2002 and January 2003), at <http://www.hoover.org/publications/policyreview/3458466.html> (June 16, 2009).

The U.S. statement in the General Assembly before the vote was serious, but it did little to elucidate the issues for a press already predisposed to favor the treaty.²⁶ The U.S. is being defeated in the realm of public diplomacy and is doing nothing to make up ground, thus setting itself up for more defeats—or tame acquiescence—in the years to come. Yet the treaty has not yet been drafted, so the U.S. still has an opportunity to clarify its own thinking and make its case.

Failings of the Projected Arms Trade Treaty

The projected arms trade treaty, as contemplated by the General Assembly's October resolution, is fatally flawed for several reasons.

Flaw # 1: The projected treaty will undercut U.S. embargoes and damage U.S. arms export control policy by enshrining lowest-common-denominator standards.

As of March 25, 2009, the U.S. maintains full or partial arms embargoes against 26 states or entities.²⁷ The U.S. strictly applies U.N. Security Council arms embargoes, but only 12 of the current U.S. embargoes are the result of action by the Security Council.²⁸

By mandate of the council, the U.S. operates full or partial embargoes against Cote d'Ivoire; nongovernmental forces in the Democratic Republic of the Congo; nongovernmental forces in Iraq; prolifera-

tion-related activities in Iran; nongovernmental forces in Lebanon; Liberia; North Korea; nongovernmental forces in Rwanda; nongovernmental forces in Sierra Leone; Somalia; the Darfur region of Sudan; and al-Qaeda, the Taliban, and associated actors.²⁹ In some cases, such as Iran, the U.S. embargo is far more comprehensive than required by the U.N.³⁰ The U.S. operates embargoes that are not mandated by the Security Council against Burma, Belarus, Cuba, Cyprus, Eritrea, Haiti, Libya, the People's Republic of China, Sri Lanka, Syria, Venezuela, Vietnam, Yemen, and Zimbabwe.

Of the non-U.N. embargoes maintained by the U.S., the European Union (EU) has matching embargoes against only Burma and Zimbabwe. Reliable data on Chinese and Russian exports are not available. Of course, the EU has a much better record than China and Russia, but given that many EU member states are among the treaty's leading proponents and are often considered responsible arms sellers, comparing their records to that of the U.S. is reasonable.

- EU member states frequently sell arms to states embargoed by the U.S. For instance, in 2006, Germany issued export licenses for almost 2 million euros of arms exports to Libya.³¹
- The EU does not always fully implement Security Council arms embargoes. In 2006, Germany

25. Geraldine Baum, "U.S., Zimbabwe Oppose U.N. Arms Trade Treaty," *Los Angeles Times*, November 1, 2008, at <http://articles.latimes.com/2008/nov/01/world/jg-un1> (May 7, 2009).

26. Press release, "First Committee Asks General Assembly to Encourage States to Ensure Ironclad Internal Controls to Prevent Diversion of Legal Weapons to Illicit Market," U.N. General Assembly, U.N. Document GA/DIS/3380, October 31, 2008, pp. 9–10, at <http://www.un.org/News/Press/docs/2008/gadis3380.doc.htm> (May 7, 2009).

27. U.S. Department of State, Directorate of Defense Trade Controls, "Country Policies and Embargoes," March 25, 2009, at http://www.pmdtcc.state.gov/embargoed_countries/index.html (May 7, 2009).

28. U.S. Department of State, "Amendment to the International Arms Traffic in Arms Regulations: UN Embargoed Countries," *Federal Register*, Vol. 72, No. 242 (December 18, 2007), p. 71575, at <http://www.pmdtcc.state.gov/documents/FRNotices/72FR71575.pdf> (May 7, 2009).

29. U.N. Security Council, "Security Council Sanctions Committees: An Overview," 2009, at <http://www.un.org/sc/committees/index.shtml> (June 26, 2009).

30. U.N. Security Council Resolution 1747 only "[c]alls upon all States to exercise vigilance and restraint in the supply, sale or transfer...of any battle tanks, armoured combat vehicles, large calibre artillery systems, combat aircraft, attack helicopters, warships, missiles or missile systems" to Iran. U.N. Security Council, "Resolution 1747 (2007)," S/RES/1747, March 24, 2007. "Vigilance and restraint" is not an embargo.

31. Bonn International Center for Conversion, "Arms Export Evaluation Profile: Libya," 2006, at <http://www.bicc.de/ruestungsexport/database.php?auswahlland=Libya> (May 7, 2009).

issued export licenses for over 187,000 euros of arms exports to Iran. There is no EU embargo against Iran.³²

- EU arms embargoes are not necessarily respected in practice. Germany exported 22,000 euros of military weapons to Sudan in 2006, one year after the EU mandated an arms embargo.³³
- The EU can be very slow to follow the U.N.'s lead. The EU did not embargo Somalia until 2002, 10 years after the U.N. acted.³⁴
- EU member states are willing to sell to states with dubious human rights records. Germany exported over 22 million euros of military weapons to Venezuela in 2006 and issued licenses worth over 2.5 million euros for arms exports to China.³⁵

In short, by either U.N. or EU standards, the U.S. has one of the world's most restrictive policies on the export of arms. While often accused of basing its foreign policy on commercial considerations, the U.S. is one of the few states willing to forgo military sales to make a political or moral point. This contrasts with the willingness of leading European states to supply arms to regimes such as Iran and Venezuela.

The goal of the projected treaty, as the title of the U.N. resolution states, is to develop "common international standards for the import, export and transfer of conventional arms." Because they are not based on decisions of the Security Council, more than half of the U.S. embargoes violate existing common international standards. The U.N. resolution calls upon states to "fully comply with arms embargoes decided by the Security Council," but it does not acknowledge their right to have higher

standards. Instead, it "acknowledg[es] the right of all States to...import...conventional arms."³⁶ By this standard, the U.S. is arguably restraining 14 U.N. member states from exercising their rights.

Because the projected universal treaty will be based upon the consensus views of all participating U.N. member states, it will enshrine the lowest-common-denominator standards for importing, exporting, and transferring conventional weapons. The treaty's standards will therefore be lower than U.S. standards. It would also open the U.S. to a legal challenge—albeit a frivolous one—from embargoed states such as Iran, which would argue that the U.S. is illegally constraining trade with it and is violating the "common international standards" enshrined in the treaty. Finally, irresponsible U.S. manufacturers could use the treaty to challenge existing U.S. arms export control legislation as incompatible with the treaty's lower standards. Together, these effects would seriously damage U.S. arms export control policy.

This explains why Iran emphasizes that all disarmament treaties must be multilateral, guaranteeing that the higher U.S. standards will not prevail.³⁷ The projected treaty will subvert, not strengthen, arms control standards.

Flaw # 2: The U.N. has not defined terrorism.

The October resolution states that the absence of "common international standards" is a contributing factor in "crime and terrorism." This wrongly implies that U.N. member states agree on what constitutes terrorism. Otherwise, they cannot negotiate a treaty supposedly intended in part to deny arms to terrorists.

32. Bonn International Center for Conversion, "Arms Export Evaluation Profile: Iran," 2006, at <http://www.bicc.de/ruestungsexport/database.php?auswahlland=Iran> (May 7, 2009).

33. Bonn International Center for Conversion, "Arms Export Evaluation Profile: Sudan," 2006, at <http://www.bicc.de/ruestungsexport/database.php?auswahlland=Sudan> (May 7, 2009).

34. Bonn International Center for Conversion, "Arms Export Evaluation Profile: Somalia," 2006, at <http://www.bicc.de/ruestungsexport/database.php?auswahlland=Somalia> (May 7, 2009).

35. Bonn International Center for Conversion, "Arms Export Evaluation Profile: Venezuela," 2006, at <http://www.bicc.de/ruestungsexport/database.php?auswahlland=Venezuela> (May 7, 2009), and "Arms Export Evaluation Profile: China," 2006, at <http://www.bicc.de/ruestungsexport/database.php?auswahlland=China> (May 7, 2009).

36. U.N. General Assembly, "Towards an Arms Trade Treaty," U.N. Document A/C.1/63/L.39*, p. 2.

37. U.N. General Assembly, "Towards an Arms Trade Treaty," U.N. Document A/62/278/Add.2, p. 1.

In fact, U.N. member states have not reached agreement on what constitutes terrorism. The U.N. has not adopted the proposed Comprehensive Convention on International Terrorism because of resistance from the Organization of the Islamic Conference (OIC), which seeks to insert the sentence: “The activities of the parties during an armed conflict, including in situations of foreign occupation...are not governed by this Convention.”³⁸

This argument runs through submissions by member states on the projected arms trade treaty. For example, Algeria, while claiming to support the treaty, states that it must be concluded in accordance with “[t]he right of self-determination and the liberation struggle.”³⁹ Pakistan refers to “the right of peoples to self-determination...and the illegality of aggression [and] foreign occupation.”⁴⁰ In another U.N. forum, a Pakistani delegate observed on the OIC’s behalf a need “to make a distinction between terrorism and the exercise of [the] legitimate right of peoples to resist foreign occupation.”⁴¹

The OIC’s clause would destroy the concept of terrorism, because it would legitimize the activities of any terrorist—or terrorist-supporting state—that claimed to be resisting foreign occupation. In particular, Algeria’s and Pakistan’s statements and the OIC’s efforts are thinly veiled attempts to protect the unabated transfer of small arms and other conventional weapons from OIC members to Hamas, Hezbollah, and other non-state organizations waging a campaign of terrorism against Israel or, in Pakistan’s case, to groups fighting to “liberate” Kashmir from India.

This makes nonsense out of the idea of negotiating a worldwide treaty based on a shared definition of terrorism, because no such shared definition exists. As a result, the treaty will simply be based on a decision to disagree about what constitutes terrorism, which will leave those states free to continue supporting terrorism.

Flaw #3: The treaty fails to recognize the culpability of U.N. member states.

Most terrorists have access to weapons because they are the clients of states, such as Iran, that are also violating existing U.N. Security Council resolutions that are intended to prevent such diversions. Under the projected treaty, these same states would be responsible for preventing any “diversion of conventional arms from the legal to the illicit market.”⁴²

For example, in mid-April, *The Wall Street Journal* reported that the Obama Administration was “pushing for a formal censure of Iran and Syria at the United Nations over an arms-smuggling case.” The report came after an Iranian-chartered cargo ship in Cyprus was found to be carrying “bullet shells, high-explosive gun charges and items related to 125-mm armor-piercing guns” that were ultimately destined for Hamas or Hezbollah. Iran’s involvement in such smuggling is not new, but as one EU official noted, “What’s new is that they got caught in the act.... We now have the evidence.” Iran predictably denied the charges, and the chairman of the Iranian shipping firm stated that the weapons were “logically not prohibited goods, because we do not ship prohibited goods.”⁴³

38. Eye on the U.N., “There Is No U.N. Definition of Terrorism,” 2008, at <http://www.eyeontheun.org/facts.asp?1=1&p=61> (May 7, 2009).

39. U.N. General Assembly, “Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms,” U.N. Document A/62/278 (Part I), August 17, 2007, p. 4.

40. U.N. General Assembly, “Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms,” U.N. Document A/62/278 (Part II), August 17, 2007, p. 158.

41. Farukh Amil, “The OIC Group Statement on Agenda Item 99, Measures to Eliminate International Terrorism,” Pakistan Permanent Mission to the United Nations, October 8, 2008, p. 2, at http://www.eyeontheun.org/assets/attachments/documents/7087_OIC_terrorism_10-8-08.pdf (May 7, 2009).

42. U.N. General Assembly, “Towards an Arms Trade Treaty,” U.N. Document A/C.1/63/L.39*.

43. Jay Solomon, “U.S. Pushes for U.N. Censure of Iran, Syria on Arms,” *The Wall Street Journal*, April 17, 2009, at <http://online.wsj.com/article/SB123992372145727175.html> (May 7, 2009).

As long as the treaty's supporters are unwilling to face the reality that U.N. member states are deliberately supplying terrorists with weapons, the treaty will fail. By subverting U.S. arms embargoes and acknowledging the "right of all States to...import...conventional arms," the treaty will actually facilitate the buying and distribution of weapons by rogue states.⁴⁴

These states will not carry out their treaty obligations. Instead, they will simply deny that their actions are illegal by pointing to their acceptance of the treaty. They will then use their self-proclaimed compliance to further conceal their violations of that treaty. Ultimately, the treaty will offer them another way to elude their responsibility for the actions that claim so many lives. The treaty is flawed because it repeats the fundamental flaw of the U.N.: universal membership and the U.N. premise that all states are alike, equally deserving of respect and equally responsible.

Flaw #4: The treaty will be a buyer's and seller's charter.

Because the U.N. resolution supporting the treaty proclaims that all states—unless subject to a U.N. Security Council embargo—have "the right...to manufacture, import, export, transfer and retain conventional arms," the projected treaty will allow all suppliers to sell to almost all comers.⁴⁵ This clause was the most frequently requested element in the submissions of U.N. member states on the projected treaty.⁴⁶

The treaty masquerades as an arms control measure, but if it were adopted with this "right to buy" clause intact, any supplier would be entirely within its rights to sell any conventional weapon to Cuba, Haiti, the People's Republic of China, Syria, Venezuela, or any other dictatorship. If the U.S. protested, the supplier could reply that its actions were sanctioned by international treaty and by a global consensus confirming the existence of the right to buy.

Thus, the treaty is not simply an attack on U.S. arms export control policy and the higher standards expressed in the U.S. arms embargoes. It would establish a presumption of legitimacy for the arms trade around the world. In reality, the treaty is a buyer's and seller's charter, not an arms control measure.

This fact sheds important light on the support from EU member states and such organizations as the British Defence Manufacturers Association (BDMA). The BDMA has stated, "we warmly welcome the principle behind the international arms trade treaty," which "is intended to...achieve a greater degree of harmonization" of export control systems.⁴⁷ These "harmonized" systems would of necessity have weak standards, because they would enshrine the lowest common denominator. Many defense manufacturers would naturally welcome such a development.

More broadly, a popular European fiction is that U.S. diplomacy is a tool of commercial interests. In fact, commercial considerations drive European diplomacy, even though it is regularly cloaked in idealism, more often than they drive U.S. diplomacy. Given shrinking European defense budgets, the European arms industry would struggle to survive without foreign sales. A treaty that enshrines the right to buy and sell would be very useful to the European states that are among the world's leading arms suppliers, because it would allow them to sell to almost all comers while claiming that the treaty sanctions the practice. By supporting a treaty that is supposedly intended to control arms transfers but in reality legitimizes sales to almost all national buyers, these states are serving the interests of their arms exporters and, more important, the employees of these firms.

Similarly, the Non-Aligned Movement, an influential U.N. voting bloc of former Third World nations, also supports the treaty for largely self-

44. U.N. General Assembly, "Towards an Arms Trade Treaty," U.N. Document A/C.1/63/L.39*, p. 2.

45. *Ibid.*

46. Sarah Parker, "Analysis of States' Views on an Arms Trade Treaty," U.N. Institute for Disarmament Research, October 2007, pp. 13–14, at <http://www.unidir.ch/pdf/ouvrages/pdf-1-92-9045-008-A-en.pdf> (June 22, 2009).

47. Press release, "Key Players in Defence Industry Throw Weight Behind an Arms Trade Treaty," Control Arms, July 11, 2005, at <http://www.controlarms.org/en/media/2005-press-releases/11-july-2005.-key-players-in-defence-industry> (June 17, 2009).

interested and diverse reasons. Cuba wants the U.N. to focus on “the most modern and sophisticated” conventional arms, leaving untouched its greater trade interests in smaller weapons.⁴⁸ On the other hand, Tanzania wants the U.N. to include “a specific clause on small arms and light weapons, which have become ‘weapons of mass destruction’ in Africa.”⁴⁹ While small arms have certainly done much damage in Africa, controlling such weapons would be extremely difficult, and such a treaty would leave the Tanzanian government and other, less credible regimes free to arm themselves as they see fit.

In practice, all states that are not under Security Council sanction have the right to buy and sell conventional weapons. The U.N. resolution implies that this right is part of the inherent right of all states to self-defense, as recognized in Article 51 of the U.N. Charter. However, this is only an inference. Article 51 does not explicitly recognize the right to buy and sell. This places the U.S. in a difficult situation. It should support recognizing the right of democracies to self-defense and to buy and sell, but it should not accept that dictatorships possess these rights, because they do not respect the inherent right of self-government and are not properly constituted states.

However, no treaty negotiated through the U.N. will differentiate between the rights of dictatorships and democracies. Therefore, if a treaty is to be negotiated, the best course of action is to preserve the status quo in which the right to buy and sell is based on customary international law, not on a treaty. Codifying this right would make it impossible to move toward a world in which the right of import and export belongs only to democratic nation-states. By formally treating all states as if they were alike, the treaty would retreat from the reality that not all states are alike or deserve to be treated as such.

Flaw #5: Monitoring and enforcement of the treaty will be biased and irresponsible.

A central problem with human rights treaties is that they are not enforced. Indeed, because they concern internal conduct, not external action, they are exceptionally difficult to enforce.⁵⁰

One problem with treating arms control as a human rights issue is that the unenforceable model of human rights diplomacy contaminates the model of arms control negotiations, in which enforcement concerns have long been central. Instead of remaining enforced and verified agreements between sovereign states, treaties are becoming expressions of aspirations. Demonstrating rhetorical commitment to the “correct” position on an issue by adopting a treaty, even if it is useless or destructive, has become more important than achieving the ends set out in the treaty.

Any arms trade treaty drawn up for signature will likely follow the verification and enforcement precedents embodied in other universal treaties. Signatories will be responsible for submitting annual reports to a monitoring body. In theory, this is the correct way to proceed because it respects the sovereignty of the world’s states and accords with the reality that the U.N. is their agent, not their superior. Of course, states such as Iran will not police themselves effectively or submit honest annual reports. If they followed through on their obligations, the treaty would not need to concern itself with the “diversion”⁵¹ of arms to terrorists, because the armed support of terrorism is already illegal.

It makes perfect sense for the democracies of the world to submit their own reports, but it makes none to believe that Iran and the other dictatorships will not continue to make a mockery of the system. One of the proposed treaty’s champions argues: “In

48. U.N. General Assembly, “Towards an Arms Trade Treaty,” U.N. Document A/62/278 (Part II), p. 55.

49. U.N. General Assembly, “Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms—Report of the Secretary-General,” U.N. Document A/62/278/Add.3, November 27, 2007, p. 5.

50. Ted R. Bromund, “Harold Koh and the End of Human Rights,” *The New Ledger*, April 23, 2009, at <http://newledger.com/2009/04/harold-koh-and-the-end-of-human-rights> (May 7, 2009), and “Harold Koh and the End of Human Rights, Redux,” *The New Ledger*, April 26, 2009, at <http://newledger.com/2009/04/harold-koh-and-the-end-of-human-rights-redux> (May 7, 2009).

51. U.N. General Assembly, “Towards an Arms Trade Treaty,” U.N. Document A/C.1/63/L.39*.

the Democratic Republic of Congo we have a U.N. arms embargo, but it has proved totally ineffective. That is why an Arms Trade Treaty has become so important.”⁵² According to this *non sequitur*, because many countries violate their existing multilateral agreements, the world should adopt a new multilateral agreement to fix the problem.

This is not a serious argument. By proudly quoting it, Control Arms, the NGO leading the campaign for the arms trade treaty, illustrates its failure to grasp the dilemma that is inherent in relying on states such as Iran to live up to their treaty commitments.

The monitoring body will also be problematic. Because the treaty will be universal, the monitoring body will be drawn from the U.N. member states as a whole. It will therefore have no meaningful membership standards and will be incapable of providing effective oversight—a weakness repeatedly exhibited by other U.N. bodies. For example, Libya was chosen in 2007 to chair the preparatory committee for the U.N.’s Durban Review Conference. The U.N. Human Rights Council includes such luminaries as Saudi Arabia, China, Russia, and Cuba, and a representative from Syria, which has a long history of supporting terrorists, was a vice-chair of the U.N. General Assembly’s Disarmament and International Security Committee in 2007.

The monitoring body for the arms trade treaty will be similarly stacked with states that have no serious interest in resolving the problems that the treaty would supposedly address. Even Control Arms admits that “[t]he current patchwork of national arms controls is riddled with loopholes and poorly enforced.”⁵³ As evidenced by this fact and by their current behavior, many states are not responsible now. The treaty will not magically instill responsibility in buyers or sellers who do not already possess it.

Instead, these states will use the monitoring body to score political points and achieve political ends. The U.N. Commission on Human Rights, the predecessor of the Human Rights Council, was so notoriously biased against Israel and deferential toward dictatorships that Secretary-General Annan acknowledged in 2005 that the “commission’s declining credibility has cast a shadow on the reputation of the United Nations system.”⁵⁴ The council has been just as bad as its predecessor, targeting Israel in 23 of its 44 actions.⁵⁵

A universal arms trade treaty will necessarily establish this kind of body. The states that do not respect the treaty will use it to gang up on their favorite targets: Israel, the U.S., the West, and their regional enemies. Iran’s statement in support of the treaty notes that “the largest arms-producing and exporting countries should undertake special responsibility in any international arms trade arrangement.... [C]ertain Western countries have always been at the top of the list of the five largest exporters.”⁵⁶ This declaration foreshadows what Iran hopes to gain from the treaty: another forum for declaiming against the West and denouncing Western arms sales to its regional enemies, such as Saudi Arabia and Israel, in an effort to reduce their ability to resist its aggression.

The treaty’s monitoring body will thus become a venue in which Iran and other states can conceal their own violations while trying to disarm their neighbors and discredit the world’s democracies. U.S. arms embargoes will be attacked as examples of American unilateralism, but the monitoring body will always find insufficient evidence to condemn the flagrant violations of dictatorships, just as the world has been unable to summon the will to act against Iran’s nuclear program. States such as Rwanda, which is flagrantly violating the U.N. arms

52. Control Arms, “Senior Military Officers Back an Arms Trade Treaty,” 2008, at <http://www.controlarms.org/en/events/first-comm-2008/senior-military-officers-back-an-arms-trade-treaty> (May 7, 2009).

53. Control Arms, “Frequently Asked Questions on the Arms Trade and the Arms Trade Treaty,” p. 3.

54. BBC News, “Annan Says Rights Body Harming U.N.,” April 7, 2005, at <http://news.bbc.co.uk/2/hi/europe/4419333.stm> (May 7, 2009).

55. Eye on the UN, “Human Rights Actions,” at http://www.eyeontheun.org/browse-un.asp?ya=1&sa=1&u=344&un_s=0&ul=1&tp=1&tpn=Resolution (June 26, 2009).

56. U.N. General Assembly, “Towards an Arms Trade Treaty,” U.N. Document A/62/278/Add.2, pp. 2–3.

embargo on the Democratic Republic of the Congo, will use the body to seek to condemn foreign shipments to their enemies while concealing their own support for “liberation” movements against their neighbors.⁵⁷

In short, as long as an overwhelming majority of the world’s states are not democratic, no monitoring body drawn from those states or system of self-reporting can be effective. In today’s world, the projected arms trade treaty will not be monitored or enforced fairly.

This is particularly problematic given that the monitoring body will be responsible for interpreting how to apply the treaty’s weak common standards. The criteria for acceptable arms transfers in the October resolution include the need to respect “international human rights law,” “international humanitarian law,” the U.N. Charter, and “peace, reconciliation, safety, security, stability, and sustainable social and economic development.” Once the monitoring body is established, nothing can prevent it from using its power to interpret this vast range of criteria to discriminate against one, some, or all of world’s democratic nations.

The monitoring body will then either pass resolutions or refer reports to the Security Council for action. Any resolutions passed by the monitoring body will be unenforced expressions of majority opinion that will likely target the U.S., Israel, or the West. If reports are referred to the Security Council, the U.S. veto could protect the interests of the U.S. and its allies, but resorting regularly to the veto would put the U.S. in a bad light. Even if the monitoring body refers only sensible reports, the Security Council already passes too many toothless, unenforced resolutions. It clearly lacks the time, ability, and willpower to deal on a case-by-case basis with the conventional arms trade, especially when Russia and China—two perma-

nent members that are involved in the worst elements of that trade—can veto any effort that would affect their interests.

Finally, the International Criminal Court could be an alternative avenue of enforcement. Article 25 of the Rome Statute states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person...aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”⁵⁸ This raises the possibility that, if the U.S. ratifies the Rome Statute or if the ICC prosecutor initiates an investigation into an alleged crime, the court could investigate and charge U.S. policymakers who were responsible for selling or providing arms to a government or rebel group accused of criminal actions on the basis that they were “providing the means” for the commission of purported war crimes, crimes against humanity, or genocide.

Flaw #6: The treaty would restrict the ability of the U.S. to support armed resistance to dictatorships.

If the U.S. were to sign a treaty based on the October resolution, under international law, it could no longer arm the opposition to hostile or even genocidal regimes. This was an important tool for both Democratic and Republican Presidents in opposing the spread of Communism in South America, Africa, and Asia during the Cold War. The policy became known in 1985 as the Reagan Doctrine, but it was employed by Presidents before and after Reagan. Under the projected arms trade treaty, these Presidents would have been guilty of violating international law.

This policy has continued in the years since the end of the Cold War. For example, on October 31, 1998, President Bill Clinton signed the Iraq Liberation Act, which declared it the “policy of the United

57. See U.N. News Centre, “DR Congo: UN-Mandated Group Finds Evidence Rwanda, Army Aiding Rival Rebels,” December 12, 2008, at <http://www.un.org/apps/news/story.asp?NewsID=29299> (May 8, 2009), and, more broadly, U.N. Security Council, report of the Group of Experts on the Democratic Republic of the Congo, S/2005/30, January 25, 2005, at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/GLI%20S200530.pdf> (June 22, 2009).

58. Rome Statute of the International Criminal Court, July 17, 1998, Art. 25, at <http://untreaty.un.org/cod/icc/statute/rome.htm> (June 26, 2009).

States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq.”⁵⁹ To that end, it authorized military assistance to the democratic opposition to Saddam Hussein. Providing such assistance would have been illegal under the projected treaty.

Similarly, the Bush Administration, as authorized by Congress, began to provide nonlethal military assistance to the so-called Government of South Sudan in early 2007, and the Obama Administration has continued this policy.⁶⁰ The Government of South Sudan is technically not independent from Sudan; the region will have the opportunity to vote for independence in 2011. By supplying military assistance, the U.S. is anticipating the outcome of that referendum and thus subverting the authority of the Sudanese state. Under the projected treaty, these actions could be subject to a legal challenge from Sudan.

Furthermore, the projected treaty makes no distinction between states that support terrorists in the name of totalitarianism and genocide and those that support groups resisting totalitarian and genocidal governments. The treaty would make U.S. support for any freedom fighters illegal under international law but would have no practical effect on dictatorial regimes’ ability to support terrorism aimed at the U.S., Israel, or other democracies around the world. It is wrong to sign a treaty that puts support for tyranny and resistance against tyranny on an equal moral and legal footing.

Flaw #7: The treaty poses a danger to the Second Amendment and legitimates dictatorial rule.

The projected treaty would require all signatories to have the “highest possible standards” to keep weapons away not just from terrorists and organized crime, but also from all “criminal activity.” Although the Group of Governmental Experts

noted that any treaty would need to respect the member states’ internal affairs and constitutional provisions,⁶¹ such as the Second Amendment, the October resolution ignored this stipulation.

This lends credence to the argument that the “highest possible standards” requirement is intended as an assault on the Second Amendment right “to keep and bear arms,” because there is ultimately no guarantee that any privately held gun in the U.S. will never be used in criminal activity. The “highest possible standards” requirement and the Second Amendment are therefore ultimately incompatible. This is particularly troubling given the U.N.’s hostility to the import of guns by or the transfer of guns to all non-state actors, including private citizens.⁶² Because the treaty reserves exclusively to states the right to import arms, it poses a potential threat not only to the right to own, but also to the private right to buy or acquire by import.

This is not simply a danger to the U.S. All democratic states have the right, subject to their constitutions, to regulate the possession of firearms as they see fit. However, the treaty would give the world’s dictatorships a legal pretext for imposing far-reaching civil controls and regulations ostensibly to prevent criminals from obtaining arms.

Dictatorships will not hesitate to employ such controls in any case, but there is no reason to sanction the controls under international law. Nor is it proper for the U.S.—founded by the revolt of armed citizens in 1776—to endorse the principle that the people have no right of armed rebellion against tyranny or to back a treaty that encourages states to disarm their citizens. Such a treaty would connive with dictators in oppressing their own people and would make their regimes more stable by disarming and therefore disempowering their internal opponents.

59. Iraq Liberation Act of 1998, Public Law 105–338.

60. U.S. Department of State, “Determination Pursuant to the Darfur Peace and Accountability Act Related to the Provision of Military Assistance in Support of a Southern Sudan Security Sector Transformation Program (SST),” *Federal Register*, Vol. 72, No. 11 (January 18, 2007), p. 2326, at <http://www.pmdtc.state.gov/FR/2007/72FR02326.pdf> (May 8, 2009).

61. U.N. General Assembly, “Towards an Arms Trade Treaty,” U.N. Document A/63/334, p. 14.

62. David B. Kopel, “The U.N. Small Arms Conference,” *SAIS Review*, Vol. 23, No. 1 (Winter–Spring 2003), pp. 319–322, at <http://www.davekopel.com/2A/Foreign/UN-Small-Arms-Conference.htm> (June 22, 2009).

Flaw #8: The treaty would infringe on U.S. sovereignty.

Like most human rights treaties, the arms trade treaty is an example of aspirational treaty making. It aspires to end practices in which most states engage. As these practices are entirely under national control, the states are evidently uninterested in abandoning them. Treaties are commitments by states to do or not to do certain things. As such, treaties constrain the inherent right of self-government that is the basis for national sovereignty.

In the international context, such constraints can be justified only by an agreement that other states will similarly constrain themselves. That agreement is embodied in a treaty, but if other countries refuse to abide by it after signing it, the constraint on the right of self-government—and U.S. sovereignty—becomes one-sided. Because the behavior of the world's states testifies that they do not want to curtail the practices that the treaty would seek to control, this treaty would be an unbalanced and therefore illegitimate constraint on American sovereignty.

Flaw #9: The treaty would have additional perverse effects.

Most of the treaty's effects would be perverse, but three additional dangers deserve to be highlighted.

First, if the treaty does indeed reduce—against all evidence—the size of the conventional and heretofore legal arms trade, it will do nothing to reduce the demand for conventional arms. Thus, it will increase the incentive to supply arms illegally. The reality is that the problem is not the supply of weapons, but the political conflicts that create the demand. The answer to the problem of the illegal arms trade will not be found in supply-side controls.

Second, the treaty will encourage states and terrorist groups to reduce their reliance on international trade and to manufacture their own weapons, which is relatively simple in the case of many con-

ventional weapons. It is much more difficult to monitor domestic production than it is to monitor international trade. Just as the ban on land mines has not discouraged Iraqi insurgents and the Taliban from using improvised explosive devices (IEDs), an arms trade treaty will only drive the parties in a conflict to rely less on legitimate international trade.

Third, the treaty's most significant NGO supporters openly admit that it is aimed at U.S. support of Israel. Rebecca Peters, director of the International Action Network on Small Arms (IANSA), noted when speaking on the 2007–2008 Gaza conflict:

If combatants [Israel and Hamas] are violating international humanitarian law, then states supplying them with weapons are knowingly assisting these violations and must bear some responsibility. An Arms Trade Treaty would prohibit such arms transfers.⁶³

Peters noted Hamas's violations in passing but made no mention of the arms smuggling from Iran and other states that abets its terrorism. She also asserted that “[t]he most obvious case [of a supplier assisting in the violation of international humanitarian law]...is the continuing US supply of arms to Israel.”⁶⁴

IANSA is not just another NGO. It is one of the founders of the Control Arms campaign and “the organisation officially designated by the UN Department of Disarmament Affairs (DDA) to coordinate civil society involvement to the UN small arms process.”⁶⁵

The Control Arms campaign makes a similar claim, although without specifically stigmatizing Israel and the U.S., stating that “a transfer of weapons or munitions will be stopped if there is evidence that the weapons are likely to be used for grave violations of international human rights, humanitarian law, or will adversely affect sustainable development.”⁶⁶ If the treaty includes such terms, which

63. International Action Network on Small Arms, “Gaza: An ATT Would Reduce Civilian Casualties,” at http://www.iansa.org/regions/nafrica/gaza_att09.htm (June 17, 2009).

64. *Ibid.*

65. International Action Network on Small Arms, “IANSA's 2004 Review—The Year in Small Arms,” 2005, p. 7, at http://www.iansa.org/documents/documents/iansa_2004_wrap_up_revised.pdf (June 22, 2009).

were in the U.N.'s October resolution, they will be subject to interpretation by the treaty-monitoring body. Given the abysmal record of U.N. human rights organizations and treaty committees, these terms will likely be interpreted to limit Israel's ability to import arms. Thus, while pretending to reduce conflict, the treaty will actually encourage aggression by reducing the power of Israel and, potentially, other small democracies to defend themselves.

Standards for an Acceptable Arms Trade Treaty

Despite its many serious flaws, the proposed arms trade treaty could be revised to help to control the illicit sale and transfer of arms to terrorists and organized crime and to reduce the supply of weapons to ongoing civil conflicts. At a minimum:

- The treaty should be based on President Ronald Reagan's cautious approach to arms control agreements: "trust, but verify."⁶⁷ This means that reliable data must be available on which to base verification. States should not proceed with a treaty that controls the trade in particular items until all parties agree that the necessary data on these items are available. A limited treaty that applies to a few carefully defined items will be easier to verify and easier for the U.S. to support than a treaty that seeks to cover everything.
- The treaty should recognize that all states have the *de facto* right to regulate the import, export, and transfer of arms according to their national standards. The mandatory application of universal standards will necessarily produce an enforcement regime that reflects the lowest common denominator, thereby weakening U.S. arms export control policy and undercutting U.S. arms embargoes.
- While respecting the inherent right of self-defense, the treaty should not create new rights that make it easier for dictatorships and the terrorists they support to acquire weapons.

- Because many U.N. members are undemocratic states, the treaty should not have universal membership, because the responsibility for monitoring and enforcing the treaty should not be given to states that cannot be trusted with this serious duty.
- The treaty should not rely on multilateral organizations to monitor and enforce compliance. The Nuclear Non-Proliferation Treaty, which has not prevented North Korea and other states from acquiring nuclear weapons, demonstrates that multilateral arms control compliance regimes face serious challenges. Instead, the treaty should follow the traditional model of arms control agreements, which are monitored by nationally appointed experts working on behalf of their states and ultimately enforced against violations by the threat of national renunciation of the treaty.
- The treaty should not legitimize dictatorial rule or seek to impose restrictions on arming non-state, non-terrorist groups that are rebelling against tyranny and oppression.
- The treaty should unconditionally respect the internal affairs and constitutional provisions of all states, including the right "to keep and bear arms" as guaranteed in the U.S. by the Second Amendment.

The Danger of Inaction

The U.S. might decide simply to ignore the ongoing U.N. negotiations and allow the treaty to be negotiated and signed without actively opposing it. The justification for this approach would be that the U.S., as evidenced by its embargoes, already takes seriously its responsibilities as an arms supplier. If other states wish to adopt a treaty devoid of substance, that is their prerogative.

However, this approach would be a mistake. The U.S. cannot afford to ignore the treaty negotiations, because the treaty's proponents clearly have other goals in mind that are not in the American interest.

66. Control Arms, "Frequently Asked Questions on the Arms Trade and the Arms Trade Treaty," p. 1.

67. Ronald Reagan and Mikhail Gorbachev, "Remarks on Signing the Intermediate-Range Nuclear Forces Treaty," Ronald Reagan Presidential Library, December 8, 1987, at <http://www.reagan.utexas.edu/archives/speeches/1987/120887c.htm> (July 29, 2009).

Some wish to use the treaty to restrict Israel's right to import arms. Others, such as State Department Legal Adviser Harold Koh, refer regretfully to the fact that they "are a long way from persuading governments to accept a flat ban on the trade of *legal* arms," implying that the treaty would be merely a step toward that ultimate goal.⁶⁸

Even more seriously, the treaty's proponents are already referring to it as representing a "growing global consensus."⁶⁹ This is the language of legal transnationalism, a theory endorsed by activist scholars such as Koh. According to Koh, one of his roles as Legal Adviser to the State Department is to "help maintain...habitual compliance with internalized international norms." He has also praised what he describes as "sympathetic people from within government" who take it upon themselves not only to ensure compliance with previous norms, but also to promote new ones. Finally, Koh argues that international norms are as obligatory on the U.S. as ratified treaties and that U.S. judges have the responsibility to enforce these norms within the U.S. when they interpret statutes and the Constitution.⁷⁰

Koh has defined a process that he believes should be used to evade and overcome what he regards as a serious problem: the refusal of consecutive U.S. Administrations and the Senate to give favorable consideration to the treaties he supports and the policies he favors. Under his process, the U.S. can be driven into compliance with whatever he supports without the need for the Senate's advice and consent. In short, once the treaty is adopted by even part of the "international community," liberal legal activists will claim that the treaty's provisions have become norms that bind the U.S., regardless of whether the U.S. is a party to the treaty. Those activ-

ists will then petition U.S. courts to internalize the norms created by the treaty.

This has happened before. In recent years, liberal NGOs and foreign courts, in their ongoing effort to place a complete ban on the death penalty, have successfully integrated certain norms regarding who may be sentenced to death.

In 2002 and 2005, the liberal justices of the U.S. Supreme Court undemocratically internalized certain norms relating to the death penalty in the cases of *Atkins v. Virginia*⁷¹ and *Roper v. Simmons*.⁷² In these cases, the Court declared that the death penalty could no longer be imposed on defendants who were mentally retarded or who committed their crimes, no matter how heinous, while under the age of 18. This was done even though neither the relevant state legislatures nor Congress had passed laws to that effect. In *Roper*, the Court based its ruling partly on the prohibition against the juvenile death penalty in the U.N. Convention on the Rights of the Child—a treaty to which the United States is not a party.

The U.S. therefore cannot afford to ignore the proposed arms trade treaty. If it does, it will be forced to pay attention sooner or later. If later, the U.S. will have lost any hope of changing the language of the treaty for the better. Even now, given the overwhelming majority of U.N. members that supported the October arms trade resolution, the U.S. will have great difficulty successfully reshaping the terms of the proposed treaty.

The low prospects for success should not deter the U.S. from making its case. Speaking up may not stop the process, but it will establish a record of clear and consistent objections to the treaty's failings

68. Ted R. Bromund, "Koh's Goal for the Legal Trade in Arms: Ban It," Heritage Foundation *Foundry*, May 11, 2009, at <http://blog.heritage.org/2009/05/11/koh%e2%80%99s-goal-for-the-legal-trade-in-arms-ban-it> (original emphasis).

69. Control Arms, "Landslide UN Vote in Favour of Arms Trade Treaty," 2008, at <http://www.controlarms.org/en/media/2008/landslide-un-vote-in-favour-of-arms-trade-treaty> (July 22, 2009).

70. Ted R. Bromund, "Harold Koh's Terminological Inexactitude," *Contentions*, April 29, 2009, at <http://www.commentarymagazine.com/blogs/index.php/bromund/64051> (May 8, 2009), and Ted R. Bromund, "Harold Koh on International Norms and 'Skeptical' Nation-States," Heritage Foundation *Foundry*, April 21, 2009, at <http://blog.heritage.org/2009/04/21/harold-koh-on-international-norms-and-%e2%80%99cskeptical%e2%80%9d-nation-states>.

71. *Atkins v. Virginia*, 536 U.S. 304 (2002).

72. *Roper v. Simmons*, 543 U.S. 551 (2005).

that may carry weight with U.S. judges if the treaty's supporters seek to litigate cases based on it in American courts. Given the ascent of the doctrine of transnationalism, such a record—even a reservation or understanding by the Senate if the treaty is submitted for ratification—may be insufficient to protect Americans' rights, but remaining silent will certainly not improve matters.

What the U.S. Should Do

The United States needs to take a measured approach to the upcoming negotiations on the proposed arms trade treaty. While the U.S. should continue to participate in the New York–based working group, it should not allow this participation to be mistaken for acquiescence in or agreement with the discussions or any resulting treaty. Specifically, the U.S. should take a firm position against any treaty that is based on the fundamentally flawed model of the U.N.'s October resolution.

The U.S. should judge the acceptability of any treaty that emerges by the following tests and should refuse to sign any treaty that does not meet all of them.

- Does the treaty recognize the legitimacy of nationally declared arms embargoes and, more broadly, avoid enshrining lowest-common-denominator standards?
- Does the treaty contain an agreed definition of terrorism that differentiates between terrorism (the use of violence against civilians by non-state actors to achieve political ends) and armed rebellion against tyrannical and oppressive regimes that do not respect the inherent right of self-government?
- Does the treaty clearly and unconditionally respect the rights of the private citizens of member states to keep and bear arms?
- Does the treaty avoid establishing a right to buy and instead leave this question as a matter for customary international law?
- Is membership in any monitoring body established by the treaty restricted to law-abiding states that have a strong and consistent record of controlling the transfer and sale of arms to terrorists and repressive regimes?
- Do the terms of the treaty expressly state that it is not self-executing? In other words, does the treaty require passage of legislation to take effect domestically? Without an explicit proviso that the treaty is not self-executing, it may be interpreted to require domestic regulation of the sale and transfer of arms that would contravene the Second Amendment.
- Do the terms of the treaty expressly exclude rights of individuals and private entities to sue to enforce the treaty, to assert rights under the treaty, or to use its provisions as a defense against prosecution? Without such an exclusion, anti-gun activists in the U.S. will likely file frivolous actions and other nuisance lawsuits against gun manufacturers engaging in legal activity.

The U.S. can and should seek to advance the control of the international import, export, and transfer of conventional weapons through means that are less dramatic but more effective than the projected U.N. treaty. To this end, the U.S. should:

- Seek to use the largely inactive framework of the U.N. disarmament organization in Geneva as a good-offices organization in times of regional crisis to bring regional states together and to negotiate small, geographically limited treaties to address particular issues.
- Seek to secure adoption of a U.N. Security Council resolution requiring all U.N. member states to have strong laws against internal diversions from government stockpiles to terrorists. The U.S. already has such laws and could work with other responsible states to supply technical and expert assistance to states that are genuinely interested in reducing potential terrorists' access to arms.
- Work through suppliers groups—such as the member states of the Wassenaar Arrangement,⁷³ the existing multilateral forum for export controls on conventional weapons and dual-use goods and technologies—to build up a body of knowl-

73. "Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies," Web site, June 15, 2009, at <http://www.wassenaar.org> (June 17, 2009).

edge and practice for use by all states that desire to improve their export and transit controls.

- Draw on the Proliferation Security Initiative (PSI) model to promote expanded international monitoring of the sale, purchase, and transfer of conventional arms. The PSI is a self-selecting, non-treaty-based set of partnerships that cooperate on nonproliferation. The advantages of this model are that it does not infringe on national sovereignty and that it can be restricted to states that are genuinely interested in achieving its ends because it does not rely on a universal treaty.

Conclusion

The purported goal of the U.N. arms trade treaty is to keep guns out of the hands of terrorists and organized criminals and to reduce conflict. These are worthy endeavors and should have the support of the United States and its democratic allies around the world.

However, a treaty based on the October 2008 arms trade resolution will not achieve these ends. Instead, it will make it easier for dictators and unscrupulous suppliers—including some European suppliers—to buy and sell arms. It will also provide a justification under international law for dictatorships to oppress their peoples.

Britain, the U.S., and other reputable arms sellers do not sell guns to known terrorist organizations. EU arms sales to terrorist-supporting states like Iran are wrong, but the EU does not need to support a treaty to stop these sales. It merely needs to live up to its own declared standards. Russia and China, the

leading suppliers of arms to many of the world's worst regimes, have not shown any serious interest in the proposed treaty.

It is revealing that Russia and China did not support the U.N. resolution. They abstained, knowing that the U.S. would oppose it and take the heat. Nor was the resolution backed by irresponsible states such as Venezuela, which runs guns to terrorists in Colombia,⁷⁴ or Pakistan, which is notorious for its winking relationship with the Taliban and for its support of armed insurgent groups in Kashmir and against India.

In summary, rogue states buy guns from disreputable suppliers, including the EU and especially Russia and China, and then use the arms directly or transfer them to terrorists. The problem is not the absence of an arms trade treaty. It is the U.N. members that are supplying and buying arms, conniving with terrorists, and killing people directly.

Thus, any U.N. treaty that seeks to control the import, export, and transfer of conventional weapons will fail and, in failing, exacerbate the existing evils. If all U.N. member states were serious about its aims, no new treaty would be necessary. The unwillingness of the treaty's supporters to face this reality is the best evidence that the treaty is based on destructive illusions and will be a dangerous failure in practice.

—*Ted R. Bromund, Ph.D., is Senior Research Fellow and Steven Groves is Bernard and Barbara Lomas Fellow in the Margaret Thatcher Center for Freedom, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation.*

74. Simon Romero, "Files Suggest Venezuela Bid to Aid Colombia Rebels," *The New York Times*, March 30, 2008, at <http://www.nytimes.com/2008/03/30/world/americas/30colombia.html> (May 8, 2009).