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## Legitimizing Liberal Militarism: Politics, Law and War in the Arms Trade Treaty

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### Abstract

Post-Cold War efforts to knit together human rights and international humanitarian law in pursuit of tougher arms transfer control reached their apogee in the UN Arms Trade Treaty (ATT). In contrast to dominant accounts based on human security norms, I argue that a key effect of the ATT is to legitimise liberal forms of militarism. During negotiations, the US and UK governments justified their arms export practices in terms of morality, responsibility and legitimacy. And more broadly their arms transfer practices are explained away by reference to national regulatory regimes that exceed the standards set out in the ATT. Arms transfers to Egypt and intra-western transfers illustrate the way these justifications and regimes serve to shield US-UK weapons transfers and use from scrutiny and accountability. Rather than signalling the victory of human security, the ATT is better understood as facilitating the mobilisation of legitimacy for contemporary liberal forms of war-fighting and war-preparation.

### Keywords

arms trade; arms transfer control; norms; liberal militarism; human security ; risk

In the run-up to the final United Nations (UN) conference negotiating an Arms Trade Treaty (ATT) in early 2013, UK Foreign Minister William Hague warned those states yet to commit to the treaty: “history will judge you harshly if you miss this moment.”<sup>1</sup> This invocation of the historical responsibility at stake in the effort to agree a universal, legally binding treaty to regulate conventional arms transfers was amplified when the overwhelming treaty vote on 2 April 2013 was met in the UN General Assembly with “a burst of sustained applause.”<sup>2</sup> Treaty commentator and scholar Matthew Bolton gave congratulations to civil society and kudos to small and middle powers, and to the US “for doing the right thing in the end.” Together, “crucial norms against profiting from the sale of killing machines to those who abuse human rights and humanitarian law” have been established.<sup>3</sup> The treaty entered into force in December

2014, requiring state parties to regulate their weapons transfers with reference to arms embargoes, illicit trafficking, genocide, crimes against humanity, war crimes, peace and security, international humanitarian law (IHL), international human rights law (IHRL), terrorism, transnational crime, and gender-based violence.

In this article I argue, contrary to the predominantly optimistic emerging assessment of the treaty, that a key effect of the ATT is the legitimization of liberal forms of militarism exercised by major western states. It is not simply that these states have long been amongst the world's largest military spenders, arms producers and arms exporters, and claim the ATT will bring no new responsibilities for them. The same applies to major non-western suppliers and non-signatories such as Russia and, increasingly, China. There is something more at stake: the liberal form that war-making and war preparation take when exercised by major western, liberal states. There is a distinct political economy, strategic orientation and – crucially – form of justification based on human rights, humanitarianism and morality that frame their arms transfers as part of broader war-making and war preparation practices. Arms transfers by liberal states that contribute to violations of human rights and IHL are hidden from view by the existence of regulatory regimes that include consideration of human rights and IHL. This legitimating function of regulatory regimes has been uploaded into the ATT in the way it introduces a balancing act in which states can weigh the risk of human rights violations against the interests of peace and security and justify exports in the name of the latter. With the effect of naturalising liberal states' practices and allowing them to evade scrutiny, create the impression of responsibility and morality, and effect leadership of a liberal international order that is nonetheless reliant on coercion and violence, the ATT takes on a rather different hue as a means for the reworking and relegitimation of liberal forms of militarism.

In what follows, I first situate the treaty empirically, set out the emerging scholarly assessment of it based on human security norms, and advance as an alternative the concept of liberal militarism. Second, I analyse the similarities and differences in forms of justification by the USA and the UK. As an ambivalent sceptic-turned-supporter of the treaty, the US engaged in more unilateralist forms of justification than the UK, which was a major champion of the treaty. However, both states' engagements with the treaty share a framing based on a universalising moral

responsibility. Two cases – arms transfers to Egypt during the Arab Spring, and intra-western transfers – are then used to illustrate the ways in which the US and UK governments justify their arms transfers by reference to regulatory regimes that include explicit reference to IHRL and IHL: regimes that are deemed to already exceed the standards of the ATT. Whilst transfers to the Middle East during the Arab Spring were used by proponent non-governmental organisations (NGOs) as an illustration of why an ATT is needed, intra-western transfers are generally not on the arms transfer control agenda. More broadly, claims around the need for tighter arms trade regulation revolve around an armed violence agenda, primarily in Sub Saharan Africa and Latin America. Analysing a Middle Eastern and an intra-western case helps us think harder about the broader purposes of arms transfer regulation. The existence of transfer regimes that already exceed the standards of the ATT creates a paradox in which contemporary risk transfer militarism is justified by reference to arms export licensing processes that are themselves based on risk assessment. Rather than signalling the success of human security norms then, the effort to use criteria- and risk-based assessments of arms transfers – the core of the ATT – is better understood as having been mobilised as part of the legitimisation of contemporary liberal forms of militarism. There is, as yet, no negotiating history of the ATT. This article combines analysis of states’ official statements and expert commentary from observers of the process with off-the-record discussions with US-UK state and civil society participants in the treaty negotiations as a contribution to understanding the dynamics of the treaty negotiation process and early implementation phase.

### **Theorising the ATT: from human security norms to liberal militarism**

The ATT brings together states’ existing obligations under international law in the form of express prohibitions that are binding on importers and exporters (Article 6), and sets standards for regulatory practice in the form of national risk assessments to bind exporters (Article 7). Its goal is to address “the security, social, economic and humanitarian consequences of the illicit and unregulated trade in conventional arms” whilst protecting the “legitimate political, security, economic and commercial interests of States.”<sup>4</sup> As with other arms transfer control regimes, the “illicit” trade is simultaneously an organising term of the ATT and never defined in the treaty text.<sup>5</sup> The combination of existing obligations under international law with human rights

standards to be enshrined in national regulatory systems is envisaged by proponents to render irresponsible transfers illegal.<sup>6</sup> This was resisted by some southern states who saw it as a political move to delegitimise their practices whilst facilitating western ones.<sup>7</sup>

The idea for the treaty originated in the 1990s with NGO campaigners and a group of Nobel Peace Laureates and was taken up by states via the UN system. A loose coalition of European and Southern states, most notably in Latin America and Sub Saharan Africa, working in alliance with the Control Arms NGO campaign, took on the role of “regional champions” of the treaty and worked together as a “like-minded” group,<sup>8</sup> building on the regional “minilateralism” of initiatives such as the Nairobi Protocol<sup>9</sup> and existing national and international regimes such as the EU Common Position on Arms Exports. A series of technical criticisms have been levelled at the scope,<sup>10</sup> clarity and force of the final treaty text,<sup>11</sup> including the absence of an enforcement mechanism.<sup>12</sup> And diplomatic obstacles to the implementation of the treaty remain: key exporting and importing states such as Russia, China and India have not signed it; the US has signed but is unlikely to ratify any time soon. However, other states’ widespread enthusiasm for the treaty vote translated into rapid entry into force twenty one months after being agreed at the General Assembly.

The emerging scholarly assessment of the ATT is clear that international action to regulate the arms trade is an “unprecedented effort” at norm creation<sup>13</sup> and “one of the most ambitious and difficult goals to achieve in global governance.”<sup>14</sup> It grows out of existing arms control, disarmament and arms transfer control regimes. Extant arms control or disarmament regimes that ban specific technologies such as landmines, cluster munitions, chemical and nuclear weapons, have all relied on their being framed as indiscriminate, inhumane, unacceptable or pariah in some way, thus challenging states’ abilities to produce, use or transfer them as part of legitimate military need and state security practice.<sup>15</sup> The difficulty with regulating the conventional arms trade as a whole, as the ATT attempts to do, is that it does not lend itself to such framing due to the centrality of the arms trade to state security and sovereignty, and hence widespread legitimacy.<sup>16</sup> Any multilateral action on the trade in conventional weapons as a whole thus has to take the form of regulation rather than abolition or a ban.

The ATT is both emblematic of, and distinct from, the post-Cold War non-proliferation paradigm.<sup>17</sup> For example, there is specific mention of terrorism as an ill to be combated, and a framing around the “illicit and unregulated” trade; yet it applies to a broad range of military equipment, and does not generate a taboo or ban on particular types of technologies. As such, it may be able to serve to draw attention to the patterns of civilian death and injury “associated with technologies considered ‘normal’ or the use of which is somehow seen as ‘inevitable.’”<sup>18</sup> One way this is envisaged is through inclusion not only of the laws of war under existing IHL, but also the inclusion of human rights provisions. This human security content of the treaty secured widespread agreement, with the reduction of human suffering explicitly named as a goal of the treaty.

The treaty means different things to the various constituencies involved in the campaign and negotiating processes; indeed, this was a necessary condition for its agreement. It is as much about trade regulation (according to supportive government and industry representatives) as arms transfer control (as most proponent NGOs would have it), with only minority voices (such as the Women’s International League for Peace and Freedom, WILPF) articulating a disarmament agenda. And this is quite aside from the vocal hostility of US-based campaign groups and think-tanks such as the National Rifle Association (NRA) and Heritage Foundation on unilateralist and Second Amendment grounds, and the scepticism (e.g. China, India and Russia) and opposition (e.g. Iran, North Korea and Syria) of some non-western states on substantive and/or procedural grounds.<sup>19</sup> Overall, the treaty represents the “confluence of arms control, security, human rights, trade, armed violence, sovereignty, development, self-defence, technology, and other issues”<sup>20</sup> and its widely-drawn provisions “must be applied in an innumerable number of different factual contexts ... which take shape as the treaty is applied in practice.”<sup>21</sup> As experience from international action on small arms has shown, the problems posed by the arms trade are of a different character in different parts of the world: small arms are an issue of recirculation post-conflict in West Africa, of excessive stocks in southeast Europe, and of criminal activity and drug trafficking in Latin America and the CARICOM region.<sup>22</sup> And notes of caution have been sounded by more radical campaign groups: to ensure the ATT makes a difference, states, civil society and UN “must avoid legitimising further the international arms trade and

irresponsible transfers.”<sup>23</sup> But limits of the treaty aside, most agree that “we have to start somewhere” and push for “robust interpretation and effective implementation.”<sup>24</sup>

The ATT is seen by proponents as a step forward in the development of norms around the protection of human security, and potentially generative of a norm cascade such that it will have an effect even on non-signatories.<sup>25</sup> This chimes with the academic literature on norms, which makes the case for the possibility of moral progress in international politics and a rising tide of principled action. The UK government is seen as having “humanitarian, developmental and moral justifications” or “motivations” for exercising leadership on the ATT, according to norms scholar Denise Garcia.<sup>26</sup> As an example of “disarmament diplomacy”, the ATT signals the way in which the rise of norms based on moral concerns can change conduct in international politics:<sup>27</sup> “The creation of new international norms transforms deeply held practices and changes behaviour.”<sup>28</sup> This is resonant with a common theme within the constructivist norms literature that norms co-exist with and sometimes trump material and strategic concerns, requiring a move beyond interest-based explanations.<sup>29</sup> As Price puts it, “almost any international treaty dealing with subjects such as human rights or war would seem to be a mix of the brutal bargaining of national interests and coercion sprinkled, if not always enveloped, with other, including moral, considerations.”<sup>30</sup> At first blush, then, we cannot understand the entry into force of the ATT without the role of human security norms.

However, whilst the circulation of norms around human security was a necessary (but not sufficient) condition for the agreement and content of the treaty, the character of the explanation given by a constructivist norms account is limited. Norms are supposed to facilitate more progressive standards of behaviour through, for example, the “rhetorical entrapment and shaming involved in hypocrisy” and a constructivist approach is supposed to illuminate the “nuances of progressive and regressive effects of even strategically moral uses of morality.”<sup>31</sup> But existing norms-based accounts of the ATT have taken at face value the moral representations of leading liberal states, as seen in Garcia’s equation of justifications with motivations.<sup>32</sup> And broader constructivist accounts of weapons activism have not tackled the ongoing patterns across the spectrum of weapons transfers, outside of the banning of specific technologies. Carpenter’s insightful analysis of the question of why some weapons

systems are targeted for delegitimation and not others brackets the wider system of war preparation of which the development of weapons systems is a part.<sup>33</sup> Constructivist arguments implicitly assume that progressive change in the area of weapons issues can come from delegitimizing one technology at a time. Yet broader systems of war preparation and war fighting will always generate new technologies. And as I argue later, liberal states' war practices are kept off the agenda through risk assessment processes and legitimating claims based on a universalising morality.

Claims about the normative power of conventional arms transfer control regimes have been sternly tested by empirical studies. Studies of patterns of arms exports demonstrate how the "self-declared ethical turn" of major western arms suppliers in the 1990s has not acted as a bar on weapons exports.<sup>34</sup> The US and Western European states "have generally not exercised export controls so as to discriminate against human rights abusing or autocratic countries during the post-Cold War period."<sup>35</sup> At best, the effect of the EU Code of Conduct, which served as one of the templates for the ATT, has been that "EU members no longer appear to *reward* poor human rights with arms transfers, even if they are not punishing it either."<sup>36</sup> And in specific cases such as EU member states' arms transfers to Libya, evidence demonstrates comprehensive violation of export control principles even though exporting governments were aware of the risks posed by transfers: licence denials "constitute exceptions in an overall export-friendly environment."<sup>37</sup>

These empirical patterns raise the question of how liberal states manage to both transfer weapons to human rights violating and authoritarian regimes, and claim the mantle of responsibility by being publicly in favour of the ATT. The empirical studies cited above tend to adopt a realist explanation in which seemingly normatively progressive regimes serve as rhetorical cover for material or strategic interests,<sup>38</sup> yet they do not go into detail as to how that process works. Realist explanations are inadequate because they fail to take into account the hard work that such rhetoric performs or the way that regimes function often despite the good intention of some proponents.<sup>39</sup> Law and regulation are not merely superficial cover, a distraction from a focus on the advancement of material interests: law "*does* matter; that is both the problem and the promise."<sup>40</sup> Thus whilst constructivists are right that rationalist assumptions of narrowly instrumental behaviour are false,<sup>41</sup> they do not give an



adequate explanation of the significance of the morally oriented work that is going on in the ATT: the ways in which a seemingly progressive initiative contains the seeds of its own complicity in broader systems of preparation for war and violence. Yet Price does point to how, “if hypocrisy becomes too endemic then it may undercut the power of the moral legitimacy more generally that is required for hypocrisy’s piggy-back effects.”<sup>42</sup> So it may be that arms transfers are so embedded in hypocrisy that normative shaming is less effective. As Erickson argues, “the ATT faces a hard road ahead”: “without the means to expose and punish noncompliance, ... [ambitious policies] do little more than enhance states’ reputations without improving human rights and conflict conditions on the ground.”<sup>43</sup> Yet “Research explaining major suppliers’ support for ‘responsible’ arms export controls is lacking.”<sup>44</sup> –To start thinking about this gap between commitment and compliance, and to explain major suppliers’ positions, I advance the concept of liberal militarism. This moves beyond arguments based on hypocrisy and instrumental or functional pursuit of material interests, in order to explain key effects of the treaty in ways other approaches cannot. The normalization and legitimation of liberal ways of war and war preparation via the ATT are an important component of contemporary militarism.

The concept of militarism, understood as the social and international relations of the preparation for, and conduct of, organized political violence,<sup>45</sup> allows us to examine the historical, socio-economic and political sources and character of military power.<sup>46</sup> Understood this way, the concept goes beyond a definition of militarism as ideology, and militarisation as the material process through which militarism comes about. Militarism includes an ideological component but is not restricted to it, because war and armed violence can be justified and facilitated even if not necessarily glorified; and because social forces beyond ideology are required to produce it. Arms transfers and arms transfer control may thus contribute to militarisation (an increase in the intensity of military power in society, whether domestic or international), demilitarisation (a decrease), or a change in the character of militarism. The concept allows for the analysis of the different forms across space and time taken by war and preparation for it.<sup>47</sup> And whilst the number of deaths caused by the arms trade is clearly an important yardstick, a militarism frame goes beyond numbers. Rather, it captures the influence of military relations on social relations in general, and the ways that war and armed violence are

prepared for. This requires broadening the empirical focus beyond conflict in Africa and organized crime in Latin America, which have been the main focus for arms transfer control.

Scholars are increasingly challenging the long- and widely cherished belief that liberalism and militarism are antithetical.<sup>48</sup> Key features of the specificity of liberal militarism include the capital- and technology-intensive character of the preparation for and conduct of war; a strong commitment to military production across war and peacetime and self-understanding as a primarily “economic, industrial and commercial power;” the distanced form of attacks on Southern populations and simultaneous containment of social conflict at home and policing empire abroad, often featuring supposedly “small” massacres; a universalist ideology and conception of world order; low levels of military participation by society; and a state-capital relation that is formally separate but organically related.<sup>49</sup> Justifications based on values and morals promoting human rights and humanitarian values are central to legitimating these features of liberal militarism, and are in contrast to the justifications based on sovereignty of other major, non-liberal suppliers and recipients such as Russia, China and India. In the case of the ATT, language and regulatory bureaucratic practices of risk assessment are embedded in western, liberal regimes that on paper already exceed the standards set out in the ATT.

More generally, the turn to law has been central to the development of liberal militarism. The laws of war serve a legitimizing effect for western ways of war, preempting criticism through reassurance, shielding acts and practices from criticism, and giving rhetorical protection from challenge, which serves to naturalise and normalise the prevailing distribution of power.<sup>50</sup> And the combination of human rights and IHL has served to criminalize low-tech violence and legitimate high-tech forms of war.<sup>51</sup> The turn to law is “productive of the social and political context that makes possible certain forms of war and certain relations of hierarchy,” as the “perceived compliance with the law itself is partly productive of the global order in which contemporary war occurs.”<sup>52</sup> This allows liberal states to pitch their practice in terms of responsibility, morality and legitimacy. Overall, then, whilst it is inappropriate to claim that legal regimes are mere instruments of the powerful, it is also too strong to say that humanitarian security regimes such as the ATT operate “in opposition to the aspirations of the most powerful

states.”<sup>53</sup> What is at stake, rather, is the legitimization of specific forms of war fighting and war preparation.

### **From arms trade regulation to risk-transfer militarism**

The UK government was the first major exporter to express public support for the ATT, in March 2005, becoming a key champion of the treaty, bringing “political force and credibility”<sup>54</sup> to the campaign. UK industry came on board a year later as a way to level the playing field and UK-based NGOs were central to the Control Arms campaign, which was funded and supported to a considerable extent by the UK government.<sup>55</sup> In contrast, the USA was the only state to vote against the July 2006 and January 2009 UN Resolutions.<sup>56</sup> It was not until October 2009 (under the Obama administration) that the US voted in favour of the negotiating process under Resolution 64/48. For British treaty participants, getting the USA on board was crucial<sup>57</sup> and involved dialogue with the US to get it to a position where it could support the treaty.<sup>58</sup> The US government was never a leader in the negotiations but over time shifted to “refrain from serving as an impediment to progress.”<sup>59</sup> Once this shift happened, the US position was pitched in terms of how the ATT allows the US to promote its standards universally, using language of responsibility and legitimate trade.<sup>60</sup> And the US delegation insisted on key procedural conditions such as consensus as the mechanism for decision-making,<sup>61</sup> as a means to control the agenda. In this light, the roots of the ATT – in addition to the human security agenda – include the US’ International Arms Sales Code of Conduct Act of 1999, which required the President to begin negotiations towards an international code of conduct for arms sales<sup>62</sup>; and the related 2000 US-EU Declaration in Responsibility in Arms Exports, in which they publicly espoused the importance of “responsibility, transparency and restraint.”<sup>63</sup> These other politico-economic sources of impetus for multilateral action promote the shared goal of bringing China and other emerging suppliers into a common regulatory regime, to prevent undercutting.<sup>64</sup>

There are similarities and differences in forms of justification between the US and UK. The UK government was more explicitly moral about the ATT and the need to build multilateralism and international law; yet both governments framed their approach in terms of responsibility. Key features of the UK position were pride in Britain’s role (whether via the government or NGOs) acting as an early champion of the

treaty<sup>65</sup> and the government's early adoption of it.<sup>66</sup> The government made both a moral case for the need for a treaty<sup>67</sup> and set out its compatibility with promoting arms exports: for the UK government, the treaty serves to plug gaps in the patchwork of national and regional regulatory regimes, and to level the playing field for British industry by creating common standards by which competitors must also abide. And for BAE Systems, the UK and Europe's largest arms manufacturer, as an already "responsible company", the ATT is not deemed to have any effect on its operations – because it already satisfies the government's requirements, and the government has signed the ATT.<sup>68</sup> In this line of reasoning, the values and prosperity and security agendas are presented as mutually reinforcing<sup>69</sup> and the human security dimension of the ATT and promotion of industry interests are seen as compatible.<sup>70</sup> The UK took the responsibility to lead by example, spreading the word of the treaty and helping build international law and good practice,<sup>71</sup> which would generate "a process whereby everybody agrees on the basic norms at an international level which are then cascaded down into national controls of a high standard."<sup>72</sup> So the self-representation is in line with the norms and human security argument, and pitched explicitly in terms of morals, values and responsibility.

The US government's claims to universalism, responsibility and morality, meanwhile, were more unilateralist and interest-based in character. Its delegation was much more explicit about bringing the rest of world up to its "responsible" standards for "legitimate" transfers,<sup>73</sup> with its system understood as "the 'gold standard' of export controls."<sup>74</sup> The ATT will serve as a "trifecta" of peace, security and human rights for the USA.<sup>75</sup> US arms transfers are carried out for "one main reason: to further US national security interests" – they are "an unequivocal signal to those who seek to counter US interests or undermine international norms."<sup>76</sup> This alignment of US interests with international norms serves to elide the empirical patterns identified earlier and there is a clear political move at stake, which is much more acceptable in US political speech than British: "the regulatory elegance of export control systems aside, it is the arms transfer policies of governments that matter most."<sup>77</sup>

In January 2014, the White House announced the first Presidential Policy Directive on conventional arms transfer policy since 1995. Whilst "the importance of protecting fundamental freedoms and human rights hasn't changed," it needed to be

“more prominently reflected.”<sup>78</sup> A norms-based argument might argue that the fact the US government feels the need to reflect it more prominently is a positive effect of the ATT. But the government was simultaneously clear that the ATT will make no difference to its practice, and has been enacting an Export Control Initiative that further streamlines export licensing. In this, “less sensitive” items will be moved to a Commerce Control List away from a Military List, putting “higher fences round fewer items” but also leading to less statutory involvement of Congress in decision-making and a recategorisation of lists primarily based on military threats to the US, “diminishing the ability to use the controls to deny exports to human rights abusers”<sup>79</sup>

A focus on two specific cases – arms transfers to Egypt during the Arab Spring, and intra-western transfers for use in liberal wars of choice – illustrates the argument in more detail. Discourses of risk have been embedded into arms trade regulation, yet the continuities in US-UK practice suggest that they serve a primarily legitimating purpose. The risk assessment process allows liberal states to continue preparing for war and supporting war-making institutions, capitalist development, and restricted forms of politics overseas and simultaneously claim the mantle of morality and responsibility. Krause identifies a logic of governmentality in arms control, in which forms of regulation burrow deep into the domestic politics of states. Accompanying this has been a “normative evolution” around “*who* could legitimately use *what kinds of violence* against *which people or groups* and under *what circumstances*.”<sup>80</sup> Whilst there are indeed increasingly complex and bureaucratised processes of risk management around arms transfer regulation, this supposed normative evolution has not restrained historically long-standing patterns of liberal use of violence against non-liberal societies and support for violence in the non-European world. While the burgeoning literature on risk “has shifted security away from the register of war and violence,”<sup>81</sup> the incorporation of risk into arms trade regulation is better understood in terms of the maintenance of the legitimacy of war in the west.<sup>82</sup> This is not to say that modes of control have not been changing in recent decades: the shift to democracy promotion since the 1980s may generate “a more resilient form of social control than authoritarian and dictatorial rule,”<sup>83</sup> and capitalism has long featured combinations of consensual and coercive modes of rule.

The brutal suppression of demonstrations and protests in Middle Eastern and North African states from late 2010, often using foreign-supplied military and police equipment, was used by campaigners as an example of the need for an ATT.<sup>84</sup> Seeking to provide a practical methodology for the implementation of human rights protection as part of the treaty, Amnesty International asks “what went wrong?” with arms supplies to the region.<sup>85</sup> Amnesty’s answer, pitched in terms of risk assessment and mitigation, provides an example of the (by political necessity) thoroughly depoliticised character of debate about arms transfers and control, and of the shared fiction between state and non-state actors around arms transfer control. Amnesty proposes a methodology for risk assessment based on the seriousness of violations (measured by gravity and pervasiveness) and level of risk. For the risk of misuse of weapons to be “substantial”, it must be “beyond suspicion, but need not be as high as ‘highly probable’” – it needs to be “reasonably foreseen,” based on credible evidence of current and past record.<sup>86</sup> If the risk is deemed substantial, arms export licences should be refused or revoked “until the risk of further violations using such arms has been curtailed through remedial action.”<sup>87</sup> In the case of Egypt, the pattern of serious violations was such that “any meaningful risk assessment process would have informed states that there was a substantial risk of arms being misused by the security forces.”<sup>88</sup> As a result, Amnesty called for a suspension of arms transfers and a review of policy by suppliers,<sup>89</sup> and for an ATT that has “international human rights and humanitarian law at the core of its normative framework.”<sup>90</sup>

Given that the ATT is intended to protect the “legitimate” arms trade, there has to be a way for states to be able to resume transfers. As such, criticisms of suppliers’ practices are pitched in terms of the need for more rigorous implementation and a halt to exports until improvements are seen. NGOs campaigning for the ATT such as Amnesty International take “no position” on weaponry not of “direct use” in human rights violations.<sup>91</sup> This approach stems from an opposition to the politicization of arms transfer criteria, which should be “implemented objectively and fairly.”<sup>92</sup> Yet the assumption that objective judgments can be made, outside of interpretation, depoliticises what is inherently and unavoidably political. And the no-position position effectively marginalises the wider role of arms transfers in buttressing authoritarian social relations beyond their direct use in human rights abuses. Amnesty concludes that

“It is difficult to understand” how arms suppliers examined risk, “particularly in the context of the existing pattern of internal repression.”<sup>93</sup> But the case for an alternative explanation is contained within Amnesty’s own evidence base: entrenched patterns, and the way that “political and economic interests have often been prioritized in the decision-making process over human rights considerations.”<sup>94</sup> Yet the focus on case-by-case risk assessment assumes that human rights violations are aberrations that can be ironed out, rather than an organic component of support for elites and authoritarian social relations that, whilst undergoing transformation in the contemporary moment, still involve the buttressing of coercive institutions.

In the eventual treaty text, the language of “substantial” risk as called for by NGOs was downgraded to that of “overriding” risk, at the US’ insistence<sup>95</sup> and in line with the US’ national approach to arms export licensing.<sup>96</sup> And the risk of serious human rights violations and other ills can be balanced against consideration of whether the export “would contribute to or undermine peace and security”<sup>97</sup> – allowing states to conduct a risk assessment and approve the export anyway. The US has a system of either weakly “taking into account” human rights or blanket banning, which often becomes “a punitive sanctions measure,” according to Amnesty.<sup>98</sup> The transfer process is “subject to large executive discretion” through the use of waivers by the President or Secretary of State for Defense.<sup>99</sup> While Amnesty wants to encourage a shift in US policy to a “preventive approach” in which licences are denied “if there is a risk the arms are likely to be used to commit human rights violations,”<sup>100</sup> the US government claims to already operate a case-by-case approach in which arms transfers are always “thoroughly reviewed” by the State Department Political-Military Bureau “to ensure any arms sale is in line with U.S. foreign policy so that it advances *both* our interests and our values.”<sup>101</sup> So controversial decisions are not a mistake – they are the policy. And one of the US’ negotiating redlines was that there was to be no international body to enforce the ATT, and that exports remain a national decision.<sup>102</sup> Whilst the ATT directs state parties to undertake a risk assessment, it cannot direct them what decision to make as a result.

The US government response to the repression of protest in Egypt combined denial of the use of US-supplied weaponry<sup>103</sup>, a pledge to make “adjustments” where necessary<sup>104</sup>, a review that made little change to transfers to Egypt<sup>105</sup>, and the use of a

national security waiver to facilitate the release of US \$1.3bn of military aid.<sup>106</sup> It was only when the Egyptian military ousted President Morsi in July 2013 that the US government was compelled to suspend its aid programme (due to requirements of the Foreign Assistance Act) but this was only partial and temporary.<sup>107</sup> The US response suggests that the calculus of risk is only weakly embedded in the governance of its arms transfers and military aid – and the US approach predominated in the wording of the final ATT text.

However, analysis of UK policy, which is framed in terms closer to that campaign NGOs' strongest version of the ATT,<sup>108</sup> suggests that even here, the ability of the risk approach to restrict arms transfers is to be seen with scepticism. The UK government's response to the repression of protest in Egypt was to announce that it was revoking five licences for exports of military equipment to Egypt, as part of a wider revocation of licences to the region.<sup>109</sup> It also announced a review of the licensing process, which led to a tightening of procedures (but not of policy). Foreign Minister William Hague claimed there was "no evidence of any misuse of controlled military goods exported from the United Kingdom"<sup>110</sup> and the review concluded that "there are no fundamental flaws with the UK export licensing system."<sup>111</sup> To enable ministers to be able to "respond rapidly and decisively to the outbreak of conflict, instability or unpredictable events," an "immediate licensing suspension" mechanism was announced, under which "Applications in the pipeline would be stopped and no further licences issued, pending ministerial or departmental review." The review also proposed a "revised risk categorisation" using objective indicators and more regular review, to keep pace with changing circumstances.<sup>112</sup> In August 2013 the UK implemented the EU Foreign Affairs Council decision to "suspend all export licences for Egypt for items which might be used in internal repression", initially taking a "precautionary approach" and suspending 48 extant licences, later releasing 31 of these from suspension after a review of all licences.<sup>113</sup>

This four-part response of revoke, review, suspend and revise seems at first sight to be an effective risk-based response. However, none of these mechanisms necessarily stopped military and police equipment being transferred to Egypt. William Hague's focus on the question of whether specifically UK-supplied goods had been misused, similar to the US denial of US-supplied equipment, as above, restricts the general risk of



equipment being misused to that supplied by particular suppliers. This type of claim has been challenged for well over a decade<sup>114</sup> and yet continues to be made. Beyond this, revoking licences does not require the recipient to return equipment already transferred; and the “suspension” mechanism applies to new licence applications only and does not prevent the transfer of equipment already licensed, to the effect that “in many, if not most, cases the arms will have left the UK before suspension occurs,” according to the UK Parliamentary Committees on Arms Export Controls (CAEC), an often dissenting voice in UK arms export policy.<sup>115</sup> Despite the Consolidated Criteria and EU FAC suspension, the Government deemed extant licences for equipment including assault rifles, combat shotguns, sniper rifles, acoustic devices for riot control, small arms ammunition to be compliant its commitments.<sup>116</sup> The CAEC had further reason to criticise the UK government after it repeatedly described weapons such as semi-automatic pistols, assault rifles, sniper rifles, submachine guns, ammunition and armoured personnel carriers exported to North African and Middle Eastern states during the Arab Spring as “crowd control goods”<sup>117</sup>.

Overall, the combination of restrictions on the definition of risk, revocations and suspensions that do not stop equipment being transferred,<sup>118</sup> and dissimulation in its supposedly transparent reporting, by a government that is at the forefront of the risk-based approach suggest that discourses of risk and responsibility are more legitimacy than restrictive. UK licensing policy functions primarily to give the UK government a means to respond to domestic critics with the reassurance that there are measures in place to protect human rights and humanitarian values. And the UK government’s enthusiasm for the ATT is to a significant degree a means to silence domestic critics and claim the mantle of responsibility in the international arena. As set out by a campaigner, one response to transfers that “On the face of it” contradict the UK’s commitment to the ATT and “risk tarnishing the UK’s reputation as a leading ATT advocate”, the imperative is “clarifying” the misunderstanding and, “where appropriate, rectifying its position” so that “the UK will be on much firmer footing when championing the Treaty”<sup>119</sup> – even though, as seen in the Egypt case, changes to its position do not involve a fundamental change in arms transfer practice. The UK government has simultaneously claimed that it will implement the human rights provisions of the ATT before its entry into force<sup>120</sup> and reassured Middle Eastern states that the ATT is similar to national UK policy and “would

not add anything on top of that” or “make it more difficult” for them to receive weapons.<sup>121</sup> In the US, alongside liberal critics of government policy, there is a strong conservative strand within Congress and Senate, and organisations such as the Heritage Foundation and the National Rifle Association that are vehemently opposed to the ATT. Overall, however, the main audience for US claims is friendly and allied states rather than any domestic constituency, according to Erickson: international reputation repair towards the end of the 2000s was a major reason for eventual US support for the ATT.<sup>122</sup>

Arms transfers to Egypt were used by campaigners as a case of the need for tougher arms transfer control through the ATT. And in principle the proposed risk assessment procedure applies to all international transfers – so it is worth asking what the potential effect might be on intra-western transfers. Whilst domestic military production is excluded from the ATT (as it is a trade regulation, not a disarmament treaty), it is significantly internationalised: the US, the world’s largest military producer and spender, is also currently the world’s eighth largest arms importer, importing weapons and equipment from allies such as Germany, Canada, the UK and other European states.<sup>123</sup> In Iraq, Coalition forces caused 12% of the 92,614 civilian direct deaths between March 2003 and March 2008, with a peak during the invasion period, aerial bombing being a specifically highly lethal form of military action, and attacks disproportionately harming women and children.<sup>124</sup> Amnesty International, Human Rights Watch, and Stanford Law School and NYU School of Law have all documented drone strikes in Pakistan and Yemen that may constitute war crimes and violations of international humanitarian and human rights law.<sup>125</sup>

Given the credible evidence (from the type of organisation that ATT proponents say should be used as evidence for assessing risk) that US-led international military action may have led to violations of international humanitarian and human rights law, intra-western arms transfers should be open for scrutiny under the remit of the ATT prohibitions and criteria. Under the terms of the ATT, existing provisions under international law are used to create prohibitions on transfers under certain circumstances, which are allied to the setting of standards through human rights risk assessment to raise the bar of international practice of permitted transfers. This is emblematic of the way human rights law and IHL are understood to be complementary

and mutually reinforcing, in which human rights have been used to fill “an institutional vacuum in cases where the application of humanitarian law is disputed or unclear.”<sup>126</sup>

Yet in practice the restrictions on intra-western transfers are limited. Despite the laws, extensive regulatory bureaucracies and institutional support for arms export control in western states, significant political work goes into making these transfers *not* count under the ATT. The licensing process for US-UK transfers is streamlined through the use of open licences and a Defence Trade Cooperation Treaty, for example, which generates blanket authorisations for transfers between them in support of pre-approved combined military and anti-terrorism operations.<sup>127</sup> The UK, Australia and Canada have such agreements with USA, designed to enhance interoperability, which are valid indefinitely, encompass broad authorization and mean exporters do not need to wait for approval before exporting.<sup>128</sup> Through the use of Open General Export Licence (OGEL), transfers of any military or dual-use goods, technology and software from the UK to the US are permitted as part of an “Approved Community” and as long as the ultimate end-user is the US or UK Government.<sup>129</sup> Overall, the bureaucratic focus of licensing institutions is primarily on exports to the South, to the point that refusals between western states on human rights or humanitarian grounds are politically unthinkable, in line with the broader political project of common defence through NATO. Even critics of the wars in Iraq and Afghanistan do not use violations committed by Coalition forces as a reason to push for restrictions on intra-western arms transfers.<sup>130</sup> Intra-western transfers are thus in practice not considered to be politically sensitive or controversial and fall off the radar of scrutiny and accountability. They are “normalized, routinized, serial moments of exception operating as part of a day-to-day bureaucracy whose only external audience is usually the company applying for licences.”<sup>131</sup>

The streamlining and depoliticisation of intra-western transfers find justification in discourses of contemporary liberal war-making, which are marked by risk-transfer and the notion of collateral damage and accidental civilian harm.<sup>132</sup> The transfer of the risk on to civilians of being killed in risk-transfer war is “deliberate and systematic”, according to Martin Shaw, and “a completely predictable consequence of the protection provided to western aircrew.”<sup>133</sup> In this, the concept of “double effect” has become central: the distinction between “those consequences that are intended and those that

are, as it is usually put, ‘merely’ foreseen.”<sup>134</sup> This means that military forces are not held responsible for civilian deaths and injury, as long as they are not deliberately intended. The character of liberal justifications thus disavows responsibility for civilian deaths and casualties, and explains them away as accidental, muting criticism and evading responsibility.<sup>135</sup> And yet accidents, as “both technological acts and spaces of political subjectivity [are] partly *productive* of how these wars have been conceived,” as Owens argues.<sup>136</sup> This is visible in the formulations of the ATT: under the terms of Article 6, states must refuse arms transfers if they have “knowledge at the time of authorization” that the equipment “would be used in the commission of” war crimes or other violations of international law; this is a higher bar than the terms of Article 7, which requires exporting states to undertake a risk assessment to “assess the potential” that weapons “could be used to commit or facilitate” serious violations of IHL and IHRL.<sup>137</sup> So transfers are only automatically prohibited if states *know* that transfers would be used in war crimes and other violations of international law – but the doctrine of double effect makes space for consequences that are not deliberately intended, merely foreseen. The claim that targeting is done carefully and civilian protection is emphasised allows civilian deaths and casualties to be explained away as accidents and therefore not fall foul of the automatic prohibition under Article 6, and not pose a risk under Article 7. Much of the risk assessment as suggested by the ICRC, for example, as to how states should apply IHL criteria to arms transfer decisions, focuses on the record, intention and capacity of states to respect and ensure respect for IHL.<sup>138</sup> Given that western states do include reference to IHL in their arms transfer policies and military doctrines and training, any record of violation is deemed a mistake rather than a need for policy review.

This interpretive gap between policy and practice should prompt us to move away from an arms trade regulation frame towards a militarism frame, and start thinking about legitimation. The merging of human rights law and IHL tends to “criminalize low-tech violence rather than high-tech violence” and “[legalize] military necessity on the battlefield,” enhancing the legitimacy of war through the association with human rights.<sup>139</sup> Humanitarian law “is firmest in areas of marginal military utility” in which more technologically sophisticated militaries can claim to exercise more humanitarian forms of war.<sup>140</sup> And it is a claim with political effects: it marginalises

accountability and responsibility of high-tech liberal states, and it pushes attention on to low-tech war, as seen with the preoccupation with small arms, conflict in Sub Saharan Africa and organized crime in Latin America in the mainstream arms transfer control agenda.

Overall, then, European and US regulatory regimes provide ritualised and legitimising cover for liberal states' arms transfers and wars. States with control systems that already exceed the standards of the ATT are known to authorize transfers that contribute to human rights and humanitarian violations, whether in terms of transfers to southern clients or intra-western transfers for use in liberal wars. Yet liberal states say the ATT will make no difference to their policies, and will primarily be a means to bring other states up to their standards. Potentially controversial transfers are explained away as mistakes or aberrations, if they are explained away at all (on the rare occasion of licence suspension or revocation, for example). But more often, they are justified by reference to the very existence of these regulations: the existence of a bureaucratic process that includes reference to human rights and IHL is taken as evidence that arms transfer practices do not violate human rights or IHL. In fact, the ATT may come to mean that potentially controversial transfers do not even need to be explained away as aberrations, adding a further layer of legitimation. As noted earlier, the inclusion of "peace and security" justifications for transfers allows state to both say they conducted the risk assessment and decided in favour of the transfer anyway.<sup>141</sup> The US and UK governments and industry claim both things can be true – that they can simultaneously be amongst the world's largest arms exporters *and* make a moral case for an ATT – because they see the problem of armed violence as separate from the types of arms transfers and war-making they are engaged in. The impression that western arms transfers are responsible persists because of the assumption that US-led military preponderance, foreign policy and wars of choice are compatible with human rights protection – a position taken by most proponent NGOs as much as by states.<sup>142</sup> They claim the mantle of responsibility by either denying that there is evidence of their complicity, reviewing policy but not actually changing much, or dismissing human rights claims as part of a war for freedom and democracy. There is a difference in the character of their claims, though, as illustrated above, with US claims more unilateralist and aggressive than those of the UK. This difference is in part explained by the US' centrality to the western alliance and the structural demilitarisation of the UK and other

western allies – the US is both more likely to go to war, and to be more aggressively war-like in its justificatory claims.<sup>143</sup> The US is happy for the UK to take the lead in institutionalising a liberal arms transfer control system, but will do little to implement it, nationally or internationally.

### **Conclusion: Legitimising liberal militarism**

The ATT is very much a product of its time: the fusing of human rights and IHL by a North-South coalition of state and non-state actors in pursuit of improved human security. This project occurs in the context of an international system marked by western military predominance: the post-9/11 period is the “longest period of continuous warfare in American history”, according to Michael Mann, in which we see “a highly militaristic power in a peaceful international system,” an expansive imperial appetite “accompanying it of course with fine-sounding rhetoric about improving the world.”<sup>144</sup> This article has sought to examine the significance of the liberal claim to improving the world via the claim to the mantle of legitimacy, responsibility and morality in arms trade regulation. The mobilisation of risk assessment in ways that mute criticism of ongoing arms supply despite human rights violations, as seen in the Egypt case, and the depoliticisation of war-preparation that includes potential violations of IHL, as seen in the case of intra-western transfers and the prosecution of liberal wars, are key ways in which liberal forms of militarism are legitimated. Understanding regulatory regimes as performing such a function helps us explore the role they play in what Anna Leander calls “militarizing by distraction” (here, distracting away from the harm and violence caused by legitimate as well as illegitimate transfers) and “militarizing by distinction” (the distinction between legitimate interests and the illicit market, between responsible actors and irresponsible ones).<sup>145</sup>

Proponent NGOs are critical of liberal state practices that violate human rights, but their arguments are usually based on the assumption that their policies and practices are fundamentally sound, and that liberal states’ own use of force and transfers between them are not relevant to the arms transfer control agenda. Liberal states themselves disavow any impact that the ATT will have on their regulatory regimes, precisely by reference to their existing systems. So liberal states’ regulatory regimes and justifications cannot be dismissed as purely strategic or rhetorical – they have a strong effect, even if that effect is not towards more restrictive arms transfer

practices. Further, “if hi-tech violence is shielded from prosecution, this may sap the moral force of the law and allow low-end offenders to paint themselves as victims of politicized proceedings.”<sup>146</sup> This is precisely what happened in the ATT negotiations,<sup>147</sup> and is a reason for thinking in terms of legitimation. With attempts at legitimation comes resistance and contestation, as seen in the justifications from non-liberal states along the way.

Yet the very conditions of the ATT’s success are the basis of its political effects. Part of the success of post-Cold War arms transfer control has been the way it has coalesced with mainstream security discourse.<sup>148</sup> Control Arms and other proponent NGOs want a universal system in which human rights are not politicised: whilst they recognise that states will engage in politicking, they hold to the idea of a fundamentally apolitical core of the protection of human rights and IHL. For them, the ATT is an attempt to engage in technical, non-political discussions with non-liberal states about issues such as the diversion of weapons, in order to raise the bar of control standards around the world.<sup>149</sup> One of the ironies of the ATT process is that consensus that the treaty should only deal with the “illicit” and unregulated trade was fundamental to the degree of traction it eventually garnered; yet the productive slippage between the concepts of “illicit” and “irresponsible” transfers means the ATT cannot adequately be understood as an apolitical, human security oriented agenda with which some states played politics. The very formulation is itself deeply political.

Sounding a sceptical note about the ambiguities of regulation and the way it can create both accountability and militarization poses “an intractable dilemma; having to side either against regulation or in favour of militarism is singularly unattractive.”<sup>150</sup> It is also still quite a marginal activity: even Martin Shaw, who has done so much to analyse risk-transfer militarism, ends on an optimistic note that this analysis of the ATT cannot share. He argues that “the door has been fundamentally opened to new kinds of delegitimation of war:” risk-transfer war is “vulnerable to new criticisms that will, sooner or later, challenge even its newly refined justifications.”<sup>151</sup> And the development of legal frameworks combined with civil society monitoring “means that military events are likely to be legally monitored in new ways. Thus excesses (of course, a normal product of war) are increasingly, if still very variably, capable of being legally actioned.”<sup>152</sup> Similarly, Smith argues that human rights could help “develop alternatives

to war itself” and can bring “long-term and cumulative impacts of war into focus in a way that IHL cannot”, including by “raising basic questions about the militarization of societies and economies.”<sup>153</sup>

The analysis of the ATT advanced here suggests instead, however, that it is precisely the turn to law, the supposed compatibility between military preponderance and human rights protection, and the failure to move beyond direct use of weapons, that helps legitimise (particular forms of) war. Critical legal studies scholars advocate “a form of law-politics to develop humanitarian principles into a concrete, normative agenda:”<sup>154</sup> and yet this is exactly what humanitarian disarmers have been trying to do with the ATT and previous arms transfer control regimes. It is important to recognize “that some degree of complicity in previous social structures is inherent in social change.”<sup>155</sup> Price argues that scholars should not underplay the morally progressive significance of “practices that at once contain elements of progressive change ... yet at the same time are predicated on or produce the conditions of possibility for other forms of exclusion, hierarchy, inequality, repression or violence.”<sup>156</sup> However, the widespread emphasis on the progressive, if imperfect character of the ATT in scholarship and policy, has failed to interrogate the justificatory claims around moral responsibility that so pervaded its negotiation. These claims contribute to obscuring a significant scale of human rights violations and the wider systems of war preparation that arms transfers are a part of. Further, such claims are part of what sceptical southern states are responding to and resisting, thus making wider normative change more difficult. The ATT negotiation process shored up liberal states’ actions whilst invoking their benevolence and assuming them to be distinct from illicit or irresponsible actors. The supposed effectiveness of normative change is muted by the existence of regimes that claim already to exceed the standards of the ATT. This may not be the ideological glorification of war that we tend to equate with the concept of militarism, but the ATT signals the contemporary mobilisation of legitimacy for liberal war-making and war-preparation nonetheless.

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#### Notes

<sup>1</sup> Hague, “A safer future.”



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<sup>2</sup> UN Department of Public Information, “Overwhelming majority of states”; Control Arms, “States vote overwhelmingly”.

<sup>3</sup> Bolton, “Arms Trade Treaty.”

<sup>4</sup> UN General Assembly, “The Arms Trade Treaty”

<sup>5</sup> Bourne, “Controlling the Shadow Trade”; Mutimer, “A serious threat to peace”

<sup>6</sup> Mack, “The Arms Trade Treaty PrepCom”

<sup>7</sup> Stavrianakis, “Pariahs, progressives and sceptics”

<sup>8</sup> McDonald, “Worth the Paper?”

<sup>9</sup> Wulf et al, “Small Arms and Light Weapons;” see also Krause, “Transnational civil society activism” and Garcia, *Disarmament Diplomacy*, for discussion of the campaign.

<sup>10</sup> The scope of the treaty covers battle tanks, armoured combat vehicles, large-calibre artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, and small arms and light weapons. Ammunition and parts/components relevant to these weapons types are treated separately but apply the same criteria.

<sup>11</sup> e.g. Brück and Holtom, “Will the arms trade treaty be stuck in the past?”; Control Arms, “Finishing the Job;” Saferworld, “Finishing the Job”; Women’s International League for Peace and Freedom, “UN member states adopt first ever arms trade treaty;” Lustgarten, “The Arms Trade Treaty.”

<sup>12</sup> In sum, there are mild reporting requirements (state parties are to report on their implementation measures within a year of entry into force of the treaty, and to provide a retrospective annual report on imports and exports of equipment covered by the treaty, with the caveat that they can exclude commercially sensitive or national security information; and enforcement is purely at the national level. State parties are encouraged to cooperate and seek or provide assistance for implementation; and the treaty establishes a Secretariat to assist in implementation, which has no enforcement capacity.

<sup>13</sup> Garcia, *Disarmament Diplomacy*, 37

<sup>14</sup> Bolton et al, “Globalization and the Kalashnikov.”

<sup>15</sup> For just a few examples of this literature see e.g. Price, *The Chemical Weapons Taboo* and “Reversing the Gun Sights;” Krause “Transnational civil society activism”; Tannenwald, “Stigmatizing the Bomb;” Cameron et al, *To Walk Without Fear*; Rutherford, “The Evolving Arms Control Agenda.”

<sup>16</sup> Erickson, “The Arms Trade Treaty.”

<sup>17</sup> Cooper, “What’s the point”; Cooper and Mutimer, “Arms Control for the 21<sup>st</sup> Century”; Krause and Latham, “Constructing non-proliferation and arms control”; Stavrianakis, *Taking Aim at the Arms Trade*.

<sup>18</sup> Rappert et al, “The roles of civil society,” 773.

<sup>19</sup> On ATT as arms control, see Ray, “A human security agenda”; as a novel type of “humanitarian security regime”, see Garcia *Disarmament Diplomacy*; as trade regulation, see Wood, “How to reach consensus” and Countryman, “Statement”. For WILPF’s feminist and pacifist position, see Acheson, “Starting somewhere;” for conservative opposition, see Bromund, “Congress should continue,” and National Rifle Association Institute for Legislative Action, “Obama Administration signs”; and on the position of sceptical states, see Stavrianakis, “Pariahs, Progressives and Sceptics”.

<sup>20</sup> Mack, “The ATT PrepCom”; also Ray “A human security agenda,” 203.

<sup>21</sup> Green et al, “Gender-based violence.”

<sup>22</sup> Krause, “Transnational civil society activism,” 232; Joseph, “Reflections from the Arms Trade Treaty Negotiations.”

<sup>23</sup> Acheson, “Starting somewhere.”

<sup>24</sup> *Ibid.*

<sup>25</sup> Acheson, “Starting somewhere;” Saferworld “The Arms Trade Treaty”; Duncan, “The Arms Trade Treaty.” Sears (2012) “Controlling Small Arms and Light Weapons Proliferation.”

<sup>26</sup> Garcia, *Disarmament Diplomacy*, 56.

<sup>27</sup> *Ibid.*, 14

<sup>28</sup> Garcia, “Humanitarian security regimes,” 56

<sup>29</sup> E.g. Price, “Moral norms in world politics” and “Moral limit and possibility in world politics;” Florini “The Evolution of International Norms;” Sikkink, “Transnational Politics.”

<sup>30</sup> Price “Moral limit and possibility,” 201

<sup>31</sup> *Ibid.*, 204

<sup>32</sup> Krebs and Jackson point to the limits of the US constructivist norms literature’s assertion of crass material interests versus sincerely held ideational beliefs, and to the limits of persuasion and

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internalisation of beliefs as a mechanism for change, arguing, rather, for a model of rhetorical coercion. I share their scepticism as to the explanatory effectiveness of a norms-based argument and emphasis on the relationship between rhetoric, legitimacy and rule but do not go into detail as to the mechanisms of the rhetorical practices around the ATT, as the substantive outcome (legitimation of liberal militarism rather than promotion of human security norms) is my focus. Krebs and Jackson, "Twisting Tongues and Twisting Arms." For an interesting op-ed by an arms control consultant using language of "Diplomacy, lobbying and out and out arm-twisting" and the way "rhetoric can often trump fact" in Washington, whilst also trying to pitch the ATT as in US interests, see Stohl, "Tell the Truth about the Arms Trade Treaty."

<sup>33</sup> Carpenter, "Vetting the Advocacy Agenda".

<sup>34</sup> Perkins and Neumayer, "The organized hypocrisy of ethical foreign policy".

<sup>35</sup> Ibid., 247, 253. See also their discussion of why their findings differ from those of previous econometric work by Blanton, whose results paint a more optimistic picture. See also De Soysa and Midford, "Enter the Dragon!" and Erickson, "Market imperative meets normative power".

<sup>36</sup> Ibid., 218. Under the EU Common Position, Member States are legally bound to "deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression", in order to ensure "Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law." Council of the European Union, *Council Common Position 2008/944/CFSP*.

<sup>37</sup> Hansen and Marsh, "Normative power and organized hypocrisy."

<sup>38</sup> Perkins and Neumayer, "The organized hypocrisy" and Hansen and Marsh, "Normative power and organized hypocrisy," for example, both mobilise Krasner's concept of "organized hypocrisy"; Krasner, *Sovereignty*.

<sup>39</sup> Hansen's argument that seeks to "tak[e] ambiguity seriously", for example, still ultimately theorises ambiguity in terms of a rational model of material interests; Hansen, "Taking Ambiguity Seriously"

<sup>40</sup> Af Jochnick and Normand "The Legitimation of Violence," 412.

<sup>41</sup> Price, "Moral limit and possibility," 203.

<sup>42</sup> Ibid., 204

<sup>43</sup> Erickson, *Dangerous Trade*, 153-4

<sup>44</sup> Ibid., 37

<sup>45</sup> Stavrianakis and Selby, "Militarism and International Relations."

<sup>46</sup> Shaw, *Post-Military Society*, 3

<sup>47</sup> For typologies of forms of militarism see e.g. Mann, "The roots and contradictions," Shaw, *Post-Military Society* and *The New Western Way of War*; Sjoberg and Via, *Gender, War and Militarism*

<sup>48</sup> Caverley, *Democratic Militarism*; Edgerton, "Liberal Militarism and the British State;" Stavrianakis and Selby, "Militarism and International Relations." Caverley does not specify that democratic militarism is specifically liberal, but seems to mean liberal-democratic militarism given his assumptions about the form of democracy in play. The category of liberal militarism subsumes democratic militarism, but the reverse is not the case; democratic militarism is not necessarily liberal.

<sup>49</sup> Edgerton, "Liberal Militarism and the British State." Shaw, "Risk-transfer militarism."

<sup>50</sup> af Jochnick and Normand, "The Legitimation of Violence: A Critical History of the Laws of War" and "The Legitimation of Violence: A Critical Analysis of the Gulf War."

<sup>51</sup> Smith, "The New Law of War," and "Can Human Rights Build a Better War?"

<sup>52</sup> Owens, *Between War and Politics*, 74.

<sup>53</sup> Garcia, "Humanitarian security regimes," 56.

<sup>54</sup> Erickson, "The Arms Trade Treaty."

<sup>55</sup> Krause, "Transnational civil society activism," 231.

<sup>56</sup> "Towards an arms trade treaty" (A/C.1/61/L.55 and A/Res/63/240, respectively)

<sup>57</sup> Wood, "How to reach consensus"

<sup>58</sup> Abramson and Horner, "Toward a legally binding Arms Trade Treaty." UK Foreign Minister David Miliband claimed to have sought "an active US partners" on ATT for many years and now has one; cited in Abramson "US supports ATT process"

<sup>59</sup> Stohl, "Putting the Arms Trade Treaty into context" 336

<sup>60</sup> Clinton, "US Support for the Arms Trade Treaty"

<sup>61</sup> Erickson, *Dangerous Trade*, 88.

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- <sup>62</sup> US Department of State, *International Arms Sales Code of Conduct*
- <sup>63</sup> United States, *US-EU Declaration on Responsibility in Arms Exports*
- <sup>64</sup> One of the ironies of the ATT is that the effort to promote responsible arms trading does not rule out undercutting. In the Egypt case, discussed later in this article, for example, during the period that certain US arms transfers were temporarily put on hold, other suppliers such as France (a state party to the ATT) and Russia (a non-signatory) reportedly concluded significant deals; Sharp, *Egypt*. I am grateful to the reviewer who pointed out this additional source of the ATT and the undercutting issue in relation to Egypt.
- <sup>65</sup> Hague “Speeches”
- <sup>66</sup> Amnesty International, “UN: Final push”
- <sup>67</sup> Donaldson, “How the UK can be a global champion”; also Hague et al, “Why this arms trade treaty is essential;” Wood “How to reach consensus”; Duncan “The Arms Trade Treaty”
- <sup>68</sup> Quoted in Kytömäki, *The Defence Industry*, 21
- <sup>69</sup> Wood “How to reach consensus”; Abramson and Horner “Toward a legally binding Arms Trade Treaty.” The embodiment of this position can be seen in the inclusion of Wood, a former MoD official working on strategic export controls and now Rolls Royce director of export controls, on the UK’s ATT negotiating team.
- <sup>70</sup> Kytömäki, *Defence Industry*; Wood, “How to reach consensus”
- <sup>71</sup> Duncan “The Arms Trade Treaty”
- <sup>72</sup> Ibid.
- <sup>73</sup> Hillary Clinton, quoted in Amnesty International, *The US should support*; Kerry, “The United States Supports;” Countryman, “Statement.”
- <sup>74</sup> US Department of State, “United States Signs Arms Trade Treaty;” Suchan “Why you shouldn’t expect”
- <sup>75</sup> Kerry, “Remarks;” Mahley, “Statement”
- <sup>76</sup> Kausner, “Conventional Arms Transfer Policy”
- <sup>77</sup> Suchan “Why you shouldn’t expect”
- <sup>78</sup> Ibid.
- <sup>79</sup> Spear, “The United States implements”
- <sup>80</sup> Krause, “Leashing the Dogs,” 31, emphasis in original
- <sup>81</sup> Aradau et al, “Security, Technologies of Risk, and the Political,” 149
- <sup>82</sup> Shaw, “Risk –transfer militarism,” 349
- <sup>83</sup> Robinson, “Promoting Polyarchy”
- <sup>84</sup> Amnesty International, *Arms Transfers to the Middle East and North Africa*.
- <sup>85</sup> Ibid.
- <sup>86</sup> Ibid.
- <sup>87</sup> Ibid.
- <sup>88</sup> Ibid.
- <sup>89</sup> Ibid.; Akwei, “Letter to Secretary of State”
- <sup>90</sup> Amnesty, *Arms Transfers to the Middle East and North Africa*, p68
- <sup>91</sup> Akwei, “Letter to Secretary of State”
- <sup>92</sup> Amnesty, *Arms Transfers to the Middle East and North Africa*
- <sup>93</sup> Ibid.
- <sup>94</sup> Ibid.
- <sup>95</sup> Arms Trade Treaty Legal Blog, “The President scrubs up pretty well”
- <sup>96</sup> Amnesty, *Arms Transfers to the Middle East and North Africa*; Amnesty, *The US should support*
- <sup>97</sup> UN General Assembly, “The Arms Trade Treaty,” Article 7.1(a)
- <sup>98</sup> Amnesty, *Arms Transfers to the Middle East and North Africa*
- <sup>99</sup> Amnesty, *The US should support*
- <sup>100</sup> Ibid.
- <sup>101</sup> Shapiro, “Defense Trade Advisory Group Plenary”
- <sup>102</sup> US Department of State, “Elements of an Arms Trade Treaty”
- <sup>103</sup> Toner, “Daily Briefing”
- <sup>104</sup> Crowley, “Daily Press Briefing”
- <sup>105</sup> Bromley and Wezeman, “Policies on exports”

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<sup>106</sup> Pressure for the waiver also came from the ostensible need to provide Egypt with the funds to pay for its arms and defence contracts with US manufacturers (as per the terms of US military aid); Myers, “Despite rights concerns”. US military aid is as much about subsidy for US defence companies as it is about “strategic partnership” with Egypt; Marshall, “Why the US won’t cut military aid to Egypt.”

<sup>107</sup> The suspension included a delay to F-16 and other major platform deliveries and postponement of military exercises, but counter-terrorism assistance, military training, and the provision of spare parts continued. US Department of State, “Background Briefing.”

<sup>108</sup> The UK government was one of those pushing for the stronger formulation of “significant” rather than “overriding” risk; Lustgarten, “The Arms Trade Treaty.”

<sup>109</sup> Saferworld, “UK arms export review”

<sup>110</sup> Hague, “Ministerial Statement”, 18 July 2011, in Committees on Arms Export Controls, *Scrutiny of Arms Exports 2012*

<sup>111</sup> Hague, “Ministerial Statement”, 13 October 2011, in *ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> Secretaries of State, *Strategic Export Controls*, 60

<sup>114</sup> Gilby, “Labour, Arms and Indonesia”

<sup>115</sup> Committees on Arms Export Controls, *Scrutiny of Arms Exports*, 6. The precise mechanisms of the suspension mechanism, and the actual effect in terms of restricting equipment being transferred, remains unclear.

<sup>116</sup> Secretaries of State, *Strategic Export Control*, 81

<sup>117</sup> *Ibid.*

<sup>118</sup> In addition, dual-use goods and technologies, including surveillance equipment that was important in the repression of protest in Egypt and elsewhere during the Arab Spring, are excluded from the scope of the treaty; Lustgarten “The Arms Trade Treaty.”

<sup>119</sup> Donaldson, “How the UK can be a global champion”

<sup>120</sup> Amnesty, “UN: Final push”

<sup>121</sup> Tauwwhere, in Committees on Arms Export Controls, “Minutes of Evidence”

<sup>122</sup> Erickson, “Saint or Sinner?” and *Dangerous Trade*

<sup>123</sup> Wezeman and Wezeman, “Trends in International Arms Transfers, 2014”

<sup>124</sup> Hsiao-Rei Hicks et al, “Violent Deaths of Iraqi Civilians”

<sup>125</sup> Amnesty International, ‘*Will I Be Next?*’ Human Rights Watch, *Between a Drone and Al-Qaeda*; Stanford Law School and NYU School of Law (2012) *Living Under Drones*.

<sup>126</sup> Smith, “Can human rights” 25

<sup>127</sup> Cabinet Office, *United Kingdom/United States*; US Department of State, *Implementing Arrangement*.

<sup>128</sup> West of England Aerospace Forum, *US-UK Defence Trade Cooperation Treaty*

<sup>129</sup> Department for Business, Innovation and Skills, “Open General Export Licence”

<sup>130</sup> Amnesty International, *Blood at the Crossroads*. Human rights violations committed by coalition forces are pointed out, but not used as an argument for an ATT; the “lessons from Iraq” are about misuse by Iraqi forces; and no mention of intra-western transfers and violations in the course of the war, which are part of making a war.

<sup>131</sup> Cooper, “Humanitarian Arms Control,” 138-9

<sup>132</sup> Shaw, *The New Western Way of War*

<sup>133</sup> Shaw, “Risk-transfer militarism,” 344, 349

<sup>134</sup> Smith, “Can Human Rights,” 31

<sup>135</sup> Owens “Accidents don’t just happen,” 596

<sup>136</sup> *Ibid.*, 599

<sup>137</sup> UN General Assembly, “The Arms Trade Treaty”

<sup>138</sup> ICRC, *Arms Transfer Decisions*

<sup>139</sup> Smith, “Can human rights,” 25, 28

<sup>140</sup> Smith, “The New Law of War,” 368

<sup>141</sup> Thanks to the reviewer who encouraged me to push this line of argument further regarding the balancing act of Article 7.

<sup>142</sup> An exception here is the Reaching Critical Will project of the Women’s International League for Peace and Freedom (WILPF), designed to facilitate NGO engagement in UN disarmament processes. Its interventions in the debates around the ATT were unusual in their more critical stance towards the arms trade.

<sup>143</sup> Shaw, “Risk-transfer militarism,” 358

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<sup>144</sup> Mann, *The Sources of Social Power*, 273-5

<sup>145</sup> Leander, 'What do codes of conduct do?'

<sup>146</sup> Smith, "The New Law of War," 362

<sup>147</sup> Stavrianakis, "Progressives, Pariahs and Sceptics."

<sup>148</sup> Cooper, "What's the point," 131.

<sup>149</sup> Stavrianakis, *Taking Aim at the Arms Trade*

<sup>150</sup> Leander, "What do codes of conduct do?" 114.

<sup>151</sup> Shaw, "Risk-transfer militarism," 357.

<sup>152</sup> Shaw, "Twenty-first century militarism," 28.

<sup>153</sup> Smith, "Can Human Rights" 25, 29

<sup>154</sup> Af Jochnick and Normand, "The Legitimation of Violence"

<sup>155</sup> Price, "Moral progress," 210

<sup>156</sup> *Ibid.*, 206.

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